

**REGULATIONS FOR THE PROCUREMENT OF
GENERATION CAPACITY 2014**

Ad

xx 2014

Ad

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 2014.

Arrangement of Clauses

CHAPTER I
GENERAL PROVISIONS

1. Short Title
2. Commencement
3. Interpretation
4. Objectives
5. Application of the Regulations

CHAPTER II
GENERATION PROCUREMENT PROCESS

6. Solicitation of New Generating Capacity
7. Qualified Bidders
8. Requests for Proposals
9. Indicative Bids
10. Final Bids
11. Communications Protocols and Procedure
12. Unsolicited Offers
13. Tender Audit
14. Petitions

SCHEDULES

- I. Schedule I
- II. Schedule II
- III. Schedule III

CHAPTER I GENERAL PROVISIONS

1. Short Title

These Regulations may be cited as the Nigerian Electricity Regulatory Commission (NERC) Regulations for the Procurement of Generation Capacity 2014.

2. Commencement

These Regulations shall come into force on the date on which they are approved by a resolution of the Commission, and signed by the Chairman who shall cause the seal of the Commission to be affixed thereto.

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 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.

“**Bulk Trader**” means the trading Licensee holding a bulk purchase and resale Licence or temporary Licence, authorised to purchase generation from successor generation companies and independent power producers, for resale to distributors and eligible customers pursuant to Part II of the Act

“**Buyer**” means a person licensed in accordance with the Act and authorised to purchase bulk power from existing and/or new generating companies, including the holder of a bulk trading licence and the 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 distribution companies 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.

AV

“Embedded Generator” means a person 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 the bidding 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 first 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, with respect to an EOI or RFP, a bidder which a Buyer determines (following evaluation of Expressions of Interest) is eligible to receive a Request for Proposal.

“RFP” or “Request for Proposal” means a request for proposal for the construction of new generating capacity.

“RFP Document” means a document issued by a Buyer to Qualified Bidders detailing information pertaining to any particular RFP.

“Short List” means a limited number of Qualified Bidders who are selected by a Buyer to submit Final Bids on the basis of their ranking in Indicative Bid submissions.

“Shortlisted Bidder”: means, with respect to a RFP, a Qualified Bidder who is selected as a member of the Short List.

“Special Trader” means the trading Licensee holding a bulk purchase and resale Licence or temporary Licence, authorised to purchase generation from successor generation companies and independent power producers, for resale to distributors and eligible customers pursuant to Part II of the Act

“Successful Bidder” means the Qualified Bidder that is determined by a Buyer to have submitted the best offer in response to a RFP.

“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 conduct and results of a bulk procurement process.

“Tender Audit Report” means a report prepared by the Tender Auditor on the conduct and results of a bulk power procurement process.

“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 generation capacity expansion plans reviewed and approved by the 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 financial manipulation, fraud or corruption of any kind during the resource acquisition 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 must 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 10MW or less;
- b) purchase of occasional electricity supply from a self-scheduling generator;
- c) any procurement by a Buyer under any agreement entered into prior to the coming into force of these Regulations, including pending applications;
- 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 requirement of Section 21.1.7 of the Market Rules on preparation of load projection report and generation adequacy report by the SO shall not apply to this procurement until determined by the Commission as reviewed from time to time.

The SO shall prepare an Annual Report assessing the position on capacity needs and system constraints for a five year period ahead. The Annual Report shall analyse the NESI and its historic and current demand profiles 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. Projected transmission grid system capabilities and constraints, taking all the above into account;
- vii. Current and projected natural gas and other fuel supply capabilities; and
- 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.
- ix. Requirements for new black start generation (note that generators are required under the Grid Code to provide voltage and frequency control).
- x. Available free capacity in international interconnector;
- xi. Forecast energy consumption of each distributor;
- xii. forecast system peak load and energy consumption for each month of the year

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 commence forthwith the procurement process set forth in these Regulations, subject to the approval of NERC, 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 an 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 shall be deemed to be pre-qualified in respect of Requests for Proposal issued during financial years 2014 and 2015.

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 must 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 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.

7.2. Form of EOI Invitation

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

- 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 and time 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 the Federal Government Tenders Journal, the World Bank procurement website and at least two newspapers circulating generally throughout Nigeria, published in English.

In addition, where the Buyer deems it cost-effective and useful in ensuring that the planned solicitation will be brought to the attention of all likely candidates, the Buyer shall invite submission of EOIs through:

- i. such international publications or trade journal as may be appropriate; and
- ii. in other media that may be appropriate, such as a Buyer's website.

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, 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 EOIs 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 EOIs, 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 EOIs, 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. Evaluation of EOIs Received

A Buyer must publish the names of each Qualified Bidder, or in the case of a limited participation, the names of each Qualified Bidder, with respect to any RFP.

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 EOIs and other documents submitted by potential bidders or Qualified Bidders, including final transaction documents, shall remain confidential unless otherwise ordered by NERC.

8. Requests for Proposal

8.1. Preparation

A Buyer must prepare a Request for Proposal Document ("RFP Document") 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 must issue an RFP Document 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 Document must 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;
- ii. Requirement of a bid bond to be submitted with the RFP and
- iii. such other information as a Buyer considers appropriate.
- iv.

9. Indicative Bids

9.1. Use of Indicative Bids

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

AD

- 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
- ii. a final round of detailed proposals ("Final Bids") from among only those Qualified Bidders chosen as members of a limited list of Qualified Bidders with the best Indicative Bids in response to the RFP (the "Short List" or "short-listed" 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 Persons.

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 Qualifying Bidder whom a Buyer determines will be invited to submit a Final Bid ("Shortlisted Bidder").

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.

10.2. Bid Security

A Buyer shall require bid security from all Qualified 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
such other information as may be stipulated in the RFP Document and in the invitation to submit a final Bid.

10.4. Final Bid Evaluation

A Buyer shall evaluate Final Bids received from Shortlisted or Qualified 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 Document equally to all Final Bids.

Each evaluation shall be conducted in the presence of two of the Commission's observers;

All negotiations shall be conducted with at least two of the Commission's observers present

10.5. Execution of Power Purchase Agreement

A Buyer shall not announce its readiness to execute a PPA until the Tender Report has been submitted to the Commission and the Commission has confirmed the selection of the successful Bidder;

A Buyer shall enter a contract only with the Qualified Bidder that has submitted the bid achieving the highest ranking during bid evaluation ("Successful Bidder") and 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 the written approval of NERC.

The Commission is not bound to accept any findings or recommendations on the Tender Audit Report even though this may be taken into account in determining whether or not this regulation was complied with in the procurement process.

10.6 Type of New Contracts

The provisions of Rule 22.3.3. of the Market Rules with regards to tripartite contracts between the Bulk Trader, distributors and the IPP shall not apply until such a time as determined by the Commission.

10.7 Reference to Special Trader in S. 22.3.1 of the Market Rules shall be deemed applicable to distribution companies and the IPPs and the provisions of S. 22.3.3(b)-(f) shall apply *mutatis mutandis* to bilateral contracts between the IPPs and the distribution companies as and when the Commission so decides.

11. Communications Protocols and Procedure

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

- i. the extent of and means of communications between a Buyer, its representatives and advisers and Qualified Bidders, their representatives and advisers;
- ii. confidentiality of information, relevant to the RFP, whether sourced from a Buyer, Qualified Bidders or otherwise;
- iii. the use of and dissemination of information by a Buyer;
- iv. the extent to which Qualified 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 Qualified 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

13.1 Upon the completion of the procurement process but before the execution of an agreement between a Buyer and the highest-ranked Qualified Bidder, the Buyer shall;

- i. Send a report to the Commission and advise the Commission of the name of the highest ranked bidder and the name of the second highest ranked or reserve bidder (where the RFP so provides); and
- ii. Immediately request the Commission to appoint a Tender Auditor for an audit report of the conduct and results of the procurement process

13.2 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.

13.3 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.

13.4 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

in either case to determine whether these Regulations has been complied with by a Buyer and to identify any potential revisions to the Regulations that might improve the generation procurement process.

13.6 If satisfied that the competitive procurement solicitation and the bid selection criteria are based on the selection of the highest-ranked Qualified Bidder and have been properly followed. NERC shall certify that this is the case.

13.7 The Buyer shall enter into contracts for the construction, operation, maintenance and supply of wholesale generation capacity only after it has obtained a certificate of due procurement from the Commission.

14. After obtaining the Commission's certificate, the Buyer shall immediately publish in the same publications in which it published its call for EOIs the completion of the process, the issue of the certificate, the name(s) of the relevant IPPs, the capacities to be constructed, the sites where the IPP is to be located and the period/year in which the IPP is to deliver commercial capacity.

15. Petitions

15.1 Petitions in respect of the bidding process may be made by bidders to NERC within 21 days after the results of the bidding process have been published by a Buyer.

15.2 Any such petition should be in respect of a contravention, by a Buyer, of the rule, procedure and guidelines specified by a Buyer in the request for EOI or in the RFP, or a contravention of the provisions of this Procurement Regulation.

15.3 Petitions should not be in respect of the final decision of the Buyer as to whether the petitioner should have become a Qualified Bidder or whether its bid should have been declared as the preferred bid to sign a PPA with the Buyer.

15.4 NERC shall issue its decision on the merits of the petition within 20 working days of the petition being submitted to it.

Schedule I

Content of RFP

The RFP documentation must include the following:

- a) copies of the most recent Annual Report prepared by the SO;
- b) an explanation of the basis on which bids (both final, and where used, indicative) 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 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 contracts which a Buyer proposes should be entered into by the Successful Bidder in connection with the provision of generation capacity as well as a timeline for undertaking and concluding contract negotiations and the extent to which these contracts may be negotiated
- 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
 - (vi) Statement of extent of willingness to undertake necessary system interconnection if so required

- k) Such additional information as may be applicable to each specific solicitation, including geotechnical, economic, social, legal, licensing and permits, fiscal (applicable taxes, incentives, etc).
- l) All information required in this Schedule and any other information stated to be provided in the tender proposal shall be provided or the RFP shall be disqualified as being "non-responsive".



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 bid; 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, 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 divided into capacity (fixed) and energy charges;

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, commissioning and ownership and operation of generation plant, both 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 indicative bid stage) together with:

- a) bidder's final and detailed technical proposal;
- b) bidder's price proposal 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;
- 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 authorizations (such as board approvals and regulatory or foreign investment approvals); and
- f) Any other information bidder chooses to present in support of its bid.

DATED AT ABUJA THIS 11th DAY OF Feb. 2014



CHAIRMAN