

LEGAL FRAMEWORK FOR PROCUREMENT OF NEW GENERATION ENERGY CAPACITY BY MUNICIPALITIES AND MUNICIPAL ENTITIES: (DIRECTOR ENGINEERING SERVICES)

Purpose of report

To submit a report to council regarding the Legal Framework for Procurement of New Generation Energy Capacity by Municipalities and Municipal Entities.

Background

National Treasury published Circular No. 118 in terms of the Municipal Finance Management Act, Act No. 56 of 2003, in June 2022. The purpose of the Circular is to provide advice to municipalities and municipal entities, relating to the legal framework for procurement of new generation energy capacity, particularly from renewable energy sources, within the provision of the Constitution, MFMA and other related legislation.

The Department of Mineral Resources and Energy published amendments to the New Generation Capacity Regulations in terms of the Electricity Regulation Act, Act 4 of 2006, as amended on 16 October 2020.

The National Treasury, in collaboration with the Department of Mineral Resources and Energy Regulator and SALGA have developed the supporting information to assist municipalities and municipal entities.

1. SCENARIOS

1.1 In providing guidance, considering the applicable legislation for municipal procurement of new generation capacity and related aspects under the below scenarios ("**different Scenarios**"). These are dealt with below and in the supporting **Annexures covering roadmaps** in order to assist municipalities and municipal entities, in considering how they may procure, buy, sell and generate electricity in the applicable Scenario. The salient aspects are summarized below.

1.2 The different Scenarios are as follows:

1.2.1 Municipal IPP procurement programme in which the DMRE is the procurer and the municipality are the buyers following a determination:

A Municipal IPP procurement programme which may be similar to the REIPP with necessary differences as may apply to municipalities (e.g. the DMRE continues to be the procurer pursuant to Section 34 Determination, but the municipalities become the off-takers/buyers as opposed to Eskom acting as the single off-taker as it is the case in REIPPP). It is noted that at the date of issuing this Circular, procurement under Scenario 1 requires capacity to be mobilized within the DMRE. Scenario 1 is therefore under consideration and may be initiated subject to terms and conditions determined by the DMRE and in line with existing legislation.

1.2.2 Municipal IPP procurement programme where IPP's will bid for projects that are located on a non-municipal site and the municipality does not take any site or development risks.

A Municipal IPP procurement programme, where an IPP is located within the municipality and where the municipality would be the procurer and the off-taker. In this Scenario, the potential IPPs will bid for projects that will be located within the municipality boundaries, but the municipality does not make the site available or take any site or development risk. Therefore, if the procurement relates to 100 MW and below, it be directed to Schedule 2. If the procurement is above 100 MW, it be undertaken in line with Section 34 and directed to the DMRE.

1.2.3 Municipal IPP procurement programme where the IPP's will bid for projects that are located on a municipal site and the municipality takes all or most of the site risk.

A Municipal IPP procurement process, where the IPP is located within the municipality on a municipal-owned site and where the municipality would be the procurer and the off-taker. In this Scenario, the potential IPPs will bid for a project to be located on municipal land.

1.2.4 A municipality constructing its own power plant and generating it's own electricity whether in the municipal jurisdiction or outside the municipal jurisdiction.

A municipality constructing its own power plant and generating its own electricity whether in the municipal jurisdiction or outside the municipal jurisdiction.

1.2.5 A municipality owned and constructed generation facility that can supply surrounding municipalities.

A municipality owned and constructed generation facility that can supply surrounding municipalities. The municipalities that are capable of executing this task may be specified according to its financial status, institutional capacity, human resources and distribution license status.

1.2.6 A multi-buyer scheme and municipal power pool arrangement.

A multi-buyer scheme where a municipality is one of more than one off-taker with a potential IPP.

1.2.7 Unsolicited Bids

Unsolicited bids (i.e. where a municipality is approached by a bidder or developer with a specific project and the municipality seeks to enter into an agreement with such party in the absence of a competitive tender)

1.3 The afore-mentioned scenarios are not the only scenarios available to municipalities under which new generation capacity may be established or procured. There may be various permutations of the scenarios or other scenarios which have not been considered. Therefore, this information serves as a guide to use by municipalities and municipal entities performing this function.

1.4 The annexures relating to the Scenarios and Roadmaps are as follows:

Annexure A:	Scenario 1 Roadmap - MIPPP with a Ministerial Determination
Annexure B:	Scenario 2 Roadmap - MIPPP in which the municipality is both procurer and buyer
Annexure C:	Scenario 3 Roadmap - MIPPP based on PPP requirements
Annexure D:	Scenario 4 and 5 Roadmap - MIPPP based on developing and operating own power plant

In respect of each of these Scenarios, the applicable legal framework is identified and key aspects in the process are highlighted. This will assist municipalities and municipal entities to ensure risk mitigation measures are included and addressed appropriately.

1.5 The Report highlights to municipalities and municipal entities the other licenses, permits and authorizations required to construct and operate renewable energy electricity generation infrastructure, see **Annexure E**. It must be noted that this reform is emerging and, in that context, any changes to approval and authorization by different institutions be directed to the specific institutions responsible for its administration.

1.6 It must be noted that this Report does not take a view on the legal status of municipalities' rights to procure new generation capacity.

2. ACRONYMS

2.1 Acronyms used in this and other Annexures

2.1.1	2015 Consultation Paper	means the 2015 Consultation Paper on Small Scale Embedded Generation published by the NERSA
2.1.2	2019 IRP	means the Integrated Resource Plan issued by the Minister of Energy under Government Notice 1360 under in <i>Government Gazette</i> 42784 on 18 October 2019, pursuant to the ERA
2.1.3	B-BBEE	means Broad-Based Black Economic Empowerment as defined in the Broad-Based Black Economic Empowerment Act 53 of 2003
2.1.4	Commercial Close	means the date on which the Preferred Bid and therelevant municipality sign the PPA; PPP agreement where applicable; or any other relevant ancillary agreement
2.1.5	Constitution	means the Constitution of the Republic of South Africa, 1996
2.1.6	CSP	Concentrated Solar Power
2.1.7	COS Framework	Cost of Supply Framework for Licensed Electricity Distributors in South Africa issued by the NERSA.
2.1.8	COGTA	Cooperative Governance and Traditional Affairs
2.1.9	COGTA Minister	Minister of Cooperative Governance and Traditional Affairs
2.1.10	DBSA	Development Bank of Southern Africa
2.1.11	Determination Ministerial Determination or	means a determination issued by the Minister of Mineral Resources and Energy to determine that new generation capacity is needed, in terms of section 34 of the Electricity Regulation Act 4 of 2006
2.1.12	Deviation Ministerial Deviation or	means obtaining approval by the Minister of Mineral Resources and Energy for the deviation from the Integrated Resource Plan in terms of section 10(2)(g) of the Electricity Regulation Act 4 of 2006
2.1.13	DMRE	Department of Mineral Resources and Energy
2.1.14	Energy Policy	means the White Paper on the Energy Policy of the Republic of South Africa approved by Cabinet on 2 December 1998 published under General Notice 3007 in <i>Government Gazette</i> 19606 on 17 December 1998
2.1.15	EPP	means the Electricity Pricing Policy of the South African Electricity Supply Industry published by the Department of Minerals and Energy under Government Notice 1398 in <i>Government Gazette</i> 31741 on 19 December 2008
2.1.16	ERA	means the Electricity Regulation Act 4 of 2006
2.1.17	Eskom	Eskom Holdings SOC Limited
2.1.18	GW	Gigawatt
2.1.19	IDP	Integrated Development Plan

2.1.20	IGFA	means the Intergovernmental Relations Framework Act 13 of 2005, as amended
2.1.21	IPP	Independent Power Producer
2.1.22	IPP Office	Independent Power Producer Office of the DMRE
2.1.23	IRP	means an Integrated Resource Plan issued by the Minister of Mineral Resources and Energy
2.1.24	ISMO	Independent System and Market Operator
2.1.25	ISMO Bill	means the Independent System and Market Operator Bill, 2012
2.1.26	LGFIDPM	means the Local Government Framework for Infrastructure Delivery and Procurement Management
2.1.27	kV	Kilovolt
2.1.28	MEC	means a Member of the Executive Council
2.1.29	Minister or Minister of Mineral Resources and Energy	means a member of cabinet that is responsible for mineral resources and energy
2.1.30	Ministerial Consent	means the consent of the Minister of Mineral Resources and Energy referred to in Regulation 5(3) of the New Gen Regulations which a municipality which wishes to procure or buy new generation capacity in accordance with IRP is required to obtain
2.1.31	MFMA	means the Local Government: Municipal Finance Management Act 56 of 2003
2.1.32	MPPP Regulations	means the Municipal Public-Private Partnership Regulations published under Government Notice R309 in <i>Government Gazette</i> 27431 of 1 April 2005, as amended
2.1.33	Municipal Council	means the municipal council of a municipality
2.1.34	Municipal Fiscal Act	means the Municipal Fiscal Powers and Functions Act 12 of 2007, as amended
2.1.35	Municipal IPP procurement programme	means a potential IPP procurement programme that may involve one or more of the Scenarios covered in this Circular
2.1.36	Municipal SCM Regulations	means the Municipal Supply Chain Management Regulations published under General Notice 868 in <i>Government Gazette</i> 27636 on 30 May 2005 under the MFMA, as amended
2.1.37	Municipal Systems Act	means the Local Government: Municipal Systems Act 32 of 2000
2.1.38	MW	Megawatt
2.1.39	National Transmission Company	means Eskom
2.1.40	New Generation Capacity	has the meaning given to it in the New Gen Regulations

2.1.41	New Gen Regulations	means the Electricity Regulations on New Generation Capacity published in terms of the ERA in Government Notice R399 in <i>Government Gazette</i> 34262 of 4 May 2011, as amended
2.1.42	NERSA	means the National Energy Regulator of South Africa established in terms of section 3 of the National Energy Regulator Act 40 of 2004
2.1.43	Network Charges Rules	means the NERSA Regulatory rules on network charges for Third Party Transportation of Energy, March 2012
2.1.44	NSP	Network Services Provider
2.1.45	National Treasury	South African National Treasury established in terms of section 216 of the Constitution
2.1.46	NT CSP	South African National Treasury's Cities Support Programme
2.1.47	PFMA	means the Public Finance Management Act 1 of 1999, as amended
2.1.48	PFMA SCM Regulations	means the Amendment of Treasury Regulations in terms of section 76 published under Government Notice R225 in <i>Government Gazette</i> 27388 on 15 March 2005, as amended
2.1.49	PPA	Power Purchase Agreement
2.1.50	PPP	Private Public Partnership
2.1.51	PPFPA	means the Preferential Procurement Policy Framework Act 5 of 2000, as amended
2.1.52	PV	Photovoltaics
2.1.53	Preferred Bidder	means an IPP that is selected following a competitive evaluation process and which, upon acceptance of such appointment, will conclude a PPA with the relevant municipality
2.1.54	Property Rates Act	means the Local Government: Municipal Property Rates Act 6 of 2004, as amended
2.1.55	Registration Procedure	Registration Procedure applicable to activities listed in terms of Schedule 2 of the ERA, Version 2, October 2020
2.1.56	RE	means Renewable Energy
2.1.57	Reference Group	means the municipal procurement of energy reference group that assisted the National Treasury analyse and map the legal and regulatory framework, processes applicable to municipalities in the procurement of new electricity generation capacity and <i>inter alia</i> comprising of representatives from DMRE; AMEU; SALGA; and various units within National Treasury
2.1.58	REFIT	Renewable Energy Feed-in Tariff
2.1.59	RFP	Request for Proposal
2.1.60	RFQ	Request for Quotation
2.1.61	REIPP	means the renewable energy independent power producer procurement programme which is currently run by the IPP Office under different bidding windows

2.1.62	SALGA	South African Local Government Association
2.1.63	Scenarios	means the scenarios contemplated in paragraph 2.2
2.1.64	SCM	Supply Chain Management
2.1.65	SIPDM	National Treasury's Standard for Infrastructure Procurement and Delivery Management
2.1.66	SSEG	Small-Scale Embedded Generation
2.1.67	Stats Act	The Statistics Act 6 of 1999
2.1.68	Structures Act	means the Local Government: Municipal Structures Act 117 of 1998, as amended
2.1.69	Study	means the project by NT supported by DMRE to set out the regulatory framework that applies to the procurement of new generation capacity by municipalities
2.1.70	S&EIR	Scoping and Environmental Impact Circular Report
2.1.71	ToR	Terms of reference for the Study attached as Annexure F
2.1.72	TVR	means treasury views and recommendations at different stages of the PPP including: (i) TVR I which is the treasury views and recommendations on the feasibility study; (ii) TVR IIA which is the treasury views and recommendations on the draft of procurement documents which must be taken into account and addressed before the procurement documents may be released to market; (iii) TVR IIB which is the treasury views and recommendations on the bid evaluation outcome and/or value for money circular; and (iv) TVR III which is the treasury views and recommendations on the final PPP agreement and the value for money circular
2.1.73	TWh	Terawatt-hours
2.1.74	UOS	Use-of-system
2.1.75	WB	The World Bank

3. PROJECT SIZE DISTINCTIONS

- 3.1 The terms “utility scale”; “distributed generation” and “SSEG” are used to distinguish between different generation plant name plate capacity sizes as the legal and policy approach to these different plant sizes differs.
- 3.2 The legal and policy approach to these different plant sizes differs. The terms “*utility scale*”; “*distributed generation*” and “SSEG” themselves however may not be found consistently in the relevant legislation and policy documents.
- 3.3 Explanations on how the distinctions were derived are explained below.

Utility scale plants are considered those with a name plate capacity of more than 10 MW

3.3.1 A facility of this size is distinguishable because:

- 3.3.1.1 Previously 10 MW was the limit which had been indicated for licensing of a generation facility under ERA. This has however fallen away, and the Minister has recently raised the licensing threshold under the ERA to above 100 MW thereby distinguishing a facility of this size. ¹
- 3.3.1.2 The 10MW as the threshold for a “utility scale” facility as a facility of this size has been retained as it would generally have to be connected to the transmission system, raising the possibility of wheeling arrangements with the transmission system operator (generally Eskom, the National Transmission Company).
- 3.3.1.3 If a municipal utility scale project needed a license (which is presently only a facility of over 100 MW) it would need an IRP Deviation as all utility scale capacity provided for in the 2019 IRP have been taken up with a Determination for procurement by the DMRE.
- 3.3.1.4 The facility would need a long-term PPA (15-20 years) to ensure the financial viability of the facility.
- 3.3.1.5 Such a facility may be best suited to serve large load centers such as a metropolitan municipality or a district municipality.

Distributed generation scale plants are considered those with a name plate capacity of more than 1 MW but less than 10 MW

- 3.3.2 This term is not to be confused with the term “*embedded generation*” which is used to mean a generation facility that is connected into the distribution grid of a municipality which operates at below 132kV as per the definition of a “*distribution power system*” in section 1 of the ERA. Often a distributed generation facility would also be “*embedded generation*”.

3.3.3 A facility of this size is distinguishable because:

- 3.3.3.1 The 2019 IRP specifically defined “distributed generation” as 1-<10 MW size facilities embedded in a municipal network, ² and allowed 500 MW allocation per annum to such facilities, the relevance of this has however fallen away with the removal of a licensing requirement for such facilities.
- 3.3.3.2 Such facilities may connect to a distribution or transmission power system, raising the possibility of wheeling arrangements with either the distribution system operator (generally Eskom or the municipality) or the transmission system operator (generally Eskom, as the National Transmission Company).
- 3.3.3.3 These projects are also likely to need a long-term PPA (15-20 years) to support their financial viability, although at the lower end of the size scale there is the possibility of alternative

agreements, such as net metering or shorter contracts, even though there is limited prospect of contracts of less than three years.

3.3.3.4 Such a facility may be best suited to a metropolitan or district municipality due to load and demand factors but could also be found within a local municipality in appropriate circumstances.

3.3.3.5 There is no license required for such a facility but it must be registered with NERSA.

Small-scale embedded generation (SSEG) are considered those with a name plate capacity of less than 1 MW.

3.3.3.6 A facility of this size is distinguishable because:

3.3.3.7 SSEG facilities are currently exempt from licensing under the ERA and are subject to registration.

³ Detailed registration guidelines facilitate this. ⁴

3.3.3.8 Many municipalities already provide a tariff for such facilities to connect and feed the municipal grid on a “net metering” basis.

3.3.3.9 The IRP does not contain any limit on SSEG facilities. ⁵

3.3.3.10 Such facilities would generally connect to the distribution system. These facilities could include a range of feedstock types but PV is probably the most likely project at this size.

3.3.3.11 These projects are unlikely to need a long-term PPA to reach financial viability and may be concluded based on “short-term” contracts (i.e. less than three years).

3.3.3.12 These facilities could suit any type of municipality.

3.3.3.13 As with all facilities below 100 MW SSEG facilities are exempt from licensing under the ERA and are subject to registration. ⁶ Detailed registration guidelines facilitate this, the current version is specifically applicable to SSEG. ⁷

4. SUMMARY OF CONSTITUTIONAL AUTHORITY AND COMPETENCY OF MUNICIPALITIES TO PROCURE OR ESTABLISH NEW GENERATION CAPACITY

4.1 Subject to compliance with the laws applicable to the regulation of new generation capacity; public procurement requirements and other legal requirements, it can be interpreted that:

4.1.1 Metropolitan municipalities and local municipalities have the power and competency to:

4.1.1.1 purchase electricity from an IPP or a neighboring municipality;

4.1.1.2 establish or procure generation facilities; and

4.1.1.3 supply customers within their area of jurisdiction (including industrial customers) on non-discriminatory terms and in accordance with the municipal tariff.

4.1.2 The authority to participate in the Municipal IPP procurement programme contemplated in the different Scenarios arises from the municipal constitutional function to reticulate or supply electricity to their local communities. This means municipalities may construct generation facilities, distribution networks and enter into PPAs with IPPs and any other ancillary agreements, as the reforms in the sector allow.

4.1.3 District municipalities have the power to:

- 4.1.3.1 purchase electricity from an IPP (or a neighboring district municipality);
- 4.1.3.2 establish or procure generation facilities; and
- 4.1.3.3 supply municipalities within their area of jurisdiction.

4.1.4 It is noted that in the case of many local municipalities in the country, the “bulk supply” powers of the district municipality in respect of electricity have specifically been extended to these local municipalities. This may be interpreted to give these local municipalities the power to extend their area of supply beyond their territorial area of jurisdiction and supply other municipalities within the district with electricity. The prohibitions in section 164 and the safeguards therein apply.

4.1.5 Provincial government has a concurrent competence in electricity supply regulation and could pass legislation which empowers a role for provincial government in activities which assist municipalities to deliver electricity reticulation. This could include a provincial power pool or agency-based procurement role for municipalities.

- 4.1.5.1 A municipality may supply a customer outside of its municipal jurisdiction provided the neighboring municipality consents. This may not be on “commercial” terms and must be “non-discriminatory”. As such, the terms of service and price for the electricity would be regulated under the neighboring municipalities’ tariff although the seller could act as collecting agent for the municipality and retain the agreed cost of supply before paying the balance over to the municipality. Please note that the NERSA process will apply.

5. LEGAL FRAMEWORK REGARDING LICENSING AND REGISTRATION

- 5.1 Generation activities <100 MW do not require licensing but do require registration. NERSA is responsible for setting out the procedure to register these facilities.
- 5.2 Any generation facility of more than 100 MW will need a license from NERSA.⁸ This may require a Deviation or Determination (or Ministerial Consent granted in terms of Regulation 5 of the New Gen Regulations). The length of the process for approval of any of the aforementioned is outlined in the DMRE Section 34 determination terms of reference.
- 5.3 If the Municipal IPP projects are individually 100 MW or less, there is no need for seeking a Determination or Deviation because none of these are required for registration purposes. NERSA required these for licensing purposes.
- 5.4 The ERA provides a framework for municipalities to develop wheeling agreements and a wheeling tariff.

6. MUNICIPAL AND PROCUREMENT LAW CONSIDERATIONS APPLICABLE TO PROCUREMENT OF ELECTRICITY BY A MUNICIPALITY OR BY A THIRD PARTY ON BEHALF OF MUNICIPALITIES

- 6.1 The legal and regulatory principles should be carefully considered when a municipality considers procurement of electricity either itself or through a third party.

7. THE LEGAL FRAMEWORK FOR THE REGULATION OF ELECTRICITY PRICES AND TARIFFS

- 7.1 There is no statutory restriction on the price a municipality may pay to purchase electricity under a municipal PPA. However, decision-making is premised on concepts such as value for money, reasonably incurred costs, prudence, financial sustainability and transparent pricing.

- 7.2 The NERSA will require a Cost of Supply study for any change to the tariff structure that arises from procurement of electricity from IPPs or own build New Generation Capacity. The EPP anticipates that RE may come at a higher cost, but this would have to be reasonably capable of justification and should generally not cause the municipal tariff to rise significantly above the benchmark rise set by the NERSA annually.
- 7.3 There are multiple levels of decision points and oversight regarding the price charged under a PPA to a municipality, particularly one which is for a period of more than three years and requires licensing (>100 MW) rather than registration.
- 7.4 NERSA will interrogate the PPA at both registration and licensing stage.
- 7.5 A net metering arrangement probably has the least direct scrutiny, it is justified annually at tariffing setting stage by the Municipal Council and submitted for approval to the NERSA.
- 7.6 A PPA of more than three years would be subject to the provisions of section 33 of the MFMA.
- 7.7 If a PPA is entered into following a Determination and in accordance with the scheme provided for in the New Gen Regulations, then the NERSA will communicate engage with the municipality relating to the pass through the full costs which it incurs under the PPA in its tariff to consumers.

8. MUNICIPAL LONG-TERM CONTRACTS AND SECTION 33 REQUIREMENTS

8.1 Summary of the MFMA Section 33 Requirements

8.1.1 In terms of section 33 of the MFMA, a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year.

8.1.2 However, if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, the municipality may do so only if approval is obtained from the municipal council after following the process required in terms of section 33 of the MFMA stated below:

Section 33 of the MFMA: Contracts having future budgetary implications.

“(1) A municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if--

8.1.2 the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved-

(i) has, in accordance with section 21A of the Municipal Systems Act-

(aa) made public the draft contract and an information statement summarizing the municipality's obligations in terms of the proposed contract; and

(bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and

(ii) has solicited the views and recommendations of-

(aa) the National Treasury and the relevant provincial treasury; (bb) the national department responsible for local government; and

(cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department;

8.1.2.1 the municipal council has taken into account-

(i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;

(ii) the impact of those financial obligations on the municipality's future

(iii) any comments or representations on the proposed contract received from the local community and other interested persons; and

(iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department

responsible for local government and any national department referred to in paragraph (a)(ii)(cc); and

8.1.2.2 *the municipal council has adopted a resolution in which-*

- (i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;*
- (ii) it approves the entire contract exactly as it is to be executed; and*
- (iii) it authorizes the municipal manager to sign the contract on behalf of the municipality.*

(2) The process set out in subsection (1) does not apply to-

- (a) contracts for long-term debt regulated in terms of section 46(3);*
- (b) employment contracts; or*
- (c) contracts-*
 - (i) for categories of goods as may be prescribed; or*
 - (ii) in terms of which the financial obligation on the municipality is below-*
 - (aa) a prescribed value; or*
 - (bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.*

(3)(a) All contracts referred to in subsection (1) and all other contracts that impose a financial obligation on a municipality-

- (i) must be made available in their entirety to the municipal council; and*
- (ii) may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).*

(b) Paragraph (a)(i) does not apply to contracts in respect of which the financial obligation on the municipality is below a prescribed value.

(4) This section may not be read as exempting the municipality from the provisions of Chapter 11 to the extent that those provisions are applicable in a particular case."

8.1.3 The main steps of the section 33 process are—

8.1.3.1 public participation;

8.1.3.2 the soliciting and consideration of the views and recommendations of the National Treasury, the relevant provincial treasury and certain government departments; and

8.1.3.3 the approval of the Municipal Council.

8.1.4 Specific requirements apply to each of these steps. This is a process which may take between three to six months, as amongst others, the municipal management must at least sixty days before the meeting of the Municipal Council make the draft contract and information statement summarizing the municipality's obligations publicly available and invite the local community and interested persons to submit comments.⁹

8.2 Application of the MFMA Section 33 Process and Practical Guidance for Applying these Requirements

8.2.1 From the outset, while there are several procedural requirements that are applicable to the conclusion of long-term contracts none of which preclude or prohibit such contracts from being concluded, provided they can be financially justified by the municipality.

8.2.2 Procedurally, the requirements for long-term contracts are as follows:

8.2.2.1 Firstly, the municipal manager must, at least 60 days before the meeting at which the contract is to be approved by the Municipal Council (i) make public the draft contract and other information and conduct a public participation process in accordance with section 21A of the Municipal Systems Act; and (ii) solicit the views and recommendations of the National Treasury and the relevant provincial treasury; the national department responsible for local government;¹⁰ and, if the contract involves the provision of electricity, the national department responsible energy policy, being the DMRE.

8.2.2.2 Secondly, when entering into contracts having future budgetary implications, the Municipal

Council must take into account a number of factors, namely-

- the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
- the impact of those financial obligations on the municipality's future municipal tariffs and revenue;

8.2.2.2.1 any comments or representations on the proposed contract received from the local community and other interested persons; and

8.2.2.2.2 any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government (COGTA) and any national department referred to above.¹¹

8.2.2.3 Thirdly, the Municipal Council must adopt a resolution in which it (i) determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract; (ii) it approves the entire contract exactly as it is to be executed; and (iii) it authorizes the municipal manager to sign the contract on behalf of the municipality.¹²

8.2.3 The theme of financial sustainability runs through both the MFMA and the Municipal Systems Act. For section 73(2) of the Municipal Systems Act requires that Municipal services must be provided in a manner that is financially sustainable.¹³

8.2.4 Further, the section 33 process requires consultation with organs of, or other State functionaries that have other mandates in the electricity generation and distribution value chain. This is because section 33(1)(a)(ii) of the MFMA provides that "*if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department*", the municipality must consult with the department responsible for the provision of the relevant services. The DMRE is not responsible for providing electricity but is responsible for policy and regulation of the electricity supply. As a result, before entering into a long-term PPA, a municipality must solicit the views of the DMRE in terms of 33(1)(a)(ii)(cc) of MFMA.

8.2.5 Section 33 requires consultation with:

8.2.5.1 The local community and other interested persons;

8.2.5.2 National Treasury and the relevant provincial treasury;

8.2.5.3 the national department responsible for local government (COGTA); and

8.2.5.4 if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department.

8.2.6 In this case this would require consultation with:

8.2.6.1 The DMRE (as the national department responsible for the policy and regulation of the electricity supply);

8.2.6.2 COGTA (as the national department responsible for local government).¹⁵

8.2.6.3 The National Treasury and relevant provincial treasury.

8.2.7 Accordingly, in terms of section 33(1)(b)(iv) of the MFMA, the municipality must take into account the views of the DMRE, COGTA, National Treasury and the relevant provincial treasury before it passes a resolution authorizing the conclusion of a long-term PPA.

9. BRIEF RISKS IDENTIFIED ACCORDING TO THE LEGAL AND REGULATORY ANALYSIS

Scenario	Risks and Observations
Municipal IPP procurement programme in which the DMRE is the procurer and the Municipalities are the buyers following a Determination	At the time of publishing this document, this Scenario is viable because it would have policy support from the outset. When the Minister grants or issues a determination to which NERSA concurs which identifies the municipality as the buyer, that would indicate policy support for the Municipal IPP procurement programme. This Scenario requires capacity to be mobilized within the DMRE. Therefore, it is under consideration and may be initiated subject to terms and conditions determined by the DMRE and in line with existing legislation.
Municipal IPP procurement programme where the IPPs will bid for projects that are located on a non-municipal site. And the municipality does not take any site or development risks.	Besides the policy issues, this Scenario presents a complex decision-making process and some of the decisions may not have clear timeline and decision-making criteria. Therefore, if the procurement relates to 100 MW and below, it be directed to Schedule 2. If the procurement is above 100 MW, it be undertaken in line with Section 34 and directed to the DMRE.
Municipal IPP procurement programme where the IPPs will bid for projects that are located on a municipal or a non-municipal site and the municipality takes all or most of the site risk.	The key considerations which apply to Scenario 2 are a factor in this Scenario. These would require decision-making and timing considerations. We must state upfront that the mere fact that a municipality makes a site available for the generation facility does not on its own establish a MPPP.

A municipality constructing its own power plant and generating its own electricity whether in the municipal jurisdiction or outside the municipal jurisdiction.	From an approval/authorization point of view this Scenario has similarities to Scenario 1. In respect of this Scenario the municipality will in addition have to comply with requirements that are common to most Scenarios and also have to comply with the requirements of procuring strategic infrastructure or assets. This will also require further analysis as there may be implications for a municipality and its neighboring municipality, depending on the location of the asset, which impact on operations outside of its jurisdiction or boundaries. The MFMA has some specific prohibitions or conditions in section 164, relating to the latter point.
A municipality owned and constructed generation facility that can supply surrounding municipalities.	This is very similar to Scenario 4 but introduces intra-municipal arrangements relating to supplying other municipalities.
A multi-buyer scheme and municipal power pool arrangements.	This is another Scenario which with clear policy support is viable. There are different models which can be adopted to give effect to this Scenario. The different models include establishing a multi-jurisdictional service utility or incorporate of a state-owned entity to which two or more municipalities are shareholders.
Unsolicited Bids.	This scenario is not recommended due to a lack of competition. Outside the set pre-conditions, it is difficult to justify unsolicited bids especially in the power purchase environment. The National Treasury recommends that electricity procurement processes are fair, equitable, transparent, competitive and cost-effective.

10. DIFFERENT SCENARIOS

10.1 Scenario 1 – MUNICIPAL PROCUREMENT PROGRAMME IN WHICH THE DMRE IS THE PROCURER AND THE MUNICIPALITIES ARE THE BUYERS FOLLOWING A DETERMINATION

Summary of Approvals/Relevant Authority/Key Considerations

The Type of Approval	Relevant Authority and Key Stakeholders	Timing – When to Apply for /Obtain the Relevant Approval and Other Considerations
Section 34 Determination naming a municipality as a buyer in a Municipal IPP procurement programme.	Minister of Mineral Resources and Energy. NERSA concurrence. Relevant municipal council approving the municipality's participation in the municipal IPP procurement programme and agreeing that the municipality is named as the buyer in the Determination.	We envisage this done in a pragmatic manner. Timing and other considerations will be agreed before the municipal IPP procurement programme is initiated.
Ministerial consent under regulation 5 of the New Gen Regulations.	Minister of Mineral Resources and Energy – approving authority. Municipality as the applicant after completing a feasibility study. Visit the DMRE website under programmes and projects, information in the application forms.	<i>Key considerations</i> In respect of this scenario, we do not anticipate ministerial consent being required if the determination is issued to allow procurement by the DMRE/IPP office. <i>Timing for application and approval</i> Because this scenario will only work if there is a determination which is mutually agreed, we anticipate timing and other key considerations being agreed upfront.
Registration in terms of Schedule 2 of ERA.	NERSA – authority empowered to register generation facilities. The generator applies for registration certificate.	<i>Key considerations</i> We have assumed that the projects that will participate in the Municipal IPP procurement programme will generate 100 MW or less which will mean they do not require a generation license but do require registration with NERSA. Registration itself is done in terms of the SSEG registration procedure to be updated from time to time. <i>Timing for Application</i> Following appointment as Preferred Bidder <i>Timing for approval</i> The registration certificate is required to be issued within 60 days of NERSA Or its electricity sub-committee receiving the evaluation report.

Section 33 Requirements for conclusion of a contract longer than 3 years.	Municipal council approves the contract after public participation process and consultation with National Treasury, COGTA and DMRE among others. Information to be made available for public participation process. It is also advisable to include this during the municipal IDP consultation processes.	<i>Key considerations</i> Public notice and comment required. Solicitation of views and recommendations from a range of government stakeholders will be required as these have long term financial and other obligations for the municipality and it promotes the key principles of transparency and accountability. <i>Timing for applying/obtaining the approval</i> After appointment of Preferred Bidder and prior to final PPA approval by the municipal council, depending on the municipal council policy and processes. A 60-day comment period is required.
Price under the PPA.	NERSA	<i>Key Considerations</i> Considered and approved at registration, also considered during annual tariff approval process. Updated Cost of Supply Study to reflect and changes arising from the PPA. <i>Timing for applying or obtaining the approval of the tariff</i> Municipal electricity tariffs approved annually by NERSA.
Government Guarantee.	Minister of Mineral Resources and Energy, Minister of Finance, Municipal Council.	<i>Key Considerations</i> The provision of financial support is generally addressed in the Annual Division of Revenue Act. National Treasury has not issued guarantees for a Municipal IPP procurement programme. The current policy position is that such transactions be undertaken within the financial capacity of the municipality. <i>Timing for application/approval</i> The RFP must be developed consistent with the current policy. Any guarantees to be secured, before the PPA and incidental agreements (e.g. Implementation Agreement is signed).

10.2 Scenario 2: MUNICIPAL IPP PROCUREMENT PROGRAMME, WHERE THE IPPs WILL BID FOR PROJECTS THAT ARE SITUATED ON A NON-MUNICIPAL SITE AND THE MUNICIPALITY DOES NOT TAKE ANY SITE OR DEVELOPMENT RISKS

Summary of Approvals/Relevant Authority/Key Considerations

The Type of Approval	Relevant Authority and Key Stakeholders	Timing – When to Apply for /Obtain the Relevant Approval and Other Considerations
Section 34 Determination naming a municipality as a buyer in a Municipal IPP procurement programme.	Minister of Mineral Resources and Energy NERSA concurrence Relevant municipal council approving the municipality's participation in the municipal IPP procurement programme and agreeing that the municipality is named as the buyer in the determination.	<i>Key considerations</i> In light of changes to the generation facilities licensing requirements, therequirement to obtain a Determination before initiating procurement will be confirmed by the procedures agreed to within DMRE and NERSA. As a result, this may be required at Preferred Bidder stage. DMRE view is that if Regulation 5 approval is granted, then section 34 Determination will follow. The Determination could be sought at the same time as Ministerial Consent. <i>Timing for Application:</i> A Determination may be required for registration purposes however, it is not required presently. <i>Timing for approval:</i> No statutory time period. It is therefore recommended that all relevant information is provided as early as possible. It could be a lengthy process, however, DMRE has indicated it will expedite all processes.
Ministerial consent under regulation 5 of the New Gen Regulations.	Minister of Mineral Resources and Energy – approving authority. Municipality as the applicant after completing a feasibility study.	<i>Key Considerations</i> DMRE advises that Ministerial Consent isneeded for a generation facility andrequires registration. To ensure Ministerial Consent, a feasibility study that complies with regulation 5(2) of the New Gen Regulations will need to be undertaken. <i>Timing for Application:</i> Ministerial Consent may be linked to registration.

		This could be sought at Preferred Bidder stage. <i>Timing for approval:</i> No statutory time period. It is therefore recommended that all relevant information is provided as early as possible. It could be a lengthy process, however, DMRE has indicated it will expedite all processes.
Registration in terms of Schedule 2 of ERA.	NERSA – authority empowered to register generation facilities. The generator applies for registration certificate.	<i>Key Considerations</i> We have assumed that the projects that will participate in the Municipal IPP procurement programme will generate 100 MW or less which will mean they do not require a generation license but do require registration with NERSA. Registration itself is done in terms of the SSEG registration procedure to be updated from time to time. <i>Timing for Application</i> Following appointment as Preferred Bidder <i>Timing for approval</i> The registration certificate is required to be issued within 60 days of NERSA or its electricity subcommittee receiving the evaluation report.
Section 33 Requirements for conclusion of a contract longer than 3 years.	Municipal council approves the contract after public participation process and consultation with National Treasury, COGTA and DMRE among others. Information to be made available for public participation process. It is also advisable to include this during the municipal IDP consultation processes.	<i>Key considerations</i> Public notice and comment required. Solicitation of views and recommendations from a range of government stakeholders will be required as these have long term financial and other obligations for the municipality and it promotes the key principles of transparency and accountability. <i>Timing for applying/obtaining the approval</i> After appointment of preferred bidder and prior to final PPA approval by the municipal council. 60-day comment period required.

Price under the PPA.	NERSA	<i>Key Considerations</i> Considered and approved at registration, also considered at during annual tariff approval process. Updated Cost of Supply Study to reflect and changes arising from the PPA. <i>Timing for applying or obtaining the approval of the tariff</i> Municipal electricity tariffs approved annually by NERSA.
Government Guarantee.	Minister of Mineral Resources and Energy, Minister of Finance, Municipal Council.	<i>Key Considerations</i> The Minister under section 34(2)(e) of the ERA is empowered to provide a government guarantee to support the PPA if the Municipal IPP procurement programme is procured by the municipality under a Determination. The provision of financial support is generally addressed in the Annual Division of Revenue Act. National Treasury has not issued guarantees for a Municipal IPP procurement programme. The current policy position is that such transactions be undertaken within the financial capacity of the municipality. <i>Timing for application/approval</i> Before the PPA and incidental agreements (e.g. Implementation Agreement is signed).

10.3 Scenario 3: MUNICIPAL IPP PROCUREMENT PROGRAMME, WHERE IPPs WILL BID FOR PROJECTS THAT ARE SITUATED ON MUNICIPAL LAND OR A NON-MUNICIPAL SITE AND THE MUNICIPALITY TAKES ALL OR MOST OF THE SITE RISKS

Summary of Approvals/Relevant Authority/Key Considerations

The Approval	Type of Relevant Authority and Key Stakeholders	Timing – When to Apply for /Obtain the Relevant Approval and Other Considerations
MPPP approvals if a project participating in a municipal IPP procurement programme is a PPP.	Accounting officer of the municipality must notify the National Treasury and the relevant provincial treasury in writing of the municipality's intention to procure power through a PPP arrangement. Among others, the notification must include information on the municipality's ability to comply with the provisions of section 120 of the MFMA Appoint a transaction advisor, if required. Conduct and complete feasibility study. Accounting officer to submit feasibility study to Municipal Council for a decision on PPP (after having made particulars of the feasibility study public and considered comments of the public) and views of National Treasury, COGTA and provincial / national organs dealing with regulation of electricity (DMRE) Before the proposed bid documentation is made public, the municipality must solicit the views of National Treasury and the relevant provincial treasury on the procurement document. The views of these bodies must be solicited at least 30 days before they are released to the public. An award can only be made after the National Treasury and the relevant provincial treasury views on the evaluation outcome have been solicited; the agreement is made available for public comment and the approval process envisaged in section 33 of the MFMA and discussed above has been followed.	<i>Timing for application</i> Prior to issuing bid documents. <i>Timing for approval</i> Varies per step and this will require further consideration after feasibility study if any project proceeds this way.

Approval for leasing of land from municipality <R10million and <3 years.	Lease must be approved bymunicipal council or accounting officer of the municipality (if delegated authority exists).	<i>Timing for application</i> Prior to entering into lease. <i>Timing for approval</i> There is no prescribed time period.
Approval for leasing of land from municipality >R10million and >3 years.	Municipal council approves inprinciple. Minimum of 60-day publicparticipation for the proposed lease and views of National Treasury andrelevant provincial treasury. Municipal council meeting for approval. Note provisions in the Municipal Asset Transfer Regulations issued under the MFMA.	<i>Timing for application</i> Prior to entering into lease. <i>Timing for approval</i> The prescribed timeline for approvalbut can only be approved after the public participation process.

10.4 Scenario 4: MUNICIPALITY CONSTRUCTING ITS OWN POWER PLANT AND GENERATING ITS OWN ELECTRICITY WHETHER IN THE MUNICIPAL JURISDICTION OR OUTSIDE THE MUNICIPAL JURISDICTION

Summary of Approvals/Relevant Authority/Key Considerations

The Type of Approval	Relevant Authority and Key Stakeholders	Timing – When to Apply for /Obtain the Relevant Approval and Other Considerations
Section 34 Determination setting out terms on which a municipality may establish new generation capacity.	Minister of Mineral Resources and Energy NERSA concurrence	<i>Key considerations</i> In light of changes to the generation facilities licensing requirements, the requirement to obtain a Determination before initiating procurement will be confirmed by the procedures agreed to within DMRE and NERSA. As a result, this may be required at Preferred Bidder stage. DMRE view is that if Regulation 5 approval is granted, then section 34 Determination will follow. The Determination could be sought at the same time as Ministerial Consent. <i>Timing for Application:</i> A Determination may be required for registration purposes however, it is not required presently. <i>Timing for approval:</i> No statutory time period. It is therefore recommended that all relevant information is provided as early as possible. It could be a lengthy process, however, DMRE has indicated it will expedite all processes.
Ministerial consent under regulation 5 of the New Gen Regulations.	Minister of Mineral Resources and Energy – approving authority. Municipality as the applicant after completing a feasibility study.	<i>Key Considerations</i> DMRE advises that Ministerial Consent is needed for a generation facility and requires registration. To ensure Ministerial Consent, a feasibility study that complies with regulation 5(2) of the New Gen Regulations will need to be undertaken. <i>Timing for Application:</i>

		<i>Ministerial Consent may be linked to registration.</i> This could be sought at Preferred Bidder stage. <i>Timing for approval:</i> No statutory time period. It is therefore recommended that all relevant information is provided as early as possible. It could be a lengthy process, however, DMRE has indicated it will expedite all processes.
Registration interms of Schedule 2 of ERA.	NERSA – authority empowered to register generation facilities. The generator applies for registration certificate.	<i>Key Considerations</i> We have assumed that the projects that will participate in the Municipal IPP procurement programme will generate 100 MW or less which will mean they do not require a generation license but do require registration with NERSA. Registration itself is done in terms of the SSEG Registration Procedure to be updated from time to time. <i>Timing for Application</i> Following appointment as Preferred Bidder <i>Timing for approval</i> The registration certificate is required to be issued within 60 days of NERSA or its electricity subcommittee receiving the evaluation report.
Section 33 Requirements for conclusion of a contract longer than 3 years.	Municipal council approves the contract after public participation process and consultation with National Treasury, COGTA and DMRE among others. Information to be made available for public participation process. It is also advisable to include this during the municipal IDP consultation processes.	<i>Key considerations</i> Public notice and comment required. Solicitation of views and recommendations from a range of government stakeholders will be required as these have long term financial and other obligations for the municipality and it promotes the key principles of transparency and accountability. <i>Timing for applying/obtaining the approval</i> After appointment of preferred bidder and prior to final PPA approval by the municipal council. 60- day comment period required.

Price under the PPA.	NERSA	<i>Key Considerations</i> Considered and approved at registration, also considered at during annual tariff approval process. Updated Cost of Supply Study to reflect and changes arising from the PPA. <i>Timing for applying or obtaining the approval of the tariff</i> Municipal electricity tariffs approved annually by NERSA.
Government Guarantee.	Minister of Mineral Resources and Energy, Minister of Finance, Municipal Council.	<i>Key Considerations</i> The Minister under section 34(2)(e) of the ERA is empowered to provide a government guarantee to support the PPA if the Municipal IPP procurement programme is procured by the municipality under a Determination. The provision of financial support is generally addressed in the Annual Division of Revenue Act. National Treasury has not issued guarantees for a Municipal IPP procurement programme. The current policy position is that such transactions be undertaken within the financial capacity of the municipality.

10.5 Scenario 5- A MUNICIPALITY OWNED AND CONSTRUCTED GENERATION FACILITY THAT CAN SUPPLY SURROUNDING MUNICIPALITIES

Summary of Approvals/Relevant Authority/Key Considerations

This Scenario has many similarities to Scenario 4. The key difference is that the municipality will also supply electricity from the facility it builds to other neighboring municipalities and customers outside its jurisdiction. As a result, the roadmaps or flow chart in **Annexure D** is equally applicable to this Scenario.

10.6 Scenario 6 - A MULTI-BUYER SCHEME AND MUNICIPAL POWER POOL ARRANGEMENTS

This Scenario contemplates a multi-buyer scheme. This scheme may either be regional pooling arrangements or establishment of a multi-jurisdictional service utility that will undertake procurement on behalf of the relevant municipalities.

Summary of Approvals/Key Considerations

The specifics which apply to each type of possible vehicle which the municipalities may use are not discussed here. This discussion is quite specific and requires an in-principle decision based on exactly what is intended. For example, are municipalities considering providing this service through a state-owned company as opposed to a service utility. If a service utility is contemplated, is the intention for this entity to have customer interface or it will just be selling power to the participating municipalities.

10.7 Scenario 7: UNSOLICITED BIDS

Summary of Approvals/Key Considerations

The criteria for unsolicited bids are clearly articulated in section 113 of the MFMA and Regulation 37 Municipal SCM Regulations.

The National Treasury recommends that electricity procurement processes are fair, equitable, transparent, competitive and cost-effective.

If the criteria and threshold in the SCM Regulations are met, a municipality may proceed to the next step.

11. CONCLUSION

- 11.1 This guidance to municipalities and municipal entities was developed through an analysis and mapping of the legal and regulatory framework and processes in the possible procurement of new generation capacity, relevant at the time of the project. Further updates and as the sector policy reforms unfold can be located from the contact information mentioned below.
- 11.2 This guidance is intended to assist municipalities and municipal entities in considering how they may procure, buy, sell and generate electricity having regard to the applicable Scenario and navigating such path, bearing in mind that the Scenarios outlined above are not exhaustive.

Recommendation

1. That the content of the report be noted.

