



16/January/2018

The Minister of Energy Development
P.O. Box 7270,
Kampala (U)

Dear Madame,

R.E: PETITION TO ADDRESS GAPS IN THE 2016 UPSTREAM GENERAL REGULATIONS

Africa Institute for Energy Governance (AFIEGO), a public policy research and advocacy registered non-governmental organisation (NGO) dedicated to influencing energy policies for the common good, sends you greetings.

We also extend our appreciation of the work your ministry did to put in place regulations for the 2013 Petroleum (Exploration, Development and Production) Act as provided for under Section 183 of the Act. We also appreciate the efforts expended towards putting in place regulations for the 2013 Petroleum (Refining, Conversion, Transmission and Midstream) Act.

Madame Minister, with the above being said, AFIEGO has taken note of some weaknesses in the 2016 Petroleum (Exploration, Development and Production) General Regulations, also referred to as the Upstream General Regulations. In particular, weaknesses in the complaints procedure laid out in Part XII on *Procurement and Contracts* of the General Regulations are of grave concern.

Unless your ministry urgently reviews and amends the said Upstream General Regulations, national content, fairness, competition and efficient regulation of licensees (oil companies) by the Petroleum Authority of Uganda (PAU) for the common good will be hindered.

It will be recalled, Madame Minister, that the aforementioned General Regulations, the Upstream National Content Regulations and the Upstream in addition to Midstream laws of 2013 all aspire towards creating prosperity and lasting value for the Ugandan society through promotion of national content and the above values in the petroleum sub-sector. The National Content Policy for the Petroleum Sub-sector and the National Oil and Gas Policy for Uganda also aspire towards the same.

However, the above aims cannot be achieved amidst grave weaknesses in laws and policies governing bidding and procurement processes. Such weaknesses are seen in the Upstream General regulations, especially regulation 182 that gives licensees power to act as both the accused and the judge and denies the complainants a right of appeal from the decisions of the licensees.

To promote national content, fairness, competition and efficient implementation of the regulations for the petroleum sub-sector procurement processes therefore, AFIEGO demands that you address the above and weaknesses below in a period of one month from receipt of this petition.

WEAKNESSES

Regulation 173 of the 2016 Upstream General Regulations lays out the principles of procurement processes for the oil and gas sector. These include licensees ensuring that the procurement processes are in accordance with the Upstream Act and that **transparency, uniformity, fairness, competition ... and national content development** are promoted.

While the above is the case, the procedure for handling complaints as laid out under Regulation 182 of the Upstream General Regulations does not promote the values of equity and fairness that are necessary for fair competition and effective national content.

The regulation places the responsibility to address complaints arising out of procurement processes on oil companies. The regulation states, “The licensee shall be responsible for addressing any complaints arising out of any procurement process.” This is unfair and does not promote equitable competition. This is because the licensee against whom a complaint is being brought is given the right and responsibility of addressing the same complaint without the oversight of an independent arbiter. In effect, the regulation does not give sub-contractors or bidders an option of independent redress in cases of injustice. Instead, it gives licensees powers to accept or dismiss the complaints without fear of consequences.

While Regulation 184 gives PAU the power to audit a licensee at any time, an act that may promote transparency and other principles of procurement laid out in the regulations such as fairness and competition, the fact that the audit process could happen after the bidding process was long-concluded means such an audit cannot guarantee bidders equitable competition. This neither benefits the bidder nor Uganda’s national content aspirations.

Further, while Regulation 185 which provides that failure by a licensee to comply with the procurement regulations will mean that costs and expenses incurred will not be recovered is an attempt in the right direction, it does not help complainants and it is an obstacle to doing business in the country. Indeed, the right to recover costs by a licensee is a non-issue to bidders whose main interest is to do fair business and/or get redress for any grievance. Without an independent arbiter, justice and this interest cannot be guaranteed.

Regulation 182 violates the principles of natural justice as it does not allow physical appearance of the complainant to present his or her case and be heard by an independent tribunal.

Moreover, the regulations do not provide for a right of appeal against a decision of a licensee. This is unfortunate and a danger to genuine investors who desire fair play. It also undermines the powers of PAU to regulate the industry as well as protect the interests of citizens.

The period of five days within which a bidder is mandated to submit a complaint from the date of notification that their bid was unsuccessful is also too small. An unsuccessful bidder may be constrained to study the reasons for the failure of their bid and lodge a complaint in five days. It is perhaps for this reason that licensees were given 15 days to respond to complaints. If licensees need 15 days, unsuccessful bidders need ample time too.

The regulations also do not state whether the five days include weekends and public holidays. This needs to be remedied.

What should be done?

Recommendations

The following should be done:

- a) The Upstream General Regulations should be reviewed to provide for PAU, whose roles include regulation of the petroleum sub-sector and promotion of national content, to be part of the complaints handling procedure in bidding processes. As an independent arbiter, PAU will assist bidders and licensees to handle complaints in real time.
- b) Further, the petroleum laws and regulations should be reviewed to provide for establishment of a Petroleum Disputes Tribunal (PDT) that is independent and has skills to handle all oil disputes in a timely manner.
- c) The regulations should also be urgently reviewed to provide that where a bidder is dissatisfied with the bidding decision, the bidder may lodge a complaint with the licensee. If the bidder is dissatisfied with the licensee's decision, he/she shall lodge a complaint with the PAU and if he/she is still not satisfied, he/she may appeal to the Petroleum Disputes Tribunal. If the bidder is still dissatisfied, he/shall lodge an appeal with the High Court.
- d) More so, the regulations should be reviewed to provide for physical appearance of the complainants if they so wish to present their cases.
- e) Finally, the regulations should be reviewed to increase the number of days within which an unsuccessful bidder should file a complaint from the current five to 15 days equal to the days within which a licensee is allowed to handle complaints. The regulations should specifically state that the 15 days do not include weekends and public holidays.

We demand that government undertakes the above reforms in a period of one month from the date of receipt of this letter.

We await a positive response.

Thank you,



Dickens Kamugisha,
CEO, AFIEGO

CC:

- The Speaker, Parliament of the Republic of Uganda
- The Prime Minister of the Republic of Uganda
- The Executive Director, Petroleum Authority of Uganda
- The Chief Executive Officer, Uganda National Oil Company
- The Chairperson, Natural Resources Committee of Parliament
- The Chairperson, Association of Uganda Oil and Gas Suppliers
- The Director, Uganda Law Reform Commission
- The President, Uganda Law Society