Western Cape Government

Provincial Treasury

Western Cape Provincial Treasury

Public Entity Governance Guidelines

Table of Contents

EXECUTIVE SUMMARY

The management of public entities or state-owned entities have been the subject of many discussions given their role in partnering for service delivery.

Governance and oversight are critical in the effective functioning of Public Entities. This is a key focus area that the Western Cape Government will continuously strive to improve and make consistent progress in strategic placements, procurement, service delivery and oversight etc.

This guideline is based on the analysis and recommendations of the corporate governance theories of stewardship, stakeholders, agency, and resource dependence. These indicate that the application of good governance in public entities should be supported by a thorough understanding of the concept of leadership (stewardship); a clear demarcation of the key players and stakeholders in the public entity (stakeholder approach); measurable performance indicators established in a shareholder's compact; holding the board and management accountable for the performance of the public entity and management of risk (agency theory); and conformance with regulatory requirements. In practice, these theories are reduced to key governance components that are structured in a specific way to identify and define:

- the key underlying elements that constitute the governance environment for the entity;
- the major areas of organisational life affected by governance issues; and
- the roles, interests, and claims of both internal and external parties involved in governance.

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CHAPTER 1

INTRODUCTION

CHAPTER 1 - INTRODUCTION

In Schedules 3C and 3D of Act No. 1 of 1999, Public Finance Management Act, the Western Cape Provincial Government includes ten provincial public entities.

Public entities ("PE's") are government-owned organisations that operate independently. They perform particular functions and operate in accordance with a specific Act or enabling legislation, such as the Companies Act, Act No. 71 of 2008. These government entities are established and organised in numerous ways and are subject to a vast array of statutes and regulations.

Whatever form an organisation adopts, it must be appropriate for its function, but there is no assurance that it will automatically adhere to good governance practices. The delegation of authority to public sector entities, also known as distributed governance, carries both benefits and hazards. Ineffective interactions between the Board, the Executive, the Minister, and the Department can result in subpar governance outcomes. Despite laws, rules, policies, guidelines, and experience, governance issues of public sector entities (PEs) continually arise.

It is acknowledged that executive authorities, accounting officers, and accounting authorities have limited guidelines for exercising oversight over these entities, including clarification of duties and responsibilities between the various stakeholders, including Provincial Treasury. Consequently, it has been observed specifically in the WCPG that Provincial Ministers and Heads of Departments exercise a variety of inconsistent practises in their oversight of Public Entities.

In this context, the appropriate governance and oversight of government entities becomes an essential element of the Western Cape's governance priority agenda. With the foregoing in mind, we set out to provide a guideline for Provincial Treasury, Executive Authorities, Accounting Officers (including officials in the relevant Branch or Programme of the departments), and Accounting Authorities to implement minimum norms and standards for exercising oversight over government entities within the confines of the law but without exceeding their respective mandates.

CHAPTER 2

PURPOSE

CHAPTER 2 - PURPOSE

To improve the monitoring effectiveness of Public Entities, the numerous entities should formalise their respective shareholder, policymaker, and regulator roles. This document outlines the framework of responsibilities that are aligned with the entity's objectives and mandates and takes into account applicable legislation, including the PFMA, Treasury regulations, Companies Act, National and Provincial Treasury Guidelines, and King IV.

The RACI tool may be used to provide practical guidance based on the legislative framework governing public sector institutions and the oversight roles of the Executive Authority, the Accounting Officers of the relevant Department[1] (who may delegate functions, where allowable in terms of the legal prescripts), and the Provincial Treasury. This tool will be used as a basis amongst other tools and this guideline framework to develop and adapt the CGRO according to the circumstances of the Department and Public Entities.

The considerations are not exhaustive, and other considerations may be applicable in certain circumstances; accordingly, the document must be tailored to the needs of the Public Entity and/or Department. Important is that the appropriate level of oversight is provided by appropriately qualified officials in the relevant Department, assuring an appropriate mix of branch/line functions' skills and the departmental CFO's capacity.

A RACI chart is a tool used to clarify the duties and responsibilities associated with each task, milestone, and decision. It is a simple table listing all stakeholders and their level of participation in each task, indicated by the letters R, A, C, or I which may or may not be used as a reference point for the respective departments and entities.

The RACI does not replace the Accounting Authorities' responsibilities under the PFMA and Companies Act when establishing the overall strategy, consenting to it with the shareholder/Provincial Minister, and implementing it.

The following definitions in the RACI apply:

R	**Responsible**	**A**	**Accountable**
A manager or team member who is directly responsible for successfully completing a project task or activity (for example an **employee or the Head of Department** who prepares/reviews the budget)			The person with final authority over the successful completion of the specific task, activity, or deliverable (for example the **Provincial Minister approving the APP and budget**)
C	**Consulted**	**I**	**Informed**
Someone with unique insights the team will consult (for example **PT** in the budget preparation process)			A client or executive who isn't directly involved, but should be kept up to speed (for example inform the **Board** once the budget has been approved)

[1] "Department" refers to the relevant department that has the oversight responsibility

CHAPTER 3

APPLICABLE LEGISLATION/ LEGAL FRAMEWORK

CHAPTER 3 - APPLICABLE LEGISLATION/LEGAL FRAMEWORK

Public Finance Management Act, Act No 1 of 1999

The Public Finance Management Act ("PFMA") was enacted to regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets, and liabilities of those governments are managed efficiently and effectively and to provide for the responsibilities of persons entrusted with financial management within those governments.

Section 3(3) states: *"In the event of any inconsistency between this Act and any other legislation, this Act prevails."*

Provincial Treasury

Section 18 of the PFMA specifies Provincial Treasury's powers and responsibilities in terms of public finance management related to the provincial government sphere which states the following:

(1) A Provincial Treasury must:-

- (a) prepare the provincial budget;
- (b) exercise control over the implementation of the provincial budget;
- (c) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities; and
- (d) ensure that its fiscal policies do not materially and unreasonably prejudice national economic policies.

(2) A Provincial Treasury:

- (a) must issue provincial treasury instructions not inconsistent with this Act;
- (b) must enforce this Act and any prescribed national and provincial norms and standards, including any prescribed standards of general recognised accounting practice and uniform classification systems, in provincial departments;
- (c) must comply with the annual Division of Revenue Act, and monitor and assess the implementation of that Act in provincial public entities;
- (d) must monitor and assess the implementation in provincial public entities of national and provincial norms and standards;
- (e) may assist provincial departments and provincial public entities in building their capacity for efficient, effective, and transparent financial management;
- (f) may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity;
- (g) must intervene by taking appropriate steps, which may include the withholding of funds, to address a serious or persistent material breach of this Act by a provincial department or a provincial public entity;
- (h) must promptly provide any information required by the National Treasury in terms of this Act; and
- (i) may do anything further that is necessary to fulfil its responsibilities effectively.

In terms of these sections, PT may issue instructions and assist Public Entities in complying with the PFMA and sound public financial management including revenue, expenditure, assets, and liabilities management. This further extends to monitoring and evaluation of financial risks that the Public Entity may expose the Provincial Government to.

Executive Authorities

Section 63 prescribes the financial responsibilities of executive authorities and provides that:

(1)(a) Executive authorities of departments must perform their statutory functions within the limits of the funds authorized for the relevant vote; and

(b) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39(2)(b) and 40(4)(c).

(2) The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive".

Section 63(2) therefore makes it clear that the executive authority responsible for a Schedule 3C and 3D Public Entity must exercise ownership control to ensure that the public entity complies with the PFMA and the financial policies of that executive. It is noted that there are other sections within Section 50 - 55 of the PFMA read together with the Treasury Regulations that confer additional responsibility on the Executive Authority such as approval of Significant Transactions, Shareholders Compact and APPs.

Companies Act, Act No 71 of 2008

The Companies Act 71 of 2008 aims amongst others:

- to provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of offices of foreign companies carrying on business within the Republic;
- to define the relationships between companies and their respective shareholders or members and directors.
- to provide for efficient rescue of financially distressed companies;
- to provide appropriate legal redress for investors and third parties with respect to companies; and
- to provide for matters connected therewith.

The Companies Act would only apply in the instances where the public entity is registered and incorporated as a Company.

The Shareholder of the Company, represented by the Executive Authority in the case of a State-Owned Company has the following rights and responsibilities:

- Section 15 and 16 to approve and amend the Memorandum of Incorporation;
- Section 36 to amend the MOI with regards to the authorisation and classification of shares by way of Special Resolution;
- Section 61 to call for a General Meeting at any time;
- Section 65 to propose Shareholders' resolution;

- Section 81(1) (e), a shareholder may apply for a court order to wind up a company;
- Section 112 a company 'may not dispose of all or the greater part of its assets unless the disposal has been approved by a special resolution of the shareholders; and
- Section 162(2) allows a shareholder, among other stakeholders, to apply to a court for an order declaring a director delinquent or under probation.

The shareholder has rights to oversee the performance of the company in accordance with the Companies Act, the PFMA, and the Executive Authorities' responsibilities, although the Companies Act and PFMA stipulate that proper procedures must be implemented.

CHAPTER 4

GOVERNANCE PROCESSES

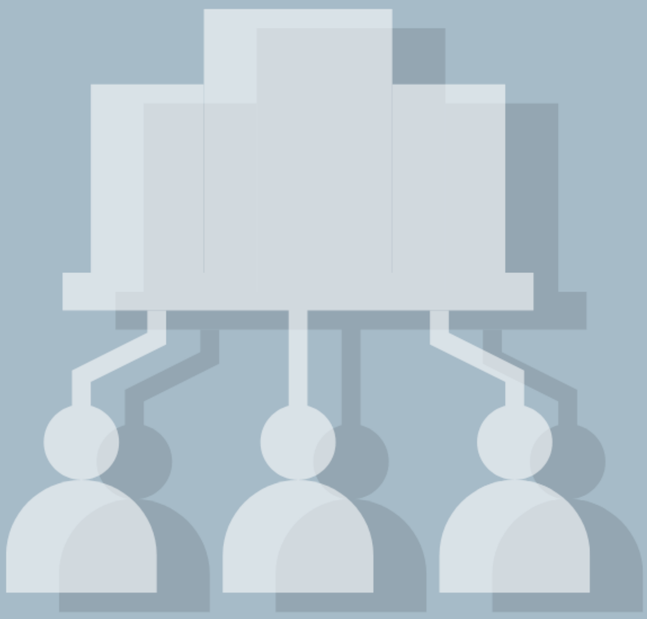
CHAPTER 4 - GOVERNANCE PROCESSES

When implementing controls over oversight, it is crucial to consider the enabling legislation in order to monitor and supervise public entities from a departmental perspective. The guideline is aligned with the financial management cycle of the fiscus and takes into account the aforementioned specific considerations:

Delegation of Authority

No.	Highlighted matters	Detail
1	Delegation of Authority	Delegation between the Minister, where allowable in terms of the legal prescripts, and the Head of Department to ensure clarity for the operational aspects of monitoring and evaluation the Minister is required to provide.
2	Governance arrangements	Arrangements between the Department and the Public Entity to ensure that documentation and rights of the Department officials are clearly articulated in their oversight role that they play.
3	Members of the Accounting Authority appointment and termination processes	a. Appointment process as determined by the Public Entities legislative framework considering Zondo Commission (1) recommendations; b. Termination process in cases of under-or poor performance of the Public Entity; and c. Reappointment of Board member.
4	Planning and budgeting processes including assessment of the Strategy of the Public Entity, the setting of Key Performance Indicators and appropriate Budget and Revenue Management	a. Schedule 3D entities: Shareholders Compact and Corporate Plan including Budgeting and setting Key Performance Indicators; and b. Schedule 3C entities: Strategic Plan and Annual Performance Plan including Budgeting and Key Performance Indicators.
5	Monitoring and evaluation	Processes in terms of quarterly reporting against the Corporate Plan and the Annual Performance Plan including assessment of achievement of key performance indicators against the performance of the entity (both financial and non-financial), assessment of the actual against budget on a quarterly basis
6	Annual reporting	Process including financial statements, performance report and the external audit report process for matters to be raised for assistance if required
7	Cash surplus retention	When Schedule 3C entities request permission to retain surpluses and the guidance provided to appropriately motivate for the retention of the surplus. This will also extend to ongoing monitoring of the utilisation of such funds retained.
8	Significant Transactions	In terms of Section 54 of the PFMA and the processes that should be followed including the assessment of the decision by the Department prior to the Executive Authority approving the transaction
9	Escalation matters	Decisions and recommendations by the Shareholder/Executive Authority and Provincial Treasury should indicators necessitate more involvement from these Stakeholders.

CHAPTER 5



PUBLIC ENTITY – STAKEHOLDER ROLES

CHAPTER 5 - PUBLIC ENTITY - STAKEHOLDER ROLES

Role of the Provincial Executive[2]

The Constitution stipulates that each province has its own legislature. The number of Representatives is determined by a formula established by national law or contained in the Provincial Constitution in the case of the Western Cape. Members of Parliament are elected using proportional representation. The legislature elects the Premier. The President/Premiers appoints his/her cabinet. As is the case in the national Cabinet, decisions are reached by consensus.

A provincial legislature may adopt a constitution for its province if two-thirds of its members concur, in addition to passing provincial laws.

A provincial constitution must be consistent with the national one. Consistent with the national sphere of government, the Constitution allows provinces to have certain legislative and executive powers, including, but not limited to, the ability to legislate and execute laws:

- casinos, racing, gambling, and wagering;
- cultural affairs;
- environment;
- language policy;
- nature conservation; and
- trade and industrial promotion.

These powers can be exercised to the extent that provinces have the administrative capacity to assume effective responsibilities.

Provinces also have exclusive competency over several areas, including but not limited to:

- liquor licences;
- provincial cultural matters; and
- provincial recreational activities.

The Provincial Executive is therefore responsible for establishing the policy aligned with the National Legislation, which the Executive Authority from a political perspective, the Accounting Officer of the Departments from an administrative perspective, and the Accounting Authorities of public entities within the portfolio are accountable for meeting.

2 https://www.gov.za/about-government/government-system/provincial-government

Role of the Executive Authority

The Executive Authority (defined as Ministers) is responsible to their legislature for achieving the institution's goals and objectives. Ministers are also answerable to the Premier, who has the authority to dismiss them. The Ministers are accountable for the areas designated to them by the Premier. The Minister has been delegated stewardship of the institutions, including responsibilities outlined in the Public Finance Management Act and the Companies Act 71 of 2008, where applicable, by virtue of his portfolio appointment.

Section 63 of the PFMA specifies the Executive Authority's responsibilities namely:

(1)(a) Executive authorities of departments must perform their statutory functions within the limits of the funds authorised for the relevant vote.

(b) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39 (2) (b) and 40 (4) (c).

(2) The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive.

The Executive Authority is responsible for the following[3]:

(a) Appointment or removal of board members and chief executive officers in accordance with the enabling documents (or legislation) of public entities;

(b) Annual budget of non-business public entities in the portfolio of the EA;

(c) Annually conclude a shareholder's compact with associated major public entities and government business enterprises; and

(d) Assess quarterly reports for the effective performance monitoring, evaluation, and corrective action of public entities.

In addition, if the entity is registered as a company, the Minister is also accountable for the decisions as a shareholder. The Companies Act specifies, among others, the following responsibilities:

- Section 15 and 16 to approve and amend the Memorandum of Incorporation (MoI);
- Section 36 to amend the MOI by way of Special Resolution;
- Section 61 to call for a General Meeting at any time;
- Section 65 to propose Shareholders' resolution;
- Section 81(1) I, a shareholder may apply for a court order to wind up a company;
- Section 112 a company 'may not dispose of all or the greater part of its assets unless the disposal has been approved by a special resolution of the shareholders; and
- Section 162 (2) allows a shareholder, among other stakeholders, to apply to a court for an order declaring a director delinquent or under probation

[3] Guide on Governance Practice for Executive Authorities and Heads of Department issued by the Public Service Commission 2019

Role of the Provincial Treasury

In accordance with the PFMA, the Provincial Treasury is responsible for oversight of the public sector, including public entities, as outlined in Sections 17 and 18:

1. *A Provincial Treasury must:*

   a. *prepare the provincial budget;*

   b. *exercise control over the implementation of the provincial budget(c) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities; and*

   c. *ensure that its fiscal policies do not materially and unreasonably prejudice national economic policies.*

2. *A Provincial Treasury:*

   a. *must issue provincial treasury instructions not inconsistent with this Act;*

   b. *must enforce this Act and any prescribed national and provincial norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in provincial department;*

   c. *must comply with the annual Division of Revenue Act, and monitor and assess the implementation of that Act in provincial public entities;*

   d. *must monitor and assess the implementation in provincial public entities of national and provincial norms and standards;*

   e. *may assist provincial departments and provincial public entities in building their capacity for efficient, effective and transparent financial management;*

   f. *may review any system of financial management and internal control applied by a provincial department or a provincial public entity;*

   g. *must intervene by taking appropriate steps, which may include the withholding of funds, to address a breach of this Act by a provincial department or a provincial public entity;*

   h. *must promptly provide any information required by the National Treasury in terms of this Act; and*

   i. *may do anything further that is necessary to fulfil its responsibilities effectively.*

Furthermore, in terms of the Public Sector Risk Management Framework Provincial Treasury Roles - Provincial Public Entities issued by National Treasury, the following is stated as PT's role with regards to risk management from an oversight perspective:

Although the ultimate responsibility for implementing and maintaining effective, efficient, and transparent risk management systems rests with the Accounting Officers of public sector institutions, the PFMA prescribes certain responsibilities to PT to ensure that the implementation of the prescripts adheres to both the letter and the spirit of their underlying intent. When viewed in the context of risk management, the prescripts impose the following responsibilities on PT:

- monitor and assess the systems of risk management in provincial public entities;
- assist with building risk management capacity in provincial public entities; and

- enforce the PFMA (by implication the specific prescripts therein pertaining to risk management) in each sphere of government.

The Western Cape Provincial Treasury has articulated its mandate[4] as follows:

> *Our mandate is to control and oversee the finances of the Western Cape government. Giving efficient supporting and sustainable public financial management to promote economic development, good governance, social progress, and a rising standard of the Western Cape's people.*
>
> *The Provincial Treasury plays a major role in achieving the desired socio-economic and governance outcomes of the Western Cape by providing strategic financial leadership to the Western Cape Government provincial department, its public entities, and municipalities.*
>
> *The Provincial Treasury, the Department of the Premier and Department of Local Government and Department of Environmental Affairs and Development Planning collectively contribute to the Provincial Strategic Goal which is to embed good governance and integrated service delivery through partnerships and spatial alignment.*

It is Provincial Treasury's mandate to **monitor and evaluate the utilisation of financial resources of the Province against the Approved Budget and to** assist Departments and Public Entities in implementing sound financial management, internal controls and systems. One of the key functions is to **monitor, manage and mitigate provincial risk, with a focus on financial risk to the province, including those that entities are exposing the province to**.

Role of the Accounting Officer of the Parent Department

The Accounting Officer (Department Head) is responsible for the Department's financial management, including budget management. This would include submitting the funding needs of the public entity in the budget submissions, ensuring that any transfer payments made to the public entity are used for their intended purpose, and, among other things, advocating for the necessary financial guarantees for the public entity. In addition, the accounting officer must ensure there is no duplication of effort between the entity and the department in terms of the entity's service mandate by reviewing the Corporate Plan or Annual Performance Plan and informing the Executive Authority of any identified duplications.

The accounting officer is responsible for advising the Executive Authority on operational issues and other risk issues that the Public Entity may face so that the relevant oversight bodies can make informed decisions when matters are referred and escalated for action by the Provincial Minister and/or PT.

In order for this to be accomplished effectively, the Executive Authority may delegate authority, where allowable in terms of the legal prescripts, to the Accounting Officer/Head of Department for operational aspects related to management and oversight of the entities, while retaining responsibility for decisions as required by the PFMA and the Companies Act.

The Accounting Officer of the Parent Department has the following responsibilities:

- Advising the Minister through review of the Corporate Plan, the Strategic Plan, Annual Performance Plans, Shareholders Compact and other statutory documentation to be submitted and approved by the Minister;
- Align and advise the Minister and Accounting Authorities on the Budget allocation against the Key Performance Indicators agreed in the APP or the Shareholders Compact, this includes how the budget allocation is reconciled to the Public Entities objectives and programmes;

[4] https://www.westerncape.gov.za/provincial-treasury/

- Review the Quarterly reports against the APP and Shareholders Compact and advise the accounting authority and Provincial Minister/Minister on recommendations for corrective action;
- Assist the Minister with the nomination of Board members per each legislation for the appointment of Board members;
- In accordance with the PFMA, exercise the responsibilities of the Accounting Officer responsible for the transfer of funds to the public entity as per section 38(1)(j) read with Treasury Regulation 8.4.1; and
- Establish a system for monitoring and reporting of the effectiveness of the use of funds transferred.

The Accounting Officer may at his/her discretion delegate oversight functions to the delegated officials in the Department in the following manner where allowable in terms of the legal prescripts:

- Branch, programme or line manager responsible for oversight of the performance of the Public Entity
- Chief Financial Officer of the Department for delegations regarding financial matters (such as Budget Process, Retention of Surplus) or Transfer Payments)

It is essential that the CFO and the Branch, Programme, or Line Manager are in agreement with regard to the supervision of the public entity. This could be accomplished by establishing a dedicated structure and implementing the necessary oversight mechanisms for the oversight function.

The Accounting Officer must ensure that delegated officials have the necessary authority, skills, and experience to monitor and oversee the Public Entity, as well as identify matters for escalation to the Accounting Officer and Management Executive Committee, which may include a due diligence or deep dive analysis on operations based on appropriate financial management risk indicators.

The Accounting Authority's/Public Entity Board's Role

Every public entity governed by the PFMA is required to have an Accounting Authority that is accountable for PFMA purposes. Typically, this is the Board. In the absence of a Board, the statutory governing body will serve as the "authority." In some cases, the enabling legislation may designate the CEO as the Accounting Authority. In exceptional cases, the relevant treasury may approve or direct another entity to function as the accounting authority for a public entity.

Duties of Accounting Authorities in terms of the PFMA

The Accounting Authority/Board in terms of Section 50-55 of the PFMA are responsible for the following:

- Section 50: Fiduciary responsibilities of the Board Members including acting in good faith **and providing documentation and information to the Executive Authority and Legislature on request**;
- Section 51: General responsibilities including implementing an effective and efficient system of internal controls over financial and risk management **over all aspects of operations of the public entity including revenue, expenditure, procurement, assets and liabilities management**;
- Section 52 (Schedule 3D entities): Annual Budget and Corporate Plan- proposing and agreeing the budget as well as the Corporate Plan **for the achievements of the objectives of the entity** aligned to the policy directives as provided by the Provincial Minister/Minister;
- Section 53 (Schedule 3C entities): Annual Budget and Annual Performance Plan- proposing and agreeing the budget as well as the Annual Performance Plan for the achievements of the objectives of the entity aligned to the policy directives as provided by the Provincial Minister/Minister;

- Section 54: **Information and Significant Transactions**: Provide information as required by the PFMA and other legislation to the relevant Treasury and the AGSA as well as **seek approval for significant transactions;** and

- Section 55: Reporting requirements regarding the annual report and annual financial statements for reporting the activities of the Public Entity.

With respect to public entities also registered as companies, the Board should perform/ensure the following in relation to the Companies Act and Common Law as determined by decisions of the courts which can be summarised as follows:

- To act within the powers granted to them in the Memorandum of Incorporation;

- To act in good faith and in the best interest of the company;

- To exercise their powers for a proper purpose;

- The duty to exercise an independent judgement in all decision-making;

- To avoid, or declare, any conflict of interest;

- Not to accept benefits from third parties or use their position to benefit themselves;

- To disclose to the company their financial interests in proposed or existing transactions or arrangements with the company or other entities; and

- To apply reasonable care, skill and diligence in exercising their duties.[5]

Consequently, it is evident that the Accounting Authorities (Board of Directors) of public entities are accountable and responsible for proposing, approving, and implementing solid financial and risk management controls to fulfil their mandate. However, stakeholders involved in oversight of the entities (Legislature, Portfolio Committees, Accounting Officers, and Departmental officials) are responsible for ensuring that the entities are fulfilling their mandates, utilising funds for their intended purpose, and not exposing the entity and, by extension, the province to risk.

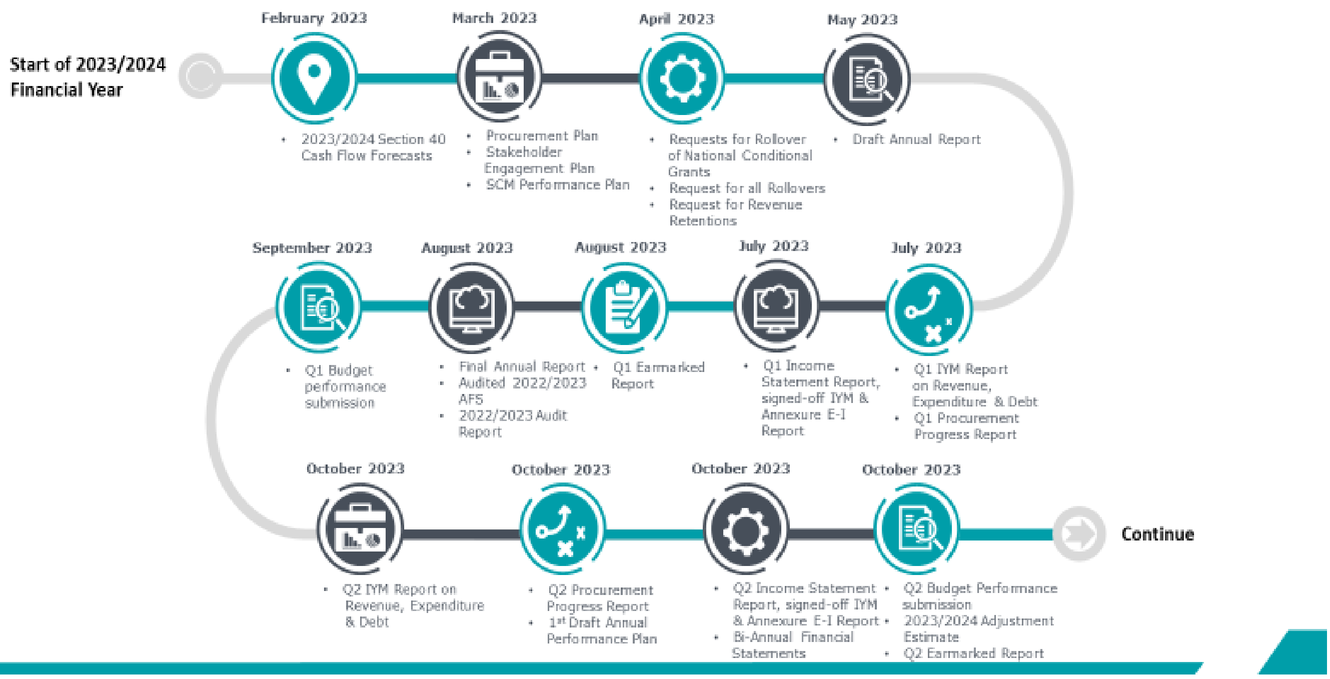
In accordance with Section 56 of the PFMA, the Accounting Authority delegates the implementation of internal controls to officials of the organisation, such as the Chief Executive Officer (CEO) and other senior officials. The Chief Financial Officer (CFO) of the Public Entity, as required by Treasury Regulation 26, would also be delegated the responsibilities of implementing internal controls, preparing and/or contributing to statutory documentation such as the Corporate Plan, Shareholders Compact, Strategic Plan Annual Performance Plan, Quarterly Reports and submissions, Annual Report and Annual Financial Statements pertaining to financial management issues.

In terms of the public entities and their related relationships with their respective departments, it is important to highlight the public entity cycle as well as the instruments that are at the disposal of the entities.

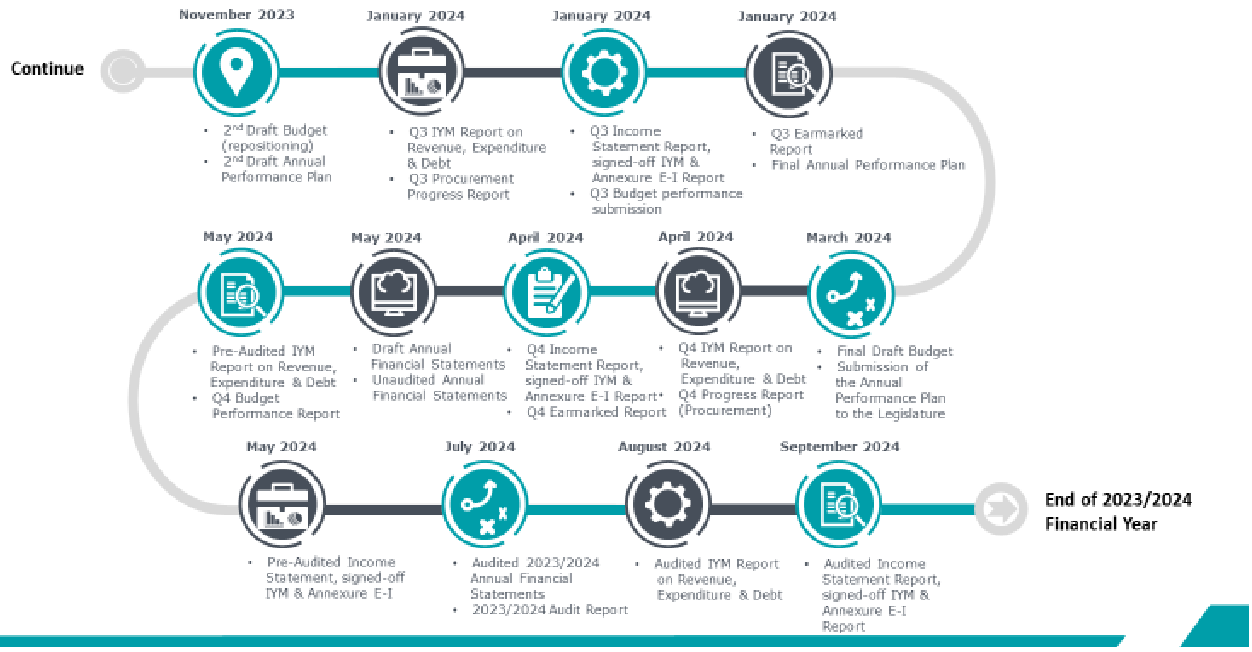
[5] https://serr.co.za/understanding-the-fundamental-duties-and-responsibilities-of-a-director-of-a-company

Public Entity cycle

Public Entity Cycle



Public Entity Cycle



The various intergovernmental instruments are the following:

Transfer Payment Agreement

A transfer payment is a one-way payment to a person or organisation which has given or exchanged no goods or services for it.

Where a department makes a payment to its entity for the entity to conduct its operations in accordance with the entity's legislative mandate and not to acquire any goods or deliver any services for the department, this transaction is classified as a transfer.

The transfer payment should be measured separately from the payment made towards the administration of the agreement (for e.g., admin fees). Any fees paid towards to the administration of the agreement should be accounted for as goods and services.

If a department makes a payment to its entity for the acquisition of goods, services or capital assets, this payment is classified as goods and services or payments for capital assets.

Principal Agent

Two important aspects to consider in assessing whether a principal-agent arrangement exist:

- The existence of a binding arrangement between the principal and the agent; and
- The arrangement is such that one entity (the agent) represents the interests of another party (the principal), in dealing with identified third parties.

A key determinant in assessing a principal-agent arrangement is to assess which entity benefits from the transaction with third parties. The transaction should be for the benefit of the principal if the agreement is to be classified as a principal-agent arrangement.

Shareholder Compact

The Shareholder's Compact represents the agreement between the Executive Authority and the Accounting Authority. It is a reflection of the expectations of each party, expressed in terms of outcomes and outputs that need to be achieved.

The Shareholder's Compact needs to be reviewed and adjusted on an annual basis, in line with the performance of the Public Entity over the previous financial year.

The Treasury Regulations impose the following legal requirements on public entities and their executive authorities regarding the Shareholder's Compact:

- The accounting authority for a public entity listed in Schedule 3D must, in consultation with its executive authority, annually conclude a shareholder's compact; and
- The shareholder's compact must document the mandated key performance measures and indicators to be attained by the public entity as agreed between the accounting authority and the executive authority.

A well thought out agreement, prepared in consultation with the executive authority, will assist the public entity to focus its activities on the delivery of strategic or high-quality services as an agent of the state for the benefit of the citizens of the country. Agreement on the outcomes to be achieved, with relevant performance measurements attached to these, will empower the executive authority to meet the required commitments to the legislature and the people of the country.

Service Level Agreement

A Service Level Agreement (SLA) is the part of a contract which defines exactly what services a service provider will provide and the required level or standard for those services. The SLA is generally part of an outsourcing, contracted or managed services agreement, or can be used in facilities management agreements and other agreements for the provision of services.

A well drafted and well thought out SLA should have the following elements:

- It will state the business objectives to be achieved in the provision of the services;
- It will describe in detail the service deliverables;
- It will define the performance standards the customer expects in the provision of the services by the service provider;
- It will provide an ongoing reporting mechanism for measuring the expected performance standards;
- It will provide a remedial mechanism and compensation regime where performance standards are not achieved, whilst incentivising the service provider to maintain a high level of performance;
- It will provide a mechanism for review and change to the service levels over the course of the contract; and
- Ultimately it will give the customer the right to terminate the contract where performance standards fall consistently below an acceptable level.

Putting together an SLA can be a difficult process, as it often involves documenting processes which have previously arisen organically within an organisation, however, if you consider the points listed above you should produce a SLA that is well written and enhances the business objectives.

CHAPTER 6

MEMBERS OF THE ACCOUNTING AUTHORITY

CHAPTER 6 - MEMBERS OF THE ACCOUNTING AUTHORITY

Appointment of Board Members

According to Section 49 of the PFMA, every public entity must have an Accounting Authority that is accountable for the purposes of the Act. Ordinarily, the members of the Accounting Authority are determined by enabling legislation or the Companies Act.

In accordance with the enabling legislation, the Provincial Minister/Minister (as the shareholder) or provincial cabinet appoints the Directors or Board members. Lessons can be learnt from the Zondo Commission's findings, which revealed a lack of transparency in the appointment of Board members, CEOs, and CFOs to Public Entities, and that Ministers should not be solely responsible for appointing the boards of state-owned enterprises.

It is essential to appoint board members with the necessary skills and to provide them with the independence and objectivity they need to perform their duties. The effectiveness of the Public Entity is contingent upon the qualifications and performance of its Board. When appointing directors, it is essential that the shareholder/Executive Authority ensure that the Board is correctly constituted. In this regard, the Board should always consist of individuals with integrity and accountability, as well as competence, relevant and complementary skills, experience, and knowledge. This is done to avoid probable dominance by any one director or group of directors and, most importantly, to ensure dedication to the success of the public entity and shareholder/Executive Authority satisfaction.[6]

Another lesson from the Zondo commission findings is that a Standing *Appointment and Oversight Committee should be established for the appointment of Board members, CEO, and CFO*. Consideration should be given to the following:

- Establishment of a provincial nomination committee;
- Vetting of all proposed board members;
- Interview of all proposed board members by the Committee;
- Recommendation by the nomination committee to the Provincial Minister/Minister; and
- Appointment by the Provincial Minister/Minister.[7]

The Committee should provide the Executive Authority with a list of qualified candidates for board membership, which may include the names of directors who are retiring. However, the Provincial Minister/Minister/shareholder is not required to appoint a candidate proposed by the Committee.

Termination of membership of the Accounting Authority

If the public entity fails to perform satisfactorily, the shareholder/Executive Authority may initiate prompt remedial action, including the dismissal of the board member/director, particularly in the case of failure to keep the shareholder/Executive Authority adequately informed and in situations of ongoing underperformance in relation to financial and other aspects of the operation of the business.

6 Handbook for the appointment of persons to boards of state and state-controlled institutions issued January 2009 by DPSA

7 Consultation with PT in progress

To conduct this in a timely manner, the EA would require the following information to be collected and communicated during the Board's term in office:

- assessment of the achievements of key performance indicators;
- assessment of financial performance against budgets;
- any risk issues identified by the Head of Department and departmental staff;
- matters emanating from the supplementary Monitoring and Evaluation Dashboard;
- any requests by EA not addressed by Public Entity; and
- any matters elevated by the EA and not timely addressed by the AA.

Expiration of term of appointment

A board member's or director's term of office expires at the end of the appointment period or such other shortened period as the circumstances may require. Subject to the board member's or director's continued performance and relevance to the business, they may be reappointed for another term.

CHAPTER 7

GOVERNANCE ARRANGEMENTS WITH DEPARTMENTS AND PUBLIC ENTITIES

CHAPTER 7 - GOVERNANCE ARRANGEMENTS WITH DEPARTMENTS AND PUBLIC ENTITIES

Schedule 3D entities

In accordance with Treasury Regulation 29.2, the Board of Directors and the Provincial Minister/Minister (with the Accounting Officer's input) are required to enter into an annual Shareholder's Compact. The Shareholders Compact would regulate the relationship between the Provincial Minister/Minister, in their capacity as Shareholder, and the Board of Directors. The Companies Act requires that the Shareholders Compact and the Memorandum of Incorporation be consistent and aligned.

Although the Shareholders' Compact establishes the Key Performance Indicators between the Board and the Provincial Minister/Minister, it should also account for the governance provided by the delegated Branch, which is accountable for ensuring that the Public Entity fulfils its mandate by executing its strategic plan:

- Reviewing key performance indicators against the mandate, and reporting against the targets;
- Budget submissions and support;
- Utilising the transferred funds for their intended purpose;
- Submission of documentation required by the PFMA and the Companies Act;
- Managing and mitigating against risks that the public entity may expose the province to; and
- Matters for escalation, and
- Attending Board meetings and/or sub-committee meetings such as Audit and Risk Committee as observers.

The shareholders' compact should also include procedures for resolving issues that have been escalated by the Provincial Minister/Minister, Accounting Officer (through Departmental Officials), and/or Provincial Treasury.

Schedule 3C entities

Although the PFMA does not require a formal agreement to govern the relationship between the Executive Authority, the Accounting Officer, and the Accounting Authority, it is recommended that a formal agreement be entered into between the Accounting Officer (as the Executive Authority's representative) and the Accounting Authority. The agreement will specify the role of the Accounting Officer in overseeing the Department's transfer of funds to the entity.

The Departments and Public Entities of the Western Cape Government have engaged into these agreements defining the roles of the Accounting Officer (including Department officials) and the Accounting Authority. It is suggested that each Department and Public Entity formally establish their relationship. The following items must be incorporated:

- Submission of reports as required by the PFMA;
- Reviewing of key performance indicators against the mandate and assessing achievement of that mandate;
- Attendance at Board meetings and other oversight meetings by the WCG representative appointed by the EA, the department may also attend some of the board meetings;
- Budget submissions and inputs; and
- Matters for escalation.

CHAPTER 8

STRATEGIC PLANNING, CORPORATE PLANS, ANNUAL PERFORMANCE PLANS, BUDGETS

CHAPTER 8 - STRATEGIC PLANNING, CORPORATE PLANS, ANNUAL PERFORMANCE PLANS, BUDGETS

In accordance with Sections 52 and 53 of the PFMA, Accounting Authorities are responsible for preparing and motivating budget submissions aligned with the Strategic plan, Annual Performance Plan, Corporate Plan, and Shareholders Compact as part of the annual budgeting process. These reports contain Key Performance Indicators.

The annual performance plan (Schedule 3C) or corporate plan (Schedule 3D) is a short-term operating and financial plan that identifies the resources that the public entity will use in the upcoming fiscal year or other accounting period. It indicates where the public entity intends to obtain its resources, how it intends to utilise them, and what it intends to accomplish during the period. The budget summarises the project and circumstance decisions that have already been made, includes a preliminary forecast of those that remain to be made and implemented during the period, and presents the results as an all-inclusive plan for the period.

Directors and managers of Public Entities should consider the following decision criteria when evaluating individual budget proposals within the organisation:

- do the expected benefits of proposed expenditures justify the costs?
- are the estimates realistic?
- is the proposal consistent with the Public Entity's strategic plan and with proposals of other parts of the organisation?
- is it aligned to the strategic intent of the provincial strategic direction?
- is it feasible in the context of the organisation's production and managerial capabilities?

In accordance with the MTEF guidelines issued by the National Treasury, budgets should ideally be zero-based budgets per programme/activity rather than linear adjustments from prior years. The programmes of the Public Entities ensure that the baseline budget is reasonable and considers circumstances that have changed over time. Current or operating budgets should be sufficiently detailed to identify significant items under management's control.

The capital budget should identify all main capital items to be acquired, as well as which are new and which are replacements for existing items that have been lost, damaged, or have reached the end of their useful lives. GRAP requires that any revenue generated from the sale of such items (e.g., vehicles) be noted and reported on the income statement.

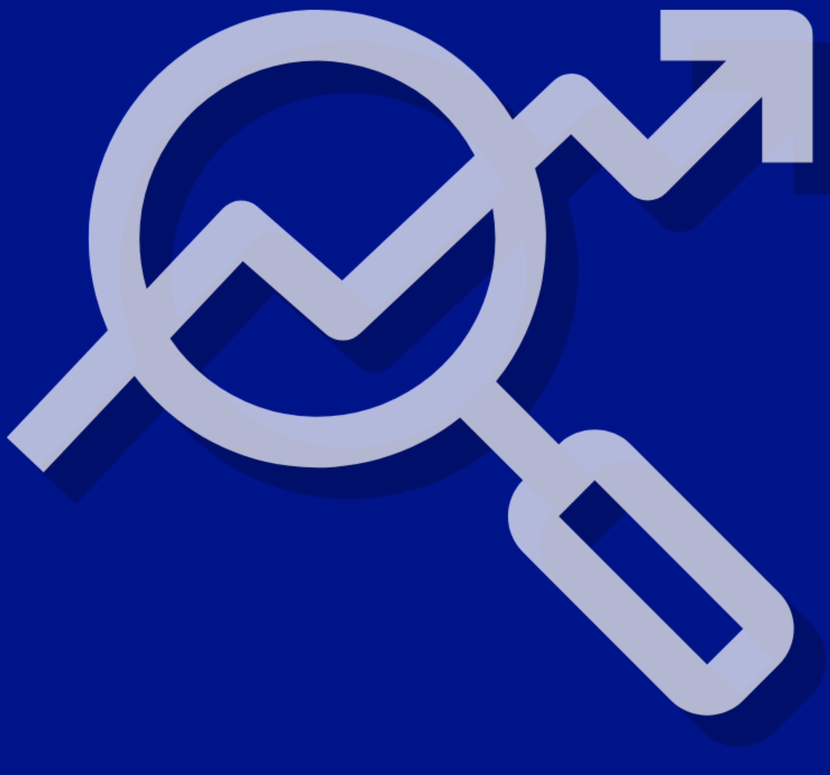
The annual performance plan or corporate plan must be submitted to the Accounting Officer of a department designated by the Executive Authority in charge of that public entity. Through delegation to the CFO and line function, the Accounting Officer of the Department would be responsible for reviewing the plans and ensuring that the key performance indicators and budgets are aligned with the Government policy over which the Department has oversight. In accordance with their mandate, the Office of the Premier would also review the main performance indicators. Provincial Treasury will provide the dates for the preparation and certification of the Annual Performance Plan and Corporate Plan beginning in September.

Strategic objectives and key performance indicators programmes

Regarding the preparation and review of the Public Entity's Key Performance Indicators, it is crucial that the numerous frameworks issued by National Treasury and the Department of Monitoring and Evaluation be adhered to. Critically, it is necessary to compare the Key Performance Indicators to the strategic outcomes and outputs as determined by the various stakeholders in governance, including the Provincial Minister/Minister. Operational Key Performance Indicators, such as whether financial statements are prepared in accordance with the Accounting Framework, should be minimised.

Strategic Key Performance Indicators and targets must be aligned with the Program's activities and objectives. For instance, if the Program's strategic objective is to increase its own revenue or maximise provincial revenue, revenue collection targets must be established.

CHAPTER 9



MONITORING, EVALUATION AND REPORTING

CHAPTER 9 - MONITORING, EVALUATION AND REPORTING

9.1 MONITORING AND EVALUATION

In accordance with Treasury Regulation 29 and 30, Accounting Authorities are required to prepare quarterly reports. In accordance with the guidelines issued by National Treasury, the Quarterly Report should address the following topics:

- Database reporting;
- Programme/objective/activity information;
- Performance indicators and targets;
- Borrowings;
- Capital investment projects;
- Risk management and Job creation; ND
- Financial commitments.

As part of the reporting, the Public Entity should complete a supplementary monitoring and evaluation instrument for use by the Public Entity, the department, and the provincial treasury to support their oversight responsibilities. The instrument provides information on common issues such as expenditures per programme versus the budgeted amount and utilisation of budgeted cash resources. The tool must be tailored to the circumstances of each Public Entity and identify hazards that should be monitored by the EA.

It is anticipated that the Head of Department will review and analyse the Quarterly report and include any subsequent commentary in the Department's report on oversight of the entity. This would include an analysis of any issues that may necessitate an escalated response, as determined in Chapter 8.

Provincial Treasury will also analyse the provided information and communicate with the Executive Authority and Accounting Officer if any issues require follow-up or escalation based on a common M&E template to be applied per Public Entity.

Quarter 1- 31 July, Quarter 2 - 31 October, Quarter 3- 31 January, and Quarter 4 - 30 April are the dates by which the quarterly reports should be submitted to the Department so that the oversight stakeholders can report to the Provincial Executive.

An institution should conduct a review at the conclusion of the period covered by its Strategic Plan. The review should generally adhere to the same structure as the plan. The institution should report on its strategic accomplishments for each of the strategic outcome-oriented goals and objectives established at the start of the five-year period, as well as any other evaluations conducted during the period. At the conclusion of the five-year strategic period, the Minister or Head of Department may choose to evaluate the plan's effectiveness and ensure that the mandate and strategies are in line.

9.2 REPORTING

Section 55 of the PFMA specifies the entity's annual reporting requirements. The annual report and the financial statement of the public entity must present the situation of the public entity, its business, its financial results, its performance relative to predetermined objectives, and its financial position as of the end of the fiscal year in question in a fair and accurate manner, and provide the following details:

- *any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year;*
- *any criminal or disciplinary steps taken because of such losses or irregular expenditure or fruitless and wasteful expenditure;*
- *any losses recovered or written off; and*
- *any financial assistance received from the state and commitments made by the state on its behalf.*

The Financial Statements must be submitted to the Auditor-General for auditing purposes two months after the end of the fiscal year. Financial statements of Public Entities must be audited or reported on by the Auditor-General or a person registered in terms of the Auditing Professions Act, as an accountant and auditor, and engaged in public practise as such in the event that the AGSA has elected not to perform the audit. It is crucial that any findings that could result in a negative audit outcome for the entity be communicated to the Executive Authority, Accounting Officer, and Provincial Treasury so that the appropriate recommendations can be made to address the issues. The Audit and Risk Committee of the Public Entity, the Department Head, Branch Management, the CFO of the Department, and the Provincial Accountant General should be involved in a timely manner.

The Accounting Authority is responsible for submitting the annual report along with audited financial statements and an audit report to the Executive Authority five months after the end of the fiscal year. However, it is standard practise for the AGSA to complete the audit by July 31. In accordance with Section 65 of the PFMA, the Executive Authority is required to submit the annual report to the provincial legislature within one month of receiving the audit report related to the annual financial statements, or within six months of the year-end (30 September).

9.3 ESCALATION

Accounting Authorities being held accountable for the non-financial and financial performance of Public Entities is an essential aspect of oversight. Thus, the PFMA and Companies Act allow oversight mechanisms like the Executive Authority, Department, and Provincial Treasury to investigate performance measures and advise the Accounting Authority to address risk areas.

The Executive Authority and the Accounting Officer (supported by pertinent officials) of the relevant department comprise the primary mechanism for oversight. Consequently, the Provincial Minister/Minister is responsible for proposing and recommending courses of action, based on the advice and recommendation of the Department Head and, if there is a financial component, the line function or CFO of the Department.

PT will communicate with the Provincial Ministers/Ministers and the Heads of Departments to bring to their attention any risks that should be addressed by the entity, the Department, or the Provincial Treasury. Section 18 of the PFMA, among other things, grants the PT authority over public entities:

- **promote and enforce transparency** and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities;

- must monitor and assess the implementation in provincial public entities of national and provincial norms and standards;
- may assist provincial public entities in building their capacity for efficient, effective and transparent financial management;
- may **investigate any system of financial management and internal control** applied by a provincial department of a provincial public entity;
- must intervene by taking appropriate steps which may include the withholding of funds, to address a serious or persistent material breach of the PFMA by a provincial department or a provincial public entity; and
- **may do anything further that is necessary to fulfil its responsibilities effectively**.

Issues that could result in escalation to Provincial Minister/Minister/Head of Department/PT/Accounting Authority would include:

- Failure to submit documentation to the relevant authorities;
- Failure to hold meetings as required in terms of the PFMA/Companies Act and other legislation;
- Dissolution of the Board/lack of quorum;
- Conflict between the Board and the Provincial Minister/Minister, which may be referred to the Premier for intervention if it falls outside PT's mandate;
- Negative audit outcomes;
- Material irregularities identified by the AGSA; and
- Going concern risks.
- **Financial viability matters amongst others:**
    - Lack of revenue/conversion of investor pipeline;
    - Sustained losses/Operations funded by cash reserves;
    - Budget/operational issues;
    - Business model not translating into revenues/self-sustainability or break-even;
    - Budget spent but targets not being achieved; and
    - Loss of resources to the state–VAT leakage.

9.4 RETENTION OF SURPLUS

Section 53(3) of the PFMA prohibits schedule 3C public entities from accumulating surpluses or planning for deficits. On 2 September 2020, the National Treasury issued Instruction No. 12 of 2020/21 regarding Retention of Surpluses, instructing entities to justify the retention of surpluses.

In accordance with the above circular issued by National Treasury, it has become standard practise for entities to request approval from the relevant treasury before retaining surpluses. Some of these practises and retention permissions have resulted in Public Entitles accumulating cash balances based on retained surpluses, but not spending them in accordance with the stated motivation for a variety of reasons.

In terms of the procedure, the Accounting Authority should, through the Department, justify the retention of surpluses based on adequately defined and justified commitments or obligations resulting in cash outflows, in accordance with applicable accounting requirements.

PT would then be responsible for providing a decision through the Department's Accounting Officer. This would then need to be accounted for in the Budget and Quarterly reporting procedure regarding the entity's utilisation of the surplus.

Retention of surpluses is also covered by the public entity cycle under the request for role overs that happens during the month of April.

9.5 SIGNIFICANT TRANSACTIONS

In accordance with Treasury Regulation 28.3,1, the Accounting Authority of a Public Entity is required to concur with the Executive Authority on a framework for material disclosures in accordance with Section 55 and significant transactions in accordance with Section 54 of the PFMA. The following National Treasury practice note on the agreement of a framework for significant transactions should be considered.

As required by the PFMA, the Accounting Authority must therefore concur with the EA on quantitative and qualitative amounts for significant transactions:

- Establishment or participation in the establishment of any company;
- Participation in a significant partnership, trust, unincorporated joint venture or any similar arrangement;
- Acquisition or disposal of a significant shareholding in a company;
- Acquisition or disposal of a significant asset;
- Commencement or cessation of a significant business activity; or
- A significant change in the nature extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.

Before recommending the materiality and significance framework for approval and agreement by the Executive Authority, the Accounting Officer (Head of Department) should review the framework. The Accounting Officer would also be responsible for reviewing the Accounting Authority's submissions prior to recommending the transaction to the Executive Authority for approval in accordance with Section 54.

Examples include:

- Purchase of significant assets by the Public Entity;
- Change in business activities of the Public Entity from original envisioned due to market conditions; and
- Transactions involving any exchange of shares or assets.

9.6 BORROWINGS, GUARANTEES AND OTHER COMMITMENTS

In accordance with Section 66(3)(d) of the PFMA, a provincial government enterprise may only borrow money, issue a guarantee, indemnity, or security, or enter any other transaction that binds or may bind the public entity to a future financial commitment with the approval and/or concurrence of the Provincial Minister for Finance when impacting the Provincial Revenue Fund.

In terms of section 66(3)(d), Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:

a) A public entity listed in Schedule 2: The accounting authority for that Schedule 2 public entity;

b) A national government business enterprise listed in Schedule 3 and authorised by notice in the national Government Gazette by the Minister: The accounting authority for that government business enterprise, subject to any conditions the Minister may impose;

c) Any other national public entity: The Minister or, in the case of the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70; and

d) A provincial government business enterprise listed in Schedule 3 and authorised by notice in the national Government Gazette by the Minister: The Provincial Minister for Finance in the province, acting with the concurrence of the Minister, subject to any conditions that the Minister may impose.

Currently, the Western Cape Government enterprises not listed in Schedule 3D of the PFMA are not authorised under Section 66(3)(d). Occasionally, public entities may need to borrow funds, for instance to finance capital projects or to close temporary revenue gaps. Such borrowing should be approved by the board for submission via the parent department and related Executive Authority to the Provincial Minister of Finance, with concurrence from the National Minister of Finance, and reported to the relevant treasury prior to the commencement of the fiscal year in accordance with the PFMA.

In accordance with the provisions of the PFMA, the public entity may only issue a guarantee with the approval of the Provincial Minister/Minister for Finance acting in conjunction with the Minister of Finance.

Borrowing is also covered by the public entity cycle under the request for roll-overs that happens during the month of April.

Glossary of Terms and Interpretation

In this Protocol, unless the context otherwise indicates:

"Accounting Authority or AA" means a body or person mentioned in section 49 of the PFMA;

"Accounting Officer or AO" means a person mentioned in Section 36 of the PFMA;

"APP" means Annual Performance Plan'

"board" means the board of directors of Schedule 3D State Owned Companies if the Public Entity is a Company and are also the appointed Accounting Authority of these entities;

"board" means the members appointed to the accounting authority (in the case of a 3C or "listed entity);

"CEO" means the Chief Executive Officer as the most senior official in a Public Entity delegated by the AA;

"CFO" means the Chief Financial Officer of a Department or Public Entity responsible for the Finance Function of the Department or Public Entity;

"DoA" means delegation of authority between Provincial Minister/Minister, where allowable in terms of the legal prescripts, and Head of Department, or Head of Department and Departmental officials or AA and Public Entity officials;

"Executive Authority or EA" means the member of the provincial Executive Council who is accountable to the provincial legislature for the government entity or in whose portfolio it falls;

"GRAP" means South African Statement of Generally Recognised Accounting Practices as approved by the Accounting Practice Board or such other body authorised in terms of the relevant legislation to issue such accounting standards;

"Government" means the Government of the Republic of South Africa as defined in the Constitution of the Republic of South Africa;

"Head of Department"- Head of Department or Accounting Officer of Department;

"King Code" means The Code of Corporate Practices and Conduct representing the principles of good governance as set out in the King Report 4 of 2016;

"KPI" means Key Performance Indicator set by Public Entities and agreed with the EA in the Shareholders Compact or APP;

"M&E" means Monitoring and Evaluation processes for continually assessing Public Entities performance;

"MoA or MoU" means Memorandum of Agreement or Understanding entered into between Departments and AA;

"MoI" means the Memorandum of Incorporation establishing Companies;

"PFMA" means the Public Finance Management Act No.1 of 1999, as amended;

"PT" means Provincial Treasury established in terms of Section 17 of the PFMA;

"Public Entity or PE" means a term used to describe Schedule 3C, 3D and unlisted public entities in terms of the PFMA;

"RACI" means the Responsible, Accountable, Consult and Inform Framework for oversight of public entities;

"Shareholder" means the Executive Authority acting in capacity as Shareholder in terms of the Companies Act No 70 of 2008;

"shareholder compact" means an agreement regulating the relationship between the Shareholder and the board in terms of the Treasury Regulations;

"SOC's" means State Owned Companies as per the Companies Act; and

"Treasury" means the National Treasury established in terms of by section 5 of the PFMA or the provincial treasury, as may be appropriate in the circumstances.

References

Public Finance Management Act, No 1 of 1999

Treasury Regulations issued in terms of the PFMA, 2005

Companies Act, No 20 of 2008

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