

OIL AND GAS

THE LAW DIGEST

TOPIC: HOW TO OBTAIN PETROLEUM EXPLORATION
AND PRODUCTION LICENCE IN GHANA.

Contributor

David Yaw Danquah, Esq

OIL AND GAS

THE LAW DIGEST

TOPIC: HOW TO OBTAIN PETROLEUM EXPLORATION
AND PRODUCTION LICENCE IN GHANA.

Reproduced with permission from Legalstone Solicitors LLP
This article was first published in June 2019
For further information please contact david@legalstonesolicitorsllp.com

Contributor

David Yaw Danquah, Esq

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

ACKNOWLEDGMENT

Legalstone acknowledges all its staff and partners for contributing to this law digest on how to obtain petroleum exploration and production licence in Ghana

INTRODUCTION

LAWS AND REGULATIONS.

Ghana is a democratic state, and its petroleum exploration and production activities are governed by a number of laws within her jurisdiction which laws include the following:

1. Petroleum (Exploration and Production) Act, 2016 (Act 919)
2. Petroleum Commission Act, 2011 (Act 821)
3. Ghana National Petroleum Corporation Law 1983 (PNDC Law 64)
4. Petroleum Commission (Fees and Charges) Regulations, 2015 (L.I 2221)
5. Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I 2204)
6. Petroleum (Exploration and Production) (Measurement) Regulations, 2016 (L.I 2246)
7. Petroleum Revenue Management Act, 2011 (Act 815)
8. Petroleum Revenue Management (Amendment) Act, 2015 (893)
9. Revenue Administration Act, 2016 (Act 915)
10. Environmental Assessment Regulation 1999 (L.I 1652)
11. Petroleum (Exploration and Production) (General) Regulations, 2018
12. Petroleum (Exploration and Production) (Health, Safety and Environment) Regulations, 2017 (L.I 2258)
13. Petroleum (Exploration and Production) (General) Regulations, 2018 (L.I 2359)

OWNERSHIP OF PETROLEUM RESOURCES

Under Act 919, all petroleum resources existing in its natural state in, under or upon any land in Ghana, rivers, streams, watercourses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf, is the property of the Republic of Ghana and is vested in the President on behalf of and in trust for the people of Ghana. The law requires persons responsible for the management of petroleum resources to do so in accordance with the principles of good governance, including transparency and accountability taking into consideration the object of the Acts governing the industry.

CONDUCT OF PETROLEUM ACTIVITIES

In Ghana, petroleum activities shall be conducted only in an open area under a license or petroleum agreement and in accordance with applicable laws. An open area simply refers to an area of possible petroleum accumulation within the jurisdiction of Ghana, and those areas shall be on a reference map prepared by the Minister in consultation with the Commission. The open area shall be divided into numbered areas, each of which shall be described as a block

PARTICIPATION OF INDIGENOUS GHANAIAAN COMPANIES IN PETROLEUM ACTIVITIES

Under L.I 2204, an indigenous Ghanaian company shall be afforded first preference in the grant of a petroleum agreement or a license concerning the undertaking of petroleum exploration and production in an area delineated on the reference map.

An indigenous Ghanaian company is a company incorporated under the 1963 Companies Act, 1963 (Act 179) that has at least 51% of its equity owned by a citizen of Ghana and also has Ghanaian citizens holding at least 80% executive and senior management positions and 100% of non-managerial and other positions.

PARTICIPATION OF NON-INDIGENOUS GHANAIAAN COMPANY IN PETROLEUM ACTIVITIES

Under L.I 2204, specifically Regulation 4 (2), a non-indigenous Ghanaian company seeking to participate in a petroleum activity in Ghana must afford an indigenous Ghanaian company other than the Corporation (GNPC) equity participation of at least 5% to be qualified to enter into a petroleum agreement and or a license with the government of the Republic of Ghana. A foreign company is therefore expected to incorporate a subsidiary company, and have an indigenous Ghanaian company hold at least 5% of its equity stake. This shall mean that a foreign company cannot participate in the licensing processes to undertake petroleum activities in Ghana without complying with this hurdle of equity participation by a Ghanaian company in its business.

LICENSING

In Ghana, there are two ways to which a body corporate or an entity may enter into petroleum agreement with the Republic and other stakeholders. These include:

- i. either through competitive bidding process; or
- ii. through a direct negotiation at the invitation of the Minister

COMPETITIVE BIDDING PROCESSES

The competitive bidding process is a recent introduction to the grant of petroleum license in Ghana introduced by L.I 2359. Regulation 9 of L.I 2359 states the general procedural requirements for the tender/bidding processes leading to the grant of an oil block and the eventual execution of a petroleum agreement. Regulation 9 provides that the tender procedures shall include:

- a. an expression of interest further to subsections (6) and (7) of section 10 of Act 919
- b. an invitation to tender
- c. the submission of bids
- d. the evaluation of bids
- e. the decision on bids; and
- f. the entry into a petroleum agreement

However, it is significant for a prospective entity to understand that, at the expression of interest stage, the Minister may direct that a pre-qualification process be carried out on the potential companies before the tender process.

A pre-qualification is undertaken to ensure that potential license holders have sufficient technical and financial capacity to execute a resource development program, and adequate experience in managing the environmental risks associated with the project and related infrastructure. More importantly, pre-bid qualification is a crucial process to ensure the most suitable candidates for licenses have a chance to bid. Where two or more persons are submitting a pre-qualification application jointly, the application shall designate the desired operator amongst them. The pre-qualification requirement is provided for under Regulation 11 of L.I 2359. The Minister is empowered to come out with specific pre-qualification requirements for prospective operators and indigenous Ghanaian companies.

The deadline for the submission of bids shall be determined by the Minister, taking into consideration the conditions and circumstances of the tender process. However, the period shall not be less than one hundred and twenty days from the publication of the invitation to tender or the invitation for direct negotiations.

EVALUATION OF BIDS AND EVALUATION CRITERIA FOR PETROLEUM AGREEMENTS

The Minister shall decide to enter into a petroleum agreement based on objective criteria. Regulation 16 of L.I 2359 list the objective criteria to include:

- i. the responsiveness of the applicant to the policy objective of the bid round;
- ii. the proposed work program based on any minimum requirements set out in the invitation to tender;
- iii. the geological understanding and assessment of the prospectivity of the area in question;
- iv. the proposal of the initial participating carried interest and additional participating interest to be held by the Corporation;
- v. the proposed level of local content compliance in accordance with L.I 2204
- vi. the rate of royalty exceeding the minimum rate;
- vii. the bonus if any;
- viii. the methodology and plan for the transfer of knowledge and skills;
- ix. the training and technology support; and
- x. any other criterion that the Minister may determine.

The decision to enter into the petroleum agreement shall be based on the highest numerical score. Where two bids receive the same total numerical score, the prospective bidder who scores the highest numerical score on financial capability and the relevant technical capabilities and experience shall be the preferred bidder.

NOTICE OF DECISION TO ENTER INTO A PETROLEUM AGREEMENT

Both unsuccessful and successful or preferred bidders shall be issued with a written notice from the Minister after the evaluation of bids and the decision to enter into one or more petroleum agreements. Note to the preferred bidders shall be accompanied by invitation to negotiate the specific terms of the petroleum agreement.

DIRECT NEGOTIATIONS

The Minister may decide to initiate direct negotiations with a prospective entity in the petroleum industry. However, a body corporate that the Minister intends to engage in direct talk must be a body corporate that have to meet the pre-qualification requirements under Regulation 10 and the additional requirement (that is the objective criteria test) under Regulation 16 of L.I 2359. Direct negotiation by the Minister shall be resorted to if and only if a public tender process does not represent the most expedient way to enter into a petroleum agreement.

The Minister is required to publish the reasons for the decision, the area concerned, and the potential contractor in the following:

- i. in the Gazette
- ii. at least two state-owned daily newspapers
- iii. on the website of the Ministry; and
- iv. in any medium of public communication.

Direct negotiation with a body corporate that has expressed interest is expected to commence immediately after the publication is done.

RATIFICATION

In Ghana, it is significant for International Oil Company's seeking to engage in petroleum activities to bear in mind that, a petroleum agreement entered into by the Minister shall need the ratification of Parliament of the Republic of Ghana to become an effective, operational and binding piece of a document on the parties.

DURATION

A petroleum agreement shall be valid for a total period not exceeding 25years. The parties to the petroleum agreement can, however, negotiate for an extension where the production from the field is projected to extend beyond the original term of the petroleum agreement. In such circumstances, the Minister may either approve an extension of the petroleum agreement on the terms agreed by the parties or may cause a new petroleum agreement to be negotiated by direct negotiations.

It is to be noted that the extension of a petroleum agreement and or the execution of a new petroleum agreement is subject to the ratification of the Parliament of Ghana.

ASSIGNMENT OF INTEREST CREATED BY PETROLEUM AGREEMENT/LICENCE

The law on assignment in the petroleum industry is total prohibition except with the written approval of the Minister. Section 16 of Act 919 provides that a contractor or a licensee shall not without the written permission of the Minister, directly or indirectly assign the interest of the con-

tractor under a petroleum agreement, whether in whole or in part, to a third party or an affiliate.

Under Regulation 27 of L.I 2359, an application for approval of an assignment submitted to the Minister shall be accompanied by

- i. the final terms and conditions for the transfer and evidence of the proposed qualifications of the assignee to be a licensee or a contractor
- ii. the unconditional undertaking by the assignee to, following the approval of the Minister, assume all obligations from the assigned participating interest of the license or the petroleum agreement; and
- iii. a statement of the assignor that indicates that the assignor accepts to be bound as a licensee or as a contracting party to petroleum agreement to all the terms and conditions of the contract.

CHANGE OF OWNERSHIP OF COMPANY/ TRANSFER OF SHARES

Section 15 of Act 919 and Regulation 26 of L.I 2359 governs change of ownership of a body corporate licensed to undertake petroleum activities in Ghana. It is worthy to note that, in Ghana, a licensed company is it a contractor or sub-contractor, shall not transfer a share of that contractor's or subcontractor's incorporated company to a third party or an affiliate. It is, therefore, imperative to note that the diversification of the ownership of a licensed company through the transfer of shares to a third party is prohibited. However, the same is allowed under the following circumstances with the written approval of the appropriate authorities.

- a. With the written approval of the Minister in the case of a contractor, or
- b. The commission, in the case of a sub-contractor,

if the effect to the transfer would be to

- a. Give the third party or affiliate control of the company, or
- b. Enable the third party or affiliate to take over the interest of a shareholder who owns 5% or more of the shares of the company.

REVIEW OF THE TERMS AND CONDITIONS OF THE PETROLEUM AGREEMENT ENTERED INTO

The law allows for a review of the terms and conditions a petroleum agreement under some minimum and or prescribed conditions. Under Act 919, the terms of petroleum agreement may be reviewed by the parties to it where there is a material change in the circumstances that prevailed at the time the contract was executed or the last review of the agreement. However, if the review of a petroleum agreement results in a material change, the same shall require the ratification of Parliament. What constitutes a material change is not defined under the Act. It is the view of the writer that, this may constitute a ground for litigation in the future and that, international oil company's needs to engage the services of legal expert right from inception.

SECURITY FOR THE FULFILMENT OF OBLIGATIONS

A licensee, contractor or sub-contractor is expected as part of its obligations to provide the Minister with performance bond or guarantees as the Minister may require for the fulfilment of the commitments undertaken by the licensee, contractor or sub-contractor and for the possible liabilities arising out of the petroleum activities conducted under the license, petroleum agreement or petroleum sub-contract.

NOTES ON CONTRIBUTOR



Mr David Yaw Danquah is the founder and Managing Partner of Legalstone Solicitors LLP, a boutique law firm in Ghana with a concentration on Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, Real Estate and Construction Law, and Commercial Arbitration.

He heads the firm's practice areas of focusing are Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, and Commercial Arbitration.

David has advised on numerous investment and mining-related transactions. He also has assisted countless international entities in establishing their operations in Ghana, and through his firms, offers support services to those entities. He has an impeccable record of providing technical savvy and exceptional client services.

David is a graduate of Kwame Nkrumah University of Science and Technology (KNUST), Kumasi, where he received his Bachelor's Degree in Law (LL. B) and the Ghana School of Law, where he studied and received a Post Graduate Qualifying Certificate in Law (PQCL). He holds a Certificate in Negotiation Mastery from Harvard University. Presently, he is pursuing an LL.M Degree in International Dispute Resolution at the prestigious Queen Mary University of London, United Kingdom.

David is a member of the Ghana Bar Association, Association of International Petroleum Negotiators (AIPN) and Institute of Energy Law (IEL) based in Houston, U.S.

LEGALSTONE SOLICITORS LLP

Website:

www.legalstonesolicitorsllp.com

Email:

info@legalstonesolicitorsllp.com
david@legalstonesolicitorsllp.com

Ghana Post GPS:

GA-417-3770