



Reference: 16/4/3/4

## APPENDIX A

### TERMS OF REFERENCE

#### Provincial Evaluation Project

#### Evaluation of the implementation and impact of Environmental Impact Assessment

## 1. BACKGROUND INFORMATION AND RATIONALE

### 1.1 Background to the intervention being evaluated

The National Environmental Management Act, 107 of 1998 (NEMA) is the framework legislation for environmental management in South Africa and came into effect on 29 January 1999. NEMA defines sustainable development as *'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'*.

Environmental impact assessments and planning are key tools to support decision-making in pursuit of sustainable development in South Africa, where planning provides the enabling framework and environmental impact assessment ensures that a project is measured against the required framework.

Currently the Environmental Impact Assessment process in South Africa is regulated through the Environmental Impact Assessment (EIA) Regulations published in terms of Chapter 5 of NEMA on 18 June 2010. The EIA process essentially provides that the potential consequences for, or impact on the environment of listed or specified activities, must be considered, investigated, assessed and reported on to the competent authority. Based on the assessment the competent authority must then either grant or refuse environmental authorisation for the activities.

Apart from the specific situations identified in terms of section 24C<sup>1</sup> of NEMA where the Minister must be identified as the competent authority, the Department of Environmental Affairs and

<sup>1</sup> In terms of S24C(2) the Minister must be identified as the competent authority if the activity –

- (a) has implications for international environmental commitments or relations;
- (b) will take place within an area protected by means of an international environmental instrument, other than –
  - (i) any area falling within the sea-shore or within 150 metres seaward from the high-water mark, whichever is the greater;
  - (ii) a conservancy;

Development Planning (the Department) will be the competent authority responsible for granting environmental authorisations in respect of listed or specified activities requiring such authorisation in the Western Cape. Within the Department this function is being fulfilled by the Environmental and Land Management (ELM) Component.

In terms of NEMA and the EIA Regulations various guidelines, policies and decision-making instruments are relevant and must be taken into account when a competent authority assesses an application for environmental authorisation. As competent authority the Department is however increasingly being faced with court applications challenging its decisions in terms of planning and EIA legislation. These court challenges mainly take the form of judicial review applications in terms of the Promotion of Administrative Justice Act, 3 of 2000 and have substantial negative implications for the Department in terms of costs, time delays and additional resources and capacity required.

In response to the above the Department intends to identify and utilise the lessons learnt from court challenges in order to inform ways of strengthening the current system of environmental impact assessment review<sup>2</sup> and decision-making within the Department. This will not only lead to more defensible decisions and a reduction in court challenges, but also to more sustainable decision-making.

## 1.2 Purpose of the Evaluation

The purpose of the evaluation is in line with the concept note contained in the Provincial Evaluation Plan 2013/14-2015/16. The focus for this Terms of Reference is to, based on court challenges, evaluate the implementation of the environmental impact assessment process within the Western Cape, in order to ascertain how to strengthen the current system of environmental impact assessment related review<sup>3</sup> and decision-making in the Western Cape.

## 2. FOCUS OF THE EVALUATION

### 2.1 Evaluation questions

1. What are the trends emerging from court challenges relevant to the Department's decision-making in terms of environmental impact assessment?

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- (iii) a protected environment;
  - (iv) a proclaimed private nature reserve;
  - (v) a natural heritage site;
  - (vi) the buffer zone or transitional area of a biosphere reserve; or
  - (vii) the buffer zone or transitional area of a world heritage site;
  - (c) a development footprint that falls within the boundaries of more than one province or traverses international boundaries;
  - (d) is undertaken, or is to be undertaken, by –
    - (i) a national department;
    - (ii) a provincial department responsible for environmental affairs or any other organ of state performing a regulatory function and reporting to the MEC; or
    - (iii) a statutory body, excluding any municipality, performing an exclusive competence of the national sphere of government; or
  - (e) will take place within a national proclaimed protected area or other conservation area under control of a national authority.

<sup>2</sup> Section 1 of NEMA defines "review", when used in Chapter 5, to mean "the process of determining whether an assessment has been carried out correctly or whether the resulting information is adequate in order to make a decision".

<sup>3</sup> Section 1 of NEMA defines "review", when used in Chapter 5, to mean "the process of determining whether an assessment has been carried out correctly or whether the resulting information is adequate in order to make a decision".

2. How can the trends be utilised to further strengthen the current environmental impact assessment review and decision-making framework?
3. What are the lessons learnt from other relevant judgments, challenging the Department and other decision-makers, which can further be applied to improve the Department's current environmental impact assessment review and decision-making framework?

## **2.2 Intended users and stakeholders**

The key intended users of the evaluation results will be the relevant decision making authorities mandated with environmental impact assessment related decision-making. It is anticipated that the project outcomes will further benefit and be utilised by civil society.

## **2.3 Scope**

The proposed project will consist of the following phases -

1. Identification and compilation of a database consisting of all relevant case law;
2. Reviewing/analysing relevant cases to identify trends, lessons learnt, gaps and challenges related to the current environmental impact assessment review and decision making framework; and
3. Making recommendations to further strengthen the current environmental impact assessment review and decision-making framework within the Department.

### 2.3.1 Phase 1: Identification and compilation of a case database:

Phase 1 will consist of the identification and collection of relevant cases that will contribute to fulfil the purpose, as a minimum:

- Court proceedings of all applications lodged in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) against decisions taken by the Department in terms of EIA legislation. In order to assure relevance, the scope of this project must include all challenges to decisions taken after the commencement of NEMA, i.e. post January 1999.
- Case law involving challenges against other relevant and related decisions (for example planning related matters) to ensure that the lessons learnt, from an administrative justice perspective, are also utilised.
- Case law involving litigation against decisions taken by a competent authority, other than the Department, which will be relevant and assist toward achieving the purpose of this project.

**It is estimated that a total of approximately 30 cases, which would include all three of the categories above, will be analysed.**

### 2.3.2 Phase 2: Review and analysis to identify trends, lessons learnt, gaps and challenges:

Phase 2 will include the following:

- Ascertaining the current trends in review applications lodged against planning and EIA related decisions taken by the Department through -
  - Identifying the number of review applications challenging relevant decisions made since 1999;
  - Detailing the outcomes, i.e. judgements handed down, withdrawn, settled etc;

- Identifying and analysing the main grounds on which the Department's decisions are being challenged;
  - Examining the relationship between
    - o the grounds of review;
    - o the implementation of the relevant legal and policy framework; and
    - o the court's findings, including cases settled out of court through a settlement agreement, made an order of court.
  - Conducting interviews with the Department's legal counsel briefed on relevant cases;
  - Based on the foregoing, identifying key aspects of the environmental impact assessment review and decision-making framework that should be implemented by the Department.
- Determining the lessons learnt from relevant judgments against decision-makers other than the Department, which could contribute to the Department's learning and an improved environmental impact assessment review and decision-making framework within the Department.

### 2.3.2 Phase 3: Formulate recommendations to further strengthen the environmental impact assessment review and decision-making framework

Based on findings, phase 3 will entail the formulation of a set of recommendations and guidelines detailing how to further strengthen the current system of environmental impact assessment review and decision-making within the Department in order to ensure more defensible decisions and a review template to monitor the implementation and review of recommendations.

## 3. EVALUATION DESIGN

The overall methodology will entail a systematic review, and as a minimum, include the following:

- 3.1 Identification and collation of relevant court proceedings;
- 3.2 Review of relevant court proceedings as well as the applicable legal and policy framework;
- 3.3 Interviews with Department's legal counsel appointed in relevant cases;
- 3.4 Analysis of the evidence collected through the document review; and
- 3.5 Drawing conclusions and formulating recommendations.

## 4. EVALUATION PLAN

### 4.1 Products/deliverables

The following deliverables are expected as part of the evaluation:

- 4.1.1 Inception Report and Project plan;
- 4.1.2 Draft Evaluation Report;
- 4.1.3 Final Evaluation Report;
- 4.1.4 Provision of all datasets, metadata and other documentation; and
- 4.1.5 PowerPoint or audio-visual presentation of the results.

The Inception Report and revised Project Plan will be required from the Service Provider after their appointment and the inception meeting and must include the following:

- i. Project planning and management mechanisms, including the timing and sequences of phases and components, and associated budgets (i.e. expenditure schedule) as well as details of overall project administration including the delivery dates and all meetings.
- ii. A schedule of payment indicating when in the project schedule payments are to be made.
- iii. An outline of the various draft and final reports to be produced, expected delivery dates for the various phases and component reports.
- iv. Research design and method statements for the collection, analysis and presentation of information required.

The Draft Evaluation Report (to be reviewed) and the Final Evaluation Report must include, as a minimum, the aspects highlighted under the scope in 2.3 above.

The Draft Evaluation Report for review must be produced in the form of an abridged report and a full report. The abridged report must be in 1/3/25 format. The 1/3/25 format requires a one page policy summary of the implications for the evaluation, a three page executive summary of the whole report and a 25 page main report (Arial 11 point, single spacing, exclusive of appendices).

The Final Evaluation Report (the abridged report and the full report) must be produced in hard copy and electronic format.

#### **4.2 Time frame for the project**

All deliverables must be completed and the final reports must be submitted to the Department within 8 months of commencement of the Project.

#### **5. MANAGEMENT ARRANGEMENTS**

A Project Steering Committee will be established of all the key stakeholders within the Department of Environmental Affairs and Development Planning.

- 5.1 The successful service provider/s must make themselves available for regular progress meetings with the Project Steering Committee, which will monitor the progress of the project and from time to time may request meetings or other interactions.
- 5.2 Action based minutes of all meetings must be taken by the consultants and circulated within 5 work days of the meeting to all relevant parties.
- 5.3 Progress reports at intervals agreed upon with the project team will be expected. The Project Steering Committee reserves the right to request provisional reports during the course of the project.
- 5.4 Service provider/s may be requested to give presentations to the Steering Committee as and when required.
- 5.5 The service provider/s must guarantee the presence of the senior staff throughout the duration of the contract. If the senior official has to leave the project, a period of at least a month is required in which the senior official must work parallel with the next person (senior consultant with similar expertise and equal years of experience) appointed in order to transfer skills and knowledge.

5.6 No presentations of the project outputs or reports may be made to third parties without the prior permission of the Department.

## **6. THE PROPOSAL TO BE SUBMITTED**

Responsiveness in terms of this document refers to the bidder's adherence and compliance to the requirements set out in sections 6.1, 6.2 and 6.3 in order for the Department to evaluate their bid in terms of price and equity. Failure to comply with the criteria will disqualify the bid.

### **6.1. Responsiveness criteria applicable to this bid**

All proposals must include the following information:

- 6.1.1 Composition of Project Team:
  - i. Proof of experience of the team that relates to the requirements of the project
  - ii. Contactable references for team members
  - iii. Submission of CV's and copies of qualifications of all key personnel
- 6.1.2 Convey a clear understanding of the Department's Terms of Reference for the project, the deliverables and the use thereof.
- 6.1.3 An outline of the suggested approach and methodology proposed to undertake the project.
- 6.1.4 A detailed work breakdown structure indicating tasks, resources allocated and timeframes applicable and associated detailed cost breakdown must be submitted.
- 6.1.5 Bid form must be properly received on the bid closing date and time specified on the invitation, fully completed, dated and signed in ink.
- 6.1.6 Submission of the bid document without removing any pages.
- 6.1.7 Invitation to Bid (WCBD 1), Submission of WCBD 4 (Declaration of Interest, Declaration of Bidders Past SCM Practice, Certificate of Independent Bid Determination), Preference Claim Certificate (WCBD 6.1a ), Contract form for Goods/Works/Service (WCBD 7.1).
- 6.1.8 Submission of an Original Valid Tax Clearance Certificate, Business Registration Certificate e.g. CK1, certificate of incorporation and B-BBEE Status Level Verification Certificate
- 6.1.9 Failure of bidders to comply with any of the responsive criteria will lead to disqualification of the bid.
- 6.1.10 Provision must be made for skills transfer from the Service Provider to the Department.

### **6.2. Competencies of the service provider**

The preferred service provider will be selected based on the Experience and Qualifications expressed in the bid proposal. Potential service providers must therefore provide a clear bid proposal that demonstrates the skills, experience and track record of the applicant to deliver the services required, and that reflects an understanding of key issues relating to the scope of work.

- 6.2.1 The service provider must designate a lead consultant who is capable of managing a team that has the expertise to produce the specified deliverables within the time requirements of these Terms of Reference. The service provider can be the lead consultant.
- 6.2.2 The service provider must consist of practitioners with the following experience and competencies:
  - i. A relevant legal qualification (LLB or equivalent);



- ii. Knowledge and experience in research and/or review of legislation/and or case law pertaining to environmental impact assessment and planning;
- iii. Legal experience with proven knowledge and understanding of High Court litigation, particularly administrative and environmental law;
- iv. Legal experience with proven knowledge and understanding of environmental and planning law,
- v. Legal experience with in depth knowledge and understanding of the legal and policy framework relevant to the environmental impact assessment and planning procedures, especially so far as it pertains to the Western Cape;

**6.2.3 Should the team not have the required number of practitioners with the relevant legal qualification their bid will not be considered.**

**6.3. Functional responsiveness criteria applicable to this bid**

6.3.1 All proposals will be evaluated based on the following functional criteria:

<b>Functionality Criteria</b>	<b>Weighting Factors:</b>
<b>Qualifications</b>	<b>20</b>
Law*	20
<b>Experience of Service Providers</b>	<b>40</b>
Research and/or review of environmental impact assessment and planning legislation and/or case law.	10
High Court litigation involving environmental and administrative law and/or similar experience obtained through employment at an academic institution.	10
In depth knowledge of environmental impact assessment and planning legislation and procedures.	8
Proven experience in environmental and planning law.	8
Knowledge and experience of the legal and policy framework specific to the Western Cape.	4
<b>Interpretation of the terms of reference and quality of the methodology presented</b>	<b>40</b>
Responsiveness of methodology and the interpretation of the terms of reference and clarity of deliverables (a detailed work breakdown structure indicating tasks, resources allocated and timeframes applicable and associated detailed cost breakdown must be submitted)	40
<b>Total score:</b>	<b>100</b>

*\*Persons without the appropriate legal qualifications will be disqualified*

6.3.2 Bidders should at least obtain 75% of the functionality in order to be evaluated further.

6.3.3 The proposals will be evaluated according to the 80/20 preference point system.

## **7. RESPONSIBILITY OF THE DEPARTMENT**

The Project Steering Committee will make themselves available, within reason, for the various agreed meetings and will review and make comments to all draft documents and reports as per agreed schedules.

## **8. INTELLECTUAL PROPERTY**

The appointee must note that all drafts, including the final draft of the documents and any digital information derived in undertaking the project will be the sole property of the Department of Environmental Affairs and Development Planning. Any studies, reports or other material, graphics, software or otherwise prepared by the appointee for this project under this contract shall belong to and remain the property of the Department of Environmental Affairs and Development Planning. No presentations of the reports may be made without prior written permission of the Department of Environmental Affairs and Development Planning and all information contained in these reports are considered confidential.

All materials emanating from services rendered with a branding implication must be consulted with the Department's Communication Services unit prior to the design or production thereof. Materials may include, but are not limited to, specialist reports; advertising; promotional materials and/or any other communication product produced for public or internal consumption.

## **9. DECLARATION OF CONFIDENTIALITY**

The service provider/s shall regard all information in, or in support of the project, as confidential and may not use any information for personal or 3rd party gain. All communication with the media regarding this project (if any) will be conducted through the communication component of the Department (unless agreed upon otherwise).

The service provider/s must provide an undertaking that no member of its staff will accept any new instructions involving any litigation, or other legal action, against the Department or the Minister of Local Government, Environmental Affairs and Development Planning throughout the duration of the project.

## **10. PAYMENTS**

- 10.1 Invoices must indicate the hours spent, team members involved, task and/or output and should include a short description of work done referring to any relevant reports.
- 10.2 Disbursements to be claimed as above and to include original invoices.
- 10.3 Lists of invoices to be submitted are to be included in the draft plan of work, and should be related to tangible outputs as mentioned above.
- 10.4 All invoices to be inclusive of VAT.

## **11. CONTACTABLE OFFICIALS FOR CLARIFICATION**

For technical queries regarding the Scope of Work, contact:



Anique Rossouw  
Directorate: Planning and Policy Co-ordination  
Tel: (021) 483 2900  
Email: [anique.rossouw@westerncape.gov.za](mailto:anique.rossouw@westerncape.gov.za)

For enquiries relating to the bid documentation, contact:  
Siyabulela Ncipha  
Supply Chain Management  
Tel: (021) 483 2782  
Email: [Siyabulela.ncipha@westerncape.gov.za](mailto:Siyabulela.ncipha@westerncape.gov.za)

