

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Regulation Gazette

No. R. 9021

Regulasiekoerant

Vol. 523

Pretoria, 30 January 2009
Januarie

No. 31849

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GOVERNMENT NOTICE

DEPARTMENT OF MINERALS AND ENERGY

No. R. 79

30 January 2009

ELECTRICITY REGULATION ACT, 2006

ELECTRICITY REGULATION

I, Buyelwa P Sonjica, Minister of Minerals and Energy under section 35(4) 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 –

“Act” Means the Electricity Regulation Act, 2006 (Act No. 4 of 2006);

“Agreement” means an agreement concluded between an IPP and the Buyer for the sale and purchase of electricity generation capacity and/ or of Ancillary Services;

“Ancillary Services” Means the services that are necessary for the reliable and secure transmission of electrical energy from generators to distributors and other customers as described in the Grid Code;

“Buyer” means any person or entity designated by the Minister in terms of Section 34(1)(c) and (d) and authorised under a trading licence;

“Central Dispatch” means the process of directing the electrical energy output of generation facilities into the national transmission system to achieve the stability, reliability and security of the national transmission system;

“Department” means the Department of Minerals and Energy;

“Eskom” means Eskom Holdings limited

“Grid” means the electricity transmission system in South Africa to which the IPP facility will be connected, and the same may be modified or developed during the terms of the Agreement;

“Grid Code” means the Grid Code applicable to the electricity supply industry, which is published 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 (“NewGen”) 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 tender for the procurement of NewGen and/ or Ancillary Services from IPPs whose generation facilities will be located in South Africa, which has been planned for in the Integrated Resource Plan as determined by the Minister in terms of section 34(1)(e) of the Act;

“IPP Project” means a project undertaken following an IPP Bid Programme for the selection of a preferred bidder and IPP who will enter into the Project Agreement with the Buyer Office;

“Minister” means the Minister of Minerals and Energy;

“NTC” Means any person or entity licensed to execute the national transmission responsibility;

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

“Project Agreements” means the Agreements including the Agreement to be entered into by the Buyer Office and the IPP in respect of any IPP project;

“Regulator” means the National Energy Regulator of South Africa established in terms of the National Energy Regulator Act, 40 of 2004;

“Treasury Regulation 16” means the treasury regulations in respect of PPP’s issued in terms of the PFMA; and

“System Operator” Means any person responsible for the short-term reliability of the interconnected power system within its control area, comprising the

national transmission system, the NTC assets connected to national transmission system, the power stations connected to the national transmission system and international connectors, and for Central Dispatch.

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 and in Treasury Regulation 16 of the PFMA.

Application of the regulations

(1) These Regulations shall:

- (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.
- (c) take effect from date of promulgation, unless otherwise indicated in the text.

Objectives of the Regulations

(2) The objectives of these Regulations are:

- (a) the procurement by the Buyer Office of new generation capacity, and/or Ancillary Services from IPPs;
- (b) the regulation of entry by the Buyer and the IPP into the Agreement;
- (c) the facilitation, the fair treatment of and non-discrimination between IPP generation and Eskom generation;

- (d) to ensure the financial viability of the sector and to attract investments by IPPs;
- (e) to facilitate the full recovery by the Buyer of all costs incurred by it under or in connection with the 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;
- (f) establishment of guidelines which are to be applied in the undertaking of an IPP Bid Programme and the procurement of an IPP for purposes of NewGen;
- (g) framework of approval by the Regulator of the Agreement and the Reimbursement Costs;
- (h) framework of approval by the Department of the IPP Bid Programme, the procurement process and the relevant agreements to be concluded;
- (i) framework of approval by National Treasury in terms of the PFMA; and
- (j) matters incidental to any of the above.

Buyer Reimbursement

(3) The following costs of the Buyer shall form part of the Reimbursement Costs which the Buyer will be entitled to recover as part of the tariff:

- (a) The reasonable costs of its involvement where required by the Buyer Office in any new generation capacity;
- (b) All reasonable costs incurred by Eskom (to the extent not taken into account in either sub-regulation (a)) in connection with the negotiation of any

Agreement, not concluded by it or if concluded by it which does not come into effect in accordance with its terms and conditions, shall be fully recoverable by the Buyer; and

- (c) Notwithstanding sub-regulation (b) Eskom may motivate to the Regulator for reimbursement of costs incurred by them in connection with new generation capacity projects not covered in sub-regulation (b).

Procurement mobilisation

(4) Having regard to the requirements for new generation capacity in the Integrated Resource Plan (as to size, technology, timing to commencement of commercial supply and choice of primary energy resources for fuel supply), the Buyer Office shall, in consultation with the Department, undertake a feasibility study to determine whether procurement of the NewGen should be undertaken by Eskom as part of its services as the national electricity producer, another utility provider should procure the required NewGen or an IPP should do so with the identification of the Buyer thereof. The following will form part of the considerations and outcomes for the feasibility study:

- (a) the affordability of the proposed new generation capacity;
- (b) the proposed allocation of financial, technical and operational risk between Eskom and the IPP;
- (c) demonstration of the anticipated value for money to be achieved by the IPP, and;
- (d) the capacity of the Buyer Office in consultation with and on behalf of the Buyer to procure, implement, manage, enforce, monitor and report on the IPP.

(5) No procurement of any NewGen may proceed to the procurement phase without a feasibility study having been conducted,

(6) Should the assumptions and the findings of the feasibility study change during any change of the procurement but prior to the granting of the final approval, the Buyer Office

shall undertake an immediate revision of the changed assumptions and amend the feasibility study accordingly and:

- (a) provide the Department with details of the intended revision, including a statement regarding the purpose and impact of the intended revision, on the affordability, value for money and the risk transfer evaluation contained in the feasibility study; and
 - (b) ensure that the Department is provided with a revised feasibility study after which the Department may grant a revised approval in respect of the feasibility study.
- (7) Following the undertaking of the feasibility study, the Buyer Office shall then:
 - (a) Register each IPP Bid Programme identified above with the Department and may not proceed with any such IPP Bid Programme unless it is registered as aforesaid; provided that the Buyer Office may de-register any such programme following consultation with the Department;
 - (b) In relation to each registered IPP Bid Programme, appoint a person who is capable of managing and appropriately qualified to manage a competitive bid for the procurement of generation capacity from its commencement to financial close, as the Project Officer responsible for such registered IPP Bid Programme;
 - (c) Appoint persons with appropriate skills and experience (at a minimum, as to financial, technical, and legal matters) to assist and advise the Buyer Office in connection with each registered IPP Bid Programme; and
 - (d) Notify the Regulator of each registered IPP Bid Programme and of any changes to such register from time to time, with details of size, technology, timing to commencement of commercial supply and choice of primary energy resources for fuel supply of such IPP Bid Programme.
- (8) The Department shall:
 - (a) maintain a public register of all IPP Bid Programmes registered with it by the Buyer Office; and
 - (b) appoint a Project Steering Committee, to which the Project Leader shall report.

(9) Prior to the issuance of any procurement documentation, to any prospective bidders, approval shall be obtained from the Department of the procurement documentation including the draft Agreement and all other draft project agreements envisaged to be entered into with the IPP.

Procurement process under the IPP Bid Programme

(10) The procurement process for the IPP Bid Programme shall:

- (a) Be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective;
- (b) Be conducted in accordance with (and the procurement documentation shall set forth) objective, clear, transparent and non-discriminatory criteria which may relate to the safety, reliability and security of the interconnected power system, land use and sitting, the protection of the environment, energy efficiency, the nature and availability of primary energy resources, and any other criteria set forth in the Integrated Resource Plan;
- (c) Include a preference for the advancement of Black people in accordance with national government policy; and
- (d) After the evaluation of the bids, but prior to appointing the preferred bidder, the Buyer Office must submit a report for approval by the Department, demonstrating how the criteria of affordability, value for money and the substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the Department.

Concluding the project agreement

(11) After the procurement procedure has been concluded but before the accounting officer or accounting authority of the Department concludes the requisite agreements and prior to the entry by the Buyer of the agreement, approval must be obtained from the Department and National Treasury in terms of the PFMA –

- (a) that the project agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation (4) or as revised in terms of regulation (5);
- (b) for the management plan that explain the capacity of the Buyer Office and the Buyer, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on IPP project; and
- (c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer's or accounting authority, the Buyer's representative and the proposed IPP in relation to matters of their respective competence and capacity to enter into the project agreement.

(12) In addition to the approval to be given by the Department as set out in regulation (11), the Buyer shall in accordance with these Regulations obtain the prior approval from the Regulator to enter into an Agreement with the IPP Bid programme.

(13) Notwithstanding the approval by the Regulator of any Agreement, the Buyer may elect not to conclude such Agreement, provided that nothing herein shall be construed so as to exempt from civil claims (if any) arising under applicable law for any losses that may be incurred by any person as a result of such election.

System Operator

(14) The System Operator:

- (a) Subject to the Grid Code and the conclusion of the necessary transmission agreements, shall provide access to and use of the national transmission system to all licensed IPPs;
- (b) Shall not discriminate between IPP generation and Eskom; and
- (c) Subject to technical constraints, shall provide Central Dispatch of all IPP generation facilities connected directly or indirectly to the national transmission system in accordance with the guidelines for Central Dispatch published by the Regulator from time to time.

(15) The Buyer shall be authorised, upon the coming into effect of the Agreement approved by the Regulator as provided herein, to fully recover from its allowable revenues, the Agreement cost incurred by the Buyer from time to time under such Agreement plus a reasonable return which shall compensate the Buyer for the risks assumed by the Buyer under such Agreement.

Cost Recovery Rules

(16) The Regulator shall prepare and pass rules, not inconsistent with these Regulations, which shall clearly and transparently set forth:

- (a) The factors that all be considered in assessing the affordability of the proposed IPP, the proposed allocation of financial, technical and operational risk between the Buyer and the IPP, demonstration of the anticipated value for money to be achieved by the IPP; and the capacity of the Buyer to procure, implement, manage, enforce, monitor and report on the IPP;
- (b) The process to be followed by the Buyer in seeking approval for any PPA negotiated with the preferred bidder under any IPP Bid Programme and hereby, authorisation for the recovery of the Agreement Cost thereunder;
- (c) How the Regulator will assess the Agreement in regard to the principle of efficient risk transfer in the Agreement and how these risks might be mitigated in relation to the off taker to the Agreement; and
- (d) Otherwise deal with all such matters as are necessary to give effect to these regulations.

Approval and Authorisation binding on Regulator

17. Any approval or authorisation by the Regulator given or made hereunder:

- (a) shall be binding on the Regulator and its successor; and
- (b) shall not be suspended, terminated or otherwise rendered ineffective by the Regulator or its successors save by order of High Court on the ground of non-compliance by the Buyer with a material condition (if any) of such approval or authorisation.

Exclusions

18. The provisions of regulation (15) shall only apply to:
- (a) any competitive bid programme for electricity supply by IPPs which has already commenced prior to effective date of these Regulations. Such programme shall be deemed to have commenced as aforesaid if an expression of interest, request for pre-qualification or request for proposals in respect thereof has been published;
 - (b) any PPA concluded at any time between the Buyer and an IPP incorporated or formed by a preferred bidder in relation to generation projects for which the preferred bidder has been selected under any competitive bid programme referred to in sub-regulation (a); and
 - (c) any PPA concluded by the Buyer prior to the effective date of these Regulations.

Electricity Regulations on New Generation Capacity

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

Comments can be hand-delivery, posted or e-mailed to the department not later than 02 March 2009.

Physical address: Department of Minerals and Energy

Mineralia Centre

234 Visagie Street (c/o Visagie & Andries)

Pretoria

(For attention Mr M Ngobeni, E413)

Postal Address: Department of Minerals and Energy

Private Bag X 59

Pretoria

0001

(For attention Mr M Ngobeni, E413 and Mr MM
Bantsijang E414)

1. E-mail address: matthews.bantsijang@dme.gov.za and
PM.Ngobeni@dme.gov.za
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