

MEMORANDUM OF ADVICE

PROCUREMENT OPTIONS

Client: Department of Education
Project: Department of Education e-Education Initiative
Subject: Legal Input to Procurement Options

1. INTRODUCTION

- 1.1 This document is prepared as a supplement to the due diligence legal report and the purpose of it is to respond to the issues, which have arisen, in respect of the procurement options.
- 1.2 The following issues will be addressed, in this supplementary due diligence report –
 - 1.2.1 the determination of mandatory services of State Information Technology Agency (“SITA”) in light of the State Information Technology Agency Act, 88 of 1998 (“the SITA Act”);
 - 1.2.2 the role of SITA in the e-Education Initiative procurement/implementation structure;
 - 1.2.3 the role of public schools in the e-Education Initiative procurement/implementation structure;
 - 1.2.4 the possibility of finance lease procurement outside of Regulation 16 of the Public Finance Management Act, 1999 (Act 1 of 1999) (“the PFMA”);
 - 1.2.5 consideration of procurement options for network connectivity;

1.2.6 the scope of the Universal Service and Access Agency of South Africa (“USAASA”);

1.2.7 Consideration of the recommended ICT Infrastructure Procurement Model; and

1.2.8 Legislative Framework on Medium Term Contract.

1.3 This Memorandum of Advice is prepared on the premise that National Treasury Regulation 16, which regulates Public Private Partnership, is not applied in the procurement of ICT infrastructure in the e-Education Initiative.

2 THE DETERMINATION OF MANDATORY SERVICES OF STATE INFORMATION TECHNOLOGY AGENCY (“SITA”) IN LIGHT OF THE SITA ACT.

2.1 It is important from the onset to appreciate objects of SITA, as that will influence the role that SITA must fulfil in the e-Education Initiative. The object of SITA is to improve service delivery to the public through the provision of information technology, information systems and related services in a maintained information security environment to, *inter alia*, departments¹.

2.2 It is further the object of SITA to promote the efficiency of, *inter alia*, departments through the use of information technology.

2.3 It is our view that, among other things, the national Department of Education (“nDoE”) and the provincial Departments of Education (“pDoE”) have a constitutional duty to deliver a service to the public, and if the efficiency of such a service is to be improved through information technology, SITA has a role to enable nDoE and pDoE to achieve that objective.

2.4 The following services are mandatory services which must be rendered by SITA when requested by departments:-

2.4.1 providing or maintain a private telecommunication network or a value-added network services;

¹ Sec 6(a) of the SITA

- 2.4.2 providing or maintaining transversal information systems; and
- 2.4.3 providing data processing or associated services for transversal information systems.
- 2.5 The nDoE and pDoE must acquire the services referred to herein above, *from* SITA in accordance with business and services level agreement in terms of section 20 of the SITA Act².
- 2.6 If SITA indicates in writing that it is unable to provide the services itself, nDoE and pDoE must still procure the services through SITA³.
- 2.7 The pillar of network connectivity, which includes wide area network connectivity and “last mile” connectivity, in the e-Education Initiative in our view is likely to fall within the mandatory services as envisaged in the SITA Act. It is on this basis that the role of SITA must be acknowledged and allowed.
- 2.8 SITA must, after consulting with all relevant stakeholders, develop a strategy regarding the convergence of information systems and other systems for departments⁴.
- 2.9 SITA is further entrusted with the duty to at all times demonstrate the value added by the private telecommunication network (“PTN”) or the value-added network (“VAN”) services⁵.
- 2.10 It is apparent from the aforesaid that SITA has a greater role to play in the e-Education Initiative in ensuring that the network connectivity is in line with its strategy regarding convergence of information systems and further demonstrating the value added by PTNs and VANs.

² Sec 7(4)(a) of the SITA Act.

³ Sec 7(4)(b) of the SITA Act.

⁴ General Regulations passed in terms of section 23 of the SITA Act, more specifically Regulation 4.1.1.

⁵ Regulation 4.1.1(b) of the General Regulations.

3 THE ROLE OF SITA IN THE e-EDUCATION INITIATIVE PROCUREMENT/IMPLEMENTATION STRUCTURE.

3.1 National Treasury Regulation 16A6.3(e) passed in terms of the Public Finance Management Act, 1 of 1999 (as amended) (“the PFMA”) states that-

“The accounting officer or accounting authority must ensure that –

(e) contracts relating to information technology are prepared in accordance with State Information Technology Act, 1998 (No. 88 of 1998), and any regulations made in terms of that Act;”

3.2 General Regulations, No. R 904, passed in terms of section 23 of the SITA Act, and published by the Minister of Public Service and Administration on 23 September 2005 (“SITA Regulations”) regulates, among other things, procurement of information technology goods or services.

3.3 Part 3 of the SITA Regulations, particularly regulation 7 which deals with procurement, provides that the procurement of information technology goods and services through SITA in terms of section 7 of the SITA Act must serve specifically as *medium* for departments⁶.

3.4 The purpose of such role as stated in the SITA Regulations, are, *inter alia*, to-

3.4.1 leverage economies of scale to provide cost effective procurement;

3.4.2 to ensure that all procurements result in value-for-money;

3.4.3 ensure security and interoperability of information systems of departments; and

3.4.4 stimulate competitive bidding.

⁶ SITA Regulation 7.1

3.5 It is advisable that the role of SITA should be acknowledged and a provision be made to include SITA within the structure of procurement and implementation of the aspect of network connectivity to the extent that it falls within the mandatory services.

3.6 The manner of procurement of information technology goods and services.

3.6.1 Regulation 8 of SITA Regulations focuses on the manner of procurement of information technology goods or services. It also focuses on the preparation of bids.

3.6.2 The nDoE and pDoE must determine the need to procure information technology goods or services and compile a business case and the user requirement specification for the need⁷. This is a *first practical step* that nDoE and pDoE must take in the e-Education Initiative.

3.6.3 A *second practical step* to be taken is the establishment of a *committee* constituted of accounting authorities or authorised representatives of all relevant departments⁸. It is our view that relevant departments may include Department of Public Service and Administration (“DPSA”) and Department of Communication (“DoC”)⁹.

3.6.4 The Committee referred to herein above has the following responsibilities¹⁰:-

3.6.4.1 make proposals regarding business case and user specifications;

3.6.4.2 to approve such case and specification; and

⁷ SITA Regulation 8.1.1(a) and (b).

⁸ SITA Regulation 8.1.3.

⁹ The relevance of DPSA is that its mandate is to ensure that there are structures in place for public service delivery. The relevance of DoC is that it has a mandate to make policies and regulate the ITC industry.

¹⁰ SITA Regulation 8.1.3(a) and (b).

3.6.4.3 to authorise the accounting authority to award the bid on their behalf.

3.6.5 A *third step* appears to be the submission of the business case and the user specification to SITA for evaluation of completeness and correctness regarding procurement requirements¹¹.

3.6.6 The nDoE and pDoE must, subject to the authority of the committee referred to herein above, after consultation with GITO Council, approve the business case and the user requirement specification¹².

3.6.7 A *fourth step* appears to be the proposal by SITA of solutions based on the business case and user requirement specification. The proposed solutions must be complete and integrated, cover the complete life cycle of the solution in technical and financial terms, inclusive of all acquisition, implementation, operation and support costs¹³. The proposed solution must demonstrate that it conform to the business case and the user requirement specification.

3.7 Compilation and Advertising of Bids Documents.

3.7.1 SITA Regulation 8.1.5 states that for purposes of advertising, SITA must compile bid documentation and this Regulation prescribe what information should be procured from the bidders.

3.7.2 The designated department, being nDoE and pDoE, must approve the final bids documentation¹⁴.

3.7.3 SITA is expected to compile a value proposal on the costs for nDoE and pDoE in respect of advertising and evaluation of the bids¹⁵.

¹¹ SITA Regulation 8.1.4

¹² SITA Regulation 9.1

¹³ SITA Regulation 9.3.

¹⁴ SITA Regulation 8.1.7(a).

¹⁵ SITA Regulation 8.1.7(b).

- 3.7.4 SITA is obliged in law to compile a procurement schedule and submit same for approval to the designated official of nDoE and pDoE within ten (10) working days from the date of receipt of the business case.
- 3.7.5 SITA must comply with the approved procurement schedule and it has a responsibility to inform the designated department, being nDoE and pDoE in the e-Education Initiative that it is unable to comply with the approved procurement schedule and the reasons of the inability.¹⁶
- 3.7.6 In respect of advertisement of bids, SITA must arrange for the advertising of all invitation for bids in the Government Tender Bulletin, its website and other media considered to be appropriate¹⁷.
- 3.7.7 Upon awarding a bid for a mandatory service by the accounting authority of nDoE and pDoE, SITA must, after consultation with GITO Council, conclude necessary contract with the successful bidder or bidders¹⁸.
- 3.7.8 SITA Regulation 13 has provided a framework for representation during procurement process. Bid Evaluation Committee and Recommendation Committee are structures provided for evaluation and recommendations on the bids.
- 3.7.9 The accounting officer of the designated department ¹⁹must make a final decision on the award of the bid to one or more bidders.
- 3.7.10 It is apparent from the SITA Regulations that in an instance where regulations in respect of Public Private Partnership are not applicable, the SITA Regulations, which contain their own regime or framework for procurement, must apply.

¹⁶ SITA Regulations 8.2.2 and 8.2.3

¹⁷ SITA Regulation 8.3.1.

¹⁸ SITA Regulation 9.5.

¹⁹ See footnote 18 above

4 THE ROLE OF PUBLIC SCHOOLS IN THE e-EDUCATION INITIATIVE PROCUREMENT/ IMPLEMENTATION STRUCTURE

- 4.1 Public schools are juristic person and have legal capacity to conclude contract provided they act within the legal framework of the South African Schools Act, 84 of 1996 (“the Schools Act”), and other applicable legislation.
- 4.2 Although public schools are organs of state as envisaged in section 239 of the Constitution of the Republic of South Africa Act, 108 of 1996 (“the Constitution”), schools are neither public entities as contemplated in the PFMA nor in the SITA Act.
- 4.3 However public schools are subject to the Constitution, and more specifically to section 217 of the Constitution. Therefore when public schools contract for goods or services using public revenue, they must do so in accordance with a system that is fair, equitable, transparent, competitive and costs-effective.
- 4.4 It is important at this stage to identify services or goods that may be procured by public schools. End-user devices such as computer hardware, printers and photocopiers may be procured by public schools provided they comply with, among other things, the regulations, which prescribe minimum norms and standards in respect of school infrastructure related to the availability of laboratory for technology and electronic connectivity²⁰. The regulations prescribing minimum norms and standards also relates to the provision of learning and teaching support material in respect of electronic equipments.
- 4.5 Public schools that are allocated status of section 21 of schools are empowered by the Schools Act to purchase materials or equipments for schools²¹ and also pay for services to the schools. According to the National Norms and Standards for School Funding²² such schools receive a lump-sum of money to procure goods or services according to their budget. The school governing body deals with suppliers directly for the relevant budgeted items.

²⁰ Sec 5A(2)(vi) and (vii) of the Schools Act.

²¹ Sec 21(1) (c) and (d) of the Schools Act.

²² Issued by the nDoE in October 1998.

standard procurement procedure will have to be complied with to avoid unnecessary legal challenges.

- 4.6 Public schools which are not on the section 21 list of schools are expected to procure goods according to the departmental arrangements and must be informed of their school budget even it is a paper budget²³.
- 4.7 In instances where public schools are expected to appoint service providers from a panel of service providers procured by either nDoE or pDoE, it is our view that procurement process (competitive bidding) would have taken place at that level, not at the school level.
- 4.8 Even though the SITA Act is not applicable to public schools and FET colleges, it is our view that if nDoE or pDoE procures goods and services, and/or making payments of such goods and services falling within the mandatory services for purposes of improving service delivery to the public, the SITA Act and its regulations must be applied.
- 4.9 It is important to identify *what* specific goods or services will be procured at schools level. It is further important at this stage to identify *how* goods are to be procured, which could either by lease or sale. Lastly it must be indicated *how* the financing of the required goods or services is to be done.

5 PROCUREMENT OPTIONS IN RESPECT OF NETWORK CONNECTIVITY

- 5.1 In developing models for connectivity for schools and FET Colleges, the Option Analysis report refers to, *inter alia*, the following aspect as constituting network connectivity:-
- 5.1.1 A Local Area Network (“LAN”);
- 5.1.2 “Last mile” connectivity; and
- 5.1.3 Wide Area Network (“WAN”).

²³ See paragraph 109 to 113 of the National Norms and Standard.

5.2 Procurement of LAN

5.2.1 LAN connectivity is the technology that connects different ICT Infrastructure within a school or FET College. It is important to identify the hardware or the tangible part of LAN that must be procured. A decision will have to be made as to whether it is economically and technically viable to lease or purchase the hardware. Purchase of the hardware will lead to the acquisition of ownership of the equipments, while leasing of the equipments may result in returning of same to the lessor. The aspect of maintenance of the hardware must be considered when procurement is done.

5.2.2 Secondly it is important to identify the software aspect of LAN connectivity to the extent that it would be necessary. Software may be accessed by procuring rights to use from the software developer or owner who holds copyright. Software may further be procured by commissioning a software developer to develop same for nDoE and pDoE. Maintenance or further development of the software will have to be considered during procurement.

5.2.3 It is our view that there is no single department entrusted in law with the institutional function to deliver LAN connectivity and that is confirmed by the statements in the White Paper on e-Education where it is stated that:-

“...The Department of Education and Communication will initiate the development of a national education network in collaboration with other relevant government departments. The education network will be designed to serve the goal of universal access for every school. The education network will provide high speed access for learning, teaching and administration²⁴.”

5.2.4 As e-Education views ICT as a resource for reorganising schooling, and a tool to assist whole-school development in number of aspects²⁵,

²⁴ Page 31, at paragraph 5.43 of the White Paper on e-Education.

²⁵ Page 14, at paragraph 2.4 of the White Paper on e-Education.

there is no legal prohibition in law that prevent nDoE and pDoE to implement LAN connectivity in cooperation with relevant institutions such as SITA.

5.3 Procurement of Last Mile Backbone and WAN Connectivity

- 5.3.1 WAN Backbone is the technology that provides connectivity for example to major cities and is sometimes referred to as “the pipe”. Last Mile Connectivity is the technology that connects the schools and FET Colleges with the WAN.
- 5.3.2 When it is identified what WAN and “Last Mile” Backbone connectivity infrastructure is necessary to procure services required, nDoE and pDoE will have to purchase the services from the duly licensed service providers.
- 5.3.3 The Electronic Communications Act, 36 of 2005 (“ECA”) regulates, among other things, the provision of electronic communications network, electronic communications facilities and electronic communications services. The service providers should be procured in compliance with SITA Act and its regulations where applicable and, the procurement legal framework.
- 5.3.4 Although it is our view that nDoE and pDoE have competence in law to procure services that will ensure that network connectivity is in place, SITA must play its role to the extent that the network connectivity falls within the mandatory role of SITA²⁶. The e-Education White Paper appears to encourage cooperation between nDoE and other relevant departments. However, that does not take away the competence of nDoE and pDoE in procuring (purchasing) network connectivity services. Ownership of the WAN and “Last Mile” connectivity infrastructure will remain with the service providers as it is not the core function of nDoE and pDoE to acquire, maintain and operate network connectivity as envisaged in ECA.

²⁶ Sec 7(1)(a) of the SITA Act has listed the mandatory services.

6 FINANCE LEASE PROCUREMENT

6.1 General

6.1.1 National Treasury Regulation 13.2.4 to the PFMA provides that the accounting officer of an institution may, for the purposes of conducting the institution's business, enter into lease transactions without any limitations, provided that such transactions are limited to operating leases.

6.1.2 An operating lease is defined as a lease other than a finance lease, by Treasury Regulation 13.2.3. Treasury Regulation 13.2.2, states that a lease is classified as a finance lease, if it transfers substantially all the risks and rewards incidental to ownership of an asset and title may or may not eventually be transferred.

6.1.3 The only exceptions provided in the regulations, is Treasury Regulation 13.2.5, which states that, with the exception of agreements concluded in terms of Treasury Regulation 16, the accounting officer may not enter into finance lease transactions.

6.2 National Treasury: Office of the Accountant-General Practice: Note 5 of 2006/2007 ("the Practice Note")

6.2.1 One of the purposes of the Practice Note is to provide details of circumstances under which departments, constitutional institutions and public entities may enter into finance lease transactions, as stated by paragraph 1.1 of the Practice Note.

6.2.2 Paragraph 2.8 of the Practice Note states that, despite the provisions contained in Treasury Regulations 13 and 32, departments, constitutional institutions and public entities may in future enter into finance lease transactions without approval of the relevant treasury, provided that –

- (a) the finance lease is found to be more economical than an operating lease; **and**

- (b) the period of the finance lease does not exceed 36 months or 60 months in respect of motor vehicles; **and**
- (c) the finance lease is for the acquisition of equipment, that is required for the day-to-day operational requirements of the department, constitutional institution or public entity for which funds have been appropriated by the relevant legislature (in the case of departments and constitutional institutions) or for which a budget has been approved by the relevant executive authority (in the case of public entities). The aforementioned equipment refers to equipment such as photocopiers, PABX boards, computer hardware and motor vehicles; **or**
- (d) the finance lease is entered into in terms of a transversal contract entered into by the National Treasury on behalf of institutions to which the contract applies.

6.2.3 Paragraph 2.9 of the Practice Note states that, where the lease period mentioned in paragraph 2.8.2 (36 months or 60 months in respect of motor vehicles) exceeds the period stipulated therein, the department, constitutional institution or public entity shall obtain written approval from the relevant treasury **prior** to entering into such a lease.

6.3 It is apparent that it is possible to enter into finance leases, for procurement, other than on public private partnerships, provided that all the requirements as stated by paragraph 2.8 of the Practice Note are complied with by government institution.

6.4 Thus, the finance lease must be more economical than an operating lease, the period must not exceed 36 months, without the prior relevant treasury approval, for such longer period and the lease can be for the acquisition of equipment or the finance lease is entered into in terms of a transversal contract entered into by the National Treasury on behalf of institutions to which the contract applies.

6.5 nDoE and pDoE, in our view, would be able to enter into finance leases for the e-Education Initiative, if it can comply with the above stated requirements.

6.6 Paragraph 2.8.4 of the Practice Note states that National Treasury will enter into transversal contract on behalf of institutions to which the contract applies. This statement will lead to departments not having legal standing towards the suppliers of goods or services. The implication of the condition referred to in paragraph 2.8.4 therein is that National Treasury will be paying the service provider. We are not certain if this was intended by the Practice Note.

7 THE SCOPE AND RELEVENCE OF UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA.

7.1 USAASA is regulated by the ECA. It is established to promote the goals of universal access and universal service in the under serviced areas of South Africa.

7.2 Section 82(1) states the functions of USAASA, which are to strive to promote the goal of universal access and universal service, to encourage, facilitate and offer guidance in respect of any scheme to provide –

7.2.1 universal access or universal service; or

7.2.2 telecommunication services as part of reconstruction and development projects and programmes, where such provision will contribute to the attainment of the object of the e-Education Initiative which states that DoE wants to make sure that schools and FET Colleges are connected to a network, have access to the internet and can communicate electronically; and

7.2.3 to foster the adoption and use of new methods of attaining universal access and universal service.

7.3 Under the ECA, the USAASA is mandated to –

7.3.1 make recommendations to the Minister of Communications to determine what constitutes universal access by all areas and communities in South Africa;

- 7.3.2 foster adoption and the use of new methods of attaining universal access and service;
 - 7.3.3 encourage, facilitate and offer guidance in respect of any scheme to provide universal access and service;
 - 7.3.4 encourage any scheme to provide telecommunications services as part of reconstruction and development projects as contemplated in Section 3(a) of the Reconstruction and Development Programme Fund Act, 1994 (Act No. 7 of 1994); and
 - 7.3.5 stimulate public awareness of the benefits of telecommunications services.
- 7.4 The mission of the USAASA is –
- 7.4.1 to facilitate the provision of ICT services to all South Africans in partnership with their stakeholders;
 - 7.4.2 to advise on the definition, standards and best practices of universal service and access; and
 - 7.4.3 to harness the talent and capability of all its employees in pursuit of delivering universal service and access in ICTs.
- 7.5 USAASA is therefore, a state entity, which is to facilitate the provision of ICT services to all South Africans.
- 7.6 Section 87 of the ECA provides for the continued existence of the Universal Service Fund which is administered by USAASA²⁷. USAASA receives funding from Parliament.
- 7.7 The money in the Universal Service and Access Fund must be utilised exclusively for the payment of subsidies related to, *inter alia*, schools and FET

²⁷ Sec 87(4) of ECA.

Colleges for procurement of broadcasting and electronic communications services and access to electronic communications network²⁸.

7.8 In our view, USAASA may be approached, where necessary, for purposes of accessing subsidies as contemplated by ECA.

8 CONSIDERATION OF THE RECOMMENDED ICT INFRASTRUCTURE PROCUREMENT MODEL.

8.1 The recommended ICT Infrastructure Procurement Model states that schools/FET Colleges will select the appropriate technology to meet its needs related to Education Technology Plan from a catalogue that contains suitable options approved by the Institutions.

8.2 There is sufficient legislative framework²⁹ which enables pDoE to provide for education and in doing so, a catalogue may be compiled in implementing the recommended model.

8.3 Section 21 schools are further enabled to purchase education materials and pay for services³⁰. The National Norms and Standards for School Funding enable public schools listed under section 21 to deal directly with service providers³¹. We advise that procurement documentation (supply chain management policies and standard contracts) should be put in place to enable compliance with the provisions of section 217 of the Constitution and other applicable legislation.

8.4 If public schools and FET Colleges are expected to select ICT Infrastructure from a catalogue and approach service providers to purchase same, procurement documentation must be issued by each school and FET College. We further advise that in respect of public schools not appearing on section 21 list, pDoE may issue procurement documentation.

²⁸ Sec 88(1)(c) and (d) of ECA.

²⁹ Sec 12(1) and sec 34(1) and (2) of the Schools Act.

³⁰ Sec 21(1)(c) and (d) of the Schools Act.

³¹ Paragraph 109 and 110 of the National Norms and Standards for School Funding.

- 8.5 The recommended ICT Infrastructure Procurement model proposed may be implemented by pDoE and nDoE where a competitive bidding process is initiated by the Institutions for purposes of compiling a catalogue or a panel of services providers, the ICT infrastructure they provide and costs of the ICT Infrastructure. In this instance Institutions may issue procurement documentation for that purpose. As and when public schools and FET Colleges require ICT Infrastructure, they may request offers from the panel and the preferred offer may be accepted by the public school or FET College. It is our view that there is sufficient legislative framework to enable the aforesaid implementation, provided procurement documentation (procurement policies and standard contracts) for schools and FET Colleges are put in place.
- 8.6 School governing bodies (“SGBs”) are task with the duty to promote the best interest of the school and strive to ensure its development through the provision of quality education for all learners at the school³². It is on this basis that SGBs are responsible for the appointment of service providers on behalf of public schools. In respect of FET Colleges, its council is responsible in law for the final decision in the appointment of service providers. This applies where the procurement of services providers is done at school or FET level.
- 8.7 Where the approach is that pDoE is procuring ICT Infrastructure and establish a catalogue for schools and FET Colleges, there is nothing in law that prohibit Head of Department of pDoE from issuing of procurement documents and decides on the appointment of services providers.

9 LEGISLATIVE FRAMEWORK ON MEDIUM TERM CONTRACT (BEYOND 3 YEARS)

- 9.1 Section 66 of the PFMA provides provisions for restriction on borrowing guarantees and other commitments. A government may only through the following persons³³, among other things, enter into any other transaction that binds or may bind a Revenue Fund to any future financial commitment:-

³² Sec 20(1)(a) of the School Act

³³ Sec 66(2)(a) and (b) of the PFMA.

- 9.1.1 the Minister of Finance, where it relates to National Revenue Fund;
and
- 9.1.2 the MEC for Finance, where it relates to Provincial Revenue Fund.
The MEC must act in accordance with the Borrowing Powers of
Provincial Government Act, 48 of 1996.
- 9.2 Regulation 13.2.4 of the National Treasury Regulations enables accounting
officers of institutions to enter into operating lease transaction without any
limitation for purposes of institution's business.
- 9.3 Accounting officer of an institution may not enter into finance lease
transaction³⁴. An exception to this rule is when an agreement is concluded in
terms of National Treasury Regulation 16. The provisions of the Practice Note
referred to herein above will have to be observed.
- 9.4 In view of the above, we advise that medium contracts (more than a 3 year
duration) which could be interpreted as future financial commitment, may be
concluded with the consent of either the Minister of Finance or MEC for
Finance, depending on which Revenue Fund will be bound.
- 9.5 We further advise that an operating lease, where applicable in the e-
Education Initiative, may be implemented and the duration of the contract may
exceed three years provided money has been appropriated³⁵.
- 9.6 The legislative framework considered herein above applies where the
contracting party is pDoE and/or nDoE.
- 9.7 In instances where public schools procure directly from the service providers,
section 38(1) states that SGBs must prepare a budget each year, according to
the prescriptions determine by the MEC in a *Provincial Gazette* which shows
the estimated income and expenditure for the following financial year. The

³⁴ Regulation 13.2.5 of the National Treasury Regulation.

³⁵ Sec 38(2) of the PFMA.

National Norms and Standards for funding states that from the 1998/99 financial year, the nDoE and pDoE budget have been prepared within the Medium Term Expenditure Framework (MTEF) which enable government outlays to be planned on a three year rolling basis³⁶.

- 9.8 There is no legislative framework which expressly enables public schools that depend on public revenue fund to conclude a contract that has duration of more than three years. The legislation in place appears to enable schools to prepare their budget for the next financial year³⁷. It is our view that there is nothing in law that prohibit public schools from concluding medium term contract provided there is a budget approved by pDoE.
- 9.9 The Further Education and Training Colleges Act, 16 of 2006 (as amended) ("the FET Act") provides in section 3(2) that FET College is a juristic person and therefore it has the necessary competence in law to enter into a contract. Although there is no legislation that expressly state that FET College may conclude a medium term contract, there is nothing in law that prohibit FET College from concluding same provided there is budget allocated in terms of the FET Act and applicable legislation³⁸.

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³⁶ Paragraph 43 on the National Norms and Standards for School Funding.

³⁷ Sec 34(2) of the Schools Act.

³⁸ Sec 22(1) and (4) of the FET Act.