
GOVERNMENT NOTICE

DEPARTMENT OF ENERGY

No. R. 721

5 August 2009

ELECTRICITY REGULATION ACT, 2006

ELECTRICITY REGULATIONS ON NEW GENERATION CAPACITY

I, Dipuo Peters, Minister of Energy, hereby under section 35(4) of the Electricity Regulation Act, 2006 (Act No 4 of 2006), make the regulations in the Schedule.

SCHEDULE

DEFINITIONS

In these Regulations, any word or expression to which a meaning has been assigned in the Act, shall have the meaning so assigned and, unless the context otherwise indicates –

“ancillary services” means the services supplied to the NTC by generators, distributors or end-users and customers, necessary for the reliable and secure transport of power from generators to distributors and other customers, as defined in the grid code;

“buyer” means any person or entity designated by the Minister in terms of section 34(1)(c) and (d) of the Act and authorised under a licence; this includes any person or entity running a procurement process in respect of the IPP bid Programme or entering into a power purchase agreement;

“energy planner” means the Department of Energy;

“Eskom” means Eskom Holdings Limited;

“grid code” means the South African grid code as approved by the regulator, which is updated by the regulator from time to time;

“Independent Power Producer” or “IPP” means any undertaking by any person or entity, in which the government of South Africa does not hold a controlling ownership interest (whether direct or indirect), of new generation capacity at a generation facility following a determination made by the Minister in terms of section 34(1) of the Act;

“IPP bid programme” means a bidding process for the procurement of new generation capacity and/ or ancillary services from IPPs;

“IPP project” means a project undertaken following an IPP bid programme for the selection of a preferred bidder;

“national transmission company” or **“NTC”** means any person or entity licensed to execute the national transmission responsibility;

“power purchase agreement” or **“PPA”** means an agreement concluded between an IPP and the buyer for the sale and purchase of –

- (a) electricity generation capacity;
- (b) electricity; and/ or
- (c) ancillary services;

“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No.1 of 1999);

“project agreements” means the agreements including the power purchase agreement to be entered into by and between the buyer, the government and the IPP in respect of any IPP project;

“renewable feed-in tariff” or **“REFIT”** means a tariff approved by the regulator for a renewable energy generator or cogeneration;

“scheduling” means the process to determine which unit or piece of equipment will be in operation and at what loading;

“system operator” means the entity responsible for short-term reliability of the interconnected power system, which is in charge of controlling and operating the transmission system and dispatching generation (or balancing the supply and demand) in real time;

“**treasury regulations**” means treasury regulations 16 developed under the Public Finance Management Act;

“**unit**” has the same meaning ascribed in the grid code.

To the extent that terms are used in these Regulations but not defined such terms shall be accorded the meaning given to them in the Act, the South African grid code and in Treasury Regulations of the Public Finance Management Act.

Application of the regulations

1. These regulations –
 - (a) apply to all types of generation technology including renewable generation and cogeneration technology, but excluding nuclear power generation technology;
 - (b) apply to base load, mid-merit and peak generation; and
 - (c) take effect from the date of promulgation, unless otherwise indicated in the text.

Objectives of the regulations

2. The objectives of these regulations are –
 - (a) the regulation of entry by a buyer and an IPP into a power purchase agreement;
 - (b) the facilitation of fair treatment and the non-discrimination between IPP generators and the buyer;
 - (c) the facilitation of the full recovery by the buyer of all costs incurred by it under or in connection with the power purchase agreement and an appropriate return based on the risks assumed by the buyer thereunder and, for this purpose to ensure the transparency and cost reflectivity in the determination of electricity tariffs;
 - (d) the establishment of rules and guidelines that are applicable in the undertaking of an IPP bid programme and the procurement of an IPP for purposes of new generation capacity;

- (e) the provision of a framework for the reimbursement by the regulator, of costs incurred by the buyer and the system operator in the power purchase agreement; and
- (f) the regulation of the framework of approving the IPP bid programme, the procurement process, the REFIT programme, and the relevant agreements to be concluded.

Planning for new generation capacity

3. (1) The process of developing the integrated resource plan shall include the –
 - (a) adoption of the planning assumptions;
 - (b) determination of the electricity load forecast;
 - (c) modelling and scenario planning based on the planning assumptions;
 - (d) determination of a base plan derived from a least cost generation investment requirement;
 - (e) risk adjustment of the base plan, which shall be based on –
 - aa. the most probable scenarios; and
 - bb. government policy objectives for a diverse generation mix, including renewable and alternative energies, demand side management and energy efficiency; and
 - (f) approval and gazetting of the integrated resource plan.
- (2) The system operator, in consultation with the energy planner and the regulator, shall be responsible for executing 3(1)(a), (b), (c), (d) and (e) above.
- (3) The energy planner, in consultation with the regulator, shall approve the policy input insofar as the risk adjustment contemplated under regulation 3(1)(e) above.
- (4) The system operator shall provide the regulator with any information that the regulator might request in relation to the integrated resource plan.

- (5) The Minister shall approve the integrated resource plan and publish it in the government gazette for implementation.
- (6) The regulator –
 - (a) must consider applications for licences in accordance with the determination in line with sub-regulation (5);
 - (b) may, in terms of section 14(1)(q) of the Act, impose a licence condition on the buyer to buy all the new generation capacity procured by the system operator in accordance with the approved integrated resource plan;
 - (c) shall issue rules relating to the keeping of relevant information and the rendering of returns by licensees pursuant to integrated resource planning.

Procurement mobilisation

4. (1) Having regard to the need for new generation capacity in the integrated resource plan, the system operator shall undertake a feasibility study to determine whether procurement of the generation capacity should be undertaken by Eskom as part of its services as the national electricity producer, another utility provider or an IPP.
- (2) The following shall form part of the considerations and outcomes for the feasibility study contemplated in sub-regulation (1) –
 - (a) the affordability of the proposed generation capacity;
 - (b) the proposed allocation of financial, technical and operational risk between the buyer and the IPP;
 - (c) the demonstration of the anticipated value for money to be achieved by the IPP; and
 - (d) the capacity of the buyer to enter into project agreements with the IPP.
- (3) The concurrence by the Minister of Finance with the approval of the outcome of the feasibility study to procure the generation capacity through IPPs, shall be confirmed before a determination by the Minister.

- (4) Having considered the outcome of the feasibility study and the approval from the Minister of Finance in terms of sub-regulation (3), the Minister shall make a determination in accordance with section 34 of the Act.

Procurement process under the IPP bid programme

5. (1) The procurement process for the IPP bid programme shall comply with applicable legal requirements including preference for the advancement of previously disadvantaged individuals.
- (2) The system operator, in consultation with the buyer, shall be responsible for the activities related to procurement under the IPP bid programme.
- (3) The procurement process shall have the following stages:
- (a) Request for prequalification (RFQ);
 - (b) Request for proposals (RFP); and
 - (c) Negotiation with the preferred bidder.

Concluding the power purchase agreement

6. (1) The power purchase agreement must meet the requirements of the treasury regulations in respect of –
- (a) affordability of the project;
 - (b) value for money;
 - (c) substantial technical, operational and financial risk transfer;
 - (d) effective implementation, management, enforcement and monitoring of the IPP; and
 - (e) satisfactory due diligence including a legal due diligence in respect of the buyer's representative and the proposed IPP in relation to matters of their respective competence and capacity to enter into the project agreements.

- (2) The buyer, having participated in the process under regulation 5, must purchase all the generation capacity negotiated and concluded by the system operator under the IPP Bid Programme.

Procurement of renewable energy and cogeneration under the REFIT Programme

7. (1) Notwithstanding the provisions of regulations 5, the Minister may determine that the REFIT programme must be used to meet the required new generation capacity.
- (2) To meet the requirements of regulation 7(1), the regulator shall -
- (a) develop rules related to the criteria for the selection of a renewable energy IPP or cogeneration IPP that qualifies for a licence.
 - (b) be responsible for the determination and publication of a tariff in respect of the REFIT programme.
- (3) The criteria prescribed by the regulator shall take into account the -
- (a) compliance with the integrated resource plan and the preferred technologies;
 - (b) acceptance by the IPP of a standardised power purchase agreement;
 - (c) preference for a plant location that contributes to grid stabilisation and mitigates against transmission losses;
 - (d) preference for a plant technology and location that contributes to local economic development;
 - (e) compliance with legislation in respect of the advancement of historically disadvantaged individuals;
 - (f) preference for projects with viable network integration requirements;
 - (g) preference for projects with advanced environmental approvals;
 - (h) preference for projects demonstrating the ability to raise finance;
 - (i) preference for small distributed generators over centralized generators; and
 - (j) preference for generators that can be commissioned in the shortest time.

(4) The system operator shall be responsible for selecting the preferred IPP under the REFIT Programme. The criteria prescribed by the regulator under regulation 7(2)(a) shall be applied by the system operator in the selection of the preferred IPP.

(5) In line with the determination by the Minister under section 34 of the Act, the buyer must purchase all the generation capacity procured in terms of regulation 7.

Cost recovery

8. The regulator shall prepare and pass rules, not inconsistent with these regulations, for purposes of cost recovery by the system operator and the buyer, which shall clearly and transparently set forth:

- (1) The factors that should be considered in assessing -
 - aa. the affordability of the proposed IPP;
 - bb. the allocation of financial, technical and operational risk between the buyer and the IPP; and
 - cc. the anticipated value for money to be achieved by the IPP.
- (2) The process to be followed by the buyer in seeking the approval of costs incurred under the power purchase agreement;
- (3) The process to be followed in assessing the principle of efficient risk transfer in the power purchase agreement and the mitigation mechanism in relation to the off taker; and
- (4) All such matters as are necessary to give effect to these regulations.

Guidelines

10. The Minister may issue guidelines relating to the IPP bid programme and the REFIT programme. All parties to the IPP bid programme and the REFIT programme shall be required to comply with such guidelines.