



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Your refs: CER 12.4 RH/NL (Thabametsi)
CER 54.1 RH/MK (Khanyisa)
12 November 2019

URGENT

Dear Adv Coetzee

UPDATE ON THE PREFERRED BIDDERS UNDER THE FIRST BID WINDOW OF THE COAL BASELOAD IPP PROCUREMENT PROGRAMME (THE PROPOSED THABAMETSI & KHANYISA COAL-FIRED POWER STATION) & STATUS OF ANY FUTURE BID WINDOWS

1. We refer to your 3 May 2019 correspondence, confirming that the deadlines for commercial and financial close for Thabametsi and Khanyisa were 2 and 3 November 2019 respectively. Accordingly, the deadlines for commercial and financial close for both projects have now expired.
2. Kindly advise whether the above deadlines have been extended; and if so, provide us with the new dates.
3. The aforementioned correspondence further advised that our queries related to the further rounds of the coal IPP bids would be addressed by the promulgation of the Integrated Resource Plan for Electricity ("the IRP"). As you will be aware, the IRP was published on 18 October 2019, and makes provision for 750 MW of coal-based electricity in 2023, and another 750 MW in 2027.
4. We note that the IRP states that, "[r]egarding the financing of the Pulverised Fuel projects, there is a deadline for the projects to reach financial close and commissioning. The Department will be guided by progress as the deadline approaches". In relation to the status of existing determinations, the comments section of the IRP notes, in

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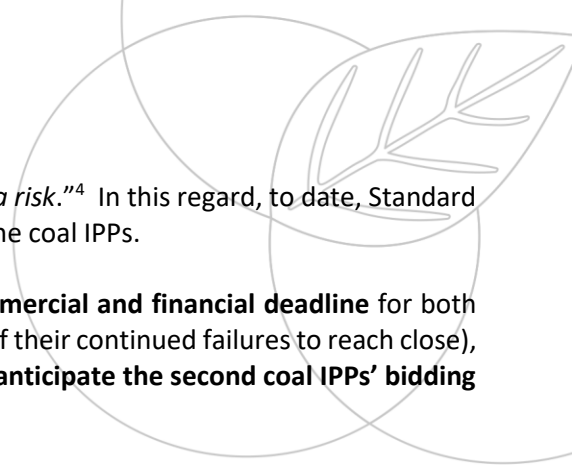
reference to the Ministerial Determination for new coal capacity of 2012, that “*Ministerial Determinations issued under the IRP2010 will be reviewed in consultation with NERSA, once the updated IRP is approved*”.

5. The IRP, however, also notes the condition that, in relation to the 900 MW of “already-procured” coal IPPs, “***not to pre-empt the outcome of the court challenges, the projects are included provided they comply with prevailing environmental legislation.***”¹ In other words, the IRP specifically recognises that, in order for the coal IPPs to proceed, all pending legal challenges are required to be resolved in the coal IPPs’ favour.
6. We and our clients strongly dispute that the coal IPPs are “already procured”.² Again, we confirm that the coal IPPs are still, in fact, unable to reach commercial and financial close; either at present, or for the foreseeable future, due to numerous licences and required authorisations still being outstanding and/or being challenged through internal appeals and/or in court. In addition, we are not aware of alternative funding having been obtained post the private banks (and DBSA, as far as we understand), refusing to finance them.
7. As you are aware, failure to provide proof of resolution of any appeals or reviews lodged against the granting of environmental consents must be submitted at least one month before the scheduled financial and commercial close deadline, and failure to do so may result in the termination of the preferred bidder appointment(s).³
8. With regard to the Khanyisa IPP, we advise that the Department of Environment, Forestry and Fisheries (DEFF) confirmed on 22 September 2019 that, absent ACWA’s confirmation that it has fulfilled the relevant conditions in the EA, **Khanyisa’s environmental authorisation (EA) expired on 31 October 2018**. A copy of the correspondence from the DEFF confirming Khanyisa’s EA expiry is attached as **Annexure 1**. Despite this, and although it apparently disputes that its EA has lapsed, ACWA has, to date, not provided such written proof to us. As you are aware, without a valid EA, Khanyisa cannot reach commercial and financial close. It would have to commence an EA application process afresh. The EA also impacts on other authorisations; for instance, it is the EA which authorises certain waste and water containments to be built, and the EA also requires that a water use licence (WUL) be obtained and gives approval for the ash disposal designs. ACWA itself concedes that its atmospheric emission licence (AEL) is reliant on the existence of a valid EA. In other words, EA expiry and the content of the new EA application which would then be required would impact on other licences.
9. Currently, the position regarding the litigation and internal appeals for the IPPs are as follows:
 - 9.1. Khanyisa’s WUL is subject to an appeal at the Water Tribunal; the Minister’s decision to uplift the WUL suspension is subject to review (coupled with an interdict) at the Pretoria High Court; a decision is yet to be made by the National Energy Regulator of South Africa (NERSA) regarding its electricity generation licence (which, if granted, is likely to be challenged); and its EA is still subject to judicial review at the Pretoria High Court and has likely expired (we also point out that ACWA has failed to file any answering papers in the review); and
 - 9.2. Thabametsi’s EA is also in the process of a judicial review at the Pretoria High Court; its AEL is subject to an internal appeal; and decisions have yet to be made regarding its WUL and electricity generation licence – both of which, if granted, are likely to be challenged.

¹ 2019 IRP, pg 61-62.

² See, for example, the submissions on the draft IRP, which set out, in detail, why this is not correct: https://cer.org.za/wp-content/uploads/2018/10/CER-IRP-2018-Comment-DoE_26-10-18.pdf

³ 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).

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10. The 2019 IRP also indicates that “the *funding for these projects is indeed a risk.*”⁴ In this regard, to date, Standard Bank,⁵ Nedbank,⁶ and First Rand⁷ have indicated that they will not fund the coal IPPs.
11. In light of the aforementioned, we await your **confirmation on the commercial and financial deadline** for both Khanyisa and Thabametsi as soon as possible (including the implications of their continued failures to reach close), and we continue to await your advice on **whether; and if so, when, you anticipate the second coal IPPs’ bidding round will be announced.**
12. Given the relevance of this information for a number of other legal processes, we request your urgent response, **by no later than 19 November 2019.**
13. Please let us know, should you have any queries.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



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⁴ 2019 IRP, pg 61-62.

⁵ https://sustainability.standardbank.com/documents/pdf/SBG_Coal_Fired_Power_Finance_Policy-FN-20190729.pdf.

⁶ <https://www.nedbank.co.za/content/dam/nedbank/site-assets/AboutUs/Information%20Hub/Integrated%20Report/2018/2018%20Sustainable%20Development%20Review.pdf>

⁷ <https://www.firststrand.co.za/media/society/risk/policy-on-thermal-coal-financing.pdf>