



Centre for Environmental Rights

Advancing Environmental Rights in South Africa



Ms Karen Breytenbach

Head of IPP Office

IPP Office of the Department of Energy

By email: karen.breytenbach@ipp-projects.co.za

Copy to:

Honourable Minister Jeff Radebe

Minister of Energy

By email: kgomotso.maditla@energy.gov.za

By email: phillip.musekwa@energy.gov.za

Our refs: CER 12.4 RH/NL (Thabametsi)
CER 54.1 RH/MK (Khanyisa)

16 November 2018

Dear Ms Breytenbach

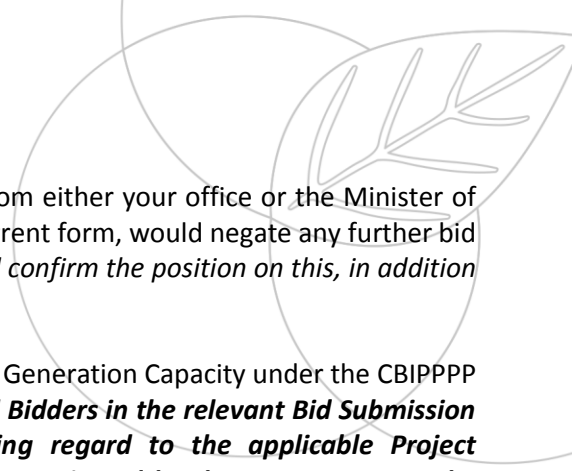
UPDATE ON THE PREFERRED BIDDERS UNDER THE FIRST BID WINDOW OF THE COAL BASELOAD IPP PROCUREMENT PROGRAMME

1. We address you on behalf of our clients, Earthlife Africa (ELA)¹ and groundWork (gW),² in respect of our previous correspondence pertaining to the Thabametsi and Khanyisa coal-fired power stations (the “coal IPPs”), the two preferred bidders under the Coal Baseload Independent Power Producer (IPP) Procurement Programme (CBIPPPP).
2. The IPP office, in its 11 October 2017 correspondence, indicated that, in light of the then Minister of Energy’s 1 September 2017 announcement advising that all future IPP programmes would be put on hold pending the finalisation of the Integrated Resource Plan for Electricity (IRP), “*it is likely that the preferred bidders ... will be afforded extensions in respect of Commercial Close and Financial Close*”.
3. As you are aware, a draft IRP update was published by the Department of Energy (DoE) for comment in August 2018 (“the draft IRP 2018”); which comment period closed on 26 October 2018.
4. In our 8 June 2018 correspondence (attached), we requested confirmation on whether: it is still the case that the coal IPPs’ commercial and financial close deadline had been put on hold pending the final IRP; or whether a commercial close deadline for the coal IPPs had since been determined and what that deadline is; and whether there are expected to be any further bid windows under the CBIPPPP. On 14 July 2018, you advised that, as a policy matter, our correspondence had been referred to the office of the Minister of Energy.

¹ Earthlife Africa 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.

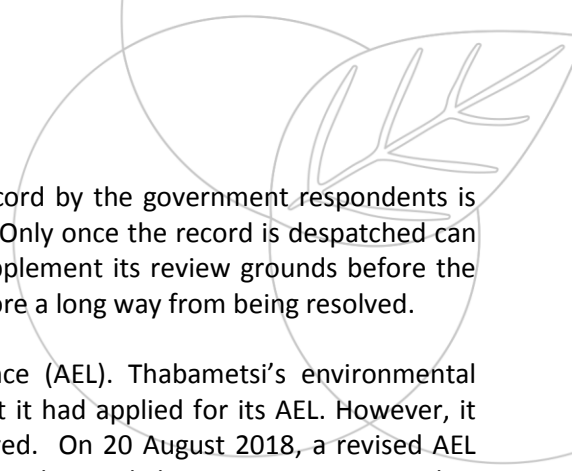
Cape Town: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa
Johannesburg: 9th Floor, Southpoint CNR, 87 De Korte Street, Braamfontein, 2001, South Africa
Tel 021 447 1647 (Cape Town) | Tel 010 442 6830 (Johannesburg)
Fax 086 730 9098
www.cer.org.za

- 
5. To date, we have not received the requested clarity or confirmation from either your office or the Minister of Energy. Although we presume that the draft IRP 2018, if finalised its current form, would negate any further bid windows of the CBIPPPP, we would appreciate it if you could *clarify and confirm the position on this, in addition to the commercial and financial close deadline for the coal IPPs – if any.*
 6. We note that the Request for Qualification and Proposals (RFP) for New Generation Capacity under the CBIPPPP states that ***“the timing of Commercial Close in respect of the Preferred Bidders in the relevant Bid Submission Phase shall be subject to the Department’s sole discretion (having regard to the applicable Project Development Plans and any other relevant factors), and shall be communicated by the Department to the Preferred Bidders at an appropriate time”*** (emphasis added).³
 7. In this regard, on 7 August 2018, we wrote to the Minister of Energy (letter attached), asking whether the DoE had communicated the timing for commercial close to the preferred bidders (in terms of 6.1.6, Part A ‘General Requirements’, RFP, referred to above), and, if so, what the timing and plans were, and how this coincided with any plans to sign the power purchase agreements (PPAs) for the coal IPPs. We also have not yet received a response to that correspondence.
 8. In respect of the Khanyisa project, proposed by ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd (“ACWA”), ACWA indicated to the Minister of Water and Sanitation in a letter of 7 November 2018 (attached), that the IPP office had indicated to ACWA on 28 October 2018, that the IPP office *“wished to extend...the bid validity from 3 November 2018 to 3 May 2019”*, and that signing of the project was targeted for the first quarter of 2019. *Kindly confirm if this statement is correct, and if a formal commercial and financial close deadline of 3 May 2019 has indeed been set for Khanyisa, and if the same deadline applies to the Thabametsi project.*
 9. In light of the above, kindly also advise what the *intended and outstanding next steps in relation to financial and commercial close for the coal IPPs are; including in relation to the signing of the PPAs for both Thabametsi and Khanyisa.*
 10. We confirm that neither of the coal IPPs is, in fact, able to reach commercial and financial close at present, or for the foreseeable future, given that there are various licences and required authorisations outstanding and/or being challenged, and there are High Court review proceedings against key environmental authorisations pending for both projects. As you are aware, any appeals or reviews lodged against the granting of environmental consents must have been resolved and proof of resolution must be provided **at least one month** before the scheduled financial and commercial close deadline. Failure to do so may result in the termination of the preferred bidder appointment(s).⁴
 11. In light of the aforementioned condition, we hereby provide you with an update to the preferred bidders’ status, which illustrates that they are far from resolving their disputes and/or obtaining their licences to reach commercial and financial close. We are able to provide more information in relation to any of these disputes, should you so require.
 12. In relation to Thabametsi:
 - 12.1. The late Minister’s decision of January 2018 to again uphold the environmental authorisation (EA) for the project (despite its significant greenhouse gas emissions) has resulted in a review being instituted against her decision at the North Gauteng High Court in March 2018 under case number 21559/18.⁵ An

³ P56 – 27, 6.1.6, Part A ‘General Requirements, Rules and Provisions, RFP.

⁴ 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).

⁵ The founding papers are available at: <https://cer.org.za/wp-content/uploads/2018/03/Notice-of-Motion-signed.pdf> and <https://cer.org.za/wp-content/uploads/2018/03/Signed-Founding-Affidavit-PL-26-3-18.pdf>



application compelling the despatching of the very-delayed record by the government respondents is currently set down on the unopposed roll for 6 February 2019. Only once the record is despatched can the matter proceed. Our client then has an opportunity to supplement its review grounds before the other parties respond to the application. This litigation is therefore a long way from being resolved.

- 12.2. Thabametsi has not obtained an atmospheric emission licence (AEL). Thabametsi's environmental assessment practitioner notified the public on 2 May 2018 that it had applied for its AEL. However, it failed to provide the entire AEL application, as is legally required. On 20 August 2018, a revised AEL application was published for comment, and on behalf of ELA, we submitted objections on 20 September 2018. The application revealed that the Thabametsi project, once operational, would bring National Ambient Air Quality Standards for sulphur dioxide out of compliance in the area impacted by its operation. ELA will appeal an AEL, if it is granted.
 - 12.3. The project's water use licence (WUL) has also not yet been issued. We, on behalf of ELA, objected to the WUL application in January 2017, and objected to a revised WUL application in March 2018. ELA will appeal a WUL at the Water Tribunal, if it is granted.
 - 12.4. Thabametsi's NERSA licence has not been issued. ELA objected to the Thabametsi's NERSA licence application in December 2016, and further supplementary written objections were made in March 2018, with oral submissions being presented to NERSA at a public hearing on 27 March 2018. We have questioned the validity of the hearing process in correspondence with NERSA – to which we have not received any response. A NERSA licence decision could be challenged in court.
13. In relation to Khanyisa:
- 13.1. As indicated in our previous correspondence, High Court review proceedings to review the EA (which was issued without a comprehensive climate change impact assessment as required in law), are still pending in the North Gauteng High Court.⁶ An application compelling the significantly-overdue records pertaining to the Minister's decision is currently set down for hearing on the unopposed roll for 6 February 2019. This litigation is far from being resolved.
 - 13.2. The validity of Khanyisa's provisional AEL is disputed by gW, and an appeal was lodged and supplemented timeously. The matter is currently before the appeal authority of the Nkangala District Municipality (NDM). Should a jurisdictional dispute be resolved in gW's favour, the opposing parties are required to submit their opposition to the appeal. If the appeal authority determines that it does not have jurisdiction, the dispute may be referred to court. In other words, the AEL challenge is not likely to be resolved soon.
 - 13.3. Khanyisa's WUL was granted without adequate public participation and without notification to interested and affected parties on 7 December 2017. A notice of appeal was lodged within the legislated timeframe on 8 August 2018, and accordingly (in terms of the National Water Act, 1998) the WUL is suspended. On 6 September 2018, ACWA petitioned the Minister of Water Affairs to uplift the suspension and we, on behalf of gW, opposed the upliftment application on 12 October 2018. Neither the WUL suspension nor the WUL appeal is likely to be resolved swiftly. Furthermore, both decisions can, and are likely to be, challenged on review in the High Court.
 - 13.4. Khanyisa does not have a NERSA licence. gW objected to the Khanyisa's NERSA licence application in February and March 2017. Further supplementary written objections were submitted in March 2018, with oral representations made to NERSA at a public hearing on 27 March 2018. We have questioned the validity of the hearing process in correspondence with NERSA – to which we have not received any response. A NERSA licence decision could be challenged in court.

⁶ The founding papers are available at: <https://cer.org.za/programmes/pollution-climate-change/litigation/groundwork-acwa-power>.

14. In addition to the above legal obstacles prohibiting the preferred bidders from reaching commercial and financial close, we note that, in response to a Parliamentary question regarding the IPPs, of June 2018, the Minister of Public Enterprises advised that:

“Eskom has not approved the signing of the coal independent power producers (IPPs) agreements. No approval nor instruction has been given by the Department of Public Enterprises to Eskom to sign such agreements. Eskom understands that all future IPP programmes are on hold until such time as the Integrated Resource Plan (IRP) has been concluded. Eskom provided these IPPs with budget quotations for connection to the grid as is required by the Eskom transmission license (sic), but has made no other allowances for these IPPs in the Eskom production plans and price applications.”

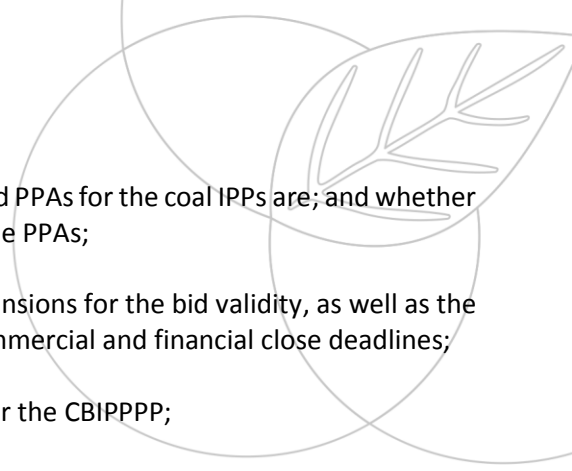
15. Moreover, we note that Eskom has not agreed to sign the PPAs for the coal IPPs, as certain conditions have not been agreed. This was confirmed by Eskom to NERSA at the March 2018 hearings for the coal IPPs, and in a letter to us on 7 September 2018.⁷ In the aforementioned letter, Eskom further advised that it has not received and is still awaiting a “value for money” assessment, which is required by regulation 9 of the Electricity Regulations for New Generation Capacity under the Electricity Regulation Act, 2006 (ERA), before a decision could be made to sign the PPAs.
16. We have made submissions to the DoE and to Eskom highlighting that the coal IPPs do not meet the “value for money” requirement and the other prescribed steps and requirements set out in the ERA and the Public Finance Management Act, 1999 (PFMA), and we are in the process of making similar submissions to the National Treasury. We have already referred you to the research by the University of Cape Town’s Energy Research Centre (ERC), which shows that the two preferred bidders would add an additional R20 billion.⁸ The Minister of Energy has recently been quoted as saying that this figure is even higher – R23 billion.⁹ The ERC report also finds that “not only are the coal IPPs not required to meet demand, and not only do they raise costs, and increase emissions, but they also result in increasing pressure on Eskom. Building new coal plants in a situation of low demand means reducing the output of Eskom’s fleet, potentially accelerating the ‘utility death spiral’ in which Eskom already finds itself and putting the electricity supply industry – and thus the South African economy – at risk”.¹⁰ The draft IRP 2018 also confirms that new coal-fired power does not form part of a least-cost electricity plan, and a final IRP that includes the coal IPPs is likely to be met with legal challenge on this basis and on the grounds of being in conflict with the Constitution of the Republic of South Africa, 1996.
17. In light of the aforementioned, we reiterate that the preferred bidders are far from being in a position to conclude the PPAs or reach commercial and financial close. In any event, we request confirmation on the status of these processes as soon as possible.
18. In the interim and in light of the issues raised above, we look forward to receiving your response to the following questions:
- 18.1. whether new commercial and financial close deadlines for the coal IPPs have been set since November 2017, and if so, what these deadlines were/are;
- 18.2. whether the extension of the bid validity from 3 November 2018 to 3 May 2019, as stated by ACWA (as per paragraph 8 above) is correct, and whether the extension coincides and/or is synonymous with a commercial and/or financial close deadline;

⁷ <https://cer.org.za/wp-content/uploads/2018/09/Coal-baseload-Independent-Procedures-Status-of-the-Power-Purchase-Agre....pdf>

⁸ ERC Coal IPP Report, page 4. <https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf>

⁹ http://www.miningweekly.com/article/radebe-outlines-additional-cost-of-coal-ipp-to-consumers-2018-10-01/rep_id:3650

¹⁰ ERC Coal IPP Report, p.8.

- 
- 18.3. what the current status of the “value for money” assessments and PPAs for the coal IPPs are; and whether any deadlines or plans have been made in regard to signing of the PPAs;
 - 18.4. what the requirements are for considering and granting the extensions for the bid validity, as well as the requirements for considering and granting extensions of the commercial and financial close deadlines;
 - 18.5. whether there are expected to be any further bid windows under the CBIPPPP;
 - 18.6. whether the two coal IPPs are on hold pending the finalisation of the IRP; and
 - 18.7. whether the two coal IPPs have provided any indication that all licences have been granted, and/or that all litigation and disputes have or will be resolved by the commercial and financial close deadlines.
19. We thank you for your assistance in this matter and look forward to receiving your response as soon as possible.
 20. Please do not hesitate to contact us, should you have any queries or require more information.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



Michelle Koyama

Attorney

Direct email: mkoyama@cer.org.za