



**DEPARTMENT OF ENVIRONMENTAL
AFFAIRS AND TOURISM**

**GUIDELINE FOR THE
DRAFTING AND MANAGEMENT OF
CONTRACTS**

TABLE OF CONTENTS

1	GLOSSARY OF TERMS	Page 3
2	THE PURPOSE OF THIS GUIDELINE	Page 4
3	WHAT IS A CONTRACT?	Page 5
4	REQUIREMENTS FOR A VALID CONTRACT	Page 5
5	CLAUSES TO INCLUDE IN A CONTACT	Page 6
6	THE AUTHORITY OF PARTIES TO ENTER INTO CONTRACTS & THE SIGNING OF CONTRACTS	Page 11
7	INTERACTION BETWEEN LEGAL SERVICES & LINE FUNCTION	Page 12
8	MANAGEMENT OF CONTRACTS	Page 13
9	TERMS OF REFERENCE	Page 15
10	COMMENTARY ON MEMORANDUM OF AGREEMENT-TEMPLATE A1 & A2	Page 18
11	TEMPLATE “B” Implementation Protocol (IP)	Page 27
12	TEMPLATE ‘C’ Umbrella Implementation Protocol	Page 33
13	TEMPLATE ‘1’ Resolution of a Board	Page 35

GLOSSARY OF TERMS

“BEE”	means Black Economic Empowerment
“DEAT”	means the Department of Environmental Affairs and Tourism
“DG”	means Director-General of the Department
“DDG”	means Deputy Director-General of a particular branch of the Department
“The Fund”	means the Marine Living Resources Fund incorporated in terms of section 10 of Marine Living Resource Act, 1998 (Act 18 of 1998)
“IGRF Act”	means the Intergovernmental Relations Framework Act, 2005 (Act 15 of 2005)
“MOA”	means Memorandum of Agreement which is a specific type of contract and is often referred to as a service level agreement.
“PFMA”	means the Public Finance Management Act, 1999 (Act 1 of 1999)
“TOR”	means Terms of Reference

1. THE PURPOSE OF THIS GUIDELINE

- ❖ The purpose of this document is to provide the Department with an introduction to contracts with specific focus on how to draft and manage them as well as establish a protocol for interactions between the line functions and Legal Services.
- ❖ Further, this document aims to streamline the contract drafting and management process and at the same time educate and provide Line Functions with a working document including contract templates.
- ❖ The need for Guidelines and templates has been identified as a result of the Department concluding contracts with third parties, for example, lease agreements, goods and services as well as consultancy agreements.
- ❖ Templates of a MOA, Implementation Protocol and Umbrella Implementation Protocol are attached hereto marked Annexure 'A1', 'A2, 'B' and 'C', respectively, which contain suggested wording and compulsory clauses which can be used as a precedent (example) / sample contract when drafting new contracts for the Department.
- ❖ Please note that the Annexures are by no means exhaustive and will inevitably not cover every eventuality. The templates attempt to reflect as many of the most common clauses found in contracts and to provide the Department with a "reference" document when drafting a particular type of contract. There are however contracts that may require very specific clauses which have not been included in the templates in which case it is suggested that such specific contracts are dealt with on an *ad hoc* basis with the relevant Line Function and Legal Services.
- ❖ This Guideline will also be of assistance when the Department drafts Terms of Reference (TOR's) for Tender purposes as the TOR's should inform the content of a contract once a bid has been awarded to a specific party.

- ❖ The annexed templates represent the most common forms of contract which the Department will need to conclude. The term 'contract' in this manual, is used in a broad sense to include memorandums of agreement and memorandums of understanding/Implementation protocols (which are not as formal as a memorandum of agreement.)
- ❖ The general principles of contract outlined below apply to all contracts. However, where necessary, distinctions will be made between the different types of contracts. When specific clauses of a contract are dealt with, each template will be explained separately.

2. WHAT IS A CONTRACT?

A contract is an **agreement**, whether written or verbal, that is entered into by **two or more parties** with the **intention of creating obligations**.

This guideline will concentrate only on written contracts. Verbal contracts are not recommended as they are more difficult to manage, often resulting in uncertainty with regard to the actual terms of the agreement between the parties and therefore creating difficulties with enforcement and proof of the actual terms when one party has breached a term of the agreement.

3. REQUIREMENTS FOR A VALID CONTRACT

When entering into a contract it is imperative to ensure that the contract is valid. In order for a contract to be valid, certain requirements need to be fulfilled. The following are the requirements for a valid contract:

- ❖ There must be **consensus or agreement** between the parties with regard to:
 - who the parties to the contract will be;
 - the subject matter of the contract; and
 - what obligations will be created.

- ❖ The parties must have the **capacity to act, which is** the capacity to participate in a legal transaction. Generally, people must be of sound mind and must have attained the age of majority, that is 21 years of age. In a Government context, and more specifically, a Departmental context, only certain people have the capacity to bind Government. In the Department, it is the Accounting Officer in terms of the Public Finance Management Act, 1999 (Act 1 of 1999) and, if the Accounting Officer delegates this function, usually the DDG of each branch or another properly delegated official.
- ❖ The **performance of the obligations must be possible** at the time the contract is entered into, for example, X cannot sell Y an object which does not exist.
- ❖ The conclusion of the contract, the performance and the object of the contracting parties **must be lawful**. Parties cannot enter into a contract in respect of something that is unlawful.
- ❖ **Formalities**, if required by law, **must be complied with**. For example, a contract of sale of land, donations, suretyship and certain credit agreements must be in writing and signed by the parties.

Once a contract has met all the above requirements and has been signed by the parties thereto, the contract is valid and becomes binding on the parties, that is, they are now compelled/obliged to perform in terms of the contract.

4. CLAUSES TO INCLUDE IN A CONTRACT

Before discussing the particular clauses of contracts, it may be useful before drafting a contract to consider the following questions:

4.1 Who are the parties to the contract?

- 4.1.1 In respect of natural persons, that is, private individuals, they are to be cited on the front page of the contract as follows:

*James Brown (full names)
(Identity Number: 700516 5123 00 0)*

- 4.1.2 In respect of a juristic person, that is, companies, close corporations, consortium, government departments, etc, they must be cited as follows on the front page of the contract:

*Flowers (Pty) Limited or Flowers Ltd or Flowers CC or Flowers Inc
Registration Number: 1998/002567/07*

Herein represented by (insert name) in his/ her capacity as a Director of Flowers (Pty) Limited and authorized by virtue of a resolution of the Directors dated 21 October 2004 and attached hereto as annexure...

OR

*The Consortium
Flowers (Pty) Limited Registration Number: 1998/002567/07 and Petal CC Registration Number: 1998/002567/07*

Herein represented by------(insert name) in his/her capacity as a Director of Flowers (pty) Limited and authorized by virtue of a resolution of the consortium dated 21 October 2004 and attached hereto as Annexure...

In the case of the Department, the citation should be as follows:

*Department of Environmental Affairs and Tourism
Branch:*

Herein represented by (DDG's name) in his/her capacity as Deputy Director-General and duly authorized hereto by virtue of a delegation issued in terms of the Public Finance Management Act, 1999 (Act 1 of 1999) dated....

OR

Marine Living Resources Fund

Herein represented by Pamela Bulelwa Yako in her capacity as accounting officer and duly authorized hereto by virtue of the Public Finance Management Act, 1999 (Act 1 of 1999)

4.2 **Why is citation important?**

The citation of parties is important, particularly if a breach of contract occurs. This is because the parties cited are invariably the representatives of the juristic person(s) who would be sued or who can sue (whether in their personal or official capacity) in the event of a breach of contract.

Incorrect citation of a party could give rise to various defences that may be used to challenge the legal process, for example, a party that is being sued may deny that the person signing on its behalf was authorized to do so.

4.3 **What is the purpose of the contract?**

The purpose of a contract is to put into writing an agreement between two contracting parties to ensure, *inter alia*, that parties are aware of their rights and responsibilities in respect of, for example, a lease agreement, the acquisition of goods or the provision of services. The object of a contract must furthermore be clear to anyone reading the contract.

The contract defines and limits rights and responsibilities to ensure that no commitments or obligations can be agreed to or imposed outside of the terms of the contract.

4.4 **What will the period of the contract be?**

How long will a contract remain in force for? This is usually the period between the commencement and termination dates of the contract. The actual commencement and termination dates may be stated in the contract or the time period of the contract for example, two *years* may be stated, which will commence from the date of signature of the contract.

It is preferable to sign a contract before the service is rendered. However, it is possible to sign a contract after the service has commenced. This will however be subject to a clause in the contract clearly stating this (See clause 3 of Template “A”).

When calculating the period of the contract it is important to ensure that it allows for all reporting and any other matters to be completed.

4.5 **What remuneration will be paid to the party rendering the service?**

Included here should be the amount of remuneration to be paid as well as when and how it will be paid. It must also be clearly indicated in the contract whether we are dealing with a fixed fee contract or a deliverables-based fee.

Where the contract is project based, payments should be made after the completion of specific phases of the project and it is always advisable to link these deliverables to timeframes for delivery.

It is preferable that payment follows delivery. Details relating to the currency, VAT and disbursements must be indicated.

4.6 What are the duties of the parties to the contract?

In this regard there is usually a party that is rendering a service and the party that is paying for the service. Each of their respective duties should be set out clearly and concisely in the contract. It is vitally important to know the rights and obligations of the parties as this would be the basis of any legal action in the event of a breach of the contract. MOA's concluded as a result of a bid process will often use the terms of reference (TOR's) of the bid, appropriately amended, as the obligations of the service provider. This should be attached as an annexure to the agreement (See template 'A' clause 4). It is therefore important to structure the TOR correctly when the bid is advertised to ensure that all the elements which will be included in the MOA once the bid is awarded, are covered in the TOR.

4.7 Is there a need for any specific clauses in the contract?

The nature of the contract should be considered to determine the need for specific clauses. If, for example, the Department is contracting with someone to design a system or undertaking research for, or providing consulting services to the Department then the ownership of the system or any research data, documents and so forth, should vest in the Department. In this instance an "Intellectual Property" clause must be included in the contract.

Once the above questions have been answered, it will be much easier to decide which clauses should be included in the contract.

When drafting contracts, there are certain clauses that must always be included.

Each template will be dealt with separately below and it is recommended that this manual be read together with the templates when drafting a contract:

5. THE AUTHORITY OF PARTIES TO ENTER INTO CONTRACTS & THE SIGNING OF CONTRACTS

When signing a contract, the Department should insist on the following documents in respect of the other party:

- ❖ A copy of the person's identity document in respect of private individuals and registration documents in respect of juristic persons.
- ❖ A resolution of the board of a juristic person when contracting with a juristic person.

These documents will ensure that the Department:

- is certain of the identity of the party they are contracting with; and
- in the case of a juristic person, that the individual representing the juristic person actually has the authority to enter into the contract on behalf of the juristic person. In this instance the Department should insist on a Resolution that has been signed by, for example, the directors or members of the company or close corporation. An example of a resolution is attached hereto marked Annexure "1"
- ❖ Two original contracts of a contract should be signed by both parties one for each party. If any handwritten amendments are made they should be initialed by both parties and the witnesses. Each page of the agreement and all the annexures need to be initialed by both parties and the witnesses.

6. INTERACTION BETWEEN LEGAL SERVICES & LINE FUNCTION

Legal Services should be involved with the Department's Line Functions in the following manner with regard to contracts:

- ❖ Consult with Legal Services prior to and preferably during negotiations with third parties to ensure that the particular contract that is being negotiated is accurately captured by the Legal Services component and that they are aware of any agreements between the service provider and the Department.

- ❖ Once negotiations have taken place between the Line Function and the third party:
 - Line Function should draft a contract in accordance with the annexed templates which is to be forwarded to Legal Services for perusal and comment/amendment; or

 - the third party will provide the Line Function with a contract which is to be perused and commented on/amended by Legal Services once it has been considered by Line Function and found to be in line with what was negotiated with the third party. (this is not a preferred option and where possible line functions should draft the agreement in accordance with the templates)

- ❖ Legal services should immediately be consulted when:
 - a breach of contract has occurred; or
 - in the event of the interpretation of a term or condition of a contract not being fully understood; or
 - an amendment needs to be made to the terms of the contract
 - for general advice regarding contracts.

- ❖ The Legal Services protocols should be followed by the line functions which may include the submission of a route form to Legal Services and the completion of a Legal Certificate by Legal Services to certify that the agreement is ready for signature.

7. MANAGEMENT OF CONTRACTS

Once a contract has been signed by the Department and the third party the contract should be managed as follows:

- ❖ If the original is not lodged with the line function, a copy of the signed contract should be retained by the Line Function concerned in a safe, but accessible, place. Each Line Function should nominate a person within their component to manage their contracts.
- ❖ As 2 original contracts should always be signed one original should be forwarded to the service provider and the other retained by the line function and lodged within the line function or a registry should be created for all contracts within each branch, preferably in the Access to Information Centre which would assist with any requests for information relating to government contracts.
- ❖ A copy of the contract should be provided to the nominated project manager and the steering committee if one is appointed.
- ❖ A copy of the signed contract should be forwarded to Legal Services.
- ❖ All dates (for example, deadlines and termination date) in the contract should be diarised by Line Function and acted upon accordingly.

- ❖ In the event of:
 - Line Function being unsure of the interpretation of a term or condition of the contract; or
 - a term or condition of a contract being/suspected of being breached by the third party; or
 - the third party has caused the Department to suffer loss or damage; or
 - the Department is accused by the third party of being in breach of a term or condition of the contract; or
 - the Department is accused by the third party of causing the third party to have suffered loss or damage at the hand of the Department;

The Line Function should immediately contact legal services for advice and assistance.

- ❖ In the event of the above mentioned breach, loss or damage not being settled between the Department and the third party in accordance with the “Dispute Resolution” clause, Legal Services should be contacted to take over the management of the matter and proceed with the necessary legal action (line functions would however still be required to make extensive input into this process).
- ❖ During the management of the contract, copies of any correspondence, e-mails, invoices, payment schedules/certificates, bank statements, photographs, reports, meeting minutes, work plans, budgets, bid documents

and any other relevant documentation must be kept by the line function in a collated organized manner which is easily accessible when requested by Legal Services or any other person. When any such documentation is requested by other parties including Legal Services, copies should be made for them. When the matter is referred to Legal Services for advice or to proceed with litigation, all documents supplied to Legal Services must be copies and not original documentation. Copies of all documents must always be kept by the line function for reference purposes and for presentation in court, during the litigation process which often takes a number of years.

8. TERMS OF REFERENCE FOR TENDERS

While each tender will have its own terms of reference based on the specific requirements, there are some terms which should be included in every tender as they will relate to generic terms which will occur in the agreement which is subsequently signed. MOA's which are concluded as a result of a tender process will make use of the TOR's as a comprehensive list of the services and responsibilities of the service provider. They should therefore be as extensive and detailed as possible. Line functions are encouraged to familiarize themselves with Department's Supply Chain Management Policy and the Treasury Regulations to assist with this process.

The following is a list of terms which should be included in all tender TOR's:

- * The successful bidder will be required to sign an appropriate service level agreement with the Department. A template of a standard service level agreement is attached and the Department reserves the right to amend and supplement the agreement to the extent it may be relevant to this particular bid.

- * All intellectual property developed by the service provider as a result of the bid will be owned by the Department. (Could also be jointly owned depending on the tender).
- * The successful bidder will be expected to comply with the relevant provisions of the PFMA - details of which will be contained in the MOA and other financial reporting which the Department may require.
- * The successful bidder will be required to compile a project/work plan which contains timeframes for delivery of the various services and which will be incorporated into the MOA. A draft template of such a plan appropriate to each tender should be included in the documents.
- * While the tender is awarded for a stipulated period of time, the Department reserves the right to cancel the MOA due to unavailability of funds, in addition to any other remedies which the Department would ordinarily have.
- * The Department will implement a penalty system for failure to deliver an item/phase within the stipulated timeframes.
- * Once the bidder has forwarded a proposal, any change in the HDI status or ownership of the bidder during the tender process, prior to the award of the tender and at any time after the award of the bid, must be submitted in writing to the Department who reserves the right to exclude the bidder from the process or award the bid to another company. It should similarly be indicated in the TOR's that this term will be included in the MOA in the event that the bidder is successful which will allow the Department to cancel the agreement if such status has changed.

- * If the service provider and the Department are not able to reach agreement on the terms of the contract the Department can withdraw the award of the bid and/or appoint another service provider.
- * A rough indication of the payment structure should be indicated i.e. a percentage on signature of the agreement and stipulated percentages thereafter linked to particular deliverables. It should be made clear that payment will generally only be made in arrears and once the Department has approved the invoice provided by the service provider. Where appropriate, a pricing schedule should be included in the bid documents which should list all the items for which the service provider should provide a quotation.
- * If an immovable or movable asset is being built or assets of the Department or bidder are to be utilised, the ownership of that asset should be clearly indicated in the TOR's together with the service provider's responsibility to insure the item. If the service provider will be utilizing any of the Department's property during the contract period, insurance will similarly be a requirement.
- * If specific services will be conducted which will require the Department to inspect the service provider's premises either prior to the award of the bid and/or during the period of the agreement this must be specified, together with the requirements of such an inspection.
- * Where consultancy services are procured and in relation to certain research projects, there should be a requirement for skills and knowledge transfer. A skills transfer programme should where appropriate be included in the bidder's proposals.
- * It should be clear whether one or more service providers will be awarded the particular bid.

(Template 'A1 and A2')

MEMORANDUM OF AGREEMENT(MOA)

These templates should be used for:

- The provision of **professional services** by consultants/service providers and all agreements which are concluded as a result of a procurement process (A1)and;
- for the **provision of goods and services (A2)**.

❖ **DEFINITIONS AND INTERPRETATION (see Clause 1)**

This section contains some standard definitions that will always appear in an MOA. There will always however be additional definitions and acronyms that need to be included that are specific to the particular agreement. This is a useful clause to have in most MOA's where a variety of terms and/or names will be repeated throughout the contract and it is necessary to clarify what is meant by such terms and/or names. In a simple MOA where few terms and/or names will be repeated throughout the contract, the following can be done the first time the particular term and/or name appears in the MOA:

"... the Department of Environmental Affairs and Tourism (hereinafter referred to as "DEAT")..."

Clause 1.5 - The bid document should only be included if the MOA is the result of a tender process.

❖ **PAYMENT (see Clause 2)**

Always check that VAT and disbursements are included in the stipulated amount as there may be separate conditions for disbursements, which should then be clearly indicated in the cost structure. If the amount

payable is in a currency other than in South African Rand, details relating to foreign exchange should be included in this section. In instances where the MOA is concerned with project deliverables, payment will be linked to specific milestones and dates eg. the delivery of a progress report or the finalisation of a particular module of work that is satisfactorily delivered. If the Department is funding a research project, a portion of the payment may be paid up front for example on the date of signature of the agreement. However this practice is generally discouraged and should only be permitted in exceptional circumstances, for example BEE service providers and measures should be put in place to ensure that the initial payment is utilised for the contract.

If the MOA is for a fixed amount that will be paid in installments upon the completion of certain phases or items, then a cost structure or pricing schedule should be compiled and attached as an annexure to the agreement.

It is recommended that this section contain a reference to penalties in the event that the service provider fails to deliver the service on time or that the work completed within the time is not in accordance with the obligations of the service provider. **Clause 2.3** is an example of such a **penalty clause** and should be amended according to the specific needs of the MOA. If a penalty clause is to be included in an MOA, this should be included in the TOR when a tender is advertised.

❖ **COMMENCEMENT AND DURATION (see Clause 3)**

As an alternative to clause 3.1 there may be a stipulated date which may have passed, in which case the date is stipulated and the words 'notwithstanding date of signature' are inserted.

❖ **OBLIGATIONS OF THE SERVICE PROVIDER (see Clause 4)**

If the MOA is being compiled as a result of a bid process, it is usually advisable to use the Terms of Reference as an annexure to the agreement, listing the obligations and responsibilities of the service provider.

If there are no TOR, each MOA will have its own unique list of obligations and services, which must be incorporated by the project/programme manager into the body of the agreement or in an annexure to the agreement. In most instances these obligations should include progress and/or financial reporting requirements whether on a monthly or quarterly basis. Examples of useful financial and reporting requirements have been included in this section. Clause 4.10 is only applicable where a transfer payment is being made.

Clauses 4.7 to 4.11 should not be included for contracts with consultants.

Clause 4.14 should only be included if the service provider in addition to other services it may provide is collecting fees/fines which are ordinarily due to the Department. This clause would not be included in a consultant's contract.

❖ **OBLIGATIONS OF THE DEPARTMENT (See clause 5)**

These obligations will also vary according to the type of MOA. The project/programme manager should include this detail. These will often include access to our premises, certain documents and making staff available to the service provider. It should be noted however that this clause

may not always be required if the only obligation of the Department is to make payment to the service provider.

❖ **CANCELLATION AND BREACH (see Clause 7)**

It is imperative to include a “Breach” clause in all MOA’s. This clause will provide clarity regarding what route to follow if a party is in breach of a term or condition of the MOA and what time period must be given to remedy the breach.

As the Fund generates its own revenue, it is important to include the option to cancel the agreement in the event that **funds for the project or service become unavailable (clause 7.3)**. This may not always be acceptable to service providers, due to the fact that when a bid is awarded this is usually for a fixed period. Service providers may then not agree to a clause which allows the Department to cancel the agreement if funding becomes unavailable. This provision is usually more acceptable to institutions who will be conducting research for the Department.

Clause 7.6 - The clause is only necessary where the service provider is a successful bidder after a tender process as they will have been awarded points for their HDI status.

❖ **GOVERNING LAW AND ARBITRATION (See clause 8)**

It is important that any alternative dispute resolution (i.e. arbitration or mediation) process is only optional as in this case, and is not a mandatory term in the MOA as the Department should always have the option of instituting proceedings in court should they wish to do so.

❖ **GENERAL (see Clause 9)**

This clause, although called “General”, contains important terms of the MOA. For example, that all amendments to the contract must be in writing and signed by the parties, failing which such amendments will not be valid.

Clause 9.3 - A clause such as this should be included in the event of the Department contracting with a service provider who is perhaps renowned for **utilizing sub-contractors** to assist in its business. The Department wants to be in a position to elect not to allow the service provider to cede or subcontract their rights and obligations in terms of the contract in order to reduce risks associated therewith and to maintain control. This clause may also be used when the Department wants the services of a particular service provider only and does not want to permit the service provider to cede their rights and obligations to any other third party. This clause is optional and should be excluded in instances where subcontracting is required for the service provider to effectively perform the service.

Clause 9.6 - It is vital that a *domicilium citandi et executandi* is included in every contract. This is the address that will be utilized to give notice or serve summons, for example, if there is a breach of the contract. It is important to remember that a *domicilium* must always be a physical address and not a postal address/post box. When legal pleadings are served on a party they must be served at a physical address in order for it to constitute effective service in terms of the Rules of Court.

❖ **CONFIDENTIALITY (see clause 10)**

This clause is always advisable to ensure that sensitive information which may be disclosed to another party remains confidential and is not for public consumption. **This clause will not be required in a goods and services agreement.**

❖ **INDEMNITY (see Clause 13)**

This clause will ensure that the service provider will be liable, and the Department indemnified, for any damage caused by the service provider to the Department or any other party that the service provider may interact with for the purposes of carrying out their obligations in terms of the MOA.

Clause 13.2 - It is important to have such a clause in a contract where the service provider you contract with will be interacting with third parties in order to carry out its obligations in terms of the contract. The Department does not want the service provider to be a representative of the Department, but rather an independent party rendering the Department a service in accordance with a contract.

Clause 13.4 is only necessary where a service provider will be compiling reports or undertaking research in instances where they will be using the ideas or research material belonging to other individuals or organizations.

Clause 13.5 is required where the service provider, any of their representatives or employees, will be performing some or all of the services on the Department's property.

The remaining clauses of Template "A" are more specific to particular MOA's or are optional and at the discretion of the parties. The functions of the remaining clauses are as follows:

❖ **MANAGEMENT OF THE AGREEMENT (see Clause 6 of Template A)**

The inclusion of such a clause in a contract is beneficial in that it will assist the parties with regard to whom they need to liaise in order to achieve the objectives outlined in the contract. This clause also facilitates communication and implementation of the contract.

Where the contract is quite complex and will involve a number of important decisions to be made during the period of the agreement, it is advisable to elect a steering committee consisting of representatives from both parties. The number of individuals from each party and the responsibilities of the committee should be included and clearly set out in the MOA. Such responsibilities should include the taking of minutes by both parties as a reflection of the accuracy of the contents of the particular meeting.

When nominating individuals as contact persons it is always advisable to nominate a particular post as opposed to an individual's name within the Department and the service provider. This will ensure continuity if the particular individual who occupies the position leaves.

❖ **INTELLECTUAL PROPERTY (see Clause 11 of Template “A”)**

A clause such as this is necessary if the Department is entering into a contract with a party that will be producing certain intellectual property material and the Department will require that the material belongs to the Department and not to the service provider.

This clause is only necessary in instances where the service provider is conducting research, compiling a report, developing new IT systems or compiling a legal opinion on behalf of the Department. The ownership of the intellectual property should be determined by the project/programme

manager as there may be some instances where the parties jointly own the intellectual property.

❖ **CONTRIBUTING RESOURCES (See clause 12)**

If the agreement results in the purchase or construction of assets, ownership and insurance of these assets needs to be dealt with in the agreement. Organs of state do not insure their assets unless with the permission of National Treasury (except for motor vehicle with premiums below R250 000.00. As such, during the course of the agreement while the service provider is in possession of, is utilizing or is constructing assets which are or will become the property of the Department, the **service provider must be required to insure such property.**

TEMPLATE A2

Below is a commentary on those clauses which do not appear in the MOA template A1. Where the agreement contains the same clauses as the above template, regard should be had to the comments above.

PAYMENT

Clause 2.1 - Where the MOA is concerned with the **delivery of goods and services**, payment may be made on delivery of the particular item or service or within 30 calendar days after the service provider presents an invoice for the service or the item. In these circumstances a pricing schedule is not required as the full amount for the service or item is paid. This clause and may be combined with **clause 2.2** in the event that payment is only to be made once an invoice has been presented by the service provider and verified by the Department.

If the MOA is for the **purchase of an asset** which is to be maintained over a period of time by the service provider then, in addition to the payment of the fixed amount, provision needs to be made in this section for **the annual or monthly maintenance fees** that will be payable by the Department. The Department must ensure that the amount specified for goods and services should clearly indicate all costs relating to delivery, installation, labour, consumables and any other ancillary costs.

OBLIGATIONS OF THE SERVICE PROVIDER

Agreements for **goods and services** should include responsibilities relating to delivery of an item or services by a particular date, modes of transport, documents to be delivered with the item or services and whether any spare parts

are to be delivered with the goods. In addition, where items have been constructed or services performed, a clause **guaranteeing the product and the workmanship** should be included (an example of such a clause is indicated in clause 4.16).

IMPLEMENTATION PROTOCOL (Template 'B')

An implementation protocol is a memorandum of understanding between two organs of state which includes different spheres of government or between a government department and a statutory body which is administered by another government department.

In terms of **section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005)**, the above bodies should enter into an implementation protocol to regulate their relationship. Section 35 provides a list of the circumstances in which an implementation protocol is preferred. As government departments or institutions should preferably not sue each other in court, the stricter format of an MOA cannot be utilised in this context. The dispute resolution clause is the most distinctive feature of the agreement as it does not allow for a normal breach and cancellation clause and prefers cooperation, mediation and finally the procedures in terms of the IGRF Act. It should be noted that the IGRF Act only applies to agreements between different spheres of government but the format is equally useful for government departments within the same sphere, although slightly amended so as not to refer to the IGFR Act.

DEFINITIONS (See clause 1)

This section contains some standard definitions that will always appear in an agreement. However There will always be additional definitions and acronyms which need to be included, which are specific to the particular

agreement. Definitions of a project officer and project leader have been included as the appointment of such individuals is always useful for the effective management of the agreement.

BACKGROUND (See clause 2)

This section, an example of which is detailed in clauses 2.1 and 2.2, will often contain general statements of intent and provide the context for the agreement, similar to the preamble in legislation. The line function should provide this information.

PURPOSE OF THE AGREEMENT (See clause 3)

A short concise statement of the aims of the particular agreement or a brief list of the objectives, clearly indicate the purpose of the agreement and contextualize the contract.

THE PARTIES (See clause 4)

This clause provides the details which ordinarily appear on the front page of an MOA. As this is a separate clause in an implementation protocol it is not necessary to include all this information on the front page of the protocol.

ROLES AND RESPONSIBILITIES (See clause 5)

The provisions in **clause 5.1.2** relate to the roles and responsibilities of the parties as well as financial controls and should be included in every agreement. In doing so it is important to require the other party to the agreement to submit documentation in terms of the PFMA to allow the Department to comply with its obligations.

Clause 5.1.2(f) is only applicable where a transfere payment is being madeThe dates and times in these provisions may vary according to the nature of the agreement and some provisions relating to services or deliverables may also vary depending on the specific agreement. If the section concerned with payment and financial controls is particularly lengthy, it would be more appropriate to include these provisions under a separate heading such as 'Payment and Financial Reporting'

Generally there will only be a list of roles and responsibilities for the two parties to the agreement. However, in some instances there will be **other institutions which will play a role and will be required to perform certain activities** and their responsibilities will then be included in the agreement as per **clause 5.2**. The specific roles and responsibilities of each party should be drafted by the project/programme manager and will often be included in an annexure (work plan) to avoid a long list in the main body of the agreement.

WORKPLAN (See clause 6)

A work plan may not always be available at the time the agreement is signed, in which case the parties simply agree to compile a work plan by a particular date which would then be incorporated into the protocol. Depending on the nature of the agreement, a work plan may not be required at all in which case the roles and responsibilities listed in clause 5 would be sufficient. Where the collaboration is concerned with research, it is always advisable that a work plan indicating the deliverables and timeframes is attached to the protocol. The project/programme manager must provide the work plan.

CONTRIBUTING RESOURCES (See clause 7)

Most protocols will have their own separate sections concerned with funding and payment structures often associated with timeframes and deliverables, which will be included in clauses 5 and 6. Where this occurs, a clause dealing with Contributing Resources will not always be necessary. However, where the parties will be purchasing or utilising movable and immovable assets during the course of the agreement, this section should indicate either in general terms or list the specific assets and then indicate which department/institution will retain ownership thereof and who will be responsible for the maintenance, insurance and general running expenses thereof. Some examples of clauses which may be relevant in this section have been provided. When a protocol is concluded between government departments, it should be noted that, according to the Treasury Regulations, government bears its own risk and therefore neither party may be required to take out insurance. Insurance requirements can only be required of statutory bodies.

MANAGEMENT OF THE AGREEMENT (See clause 8)

Depending on the nature of the agreement, the contract period and the roles and responsibilities, it may only be necessary to stipulate individual contact persons in each Department/institution for the management of the agreement. While specific names can be mentioned it is important to designate a particular post [i.e. Director: ICM,] to ensure that should the particular individual leave the position, the replacement would be able to continue with the management of the contract without amendment thereof. It is usually appropriate to call these individuals the project officer from the Department and the project leader from the service provider. If the relationship is fairly complex and requires extensive collaboration it is then advisable to establish a steering committee consisting of members of both Departments/institutions. The line function should provide this information.

 **GOOD FAITH (See clause 9)**

This clause is **compulsory**.

 **CANCELLATION/TERMINATION OF THE AGREEMENT (See clause 10)**


This allows the Department to cancel the agreement without having to follow the dispute resolution process. Cancellation may only occur where there are no funds available to continue with the collaboration or by mutual agreement between the parties.

 **DISPUTE RESOLUTION (See clause 11)**

It is important to note that this dispute resolution process replaces the ordinary breach and cancellation clauses that are commonly found in an MOA. Where government institutions sign an agreement, the Constitution prohibits them from instituting legal action against one another in court until all other processes have been exhausted. As such every attempt is made to resolve any dispute through mediation or political meetings between the heads of the departments. If this is unsuccessful then the provisions of the IGRF Act apply.

 **CONFIDENTIALITY (See clause 12)**

This clause is compulsory.

 **DURATION, EXECUTION AND AMENDING THE AGREEMENT (See clause 13)**

These clauses are **compulsory**.

INDEMNITY (See clause 14)

Clauses 14.1 and 14.2 should be included where the agreement is between the **Department and a statutory body/institution** such as the National Research Foundation (NRF) or CSIR. These kinds of indemnities should not be applied if the agreement is with another government Department.

DOMICILIUM (See clause 15)

Make sure that the street address of each party is inserted in clause 15.1 and not the P.O.Box address.

INTELLECTUAL PROPERTY (See clause 16)

The details of this section may vary according to the nature of the specific agreement. For example, in some instances the results of the agreement may be owned entirely by the Department and not jointly. This clause is only necessary where the agreement involves research or the drafting of documents which the Department will later use and rely on.

EXAMPLE WORKPLAN

Attached to the protocol is an example of a work plan. This format is optional and is only intended to assist in structuring such a document. As each collaboration or project varies, the work plan will in most instances be structured differently.

UMBRELLA IMPLEMENTATION PROTOCOL / MOA (Template C)

Template C is an example of an umbrella protocol which **can also be adapted into an umbrella MOA using the format of template 'A'**, when contracting with private individuals or institutions.

This kind of agreement is recommended where an organization such as a university (umbrella MOA) or a statutory body such as Cape Nature or KZN Wildlife (umbrella IP), will be contracted for a **number of different projects over a period of a few years**. Ordinarily this would require individual contracts to be signed each time a project is planned. An umbrella agreement will therefore contain the main clauses to regulate the relationship and each individual project will then be devised according to an agreed work plan template and annexed to the main agreement as they are developed. The payment amount and structure and specific roles and responsibilities for each project or work plan will therefore be contained in each annexure and not in the main agreement. The main agreement will contain general provisions relating to the financial reporting, intellectual property and other standard contractual terms similar to templates 'A' and 'B'.

Below is a commentary on those clauses which do not appear in the other templates. Where the agreement contains the same clauses as the above templates, regard should be had to the comments above.

➤ **DEFINITIONS (See clause 1)**

This section must distinguish between the main agreement and the individual work plans which are to be annexed as the individual projects.

➤ **BACKGROUND (See clause 2)**

This section simply provides an example of what should be contained in this section as was the case with template 'B'.

➤ **PROJECTS (See clause 6)**

This clause deals with development of future multiple projects which will be developed in a specific format and be annexed to the main agreement.

➤ **MANAGEMENT OF THE AGREEMENT (See clause 11)**

This clause must allow for the appointment of contact individuals for each project/work plan and a steering committee should be appointed to manage the entire agreement.

“TEMPLATE 1”

**RESOLUTION PASSED BY THE DIRECTORS OF
XYZ (PTY) LIMITED
REGISTRATION NUMBER 1998/002468/07
AT A MEETING HELD AT JOHANNESBURG ON 12 NOVEMBER 2004**

IT IS HEREBY RESOLVED THAT XYZ (PTY) LIMITED enter into a contract with THE DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT for the rendering of the services of production, printing and distribution of learning support materials related to environmental matters for learners and educators at Grade R to 9 Gauteng Schools.

IT IS FURTHER RESOLVED THAT JAMES SMITH (IDENTITY NUMBER 550505 5000 00 0) is hereby duly authorized to act on behalf of XYZ (PTY) LIMITED and sign the said contract with the DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT on behalf of XYZ (PTY) LIMITED.

DIRECTORS:

JAMES SMITH

MICHELLE BROWN

THABO SITHOLE