



**SPATIAL PLANNING AND ENVIRONMENT PORTFOLIO COMMITTEE  
IKOMITI YEMICIMBI YESEBE KWEZOCWANGCISO LWAMABALA NOKUSINGQONGILEYO  
PORTEFEULJEKOMITEE OOR RUIMTELIKE BEPLANNING EN DIE OMGEWING**

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1. **ITEM NUMBER: SPE 08/06/20**
  2. **SUBJECT / ONDERWERP / ISIHLOKO:**  
**PRESENTATION: Transitioning into the new opportunities derived from allowing other entrants into the supply market**
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**K NASSIEP/ LM WEIDEMAN**



CITY OF CAPE TOWN  
ISIXEKO SASEKAPA  
STAD KAAPSTAD

*Transitioning into the new opportunities derived from allowing other entrants into the supply market*

Energy & Climate Change - Sustainable Energy Markets.  
4 June 2020

Making progress possible. **Together.**

# CITY OF CAPE TOWN VERSUS NERSA AND MINISTER OF ENERGY

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Gauteng North High Court, case no. 51765/17

11 & 12 May 2020

## BACKGROUND TO THE CASE

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- Mayoral initiative to introduce a higher percentage of renewable energy into Cape Town's energy mix, 2014 – 2015.
- Legal input obtained on whether there is a sound legal basis for the initiative, and this was confirmed. (Internal opinion and opinion of Prof Pierre de Vos.)
- Mayor approached the Minister in November 2015 asking for a determination in terms of Section 34 of the Electricity Regulation Act to allow it to acquire approximately 400MW of combined solar and wind.
- Court application was launched approximately 18 months later after the City repeatedly asked for a response, and had been told that there is a moratorium on such applications.

## MAIN ARGUMENTS IN THE CASE

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### The City's position

In accordance with advice obtained from Wim Trengove SC, the main thrust of the City's arguments is :

- (a) Section 34 is empowering but not peremptory (it uses the word "may" in relation to the Minister's authority to make a determination. Therefore the City does not need such a determination in order to transact with an IPP.
- (b) If the court finds that a determination is needed, then Section 34 must be struck down for unconstitutionality.
- (c) If the court does not strike down Section 34, then it should order the Minister to make the determination requested by the City.

These arguments were supported by reference to the constitutional duties of municipalities to provide services.

The City was supported by argument from the Centre for Environmental Rights regarding the environmental benefits of renewable energy.

# MAIN ARGUMENTS IN THE CASE

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## The City's argument (summarised)

### **Intergovernmental Relations Framework Act – dispute resolution**

- City contends that primary disagreement is with NERSA's interpretation of S34 of the ERA – and NERSA is not an organ of state – it is an independent regulator.
- City contends that there is no intergovernmental dispute with the Minister of Mineral Resources and Energy but rather a failure by the various Ministers of Energy to respond to requests to engage.
- Hence the declaratory order application to the court to obtain legal clarification.

# MAIN ARGUMENTS IN THE CASE

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## The City's argument (summarised)

### **Interpretation of S34 of the Electricity Regulation Act**

- *Language* – the City contends that the language of the section is clear, it is enabling and empowering (common cause) and not prohibitive. There is no basis for assuming a prohibition on new generation capacity in the absence of a determination.
- *Purpose* – City contends that this specific section must only be invoked by DMRE where Eskom has failed to provide for sufficient capacity on the network. The word “may” instead of “must” imparts this clearly.
- *Planning* – covered by National Energy Act – IEP should provide adequate planning horizon and blueprint but has been neglected by National Government.
- *Sensible interpretation* – city contends that current interpretation by NERSA and Minister confers super-regulator powers on the Minister. This was surely not intended.
- *Constitutional Impact* – City contends that its S156 obligation to provide sustainable services cannot be fulfilled , if the City is unable to choose the type and price for the power it serves its customers with.

# MAIN ARGUMENTS IN THE CASE

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## NERSA's main arguments

- Nersa's licensing powers are constrained by whether or not a ministerial determination has been made.
- Nersa and the national department must plan and oversee electricity provision generally, especially given that we have a national grid. Grid stability requires that the injection of electricity into the grid must be managed and regulated. (The City does not dispute this and does not suggest that grid management processes and codes should be disregarded.)
- The powers of local government with regard to electricity are limited by Schedule 4B to the Constitution, which mentions "energy and gas reticulation as a local government competence.



# MAIN ARGUMENTS IN THE CASE

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## DMRE's main arguments

- The City's application should not be entertained because the City did not follow the requirements of the Intergovernmental Relations Framework Act to the effect that organs of state must seek resolution of disputes outside the courts.
- The City should have applied to overturn the moratorium on Section 34 determinations.
- The court is not allowed to interfere in the business of government, due to the separation of powers doctrine.
- The constitutional powers of local government do not include the procurement of energy.

## EVALUATION/COMMENTS

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- Judgment was reserved and it is not known how long it will take.
- Nersa and the Minister did not offer any legal justification for the hegemonic role of Eskom as the sole buyer of electricity.
- Regulations published less than a week before the hearing purport to “permit” municipalities to apply to establish new generation capacity. They were always entitled to apply, as the City did in 2015. They offer no fundamental reforms to the energy procurement system.
- Determinations in terms of the IRP 2019 issued by the Minister in March, one for emergency power and another for a mixture of renewable sources, are both in favour of Eskom.

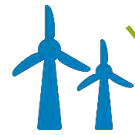
# ENERGY SECURE & LOW CARBON FUTURE FOR CAPE TOWN

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# ENERGY SECURE LOW CARBON FUTURE FOR CAPE TOWN

**Planning and Research:**  
 Energy Planning; Carbon Neutral Modelling & Planning; Feasibility Studies; Data Management; Policy Dev

1. Large Scale IPP Procurement



Roll out of Independent Power Producers (IPPs)

8. Energy Efficiency in City Building and Facilities  
 9. Net Zero Carbon New Build  
 10. Citizen awareness and education



Reduced energy consumption in both public and private buildings and operations

14. Options for unelectrifiable areas and citizens in energy poverty



Diversify energy supply and reduce the City's carbon footprint and costs over the medium to long term

Enhanced Embedded Generation



The development of a grid management system that facilitates demand management and manages peak demand



2. Small Scale IPP procurement  
 3. 1-10MW City-Owned Generation  
 4. <1MW City Generation (rooftop & groundmounted)  
 5. Wheeling Facility  
 6. SSEG support  
 7. Innovative Financing for SSEG

11. Demand management  
 12. Smart Communication & Energy Grids  
 13. Storage



**COMMUNICATION & COLLABORATION**

# SUPPLY SIDE

Large IPP  
Procurement

## IPP Large Scale Programme

- Internal preparation for City REIPPP (SCM) underway
- National REIPPP scale project, primarily wind and solar wheeled over Eskom's grid

## IPP Small Scale Programme

- S33 tender to be developed (18 month process)
- Tender adjudication
- PPAs signed subject to S34 determination/Court Case

Small IPP  
Procurement

## Introduction of a Wheeling Facility

- The City is implementing a program to enable third party renewable energy generators to sell energy to City consumers using the City's electricity grid (through a mechanism known as "wheeling").
- Systems Testing phase

## City rooftop and Ground mounted PV programme (less than 10MW)

- The City has set aside funding for a programme to increase RE generation owned by the City (rooftop and groundmounted)
- Draft City Owned Generation Framework & Rules developed
- City wide O&M tender specs to be developed
- Supporting Waste to Energy generation(4 sites) and carbon work

Own  
Generation

## Residential, Commercial and Industrial SSEG program (less than 1MW)

- Investigating SSEG financing mechanisms such as PACE.
- Installers awareness / compliance campaign
- Assisting with development of an easier online registration process

Embedded  
Distribution

IPP  
Programme

Distributed  
Generation  
Programme



# LARGE-SCALE IPP PROCUREMENT READINESS

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- Active engagement with the National Treasury run City Support Programme to assist with IPP procurement process development including development of a Munic-REIPPP and of a proposed PPA and TOU tariff review.
- A draft City renewable energy independent power procurement programme project initiation report and process flow diagram developed and demonstrates the business case for such a programme, as well as highlights the commercial, legal and technical aspects and risks that need to be considered when developing the programme.
- The process plan indicates that from a positive confirmation from the court to first power could take up to 5 years (more if doing a PPP).
- An internal governance mechanism is being established to guide and approve aspects of the programme.
- Engagement with GreenCape who are commissioning a study within the next month to determine how many, the progress and size of privately developed projects located within the municipal grid network, province and nationally, initiated. This information will assist in planning how, when and how much capacity could be brought online through an IPP procurement process.

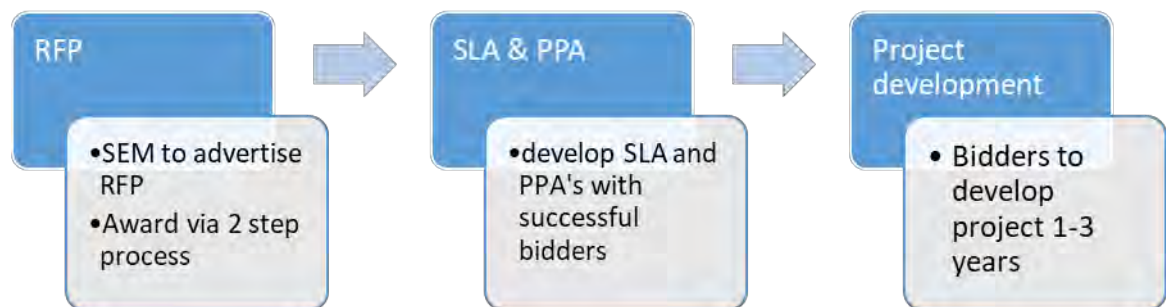
# Long term challenge

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- Simulations run by the CSIR of a “cost optimal” high renewables share supply to Cape Town without considerable storage of peaking plant in the system result in a wildly uneven demand profile from Eskom. This would almost certainly make Eskom’s regional and national load balancing difficult and elicit punitive tariffs undermining the viability of such a solution.

# Embedded IPP Procurement readiness

- An RFP via a Section 33 process will be developed and advertised by the City. A preferred bidder status will be granted to bidders as a first stage where they will be given a grid connection cost and then a final bid will be negotiated which will develop into an SLA and PPA over 20 – 25-year period.
  - RFP will be registered and DP obtained by mid-March 2020
  - RFP advertised by June/July 2020
  - Award to preferred bidders September/November 2021
  - Award final bids February/March 2022
- A first BSC was held to draft high level specification. Pre-feasibility study will be done where the city will be divided into regions based on grid-capacity. This will form part the RFP specification. The DP will be registered by mid-March and procurement process to be followed as above.





# City-Owned Generation readiness

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- An assessment for viable solar PV project sites on vacant City-owned land and Wastewater and Energy facilities has been concluded.
- The medium-scale groundmounted installation is expected to result in 10MWp of new generation being connected to the municipal grid by 2022. Budget for approximately 7MW has been secured in 2020/21 financial year.
- The small scale (<1MW) projects will result in the development of 1MWp of new generation being connected to the municipal grid by the end of the 2020/21 financial year.
- The sites assessed, could deliver a range of installations from less than 1 to 10MWp, with a preference for larger installations due to economies of scale.
- The land audit & initial grid connection assessment suggests development of RE projects on City-land & assets will be constrained and is unlikely to exceed 50MW – 70MW under current conditions.
- 50 MW of solar will provide about 1% of the energy purchased from Eskom on an annual basis. (City supplies about 75% of the electricity consumed in the metro.) The total budget at current prices to develop 50 MW would be about R750 million.
- To meet energy diversification objectives, renewable energy targets and low carbon development commitments would require significant purchasing and importation of electricity from Independent Power Producers (IPPs) outside of City boundaries.

# POTENTIAL COURT CASE OUTCOMES

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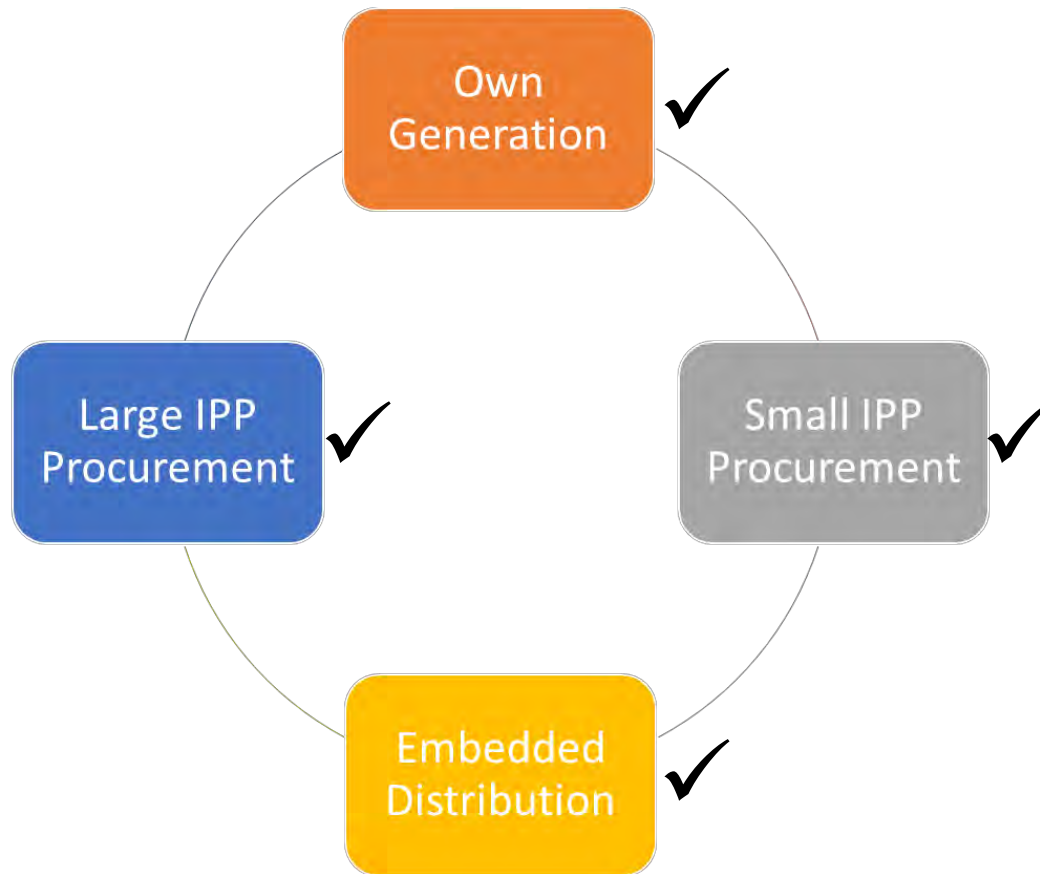
1. Ruled that no S34 determination required to allow the City to procure power from IPPs
2. Ruled that it is unconstitutional and unlawful to require a S34 determination before a municipality can procure power
3. Rule that minister must provide a response to City's S34 application
4. Matter referred back for further discussion and revert to Judge if no agreement within reasonable period
5. Court application dismissed with costs
6. Other



Planned actions to be taken by the City depending on what the respective outcome is, is outlined in the following slides. Must be noted that this is how the City foresees the potential situation at this point in time which is subject to change upon further consultation or national government directives.

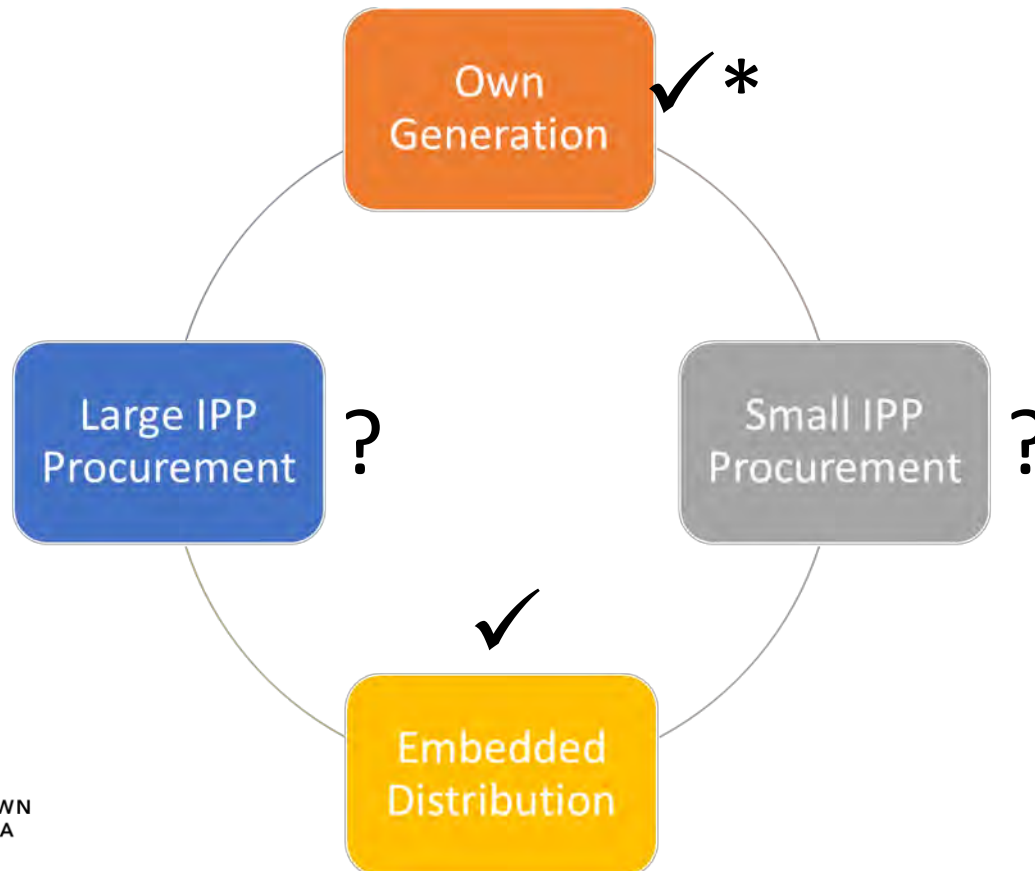
## IF RULING IN FAVOUR OF 1 OR 2

- City will progress with plans for procurement of electricity from IPPs through City and Eskom grid connected programmes but subject to regulations



## IF COURT RULES IN FAVOUR OF 3

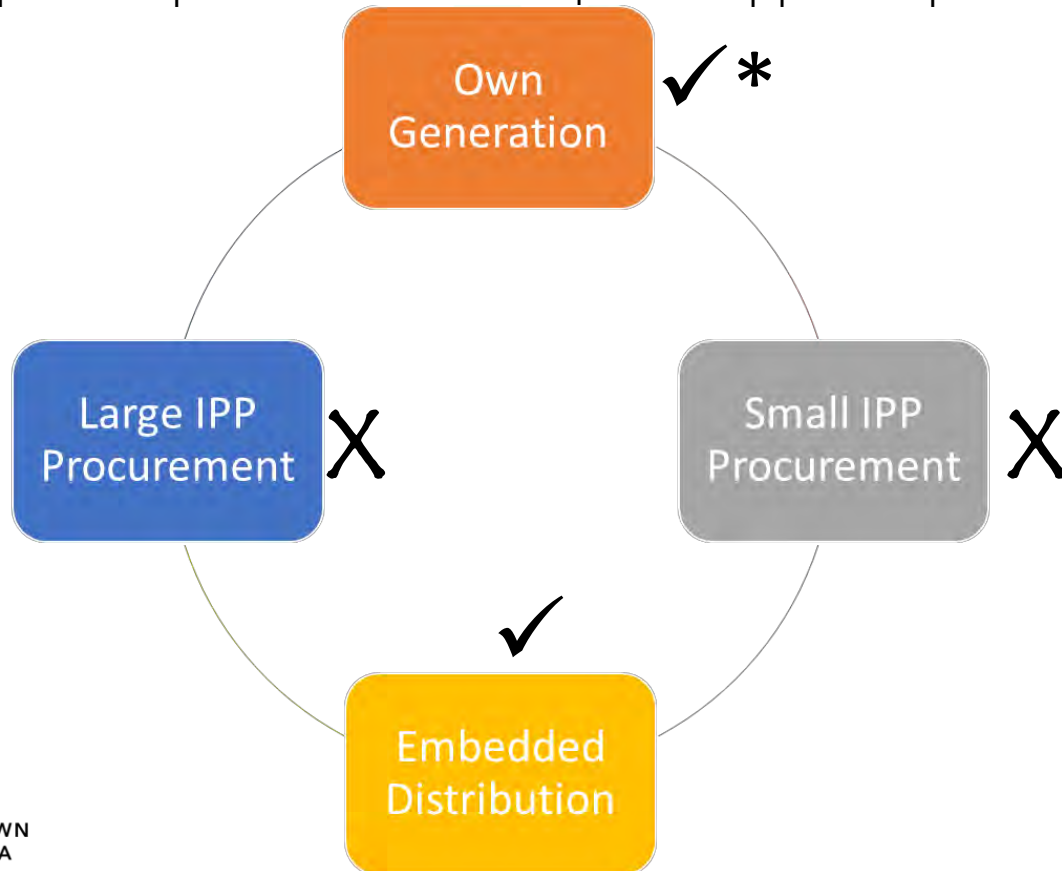
- Highest level of uncertainty associated with this outcome
- City will progress with embedded generation projects whilst still progressing with IPP programmes in hopes of favourable determination by Minister while lobbying through National Treasury through City Support Programme (CSP)



\* If <10MWp  
also considered  
embedded  
generation

# IF COURT APPLICATION DISMISSED

- City will continue with embedded generation development projects subject to approvals
- Continue working in conjunction with CSP towards a favourable allowance by DMRE to procure power from IPPs in spite of apparent prohibition to do so as it stands



\* If <10MWp  
also considered  
embedded  
generation

## OTHER RULING(S) AND WAY FORWARD

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- Other outcomes are possible from the court case, for example, the judge could make an order directing the parties to embark on mediation or settlement talks.
- In this event, the City will continue in its discussions with Nersa, DMRE & Eskom in conjunction with the other metropolitan municipalities through National Treasury's City Support Programme to formulate a workable, centralized municipal REIPPPP type solution.
- It is the City's intention to ultimately embark on programmatic approach and procure electricity in a *wholly* sustainable way i.e. from environmental, financial & national grid stability perspectives.

# DRAFT REGULATIONS AMENDING THE ELECTRICITY REGULATIONS ON NEW GENERATION CAPACITY, 2011

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(GN500, 5 MAY 2020)



## CORE OF THE PROPOSED AMENDMENTS

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A Municipality may apply to the Minister to establish new generation capacity in accordance with the

- Integrated Resource Plan, and such application must-
- (a) be accompanied by a detailed feasibility study as contemplated in sub -regulation (2);
- (b) demonstrate sound financial standing of the Municipality; and
- (c) be aligned to the Integrated Development Plan of that Municipality.
- (4) In considering an application by the Municipality in terms of sub -regulation (3), the Minister may request additional information required to make a determination in terms of regulation 6. "
- Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA,

Municipal Finance Management Act and Municipal Systems Act -"

## GAPS IN THE PROPOSED AMENDMENTS

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- We welcome the acknowledgement (through the release of these regulations) that municipalities have a role to play in new generation development
- The amendments might seem reasonable and accommodating of our request since 2015 to secure reliable and safe supply of electricity.
- Unfortunately there are still many unknowns and there are a number of inconsistencies and implementation hurdles that currently and will continue to exist eg:
  1. Can only procure once Ministers provides a S34 determination – there is no timeline for response to such a request in the regulations
  2. The determination will be based on an IRP that is not dynamic and responsive
  3. It is not clear whether the Determination will be from the 500 MW embedded generation p/a allocation from 2022 or from the technology allocations
  4. Good financial standing of a municipality is a requirement (and should be for any organ of state entering into a PPA).
  5. May request 'additional information' is very open ended.
  6. There is no guidance on : Will there be limits on MW allocations to municipalities, is it first come, first allocated? What, if any, limitations will there be on the scale/size of the projects that can be contracted by municipalities? Will there be an overall limit on capacity that can be contracted per municipality and/or a size limit per

# A MUNICIPAL RENEWABLE ENERGY INDEPENDENT POWER PRODUCER PROGRAMME

We propose

- The establishment of a sustained, credible, planned and co-ordinated national procurement programme for municipalities that take into account the national demand and supply options and constraints.
- This will give investors / IPPs and munics confidence in the process and ability to plan well
- A centrally run efficient and transparent procurement process through a body like National Treasury.
- The Programme be allocated under the existing IRP with a focus on Wind, PV and storage.
- Standardised processes and contracts be established.
- Compliance with the Municipal Finance Management Act - particularly Section 33
- The IPPS would require all the licensing and permits as per the national REIPP
- The SED component is for discussion – should qualifiers be based primarily on and MFMA requirements S33 process such as value for money and ultimately price, so that savings can be passed on and benefit all residents or should it be based on the future REIPPP SED requirements

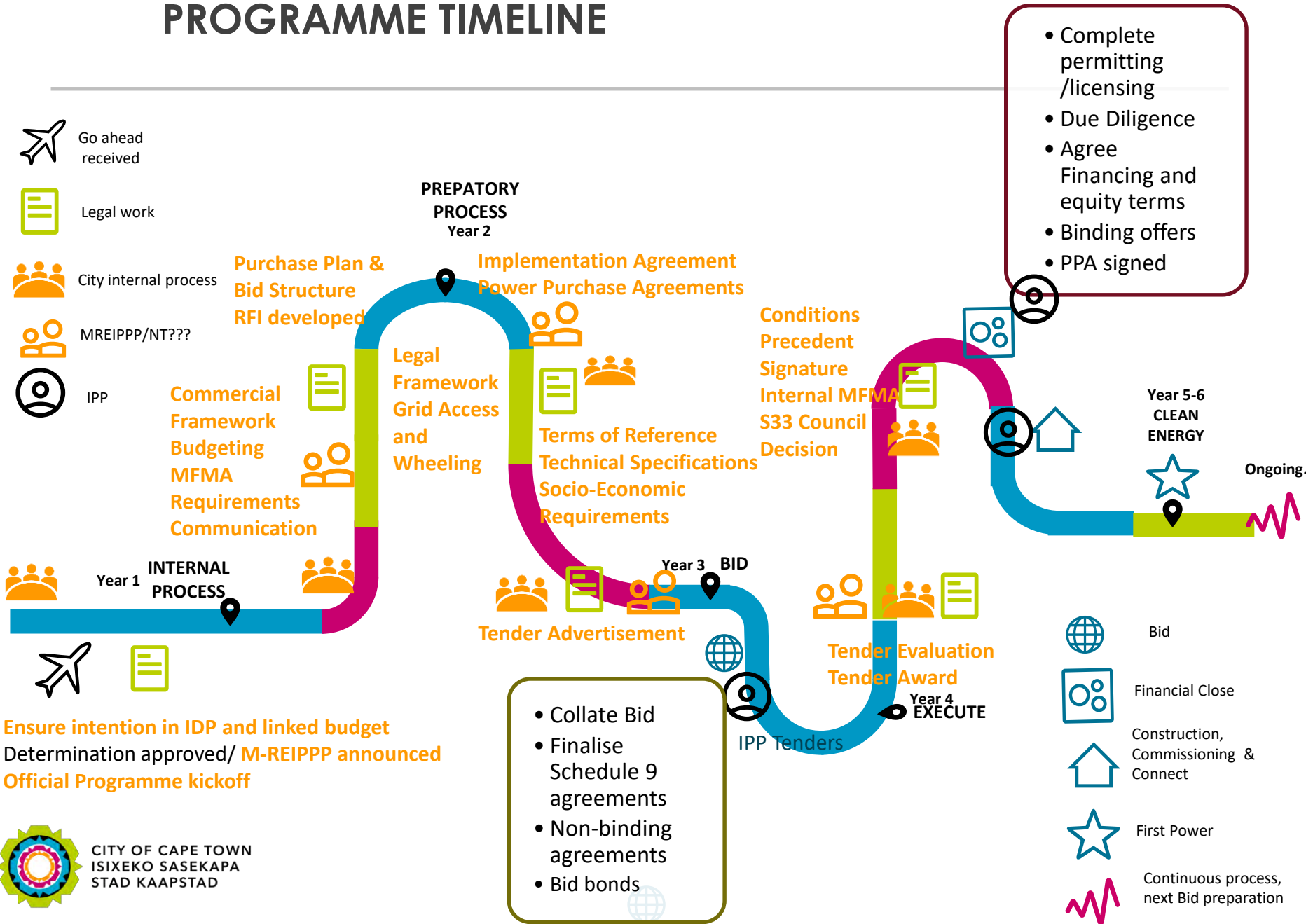


# 60 ADDITIONAL UNKNOWNNS THAT A MUNIC-REIPPP COULD ADDRESS

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- Will the Determination be a once off allocation for one year and one project?
- Who will pay for grid re-enforcements? Who will and how will the tariff be set? Can municipalities determine and include TOU linked criteria? Will municipalities be allowed to generate and sell electricity to other municipalities?
- How will Eskom recover its costs if it loses sales to municipalities?
- Who will be responsible for adding peaking generation to make up for RE when it is not available? How will the costs for this peaking plant be recovered?
- Guidance on : Will there be limits on MW allocations to municipalities, is it first come, first allocated? What, if any, limitations will there be on the scale/size of the projects that can be contracted by municipalities? Will there be an overall limit on capacity that can be contracted per municipality and/or a size limit per project?

# POTENTIAL LARGE SCALE IPP PROGRAMME TIMELINE



Ensure intention in IDP and linked budget  
 Determination approved/ M-REIPPP announced  
 Official Programme kickoff

Good day,

Thank you for your interest in contracting with the City of Cape Town for the procurement of electricity from independent power producers.

Although we are currently still prohibited from procuring power from any source other than Eskom, by national government, we are actively working to change this – both through legal processes and the lobbying of national government. In parallel, and in preparation of being able to procure electricity from private companies in the not too distant future, we are in the process of preparing tenders that will serve this exact purpose.

It must be noted that any procurement of electricity from private companies, if and when permitted, will be done in accordance with all relevant national and local legislation and regulations as well as through a solicited, competitive bidding process.

We intend to only purchase electricity generated from cleaner sources, which includes gas, than our current bulk supply. The price we eventually end up paying for this electricity will also need to be less than what is currently paid for Eskom power to ensure a benefit to our end customers.

More detail will follow in due course once the relevant tenders are published. Until such time, we encourage you to explore the available information on the City of Cape Town website which may assist in the development of your power projects; one potentially useful tool which has recently been added, is the local electricity network capacity distribution dataset, available [here](#).

We would furthermore, encourage your company to register as a vendor with the City of Cape Town to keep updated on any tender developments and be in a position to bid at such time.

Please note that unsolicited inputs to the City's bid specification may result in disqualification from bidding, as per the Municipal Supply Chain Management Regulations

We trust this provides sufficient information at this early stage in our drive towards decarbonizing the grid and we look forward to working together towards a cleaner, brighter future.

Your sincerely,

City of Cape Town: Sustainable Energy Markets

**Current auto response to email:**

**[ElectricityIPP.Enquiries@capetown.gov.za](mailto:ElectricityIPP.Enquiries@capetown.gov.za)**





**CITY OF CAPE TOWN  
ISIXEKO SASEKAPA  
STAD KAAPSTAD**

**Thank You**

**Making progress possible. Together.**