



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Our reference: NL/RH

16 November 2018

Dear Sirs

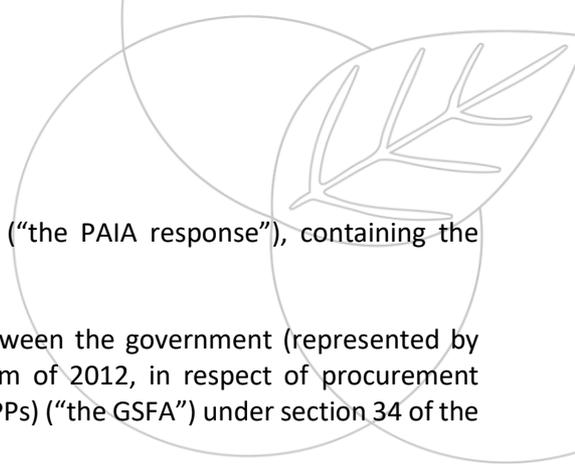
**CENTRE FOR ENVIRONMENTAL RIGHTS / NATIONAL TREASURY: APPLICATION FOR ACCESS TO INFORMATION IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000 - CER-2018-TRE-0001**

1. We refer to our PAIA Request of 9 October 2018, wherein we sought access to the following:

*"In relation to the proposed and appointed preferred bidders under the first bid window of the Coal Baseload Independent Power Producers Procurement Programme – the Thabametsi power station project proposed by Thabametsi Power Company (Pty) Ltd and the Khanyisa power station project proposed by ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd ("the coal IPPs"):*

- 1. Government Support Framework Agreement (GSFA) with Eskom as the buyer of electricity produced by IPPs, entered into by Ministers of Finance, Energy and Public Enterprises in November 2012 and any schedules thereto, referred to in slide 19 of the IPP presentation given by the Minister of Energy on 6 March 2018;*
- 2. all draft or signed schedules to the GSFA, relating to the coal IPPs;*
- 3. all subsequent GSFAs and schedules thereto;*
- 4. all records of existing or proposed guarantees by Treasury for the coal IPPs; and*
- 5. the 2017 and 2018 (or in any event the latest 2) reports in terms of s218(3) of the Constitution on the guarantees granted by government."*

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2. On 7 November 2018, we received a partial response from Treasury (“the PAIA response”), containing the following:
    - 2.1. a copy of the Government Support Framework Agreement between the government (represented by Ministers of Finance, Energy and Public Enterprises) and Eskom of 2012, in respect of procurement programmes for power from all independent power producers (IPPs) (“the GSFA”) under section 34 of the Electricity Regulation Act, 2006 (ERA);
    - 2.2. an April 2017 memo from the Minister of Energy to the then Minister of Finance Gigaba, requesting the concurrence of the Minister of Finance for the coal IPPs bid window 1 in terms of sections 66(1), 66(2) and 70 of the Public Finance Management Act, 1999 (PFMA) (“the request for concurrence”);
    - 2.3. a document addressed to the Minister of Finance titled Request for approval and concurrence and request for approval and signature of Schedule G of the GSFA, dated 14 February 2017 and signed by the then Minister of Energy Joemat-Pettersson; and
    - 2.4. a link to the 2018 Treasury Budget Review, and statement (in the PAIA response) that the contingent liabilities are reflected on table 11 of the Budget Review.
  3. We write to obtain clarity on various aspects of the PAIA response from National Treasury.
  4. We note the following, from the information received, and highlight the following, which remains unclear and unconfirmed:
    - 4.1. In the April 2017 request for concurrence, the Minister of Finance was requested to provide concurrence for the CBIPPP bid window 1 coal IPPs in terms of sections 66(1), 66(2), and 70(1) of the PFMA for **indemnities of R25.2 billion to the coal IPPs (with “maximum exposure to R225.2 billion”** (emphasis added)) and for **the Minister’s approval and signature of Schedule G to the GSFA.**
    - 4.2. This April 2017 request for concurrence from the Minister of Energy is signed by various officials at Treasury indicating that the concurrence is “recommended”. The then Minister of Finance, however, signed it some months later, in July 2017, and without indicating whether the concurrence had been approved or not. In a handwritten note next to the Minister’s signature, he explains that an urgent meeting needed to take place to resolve the concerns *“that have recently been raised by Eskom and both the Ministers of Energy and Public Enterprises regarding this window of IPPs and the financial challenges they raise for Eskom’s balance sheet”*. The PAIA response provides no further details of this meeting. **We are unaware as to whether this meeting took place or whether a final decision to grant or refuse the concurrence has been taken by the Minister of Finance – no information to this effect was provided in the PAIA response. This should be clarified and the Minister’s final approval of the concurrence – if provided – must be made available.**
    - 4.3. Schedule G to the GSFA apparently deals with the two coal IPP projects and would incorporate them in the GSFA, if /when Schedule G is concluded. **It is also not clear from the PAIA response whether Schedule G has in fact been signed and agreed to by all the requisite parties.**
    - 4.4. A letter of 14 February 2017 from the Minister of Energy to the Minister of Finance records that *“the Government of the Republic has agreed to provide financial support in respect of Eskom’s payment obligations, through an Implementation Agreement to be concluded by the Department of Energy and the Seller [the coal IPPs]. One of the requirements that must be finalised prior to Financial Close is the approval and concurrence as contemplated in sections 66(1), 66(2)(a) and 70(1)(a) of the ... PFMA for*

*purposes of ensuring the validity of the Implementation Agreements”* (emphasis added). **It is not clear whether the Implementation Agreement has been concluded.**

- 4.5. There is a column in the table of contingent liabilities for IPPs in the 2018 Budget Review. But it is not clear if this includes the coal IPPs – or pertains only to existing and already committed liabilities for the renewable IPPs. **It is also not clear whether this particular item of the PAIA response is intended to be the report in terms of s218(3) of the Constitution on the guarantees granted by government – as requested in item 5 of the PAIA request.**
- 4.6. The PAIA response states that the part of the PAIA request that “*relates to the guarantee*” has been transferred to the information officer of DoE in line with section 20 of PAIA. **It is not clear however, which part of the PAIA request – in particular, which item number of the request - is being referred to. Nor is it clear whether this means that there is an existing guarantee.**
5. In light of the various uncertainties arising from the PAIA response, we request that you **clarify and confirm**:
  - 5.1. which exact items of the PAIA request have been transferred to DoE and when (i.e. the date) they were transferred, to enable us to determine the deadline for DoE’s response;
  - 5.2. whether the necessary concurrence of the Minister of Finance in terms of the PFMA has been granted (as indicated, although the April 2017 request for concurrence is signed, the Minister of Finance did not indicate whether he had approved it, and instead requested an urgent meeting);
  - 5.3. whether schedule G to the GSFA has been signed by the Minister of Finance – and kindly provide a copy of Schedule G, whether signed or unsigned as this falls within item 1 of our request for the GSFA and any schedules thereto;
  - 5.4. whether the Implementation Agreement has been signed – and kindly provide us with a copy whether signed or unsigned; and
  - 5.5. whether the table 11 of the 2018 Budget Review is the report in terms of s218(3) of the Constitution on the guarantees granted by government – as requested in item 5 of the PAIA request.
6. If you are not the correct contact people for these queries, please ensure that this letter is forwarded to the relevant officials at Treasury who would be able to address this, alternatively provide us with their contact details.
7. We await your response as soon as possible and by no later than **7 December 2018**.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per: 

**Nicole Loser**

**Attorney**

**Centre for Environmental Rights**

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