



GENERATION PROCUREMENT REGULATIONS, 2012

.....day of 2012

NERC: R-XXXX

REGULATION NO: NERC – R – XXXX

NIGERIAN ELECTRICITY REGULATORY COMMISSION

In exercise of its powers to make Regulations conferred by Section 96 (1) & (2) (c) & (d) of the Electric Power Sector Reform Act 2005 (Act No. 6 of 2005), the Nigerian Electricity Regulatory Commission makes the following Regulations for Generation Procurement 2012.

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CHAPTER I GENERAL PROVISIONS

1. Short Title

These Regulations may be cited as the Generation Procurement Regulations, 2012.

2. Commencement

These Regulations shall come into force on the date on which they are approved by a resolution of the Commission.

3. Interpretation

In these Regulations, unless the context requires otherwise:

“**Act**” means the Electric Power Sector Reform Act 2005, as may be amended or re-enacted from time to time.

“**Annual Report**” means the report prepared by the Transmission System Operator of its assessment of the adequacy of generation facilities and of transmission facilities on, or contractually committed to, the integrated power system to satisfy the provision of safe, reliable and economic electric service to electricity consumers in Nigeria.

“**Bidder**” means a Qualified or a Shortlisted Bidder.

“**Buyer**” means a person licensed under the Act to purchase bulk power from existing and/or new generating companies and who has initiated a bid round for new generation capacity under these Regulations; and includes the holder of a bulk trading licence and a holder of a distribution licence.

“**Distribution System**” shall have the meaning ascribed thereto in the Act and in these Regulations refers to the distribution systems owned, managed and operated by the eleven licensed successor distribution companies established under section 8 of the Act and any others that may be licensed from time to time by the Commission.

“**Embedded Generation**” means the generation of electricity that is directly connected to and evacuated through a distribution system which is connected to a transmission network operated by the licensee vested with system operations functions.

“**Embedded Generator**” means the licensee who operates an embedded generation unit.

“**EPC**” means Engineering, Procurement and Construction.

“**Expression of Interest**” or “**EOI**” means a formal declaration by a potential bidder of its interest in participating in a bid round for additional generation capacity.

“**Final Bids**” means a final round of detailed proposals submitted by Shortlisted Bidders.

“**Final Date for Proposals**” means the date specified in a RFP as the last date upon which proposals may be submitted to a Buyer in response to the RFP.

“**Indicative Bids**” means a preliminary round of bids to rank Qualified Bidders according to the best initial proposals submitted as preliminary indications of their Final Bids.

“**NESI**” means the Nigerian Electricity Supply Industry.

“NERC” or “Nigerian Electricity Regulatory Commission” means the electricity regulatory authority established under the Act.

“Qualified Bidder” means an entity that has submitted an EOI and who has been determined by a Buyer (following evaluation of such EOI) to be eligible to submit Indicative or Final Bids in response to a RFP, as the case may be. In certain cases defined herein a Qualified Bidder shall also be a Shortlisted Bidder.

“RFP” or “RFP Document” or “Request for Proposal” means a document or set of documents from a Buyer to a Qualified Bidder for the latter to submit proposals, according to rules and data or other information defined in the said Request, for the construction of new generating capacity.

“Short List” means a list of a limited number of Qualified Bidders whose Indicative Bids are evaluated by a Buyer as sufficiently responsive to have them listed to submit Final Bids.

“Shortlisted Bidder” means, a Qualified Bidder whose Indicative Bid has been evaluated as sufficiently responsive to elevate the Qualified Bidder to the Short List for submission of Final Bids.

“Successful Bidder” means the Shortlisted Bidder that is determined by a Buyer to have submitted the best Final Bid.

“System Operator or SO” means the licensee carrying out system operation functions pursuant to a licence issued under the Act.

“TCN” or “Transmission Company of Nigeria” means the licensee that is the owner, operator and manager of the Transmission Grid System in Nigeria.

“Tender Auditor” means a professional firm or consortium of reputable firms appointed by NERC to audit the actions taken by a Buyer in relation to a generation procurement process and determine the extent of compliance with these Regulations.

“Tender Audit Report” means a report prepared by the Tender Auditor on its review of the actions taken by a Buyer in relation to a generation procurement process and the extent of compliance with these Regulations; and “Tender Audit” shall be construed accordingly.

“Transmission Grid System” shall have the meaning ascribed to “transmission system” in the Act and in these Regulations refers to the transmission system owned, managed and operated by TCN.

4. Objectives

These Regulations provide for the processes to be used by a Buyer in procuring additional electric generation capacity. The objectives of these Regulations are:

- i. to establish a systematic, transparent and competitive process that provides reasonable assurance that a Buyer procures additional electric generation capacity at least cost to consumers, consistent with resource expansion plans reviewed and approved by NERC;
- ii. to ensure that the firms contracted to provide new capacity have the necessary technical expertise, financial resources and industry experience to carry the defined generation project to a successful completion;
- iii. to minimise opportunities for manipulation, fraud or corruption of any kind during the procurement process; and

- iv. to facilitate the involvement of the private sector in the provision of generation capacity to a Buyer, on the basis of rules that provide certainty and transparency and fairness of the generation procurement process and its outcome.

5. Application of the Regulations

5.1. Transmission Grid and Distribution System

The provisions of these Regulations apply to the purchase by a Buyer of any generation capacity which is, or is intended to be, connected to the Transmission Grid System or, as an Embedded Generator, generating capacity that is connected to a Distribution Network.

5.2. Prohibition on Procurement outside these Regulations

After the coming into force of these Regulations, unless otherwise approved by NERC for good cause, a Buyer shall not, except under the provisions of these Regulations:

- i. solicit bids or proposals for the provision of generation capacity to which these Regulations apply; nor
- ii. enter into any contract whereby a Buyer agrees to purchase the electrical output of any generation facility to which these Regulations apply.

5.3. Exempt Transactions

The terms of Section 5.2 shall not apply to:

- a) small scale power plant generating less than 10MW;
- b) purchase of occasional electricity supply from the holder of a captive generation license;
- c) any procurement by a Buyer under any agreement entered into prior to the coming into force of these Regulations, subject to the approval of NERC;
- d) any procurement by a Buyer under any option or other right to acquire generating capacity or electricity, subject to the approval of NERC, where such option or other right had been granted prior to the coming into force of these Regulations, notwithstanding the date of exercise of the option or other right.

CHAPTER II GENERATION CAPACITY PROCUREMENT PROCESS

6. Solicitation of New Generating Capacity

6.1. Annual Report by the System Operator

The SO shall prepare an Annual Report assessing the position on capacity needs and system constraints for a five-year period ahead. NERC shall set the date by which the Report shall be produced each year,

The Annual Report shall analyse the NESI, its historic and current demand profiles and current social, economic and demographic projections and provide an outlook covering at least five years ahead on:

- i. Projected gross MW demand of the system;
- ii. Name plate and available capacity of generation units;
- iii. Anticipated generating capacity of units for which PPAs have been concluded together with information on the current state of project EPC and the expected commercial operation date;
- iv. Recommended injection points on the transmission grid for additional generation capacity, as well as the upper limit of capacity at any given point;
- v. Planned generation plant retirements;
- vi. Current and projected natural gas and other fuel supply capabilities;
- vii. Requirements for new black start generation (note that generators are required under the Grid Code to provide voltage and frequency control);
- viii. Such other operational and regulatory information as is required by Buyers and current and potential owners of generating and transmission assets in planning for their current or continued participation in, or planned retirement from, the NESI; and
- ix. Projected transmission grid system capabilities and constraints, taking all the above into account.

6.2. Solicitations Required

If an Annual Report published by the SO indicates a requirement for contracting additional generation capacity within the next twelve months, any Buyer may, with the approval of NERC, commence forthwith the procurement process set forth in these Regulations, which may specify conditions in terms of a maximum amount of capacity to be procured by any Buyer, location, or other relevant matters.

6.3. Notice of Solicitation

If an Annual Report published by the SO indicates a requirement for additional generation capacity within the next twelve months, a Buyer to whom approval has been given by NERC to procure additional generation capacity shall:

- i. announce that it intends to request proposals for the provision of such capacity in accordance with the provisions of these Regulations;
- ii. invite potential bidders to qualify for consideration in the solicitation process by submitting an Expression of Interest;
- iii. announce the date or dates on which it anticipates it will make available a Request for Proposal relating to such additional capacity; and
- iv. announce that existing on-grid licensees of NERC who have not reached financial close for their projects or who have not started project construction, at the time the announcement is made, shall be deemed to be pre-qualified in respect of Requests for Proposal issued during financial years 2012 and 2013.

7. Qualified Bidders

7.1. Qualifications

With respect to any particular solicitation for generating capacity, a Buyer shall determine, subject to approval of NERC, the information that must be provided by interested potential bidders in order to be pre-qualified in the solicitation process. Bidders or bidding consortia, shall submit an Expression of Interest ("EOI") in accordance with the published EOI requirements, which shall include the following minimum general criteria:

- i. Technical expertise:

The bidder must demonstrate that it already employs qualified professionals who possess relevant operating experience with the size and type of generating plant proposed;

ii. Financial capability:

The bidder must be able to show a strong balance sheet and demonstrate a good financial track record over time with respect to its core businesses and, particularly, other generating projects of a similar nature;

iii. Operating experience:

The bidder must have relevant experience operating electric generation facilities of a similar size and type as that proposed.

iv. Project Management Capacity:

The bidder must show a strong capacity to undertake generation plant EPC projects to specification, in time and within budget in operating environments similar to Nigeria's.

7.2. Form of EOI Invitation

A Buyer's invitation for the submission of EOIs by potential bidders shall:

- i. identify (in general terms at least) the nature of the generation capacity sought to be procured;
- ii. identify the information that must be submitted for an EOI to be considered for pre-qualification by a Buyer;
- iii. identify the selection criteria and process that will determine (and minimum criteria, if any, that must be satisfied in order to determine) whether a person is to be granted Qualified Bidder status; and
- iv. state the date by which expressions of interest are to be submitted, if they are to be considered by a Buyer.

7.3. Publication of Invitations for EOIs

A Buyer shall invite expressions of interest by publishing its Request for Expressions of Interest in at least three Nigerian daily newspapers, one international financial or industry publication, the Commission's website, its own website and other media as may be appropriate.

7.4. Evaluation of EOIs Received

A Buyer:

- i. must consider all EOIs received on or before the closing date and time by which EOIs are to be submitted ("Final Date for EOIs");
- ii. shall not consider any EOI received after the closing deadline for EOIs stated in the relevant invitation for EOIs;
- iii. must, in considering any EOI, strictly apply the evaluation criteria specified in the invitation for EOIs equally to all EOIs submitted.

A Buyer will notify NERC of its conclusions regarding the qualification of potential bidders who have submitted EOs and notify all bidders of its determinations, including bidders that fail to satisfy the established criteria for becoming Qualified Bidders. Unsuccessful bidders shall be informed in writing by a Buyer of the reasons for its rejection of their bids.

7.5. Limiting Participation by Qualified Bidders

A Buyer may, but only if the right to do so is reserved in the invitation for EOs, limit the number of Qualified Bidders who are to receive Requests for Proposals. The number of Qualified Bidders chosen may be limited to such number, having regard to the generation capacity being sought and the qualification criteria stated in the invitation to submit EOs, as in the opinion of a Buyer is desirable to encourage vigorous participation in the solicitation process and to obtain technically viable and commercially realistic proposals.

7.6. Publication of Names of Qualified Bidders

A Buyer must publish the names of each Qualified Bidder in at least three national daily newspapers, its website and in the Commission's website.

7.7. Confidentiality

A Buyer may require of any Qualified Bidder that it (and its employees and persons contracted by it, e.g. its advisers and financiers) enter into such confidentiality and other undertakings as a Buyer requires before releasing any documentation relating to the RFP. All EOs and other documents submitted by potential bidders or Qualified Bidders, including final transaction documents, shall remain confidential unless otherwise ordered by NERC.

A Qualified Bidder wishing to receive an RFP shall execute a separate undertaking to abide strictly by these Regulations; to resolve any petition it may have only in accordance with these Regulations and any other relevant Regulations established by NERC; and to accept the decision of NERC issued in accordance with these Regulations as final.

8. Requests for Proposal

8.1. Preparation

A Buyer must prepare a Request for Proposal in accordance with the requirements of these Regulations for the purposes of inviting proposals from Qualified Bidders for the procuring of additional generation capacity.

8.2. Issuance of RFP

A Buyer shall issue an RFP to each Qualified Bidder who enters into such confidentiality and other undertakings as required by a Buyer under section 7.7.

8.3. RFP Contents

Each RFP shall include or be accompanied by:

- i. the information (or so much of it as is, in the opinion of a Buyer, relevant to the particular generation procurement process concerned) identified in Schedule 1; and
- ii. such other information as a Buyer considers appropriate.

9. Indicative Bids

9.1. Use of Indicative Bids

In order to improve the competitiveness and outcome of the tender process, a Buyer may choose to engage in a two-step solicitation process:

- i. a first round of bids to rank Qualified Bidders according to the best initial proposals submitted as preliminary indications of their Final Bids (“Indicative Bids”) and place them on a Short List; and
- ii. a final round of detailed proposals (“Final Bids”) submitted only by Shortlisted Bidders.

Before issuing any RFP Document for any particular generation capacity procurement process, a Buyer must declare whether, for that particular procurement process, it will employ the Indicative Bid option or engage in a single stage bid process open to all Qualified Bidders.

The RFP should state the interval between the submission and evaluation of Indicative Bids, the publication of a shortlist and the invitation to lodge Final Bids.

9.2. Content of Indicative Bids

Qualified Bidders, when lodging an Indicative Bid in response to an RFP, must provide:

- i. the information identified in Schedule 2; and
- ii. such other information as may be stipulated in the RFP Document.

9.3. Indicative Bid Evaluation

A Buyer must evaluate Indicative Bids received from Qualified Bidders and in doing so must apply the evaluation criteria specified in the RFP Document equally to all Indicative Bids.

9.4. Notification and Publication

A Buyer must notify all Qualified Bidders participating in the Indicative Bid process of the outcome of its evaluation of their Indicative Bids, indicating their success or failure to qualify for the Final Bid competition. A Buyer must also publish the names of each Shortlisted Bidder in the same manner as it did the names of the Qualified Bidders.

10. Final Bids

10.1. Invitation to Submit Final Bid

A Buyer must invite each Qualified Bidder or, in the case of a procurement using the Indicative Bid process, each Shortlisted Bidder, to lodge a Final Bid with respect to the RFP.

The time for a Bidder to lodge a Final Bid shall not be less than eight (8) and more than fourteen (14) calendar weeks from the date of receipt of the invitation to submit a Final Bid. An extension of time by the Buyer for lodging Final Bids shall not exceed a further two (2) calendar weeks.

10.2. Bid Security

A Buyer shall require bid security from all Bidders who are invited to submit Final Bids in the form of a bid bond or security as determined by a Buyer as appropriate to safeguard the integrity of the solicitation process.

10.3. Content of Final Bids

Shortlisted Bidders, when lodging a Final Bid, must provide:

- i. the information identified in Schedule 3; and
- ii. such other information as may be stipulated in the RFP and in the invitation to submit a Final Bid.

10.4. Final Bid Evaluation

A Buyer shall evaluate Final Bids received from Bidders (as the case may be) who meet the minimum technical specifications and financial criteria and in doing so must apply the evaluation criteria specified in the RFP equally to all Final Bids. From the evaluation of Final Bids shall emerge only one Successful Bidder with whom the Buyer shall award a contract for to finance, construct and operate generating plant for the electric capacity and energy bid for.

10.5. Contract Award

A Buyer shall enter a contract only with the Successful Bidder only subsequent to the submission of the Tender Audit Report provided for in Section 13 confirming the selection of the Successful Bidder and the receipt of written approval of NERC; provided, however, that NERC may authorise the Buyer to enter into discussions with the Successful Bidder to complete all relevant transaction and regulatory documentation.

CHAPTER III MISCELLANEOUS PROVISIONS

11. Communication Protocols and Procedure

A Buyer must provide in the RFP details of the rules that are to govern:

- i. the extent of and means of communications between a Buyer, its representatives and advisers and Bidders, their representatives and advisers;
- ii. confidentiality of information, relevant to the RFP, whether sourced from a Buyer, Bidders or otherwise;
- iii. the use of and dissemination of information by a Buyer;
- iv. the extent to which Bidders, their representatives and advisers may rely upon information provided by a Buyer, its representatives and advisers; and
- v. the extent to which a Buyer excludes liability for losses, expenses or liabilities incurred by Bidders or others in relation to participation in the RFP process.

12. Unsolicited Offers

Unsolicited bids for additional generation capacity shall not be considered by Buyers in connection with any RFP process or under any other circumstances whatsoever.

13. Tender Audit

Following completion of each RFP process but before the execution of relevant transaction and regulatory documents between the Buyer, the successful bidder, NERC and any relevant other party, as the case may be, a Tender Audit report shall be prepared by the Tender Auditor appointed by NERC; this report shall be an audit report of the conduct and results of the procurement process.

The Tender Audit Report must be in such form and substance as NERC may from time to time determine after consultation with the Buyer and the Tender Auditor. The Buyer shall be required to co-operate with the Tender Auditor and be obliged to make available all information in its custody, which are relevant to the procurement process, to the Tender Auditor for the carrying out of the Tender Audit. NERC may, both before and after receipt of the Tender Audit Report:

- i. request that a Buyer provide information and documents relevant to the tender process; and
- ii. interview representatives of a Buyer.

The purpose of a Tender Audit shall be to review all actions taken by a Buyer in relation to the generation procurement process and determine the extent of compliance by such Buyer with these Regulations. The Tender Audit process is also undertaken to identify any potential revisions to the Regulations that might improve the openness, transparency and competitiveness of the generation procurement process.

If satisfied through the Tender Audit process that the entire competitive procurement solicitation and the bid selection criteria have been applied to the selection of the Bidder that best meets the specific requirements set out in the RFP by the Buyer, NERC shall certify that this is the case.

Transaction documents for the required generation capacity shall not be executed by the Buyer and NERC shall not execute the relevant regulatory documents with the Successful Bidder, until the Buyer has obtained such certification from NERC.

14. Petitions

Petitions in respect of the bidding process may be made by bidders to NERC no later than 10 working days from the day the results of the bidding process are published by a Buyer. Any such petition should be in respect of a contravention, by a Buyer, of the rules, procedures and guidelines specified by a Buyer in the request for EOI or in the RFP, or a contravention of the provisions of these Regulations. Petitions shall not be entertained by the Commission in respect of the final decision of the Buyer as to whether the petitioner should have become a Qualified Bidder or whether it should have been declared as the Successful Bid.

A petition shall not be accepted by NERC unless the petitioner accepts unconditionally in writing that it shall be bound by the decision of NERC on its petition and it shall not proceed against that decision in any other adjudicatory tribunal of any kind anywhere else.

NERC shall receive and consider petitions in accordance with such procedure as it determines, aimed at ensuring that the petition succinctly identifies the issue for determination, produces the evidence in support of the petitioner's request without resort to technicality of any kind and enables a decision to be swiftly issued by NERC.

NERC shall issue its decision on the merits of the petition within thirty (30) working days of the petition being submitted to it. Only in an instance where the Commission demands for further information within fifteen (15) working days of receiving the petition, may the Commission extend the time for issuing a decision and this shall be by no more than a further fifteen (15) working days. Where no further information is requested within the stipulated period, the decision of the Commission shall be issued within thirty (30) days as stated hereinabove.

Schedule I

Content of RFP

A RFP shall include the following:

- a) A copy of the most recent Annual Report prepared by the SO;
- b) An explanation of the basis on which bids (Indicative or Final) will be evaluated;
- c) An explanation of the process by which any shortlist of bidders will be established;
- d) Details of the length of time likely to be allowed for each stage of the RFP process from the issue of the RFP through to contract execution;
- e) Drafts of the principal transaction and regulatory contracts respectively that a Buyer proposes shall be entered into by the Successful Bidder in connection with the provision of generation capacity;
- f) A standard form bid bond or other bid security which a Buyer may require to be posted by bidders, the circumstances in which they may be called by a Buyer and the proceeds forfeited by bidders;
- g) Details of any minimum acceptable technical, operational and financial requirements;
- h) A statement of the language or languages in which bids must or may be submitted;
- i) A statement of the manner and form in which bids are to be submitted;
- j) A summary of the type(s) of project(s) for which proposals are requested, including any requirements with respect to:
 - (i) fuel type and availability;
 - (ii) set and plant size;
 - (iii) location;
 - (iv) anticipated operational characteristics;
 - (v) requirements for system interconnection; and
- k) Such additional information as may be applicable to each specific solicitation, including geotechnical, economic, commercial, social, legal, licensing and permits, fiscal (applicable taxes, incentives, etc).

Schedule II

Content of Indicative Bids

Where indicative bids are utilised, the following information shall be provided by bidders:

- a) Corporate details of the bidder:
 - i. legal identity and structure;
 - ii. ultimate beneficial ownership of the bidder;
 - iii. where more than one party comprises the bidder (e.g. a consortium) a description of the proposed roles of each of the parties in relation to the bidder;
 - iv. copies of audited annual accounts of the bidder, including consortium members for the previous four years;
 - v. details of any formal direct or indirect connection between the bidder and existing participants in the Nigerian electricity industry, including ownership or shareholding, consulting, service agreements, consulting, etc.;
- b) Bidder's response to the technical specifications of the RFP and its indicative technical proposal;
- c) Indicative consideration (price) proposed by the bidder stated as PPA price (further divided into capacity and energy charges) and the Ancillary Services price, which at the option of the Buyer could be stated in a narrow range with a variance to be also stated by the Buyer;
- d) A finance plan indicating the funding mechanisms available to the bidder that would be used to support the financing for this project, including definitive evidence of debt and equity capital available for the project ;
- e) Any material issues of concern to the bidder as to the terms of the project agreements as released by a Buyer to that time;
- f) Details of relevant experience of the bidder and of its associates in relation to the design, construction, project management, commissioning and ownership and operation of generation plant, whether in Nigeria and elsewhere;
- g) Details of all internal and external authorisations which the bidder may require, such as board approvals and regulatory or foreign investment approvals, and the steps which have been taken to ensure those authorisations are obtained and at what stage those authorisations will be obtained; and
- h) Any other information the bidder chooses to present as indicative of its qualifications to execute the RFP.

Schedule III

Content of Final Bids

Final Bids shall contain the following minimum information:

All information required as of Indicative Bid stage (highlighting any changes to the information provided as at that stage) together with:

- a) Bidder's final and detailed technical proposal;
- b) Bidder's final price proposal (stating final PPA and Ancillary Services prices) with supporting statements in the form required by the RFP;
- c) Bidder's firm arrangements to fund the project, including evidence of commitments of requisite financial support from third parties, as applicable, in the form specified in the RFP;
- d) Any further material issues of concern to the bidder as to the terms of the project agreements that have not been addressed previously during the bid process, provided that such issues shall not be stated as conditions to the execution of relevant transaction and regulatory documents;
- e) Completed internal and external authorisations which the bidder may have obtained together with a listing of those that remain to be obtained and a schedule for obtaining such authorisations (such as board approvals and regulatory or foreign investment approvals);
- f) A statement of readiness to execute the project unconditionally; and
- g) Any other information bidder chooses to present in support of its bid.

SIGNATURE

SIGNATURE