

**Proposed Regulations
dealing with
contracts between
Water Services Authorities
and
Water Service Providers**



**DEPARTMENT OF
WATER AFFAIRS AND FORESTRY**



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LIBRARY IRC
PO Box 93190, 2500 AD THE HAGUE
Tel.: +31 70 30 689 80
Fax: +31 70 35 899 64

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Foreword

Proposed regulations dealing with contracts between Water Services Authorities and Water Services Providers.

It gives me great pleasure to release a set of regulations for public comment as well as an introductory policy note.

In terms of section 71(1)(a) of the Water Services Act, interested parties are invited to submit written comments in connection with the proposed regulations. The closing date for comments is 15 September 2000.

Comments must be submitted to the Director-General, Department of Water Affairs and Forestry, Private Bag X313, Pretoria, 0001 or sent by fax to (012) 323 3877 and marked for the attention of Mr Helgard Muller (Director: Intervention and Operations Support).

Ronnie Kasrils

Ronnie Kasrils, MP
Minister of Water Affairs and Forestry
June 2000

Introduction

Draft regulations which will govern the involvement of private sector providers in water services as well as the work of public sector service providers were published on 30 June 2000 for comment by Minister Ronnie Kasrils.

The regulations cover “matters which must be regulated by a contract between a water services authority and a water services provider”. The aim of the regulations is “to encourage efficient, affordable, economic and sustainable access to water services for all consumers.”

“This is a sensitive matter. Many trade unionists, NGO’s and others are fearful that allowing the private sector into water provision will have a negative impact on the poor. The private sector for its part is concerned that the approach taken in our Water Services Act is anti-business. These regulations should help to clarify our intentions and it was thus important to consult widely with all stakeholders even before we publish a draft for comment. This will ensure that we now have a constructive consultation process,” said Minister Kasrils, who has held wide-ranging discussions on these regulations over the past twelve months.

The regulations will affect the public sector as well. They will regulate the relationship between municipalities and water boards and will also allow non-profit organisations to provide water services in rural communities by agreement with the local government concerned.

“I hope this will help us to improve the current situation in which for example, a water board can set tariffs without reference to the

local governments which it supplies. In future, such arrangements should be regulated by a formal contract whose contents will be guided by these regulations,” said Minister Kasrils.

“The regulations will also be of assistance to my Department which still provides water services for about six million people in rural areas. We will now be able to regularise the situation where I currently do local government’s job. In future, I will expect such arrangements to continue only where there is a proper agreement with local government in which each parties roles and responsibilities are clearly set out.”

In an introductory Policy Note, the Minister also indicates that he is considering a review of the Water Services Act 1997. The approaches of this Act are largely consistent with the new local government framework. Indeed, the distinction between the role of municipalities as service authorities and that of service providers, which can range from public utility to NGO to private company has now been taken up in local government legislation. There is, however a number of areas where a need for greater clarity has been identified and these will be reviewed.

The full regulations will be published in the Government Gazette on 30 June 2000 and be available, together with a separate explanatory note on the departmental website: www-dwaf.pwv.gov.za.

The consultation process is expected to be completed within three months after which final Regulations will be promulgated.

POLICY NOTE REGARDING REGULATION OF WATER SERVICE PROVIDERS

1.0 Country Context

Government welcomes the participation of the private sector, which joins our public sector, in addressing the challenges we face to provide water services for our people. Provision of water services in South Africa is a particularly formidable task. The backlog and limits to financial and staffing capacity are significant. Over and above this, there is a great diversity of situations in relation to water services that needs to be taken into account; from small rural communities to large metropolitan areas. Government wishes to progress from a situation in which central government runs a significant proportion of services, to one in which this responsibility is placed under local government, with all municipalities ultimately assuming responsibility. The means by which local government achieves service delivery vary. This may range from providing the service itself; to a management contract for the operation of a single plant; to the large metropolitan area seeking to contract with a suitable company to build, operate and manage facilities under a concession-type agreement. Regulations need to ensure that all responsibilities are clearly allocated while being simultaneously comprehensive and reasonable.

2.0 Main Sector Objectives

The objective of the regulations is to promote the best interests of customers and to ensure fair treatment of Water Service Providers (WSPs). The aim is to achieve a water supply and sanitation services sector that:

1. Is efficient and financially sustainable,
2. Provides universal coverage with services that people want and are willing to pay for,
3. Allows a range of different methods of service provision, levels of service, and a choice of service providers, and
4. Treats public and private providers in a similar manner.

3.0 Roles and Responsibilities in Sector

This policy document sets out the roles and responsibilities with respect to regulation of water services, as shown in the following table:

In addition to the above roles and responsibilities, national

Role	Who	Responsibilities
Constitution of South Africa	Ministers of Water Affairs and Forestry, and Provincial and Local Government	<ul style="list-style-type: none"> • To set national norms and standards • To fill the role of Water Service Authority if service at local level fails • To provide support to local government in relation to water services • To legislate with regard to municipal functions (including minimum procurement rules) • To monitor performance
	Municipal government (local sphere)	<ul style="list-style-type: none"> • To be responsible for the provision of basic level of service to all South Africans
Regulator	Minister of Water Affairs and Forestry	<ul style="list-style-type: none"> • To set minimum levels of service • To set minimum reporting requirements • To set tariff policy • To monitor performance • To encourage regionalisation to achieve economies of scale
Water Services Authority (WSA)	Municipal government	<ul style="list-style-type: none"> • To achieve requirements set by regulators • To balance the needs of stakeholders • To enter into contracts with WSP(s) best able to achieve these requirements • To monitor performance of the WSP in terms of the contract with the WSA • To report to regulators
Water Services Provider (WSP)	Public, private or mixed entities, or municipal government itself	<ul style="list-style-type: none"> • To provide the services and perform the duties as required in the contract, the WSA and the Constitution

departments, in particular the Departments of Water Affairs and Forestry, Provincial and Local Government, and Finance provide support to municipalities in the form of capacity building, financial assistance and operational support. Other departments such as Environment, Health, and Labour also regulate elements of this sector.

4.0 Key Issues Under Each Main Objective

4.1 Efficient and financially sustainable service

- (a) Tariffs will be aligned with prescribed norms and standards for tariffs to be regulated by the Minister of Water Affairs and Forestry under Section 10 of the Water Services Act (Act No 108 of 1997).
- (b) Services shall be financed through cost recovery and available subsidies such that they are operated in a sustainable fashion.
- (c) Tariffs may differentiate only on an equitable basis between different users of water services; different types of water services and different geographic areas.
- (d) Tariff regulation (under section 10 of the Act) will allow for tariffs to be set for fixed periods, indexed, reviewed on a periodic basis, and adjusted by an agreed formula to keep pace with the cost of providing the service.
- (e) An appropriate mechanism will be used to set tariff structures that provide incentives to WSPs and that provide a reasonable rate of return commensurate with the associated risk.
- (f) Water Service Authorities will be encouraged to use partners that are best able to achieve the water service objectives.
- (g) Regionalisation will be encouraged to achieve economies of scale/scope.
- (h) A suitable WSP may be identified by a WSA through the Water Services Development Plan process (sections 12, 13

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- and 14 of the Act).
- (i) A benchmarking system will be introduced to allow comparisons of performance by Water Service Institutions enabled through the development of a consistent comparative performance information system.
- 4.2 Provide universal coverage with services that people want and for which they are willing to pay
- (a) Standards of service will be set based on the relevant compulsory national norms and standards as set forth in terms of Section 9 of the Water Services Act.
 - (b) WSAs will use the Water Service Development Plan, as required by the Act, as the basis for the contract with a WSP to establish the range of services to be provided within prescribed time frames and for which people are willing and able to pay.
 - (c) Achievable service levels will be determined through the Water Service Development Plan process.
- 4.3 Allow a range of different methods of service provision and service providers
- (a) Where national government provides the service, the WSA is required to enter into a contractual agreement with national government as WSP.
 - (b) Water Boards are WSPs.
 - (c) Barriers to alternative service providers will be minimised.
 - (d) The WSP must be able to give the consumer a choice of service levels coupled to affordability.
- 4.4 Treat public and private providers in a similar manner
- (a) The minimum standards set by the regulator are the responsibility of the WSA to achieve, irrespective of whether they contract with public, private or mixed service providers.
 - (b) The benchmarking system will apply to all WSAs, and will capture the performance of the WSA, irrespective of the structure of the WSP(s) they contract with.

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- (c) Activities of Water Boards, outside bulk supplies, will be separately accounted for.
 - (d) Under the Constitution and legal system, including the Act, the discretion of the Minister of Water Affairs and Forestry is fettered and ad hoc interventions are not permitted.
 - (e) A lawful agreement entered into prior to promulgation of section 19(5) regulations will not be voided.

5.0 Related issues for further discussion possibly leading to amendment of the Water Services Act.

Aside from the challenges of implementation, developments in the water and sanitation sector and local government framework subsequent to 1994 have resulted in a range of issues where greater clarity in policy is required.

The Water and Sanitation White Paper was published in 1994 before a new local government framework had been established. There have since been major developments in the sector. The framework for local government has been established and a streamlined new local government system is being put in place. Local government finance has been reformed and policies to address poverty and indigency implemented. Policies on public private partnerships have been developed and a regulatory framework for such partnerships has been produced. The restructuring of state enterprises is proceeding apace.

In this new environment, we will soon be reviewing the policy framework governing water services in order to provide all stakeholders with a clear, secure and predictable environment within which to operate. Specific issues that may arise include:

- (a) The structure(s) and method(s) of operation through which these regulations are to be implemented.
- (b) The relationship between the provisions of the National Water Act and the Water Services Act, as well as the regula-

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- tion of water use by industrial users.
- (c) The role of Water Boards in the achievement of regional scale in service provision and as a competitive public alternative to promote efficiency in the sector.
 - (d) The regulation of Water Boards and the rules governing the establishment by them of joint ventures and other corporate entities.
 - (e) The approach to the regulation of WSPs, particularly with respect to the regulation of tariffs and rates of return outlined in s.19 of the Act.
 - (f) Possible amendments of s.10.2 (b) and (c), and s.19.2 of the Water Services Act.
 - (g) Technical issues such as the use of the words “license” or “permit” instead of the word “contract” to reduce the potential for litigation and whether “joint venture” should be referred to separately from other agreements in the Water Services Act, will also be considered.

DRAFT REGULATIONS

INVITATION TO SUBMIT WRITTEN COMMENTS ON THE PROPOSED REGULATIONS DEALING WITH CONTRACTS BETWEEN WATER SERVICES AUTHORITIES AND WATER SERVICES PROVIDERS IN TERMS OF SECTIONS 19(5) AND 73(1)(h) OF THE WATER SERVICES ACT, 1997 (ACT No. 108 OF 1997)

The Minister of Water Affairs and Forestry intends to prescribe by means of regulations matters which must be regulated by a contract between a water services authority and a water services provider, compulsory provisions which must be included in such contract as well as requirements for a joint venture between a water services authority and a water services institution in terms of sections 19(5) and 73(1)(h) of the Water Services Act, 1997 (Act No. 108 of 1997).

THESE ARE THE REGULATIONS AS PUBLISHED IN THE GOVERNMENT GAZETTE OF 30 JUNE 2000.

EXPLANATORY NOTE

In terms of section 19(5) of the Act, the Minister may prescribe matters which must be regulated by a contract between a water services authority and a water services provider. The Minister may also prescribe compulsory provisions to be included in such a contract as well as requirements for a joint venture between a water services authority and a water services institution. The aim of these regulations is to encourage efficient, affordable, economic and sustainable access to water services for all consumers.

SCHEDULE

PROPOSED REGULATIONS ON MATTERS WHICH MUST BE REGULATED BY A CONTRACT BETWEEN A WATER SERVICES AUTHORITY AND A WATER SERVICES PROVIDER, COMPULSORY PROVISIONS TO BE INCLUDED IN SUCH A CONTRACT AS WELL AS REQUIREMENTS FOR A JOINT VENTURE BETWEEN A WATER SERVICES AUTHORITY AND ANOTHER WATER SERVICES INSTITUTION IN TERMS OF SECTIONS 19(5) AND 73(1)(h)

Definitions

1. In these Regulations “the Act” means the Water Services Act, 1997 (Act No. 108 of 1997), and any word or expression to which a meaning has been assigned in these Regulations shall bear the meaning so assigned to it in the Act and, unless the context indicates otherwise -
 - (i) “affiliate” means;
 - (a) another company which is the holding company or a subsidiary as described in section 1 of the Companies Act, 1973 (Act No. 61 of 1973) of the water services provider; or
 - (b) any juristic person other than the holding company or the subsidiary which is subjected to the substantial influence of a parent company which juristic person is also able to exercise substantial influence over the water services provider;
 - (ii) “contract” means an agreement between a water services provider and a water services authority in terms of which the water services provider is to manage the provision of water services with or without capital investment;
 - (iii) “contract area” means the area within the jurisdictional boundaries of the water services authority or such other area

as may be defined by a water services authority in which the water services are to be rendered by a water services provider;

- (iv) “effective date” means the date upon which the obligations of a water services provider in terms of a contract commence;
- (v) “employment law” means any provision of the following Acts:
 - (a) Unemployment Insurance Act, 1966 (Act No. 30 of 1966);
 - (b) Guidance and Placement Act, 1981 (Act No. 62 of 1981);
 - (c) Manpower Training Act, 1981 (Act No. 56 of 1981);
 - (d) Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
 - (e) Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);
 - (f) Labour Relations Act, 1995 (Act No. 66 of 1995); and
 - (g) Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).
- (vi) “levels of service” means the various methods and quantities, where applicable, for the provision of water services to consumers;
- (vii) “publish” means a public announcement in at least three official languages of the Republic of South Africa and in at least two local newspapers circulating in the contract area;
- (viii) “standards of service” means the operational performance of

the services as measured against the relevant compulsory national norms and standards as regulated in terms of section 9 of the Act, as well as any additional standards specifically provided for in the contract;

Objects

- 2.(a) These Regulations prescribe matters to be regulated by a contract between a water services authority and a water services provider.
- (b) The contents of a contract shall be consistent with the objects of the Act as set out in section 2 thereof.

Commencement, amendment, termination and breach of contract

3. A contract shall contain a clause requiring each party to identify and take all reasonable steps to prevent either party, its employees, its sub-contractors, its agents or anybody under its control from engaging in any of the following:
 - (a) causing to be received, receiving or agreeing to receive any payment, bribe, gift, gratuity or commission as an inducement or reward for doing or forbearing to do any action in relation to a contract; or
 - (b) for showing favour to any person in relation to a contract.
4. A contract shall provide -
 - (a) for the duration of the contract which may not exceed a maximum of 30 years calculated from the effective date of the contract;
 - (b) for a process of earlier termination of the contract;

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- (c) for the event where a breach of contract is committed by either party, that the aggrieved party shall notify the other party of such breach within a specified period. It shall also provide for the legal remedies, including arbitration, available to the aggrieved party where such breach of contract is not rectified within the period stated by the aggrieved party in its notification to the other party;
 - (d) for a procedure for the efficient and orderly return of the water services works and any other assets, rights and obligations held by the water services provider under the contract, to the water services authority upon the termination of the contract. It shall also provide for the settlement of all outstanding debts between the parties upon the termination of the contract;
 - (e) for the effect on the contractual rights and obligations of the parties in the event of force majeure;
 - (f) that should clearly prescribed circumstances have changed materially, then an amendment of tariffs or remuneration or modification of levels of service or standards of service as well as their targets, can only be effected, apart from any other legal requirements, by public disclosure of such amendments or modifications and the contract shall contain procedures whereby this is effected; and
 - (g) for any specified penalties which may be applied by either party for non-performance.

Scope

- 5. A contract shall describe the scope of the water services to be provided by the water services provider and shall -
 - (a) designate the contract area or areas in which the water ser-

vices are to be provided and set out a procedure by means of which the contract area may be changed;

- (b) in appropriate circumstances determine the conditions under which other water services providers, both within and outside the jurisdictional boundaries of the water services authority may have access to and utilise any part of the water services works;
 - (c) describe the levels of service and standards of service to be provided which, if variable, shall be defined for different geographic areas in the contract area, accompanied by specific requirements including time frames and where appropriate accompanied by a capital development plan to achieve the target levels of the service; and
 - (d) identify the water services works which shall form part of the contract and the process by which the water services provider gains access to such water services works.
6. A contract shall require, where applicable, a flood, drought, emergency or any other disaster management plan to be prepared by the water services provider.
7. A contract shall set forth -
- (a) performance targets and performance indicators, including improvements in the levels of service and standards of services to be achieved by the water services provider over fixed periods;
 - (b) periodic performance reviews; and
 - (c) a process whereby targets and indicators may be renegotiated.

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8. A contract shall provide for the furnishing of asset management plans to demonstrate that the water services works identified under sub-regulation 5(d) are being maintained in a reasonable condition in accordance therewith.

Alienation and encumbrance

9. Provisions in terms of which any immovable assets including the water services works of a water services authority are alienated to a water services provider or any other person or are encumbered in any way, are not to be included in a contract unless such alienation or encumbrance is -
- (a) contained in the water services authority's development plan; or
 - (b) in the event of a transaction that falls outside a valid development plan, approved by a resolution of the water services authority.
10. Contracts shall include a provision in terms of which the water services provider is prohibited from ceding any of its rights or assigning any of its obligations under the contract to an affiliate or any other person without the prior permission of the water services authority, which permission must not unreasonably be withheld.
11. Contracts shall include a provision in terms of which the management and disposition of moveable assets are addressed.

Financial

12. A contract shall provide for a mechanism by which the water services provider shall be paid for its performance in terms of the contract, or by which the water services provider will

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- receive revenue for such services. Such a mechanism shall-
- (a) maintain incentive for the water services provider to perform efficiently and to allow it to retain an agreed share of the benefits of efficiency;
 - (b) ensure that the benefits of this efficiency are shared between the water services authority and the water services provider; and
 - (c) where applicable, ensure a reasonable rate of return commensurate with the risks of the operation where the water services provider performs efficiently.
13. The basis for calculation of the reasonable rate of return in terms of section 19(4)(b) of the Act by the water services provider under the contract shall be established by agreement and included in the contract.
14. (a) The formula contemplated in regulation 13 shall be based on the information included in the procurement process.
- (b) Where such information refers to a price index, such price index must be specified and shall be of a kind that is readily available from a reputable source and regularly published.
- (c) Where such information is based on a cost of capital calculation, this shall be specified and based on a reputable industry norm.

Liability and indemnity

15. A contract shall provide for indemnity in terms of which either party indemnifies the other against any claim including costs, by third parties arising from an act or omission by the party, its employees or any independent contractor of the

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- party.
16. Any warranties to be furnished by the water services provider in respect of its ability to fulfil its contractual obligations, shall be set out in the contract.
 17. A contract shall set forth the nature and the level of insurance to be taken by the parties.

Disclosure and monitoring

18. A contract shall include a clause dealing with the manner in and the means by which the water services authority must monitor the performance of the water services provider in order to comply with sub-regulation 20(a) and section 27 of the Act.
19. Where appropriate a water services provider shall contractually be required to prepare and publish a consumer charter consistent with by-laws and other regulations and approved by the water services authority, which charter must include the following -
 - (a) conditions of the supply of water services;
 - (b) payment conditions;
 - (c) determination of surcharges and interest payable for non-payment;
 - (d) determination of the deposit payable and the conditions applicable thereto in respect of new connections; and
 - (e) determination of the connection and / or reconnection fee payable including the conditions applicable thereto.
20. A contract shall require the water services provider -

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- (a) to maintain an open bookkeeping system and the water services authority shall have access to all books of account, financial records and statements reasonably required for the monitoring and regulation of the contract;
 - (b) to ensure that the preparation and retention of all books of account, financial records and statements are in accordance with the Generally Accepted Accounting Practice publication adopted in the Republic of South Africa or, in the case of a sphere of government, in accordance with the relevant financial management legislation.
21. A contract shall require a water services provider to keep and retain for the duration of the contract a full and accurate record of all -
- (a) existing, past and potential consumers of water services dealt with in terms of the contract;
 - (b) working conditions and geographical locations of all water services works, extensions, improvements and any other infrastructural improvements or alterations effected by the water services provider during the term of the contract; and
 - (c) maintenance, inspections and technical auditing for an agreed period prior to termination.
22. (a) A water services provider shall be required in terms of the contract to ensure access to such information as may be reasonably called for by a consumer or a potential consumer to realise their rights.
- (b) The contract shall provide that any dispute in connection with such access may be referred by either the water services provider, the consumer or the potential consumer for arbitration.

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23. The water services provider shall in terms of the contract provide the water services authority with such information as may be reasonably required for the water services authority to comply with its obligations to monitor and report to the Minister and the Province on compliance by the water services provider with the Act and these regulations.
24. A contract shall contain a clause dealing with public disclosure which shall provide for the publication of information relating to -
- (a) consumers served;
 - (b) levels of service and standards of service achieved;
 - (c) a current situation report in respect of the capital development plan;
 - (d) the extent of compliance with the implementation of the contract for the period;
 - (e) any penalties levied by either party for non-performance by the other party in terms of the contract; and
 - (f) audited financial statements of the water services provider.

General

25. Should any of the provisions of sub-sections 19(2), 19(3) or 19(4) of the Act apply, a contract shall indicate which of these sub-sections are applicable and record that there has been due compliance.
26. A contract shall, where appropriate, set out the procedure to be followed by a consumer who seeks the approval of the

water services authority under sections 6 and 8 of the Act.

27. Contracts shall provide for the handling of complaints by the water services authority which includes directing it to the water services provider for further action which may include a report by the water services provider to the water services authority of steps taken to address the complaint.
28. A contract shall provide for the manner in which the water services provider will comply with the provisions of the employment laws.
29. A contract shall provide for a human resource development programme including training obligations to be implemented by the water services provider.
30. A contract shall provide for an arrangement in terms of which the existing employees of the water services authority involved in water services affected by the contract, are to be managed.
31. An appropriate and cost-effective mechanism for the arbitration of disputes arising from the contract is to be provided for.
32. A contract shall include a term stipulating that the contract will be governed and interpreted by the law of South Africa.
33. These Regulations are called the Water Services Provider Contract Regulations, 2000.

