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GOVERNMENT NOTICE

DEPARTMENT OF ENERGY

No. R. 1130

30 November 2010

Electricity Regulation Act No.4 of 2006

Electricity Regulations on New Generation Capacity

I, Dipuo Peters, Minister of Energy, hereby under section 35(5) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), intend to 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—

1. **“Act”** means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

“affordability”, in relation to a new generation capacity project, means that the financial commitments to be incurred by the buyer in terms of the power purchase agreement can be met by funds—

(a) designated within the buyer's existing budget for the functions to which the power purchase agreement relates; or

(b) destined for the buyer in accordance with the relevant authority's future budgetary projections for the buyer;

“buyer” means, in relation to a new generation capacity project, any person designated by the Minister in terms of section 34(1)(c) and (d) of the Act;

“cross border project” means a new generation capacity project for the purchase by the buyer of new generation capacity produced by a generation facility situated outside of the Republic;

“Department” means the Department of Energy;

“Eskom” means Eskom Holdings Limited contemplated in section 3(1) of the Eskom Conversion Act, 2001 (Act No. 13 of 2001);

“Government” means the Government of the Republic of South Africa;

“Independent Power Producer” or **“IPP”** means any person in which the Government does not hold a controlling ownership interest (whether direct or indirect), which undertakes or intends to undertake the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34(1) of the Act;

“IPP bid programme” means a procurement process undertaken for the procurement of new generation capacity from IPPs, but excludes procurement under a REFIT bid programme;

“Minister” means the Minister of Energy;

“national transmission company” or **“NTC”** means the person licensed to execute the national transmission responsibility, which includes a transmission network service provider which maintains the transmission network;

“National Treasury” means the National Treasury established by section 5 of the Public Finance Management Act, 1999 (Act No.1 of 1999);

“new generation capacity” means electricity generation capacity, electricity and ancillary services, individually or in any combination thereof;

“new generation capacity project” means a project for the development of new generation capacity, including a cross border project, pursuant to a determination made by the Minister in terms of section 34(1) of the Act;

“Peaker Project” means the new generation capacity project to establish generation facilities at Avon in the Kwazulu Natal Province and Dedisa in the Eastern Cape Province;

“power purchase agreement” or **“PPA”** means an agreement concluded between a generator and the buyer for the sale and purchase of new generation capacity;

“procurer” means the person designated by the Minister in terms of section 34(1)(e)(i) as being responsible for preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP bid programme or a REFIT bid programme, which person may or may not be the buyer;

“project agreements” means the agreements, including the power purchase agreement, entered into between the buyer, the NTC, the Government and the generator or any combination thereof, in respect of any new generation capacity project;

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

“REFIT bid programme” means a procurement process which may be undertaken for the procurement of new generation capacity from IPPs on the basis of a REFIT, where the source thereof is renewable energy, and excludes procurement under an IPP bid programme;

“renewable feed-in tariff” or **“REFIT”** means a tariff approved by the Regulator which is applicable to a licensed renewable energy provider participated in the REFIT bid programme;

“Treasury Regulations” means regulation 16 of the Treasury Regulations published in terms of section 76 of the Public Finance Management Act in Government Notice No. R. 345 of 9 April 2001; and

“value for money” means that the provision of new generation capacity in terms of the power purchase agreement results in a net benefit to the buyer or to Government defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

Application of the Regulations

2. (1) These Regulations apply to—

- (a) the procurement, by organs of state in the national sphere of government, of all new generation capacity, including new generation capacity derived from renewable energy sources, excluding that derived from nuclear power technology;
- (b) the procurement, by organs of state in the national sphere of government, of base load, mid-merit and peak new generation capacity; and
- (c) cross border projects.

Objectives of the Regulations

3. (1) The objectives of these Regulations are—
- (a) to facilitate planning for the establishment of new generation capacity;
 - (b) the regulation of entry by a buyer and a generator into a power purchase agreement;
 - (c) to set minimum standards or requirements for power purchase agreements;
 - (d) the facilitation of the full recovery by the buyer of all costs incurred by it under or in connection with a power purchase agreement and an appropriate return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs; and
 - (e) the provision of a framework for implementation of an IPP bid programme, a REFIT bid programme, and the relevant agreements to be concluded.

Planning for new generation capacity

4. (1) The integrated resource plan shall—
- (a) be developed by the Minister after consultation with the Regulator;
 - (b) be developed in accordance with a process which includes the—
 - (i) adoption of the planning assumptions which underpin the conclusions of the integrated resource plan;
 - (ii) determination of the electricity load forecast;
 - (iii) modelling and scenario planning based on the planning assumptions;
 - (iv) determination of a base plan for generation expansion, derived from a least cost generation investment requirement; and
 - (v) risk adjustment of the base plan, which shall be based on—
 - (aa) the most probable scenarios as regards future demand for and supply of electricity and the possible sources of new generation capacity, taking into account agreements and memoranda of understanding entered into by the Government for cross border projects; and
 - (bb) Government policy objectives for a diverse generation mix, including renewable and alternative energies, demand side management and energy efficiency.
 - (c) be published in the *Government Gazette* by the Minister; and
 - (d) be revised and updated from time to time, in accordance with the provisions of paragraphs (a) to (c).
- (2) The buyer, the NTC and the Regulator shall timeously provide such assistance as the Minister may require for purposes of developing and monitoring the implementation of an integrated resource plan.

- (3) The buyer and the NTC shall timeously provide the Regulator with any information that the Regulator may require in relation to any integrated resource plan.
- (4) The Regulator shall, after consultation with the Minister, the buyer and the NTC, issue rules relating to the keeping of relevant information, the submission of such information and the rendering of returns by licensees, as required in order to facilitate integrated resource planning.

Feasibility studies

5. (1) Having regard to the need for new generation capacity as provided for in the integrated resource plan, the Minister shall undertake or commission the buyer or another party to undertake feasibility studies in respect of such new generation capacity requirement.

- (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 new generation capacity;
 - (b) the proposed allocation of financial, technical and operational risk between the buyer and a generator;
 - (c) the demonstration of the anticipated value for money to be achieved through the project agreements;
 - (d) the material legal, financial and technical requirements including consents that will be required in order to procure the new generation capacity; and
 - (e) whether the appropriate generator should be Eskom as part of its services as the national electricity producer, another organ of state or an IPP in terms of either an IPP bid programme or a REFIT bid programme.
- (3) The Minister shall provide the Minister of Finance with each completed feasibility study, for consideration thereof in anticipation of an approval contemplated in regulation 6(1).

Ministerial determinations

6. (1) Before the Minister, after consultation with the Regulator, makes a determination in terms of section 34(1) of the Act, the approval (with or without conditions) of the Minister of Finance to proceed with one or more new generation capacity projects shall be required.
- (2) In making a determination under section 34(1) of the Act, the Minister shall consider the recommendations of the applicable feasibility study and any conditions imposed by the Minister of Finance as contemplated in sub-regulation (1).
- (3) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.
- (4) If the determination referred to in sub-regulation (3) requires that the new generation capacity be established by an IPP, the Minister shall also determine whether an IPP bid programme or a REFIT bid programme shall be followed, and the identity of the buyer or, where applicable, the procurer and the buyer.

- (5) The determination referred to in sub-regulation (3) may require or contemplate that new generation capacity be established through a cross border project, only if the Minister is satisfied that adequate agreements, memoranda of understanding or arrangements are in place between the Government and the relevant foreign government or international organisation, as are necessary to enable such cross border project.
- (6) A determination contemplated in this Regulation is binding on the buyer and the procurer.

Procurement process under the IPP bid programme

7. (1) Unless the Minister determines otherwise in terms of section 34(1)(e)(i) of the Act, the IPP bid programme procurement process shall include at least the following stages:
 - (a) request for prequalification (RFQ);
 - (b) request for proposals (RFP);
 - (c) bid submission and evaluation;
 - (d) designation of the preferred bidder or bidders; and
 - (e) negotiation with the preferred bidder or bidders.
- (2) Where the procurer in respect of a new generation capacity project procured under an IPP bid programme is not the buyer, the buyer shall be required to enter into the project agreements as buyer without itself having conducted a procurement process.
- (3) Prior to the issuing of any procurement documentation for an IPP bid programme to any prospective bidders, the procurer must:
 - (a) obtain approval from the National Treasury for the procurement documentation, including, in the case of the RFP, the draft power purchase agreement; and
 - (b) consult with the Regulator on the content of the procurement documentation.
- (4) After the evaluation of the bids, but prior to designating the preferred bidder or bidders, the procurer must submit a report for approval to the National Treasury, demonstrating how the criteria referred to in sub-regulation 10(1) were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid or bids and including any other information as may be required by the National Treasury.
- (5) The procurer may not designate the preferred bidder or bidders pursuant to an IPP bid programme without having obtained the approval of the National Treasury contemplated in sub-regulation (4) and having consulted with the Regulator on matters relating to the exercise of its licensing powers, to the extent relevant to the proposed designation of the preferred bidder or bidders.

Procurement process under the REFIT bid programme

8. (1) Unless the Minister determines otherwise in terms of section 34(1)(e)(i) of the Act, the REFIT bid programme shall include at least the following stages:
 - (a) request for prequalification (RFQ);

- (b) request for proposals (RFP);
 - (c) bid submission and evaluation;
 - (d) designation of the preferred bidder or bidders; and
 - (e) negotiation with the preferred bidder or bidders.
- (2) Where the procurer in respect of a new generation capacity project procured under a REFIT bid programme is not the buyer, the buyer shall be required to enter into the project agreements as buyer without itself having conducted a procurement process.
- (3) Prior to the issuing of any procurement documentation for a REFIT bid programme to any prospective bidders, the procurer must:
- (a) obtain approval from the National Treasury for the procurement documentation, including, in the case of the RFP, the draft power purchase agreement; and
 - (b) consult with the Regulator on the content of the procurement documentation.
- (4) After the evaluation of the bids, but prior to designating the preferred bidder or bidders, the procurer must submit a report for approval to the National Treasury, demonstrating how the criteria referred to in sub-regulation 10(1) were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid or bids and including any other information as may be required by the National Treasury.
- (5) The procurer may not designate the preferred bidder or bidders pursuant to a REFIT bid programme without having obtained the approval of the National Treasury contemplated in sub-regulation (4) and having consulted with the Regulator on matters relating to the exercise of its licensing powers, to the extent relevant to the proposed designation of the preferred bidder or bidders.

Cross border projects

9. (1) Where a section 34(1) determination requires or contemplates that new generation capacity be established through a cross border project, as contemplated in sub-regulation 6(5), the applicable IPP bid programme or REFIT bid programme may, but need not necessarily, have the sole purpose of procuring new generation capacity from beyond the borders of the Republic.
- (2) The procurement process in respect of a cross border project shall be conducted with due regard to the agreements, memoranda of understanding or arrangements referred to in sub-regulation 6(5).

Concluding the power purchase agreement

10. (1) A power purchase agreement must meet the following requirements—
- (a) affordability of the new generation capacity project;
 - (b) value for money;
 - (c) technical, operational and financial risk transfer to the generator;

- (d) effective mechanisms for implementation, management, enforcement and monitoring of the power purchase agreement; and
 - (e) satisfactory due diligence, including a legal due diligence in respect of the buyer's representative and the proposed generator in relation to matters of their respective competence and capacity to enter into the project agreements.
- (2) Before the buyer concludes a power purchase agreement, it must obtain approval from the National Treasury—
- (a) that the power purchase agreement meets the requirements set out in sub-regulation (1);
 - (b) for a contract management plan that explains the capacity of the buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the power purchase agreement and any other project agreements to which the buyer is a party to National Treasury and the Minister on a regular basis; and
 - (c) in respect of the arrangements that have been put in place to ensure that any portion of the buyer's allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer's financial obligations in respect of new generation capacity projects will be met.
- (3) Should the Minister determine, as contemplated in sub-regulation 6(3), that Eskom should establish new generation capacity as part of its services as the national electricity producer, Eskom will be required to enter into a power purchase agreement with the buyer that meets the requirements of sub-regulation (1), even if Eskom itself is the buyer.

Cost recovery

11. (1) The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the categories listed in sub-regulation (2).
- (2) The Regulator shall ensure that the buyer is able to recover at the least the following categories of costs—
- (a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;
 - (b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (f)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfillment of those obligations in terms of the power purchase agreement which gave rise to such payments;
 - (c) the transmission and connection costs incurred in providing access and grid connection to the generator, in respect of a new generation capacity project;
 - (d) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;

- (e) the efficiently incurred costs of the buyer in administering power purchase agreements;
- (f) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and
- (g) all other costs efficiently incurred by the buyer in procuring new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs.

Exemptions

12. (1) The Minister may, subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of the provisions of these Regulations other than those referred to in sub-regulation (2).
- (2) The terms and conditions referred to in sub-regulation (1) above include but not limited to:
- (a) acute shortages of power; or
 - (b) a project deemed necessary that did not reached its commercial operation date but required for security of supply, initiated prior to the promulgation of these regulations.
- (3) The Minister of Finance may, subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of those provisions of these Regulations which require the approval of the Minister of Finance or the National Treasury.

Transitional provisions

13. The provisions of these Regulations do not apply in the case of the Peaker Project, save for regulation 11.

Repeal

14. These Regulations repeal the Regulations published under GNR. 721 dated 5 August 2009 in *Government Gazette* 32378.

Electricity Regulations on New Generation Capacity

The Department of Energy, hereby invites comments on the draft Electricity Regulations on New Generation Capacity. All comments must be submitted to the department in writing.

Comments can be hand-delivered, posted or e-mailed to the department no later than the 21 January 2011.

Physical address: Department of Energy

Travenna Office Campus

70 Meintjies Street

Sunnyside, Pretoria

Arcadia

0007

(For attention Mr. M Ngobeni, 2A G40)

Postal Address: Department of Energy

Travenna Office Campus

Private Bag X19

Sunnyside, Pretoria

Arcadia

0007

(For attention Mr. M Ngobeni, 2A G040 and Mr. MM

Bantsijang 2A G03)

E-mail address: epar@energy.gov.za
