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**GOVERNMENT NOTICE**

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**DEPARTMENT OF ENERGY**

**No. R. 399**

**4 May 2011**

**Electricity Regulation Act No.4 of 2006**

**Electricity Regulations on New Generation Capacity**

I, Dipuo Peters, Minister of Energy, hereby under section 35(4) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006), make the regulations in the Schedule.

(c) ancillary services relating thereto,

individually or in any combination thereof and including an increase in the electricity generation capacity of existing generation facilities;

**“new generation capacity project”** means a project for the development of new generation capacity pursuant to a determination made by the Minister in terms of section 34 of the Act;

**“organ of state”** bears the meaning ascribed to it in section 239 of the Constitution;

**“Peaker Project”** means the new generation capacity project to establish generation facilities at Avon in the Kwazulu Natal Province and Dedisa in the Eastern Cape Province;

**“power purchase agreement”** or **“PPA”** means an agreement concluded between a generator and the buyer for the sale and purchase of new electricity generation capacity or electricity derived therefrom, or both;

**“procurer”** means the person designated by the Minister in terms of section 34 as being responsible for the preparation, management and implementation of the activities related to procurement of new generation capacity under an IPP procurement programme including the negotiation of the applicable power purchase agreements, which person may or may not be the buyer;

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

**“system operator”** means the person responsible for short-term reliability of the interconnected power system, which is in charge of controlling and operating the transmission power system and dispatching generation facilities (or balancing the supply of and demand for electricity) in real time, in its capacity as such;

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

**“value for money”** means that the new generation capacity project results in a net benefit to the prospective buyer or to Government having regard to cost, price, quality, quantity, risk transfer or a combination thereof, but also where applicable to the Government’s policies in support of renewable energy.

## 2. Application of the Regulations

- (1) These Regulations apply to the procurement of new generation capacity, by organs of state, including-
  - (a) new generation capacity derived from renewable energy sources and co-generation;
  - (b) base load, mid-merit load and peak load new generation capacity; and

(2) The following shall form part of the considerations and outcomes for a feasibility study undertaken pursuant to a decision in terms of sub-regulation (1)-

(a) the anticipated cost of the proposed new generation capacity;

(b) the proposed allocation of financial, technical and operational risk between the prospective buyer and the generator, and between the generator and the NTC or the distributor, as the case may be;

(c) the demonstration of the anticipated value for money to be achieved through the new generation capacity project;

(d) the material legal, financial and technical requirements including consents that will be required in order to procure the new generation capacity; and

(e) whether the appropriate generator should be Eskom as part of its services as the national electricity producer, another organ of state or an IPP.

#### **6. Ministerial determinations**

(1) The Minister may, in consultation with the Regulator, make a determination in terms of section 34 of the Act.

(2) A determination under section 34(1) shall include a determination as to whether the new generation capacity shall be established by Eskom, another organ of state or an IPP.

(3) If the determination referred to in sub-regulation (2) requires that the new generation capacity be established by an IPP, the Minister shall also determine the identity of the buyer or, where applicable, the procurer and the buyer.

(4) The determination referred to in sub-regulation (2) may require or contemplate that new generation capacity be established through a cross border project, provided that the Minister is satisfied that adequate agreements, memoranda of understanding or arrangements are in place or will be in place between the Government and the relevant foreign government or international organisation, as are necessary to enable such cross border project.

(5) A determination contemplated in this Regulation is binding on the buyer and the procurer.

#### **7. Procurement process under the IPP procurement programme**

(1) Subject to any determination by the Minister in terms of section 34 of the Act as to the form of an IPP procurement programme, such IPP procurement programme shall take the form determined by the procurer.

(2) The procurer shall in the appropriate procurement documentation specify any qualification and evaluation criteria applicable to that IPP procurement programme.

- (3) Should the Minister determine, as contemplated in regulation 6(3), that Eskom should establish new generation capacity as part of its services as the national electricity producer, Eskom will be required to enter into a power purchase agreement with the buyer, unless Eskom itself is the buyer.

#### **10. Cost recovery**

The Regulator shall, when determining licence conditions relating to prices, charges and tariffs, ensure that the buyer is able to recover, at least, the full amount of the costs incurred by the buyer in the following categories:

- (a) all payments made for the purchase of new generation capacity, in terms of a power purchase agreement entered into in terms of or as contemplated in these Regulations;
- (b) all amounts paid by the buyer in terms of the power purchase agreement (other than those referred to in paragraphs (a) and (e)), provided that the buyer shall have acted efficiently in the exercise of those rights and the fulfilment of those obligations in terms of the power purchase agreement which gave rise to such payments;
- (c) the efficiently incurred costs of the buyer in performing any function contemplated in these Regulations;
- (d) the efficiently incurred costs of the buyer in administering power purchase agreements;
- (e) costs of, and amounts paid by the buyer arising from the termination of a power purchase agreement; and
- (f) all other costs efficiently incurred by the buyer in participating in an IPP procurement programme and in purchasing new generation capacity through new generation capacity projects, including, without limitation, operating expenditure, professional fees and hedging costs.

#### **11. Exemptions**

The Minister may, where justifiable having regard to all the circumstances and subject to any terms and conditions that he or she considers appropriate, exempt any person whether in relation to a specific new generation capacity project or in general, from complying with any or all of the provisions of these Regulations.

#### **12. Transitional provisions**

- (1) The provisions of these Regulations do not apply in the case of any project relating to the electricity generation capacity listed under "Current Programmes" in the table titled IRP 1 in Schedule A to GN 25 of 29 January 2010: Determination regarding the integrated resource plan and new generation capacity, save for the electricity generation capacity listed as REFIT.
- (2) Notwithstanding sub-regulation (1), regulation 10 shall apply to the Peaker Project.