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ARTICLE SERIES

**THE MARGINAL FIELD BID ROUNDS –
WHAT TO KNOW ABOUT RESOLVING
POTENTIAL DISPUTES THAT COULD ARISE**



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INTRODUCTION

The 2021 Marginal Field Bid Rounds ("The Bid Rounds") concluded with 57 marginal field assets awarded to 161 companies by the Department of Petroleum Resources ("DPR") in what was the 2nd bid round since 2002/2003.

According to the Guidelines for the Award and Operations of Marginal Fields in Nigeria ("the Guidelines") released by the DPR, applications for the bid rounds were field-specific, and each bid was to fail or succeed on its account. The Guidelines set down the procedure for competing parties for each field and the criteria for evaluating and selecting winning bids. More importantly, by the provisions of the Guidelines, competing parties were expected to bid for specific fields and pay the applicable fees as it pertains to a specific field.

However, despite the Guidelines and competing parties having individually submitted bids for specific fields, the DPR jointly awarded some fields to competing parties who bid independently. The implication is that these competing parties who submitted separate bids are now joint awardees and will be required to be joint venture partners to manage and operate the field. This development in the award process appears to be a deviation from the process envisaged under the Guidelines, and the amalgamation of bidders have thrown up specific issues.

In previous articles written by the firm, we had considered several issues, particularly concerning the status of the Guidelines as a statutory instrument, the corporate governance structure, loan security and quality of the assets to potential financiers [1]. However, the focus of this article shifts from the concerns of the potential financiers to that of the bidders of the marginal fields. For instance, while bidders may have chosen initially to bid in consortiums due to the financially consuming nature of the bid, the amalgamation of these bidders becomes a merger of different consortiums which may complicate the carefully designed arrangement that each bidding consortium had.

This article therefore examines the bid process, potential areas of recourse for aggrieved bidders and mechanisms that can be adopted to resolve disputes that may arise.

[1] Aelex, 'INVESTING IN MARGINAL FIELDS - KEY CONSIDERATIONS FOR FINANCIERS' (AELEX, June 2021) <<https://www.aelex.com/wp-content/uploads/2021/06/Investing-in-Marginal-Fields-Key-Considerations-for-Financiers-1.pdf>> accessed 7 October 2021

Bid Process

Historically, disputes typically arise concerning the bid processes undertaken by government agencies. Such disputes usually relate to how the bid process was conducted, the integrity of the bid process, the selection criteria, allegations of unjustified disqualifications and revocations of successful bids. While some of the disputes have been found to be lacking in merit, there are some that the courts have considered meritorious, and the decisions of the courts have caused some disruptions to the ownership and management of the assets.

For instance, during the privatization process of the Aluminum Smelter Company of Nigeria (ALSCON), parties were invited to bid for majority shares in ALSCON, making the successful bidder the core investor with the responsibility of managing ALSCON. After the conclusion of the bid process, the 1st preferred bidder could not meet the bid requirements and timelines that had been pre-agreed with the Bureau of Public Enterprises (BPE). The BPE thus proceeded with the 2nd preferred bidder in 2006. Aggrieved with the decision of the BPE, the 1st preferred bidder commenced a court action against the BPE. Years later, in 2012, in ***BFIG v. BPE***^[2], the Supreme Court held that the 1st preferred bidder was the successful bidder. Therefore, BPE was ordered to conclude the bid process within specific timelines with the 1st preferred bidder.

This was notwithstanding the fact that the 2nd preferred bidder had been managing ALSCON since 2006. Indeed, the implications of this outcome to the 2nd preferred bidder cannot be overstated; especially, the impact of the economic interference on its investment.

The Guidelines & Inequality of Bargaining Power

The Guidelines serve as DPR's Request for Proposal (RfP) or Expression of Interest (EoI). Thus, the deviation from the Guidelines and amalgamation of competing parties for the joint award of some fields may be interpreted as a breach of DPR's bid obligations towards the parties.

Although there is limited case law in Nigeria on the nature of a RfP or an EoI, the trend in many common law jurisdictions is that an RfP is merely an invitation to treat, which is an advertisement to receive offers which may be subsequently accepted by the party who published the RfP. Notwithstanding, there have also been decisions from common law jurisdictions which have found RfPs or EoIs to be much more than invitations to treat, but as legally binding documents between the issuer of the RfP and the tenderer. By those decisions, the issuer is bound to comply and remain strictly within the scope of the RfP or the EoI.

[2] {2012} 18 NWLR (Pt.1332) 209]

In light of this, there is the possibility that the courts may, depending on its interpretation of the Guidelines, find that they constitute much more than an invitation to treat but a legally binding document for which DPR ought not to deviate.

Additionally, parties may allege that they made offers to be solely awarded specific bids pursuant to DPR's Guidelines. Still, through the joint awards, DPR introduced a counteroffer by introducing new terms into the bid process. Although the parties may have accepted the counteroffer, there is a possibility that parties may allege they were constrained to accept due to the inequality in bargaining power [3] between them and the DPR.

In **Sonnar (Nigeria) Ltd. & Anor V. Partenreedri M. S. Nordwind Owners of the Ship M. V. Nordwind & Anor**[4] the Supreme Court makes reference to Contracts of Adhesion stating that they are usually contracts where the parties are not equal and are usually contained in standard forms of contract - a "take it or leave it" contract. The Supreme Court found that even though a party agreed to that contract, such a party may be able to seek recourse under Common Law, subject to the test of reasonableness.

Therefore, based on this principle, aggrieved awardees may argue that the new terms introduced by the DPR constitutes a "take it or leave it" contract for which they may seek recourse from the Nigerian courts based on unfair terms or based on the inequality in bargaining power.

Expropriation

Parties should also be aware that they may have a cause of action where there has been expropriation (direct or indirect) against their assets. Direct expropriation may occur where a marginal field licence has been directly voided, revoked, or compulsorily acquired by the government. Indirect expropriation (or "creeping expropriation") occurs when there has been the implementation of enactments, policies, treaties, directives, etc., which negatively impacts investments (or impacts the grantees' ability to operate the assets) to the extent that it can be interpreted as an expropriation.

For direct expropriation, the Nigerian courts and arbitral tribunals are typically known to favour the investor and order the government to fulfil its agreement with the investor.

For instance, in the 2003 bid round, the Korea National Oil Company (KNOC) was awarded 60% of the exploration rights in OPL 321/323. KNOC had paid a discounted signature bonus based on an arrangement with the Federal Government of Nigeria, enabling KNOC to pay a discounted sum in exchange for participation in some downstream projects valued much higher than the signature bonus. In January 2009, the then Minister of State for Petroleum Resources voided the allocation for KNOC's failure to pay the signature bonus in full.

[4] [(1987) LPELR-3494(SC)]

KNOC therefore instituted a matter, ***Korean National Oil Company v The President of the Federal Republic of Nigeria (FRN) and Ors***, [5], where the Federal High Court found that the FRN had acted unlawfully when it voided the allocations to KNOC. Although the matter proceeded through the Court of Appeal and the Supreme Court on technical grounds, there has been no decision from the Court of Appeal and the Supreme Court on the merits of KNOC's case.

Likewise, in ***FGN v. Zebra Energy Ltd***[6], Zebra Energy had been allocated an oil block subject to certain conditions. One of such conditions was that Zebra Energy would pay a signature bonus and reserve value. Zebra Energy paid part of the amount within the stipulated period but required a grace period of 45 days to pay the balance. Before that period expired, the government voided the allocation of the oil block to Zebra Energy. Zebra Energy filed an action at the Federal High Court, which found that a valid contract existed between the parties and found that the revocation of the allocation of the oil block was unlawful. Although the FGN appealed the decision of the High Court to the Court of Appeal and subsequently, the Supreme Court, both appellate courts dismissed the FGN's appeals and upheld the decision of the Federal High Court.

Furthermore, foreign shareholders of awardees of the marginal fields may be able to find recourse for expropriation by instituting investor-state disputes against the government despite:

- a) having no direct contractual relationship with the government; and
- b) there being no investment treaty between the state of the investor and Nigeria.

In a recent decision by the International Centre for Settlement of Investment Disputes (ICSID) given in ***Interocean Oil Development Company v. Federal Republic of Nigeria*** [7], ICSID held that InterOcean (as a shareholder in Pan Ocean Oil Company) could maintain an investor-state arbitration against the FRN despite having no contract with the FRN and there being no investment treaty between InterOcean's country (USA) and Nigeria.

ICSID also found that the Nigerian Investment Promotion Commission Act has a sufficient framework for investors to commence investor-state arbitration against Nigeria even without underlying contracts or investment treaties.

This decision implies that foreign shareholders who may be from jurisdictions in which there is no investment treaty with Nigeria may still be able to pursue investor-state arbitrator where there has been expropriation which has affected their investments in the marginal field.

[5] [FHC/ABJ/M/146/2009]

[6] (SC 268/2001)

[7] ICSID Case No. ARB/13/20

CONTRACTUAL DISPUTES WITH JOINT VENTURE PARTNERS & RESOLUTION OF SUCH DISPUTES

PSBs are also required to identify and assess the money laundering or terrorist financing risks that may arise in relation to the development of new products and new business practices (including new delivery mechanisms) and the use of new or developing technologies for both new and pre-existing products.

To further regulate the post marginal field award phase and ensure uniformity of agreements, the DPR provided a suite of template agreements to govern the relationship between the amalgamated grantees. These agreements include (1) An Agreement to incorporate a Joint Company, (2) Shareholders' Agreement, and (3) Special Purpose Vehicle Operating Agreement. Although these agreements are templates, they provide the basic terms which would govern the relationship between the amalgamated grantees and the operation of the marginal field.

Notwithstanding, it is not uncommon for disputes to arise on issues such as default in payment or other contractual obligations, allocation of profits, duties of the operator, etc.

The suite of template agreements provide for a two-tier dispute resolution procedure whereby parties are required to first refer their dispute to the Alternative Dispute Resolution Center [8] (ADRC) in the Nigerian Oil

& Gas Excellence Center for settlement through mediation.

Where parties are unable to settle through mediation at the ADRC, they may resort to arbitration pursuant to the Arbitration Rules contained in the Schedule to the Arbitration and Conciliation Act, Chapter A18, LFN 2004. Additionally, the suite of agreements provide that the arbitration shall take place at the Regional Centre for International Commercial Arbitration, Lagos State, or any other venue in Nigeria agreed by the parties.

CONCLUSION

The Bid Rounds is expected to generate not less than \$5.7 Billion for the Federal Government of Nigeria [9], with the marginal fields having the potential to generate \$38 Billion in revenue over the lifetime of the fields [10]. As such, it is vital that the bid rounds are a success and that disputes are immediately and effectively resolved.

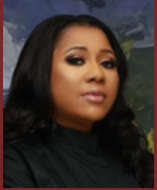
Therefore, it is essential that where parties are unable to settle disputes amicably through the mediation process at the ADRC, parties ensure that they immediately trigger any applicable arbitration process as this will afford an expeditious and party-controlled resolution of disputes while also helping to preserve parties' investments and interests in the marginal fields.

[8] The ADRC was established on 21 January 2021 to assist with resolving through Alternative Dispute Resolution (ADR) mechanisms disputes arising between companies licensed pursuant to the Petroleum Act, groups or individuals and other persons who wish to submit to the ADRC. As of date, the only form of ADR mechanism available at the ADRC is mediation. However, it is expected that the ADRC will commence arbitration in future.

[9] Femi Adekoya, 'Towing the path to successful marginal field bid round' (The Guardian, 06 January 2021) <<https://guardian.ng/energy/towing-the-path-to-successful-marginal-field-bid-round/>> accessed 20 October 2021

[10] Wood Mackenzie, 'Nigeria's marginal field bid round – opportunities for investors?' (Wood Mackenzie, 22 July 2020) <<https://www.woodmac.com/news/opinion/Nigerias-Marginal-Field-Bid-Round-opportunities-for-investors/>> accessed 20 October 2021

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