



Risk Mitigation Independent Power Producer Procurement Programme (RMIPPPP)

Legal

25 September 2020

...”it (REIPPPP) has already established a flagship public-private partnership model for South Africa, and indeed the rest of Africa, and in the process is helping alleviate Eskom’s current power crisis while also reducing greenhouse gas emissions.”

- Enabling Renewable Energy in South Africa: Assessing the REIPPPP, WWF, August 2014



Presentation Outline

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Legal Overview

- The primary enabling legislation for the Risk Mitigation IPP Procurement Programme is the Electricity Regulation Act, together with the New Gen Regulations, and the IRP 2019. This enabling legislation establishes the competency of the Department to procure and implement the Risk Mitigation IPP Procurement Programme, and regulates the manner in which it may conduct the Risk Mitigation IPP Procurement Programme.
- Procurement of the Projects will be carried out in accordance with relevant legislation, which includes but is not limited to, the Constitution of the Republic of South Africa, 1996, the B-BBEE Act, the Electricity Regulation Act, the National Energy Regulator Act, the New Gen Regulations, the PFMA, the Treasury Regulations, the Local Government: Municipal Finance Management Act No. 56 of 2003 and the Local Government: Municipal Systems Act No. 32 of 2000, each to the extent applicable and subject to any lawful exemptions from any provision thereof.
- Each Bidder must satisfy itself that its Project or any aspect of it is not a notifiable transaction as contemplated under the Competition Act No. 89 of 1998 and, to the extent that it is a notifiable transaction, that all necessary requirements to comply with the provisions of the Competition Act No. 89 of 1998 have been complied with or will be complied with by the time prescribed within the applicable Law.
- The Bidder (including its proposed Suppliers, Construction Contractors and Lenders (if any)), its Members and its O&M Contractor are required to satisfy themselves as to the compliance with all other statutory and legal requirements in relation to the Bidder's Project or any aspect thereof.



Legal Overview: Exemptions/Deviations

- The Department is in the process of obtaining an exemption from the Minister of Finance relating to the application of the Preferential Procurement Policy Framework Act to the Risk Mitigation IPP Procurement Programme. The Department has structured its Economic Development framework for the Risk Mitigation IPP Procurement Programme on the basis that such exemption will be granted by the Minister of Finance.
- The Department is also in the process of obtaining a deviation from the Minister of Trade, Industry and Competition in relation to the application of the Broad-Based Black Economic Empowerment Act and more specifically the Amended Codes of Good Practice to the Risk Mitigation IPP Procurement Programme. The Department has designed its Economic Development framework and developed a bespoke Economic Development Scoresheet in the Risk Mitigation IPP Procurement Programme on the basis that such exemption will be granted by the Minister of Trade, Industry and Competition.



Procurement Overview

- The Minister has issued a determination with the concurrence of NERSA to ensure energy security, and that approximately 2000 (two thousand) megawatts ("MW") is to be generated from a range of energy source technologies. The procurement programme shall target connection to the Grid for the new generation capacity as soon as reasonably possible, but by no later than 30 June 2022.
- The Determination designates the Department of Mineral Resources and Energy (the Department) as the Procurer and Eskom Holdings SOC Limited (Eskom) as the Buyer.
- The Risk Mitigation IPP Procurement Programme has been designed to procure the target of 2000 (two thousand) MWs of new generation capacity to be derived from different types of Dispatchable power generation Projects that will enter into:
 - PPAs with Eskom to provide new generation capacity in compliance with, amongst others, the Performance Requirements; and
 - IAs with the Department in respect of the Economic Development commitments made by Bidders, government support for the Buyer and the Seller, obligations of the Seller in respect of decommissioning and variation process for future conversion of the Dispatchable power generation Facilities to utilise gas/LNG as a fuel source.



Procurement Overview (Cont'd)

- The Dispatchable power generation Projects may utilise Fuel to produce the Energy Output and may be comprised of more than one Facility and Project Site and such Projects will also be required to provide Ancillary Services. Additionally in line with the above, the Department will procure such Capacity, Energy Output and Ancillary Services from such Dispatchable power generation Projects.
- Bid Responses in response to the Risk Mitigation Procurement Programme may be in the form of a single Dispatchable Facility or a portfolio of Facilities which include Dispatchable and Non-Dispatchable Facilities. The Projects may comprise of any of the following:
 - a single Facility using a single technology solution, on a single Project Site;
 - multiple Facilities using different technology solutions (i.e. Fuel and non-fuel based generation), on a single Project Site, or
 - multiple Facilities using different technology solutions, on multiple Project Sites.
- The Energy Output generated under this Risk Mitigation IPP Procurement Programme must be new generation capacity, as defined in the New Gen Regulations.



Procurement Overview (Cont'd)

- Bidders who wish to use brownfield sites for the purposes of their Projects must ensure that the existing equipment and machinery used for the generation of electricity on the proposed Project Sites, in respect of each Facility forming part of the Project, are completely decommissioned and that a new Facility, in respect of each Facility forming part of the Project, is built on the existing site in order to participate in the procurement process.
- The evaluation of Bid Responses will be conducted in 2 (two) distinct stages namely:
 - Qualification stage (compliance with all Part B Functional and Qualification Criteria); and
 - Evaluation stage (Part C competitive evaluation).
- The Functional and Qualification Criteria set out in Part B of the RFP are set as pass/fail criteria and in order for a Bid to be considered a compliant bid and to be eligible for selection as a Preferred Bidder, a Bidders Bid Response must meet or exceed the requirements set out in Part B.
- In order to meet the requirements of Part B (Functional and Qualification Criteria) of the RFP and the Volumes thereto, Bidders are required to submit Bid Responses in respect of prospective Dispatchable power generation Projects that can meet the Performance Requirements under the Risk Mitigation IPP Procurement Programme. The Bid Responses will consist of the Bidders' responses to the Qualification Criteria set out in the RFP.



Procurement Overview (Cont'd)

- The Qualification Criteria are divided into the following umbrella categories under Part B (Functional and Qualification Criteria Requirements) and the Volumes of Part B (Functional and Qualification Criteria Requirements):
 - Legal Qualification Criteria, including Land Acquisition and Land Use Criteria and Environmental Consent Criteria, (Volume 2 (Legal Requirements) Part 1 (Legal Qualification Criteria) of Part B (Functional and Qualification Criteria Requirements) of the RFP;
 - Technical Qualification Criteria (Volume 3 (Technical Requirements) Part 1 (Technical Qualification Criteria) of Part B (Functional and Qualification Criteria Requirements) of the RFP;
 - Financial Qualification Criteria (Volume 4 (Financial Requirements) Part 1 (Financial Criteria) of Part B (Functional and Qualification Criteria Requirements) of the RFP;
 - Economic Development Qualification Criteria (Volume 5 (Economic Development Requirements) Part 1 (Economic Development Qualification Criteria) of Part B (Functional and Qualification Criteria) of the RFP;
 - Completion of PPA and IA Tables (clause 7 (Completion of PPA and IA Tables) of Part B (Functional and Qualification Criteria Requirements) of the RFP); and
 - Value for Money (clause 8 (Value for Money) of Part B (Functional and Qualification Criteria Requirements) of the RFP.
- The second stage of evaluation is governed by Part C (Comparative and Competitive Evaluation Criteria of the RFP). Compliant Bids will be evaluated on a comparative basis, in relation to the Evaluation Price and Economic Development only.



Legal Overview: Contractual Framework

- If a Bidder is successful, it will sign the Preferred Bidder Project Development Undertaking ("PB PD Undertaking") upon selection as Preferred Bidder and thereafter, enter into the following agreements:
 - Implementation Agreement with Department,
 - Power Purchase Agreement ("PPA") with Eskom,
 - Independent Engineer Agreement with Eskom and the Independent Engineer,
 - Direct Agreement (where applicable) with the Department, Eskom and Lenders in respect of the Implementation Agreement and PPA; and
 - Connection Agreements with either the National Transmission Company (if the grid connection will be at transmission level), the Distributor (if the grid connection will be at distribution level) or the Self-Build Agreement with Eskom, or into a municipal distribution agreement with the relevant municipality;
 - Connection Direct Agreement with its Lenders and the NTC or Eskom, as the case may be, in respect of the Transmission Agreement or Distribution Agreement or if applicable, the Self-Build Agreement, as the case may be; or
 - municipal direct agreement with its Lenders and the municipal Distributor in respect of the Municipal Distribution Agreement.



Legal Overview: Contractual Framework (Cont'd)

- The Project Company of a Bidder must be a special purpose Company established with the sole purpose of undertaking the Bidder's Project, and, subject to the terms and conditions of Part A (General Requirements, Rules and Provisions) of the RFP, all Shareholders are required to be Members of the Bidder that designates that Project Company to be a Seller.
- Each Bidder that is selected as a Preferred Bidder will provide the Department with a signed PB PD Undertaking pursuant to which the Preferred Bidder will commit to developing the proposed Project in accordance with the Bid Response submitted by that Preferred Bidder, as well as in accordance with the terms of the RFP and, in particular, the PB PD Undertaking. The Preferred Bidders shall commit to time frames within which to develop the proposed Projects, and, if necessary, to appoint the relevant role players in respect of their Projects, which role players will be stipulated in the PB PD Undertaking. The Preferred Bidders will also be required, in terms of the PB PD Undertaking, to provide the Department with regular updates regarding the progress and developments of their Projects.
- If the Preferred Bidder fails to comply with its obligations in terms of the PB PD Undertaking, the PB PD Undertaking may be terminated in accordance with its terms and the Preferred Bidder may lose its status as a Preferred Bidder. In this instance, the Department will have no further obligations towards that Preferred Bidder.



Legal Qualification Criteria

- The following are the Legal Qualification Criteria:
 - Structure of the Project;
 - Legal Status of the Project Company and nomination of sponsors
 - Confirmation and Acceptance of the PB PD Undertaking, PPA, Implementation Agreement, Direct Agreement, the Independent Engineer Agreement and the Connection Agreements and all annexes to all of these agreements;
 - Contracts with the Contractors, Fuel Suppliers, Key Equipment Supply and Water Supply Rights;
 - Provision for the Decommissioning Reserve;
 - Land Acquisition and Land Use Criteria and Evaluation; and
 - Environmental Consent Criteria and Evaluation.
- Bidders are also required to complete the forms and provide the confirmations/ undertakings set out in Volume 2 Part 2 (Form of Bid and Returnable Schedules).



Thank You