



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Your ref: Please provide
Our refs: CER 12.4 RH/NL (Thabametsi)
CER 54.1 RH/NL/MK (Khanyisa)
CER 34.18 RH/NL (KiPower)

15 September 2017

Dear Madam

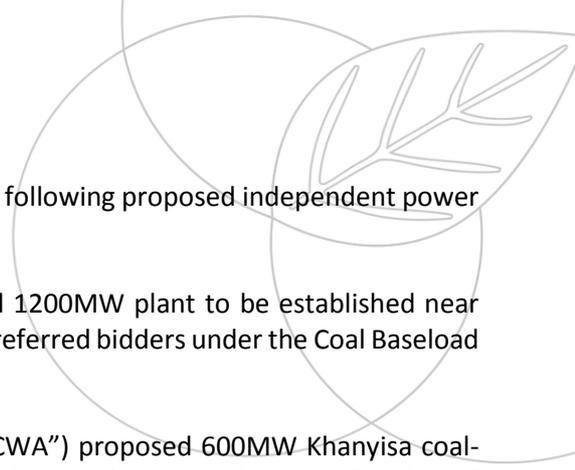
UPDATE ON THE PREFERRED BIDDERS UNDER THE FIRST BID WINDOW OF THE COAL BASELOAD IPP PROCUREMENT PROGRAMME AND THE PROPOSED KIPOWER COAL-FIRED POWER STATION

1. We address you on behalf of our clients, Earthlife Africa Johannesburg¹ (ELA) and groundWork (gW),² and refer to our previous correspondence dated 17 August 2015, 18 October 2016 and 6 April 2017, as well as your most recent response of 2 June 2017 (attached).

¹ Earthlife Africa Johannesburg is a non-profit organization that seeks to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect natural resources. See more information at: www.earthlife.org.za.

² groundWork is a non-profit environmental justice service and developmental organization working primarily in Southern Africa in the areas of Climate & Energy Justice, Coal, Environmental Health, Global Green and Healthy Hospitals, and Waste. See more information at www.groundwork.org.za.

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2. We write to provide you with an update and relevant information on the following proposed independent power producer (IPP) coal-fired power stations:
 - 2.1. Thabametsi Power Company (Pty) Ltd's ("Thabametsi") proposed 1200MW plant to be established near Lephalale, Limpopo. As you are aware, Thabametsi is one of two preferred bidders under the Coal Baseload IPP Procurement Programme (CBIPPPP);
 - 2.2. ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd's ("ACWA") proposed 600MW Khanyisa coal-fired power station ("Khanyisa"), to be based in eMalahleni, Mpumalanga. Khanyisa is the second preferred bidder under the CBIPPPP; and
 - 2.3. a 600MW coal-fired power station proposed by Kuyasa Mining (Pty) Ltd and KiPower (Pty) Ltd ("KiPower"), to be located near Delmas in Mpumalanga. Whilst this project has not bid under the CBIPPPP, it has thus far applied for, and been granted, various environmental authorisations (EAs), as will be explained in detail below. KiPower has indicated its intention to submit a bid under any subsequent bidding rounds of the CBIPPPP.
 3. Both Khanyisa and KiPower are to be located within the declared Highveld Priority Area (HPA) – declared as such because the ambient air quality is - or is anticipated to be in future – out of compliance with health-based national ambient air quality standards, and within the already water-stressed Olifants River Catchment.
 4. In your letter of 2 June 2017, you advised that the scheduled deadline for financial close for the preferred bidders had been extended to 3 November 2017. However, we understand from the Minister of Energy's 1 September 2017 statement that this deadline is now suspended, pending the finalisation of the updated Integrated Resource Plan for Electricity (IRP) and the Integrated Energy Plan (IEP). In the Minister's statement it was advised that, *inter alia*, "all future [IPP] programmes [are] to be put on hold until a proper review is done and to allow the IEP [Integrated Energy Plan] and IRP [Integrated Resource Plan for Electricity] to be concluded that will give us indication of the capacity we need."³ We understand that this also applies to the coal IPPs, and therefore it is assumed that: (1) commercial and financial close for Thabametsi and Khanyisa; and (2) the call for a subsequent bid window under the CBIPPPP, are likely to be postponed until, at least, the revised IRP update and IEP are promulgated. Kindly advise if this is incorrect?
 5. In any event, as you are, of course, aware, there are various requirements which need to be met before a preferred bidder (such as Thabametsi and Khanyisa) can reach commercial and financial close under the CBIPPPP; these include, *inter alia*: acquiring EAs and various other environmental licences (including for water use and atmospheric emissions), as well as a licence to generate electricity from the National Energy Regulator of South Africa (NERSA). Any appeals or reviews lodged against the granting of environmental consents must have been resolved or settled before financial close can be reached and proof of resolution must be provided at least one month before the scheduled financial and commercial close deadline (this being 3 October 2017 if the close deadline is 3 November 2017).⁴ Failure to do so may result in the termination of the preferred bidder appointment(s).⁵
 6. There are also requirements that need to be met by a prospective bidder under the CBIPPPP (such as KiPower), in order for a bid to be considered. Specifically, a bidder must have demonstrated that an appeal or review or anticipated appeal or review of a requisite environmental consent does not go to the heart of the relevant key environmental consents being contested, or does not affect the key activities required for the Project, and a bidder

³The Minister's statement can be accessed at <http://www.energy.gov.za/files/media/pr/2017/IPP-Media%20Statement-01September2017.pdf>

⁴ Clause 5.5.5 of Volume 2, Part 5 'Preferred Bidder Documents'.

⁵ Clauses 5.5 of Volume 2, Part 5 'Preferred Bidder Documents'; Clause 14, 30 and 31 of Volume 1 Part A of the General Requirements, Rules and Provisions; and Clause 4.1.3 of Volume 2 Part 1 of the Legal Qualification Criteria of the CBIPPPP Request for Proposals (RFP).

must demonstrate that the dispute is capable of timeous resolution'.⁶ At the time of submitting a bid, a bidder must provide details of any pending appeals or reviews.⁷

7. In this regard, we point out the following relevant information, in relation to each of the abovementioned IPPs.
8. In relation to Thabametsi:
 - 8.1. In our letter dated 6 April 2017, we advised that, on 8 March 2017, the North Gauteng High Court ruled that a full climate change impact assessment (CCIA) was a necessary part of an environmental impact assessment (EIA) for a coal-fired power station, and had to have been conducted before an EA could have been issued to Thabametsi. This is especially so since coal-fired power stations contribute significantly to climate change, posing a substantial climate risk.
 - 8.2. In terms of the court order, the Minister of Environmental Affairs must again – after considering Thabametsi's CCIA and comments thereon - make her appeal decision in respect of Thabametsi's EA. Until such time that the Minister makes her decision Thabametsi's appeal is suspended.
 - 8.3. Thabametsi's final climate change impact assessment was made available for public comment in June 2017, and comments were submitted on 31 July 2017 by ELA and by Greenpeace Africa – a copy of both of these comments (without annexures) is attached for your records and information.⁸ Thabametsi's environmental consultants responded to these comments on 18 August 2017.⁹
 - 8.4. Thabametsi's CCIA revealed that the power station – due to the circulating fluidised bed (CFB) technology that it proposes to use – will have extremely high greenhouse gas (GHG) emissions and will be **one of the highest GHG emitters in the country** (only slightly better than Eskom's oldest and dirtiest stations). The assessment also made it clear that **water availability poses a high risk to the feasibility of the power station** over its anticipated lifespan and that there are **no substantive measures that can be implemented to mitigate the plant's GHG emissions adequately**.
 - 8.5. We await the Minister's decision. If the Minister allows Thabametsi to go ahead, despite the evidence of the power station's significant climate change impacts, ELA will have no option but to consider a further legal challenge of this decision.
 - 8.6. Thabametsi has yet to apply for its atmospheric emission licence (AEL).
 - 8.7. The plant's water use licence (WUL) has not yet been issued: we, on behalf of ELA, objected to the WUL application in January 2017.
 - 8.8. ELA objected to the Thabametsi's NERSA licence application in December 2016, and a public hearing on the application is awaited.
9. In relation to Khanyisa:
 - 9.1. As we have previously indicated, Khanyisa's EA was granted without adequate consideration of the climate change impacts of the proposed power station. Therefore, following the Thabametsi judgment (which

⁶ s4.1.3 of the Legal Qualification Criteria of the Bid submission requirements.

⁷ Ibid.

⁸ The final climate change impact assessment summary report can be accessed at <https://cer.org.za/wp-content/uploads/2016/07/Thabametsi-Final-Summary-Report-Jun17.pdf> and the additional specialist reports are on the website at <https://cer.org.za/programmes/pollution-climate-change/key-correspondence> and can also be made available by the Centre for Environmental Rights on request.

⁹ https://cer.org.za/wp-content/uploads/2016/07/Thabametsi-Comments-Responses-Report_Final-Aug-2017.pdf

confirmed that a CCIA is required as part of the EIA for a coal-fired power station), on behalf of gW, we instituted review proceedings in the North Gauteng High Court to challenge Khanyisa's EA.¹⁰

9.2. ACWA proposes to use the same CFB technology as Thabametsi – which results in high emissions of the GHG nitrous oxide (N₂O). As a result, we foresee similarly high GHG emissions for this plant. Furthermore, as mentioned above, the plant will be based in the water-stressed Olifants River Catchment, which is predicted to be increasingly negatively impacted as climate change progresses. ACWA has not conducted a climate change impact assessment for Khanyisa; nor have they indicated an intention to do so.

9.3. gW objected to Khanyisa's WUL application earlier this year.

9.4. The validity of Khanyisa's provisional AEL is disputed by gW – a decision on this is awaited from the Limpopo Department of Economic Development and Tourism.

9.5. gW objected to Khanyisa's NERSA licence application in February 2017, and a public hearing on the application is awaited.

10. In relation to KiPower:

10.1. We, on behalf of gW, have instituted further court proceedings against the proposed KiPower coal-fired power station.¹¹

10.2. The basis for this case – similarly to Thabametsi and Khanyisa – is KiPower's failure to conduct a CCIA and the Minister's clearly-incorrect decision on gW's appeal of KiPower's EA, in which she stated that "... *there is currently no legal basis to inform such [climate change impact] assessments within the EIA framework*".

10.3. gW has instituted an appeal to the Water Tribunal against KiPower's WUL on the basis that the impact of KiPower's proposed operations poses unacceptable risk to the water quality of the Wilge and Olifants River catchments.¹² For a modest and unnecessary contribution to the grid, the project would release into these rivers potentially large quantities of toxic groundwater which would irreversibly harm the communities and ecosystems depending on the catchments.

10.4. KiPower has not yet been issued with an AEL.

11. The details of all the pending litigation pertaining to all three projects as well as court papers are accessible from our website,¹³ and can be provided on request.

12. As is clear from what has been set out above, neither Thabametsi nor Khanyisa meet (nor are they likely by 3 November to meet) the legal qualification criteria for commercial and financial close.

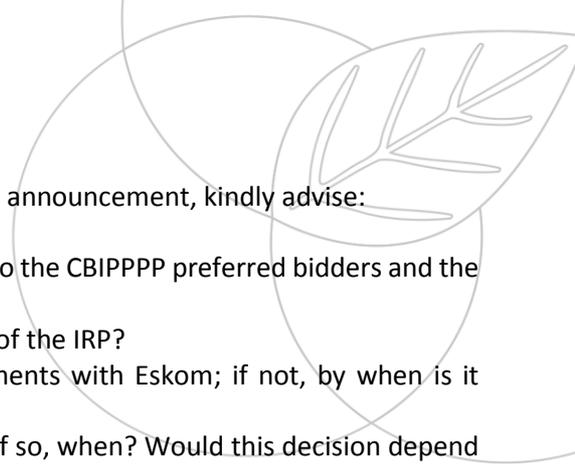
13. KiPower - with pending disputes of its EA and WUL which go to the heart of these environmental consents – would and should not qualify to be appointed as a preferred bidder, should it submit a bid under any subsequent bidding window of the CBIPPPP.

¹⁰ The founding papers are available at: <https://cer.org.za/programmes/pollution-climate-change/litigation/groundwork-acwa-power>.

¹¹ The court papers can be accessed here https://cer.org.za/programmes/pollution-climate-change/litigation/groundwork_kipower.

¹² See https://cer.org.za/programmes/pollution-climate-change/litigation/groundwork_kipower/water-use-licence.

¹³ <https://cer.org.za/programmes/pollution-climate-change/litigation>.

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14. In the circumstances, and flowing from the Minister's 1 September 2017 announcement, kindly advise:
- 14.1. What steps the Department of Energy plans to take in relation to the CBIPPPP preferred bidders and the financial close deadline. Has this deadline been extended?
 - 14.2. Are Thabametsi and Khanyisa on hold pending the finalisation of the IRP?
 - 14.3. Have Thabametsi or Khanyisa signed power purchase agreements with Eskom; if not, by when is it envisaged that these agreements would be signed?
 - 14.4. Will there be a further bidding round under the CBIPPPP; and if so, when? Would this decision depend on the IRP?
15. We again emphasise that the Thabametsi judgment makes clear that the law requires that climate change impacts for all proposed coal baseload IPPs must be comprehensively assessed and considered by governments in considering the EIAs for such projects. We are therefore instructed to require that this be regarded as a prerequisite for all such projects, including those that will bid under all future CBIPPPP bidding processes.
16. We await your response as soon as possible. Should you have any queries in relation to our letter, please contact the writer.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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