
Ex parte:

**SOUTH AFRICAN RENEWABLE
ENERGY COUNCIL**

In re:

POWER PURCHASE AGREEMENTS

Opinion

DN Unterhalter SC

L Sisilana

<p>For: Webber Wentzel Cape Town Ref: Mr M Evans and Mr A Toefy</p>

The question

1. Our consultant, SAREC, is a federation of industry associations in the renewable energy sector. It seeks our advice as to whether Eskom is legally obliged to conclude power purchase agreements with preferred bidders, the majority of whom are members of renewable energy industry associations that make up SAREC. Our advice is further sought on the prospects of success of any legal action to compel the conclusion of such agreements. There are also subsidiary questions that arise, which we will identify and answer below.

The background

2. The Department of Energy announced that it had appointed 2 independent power producers (“IPPs”) as preferred bidders in Bid Window 3.5, 26 IPPs as preferred bidders in Bid Window 4, and 10 IPPs as preferred bidders in the Small Renewables Programme. Of these IPPs, only one preferred bidder (in Bid Window 3.5) has achieved financial close (i.e. signed power purchase agreements). This leaves 37 IPPs waiting to sign power purchase agreements.
3. This whole process was conducted pursuant to the government’s policy introduced in 2011, called the Renewable Energy Independent Power Producer Procurement Programme. The policy was in turn adopted in terms of the Electricity Regulation

Act 4 of 2006, the Electricity Regulations on New Generation Capacity promulgated under section 35(4)(j) of the Electricity Regulation Act (“the Regulations”), and ministerial determinations made under section 34 of the Electricity Regulation Act. The aforesaid Regulations were published under Government Notice R399 in Government Gazette 34262 of 4 May 2011, and amended on 4 November 2016; but the amendments are for present purposes immaterial.

4. Under this statutory scheme, the government procures renewable energy from IPPs. The procurement is put out to tender: an RFP is issued, tenderers submit bids, are assessed, and preferred bidders are appointed. The 37 preferred bidders referred to above were appointed under this scheme but have not concluded any power purchase agreements. The question is whether the conclusion of such agreements could be enforced in court at the instance of the preferred bidders. A subsidiary question is whether SAREC has *locus standi* to enforce conclusion of power purchase agreements. The short answer is that that is possible. A more convenient path is for SAREC to intervene in such enforcement proceedings brought by the preferred bidders, either as an interested party or as an *amicus curiae* (a friend of the court). It is even possible for SAREC to be a co-applicant with the preferred bidders. However, this issue may have to be explored further in due course, if and when proceedings are

contemplated.

5. But in order to answer the primary question, as to the enforcement of the conclusion of power purchase agreements by preferred bidders, we ought to say more about the statutory and regulatory scheme.

The statutory and regulatory scheme

6. Section 34(1) of the Electricity Regulation Act provides for promulgation of determinations by the Minister in regard to new generation capacity, in the following terms

34. New generation capacity.—(1) The Minister may, in consultation with the Regulator—

- (a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;
- (b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;
- (c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;
- (d) determine that electricity thus produced must be purchased by the persons set out in such notice;
- (e) require that new generation capacity must—

- (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;
- (ii) provide for private sector participation.” [Emphasis added]

7. By section 34(2), the Minister is in addition afforded all powers necessary or incidental to any purpose of section 34(1), including, but not limited to, the powers expressly set out in section 34(2) of the Electricity Regulation Act.

8. Section 35(4) of the Electricity Regulation Act provides that:

“(4) The Minister may, by notice in the *Gazette*, make regulations regarding—...

- (j) new generation capacity[.]”

9. The Minister has made such regulations. Regulation 6 provides in relevant part as follows:

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.

...

- (5) A determination contemplated in this Regulation is binding on the buyer and the procurer.” [Emphasis added]

10. “Buyer” is defined in the regulations as follows:

““buyer” means, in relation to a new generation capacity project, any organ of state designated by the Minister in terms of section 34 (1) (c) and (d) of the Act.’ [Emphasis added]

11. “Procurer” is defined in the following terms:

““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.’

12. We have been furnished with a determination made by the Minister under section 34(1) (published under Government Notice 733 in Government Gazette 39111 of 18 August 2015). The determination provides in clause 7 that the “procurer” is the Department of Energy. It also provides in clause 9 that the “buyer” is Eskom. The precise terms are these:

“[T]he electricity must be purchased by Eskom Holdings SOC Limited or by any successor entity to be designated by the Minister of Energy as buyer as buyer (off-taker).” [Emphasis added]

13. Finally, we must refer to certain regulations which have a bearing on the question we are asked to answer. Regulation 3(d) states the following as one of the objectives of the Regulations:

“the facilitation of the full recovery by the buyer of all costs efficiently incurred by it under or in connection with a power purchase agreement including a reasonable return based on the risks assumed by the buyer thereunder and to ensure transparency and cost reflectivity in the determination of electricity tariffs.”

14. Regulation 10 provides that 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. And then it sets out the categories in respect of which costs incurred by Eskom would be recoverable.

15. Regulation 9(2) provides that, before Eskom concludes a power purchase agreement, Eskom or the Department of Energy must, subject to any approvals required in terms of the PFMA:

“put in place arrangements to ensure that any portion of the buyer’s allowable revenue approved or allocated by the Regulator for purposes of implementation of new generation capacity projects will be used solely for the purpose of ensuring that the buyer’s financial obligations in respect of new generation capacity projects will be met.”

16. In short, the conclusion of a power purchase agreement entails no cost risk to Eskom. Before Eskom concludes any power purchase agreements, it is entitled to ensure that it will be able to recover its costs under such agreements.

17. That, then, is the statutory scheme. We now turn to answering the questions posed to us.

Answer to the question posed

18. Under the statutory scheme set out above, it is clear that Eskom has no choice, once the Minister has made a determination, as she has, but to purchase renewable energy from IPPs. The only way in which it could do so, legally, is by concluding power purchase agreements with IPPs which have been selected as preferred bidders.
19. Therefore, once selected, it seems to us that the preferred bidders have a statutory entitlement, at the very least, to negotiating the conclusion of power purchase agreements with Eskom. At most, the preferred bidders have an entitlement to conclude power purchase agreements, provided, of course, they meet the requirements set out in the power purchase agreements. On either basis, the preferred bidders would be entitled to approach a court to enforce their entitlement, whether that is an entitlement to negotiating a power purchase agreement or an entitlement to the signature of a power purchase agreement with Eskom. We say this for the following reasons.
20. First, there is Constitutional Court authority to the effect that a reservation of right in the RFP not to award a tender does not, by itself, prevent a court from granting substitutionary relief, namely

awarding the tender. In *Trencon Construction (Pty) Ltd v the Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC), the Constitutional Court said at para 70:

“The IDC’s argument cannot prevail. Almost all tender invitations issued by organs of state contain a clause giving the organ of state a discretion to cancel the tender or not to award it at all. If, when arguing that remittal is the proper remedy, an organ of state is able to raise the fact that it has this discretion without more, a court would virtually never have the power to grant a remedy of substitution. The organ of state would always be able to argue that it still had a discretion not to award the tender, thereby constraining the power of the courts to grant just and equitable remedies. It is a fundamental principle of the rule of law that organs of state, like the IDC, can only exercise power that has been conferred onto them. They cannot, on their own volition, confer power unto themselves that was never there.”

21. The reasoning here is clear: an organ of state cannot raise the reservation of rights in the RFP to defeat a claim for substitutionary relief. Nor, following from this, can it raise such reservation of rights to refuse to conclude a power purchase agreement. This applies with greater force where, as here, the party seeking to conclude a power purchase agreement has been selected as a preferred bidder, which on its own confers a right to a power purchase agreement.
22. In our view, therefore, and on the regulatory scheme, preferred bidders have an entitlement to conclude power purchase agreements with Eskom if they meet the requirements set out in those agreements.

23. Second, and quite apart from authority, it appears to us that, on the statutory scheme, the preferred bidders have accrued rights, *vis-à-vis* the Department, to supply renewable energy to the Department or its nominee, Eskom. All that is left, now, is that the preferred bidders should be put in a position to enforce those accrued rights. The obligation to do so rests as much on the Department as on Eskom. This is further supported by the RFP (a copy of which was furnished to us) which in clause 10 of Part A requires preferred bidders, by 29 October 2014 to 30 July 2015, to do the following:

“Preferred Bidders to finalise their contractual arrangements, with, inter alia, their Members, Contractors, equipment suppliers, Lenders and Grid Provider in respect of the Fourth Bid Submission Date, and application by the Preferred Bidders and obtain of a budget quotation from a Grid Provider and a generation licence from NERSA.”

24. It appears to us that the intention was that, at least shortly after 30 July 2015, the preferred bidders should be ready to implement the power purchase agreements. If that is so, then we consider that the preferred bidders had an accrued right to sign power purchase agreements with Eskom within a reasonable time, provided they satisfy the requirements contained in those agreements. That right, quite apart from anything else, derives from the RFP itself, read together with the statutory scheme. Moreover, that right is in our view enforceable at law *via a mandamus*.

25. Third, there is some authority for the proposition that, on acceptance of a tender by the procurer, which is evidenced by a letter of award, a

binding contract comes into being. In *Boudewyn Homberg De Vries Smuts v Department of Economic Development and Environmental Affairs* 2010 JDR 0918 (EDB) the court said:

‘[9] I endorse the approach that says that the acceptance of a tender by an organ of state results in an agreement. That agreement may not be detailed enough and there may be outstanding matters that are not covered by the agreement. When such matters are lacking it may be an indication that the parties did not intend the agreement to be a final one. In the case of *CGEE Alstom* the following statement was made:

“The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement.”

[10] I agree with the statement I have just recorded. To me what that implies is that an agreement is binding in law upon the acceptance of the tender. It is then a contract in its own right. The parties may however agree to tie up in the form of a comprehensive agreement whatever matters that are outstanding in the first agreement. Once that is done the latter agreement would incorporate and supersede the first agreement. The first agreement together with what is commonly known as service level agreement translate to one comprehensive agreement.’ [Internal footnotes omitted and emphasis added]

26. There is however contrary authority. In *City of Cape Town v South African National Roads Agency* 2015 (6) SA 535 (WCC), the court held at para 221 that:

“[221] On the basis of the BAFO evaluation, the contracts committee selected PPC and Overberg as the preferred tenderer and the reserve tenderer, respectively. That marked the end of the tender process, but, as presaged in the terms of the invitation to tender, it did not result in the award of the contract, but rather in the commencement of negotiations between SANRAL and the preferred bidder towards the conclusion of a BOT agreement. The invitation to tender made it clear, however, that SANRAL was not obliged to conclude a contract and had the right to withdraw from the process. We agree with SANRAL’s argument that the inchoate nature of the procurement process makes the City’s challenge to the selection of a preferred bidder a misdirectedly premature attack in the peculiar circumstances of the case.”

27. We consider, however, that the present case is distinguishable from the *City of Cape Town* case. In the present case, the RFP included a draft power purchase agreement. The letters of award (one copy of which was furnished to us) provide that the draft power purchase agreement, together with a suite of other agreements, are non-negotiable by the preferred bidder:

“In particular, the Department wishes to confirm that:

in terms of paragraph 16.3 of Part A of the RFP , the terms of the draft PPA, Implementation Agreement, Direct Agreement, the Connection Agreements and the Connection Direct Agreement issued with the RFP (“**Transaction Agreements**”) are not negotiable...”:

28. That seems to us to suggest that, all that needs to happen is the signature of the power purchase agreements by Eskom and the preferred bidders. On the authority of *Boudewyn*, therefore, we are of the opinion that the preferred bidders have a right to approach a court and enforce the conclusion of the power purchase agreements.

Further, we consider that they have reasonable prospects of success in that regard.

Can Eskom use section 50 of the PFMA and Regulation 9 to delay the signature of the power purchase agreements?

29. We start with Regulation 9. That regulation provides that the buyer (Eskom) or the procurer (the Department) must first be satisfied of certain factors there listed before the buyer (Eskom) signs power purchase agreement. We have been instructed that the procurer (the Department) has conducted the investigation required in regulation 9. In those circumstances, we consider that Eskom cannot use regulation 9 to delay or prevent the signature of the power purchase agreements.

30. As regards section 50 of the PFMA, we have already pointed out above that, from the perspective of Eskom, the project appears to be risk-free. It is therefore inconceivable that there could be a section 50 (PFMA) concern entitling Eskom to delay or refuse to sign the power purchase agreements. In any event, such concerns, if they existed, would have to be tested for their validity against the peremptory nature of the statutory scheme which obliges Eskom, once the Department had done the preliminary work, to conclude the power purchase agreements.

31. We are therefore of the view that Eskom could not rely on regulation 9 or section 50 of the PFMA to delay or refuse to conclude the power

purchase agreements with the preferred bidders.

Reasonable time

32. We are asked to advise as to what would be the reasonable time within which Eskom should have signed the power purchase agreements with the preferred bidders. In other words, would the preferred bidders be entitled, now, to seek to enforce their entitlement to the power purchase agreements?

33. In this connection, we have been instructed that, as at 15 November 2016, it was:
 - 33.1. 23.4 months (in respect of one project) since the evaluation period in respect of Bid Window 3.5 closed;

 - 33.2. 19.3 months since the evaluation period in respect of Bid Window 4 closed;

 - 33.3. 17.6 months since the evaluation period in respect of Bid Window 4.5 closed; and

 - 33.4. 13.6 months since the evaluation period in respect of Small Renewable Programme.

34. We are further instructed that it took 11.2, 11.8 and 13.6 months for financial close to be reached (i.e. for power purchase agreements to

be signed) in respect of Bid Windows 1, 2 and 3 respectively. We have already pointed out in paragraph 23 above that the RFP requires the preferred bidder to have their contracts with their suppliers in place (i.e. be ready to provide services) by 30 July 2015.

35. On these facts, we consider that the preferred bidders have given Eskom reasonable time within which to conclude the power purchase agreements. They would therefore be entitled to approach the court now to enforce the signature of the power purchase agreements.

Could Eskom appeal to policy considerations to delay or prevent the signature of the power purchase agreements?

36. We think not. By section 34 of the Electricity Regulation Act, the policy decision whether or not to have new generation capacity is reposed in the Minister acting in consultation with the Regulator. The Minister has made that policy decision in her determination.

37. The determination is, by regulation 6(5), binding on Eskom (see paragraph 9 above). Therefore Eskom could not, in our opinion, rely on its own policy to sidestep the binding determination of the Minister. If Eskom has a contrary policy, on which it seeks to rely to sidestep that of the Minister, then it is required to review the determination by which it is bound.

38. We conclude, therefore, that Eskom cannot rely on another policy to avoid its obligations under the Ministerial determination, which

include signing the power purchase agreements.

Conclusion

39. For all the above reasons, we conclude that the preferred bidders would be entitled to approach a court to enforce the signature of the power purchase agreements.

**DN UNTERHALTER SC
L SISILANA**

Chambers
Sandton
24 November 2016