

**THE WHITE PAPER ON
MUNICIPAL SERVICE PARTNERSHIPS**



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CONTENTS

FOREWORD BY FHOLISANI SYDNEY MUFAMADI	i
SECTION A	1
1. Challenges Facing Municipal Service Delivery	1
2. What are Municipal Service Partnerships?	2
3. Powers and Functions	3
4. Assignments	4
5. MSP Contractual Arrangements	5
6. Typical MSP Arrangements	5
6.1 Service Contract	5
6.2 Management Contract	5
6.3 Lease	6
6.4 Build/Operate/Transfer (BOT)	6
6.5 Concession	6
6.6 Licensing	7
7. Why Use Municipal Service Partnerships?	7
8. Realising the benefits from Municipal Service Partnerships	7
SECTION B	9
9. MSP Policy	9
9.1 Municipal Entities	9
9.2 The Planning Process	10
9.3 The Section-78 Process	10
10. Implementation Strategy	12
10.1 A Program of Legislative Reform	12
10.2 Policy Alignment	12
10.3 Capacity Enhancement	12
10.4 Institutional Arrangements	12
10.5 Communication and Information Dissemination	13
SECTION C	14
11. Legal Authority of Municipal Councils to Engage in MSPs	14
11.1 National and Provincial Intervention	14
11.2 Transparency and Fairness in Council Decision-Making	14
11.3 Tariff Setting and Collection	14
11.4 Multi-jurisdictional municipal service utilities	15
12. Procurement and Contracting	15
13. NGO/CBOs in MSP arrangements	16
13.1 Contracting with CBOs and NGOs	16
14. Other Aspects of the Legislative Framework Affecting MSPs	17

15.	Labour	17
15.1	Consultation	17
15.2	Primacy of Labour Legislation	17
15.3	Employee Benefits	17
15.4	Choice of Bargaining Council	18
16.	Insolvency of MSP Service Providers	18
17.	The Water Services Act (1997)	18
18.	Debarment for Corrupt Practices	18
	SECTION D	20
19.	MSP Planning	20
19.1	Integrated Development Plans	20
19.2	MSP Feasibility Studies	21
20.	Definition and Role of the Procurement Stage	22
20.1	Formal Competitive Procurement	23
20.2	Bid evaluation	24
20.3	Technical evaluation	24
20.4	Financial evaluation	24
20.5	Contract negotiation	25
20.6	Types of Competitive Bidding	25
20.7	Unsolicited Proposals	25
20.8	Probity	25
20.9	Transparency	26
20.10	Amendment and re-negotiation of MSP Contracts	26
	SECTION E	27
21.	The linkage between Capacity Enhancement and Service Delivery	27
22.	Capacity Building by Service Providers	28
23.	Delegations and Assignments	28
	SECTION F	30
24.	Municipal Council Institutional Arrangements	30
25.	Additional Institutional Functions	31
25.1	Municipal Services Protector	31
26.	The Municipal Infrastructure Investment Unit (MIIU)	32
26.1	Technical Assistance Co-ordination	33
27.	Information Dissemination	33
28.	Policy Monitoring and Evaluation	33
	GLOSSARY OF TERMS	35

FOREWORD BY FHOLISANI SYDNEY MUFAMADI

Minister for Provincial and Local Government

South Africa is facing daunting challenges for municipal service delivery. As the White Paper on Local Government published in March 1998 indicates, achieving the Reconstruction and Development Programme (RDP) objectives within a reasonable time frame requires municipalities to look at innovative ways of providing municipal services. Partnerships between municipalities and the public sector, the private sector and community and non-governmental organisations (CBOs and NGOs) are a key option that municipalities should consider in their efforts to rectify infrastructure deficits and disparities. As the local government transition nears its end municipal service partnerships (MSPs) are no longer entirely new ground for South Africa. There are now several of these partnerships in place in different sectors and a reasonably mature legislative framework to regulate them. However, developing the partnership concept into a practical and beneficial method for providing good quality and affordable services for all required Government to review and consolidate its policies on these matters.

The delivery of municipal services through MSPs requires a clear and stable policy environment for the municipalities, service providers and investors to enable mobilisation of resources to meet RDP objectives. For these reasons the Government embarked on an intensive 24-month period of consultation and research, which culminated in the Policy Framework for Municipal Service Partnerships.

In the development of the policy, every effort has been made to ensure that the process is inclusive, interactive and transparent. A five-phased approach ensured that all stakeholders were included in the consultative process over 24 months.

- The first phase resulted in an Issues Document that identified the key strategic and policy issues to be addressed by the MSP Policy Framework.
- The second phase, consisting of focused research, extensive interviews and other consultation processes resulted in the publication of the First Draft of the MSP Policy Framework, which was released for public comment in August 1998.
- The third phase, consisting of MinMec discussions, public submissions, and workshops for councillors, municipal officials, the private sector, CBOs and NGOs, resulted in the Second Draft of the MSP Policy Framework in December 1998.
- The fourth phase during which stakeholders' opinions were further solicited and obtained, resulted in the Final Draft of the Municipal Services Partnership Policy, which was presented for public comment in May 1999 at the conference Towards a Programme for Municipal Infrastructure in the 21st Century.
- The fifth and the final phase, where Cabinet approved the publication of the Draft White Paper on MSPs for further consultation and input from stakeholders including provincial workshops conducted in June 2000. This phase resulted in the Final Draft White Paper on MSPs.

As part of the process towards the finalisation of the draft White Paper a round of

consultation with selected stakeholders where undertaken by the Department in September 2002. A limited number of written responses were received. Of the 25 organisations consulted only 11 submitted written responses. Extracts were taken from the draft Report on Stakeholder Comments on the White Paper on Municipal Service Partnerships and submitted to the Department on 4 April 2003.

The Department of Provincial and Local Government (the Department) has also worked closely with the relevant national departments and the South African Local Government Association to produce the Municipal Service Partnership Policy document. The document is the product of an intensive process in which a large number of dedicated people participated. They include the representatives from municipalities that attended the workshops, representatives from the private sector, NGO/CBO sector, unions, the authors of the draft policy papers, representatives from parastatals and members of my Department, to list a few.

As a culmination to this policy process and the local-government transition, the Department and the National Treasury have sponsored key statutes that regulate municipal service partnerships. The two key legislative initiatives have been the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and its recent amendment – the Local Government: Municipal Systems Amendment Act 44 of 2003 (the MSAA) - and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA). The amended Systems Act regulates the provision of services either through internal mechanisms or external mechanisms, the latter being municipal services partnerships. The amended Systems Act sets out the decision-making process that must be followed before a municipality enters into a service delivery agreement, the tariff-setting process and its controls and also regulates the procurement process in selecting the appropriate service provider. The amending Act also deals with municipal entities in some detail - the purposes for which they may be established, the forms they may take and their governance.

The Local Government: Municipal Finance Management Act deals with the financial management of municipalities and municipal entities. It has specific provisions relating to “public private partnerships” in respect of feasibility, procurement, contracting, security and debt, the amending Act to the Municipal Systems Act and the Municipal Finance Management Act will soon come into operation and complete the legislative treatment of MSPs. In short, a policy that has developed over several years has finally produced a rigorous and mature legal framework for MSPs.

I would like to thank the team of local and international advisors who assisted us to draw up this document. A special thanks is given for the financial support from the United States Agency for International Development. To all of you I would like to convey my thanks for the hard work that you have put into this important project. I believe that you will be rewarded through seeing this policy contribute to the social and economic upliftment of communities across the country.

SECTION A

Municipal Service Partnership Policy

Rationale for a

Overview:

According to the Constitution, the executive and legislative authority of a municipality is vested in its municipal council. The Constitution gives municipalities the obligation to ensure that municipal services are delivered in a sustainable way. This is a daunting challenge. Despite the significant contribution made by recent public infrastructure programmes, the demand for basic services continues to far outpace available government finances.

It is difficult to quantify the precise extent of the municipal infrastructure and service backlog. However, it has been conservatively estimated that the total cumulative backlog is about R 38,5 billion for a basic level of service. According to the analysis of the Medium Term Expenditure Framework prepared for 1998/99, if these backlogs are addressed through public sector resources alone, it will only be 2065 that many communities will be able to get adequate services. Government has started to make in-roads into the service delivery backlog, to date government has made over R7 billion available through the Consolidated Municipal Infrastructure Programme to help address the imbalance of the past in respect of municipal services.

The White Paper on Local Government recommends that municipalities look for innovative ways of providing and accelerating the delivery of municipal services. The Municipal Service Partnership (MSP) Policy aims to provide a clear framework within which to leverage and marshal the resources of public institutions, CBOs, NGOs, and the private sector towards meeting the country's overall development objectives.

It is government's explicit expectation that all stakeholders in this country want all the people to have access to adequate municipal services and to contribute actively towards the economy of the country. The MSP Policy has been derived from the principles of *batho pele* (people first). It actively promotes through the integrated development planning process an ethos of participation by consumers and other stakeholders throughout the process of determining and implementing service delivery options. It also endorses a service delivery culture that is just and takes into account social and gender equity. Furthermore the MSP Policy encourages universal access to basic municipal services, the progressive improvement in service standards, and openness and transparency in the processes used for selecting service providers. Underlying this are the core principles which service providers must strive to implement, that is, services should be affordable and delivered efficiently. Finally, the MSP Policy supports and encourages as contemplated in the Framework for Restructuring of Municipal Services better information flows, value for money, avenues for citizen's redress and, importantly, courtesy in service delivery.

1. Challenges Facing Municipal Service Delivery

Municipal councils can improve, expand and accelerate service delivery through partnership arrangements with public institutions, the private sector, or CBOs and NGOs. However, recent efforts by municipal councils to use MSPs have highlighted the existence of a number

of significant gaps and constraints in the existing policy and legislative framework. These gaps and constraints create uncertainties and impose risks on both municipal councils and MSP service providers. These factors presently limit the scope for the widespread and cost-effective application of the MSP option.

The MSP Policy and its legislative expression in the Systems Act and MFMA provides municipal councils with a framework for considering the use of MSP arrangements. Particularly through the detailed section-78 process, it will help municipalities to identify and use appropriate partnership arrangements in their efforts to rectify infrastructure backlogs and build a foundation for equitable growth in their communities. The objective of the MSP Policy is to ensure that MSPs are applied in a manner that supports the Constitutional obligations of municipalities and the Constitutional rights of communities. The MSP Policy and legislative framework will create a more conducive environment for MSPs arrangements by addressing the gaps and constraints that presently limit the use of MSPs. This will make MSPs a viable and functional service delivery option and will thereby help municipalities to plan, finance, and accelerate the delivery of municipal services. Municipalities will also be assisted in establishing systems to monitor the performance of service providers to ensure that they perform according to expectations and report on this to their communities. Finally, the MSP Policy supports and encourages better information flow, value for money, avenues for citizen's redress and, importantly, courtesy in service delivery.

2. What are Municipal Service Partnerships?

The MSP option is not an end in itself, but simply one of the means available to municipalities to address the municipal infrastructure and service backlog. Too often, the debate around MSPs is presented as an attempt by Government to actively promote the private sector, at the expense of the public sector, as the mechanism for municipal service delivery. MSPs are not intended to be a substitute for traditional methods of direct service delivery. Nor should they be viewed as an alternative to ongoing efforts to improve the efficiency and accountability of service delivery by the municipality itself. Instead, MSPs are intended to provide municipal councils with greater flexibility in addressing service delivery needs. Further private-sector involvement should primarily be aimed at achieving improved and greater levels of services, and leveraging additional capacity and investment.

The White Paper on Local Government at page 101 comments that,

“In assessing the appropriateness of different service delivery mechanisms, the choice is not between public and private provision. Rather the real issue is finding an appropriate combination of options which most effectively achieves their policy objective.”

Section 78 of the Systems Act as amended, helps the municipality to decide which would be the most viable option to provide the service. This is an exercise which considers a wide-range of relevant considerations – costs and benefits (including impacts on the environment and human health well being and safety), capacity in terms of skills and other resources, administration, job creation and employment patterns, and the views of organised labour and the local community. Moreover, amendments to the Systems Act have introduced additional considerations for MSPs (external mechanisms) – including whether they will provide value for money, address the needs of the poor, be affordable and transfer appropriate technical, operational and financial risk. This section requires that before the municipality selects a service delivery option, it must undertake a process to establish the most appropriate way of providing the service. Although the section favours a provision of a service through an

internal mechanism, by requiring that the municipality must first assess whether it is viable to provide the service internally, this section gives the municipality an opportunity to explore the best way a municipal service may be provided. The section also requires that impact on job creation, development and employment be assessed.

3. Powers and Functions

MSPs are a mechanism for providing municipal services and discharging certain municipal obligations. The basis for these obligations is the Constitution's Schedules 4 and 5 Part B. The two schedules setting out the primary constitutional allocation of responsibilities to municipalities are reproduced below in Table 1.

Table 1: Showing Schedules 4 and 5 of the Constitution

<p align="center">SCHEDULE 4 PART B</p>	<p align="center">SCHEDULE 5 PART B</p>
<p align="center"><i>(Over which national and provincial government have concurrent legislative competence)</i></p> <ul style="list-style-type: none"> • Air pollution • Building regulations • Child care facilities • Electricity and gas reticulation • Fire fighting services • Local tourism • Municipal airports • Municipal planning • Municipal health services • Municipal public transport • Municipal public works (only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law) • Pontoons • Ferries • Jetties • Piers and harbours (excluding the regulation of international and national shipping and matters related thereto) • Stormwater management systems in built-up areas • Trading regulations • Water and sanitation services (limited to potable water supply, domestic waste water and sewage disposal systems) 	<p align="center"><i>(Over which provincial government has exclusive legislative competence)</i></p> <ul style="list-style-type: none"> • Beaches and amusement facilities • Billboards and the display of advertisements in public places • Cemeteries, crematoria, and funeral parlours • Cleansing • Control of public nuisances • Control of undertakings that sell liquor to the public • Facilities for the accommodation, care and burial of animals • Fencing and fences • Licensing of dogs • Licensing and control of undertakings that sell food to the public • Local amenities • Local sport facilities • Markets • Municipal abattoirs • Municipal parks and recreation • Municipal roads • Noise pollution • Pounds • Public places • Refuse removal • Refuse dumping and solid waste disposal • Street trading • Street lighting, traffic and parking

The meaning of these functions is not defined in the Constitution or elsewhere. At times a co-operative process has been required in order to determine functional boundaries with other spheres of government in certain areas including health care, housing and transport. Currently the Department is considering the meaning of these functions and is clarifying boundaries. However, the core municipal services of water and electricity reticulation and refuse collection are elaborated in legislation and there is no question that they can be conducted through the MSP process.

4. Assignments

As more fully elaborated below (see paragraph 23) Municipalities may also perform those

functions that are assigned to them by the national or provincial spheres. The process for this assignment is set out in section 9 and 10 of the Systems Act and has been the subject of investigation by the Department. An effort has been made to clarify the circumstances which make assignments appropriate, delineate the process that must be followed before they occur and ensure that adequate funding follows the assignment (see the Department of Provincial and Local Government (DPLG), 2002, *Framework for the assignment of powers and functions*). It is emphasised that when an assignment occurs, the municipality becomes the service authority in respect of that function. This means that it can use an MSP in discharging the function.

5. MSP Contractual Arrangements

MSPs are contractual arrangements between a municipality and another entity (an “external mechanism”) to deliver municipal services. They may take any number of forms. The type of contract should be driven by the particular need that the municipality needs to address. It will depend on the type of service and the risk transfer that is appropriate. The results of the options analysis and feasibility study conducted under section 78 should drive the type of contract that is chosen. Once the scope of the project is determined, the appropriate partner should then be sought to best address the needs. The most typical forms of MSP contractual arrangements and their characteristics are set out below. Any other contractual arrangement to provide municipal services or any variant of the arrangements described below may also be an MSP.

6. Typical MSP Arrangements

The standard forms of MSP arrangements are service contracts, management contracts, leases, so-called “BOTs” and concessions. There are several variations on these basic arrangements and particular MSPs may also involve a blending of them. The trend from service contracts to concessions is increasing allocation of operational and capital responsibility to the service provider. The Department does not favour a particular form of MSP arrangement – that is a choice that must reside with the municipality. However, the form of arrangement must suit the capacity of the municipality and in many cases a management agreement will be most appropriate.

6.1 Service Contract

In this contractual form, service provider receives a fee from the municipality to manage a particular aspect of a municipal service. Service contracts are usually short-term (one to three years). Examples include repair and maintenance or billing and collection functions. Generally the municipality’s requirements are very specific and the output specifications against which the service provider is measured are agreed up-front and are specific. The service provider takes no collection risk. Evidence suggests that this type of arrangement is a starting point for involving CBOs and NGOs in municipal service provision with the other arrangements being considered as capacity and experience are developed over time.

6.2 Management Contract

Under a management contract, the service provider is responsible for the overall management of all aspects of a municipal service, but without the responsibility to finance

the operating, maintenance, repair, or capital costs of the service. Management contracts are typically for three to five years. Management contracts typically specify the payment of a fixed fee plus a variable component and the latter being payable when the contractor meets or exceeds specified performance targets. The service provider normally does not assume the risk for collecting tariffs from residents; however, high collection rates could be a trigger for incentive payments to the service provider. An example may be contracting the management of a water utility.

Management contracts are an attractive option when fuller private participation is not attractive or where it is expected that a management contractor can help to improve information about the enterprise and its market before further private participation options are considered.

6.3 Lease

In a lease, the service provider is responsible for the overall management of a municipal service, and the council's operating assets are leased to the contractor. The service provider is responsible for operating, repairing, and maintaining those assets. In some cases, the service provider may be responsible for collecting tariffs from residents and assume the related collection risk. The service provider pays the council rent for the facilities, which may include a component that varies with revenues. Generally, the service provider is not responsible for new capital investments or for replacement of the leased assets. Leases are typically for eight to fifteen years. Examples include the lease of a municipal market, port or water system.

The main drawback with this kind of contract is that the responsibilities for operating and maintenance on the one hand and investment on the other hand are vested with different entities and are sometimes difficult to distinguish clearly. Consequently, it is difficult to coordinate investment decisions and operating needs resulting in the danger that it might be difficult to allocate responsibility for non-performance.

6.4 Build/Operate/Transfer (BOT)

Here the service provider undertakes to design, build, manage, operate, maintain, and repair, at its own expense, a facility to be used for the delivery of a municipal service. The council becomes the owner of the facility at the end of the contract. BOTs may be used to develop new facilities, or expand existing ones. In the latter case, the service provider assumes the responsibility for operating and maintaining the existing facility, but may or may not (depending on the contract) assume responsibility for any replacement or improvement of the facility. A BOT typically requires the council to pay the service provider a fee (which may include performance incentives) for the services provided, leaving responsibility for tariff collection with the council.

6.5 Concession

In a concession the service provider undertakes the management, operation, repair, maintenance, replacement, design, construction, and financing of a municipal service facility or system. The service provider often assumes responsibility for managing, operating, repairing, and maintenance of related existing facilities. The contractor collects and retains all service tariffs, assumes the collection risk, and pays the council a concession fee (sometimes including a component that varies with revenue). The municipality still remains

the owner of any existing facilities operated by the concessionaire, and the ownership of any new facilities constructed by the concessionaire is transferred to the municipality at the end of the concession period.

6.6 Licensing

The licensing of companies to provide municipal services is a mechanism not treated in the legislative framework. It arises in cases where a municipality does not provide the service *per se* but is required to “regulate” it as part of its constitutional responsibilities. It occurs in areas where there is a high level of private sector penetration into an area. Good examples include gas reticulation and the collection of certain waste streams. More conventional examples include street trading. This is an area which will receive further attention by the Department.

7. Why Use Municipal Service Partnerships?

If they are well structured and properly implemented, MSP arrangements are one tool that can lead to significant improvements in the efficiency of service delivery. Greater efficiency means that significantly more services can be delivered while still remaining within the council's overall budget limits.

Contracting a specialist service provider can have several advantages. In addition to providing specialist knowledge and expertise, such a service provider can often gain efficiency from economies of scale that may not be available to a municipal council. MSPs may also permit municipal councils to reduce their expenses for equipment rental, lease costs, initial purchase costs and technology licensing arrangements. Over time, municipalities can save on the capital costs of infrastructure expansion and technology upgrades. By linking the provision of municipal services to a definitive contractual arrangement, municipal councils are also able to know their costs in advance and therefore may be in a better position to prepare their budgets and plans. In addition, by requiring a number of potential service providers to bid for the provision of municipal services, municipal councils can gain from the benefits of competition.

8. Realising the benefits from Municipal Service Partnerships

While MSPs are not a new concept for South Africa, they have not yet enjoyed widespread application or acceptance. Moreover, while some MSPs are contributing to desired improvements in service delivery, others – particularly early transactions - have yielded only mixed results.

An enabling environment is needed in order to realise the potential benefits of MSPs. Municipal councils should be able to structure cost-effective service delivery arrangements that address the needs of their communities. This means that MSPs should meet the following requirements:

- **For municipal councils:**

MSPs must be an accessible, relevant, viable and beneficial service delivery option with clearly understood risks. The municipality should also realise it is still ultimately responsible for the delivery of the service. This is emphasised in section 81(1) of

the Systems Act which imposes a range of “service authority” functions on the municipality including regulating and monitoring the provision of the service by the service provider.

○ **For communities:**

MSPs must result in accessible, affordable, equitable, reliable and safe services that are delivered to acceptable standards of quality and accessibility.

○ **For society at large:**

MSPs must support the furtherance of important societal goals such as empowerment, the sustainable management of the natural environment, local economic development, social equity and justice.

○ **For potential service providers:**

MSPs must be sufficiently worthwhile and feasible with clearly understood risks so that a viable and competitive market of potential service providers is created and efficiency gains are maximised.

Creating a conducive enabling environment for MSPs requires a package of closely integrated initiatives. This has been done by:

- Proclaiming a clearer policy framework that assures all stakeholders that MSPs are a valid and accepted option for municipalities to consider when determining how they can best provide municipal services;
- Reforming the legislative and regulatory framework to ensure that it is consistent with the policy framework and provides a clear and developed platform for MSP arrangements;
- Enhancing the capacity of municipal councils to identify, evaluate and implement a broader, more innovative and feasible range of service delivery options; and
- Providing an effective institutional framework to ensure that MSPs do achieve value for money, and to serve as a catalyst and focal point for capacity enhancement activities.

SECTION B

POLICY ISSUES

Overview:

There remains some residual uncertainty within the community regarding the necessity or desirability of providing public services through partnership arrangements. This section outlines the Government's commitment to making the use of MSP arrangements a viable option for municipalities and its strategy for implementing the policy. Clearly municipalities must put in place clear mechanisms to ensure that the poor are not compromised, and a basic level of service is provided. A basic level of service is the minimum level of service necessary to ensure an acceptable and reasonable quality of life, which takes into account public health and environmental considerations. No person should fall below this minimum level of service.

9. MSP Policy

Government is committed to facilitating the use of MSP arrangements as one option for service delivery. Furthermore Government believes that MSPs should enjoy equal status among a range of possible service delivery options available to municipal councils.

As indicated in Section A, an MSP may include arrangements between a municipal council and:

- A private sector partner, termed a public-private partnership;
- A public sector partner, which includes another municipality, a municipal entity or an organ of state, termed a public-public partnership;
- A CBO or NGO partner, termed a public-CBO/NGO partnership; or
- Any other person or organisation legally competent to operate a municipal service business activity.

These options are now enshrined in section 76(b) of the Municipal Systems Act which lists these as the alternative forms of so-called "external mechanisms". Contracting with any of these entities involves an assessment under section 78(3) of the Systems Act which has recently been amended.

9.1 Municipal Entities

A key innovation of the Systems Act and its amendments is the idea of service provision through municipally owned entities termed "municipal entities". These are a form of external mechanism that typically involves "corporatising" a municipal function. Although the Systems Act empowers municipalities to form municipal entities – it also carefully regulates their formation and their governance. It is also careful to ensure that municipal entities are formed for appropriate purposes which varies depending on the nature of the entity. Following the Amendment Act, only three forms can be used for municipal entities - **a private company,**

a service utility or a multi-jurisdictional service utility. The permitted forms allow for the use of well-regulated private companies but also makes provision for “custom built” government companies through service utilities or a multi-jurisdictional service utilities. Although the latter are currently uncommon, they hold the promise of being juristic persons that are highly suitable for public purposes. In their various forms, municipal entities will always enjoy majority control by organs of state.

9.2 The Planning Process

Determining whether to use the MSP service delivery option begins with the process of preparing an integrated development plan (IDP). The result of this process will be the municipality’s municipal infrastructure investment plan. This plan sets out the specific investments and programmes (including proposed MSPs) that the municipality will require to carry out its service delivery goals and objectives (see further paragraph 19 below).

9.3 The Section-78 Process

Once the planning process is complete, there should be a process of monitoring whether these plans are being implemented and how they are being implemented. When it is either necessary to significantly upgrade, extend or improve an internal mechanism, or when an external mechanism is to be improved in this way, reviewed or terminated section 77 requires that an assessment under section 78 be conducted. The section 78-process is designed to ensure that a full assessment is done of alternative mechanisms for service delivery before a procurement process is triggered. As further elaborated below (see paragraph 15) this is a highly consultative process designed to fully understand the impacts of implementing alternative service delivery mechanisms.

The section-78 process prescribed under the Systems Act can be divided into the four stages set out in this schedule. The stages are the following:

○ **Stage 1: first assessment**

The municipality is required to assess a range of issues that apply if the service is provided through an improved internal mechanism - costs and benefits (including impacts on the environment and human health well being and safety), capacity in terms of skills and other resources, administration, job creation and employment patterns and the views of organised labour;

○ **Stage 2: first decision**

The municipality may either decide that an internal mechanism is appropriate to provide the service or it may decide to postpone making such a decision and to “explore the possibility of providing the service through one of the external mechanisms mentioned in section 76(b)” of the Act);

○ **Stage 3: second assessment**

Only at the third stage of the process may the municipality assess different external service delivery options. This is a far more elaborate process than the internal assessment. In addition to all the issues that were relevant at the first stage, including the views of organized labour, it is also necessary for the municipality to “give notice to the local community of its intention to explore the provision of the service through an external mechanism”. Furthermore, the amendments to the System Act have introduced an entirely new requirement of a feasibility study (see new section 78(3)(c)). In addition to the trinity of virtues - value for money, risk transfer and

affordability – the feasibility study must also audit impacts on staff, assets and liabilities, the municipality’s integrated development plan, its budgets and evaluate a range of other factors including the extent to which the external mechanism will “address the needs of the poor”.

○ **Stage 4: second decision**

Finally, at the fourth stage, the municipality must finally decide on an appropriate internal or external mechanism for providing the service “taking into account” the requirements of section 73(2) in “achieving the best outcome”.

The role of the national and provincial spheres in the process of selecting service delivery mechanisms and conducting the planning and feasibility processes that proceed such a selection is to provide strategic direction by:

- creating a conducive environment for facilitating any or all of the service delivery options;
- assisting municipalities to develop the requisite capacity to make informed and appropriate decisions on service delivery;
- establishing an implementation and monitoring framework to provide ongoing evaluation and refinement of the MSP Policy; and
- providing targeted capacity enhancement for municipalities to assist in MSP implementation.

In developing an MSP arrangement, municipalities have to decide whether to involve the private sector, a public institution, or a CBO/NGO as their service delivery partner. This decision will depend on the needs of the municipality concerned and the results of the section-78 process undertaken. They would have to consider which of these possible partners has the capacity and resources best suited to service delivery in their particular context.

At the opening of parliament in June 1999, the President set a platform for a concerted action program to promote a greater role for partnerships between the private sector and the government. This type of partnership will consolidate and strengthen the resources that can be deployed to satisfy the need for public services, and for the development of South Africa’s economy. In the context of MSPs where large-scale capital investments are required the private sector generally has the greatest capacity to enhance service delivery. A national implementation strategy on MSPs must promote local economic empowerment.

Public-public partnerships can help municipalities develop important infrastructure facilities that may be beyond the capacity of CBOs and NGOs, or that may not be feasible for a public-private partnership. Municipal councils should also consider establishing partnerships with other municipalities as this could often lead to economies of scale in purchasing and operating activities. Such benefits can also extend to sharing facilities, overheads, skills and experience. Again local empowerment will be fundamental to the public-public partnership strategy.

Partnership arrangements with CBOs and NGOs can promote economic development in communities, strengthen democracy and empower civil society at the local level. Experience in South Africa and other countries has shown that the direct involvement of communities can be positive and beneficial in the creation of accessible and sustainable services, especially in rural areas and low-income communities. However, it is also necessary to

build the capacities of these institutions so that they can be vital and active participants in service delivery. This objective is also supported by the provisions of the Non Profit Organisations Act 71 of 1997. The government will support capacity building, particularly in the area of identifying appropriate projects for NGOs/CBOs, business and financial management skills, as well as sound corporate governance. Government is developing a programme that will utilise the resources and capacities of CBOs and NGOs more effectively to realise empowerment objectives at the "grass roots" level.

10. Implementation Strategy

Government's commitment to the MSP Policy will be given practical effect through the following strategy:

10.1 A Program of Legislative Reform

This process unfolded with the Municipal Systems Act and now the MSAA and the MFMA. Although the Systems Act falls within the mandate of the Department, the MFMA has been sponsored by the National Treasury and the amendments to the Systems Act are closely aligned with the thinking in the MFMA. These two new statutes come into effect soon. For MSPs these new statutes mean clarity on a wide range of issues – including security, debt, tariffs, municipal insolvency, procurement and municipal entities. These statutes are aimed to improve the flexibility of the legal framework within which the municipalities are expected to operate and to improve leadership management and accountability within the local government.

10.2 Policy Alignment

The mandates of various departments have an impact on local government. Greater policy alignment between these departments will facilitate a more conducive cross-sectoral environment for MSPs.

10.3 Capacity Enhancement

The White Paper on Local Government highlights that municipalities have different levels of administrative capacity. Accordingly it recommends managerial reform and worker empowerment for improving internal efficiency. This will also greatly enhance service delivery by the municipality.

Also the activities of the Municipal Infrastructure Investment Unit (MIIU) will provide an ongoing program for enhancing the capacity of municipal councils to engage in an array of MSP arrangements. The MIIU has become a major support structure through which government is able to provide appropriate technical support to municipalities. This is particularly in respect of the section-78 process where the MIIU has been active in funding assessments and providing technical support. The MIIU also plays a significant role in publicising MSPs and providing an annual report on the status of MSPs in South Africa.

10.4 Institutional Arrangements

In implementing the White Paper on MSPs and the legislative framework for MSPs, the Department works closely with the MIIU, SALGA, other national departments and provincial governments to ensure that municipalities are given the necessary support and guidance on MSPs.

The provision of suitable institutional arrangements will support and monitor the MSP Policy.

The use of regulatory institutions will be considered as appropriate.

10.5 Communication and Information Dissemination

The Department will provide an annual report on MSPs. It will also produce a quarterly newsletter with appropriate stakeholders.

SECTION C

Legislative

Framework

Overview:

The previous legal and regulatory environment relating to MSP activities was unclear in several respects. This created risks for municipalities and service providers alike. Such risks increase the projected cost of MSP arrangements, thereby reducing the present viability of potentially useful MSP projects. Furthermore the previous legislation made it difficult for other participants, especially the consumers, to be active participants in service delivery. This section provides an overview of the legislative reforms that have been included in the Municipal Systems Act, the MSA and the MFMA.

11. Legal Authority of Municipal Councils to Engage in MSPs

11.1 National and Provincial Intervention

The scope, extent and responsibility of provinces or national departments to intervene in a municipal function are only defined in very broad terms within the Constitution. The Constitution for instance states that provinces may assume responsibility for specific obligations of a municipality in order to "maintain essential national standards or meet established minimum standards". Section 136 of the MFMA sets out conditions that must be met before the MEC for local government in a province may intervene in terms of section 139 of the Constitution. For instance, if the MEC for local government becomes aware that there is a serious financial problem in a municipality, the MEC must consult to determine the facts, assess the seriousness of the situation and the municipality's response to the situation and determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

The Municipal Systems Act confirms the primary role of municipal councils as service authorities in deciding on the mechanisms for providing municipal services, and section 78 of the Municipal Systems Act regulates the manner in which this is done.

11.2 Transparency and Fairness in Council Decision-Making

The requirement for transparency and fairness in council processes and decision making is embodied in the Constitution. However, what may be regarded as an abuse of transparency and fairness on the part of a council is largely determined under the MFMA. The Municipal Systems Act is intended to provide suitable assurances to all stakeholders that council decisions relating to MSPs are lawful and procedurally fair. It provides that service users, employees, and their organisations have a right to information about, and participation in, service delivery choices made by municipal councils and requires that these stakeholders be consulted. Sections 114 and 115 of the MFMA also put measures in place to ensure that there is transparency in the bid process.

11.3 Tariff Setting and Collection

Under the now-repealed Local Government Transition Act (LGTA), the authority of a municipal council to delegate tariff setting methodologies and tariff collection was not clear (see particularly LGTA Sections 10C (7)(b), 10D (3) and 10G(7)(a)(ii)). This was a major impediment to the successful use of lease and concession type MSPs. Tariffs are also subject to the valid regulations and directives from national sectors (for instance, the National Electricity Regulator or the Department of Water Affairs and Forestry). The Municipal Systems Act clearly establishes the authority of municipal councils through a resolution to, among other things:

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and
- recover collection charges and interest on any outstanding amount.

In addition, the Systems Act now clarifies that a service delivery agreement may provide for the adjustment of tariffs by the service provider within limitations set by the municipal council (see section 81(3)). Section 74 of the Municipal Systems Act further stipulates that a municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and it sets out basic principles which the tariff policy must reflect.

Section 86A(1)(c) of the amended Systems Act provides that the Minister may regulate or issue guidelines in accordance with section 120 concerning limits on tariff increases. Because Government recognises the importance of enforceable agreements regarding future tariffs in attracting private sector investment, any such limits must be prospective. Contractual obligations existing at the time of any regulation under this subsection, which obligations have been entered into in good faith by the parties involved, must not be affected. This idea is reflected in section 43(3) of the MFMA which insulates existing contracts from any legislation determining the upper limits of a municipal tax or tariff provided that the contract has been entered into in accordance with section 33 or 46(3) of the MFMA. The requirements in section 33 involve wide-ranging consultation with stakeholders and other spheres of government before a municipality enters into a long-term contract. In particular, consultation with the Department and National Treasury is contemplated.

11.4 Multi-jurisdictional municipal service utilities

There may be circumstances under which two or more municipalities wish to engage jointly with an MSP service provider. The potential benefits from forming multi-jurisdictional municipal service utilities include cost-efficiency in the procurement process, and economies of scale for the service provider.

The amended Systems Act in Part 4A of Chapter 8A provides clear authority for municipalities to form multi-jurisdictional service utilities to provide municipal services in their municipal area or in any designated parts of their municipal area.

12. Procurement and Contracting

Efficient, competitive, transparent and socially equitable procurement and contracting arrangements are essential to ensure that MSPs actually improve service delivery (see further paragraph 20 below). There is also a need to ensure that the historically

disadvantaged can participate fully and effectively in municipal procurement and contracting. Specific arrangements must therefore be made in the request for proposals by municipalities to give effect to this policy objective. Section 112 of the MFMA provides that “the supply chain management policy of a municipality or a municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management.”

Sections 83 and 84 of the Municipal Systems Act provide detailed requirements for procurement of services through agreements with non-public sector providers. These requirements are intended to assure that the selection and negotiation processes are fair and open, and that the municipality is accountable for the choices it makes. The procurement exemption for MSPs with organs of state has been retained and supports public-public partnerships. The exemption does not extend to NGOs and CBOs.

13. NGO/CBOs in MSP arrangements

Section 76 of the Municipal Systems Act expressly envisions the possibility of service delivery agreements between municipalities and community-based organisations (CBOs) or non-governmental organisations (NGOs).

NGOs and CBOs may be defined as organisations of a public character established for public purposes with the sole object of carrying on public benefit activities in a non-profit manner and whose income and property is not distributable to its members or office-bearers except as reasonable compensation for services rendered.

NGOS and CBOs can take different forms:

- companies formed or established in terms of the Companies Act 61 1973;
- trusts established in terms of Trust Property Control Act 57 of 1988; or
- associations of persons.

The Non-profit Organisations Act 71 of 1997 and the Income Tax Act 58 of 1962 provide for the registration of NGOs and CBOs, as non-profit organisations and public benefit organisations respectively, to facilitate access to funding and exemption from income tax liability. Registration in terms of these Acts further provides security to municipalities considering partnerships with these types of organisations in that the legislation requires a written instrument or constitution on establishment and provides for continuous obligations in terms of reporting and financial management.

13.1 Contracting with CBOs and NGOs

CBOs as potential service providers require substantial support and guidance from government. Usually the members of the community do not have the necessary skills to operate the business. Furthermore, many NGOs and CBOs are not organised as formal legal entities. This may limit their capacity to act as an MSP service provider. The Minister for Welfare and Population Development is directed, in terms of the Non-profit Organisations Act, to issue model documents for non-profit organisations, including model constitutions and codes of good practice.

Municipal councils considering entering into an MSP with an NGO or CBO should require

the NGO or CBO to adopt a formal constitution and a code of good practice consistent with those issued by the Minister. Also, municipal councils should require NGOs and CBOs that wish to engage in the delivery of municipal services to be registered in terms of the Non-profit Organisations Act.

14. Other Aspects of the Legislative Framework Affecting MSPs

While the following aspects of the legislative framework are outside the Department's mandate, they do have implications for using MSP arrangements. For these reasons, the Department will continue policy dialogue with the relevant authorities to optimise the utility of MSP arrangements.

15. Labour

15.1 Consultation

The Labour Relations Act 66 of 1995 (LRA) requires employers to consult with employees on matters relating to the workplace and changes in work practices. It also binds employers to future national or provincial collective agreements that provide for consultation with labour on matters in addition to those described in the LRA, or for more extensive joint decision-making than is implied in the LRA. Because MSPs invariably involve work place restructuring, consultation with labour should be an integral part of the MSP process. This notion is already encapsulated in the consultation requirements under section 78 of the Systems Act. The LRA provides for the establishment of Bargaining Councils which have already been established for Local Government. The decision-making mechanism should therefore provide for a joint decision-making process between the Council and labour under the auspices of the South African Local Government Bargaining Council (SALGBC).

15.2 Primacy of Labour Legislation

Section 52 of the Municipal Systems Act provides that in the event of inconsistency between its provisions on local public administration and those of any applicable labour legislation, the labour legislation will prevail.

15.3 Employee Benefits

Section 197(2)(b) of the LRA provides that if a transfer of business as a going concern takes place, all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee. Section 197(4) of the LRA provides that subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer.

The present approaches to handling transferred membership and lump sum payments for municipal employees affected by an MSP are not optimal from the perspective of public policy, affected employees and municipal employers. The Department will explore the possibility of developing a proposal to amend the relevant provisions of the Income Tax Act. Such an amendment would preserve the tax-free status of employee benefits accrued in municipal pension or provident funds in respect of employee service prior to 1 March 1998. This will be done in consultation with the relevant Government departments, pension fund representatives, representatives of municipalities, and municipal labour unions.

15.4 Choice of Bargaining Council

The extent to which MSP service providers will be part of the South African Local Government Bargaining Council has been debated and decided upon by the Sectoral Forum. In terms of this decision MSP service providers will fall under the jurisdiction of the SALGBC.

The Department and SALGBC will continue with dialogue to ensure that adequate provisions are made in the SALGBC Constitution to facilitate and accommodate the specific and separate bargaining needs for MSP service providers throughout the Republic of South Africa.

16. Insolvency of MSP Service Providers

The Companies Act tends to favour the liquidation of insolvent enterprises rather than their reorganisation. There is a real risk for municipalities and residents if an MSP service provider encounters financial difficulties, the related municipal services would be suspended. Section 81 of the Municipal Systems Act provides that a service delivery agreement must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated, or is for any reason unable to perform its functions in terms of the service delivery agreement.

Section 142(1)(b) of the MFMA provides that “a financial recovery plan must be aimed at securing the municipality’s ability to meet its obligations to provide basic services or its financial commitments, and such a plan, whether for a mandatory or discretionary intervention may provide for the liquidation of specific assets, excluding those needed for the provision of the minimum level of basic municipal service.” This section implies that assets that are involved in the provision of minimum level of basic municipal services may not be liquidated.

Section 93B(c) of the Municipal Systems Act, as amended allows a parent municipality of a municipal entity which is a private company, to liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.

17. The Water Services Act (1997)

Water supply and sanitation services are a large component of the responsibility of most municipal councils, and are also likely candidates for MSP arrangements. As with any legislation, the precise intent of many of the key provisions of the Water Services Act 108 of 1997 (WSA) have been spelled out by the Ministerial regulations that have been produced by the Ministry of Water Affairs and Forestry.

When assessing potential service delivery mechanisms municipalities must consider the obligations imposed by the Water Services Act in respect of providing water services, such as regional efficiencies and benefits of scale, and any service delivery agreement must comply with the regulations promulgated by the Minister in terms of the Act.

18. Debarment for Corrupt Practices

Section 112 (1)(l) of the MFMA provides that supply chain management policy of a municipality must at least cover the barring of persons from participating in tendering or

other bidding processes, including persons:

- (i) who were convicted for fraud or corruption during the past five years;
- (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
- (iii) whose tax matters are not cleared by the South African Revenue Service.

SECTION D

Procurement

Planning and

Overview:

This section describes the policies to be adopted for the planning and procurement of MSPs. The specific approach and methodology to be followed by municipal councils in planning and procuring MSP arrangements will be set out in the Ministerial regulations to be issued pursuant to the Municipal Systems Act. The Department will also issue advisory guidelines that will provide additional information and best practice guidance for MSP planning and procurement.

19. MSP Planning

The IDP planning process has a critical impact in MSPs. It not only sets priorities and informs the choice of service delivery mechanism, it also impacts on longer-term MSPs on an on-going basis. Service delivery agreements with terms longer than the IDP-planning process must make provision for these on-going impacts by allowing for re-negotiation of service levels and allowing service providers to inform the planning process.

19.1 Integrated Development Plans

A municipality's Integrated Development Plan (IDP) sets out the overall strategy for achieving its developmental objectives. The IDP includes the municipality's strategies for mobilising resources and capacity, and its internal transformation needs and to achieve service delivery for the municipality in an effective and sustainable way. The IDP should also include the municipality's operational strategies which may also identify service that may be provided through an external mechanism. In short, the IDP is the municipality's principal strategic planning instrument which guides and informs all planning and development and all decisions regarding planning management and development in the municipality (see section 35 of the Systems Act). Candidate MSP projects should therefore be an integral part of a municipality's IDP. Section 36 of the Systems Act provides that "a municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan".

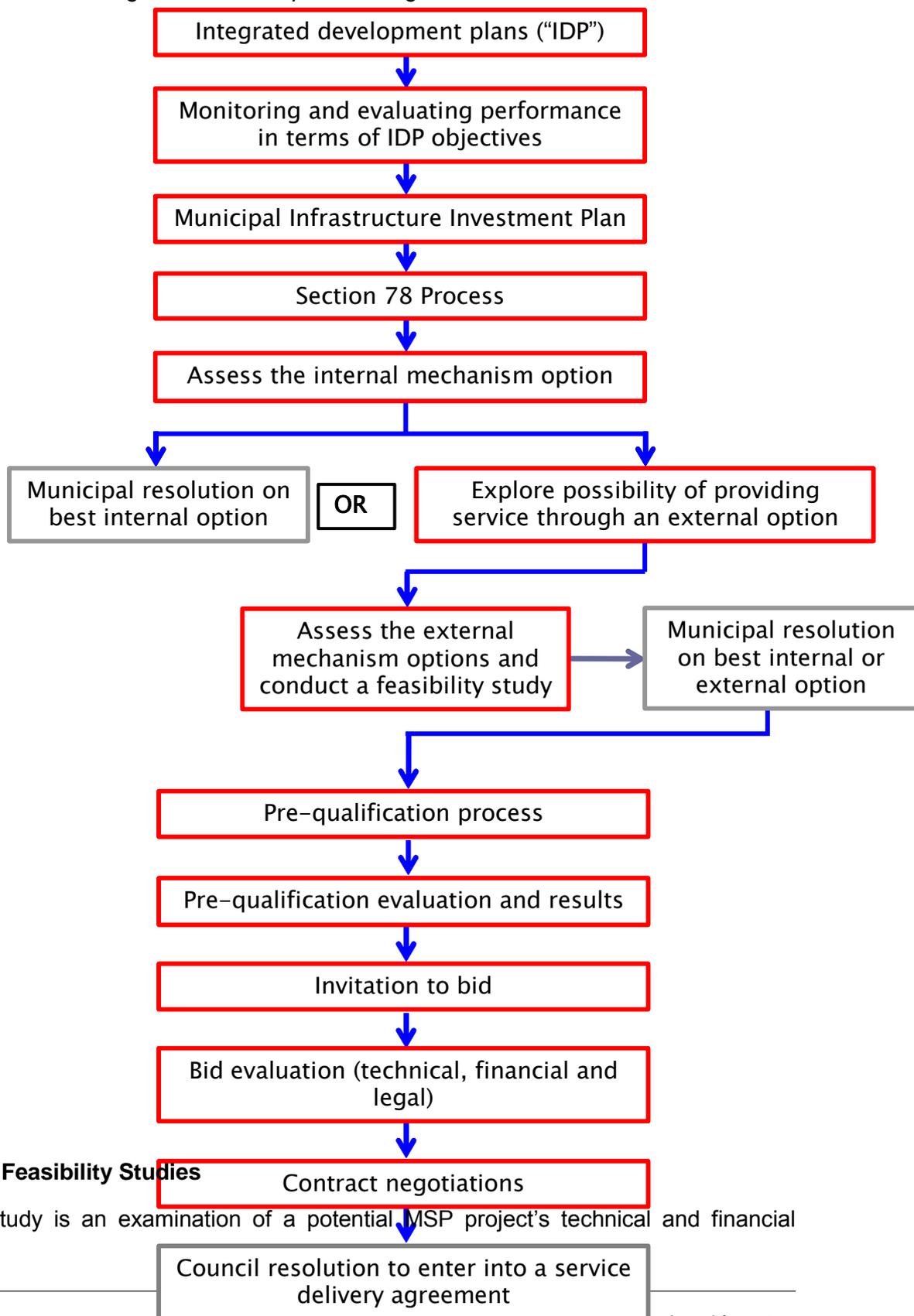
Core components of IDPs are set out in section 26 of the Systems Act and include key performance indicators, which should also be set out in the service delivery agreement.

To demonstrate to stakeholders that the determination of the best option for service delivery is not an arbitrary process municipal councils should keep records of examination of alternative services so that stakeholders and other spheres of government can see that the decision to select an MSP was systematically determined.

The regulations published under the Municipal Systems Act, dealing with municipal planning set out the details of the integrated development plans, process for amending these plans and set out these plans must be used to prepare action plans for the implementation of

strategies identified by the municipality. The sections in the Municipal Systems Act dealing with integrated development plans set out the core components of these plans and provide that these plans must be developmentally oriented. Illustration 1 below sets out a flow chart for the entire planning process from the IDP through to the section 78 process and procurement.

Illustration 1: Showing the Full Municipal Planning Process



19.2 MSP Feasibility Studies

A feasibility study is an examination of a potential MSP project’s technical and financial

viability, its environmental sustainability, and its probable risks and benefits for the municipal council, residents and other key stakeholders. In legislative terms, the need for a feasibility study is captured both in the section-78 process and in section 120 of the MFMA which establishes a feasibility process specifically for public-private partnerships. There are several differences between the feasibility study under the Municipal Systems Act and that under the MFMA. In addition to value for money, risk transfer and affordability, the assessment in the Municipal Systems Act requires that the assessment also focus on the extent to which the provision of a service will address the needs of the poor. Further the assessment in the MFMA is only required to be carried out before a public-private partnership is concluded.

A feasibility study will be more or less detailed and exhaustive, depending on the complexity of the proposed MSP. Municipalities may wish to prepare more detailed and exhaustive feasibility studies for less-complex MSPs, if, for example, the MSP is one of the first being undertaken by the municipality, or one of the first in a particular sector in the municipality, or if it is politically controversial.

The MIIU is producing useful guidance documentation for municipalities to assist them in developing a feasibility study; it includes a detailed application questionnaire, typical terms of reference and contract for engaging consultants. This will be complemented by guidelines to be issued by the Department. Municipal councils may also wish to seek assistance from the MIIU for the initial structuring of potential MSP projects, and in obtaining assistance in engaging professional consultants to assist the council in preparing feasibility studies.

20. Definition and Role of the Procurement Stage

Procurement is the stage in the MSP cycle when the municipal council takes its proposed MSP "to the market". A sound procurement process will be one that achieves "value for money" for the council and its residents and promotes important societal goals such as empowerment. The remainder of this section outlines the policies for municipal planning and procurement of MSPs.

There is an essential difference between conventional procurement activities such as civil works construction and the purchase of equipment and services, on the one hand, and procuring an MSP services provider, on the other. In the case of conventional procurement, the council is procuring assets and services so that the council itself can deliver municipal services. In the case of an MSP, the municipality is instead procuring an arrangement under which someone else delivers municipal services on behalf of the council. Because an MSP involves the delegation of a municipal function, the risks to both the municipality and the service provider are much higher than in a conventional procurement. Due to the larger number of risk implications that need to be considered in an MSP arrangement, a correspondingly more sophisticated approach to procurement is required.

The most important legislation dealing with municipal procurement is chapter 11 of the MFMA. The chapter requires each municipality to produce and implement a "supply chain management policy" to deal with the procurement of goods and services. This policy has to comply with a detailed regulatory framework that is not yet in place (see section 112). In the absence of this framework officials should develop their own procurement policy and perhaps use the regulations published under the Local Government Transition Act, 1993 (LGTA) as a guide. The LGTA regulations provide for circumstances under which a municipality may dispense with calling for tenders. They include relatively low threshold amounts (R120 000

in the highest threshold); and a standard exemption where, “the execution of the work or the supply or sale of such goods or materials is so urgent that it would not be in the interest of the municipality to invite tenders”.

As indicated earlier, all MSP procurement will be carried out using a competitive process unless it is with an organ of state. The bidding process for entities that are not organs of state, is described in section 83(1) of the Municipal Systems Act, which requires a process which:

- is competitive, fair, transparent, equitable and cost-effective;
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process;
- minimises the possibility of fraud and corruption;
- makes the municipality accountable to the local community about progress with selecting a service provider, and the reasons for any decision in this regard; and
- takes into account the need to promote the empowerment of small and emerging enterprises.

MSPs with a long duration and high monetary value require more formal and complex procurement processes than simpler MSP projects. Subject to the provisions of the Preferential Procurement Policy Framework Act 5 of 2000, a municipality may determine a preference of service providers in order to advance the interest of persons disadvantaged by unfair discrimination, as long as the manner in which such preference is exercised does not compromise or limit the quality, coverage, cost and developmental impact of the services.

Section 112(1) of the MFMA also provides that the supply chain management policy of the municipality must include, amongst other things:

- the processes that may be used, including tenders, quotations, auctions and other types of competitive bidding;
- when a particular process is to be used; and
- procedures and mechanisms for more flexible processes where the value of the contract is below a certain prescribed minimum.

20.1 Formal Competitive Procurement

The constitutional requirement for a competitive procurement system will always be satisfied by formal competitive tendering. This can be with or without bidder pre-qualification. A conventional tendering procedure without pre-qualification may be used for contracts of short duration (less than five years) or small to medium value where the services required can be clearly specified, the proposed contract will be available at the time of bidding, and where identifying acceptable service providers is straightforward. The procedure and criteria for identifying qualifying bids would be included in the bidding documents.

The use of pre-qualification would be the norm for contracts lasting more than five years. Leases, BOTs and concessions will generally be subject to the most thorough and comprehensive of the proposed procurement arrangements, namely competitive

tendering with a bidder pre-qualification process.

This is necessary to ensure that the bidders for these complex, long duration, high value MSP projects are those most likely to provide responsive and cost-effective proposals. It also helps municipalities to identify those bidders that are most likely to perform in terms of their contractual obligations, if awarded the MSP contract. Pre-qualification will also ensure that tendering will be limited to a reasonable number of bidders, so that the council's resources for bid evaluation will not be unnecessarily strained by the need to review bids submitted by unqualified bidders. Ministerial regulation under the Municipal Systems Act will set out the minimum requirements for expressions of interest by potential bidders who wish to be considered for pre-qualification in a formal competitive tendering process.

20.2 Bid evaluation

Bid evaluation is the process of selecting the best bidder. Municipalities should select the bidder whose proposal is compliant with the bid documents and offers best value in terms of the announced evaluation criteria. The bid evaluation process must be fair and transparent and comply with South African legislation such as the MFMA and Promotion of Administrative Justice Act 3 of 2000. The municipality is not obliged to award MSP contracts, where in the opinion of the municipality, no satisfactory bid is received.

20.3 Technical evaluation

The technical evaluation team should consider:

- whether the bid conforms to the minimum design, technical and environmental standards set out in the bid documents;
- whether the proposed management and organisational arrangements for the project and its subsequent operations and maintenance are clear and unambiguous;
- the suitability of a technical proposal for local needs, the reliability of the proposed technology and its ease of maintenance, and the proposed logistical arrangements for maintenance and support;
- the number, nature and quality of subcontractors and the assurance provided by the prime contractor for ensuring subcontractor quality and performance;
- the substance and credibility of empowerment, affirmative action and SMME plan, including the scope and extent of training programs for municipality staff;
- the proposed plan for utilization, redeployment and redundancy of the existing labour force, including reorganisation of work patterns;
- the quality of the bidder's management plan (staffing, parent company support, use of the local managers); and
- the arrangements for the transfer or reversion of project facilities and staff to the municipality at the end of the contract period.

20.4 Financial evaluation

The financial evaluation should only be carried out in respect of those bids that are

responsive and have passed the technical examination. Often, the financial and technical bids are placed in separate envelopes, and the financial bids are only considered for bids that satisfy technical requirements. The financial evaluation must not only consider whether the price offered is affordable, but whether the business model on which the price is based is coherent.

20.5 Contract negotiation

Once the evaluation has determined which bid provides the best value, the municipal council resolves to commence negotiations with the preferred bidder. If agreement cannot be reached, despite compromise on both sides, the municipality may turn to the bidder ranked next best and begin negotiation with that party.

20.6 Types of Competitive Bidding

The new supply-chain provisions in the MFMA anticipate a range of supply-chain management processes. One such example is competitive negotiation. There may be occasions when it is difficult or undesirable to completely specify the services required and the form of contract, for instance where a municipality wishes to encourage private sector innovation. In such instances the ability to negotiate with one or more potential service providers, or partners, may be desirable. However, such approaches should be limited to contractual arrangements where the overall scope for error is limited in terms of contract period or monetary value. Where innovation is desired, but the scope for error is large, municipalities should consider some form of intermediate process of inviting low-budget “concept proposals” in order to be able to firm up their ideas and subsequently issue a clear specification of services required, in a formal tender.

Pre-qualification of bidders may be used. However, the tendering process following pre-qualification is intended to be substantially simpler and more flexible than formal competitive tendering. The Minister may prescribe regulations for competitive negotiation, which will permit simplified tender documents to be issued by a municipal council to the pre-qualified bidders. The regulations will also allow for simultaneous negotiation with one or more of the bidders, rather than a formal bid evaluation process. The council may then select a preferred bidder and enter into contract negotiations with that bidder.

20.7 Unsolicited Proposals

Section 113 of the MFMA deals with unsolicited bids. The section provides that a municipality or municipal entity is not obliged to consider an unsolicited bid. However should it decide to consider unsolicited bids, the municipality or the municipal entity must do so in accordance with a prescribed framework.

20.8 Probity

Procurement processes create opportunities and temptations for a lack of probity. Corrupt practices are totally unacceptable since they undermine democratic processes, and sacrifice the public interest for the benefit of personal interests. The proposal of any bidder that has engaged in a corrupt practice must automatically be rejected. Any contract awarded as a result of corrupt procurement processes must be declared void *ab initio*. In addition, a bidder that has engaged in a corrupt practice in a government procurement process must be barred (temporarily or permanently) from bidding in other government procurement processes.

In terms of section 114(1) of the MFMA, if a tender other than the one recommended in the normal course of implementing the bids is approved, the accounting officer of the municipality or the municipal entity concerned must, in writing, notify the Auditor-General, the relevant provincial authority and the National Treasury, of the reasons for deviating from a recommendation. Further in terms of section 115(1) of the MFMA, the accounting officer of a municipality or a municipal entity must take all reasonable steps to ensure proper mechanisms and separation of duties in the supply chain management system are in place, to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practise. Further section 112(1)(m) requires that the supply chain management policy of the municipality must include measures for combating fraud, corruption, favouritism and unfair and irregular practices In municipal supply chain management and promote ethics of officials and other role players involved n municipal supply chain management.

20.9 Transparency

Bidders, community residents, and other stakeholders must be informed regularly about the progress of MSP procurement activities. Transparency helps ensure that the municipal council, municipal officials, and bidders follow the procedures mandated by law and by the council. Sections 114(1) and 115(1) of the MFMA referred to above are in place to ensure that there is transparency in the bid process. Further section 117 prohibits councillors from being in the on the municipal tender committee, and no person may interfere with the procurement system, amend or tamper with any bid after its submission.

20.10 Amendment and re-negotiation of MSP Contracts

Many MSP contracts involve complex arrangements over a long period of time. During the contract period, a valid need may arise to amend or even re-negotiate parts of the contract. Against this, there is the possibility that one or both parties may also seek to amend or renegotiate an MSP contract merely for reasons of convenience. In the latter instance, the resulting contract may be so substantially altered that it no longer resembles the contract contemplated by the competitive procurement process. The whole rationale for competitive bidding is therefore undermined. Moreover, this process may have damaged the interests of the other bidders, consumers, ratepayers and voters.

Amendments to MSP contracts should be limited to those circumstances in which the amendment would likely have been required no matter which bidder had won the contract. In addition, the council and the contract will establish a transparent and accountable amendment process to ensure that stakeholders can be informed of the reasons for, and scope of, the proposed amendment. Stakeholders can then make representations to the council with respect to those matters before the council decides to amend or renegotiate the MSP contract. In line with this, section 81(4) of the Municipal Systems Act provides that a service delivery agreement may be amended by agreement between the parties, except where an agreement has been concluded following a competitive bidding process. In that instance, the local community must first be given reasonable notice of the intention to amend the agreement and be allowed to make representations.

SECTION E

Capacity Building

Overview:

Municipal capacity can be defined as a council's ability to perform its duties and functions in terms of the Constitution. For historical reasons, the majority of municipalities in South Africa require assistance with capacity enhancement so that they can fulfil their executive functions and responsibilities in line with the expectations of the society.

21. The linkage between Capacity Enhancement and Service Delivery

Continuing support for capacity enhancement is essential to achieving sustainable improvement in municipal service delivery. Whether municipal services are delivered directly by municipalities, or through MSP arrangements, municipalities require functional capacity to:

- determine appropriate service levels;
- prepare an IDP;
- plan for service delivery on a sector-by-sector basis;
- marshal management, human and financial resources to ensure service delivery;
- determine tariffs and promote effective and efficient tariff collection;
- monitor performance so that service delivery goals and standards are achieved;
- manage and conduct stakeholder consultation;
- co-ordinate service delivery activity with other spheres of government; and
- adjust service delivery activities over time.

Municipal capacity in these areas requires many specialised skills, including:

- **Governance skills**

Identifying community needs, setting priorities, exercising political leadership, decision-making, and making linkages between infrastructure delivery and local economic development.

- **Facilitation skills**

Identifying stakeholders, eliciting their views, consensus-building, resolving conflicts, developing and implementing consultative processes, communicating with stakeholders.

○ **Management and administrative skills**

Planning, preparing, and reviewing financial analyses, budgeting, accounting, ensuring legal and regulatory compliance and monitoring.

A municipality's capacity depends on its management and systems resources. Focused attention on capacity enhancement will lead to improved service delivery by strengthening the development of feasible service delivery goals and implementation strategies.

Given the importance of capacity for the achievement of a sound MSP program, the Department will continue to facilitate the enhancement of functional local government capacity by:

- Preparing and issuing advisory guidelines to assist municipal councils to determine and implement suitable and effective practices in their MSP programmes;
- Co-ordinating the provision of technical assistance to municipalities for the preparation, procurement and post-transaction management of MSPs;
- Seeking complementary donor initiatives to support training and related capacity enhancement activities in support of MSP activities; and
- Co-ordinating the Department and SALGA's initiative with sector specific initiatives (e.g. building capacity by DWAF of municipalities to assume the role of water service authorities).

Government is committed to ensuring that all service providers particularly NGOs and CBOs participate on an equal footing in the delivery of services through MSP arrangements. The Department will seek ways in association with NGOs and CBOs to enhance their capacity to enable them to participate in MSP arrangements.

22. Capacity Building by Service Providers

In view of the fact that service partnerships have as a basis the enhancement of service delivery, the very essence of a partnership should entail a transfer of skills from the service delivery partner to the municipality. It follows, therefore, that every MSP should have a capacity building component in terms of which skills are transferred to the municipality by:

- providing management training in respect of the management of various aspects of the MSP to the council; and
- providing training to municipal employees with a view to building technical capacity in respect of the particular service being rendered in terms of the MSP.

23. Delegations and Assignments

The Constitution makes provision for national and provincial government to delegate and assign functions to municipalities. The process for assignment is set out in detail in section 9 and 10 of the Systems Act and has recently been further elaborated by the MSAA. The legislation emphasises the importance of ensuring that appropriate capacity exists or is developed for effective management of assigned functions. Sectoral departments will facilitate the acquisition of specialised skills required by municipalities in order to undertake the tasks assigned to them. In principle, functions that have been assigned to a municipality

can become the subject of a MSP.

SECTION F

and Responsibilities

Institutional Roles

24. Municipal Council Institutional Arrangements

Municipalities have the primary responsibility for electing to utilise MSPs and for ensuring that the MSP service provider performs in accordance with the contract. However, before engaging in an MSP arrangement, municipalities must satisfy themselves that they have:

- the capacity to do so;
- carried out adequate stakeholder consultation;
- identified MSP projects that are sensible and consistent with the IDP;
- procured MSP service providers using competitive and transparent procedures; and
- ensured that MSP service providers will fulfil their contractual obligations.

Municipalities have the responsibility to determine their institutional and management framework for carrying out MSPs. However, in doing so, municipalities must provide for a clear designation of responsibilities for the management and implementation of each stage of the MSP project life cycle, including:

- project planning and identification;
- procurement;
- contract preparation and negotiation;
- performance monitoring and compliance; and
- overall management of the MSP project.

Municipalities also have the responsibility to establish effective planning, monitoring and reporting systems that:

- describe how service delivery will be implemented within their IDP framework;
- monitor the implementation of the IDP; and
- monitor service delivery performance.

The Department will provide advisory guidelines and other capacity enhancement activities to assist municipalities to establish satisfactory institutional arrangements for their MSP arrangements.

25. Additional Institutional Functions

25.1 Municipal Services Protector

Municipal councillors are elected to represent the interests of their constituents and are accountable to them through the democratic process of local elections. However, the White Paper on Local Government advocates augmenting the process of representative democracy with a more accessible and day-to-day system of participatory democracy. Councillors and officials should therefore advocate and practise the *batho pele* principles.

Residents require timely and effective ways to express their opinions regarding service delivery and to obtain redress. This applies to services delivered directly by the council and those delivered through MSPs. Such mechanisms promote resident empowerment, help curb possible abuses of monopoly positions by service providers and give effect to participatory democracy. Municipal councils, in consultation with their residents, should therefore consider creating the position of municipal services protector. The functions of this position should include:

- actively soliciting resident and consumer opinion on municipal service provision;
- collecting, analysing, and evaluating resident and consumer complaints;
- meeting with the complainants and advising them regarding the validity of their complaints and potential solutions;
- advocating valid complaints and proposed solutions to the council or officials;
- advising the complainants of the council's decision and proposed remedial actions; and
- monitoring the council's remedial actions and informing residents and consumers.

The position should have robust terms of reference that insulate the incumbent from council interference to a great extent. Such terms of reference should include the following:

- A term of office that is the same as the council's term of office but begins its term in a different year so that there is overlap between the incumbent and a new council; and
- dismissal for serious causes, for example gross incompetence, or conviction of a felony.

A possible additional role for a municipal services protector would be to advise and assist residents to pursue their rights if the council fails to address their complaints. This might involve assistance in a variety of forums, including the courts, in arbitration or before a sector regulator, such as the National Electricity Regulator. However, to fulfil this role the municipal services protector should be appointed independently from the council.

Sufficient budgetary resources need to be made available to permit the execution of the municipal services protector's functions. These may come from general municipal revenues or from earmarked surcharges on tariffs for municipal services or municipal rates.

The municipal services protector is intended to complement and support the functioning of the council and judicial and regulatory institutions, not to be a substitute for those institutions.

To preserve the processes of democratic governance, the municipal services protector would therefore not be empowered to overturn a decision of the council. Instead, municipalities would be obliged to consider all complaints and proposed remedies put to it by the municipal services protector and to decide on appropriate and suitable actions that would remedy the causes of the complaint.

To guard against practices that render the service delivery agreement effective the additional role of the municipal services protector will include amongst others:

- Establishing and maintaining performance monitoring systems;
- Reviewing regularly the performance of the MSP service provider, note all material deviations from the terms and conditions of the contract and promptly through a written report, bring those deviations to the attention of the council and MSP service provider;
- Carrying out initial mediation with the MSP service provider for the purposes of achieving satisfactory contract compliance;
- Taking necessary actions in conformity with the procedures identified in the contract for the resolution of disputes, including where specified all submissions and other procedural requirements necessary for cases requiring dispute resolution by external parties;
- Preparing necessary submissions and make appropriate administrative arrangements for the handling of contractual matters requiring the exercise of discretionary powers as specified in the contract; and
- Preparing periodic reports to the Council for submission to the Department and/or other agencies on the implementation of MSP projects.

26. The Municipal Infrastructure Investment Unit (MIIU)

The MIIU is providing support to municipal councils in the areas of preparation, obtaining suitable expertise for municipalities in tendering and structuring MSP deals and contract negotiation. The large body of information and expertise being developed by the MIIU needs to be made more accessible, both to the public and to policy making and regulatory authorities such as the Department, the provinces, and SALGA.

Information provided by municipal councils and subsequent analyses of this data by the MIIU will:

- provide a source of MSP information that will be accessible to all municipalities and other interested parties, such as national sector regulators and MSP service providers;
- target municipal MSP capacity building activities in accordance with identified needs;
- provide feedback for the ongoing refinement and development by the Department, and potentially other sector regulators, of national MSP policy;
- provide feedback for the ongoing development by the Department of advisory

MSP guidelines;

- assist donor agencies and sector specific departments interested in supporting capacity enhancement activities to better understand the needs of municipal councils; and
- build the MSP capacity in South Africa.

26.1 Technical Assistance Co-ordination

Without an effective network technical support for MSP contract management and compliance, those municipalities that lack experience in performance monitoring run the risk of being unable to sustain their MSPs. Until a substantial volume of ongoing and successful MSPs has been established, municipal councils will need a network of technical support mechanisms, including:

- formalised training;
- on-the-job training;
- experienced technical advice; and
- information dissemination and experience sharing.

The Department will continue to take the lead role in co-ordinating technical assistance activities and liaising with donor organisations. The role of implementing these technical assistance activities should however be increasingly assumed by institutions of higher learning, especially universities, SALGA and the Institute of Local Government Managers working together with the MIIU.

27. Information Dissemination

The South African Local Government Association (“SALGA”), the National Business Initiative (“NBI”) and the Institute for Local Government Management (“ILGM”) should intensify and also increasingly assume the responsibility for information dissemination as they have already demonstrated that they can be useful partners for the Department in facilitating the implementation of MSPs. Additional funding will be required for the on-going management of conferences, workshops, meetings, newsletters, web pages and so on. Donors should be consulted about supporting a portion of the costs for the establishment and initial operation of this portion of the MSP contract compliance support network.

28. Policy Monitoring and Evaluation

The Constitution requires that the national and provincial spheres monitor and evaluate the performance of the local sphere in order to:

- Review the implementation of policies and legislation;
- Review, refine and update policies and legislation; and
- Discharge other Constitutionally mandated monitoring and oversight requirements

(for example, oversight of municipalities by the National Assembly under section 55(2)(b)(ii) of the Constitution).

However, the above means that the national or provincial spheres cannot interfere with the decisions of municipalities, where such decisions conform to relevant policy and legislation. Only where a council fails to conform to these requirements should the other spheres intervene.

An appropriate system for local governments to communicate their performance (via reporting and other means) needs to be established. This system should be focused on ensuring that the requirements of the MSP Policy and legislative framework are being discharged satisfactorily, but at the same time, should not impose an undue reporting burden on municipalities. A municipality should report to its own communities on an annual basis.

The Department, in consultation with provincial governments, will have the primary role and responsibility for monitoring the performance of municipal councils and for specifically monitoring the application of the MSP Policy. In discharging this role, the Department will continue to work closely with other national departments, provincial governments and agencies such as SALGA and ILGM. The Department will also prepare an annual report about MSP transactions and host an annual summit to report on implementation of MSPs, review the status of the Policy Framework and disseminate best practices.

GLOSSARY OF TERMS

Basic level of service	This is defined in the Systems Act as “a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment”. There are controls in the MFMA on the disposal of a “capital asset needed to provide the minimum level of basic municipal services” (see section 14).
Capital investments	In order to deliver services, municipalities need appropriate infrastructure, such as roads, sewerage systems, buildings and so forth. Spending capital (money) on the construction of such infrastructure is seen as an investment because it leaves the municipality with fixed assets that it can use in an on-going way.
Contractual safeguards	Within any contract between two or more parties, specific clauses can be included that specify what is to be done should the contract not run its normal course as planned. Contractual safeguards typically outline what action should be taken if one or more parties do not or cannot comply with the contract. They may also specify what obligations or rights the parties each have if the fulfilment of the contract is impossible due to external circumstances.
Cost-benefit criteria	Using cost-benefit criteria to evaluate a project or course of action is a process of comparing the inputs you need with the outputs you will produce. The primary consideration is whether the costs involved in a particular undertaking are in balance with the benefits that can be achieved. This consideration arises in the section-78 process.
Cost-effective	Something is seen to be cost-effective if it achieves an impact that warrants the amount of money spent.
Economies of scale	When operating on a large scale, service providers can often reduce the per-unit cost of service delivery because they are offering that service in bulk. For instance, supplying water to two municipalities can reduce the per litre cost of water delivery by making use of shared piping and other large equipment.

Environmental sustainability	If a practice or project wastes or abuses natural resources it will eventually not be able to continue because the resources it requires will be exhausted. An undertaking is said to be environmentally sustainable if it makes appropriate use of natural resources, and will therefore be able to continue into the future.
Executive authority	Executive authority is the power to make policy and to implement laws in a particular sphere. Municipal council, for instance, has executive authority in the local sphere.
ILGM	Institute for Local Government Management
MFMA	Local Government: Municipal Finance Management Act 56 of 2003.
Ministerial regulations	Laws generally set out the broad policies and rules to be followed in a certain area, rather than the detailed procedures. When new legislation is passed, its implementation generally falls within the mandate of a particular sector or department. The relevant Minister may then issue a set of regulations, which set out the precise rules and procedures to be followed for the law to be implemented
MSAA	Local Government: Municipal Systems Amendment Act 44 of 2003.
Multi-jurisdictional service areas	A jurisdiction is the area within which an authority has powers and responsibilities. For example, the jurisdiction of a council extends throughout its own municipal area. Multi-jurisdictional service utilities are entities that extend across municipal boundaries and therefore involve more than one local authority.
Municipal backlog	The municipal backlog is made up of the total amount of municipal infrastructure and services that should exist in terms of minimum standards, but have not yet been established.
Municipal infrastructure	Municipalities need certain basic fixed facilities in order to deliver services. Municipal infrastructure includes all the built or constructed things that a municipality has at its disposal, such as roads, buildings, bridges, dams, water pipes, railways, and so forth.
NBI	National Business Initiative
NER	National Electricity Regulator

Operating assets	Assets are things owned (by a municipality for example) to which a monetary value can be attached. Municipalities generally have fixed assets and operating assets. Fixed assets include things that cannot be moved, such as land or buildings. Operating assets include everything that a municipality owns and uses in its operations, such as vehicles, computers, construction equipment and so forth
Policy alignment	Within a system of co-operative governance, it is important to ensure that the different spheres and departments of government complement each other in achieving nationally accepted policy goals. Policy alignment is a process of ensuring that the rules and procedures of various policies do not contradict one another, but rather support one another and work in the same direction.
Procurement	Procurement is the process of successfully establishing a contractual arrangement (for instance, between a municipality and an external service provider) to fulfil a particular objective.
Systems Act	Local Government: Municipal Systems Act 32 of 2000.