

Date: FEBRUARY 2014

GENERATION PROCUREMENT GUIDELINES

Introduction

1. The Nigerian Electricity Regulatory Commission (NERC) has so far issued over 55 licences to potential independent power projects (IPPs) for the supply of new electricity generation capacity in excess of 26,000 MW. All the proposals to establish these new generation plants have been unsolicited. The cost to the Nigerian power system and the Nigerian electricity consumer of such unsolicited requests to establish new capacity in the absence of a master plan that includes new generation, transmission, distribution and fuel supply could be significant if an orderly approach is not adopted.
2. The Commission is convinced that continuing to license unsolicited generation providers in the context of the ongoing reform of the Nigerian Electricity Supply Industry is not productive and is therefore unsustainable. It is also in direct contradiction of the Market Rules, which set down requirements on competitive procurement of new generating capacity in the Transitional Market. The relevant section of the Market Rules will come into effect upon the commencement of the Transitional Market. However, the electricity industry is not yet ready to implement the Market Rules process in full, and therefore in the present pre-Transitional Stage it is appropriate to simplify the requirements whilst still ensuring that new capacity is procured through a transparent and competitive process.
3. The formal rules for the procurement process are set out in the NERC Regulations for the Procurement of Generation Capacity, 2013 (referred to in these Guidelines as "the Regulations"). It is intended to revise the Regulations when circumstances permit, in order to bring them fully in line with the provisions of the Market Rules as applicable during the Transitional Stage Market. The present document sets out NERC's guidelines on the procurement of

new generation capacity at least cost, explaining the purpose, intention and application of the Regulations.

A MULTIPLE BUYER PROCUREMENT MODEL

4. The Bulk Trader, Nigerian Bulk Electricity Trading (NBET) Company has a central role in the economic and competitive procurement of new generating capacity during the Transitional Stage Market. However, with the recent establishment by the Commission of the Embedded Generation Regulations, and considering that the Transitional Stage Market entails bilateral contracts for the supply of electrical capacity and energy between IPPs and buyers, the stage is set for the Nigerian Electricity Supply Industry (NESI) to develop a Multiple Buyer Model (MBM) for the procurement of generation capacity, whereby multiple entities may contract, as they deem necessary, for the capacity and output of new generating plants, provided they do so in the manner stipulated by the Regulations.

5. These Guidelines and the Regulations cover procurement of new capacity by Buyers who may be electricity distribution companies or NBET. NERC sees this development as a key step in the evolution towards a fully competitive market. They do not, and are not intended to, provide guidelines or rules for the drafting of Power Purchase Agreements (PPAs). However, it is important that given the limited experience in drafting PPAs in Nigeria and indeed previous experience with poorly-drafted PPAs (with a resultant adverse impact on the finances of the power sector), it is important that there is a substantial element of standardisation in the terms of the PPAs utilised. NERC will promote this standardisation.

6. Notwithstanding the provisions of Section 22.1.7 of the Market Rules, the Generation Capacity Procurement Process contained in the Regulation shall

apply until such a time when the Load Projection Report and the Generation Adequacy Report as required by the Market Rules are published by the TCN.

7. During the Pre-transition and Transition Stage, in Sections 21 and 22 where the phrase "Special Trader" is seen, it shall be construed to mean the Nigerian Bulk Electricity Trading Company (or Bulk Trader), any trading company and any Distribution Company wishing to undertake its procurement.
8. The provisions of S22.3.6, 22.3.7 and 22.4.1 and 2 as well as 22.3.3 shall not apply in the Regulation.

PURPOSE AND SCOPE

The Regulations to which these Guidelines refer do not apply to small scale power plants generating 10MW or less.

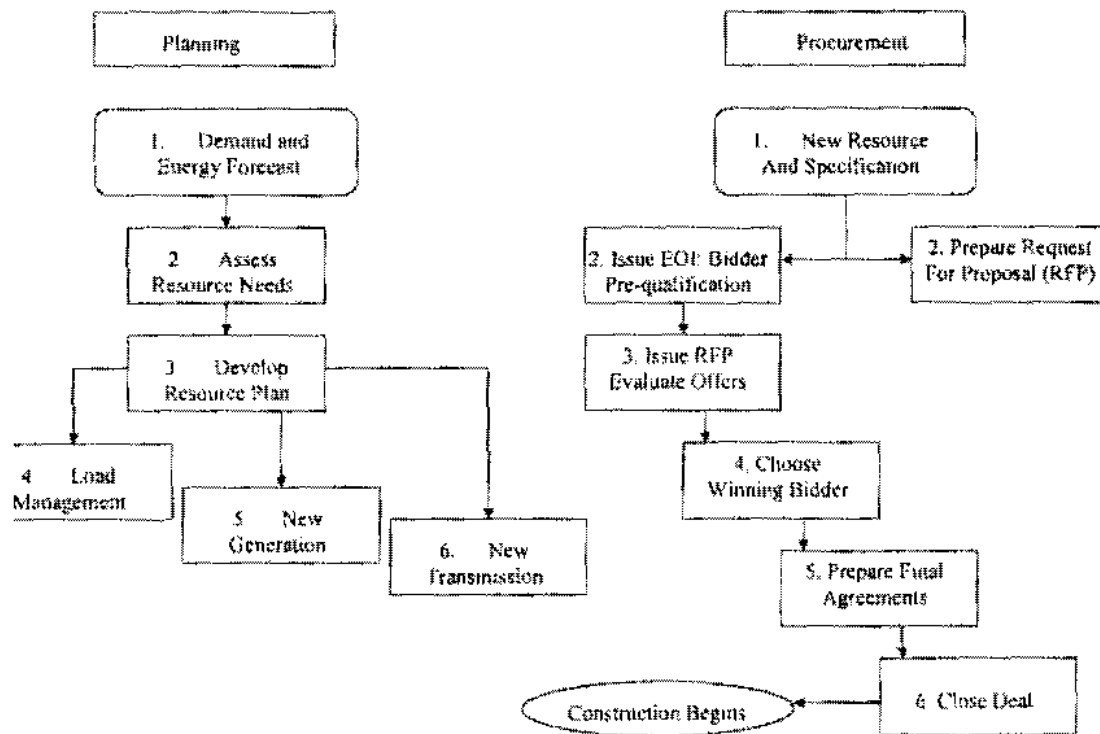
9. The provision of a continuous, adequate supply of reasonably-priced electricity is of great political and economic importance, and entails three essential steps:
 - a. The forecast of future demands for electricity;
 - b. The identification of the type, location and size of both demand- and supply-side resources required to meet projected demands most economically; and
 - c. The acquisition of the desired generation capacity through a procurement process that enables the electricity system to expand at lowest reasonable costs.
10. A comprehensive planning regime will consider a number of critical factors in assessing the least-cost options available to meet growing electricity demand, including:
 - a. Load management (and improved energy efficiency);
 - b. New generation capacity;

- c. New transmission facilities; and
- d. Access to fuel supply.

It should be noted that Buyers will depend on the System Operator (SO), currently resident within the Transmission Company of Nigeria Plc (TCN), for information on new capacity requirements and the appropriate siting of such capacity.

11. These Guidelines address the second step identified above, with a focus on competitive tendering for new generating capacity. The procurement process is illustrated in Figure 1 below. The formal rules for the procurement process are set out in the Regulations.

Figure 1 Planning & Procurement Process



CONTEXT

12. The Regulations explained in these Guidelines cover only the procurement of new generating capacity. They do not cover wider tendering activities which will be covered by a separate regulation. Moreover, in regard to new generation capacity it is important to note that they will be subject to change as the market develops over time – first with the implementation of the Transitional Market, and subsequently as competition develops and ultimately more competitive market forms are instituted in accordance with the Market Rules).
13. The Regulations apply to the procurement of generating capacity connected to the transmission system. They do not apply to off-grid (island) capacity and small scale power plant generating 10MW or less.

EFFICIENCY IN THE PROCUREMENT PROCESS

14. Providing an efficient and transparent means of contracting for the provision of additional generation capacity to meet anticipated demand is important for a number of reasons:
 - a. It is vital that the Buyers of bulk electricity from generators are in a position to economically procure further generation capacity to meet anticipated demand in a timely fashion. Failure to procure such additional generation capacity would lead to continued un-met demand (to the detriment of all consumers, and also impairing growth in the economy) and the necessity of imposing service curtailments (in order to match resources and loads and preserve system stability) as are currently experienced in Nigeria;

- b. Conversely, a Buyer would not wish to commit to over capacity as this would lead to the inefficient allocation of resources, in building generation capacity which is not required by forecast demand. The cost of over-capacity would need to be borne by the Buyer and in turn, if costs are passed through, there would be upward pressure on pricing for existing end users whose actual demands are less than the capacity paid for;
- c. An efficient means of generation procurement will minimise the transaction costs involved in seeking bids for additional capacity, evaluating those bids and moving through to financial close and commercial operation of the generating plant that is contracted;
- d. Transparency in the procurement process will encourage participation by qualified international investors in capacity solicitations and will assist in putting downward pressure on risk premiums required by competing bidders; and
- e. A robust procurement process provides an opportunity to attract the large investments necessary to expand the power system from private investors participating in global capital markets, rather than relying on the Government's scarce capital resources.

15. Given the lead time required for the design, construction, financing and commissioning of significant power plants, the process must allow for a reasonable, but disciplined timetable. There will always be the need to strike a balance between allowing sufficient time within the procurement process (in order to identify the need for further generation capacity, the calling of bids, evaluation of bids, etc.) and the anticipated time when the new generation plant will need to be fully operational in order to meet the anticipated demand.

16. Buyers must contract for new capacity on terms that reflect due regard for the allocation of project and operating risks inherent in any such transaction. It would, for example, be sub-optimal for Buyers to assume project risks that are more appropriately borne by the investor/owner of the project (e.g. financing and construction risks). Conversely, it would be sub-optimal for the Buyer to seek to pass on to the investor/owner risks resulting from discrepancies between projected and actual demand (e.g. introducing uncertainty as to when the capacity is required to come on stream).

17. An electricity generation capacity procurement process that is efficient, transparent, easily understood and able to withstand scrutiny is, in the end, likely to be more cost effective, timely and conducive to rational outcomes than a process that does not display these attributes. In our quest to facilitate the exponential growth of such generation capacity on a sustainable long-term basis, NERC has no doubt such a process is the best option for Nigeria and the NESI.

PROCUREMENT

The Annual Report

18. The need for extra generation capacity will be determined in the Pre-Transitional and Transitional Stage through an Annual Report by the System Operator submitted to NERC, whilst procurement of additional capacity will be by the Buyer(s). The System Operator is in the best position to analyse both historic and anticipated demand, not only in gross MW terms, but also in terms of location of demand, type of demand (base load, intermediate, peaking), system constraints, system stability and the like.

19. The SO will submit the following information with an appropriate outlook (not less than five years):
 - a. the projected gross MW demand requirements for the system;

- b. the generating capacity of existing generation units;
- c. the anticipated capacity of generating units for which power purchase agreements have been concluded between Buyers and successful bidders of plants, together with, where such information is publicly available, the stage of progress (following entry into the PPA) of such successful bidders towards achieving commercial operation of the plant;
- d. recommended injection points on the transmission grid for additional generation capacity, as well as the upper limit of capacity that may be injected at a given point;
- e. anticipated and planned generating plant retirements;
- f. projected transmission network capabilities and constraints (taking into account existing and anticipated generation capacity, demand and both generation and transmission capacity anticipated retirements);
- g. projected gas, and other fuel, supply capabilities;
- h. such other operational and regulatory information as is required by Buyers to assist existing owners/operators and potential owners of generating capacity in their planning as to continued participation in the market, their new or increased participation in the market and their retirement from the market.

20. In the absence of the output of a comprehensive system planning exercise, the first Annual Report issued by the SO will be based on the best information available to it. When circumstances permit, the requirements above regarding the SO's Annual Report will be replaced by the requirements specified in the Market Rules for the Transitional Stage, in particular the production of a Load Projection Report by the System Operator and a Generation Adequacy Report by the Market Operator.

The Generation Procurement Process

21. A comprehensive and effective capacity expansion plan must be consistent with:

- a. anticipated aggregate consumer demands over time;
- b. anticipated generation and transmission capacity;
- c. anticipated fuel availability and supply capacity;
- d. planned and anticipated retirements of generation and transmission assets;
- e. lead time requirements (both as to the procurement process itself but also as to the lead time necessary to order plant, effect construction and commissioning, arrange financing etc); and
- f. allowing for contingencies and forecast uncertainties.

22. The generation procurement process must be designed to provide sufficient time to enable:

- a. the procurement process to be conducted in orderly fashion with appropriate participation, oversight and regulatory review;
- b. a preferred bidder to be clearly identified;
- c. the power purchase agreement to be negotiated with and executed by the successful bidder and the Buyer;
- d. the achievement of financial close;
- e. plant construction; and
- f. the achievement of commercial operation of the proposed plant.

23. The process must commence in sufficient time for the new generation plant to be made available in coordination with the timing of anticipated future demands. Accordingly, the SO's Annual Report shall contain an assessment of the need for additional capacity. If a deficiency is found, the SO shall advise bulk buyers (distribution companies and the Bulk Trader) accordingly so that they may initiate generation procurement procedures under the Regulations.

24. For some years to come there will be a shortage of generation capacity in Nigeria and there will be both financial and technical constraints on the rate at which new capacity can be added; for instance the implications of transmission and distribution constraints and the impact on consumer tariffs have to be considered. For these reasons, the Regulations provide for NERC approval of the procurement processes that are initiated by Buyers. NERC may specify maximum amounts of capacity to be procured and attach conditions thereto, for instance in relation to locations.

25. As a multiple buyer system develops NERC anticipates that the frequency of procurement processes will be streamlined by the market itself to promote certainty and efficiency.

Procurement Characteristics

26. There are three distinct issues related to the nature of the procurement process to be utilised:

- a. Whether the procurement is of a particular specified generation plant (specified by the Buyer in the procurement process itself) or whether the procurement is of capacity (however generated);
- b. Whether the procurement is to be on a committed or uncommitted basis; and
- c. Whether the process is one of a request for tenders or of a request for proposals.

Project Specific vs Open MW Procurement

27. The first issue gives rise to two solutions: (i) project specific procurement; and (ii) open MW procurement (or loose MW procurement). With project specific procurement, it is presumed that, as a result of the annual information submission from the SO, Buyers will have identified not only anticipated demand

but also the preferred least cost solutions to meeting that anticipated demand (e.g. a 1000 MW coal fired base load power station at location X together with a 50MW gas fired peaking power station at location Y). At the other extreme an open MW process involves a Buyer identifying its need for a specified amount of capacity (measured at a particular point on the transmission system) but leaving it to bidders to propose solutions (which may encompass a range of types of plant, fuel, locations, etc.) to meet that demand.

28. Each solution has its inherent advantages and disadvantages and underlying presumptions as follows:

- a. Open MW procurement presumes that a buyer has no preference (other than as to the number of MWs) that it can identify. That is, it has no preference as to fuel type, running characteristics of the plant, economic life of the plant, environmental issues, etc. This is not to say that a number of these issues will not be relevant to the evaluation of a bid in an open MW process. For example, it will be relevant to the evaluation of a bid whether the proposed plant will in fact meet existing environmental laws. Similarly, if a buyer is mandated to facilitate the use of certain fuels over others, that factor will also be relevant in evaluating bids.
- b. A project specific procurement process presumes that a buyer has been able to identify all possible permutations and has been able to determine the best possible outcome (i.e. that which bidders are asked to bid upon). However, in practice a buyer may not be in a position to identify all possible permutations. For example, a buyer may be unaware of plans for a host customer to sponsor generation capacity to be built on its site, with excess capacity potentially available for sale to any buyer.
- c. Project specific procurement may stifle innovation. By being prescriptive as to the precise plant characteristics, location, fuel, running characteristics, etc., a Buyer runs the risk of not giving full weight to

recent innovations (either as to technology, operation and maintenance techniques, financing or otherwise) during the evaluation process or indeed not being offered these innovations at all by the bidders, to the detriment of the overall objectives of the procurement process.

- d. In theory, project specific procurement has the advantage of making evaluation of bids more straightforward as compared to an open MW procurement process. In practice, this is often not the case unless non-conforming bids in project specific procurement are disallowed (on the basis that the evaluation of a non-conforming bid will necessarily take longer or be more problematic than the evaluation of conforming bids). However, to deny the consideration of non-conforming bids may also, of itself, stifle innovation to the detriment of the Buyer.
- e. Project specific procurement has the advantage that successful bidders are unlikely to require the same degree of system modelling to underpin their bids as compared with an open MW procurement process. This is because with a project specific procurement a Buyer in effect has already mandated where the capacity is to be made available and its impact upon system capacity. Conversely, in open MW procurement, different bidders will be attempting to evaluate and then show how their proposal (involving different plant, different locations etc) is the best solution available to the Buyer.
- f. A project specific procurement process, being (in principle) simpler than an open MW process, has the advantage of being more transparent, more easily open to audit and review and less likely to be adversely scrutinised by regulators or others

29. Taking these considerations into account, the Commission believes that in practice a hybrid based on these two procurement processes would be optimal. At the one extreme, the significant amount of work that would need to be

undertaken by a Buyer to develop the specific parameters for a project specific procurement (type of plant, fuel, location, running characteristics etc) would cause the Buyer to give up the advantages of innovative bids and viable alternatives proposed by bidders. Conversely, a "pure" open MW procurement process puts potential bidders to greater trouble and expense in investigating a wide range of theoretically possible solutions, many of which are ultimately unlikely to represent a viable option, particularly given the fuel supply and transmission risks that constrain innovation and alternatives.

30. The Commission, however, believes that prospective Buyers should undertake a procurement process on a "modified" open MW basis – specifically, that the procurement be conducted on an open MW basis, but with the buyer identifying and specifying in the procurement documentation those factors which it has already determined (either absolutely or to a high degree of probability) as being consistent with its requirements and, therefore, critical for the successful bid (e.g., maximum MW proposed).

Committed vs Uncommitted

31. The second issue is whether the procurement is to be (from the perspective of the bidder) on a committed or uncommitted basis - that is, whether the obligations of the successful bidder under the PPA are conditional upon the Buyer issuing a notice to proceed with construction of the new generation capacity or whether, from the beginning, the successful bidder is obliged to procure the construction of the generation capacity, with the Buyer being obliged to purchase the output from the successful bidder.
32. An uncommitted form of procurement introduces a high level of uncertainty, given the lead time required for the design, construction, financing and commissioning of new power plant and the role of the Buyer in identifying

anticipated demand. The risk premium that successful bidders will undoubtedly want to receive from the Buyer if the Buyer proceeds on an uncommitted basis is likely to be very high. It is, therefore, highly unlikely that an uncommitted tender would attract acceptable bids, as bidders would price the uncertainty into their offers. Above all, given the substantial payment risk currently inherent in the distribution sector (which itself necessitates the existence of the Bulk Trader), it is most unlikely that uncommitted procurement would find traction amongst prospective bidders. NERC will therefore mandate that all procurement under the Regulations, at least during the Pre-Transition and Transition Stages of the Market, shall be undertaken on a committed basis. In other words, the successful bidder shall be obliged to procure the construction of the generation capacity with the Buyer being equally obliged to purchase the output from the successful bidder.

RFP vs RFT

33. Procurement processes can encompass requests for tenders ("RFTs") or requests for proposals ("RFPs"). Given the decision above to adopting a modified open MW process, a RFT is not practicable. However, for completeness, we provide a brief commentary on the differences between these two types of tender vehicles.

34. A RFT is more commonly used where greater precision can be provided by the Buyer as to the precise outcome that is desired. The objective in a RFT is to provide as much precision as possible so that the distinguishing features between bids are reduced largely to questions of price and certainty of outcome (the latter being essentially a function of the differences in the financial standings of the bidders).

35. In contrast, a RFP allows for greater differences between bids, focusing more on the desired outcomes rather than the means by which those outcomes might be achieved. Necessarily, therefore, evaluation of bids in response to a RFP involves not only questions of price and financial standing but also technical evaluation as to whether the proposed bid will, in fact, achieve the desired outcome by properly mitigating risk factors that attend the bid.

36. Given the flexibility inherent in the modified open MW procurement process that is preferred, RFPs, rather than RFTs, are the preferred form of procurement for the Buyer.

Eligible Respondents to Procurement Initiatives

37. It is in the best interests of the Buyer that it receives bids only from genuine, experienced, and financially capable bidders. The Buyer does not want to waste time or resources having to evaluate bids received from, and otherwise interact with, bidders who do not meet these standards. The issue, therefore, is how to limit the procurement process to genuine, experienced, financially capable potential bidders, whilst at the same time not excluding participation by new or "fringe" players whose entry into the market may introduce innovative and desirable outcomes.

Managing eligibility

38. The options available to manage eligibility include:

- a. maintaining a register of approved bidders;
- b. proceeding by way of invitations to bid only; and
- c. conducting an expressions of interest ("EOI") process, which precedes the bidding process.

39. **Register of Approved Bidders:** A register of approved bidders is of limited value unless the register is constantly and rigorously updated, so that its accuracy (and hence its relevance) does not become out of date. In any event, the frequent and rigorous vetting of the register in effect means that the Buyer is running de facto expressions of interest process. The register quickly becomes out of date because it is not unusual for bidders to form consortia in order to bid, with the membership of the consortia changing from project to project. In addition, not all parties have the same appetite for all types of projects (some parties may be interested only in plant which is gas fired, others coal fired, whereas others yet again may be less concerned about the type of fuel and more concerned with the level of investment required). Unless the register contains up to date, accurate information as to the preferences of registered bidders, the register is of little value to the Buyer.

40. **Invitations to bid:** Restricting bidders by issuing invitations has two principal disadvantages:

- a. it presumes that the Buyer is fully aware of all likely, genuine, experienced and financially capable bidders, when such is not necessarily the case;
- b. it is not uncommon for invitations to be issued to two separate parties, only to have those parties wanting to bid together as a consortium. This can give the impression of collusion between those parties (which arises simply from the fact that they received separate invitations), adversely and improperly affecting perceptions of the character of their bid.

41. **Expressions of interest:** An expression of interest process involves the Buyer publicly inviting all interested parties to submit an expression of their interest in participating in the procurement process for a specific project. Interested parties are required to present (evidence of experience and financial capability and their genuineness in wishing to pursue the opportunity. The Buyer, who exercises

responsibility to vet such expressions of interest, is in a position to exclude those submitting expressions of interest that do not meet the minimum technical, financial or experiential requirements. Exclusion at that stage does not preclude an interested party from the process as such a person may join with a bidder that successfully went through the EOI process. For these reasons it is preferred that Buyers employ an Expressions of Interest process to identify eligible bidders.

42. The Expressions of Interest process involves the Buyer publicly inviting all interested parties to submit credentials and be considered for eligibility to receive a request for proposals (RFP). The form of public invitation would include:

- a. Sufficient information about the procurement opportunity to enable interested parties to determine whether they wish to seek to participate or not;
- b. details of relevant bidder qualification criteria; and
- c. the applicable time schedule for submission of the EOIs.

43. It is not unusual for an EOI invitation to provide that expressions of interest need to be submitted within a particular timeframe, after which further expressions of interest are not to be considered. Upon receipt of the Expressions of Interest, the Buyer evaluates the credentials of interested parties against the evaluation criteria stated in the EOI and identifies those eligible to receive RFPs. It is usually at this stage that eligible parties are invited to enter into any relevant confidentiality undertaking pertaining to the RFP process, before receiving the RFP documentation itself.

44. It is not unusual, given changes in the financial and other fortunes of parties over time, for separate Expressions of Interest to be conducted for each procurement process, notwithstanding that they may be conducted a year or less apart. It is

better that the most up to date information is reviewed by the Buyer, rather than relying on what might be outdated information.

Existing On-Grid Licensees

45. Since its inception, NERC has licensed over forty (55) on-grid IPPs, all of whom submitted unsolicited applications. Given current structural defects in the NESI, one of which is the absence of an open, transparent procurement process, it is not surprising that almost all of these licensees are yet to execute PPAs with credit-worthy off-takers. Given the major evolution that the process set out in the Regulations represents, NERC has decided that it will no longer accept unsolicited on-grid generation licence applications with effect from the day the Regulations come into effect. Instead, a draft licence terms and conditions will be included in the RFP for prequalified bidders; and NERC will work with all prospective buyers to ensure that their prequalification criteria and proposal evaluation criteria capture the essence of NERC's licence application process.

46. This means that any bidder that comes through prequalification and the proposal evaluation process to emerge as winner of a given site under a procurement exercise certified to be compliant by the tender auditor will be deemed to be qualified to be granted an on-grid generation licence by NERC. Licensees who have commenced their projects and have reached financial closure will not be subject to power procurement under this Regulation. However, in consideration of their having gone through a rigorous licence application process, during financial years 2014 and 2015 NERC will deem all existing on-grid licensees who have not reached financial close for their projects or who have not started project construction to be pre-qualified to participate in any procurement undertaken during those years, regardless of the site for which they currently hold an on-grid generation licence. During financial year 2014, NERC shall consider and undertake consultations as to how to treat all extant on-grid

licensees, who by 31st December 2014, would have been unable to execute PPAs with credible buyers.

47. The Regulation excludes any procurement by a buyer under any agreement entered into prior to the coming into force of the Regulations, including pending applications, subject to the approval of the Commission.

Content of Request for Proposals

48. The precise content of the RFP issued by the Buyer will, of course, be dependent upon the nature of the specific procurement being undertaken. However, any RFP will need to:

- a. Provide sufficient information to potential bidders to enable them to undertake proper analysis of the opportunity presented to them and to devise a coherent, sound and commercially viable proposal for consideration by the Buyer; and
- b. Clearly identify to potential bidders the information that the Buyer will require from bidders as part of their submissions in order that the Buyer can efficiently, and in a timely fashion, evaluate bids received, verify the information provided by bidders and make its ranking decisions as to bids received.

49. Accordingly, the Commission expects that all RFPs issued under the Regulations would include the following:

- a. **Introduction**: This would describe, in general terms, the context in which the RFP is being conducted by the Buyer.
- b. **Timetable**: This would describe the anticipated timetable for the provision of information by the Buyer to potential bidders, the lodgement of bids (both final and, where used, indicative bids), their evaluation and

the timeframe for negotiation and execution of project documents (principally the PPA).

- c. **A statement as to the opportunity:** This may be in the form of a report describing the technical features of the project such as the MWs required by the Buyer together with details of any mandatory or preferred requirements (e.g. minimum/maximum plant/unit size, fuel, location, and operating characteristics). Other assessments covering the economic, financial, legal and regulatory issues, as well as the social impact assessments, will be included.
- d. **Information required with indicative bid:** Where indicative bids are utilised, the following information is likely to be required:
 - i. details of the bidder (legal identity and structure); ultimate beneficial ownership of the bidder; 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; copies of recent audited annual accounts of the bidder; details of any formal direct or indirect connection between the bidder and existing participants in the Nigerian electricity industry;
 - ii. indicative consideration (price) proposed by the bidder;
 - iii. indications as to funding mechanisms, including evidence of existing external financial support or indications of support from third parties;
 - iv. any material issues the bidder has as to the terms of the project agreements released by the Buyer to that time;
 - v. details of relevant experience of the bidder and of its associates in relation to the design, construction, commissioning and ownership and operation of generation plant, both in Nigeria and elsewhere; and

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- h. A description of evaluation of final bids; and
- i. Details of the process to be followed.

their proposal.

51. Conversely, the more one moves away from a project specific process towards an open MW process, the more difficult it is for the Buyer to articulate with absolute precision all of the relevant criteria that are to be taken into account or to articulate the relative importance of the different aspects of proposals that

are to be evaluated. In balancing these issues, these Guidelines recommend that the RFP documentation:

- a. Includes the evaluation criteria to be used by the Buyer in evaluating bids (separately identifying the evaluation criteria to be used for indicative as compared to final bids);
- b. Indicates the methodology by which the evaluation criteria are to be applied by the Buyer to bids; and
- c. Requires the Buyer to apply such evaluation criteria and methodology uniformly to all bids received.

52. The Commission notes that in principle it may be preferable to adopt a select number of criteria with mathematical weightings applied to each. However, in many cases, a number of these criteria will not easily lend themselves to mathematical certainty. For instance, project implementation strategy or the level and certainty of vendor and/or Export Credit Agency (ECA) financing or the ability to effectively manage construction risk will probably weigh heavily in future procurements but are not easily evaluated one against the other.

53. In addition, there is uncertainty as to the appropriateness of the weight given to one criterion as against another. Essentially, particularly at a time when time and country-specific experience are essential, a careful Buyer will almost certainly be looking for an IPP that can effectively manage those peculiar Nigerian risks and deliver a project on time and within budget.

54. Therefore, the Commission would prefer the evaluation methodology to focus on:

- a. First, whether the proposal is technically coherent and feasible (such that the Buyer has confidence that, if built, the generating plant will be able to produce the capacity desired);

- b. Second, the likelihood of the bidder being able to achieve financial close and its commitment to reaching commercial operation (there is little point in a bidder having the best technical proposal and the lowest pricing if it shows every sign of being ready to abandon the project if a more favourable project is identified elsewhere);
- c. Third, the pricing proposed by the bidder, given that the price per MWh, including payment for capacity, must fall within the threshold set under the extant MYTO.

55. This hierarchy of evaluation presupposes that it is the certainty of obtaining the requisite capacity that is of paramount importance to the Buyer (hence priority being given to technical compliance, commitment to achieving commercial operation and, only subsequently, pricing). A different evaluation hierarchy would be appropriate if price, not certainty of availability of generating capacity, was the predominant factor.

The Role of NERC

56. In principle NERC could have a number of potential roles in relation to the generation procurement Regulations. These include:
- a. Approving the quantity of power to be procured;
 - b. Setting the rules for competitive procurement as is done through the drafting of these Regulations and Guidelines;
 - c. Appointment of Tender Auditor;
 - d. Approving the Tender Documents;
 - e. Review of the entire exercise at the end of the procurement process.
 - f. Advance approval of departures by the Buyer from the generation procurement Regulations or the RFP; and
 - g. Proposing or approving amendments to the Generation Procurement Regulations itself.

Regulatory Review of the Process

57. NERC will not substitute its commercial decisions for those of Buyers. Rather, NERC's review will be directed towards confirming that a buyer has conducted the procurement process in accordance with the Regulations. Essentially, this role is more akin to a process review than a commercial/technical review of any particular outcome. However, in clearly egregious cases, NERC may require that the procurement process be cancelled and undertaken again.
58. However, in the early procurements, the Commission will play a more active role in working with Buyers from the early stages of pre-procurement till the final stage of post-audit certification, in order to establish precedents of practice and procedure based on transparency and fairness. As procurement templates and practices become well-established and are widely adopted and respected, the Commission will revert to its post-transaction review and appellate roles, as envisaged under the Regulations.
59. As to NERC approving departures from the requirements of the Regulations or from the requirements in particular of an RFP:
- a. Departures from the Regulations (as distinct from administrative interpretations) shall not be permitted by NERC, but rather shall necessitate an amendment to the Regulations itself, provided this is the consensus decision following consultation with stakeholders.

- b. Departures from an RFP are matters on which NERC's primary concern is to ensure adherence to the procurement principles and process defined in the Regulations. Therefore, the basis for and the procedure for undertaking any departures from the rules and principles in the RFP should be clearly set out in the RFP documentation it.

60. In practical terms, each RFP should be designed so as to minimise the need for the Buyer to depart from the RFP, whilst at the same time providing a transparent mechanism whereby the Buyer, during the conduct of the RFP process itself and in warranted circumstances, can modify the requirements of the RFP (e.g., by allowing all bidders extra time within which to submit bids).

61. The Buyer's performance in complying with the RFP and in exercising any discretion it has under the RFP in that regard would be a subject of review in the preparation of the Tender Audit Report required after each procurement is complete, as specified in the draft generation procurement Regulations.

62. In common with the development of other regulations, amendments to the generation procurement Regulations shall be made under NERC's normal procedures. NERC may also direct a Buyer to amend its own procurement procedures (usually, where this is the outcome of NERC's review of any particular procurement process or for other reasons).

RELATED ISSUES

Design of the Procurement Regulations

63. The generation procurement Regulations will not be static but rather will be a living document. They will be refined and improved over time in the light of experience. It is, however, not desirable that the Regulations are subject to constant change, as that would lead to uncertainty and added cost (both time

and money) for Buyers, NERC and potential and actual bidders for generation capacity.

64. Changes to the Regulations can be minimised by ensuring that the Regulations:
- a. Do not deal with irrelevant matters; and
 - b. Provide the Buyer with sufficient flexibility to be able to design Requests for Proposals for additional generation capacity in a manner that reflects current requirements, market expectations and experience, while also upholding principles of fairness and transparency in the procurement process and value for money in the procurement outcomes.
65. This means that the Regulations for the Procurement of Generation Capacity 2013 should be a relatively high level document, concerned more with articulating the process by which procurement of generation capacity is to be conducted and less concerned with hard wiring the actual mechanics of the procurement process.

Unsolicited Bids

66. Given the vital need for economic, competitive procurement, by giving all bidders a fair and equitable opportunity to become the next provider of generation capacity to the Buyer, it is difficult to see why a Buyer should be free to accept an unsolicited bid or proposal for the provision of additional generation capacity.
67. These Guidelines and the Regulations provide for:

- a. The publication of an Annual Report;
- b. Rules that espouse fairness, transparency and money for value; and

- c. The opportunity for a Buyer to instigate a procurement process for additional generation capacity, with that procurement process conducted in accordance with the Regulations, in a way that gives certainty of annual increases in capacity and reliability of the NESI.

68. Given the above, to accept an unsolicited bid or proposal would deny the Buyer of the opportunity to test the commercial and technical features of the unsolicited bid against competing bids; and deny other potential bidders the opportunity to have their proposals considered by the Buyer.

69. The acceptance of an unsolicited bid for additional generation capacity may also have adverse effects on other existing participants or potential participants connected to the grid system, given for example the potential for increasing transmission constraints. For these reasons Buyers are expressly prohibited under the generation procurement Regulations from accepting unsolicited bids for additional generation capacity.

70. However, in making this prohibition, the Regulations will not prevent the Buyer from:

- a. instigating a new procurement process or amending the terms of an existing RFP (if that is provided for therein) in response to an unsolicited bid for additional generation capacity (if the Buyer determines that that is justifiable and obtains prior approval of the Commission), provided the effect of the amendment is not to permit the unsolicited bidder to become a preferred bidder);
- b. Considering and awarding preferred bidder status or indeed entering into a PPA following reconfiguration of bids as part of the RFP process (i.e., ensuring that reconfigured bids are not construed as unsolicited bids).

- c. This degree of flexibility is justified if, and only if, the final outcomes are for the benefit of consumers and the correct processes are observed by the Buyer (with regulatory oversight).

Particular Power Purchase Situations

71. Procurement of small-sized plant, with a generating capacity of no more than 15MW, is not covered by the generation procurement Regulations. In some situations an entity, such as a large industrial firm, providing its own generating plant to meet its requirements may have the ability to install capacity in addition to its own needs (or perhaps expects its installed capacity to exceed its direct needs for several years). The entity may choose to dedicate this additional capacity for supply to the grid, if that is feasible under the law. The procurement of such additional capacity is highly desirable but should be carefully managed.
72. The principle guiding these provisions is that whilst NERC welcomes low cost or small capacity power supplies where they benefit consumers, it must be particularly cautious that such propositions are not designed to subvert the objectives of the normal, transparent procurement process (becoming in essence, a “non-solicited bid”). The Buyer should be required to make a convincing demonstration of significant benefits from the proposed purchase and address the impact, if any, that the proposed purchase might have on future capacity procurements.
73. Wherever possible, such “excess capacity” procurements should simply be incorporated into the normal procurement process, minimizing the opportunity for, or the appearance of, any potential impropriety in the procurement process.

In addition, Discos should out of abundance of caution, consult with the Commission when it wishes to procure such excess industrial capacity. Finally, Additional generation capacity procured, or anticipated to be procured, in any of the ways identified above shall be taken into account by the SO in the preparation of the Annual Report.

account; and the SO will provide information on the transmission constraints on generation development.

75. Recognising that the transmission grid is operated on a non-discriminatory, open access basis, the Commission reiterates the need for TCN to also ensure that all its capex must be conducted on the same principles of openness, transparency, value-for-money and a well-considered system plan that takes the need for redundancy, reliability, security and future network growth into account.

PPA Terms

76. The terms of a Power Purchase Agreement (PPA) are critical to the achievement of successful procurement of generation capacity. It is critical for a number of reasons (transparency, efficient evaluation and negotiation with successful bidders) that fully developed, coherent, equitable draft power purchase agreements are made available to potential bidders for additional generation capacity at an early stage of the RFP process.

of Generation Capacity 2014 will be that NERC will no longer entertain unsolicited applications for grid-connected generation. Rather, NERC will work with buyers to ensure that agreement is reached between key stakeholders, particularly the distribution companies, the Nigerian Bulk Electricity Trading Company, the Gas Aggregation Company of Nigeria (GACN) and Transmission Company of Nigeria (TCN), to ensure that a common set of prequalification criteria for all prospective IPPs are agreed, incorporating important elements of NERC's current licence requirements.

81. Effectively, therefore, just as with the PPA, bidders should receive a draft of Terms and Conditions of a generation licence with all applicable terms, enabling them to submit their bids taking the terms and conditions into account; and as soon a bid is concluded and certified, the Terms and Conditions of Licence (along with the PPA) will be key documents the winning bidder will execute with the Commission.

CONCLUSION

82. The Commission has prepared these Guidelines with the expectation that they will be read along with the Regulations. They seek to explain the thinking behind the Regulations but where there is a conflict between these Guidelines and the Regulations, the latter shall prevail to the extent of such inconsistency.

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DATED AT ABUJA THIS DAY OF 2014


CHAIRMAN