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HIGHLIGHTS OF THE GUIDELINES FOR GRANT OF PERMIT TO ACCESS FLARE GAS

Background

The Guidelines for Grant of Permit to Access Flare Gas (“**PAFG Guidelines**”) was issued¹ by the Department of Petroleum Resources (“**DPR**”) on 27th December 2018 to, amongst other things, provide a framework for an open competitive bid process (“**Bid Process**”) for the grant of permits by the Minister of Petroleum Resources (“**Minister**”) to Nigerian registered companies to take Flare Gas² on behalf of the Federal Government of Nigeria (“**FGN**”) from one or more specified sites (“**Permit to Access Flare Gas**”). The PAFG Guidelines also sets out the rights and obligations of a holder of a Permit to Access Flare Gas (“**Permit Holder**”).

Highlights of the PAFG Guidelines

1. **Bid Process:** A summary of the procedure for the grant of a Permit to Access Flare Gas through the Bid Process is set out as follows³:
 - a. **Registration on the Programme Portal:** Persons interested in applying for the grant of a Permit to Access Flare Gas must register on the Programme Portal⁴ at no cost, thereby becoming Registered Parties.⁵
 - b. **Request for Qualification (“RFQ”):** Registered Parties are eligible to download the RFQ package from the Programme Portal at no cost and should they wish to proceed, they must demonstrate their capability to develop a Project⁶ by submitting a Statement of Qualification (“**SOQ**”) which includes amongst other things⁷, the Mandatory Information⁸. Upon submission of the SOQ, a Registered

¹Pursuant to Paragraph 35(b) of the First Schedule of the Petroleum Act and the Flare Gas (Prevention of Waste and Pollution) Regulations 2018 (the “**Flare Gas Regulations**”).

² The Flare Gas Regulations define Flare Gas as “*any natural gas produced in association with crude oil by a producer and finally diverted toward a flare site by the producer with the intent that the natural gas will be flared, including any such natural gas from a greenfield project.*”

³See Schedule A of the PAFG Guidelines (“**Schedule A**”) for an elaborate description of the Bid Process.

⁴A website hosted by the DPR on which all Nigerian Gas Flare Commercialization Programme or any other programme to take Flare Gas (“**Programme**”) data is published and through which, among other things, Registered Parties, Applicants, Qualified Applicants and Bidders communicate about the Programme, access the RFQ and the RFP Package and pay any fees related to the Programme.

⁵Paragraph 2.1 of Schedule A.

⁶Project is defined as “*a technically and commercially viable and sustainable Flare Gas utilization project developed by the Flare Gas Buyer either as a Third-Party Flare Commercialization Project or a Producers Approved Flare Out Project.*”

⁷A list of information to be provided in the SOQ is outlined in Paragraph 2.2(b) of Schedule A.

⁸Paragraph 2.2(b)(1) of Schedule A sets out the items considered as Mandatory Information.

Party becomes an applicant for a Permit to Access Flare Gas (“**Applicant**”)⁹. The FGN has commenced the first bid rounds for the Programme¹⁰ and Registered Parties are required to submit SOQs by 17:00 hours West African Time on 28th February 2019.

- c. **Applicants Qualification:** Following submission of the SOQ and payment of the SOQ Submission Fee of US\$1,000 within the prescribed timeline, the SOQ will be evaluated based on the criteria in the RFQ and where it meets the criteria, the Applicant will be advised and granted a Qualified Applicant¹¹ status. In a bid to ensure transparency, a list of Qualified Applicants will be published on the Programme Portal¹². The PAFG Guidelines do not state when an Applicant will be advised that it has attained the Qualified Applicant status and when it will be invited to proceed to the Request for Proposal (“**RFP**”) stage.
- d. **Data Access Permit:** A Qualified Applicant may apply for a permit to access data in respect of the relevant Flare Site¹³ (“**Data Access Permit**”). The grant of the Data Access Permit is subject to the payment of a corresponding Data Prying Fee¹⁴ and Data Leasing Fee¹⁵ (if applicable).
- e. **RFP:** In response to the RFP, a Qualified Applicant may submit a proposal (“**Proposal**”) that contains: (i) Mandatory Information, technical details, business case and all other underlying assumptions of the proposed Project(s) (“**Technical and Commercial Proposal**”); and (ii) financial proposal¹⁶. The Proposal shall be accompanied by a Bid Bond¹⁷ and a Proposal Processing Fee of US\$1,000¹⁸. Following submission of a Proposal, a Qualified Applicant is converted to Bidder status¹⁹.
- f. **Proposal Evaluation and Selection of Preferred Bidder**²⁰(s): Proposals will be evaluated in the following three phases and success at one stage qualifies for the next phase:

⁹ Paragraph 2.2 (b) of Schedule A.

¹⁰ Programme is defined in the PAFG Guidelines as “The Nigerian Gas Flare Commercialisation Programme or any other programme to take Flare Gas at any Flare Site on behalf of the Federal Government of Nigeria through a competitive bid process and/or through authorisation of Producers’ Approved Flare Out Projects.”

¹¹ Qualified Applicant is defined as “an Applicant that passes the compliance, technical, financial and other evaluation criteria laid out in the Request for Qualification”.

¹² Paragraph 2.3 of Schedule A.

¹³ The PAFG Guidelines define Flare Site as “as defined in the Flare Gas Regulations, location where natural gas produced in association with Crude Oil and/or Condensate is flared, commencing at a Flare Gas Header and going to the point of the flare within an Oil Mining Lease or Marginal Field area or within an oil terminal or refinery. A producer may consolidate operations for more than one production area into one or more Flare Sites. Flare Stacks connected to different Flare GAS Headers are considered to be separate Flare Sites”.

¹⁴ US\$2,000 for all Flare Sites.

¹⁵ US\$1,000 per Flare Site.

¹⁶ Paragraph 2.5 of Schedule A

¹⁷ The PAFG Guidelines define Bid Bond as “a bond posted by a Bidder and accompanying its Proposal in the RFP”

¹⁸ The Proposal Processing Fee will be paid into a designated account of the DPR.

¹⁹ Paragraph 2.5 of Schedule A

²⁰ Preferred Bidder is defined as “the status given to a Bidder whose Proposal for one or more Flare Site(s) is one of the Proposals that make up the highest-ranking Proposals”.

Examination of the Mandatory Information (Phase 1) → Evaluation of the Technical and Commercial Proposal (Phase 2) → Evaluation of the financial proposal → selection of the Preferred Bidder(s) (Phase 3)²¹. The Preferred Bidders will subsequently be notified, and their names will be published on the Programme Portal.

- g. **Conditions Precedent to the Issuance of the Permit to Access Flare Gas:** To be granted a Permit to Access Flare Gas, the Preferred Bidder must fulfil conditions precedent²² which include: executing a Gas Sale Agreement, Connection Agreement and other specified agreements within sixty days of the date of award of Preferred Bidder status (“**Prescribed Period**”); payment of the Award Fee²³ within the Prescribed Period; and replacement of the Bid Bond with a Milestone Bond following execution of the Milestone Development Agreement.

Where the conditions precedent are not fulfilled by the stipulated timelines, a revocation notice will be issued by the Minister to the defaulting Preferred Bidder who will thereafter have a grace period of thirty days to fulfil the conditions precedent failing which it will be deemed to have forfeited its Preferred Bidder status and the FGN will draw on the Bid Bond.

- h. **Issuance of the Permit to Access Flare Gas:** A Permit to Access Flare Gas will be granted to a Preferred Bidder within fourteen days of the fulfilment of the conditions precedent whereupon it becomes a Permit Holder²⁴.

Notably, the commencement date of the fourteen-day waiting period was not prescribed in the PAFG Guidelines and it is our view that this point will be addressed by the DPR prior to the commencement of the Bid Process and/or issuance of the RFP.

2. **Eligibility:** Whilst a Permit Holder must be a company registered in Nigeria²⁵, it is instructive to note that the PAFG Guidelines provide that a Qualified Applicant or Preferred Bidder may be a company incorporated outside Nigeria. By this, foreign companies are permitted to participate in the Bid Process up until the stage of the issuance of the Permit to Access Flare Gas at which point, the foreign company qualified as a Preferred Bidder will be required to register a company in Nigeria in order to be granted the Permit to Access Flare Gas.

Any entity or individual barred by the Economic and Financial Crimes Commission, the Independent Corrupt Practices and other Related Offences Commission, the World Bank Debarred list and the US Treasury Office of Foreign Assets Control is not eligible to participate in the Bid Process.

²¹Paragraph 2.6 of Schedule A.

²²The conditions precedents are set out in Paragraph 2.8 of Schedule A.

²³Calculated in line with Paragraph (e) of Schedule A.

²⁴Paragraph 2.9 of Schedule A.

²⁵Paragraphs 4.1 and 7 of the PAFG Guidelines.

3. **Rights and Obligations of the Permit Holder:** The following rights and/or obligations are placed on a Permit Holder:
- a. **Compliance with Nigerian laws, practices and regulation:** A Permit Holder is obliged to comply with Nigerian laws including state and local government requirements, recommended oil industry practices, local content and workers compensation regulations and other relevant practices and regulations²⁶.
 - b. **Right to take Flare Gas:** A Permit Holder is entitled to take Flare Gas from the Flare Site(s) specified in the Permit to Access Flare Gas.²⁷ This right is exclusive and limited to the quantities of Flare Gas and duration specified in the Permit to Access Flare Gas.
 - c. **Title to Flare Gas:** Based on the terms of a Gas Sales Agreement²⁸, title to a specified amount of Flare Gas is transferred from the FGN to the Permit Holder.
 - d. **Right to Operate in the Flare Site(s):** A Permit Holder has a right to sustained and continuous operations of the Flare Site(s) specified in the Permit to Access Flare Gas²⁹. It also bears the responsibility for the design and construction of the Producer Gas Connection Assets³⁰ in line with the terms of its Connection Agreement and such assets must fulfil the criteria specified in Paragraph 8.3 of the PAFG Guidelines.
 - e. **Conducting Operations in line with Good Oil Field Practice:** A Permit Holder is required to undertake its operations in a safe, environmentally sound manner and in line with good Oil Field practice, with a view to ensuring that its operations do not affect the Producer's operations³¹.
 - f. **Community Obligations:** A Permit Holder is responsible for managing a fair and balanced community relationship in the conduct of its operations³².
 - g. **Safety and Environment Policy:** A Permit Holder shall provide a comprehensive safety, health and environmental policy which shall, at the minimum, be in accordance with laws and regulations issued by the FGN, including guidelines and standards issued by the DPR³³.

²⁶Paragraph 5 of the PAFG Guidelines.

²⁷Paragraph 8.1 of the PAFG Guidelines

²⁸Gas Sale Agreement is defined in the PAFG Guidelines as "an agreement conforming substantially to the template appended to the RFP Document, whereby Flare Gas is sold by the Seller to the Flare Gas Buyer" i.e. the Permit Holder.

²⁹Paragraph 8.2 of the PAFG Guidelines.

³⁰Producer Gas Connection Assets is defined in the PAFG Guidelines as "the pipeline, equipment, machinery, and other assets or facilities including the Measuring Station designed, funded and built by the Permit Holder and used to transport the Flare Gas from the Flare Gas Connection Point to the Delivery Point under the Connection Agreement. Title, care and custody of these assets is are transferred by the Permit Holder to the Producer on the Commercial Operations Date."

³¹Paragraph 8.3 of the PAFG Guidelines.

³²Paragraph 11 of the PAFG Guidelines.

³³ Paragraph 12 of the PAFG Guidelines.

Conclusion

The DPR issued the PAFG Guidelines to provide transparency in the process for the grant of Permits to Access Flare Gas pursuant to the Flare Gas Regulations. This is a commendable step towards the actualization of the FGN's commitment to reduce gas flaring, protect the environment, prevent the waste of valuable natural resources and commercialize natural gas.

It is our view that a prompt and effective implementation of the PAFG Guidelines and strategic engagement with stakeholders in the sub-sector will attract value-adding investments to the country. It could also propel the much-needed improvement of the gas value chain in Nigeria.

Qualifications

The contents herein are meant for the general information of our clients and friends and do not amount to legal advice. Adepetun Caxton-Martins Agbor & Segun accepts no responsibility for any loss or damage that may arise from reliance on information contained in this publication. All enquiries may be made to Eguono Catherine Soewu at esoewu@acas-law.com and Fisayo Atekoja at fatekoja@acas-law.com.

Adepetun Caxton-Martins Agbor & Segun by telephone (+234 1 462 2094), fax (+234 01 461 3140)

