Public Advertisement

By

The Africa Centre for Energy Policy (ACEP)

ANALYSES AND RECOMMENDATIONS FOR GOOD GOVERNANCE IN THE PETROLEUM (EXPLORATION AND PRODUCTION) BILL 2014

The Government of Ghana has submitted to Parliament a new Petroleum (Exploration and Production) Bill 2014, which seeks to govern Ghana's upstream petroleum industry. Parliament has accordingly invited public memoranda for the consideration of the Bill. ACEP has already submitted a memorandum to the Energy and Mines Committee in Parliament. However, this public advert is to draw the attention of the Ghanaian public, all Parliamentarians and their constituents, to key governance issues that need to be addressed in the Bill.

The Bill in our view makes significant improvement over the current Petroleum (Exploration and Production) Law (PNDC Law 84), in many areas including in particular the governance of oil and gas resources. The Bill attempts to address some of the problems that dominate Ghana's petroleum governance. The main features of petroleum governance include:

a. Petroleum contracts are awarded through an administrative process. There is no open and competitive process;
b. Some petroleum contracts are published but not through a mandatory process;
c. There is no requirement for the disclosure of beneficial ownership information;
d. There is no requirement for the disclosure of justification for the award of contracts; and
e. The audited accounts of the National Oil Company are not published.

The new Bill addresses two of the above problems by providing for the adoption of open and public tender process in the award of petroleum contracts; and a mandatory requirement for the disclosure of petroleum contracts.

However, whilst some of the problems associated with petroleum governance remain unaddressed, those that have been addressed are inadequate and fall short of best practices, and are therefore exposed to potential abuse. Particularly, the governance provisions in the Bill are undermined by wide discretionary powers, the exposure of the licensing regime to rent seeking behavior, and the exclusion of important public disclosures like beneficial ownership information, justification for the award of licenses; and audited accounts of the National Oil Company. These concerns in many ways undermine the high governance standards that should underpin Ghana's oil and gas sector.

Petroleum Agreement: Licensing Process (Clause 10)

The Bill addresses the problem associated with the application of administrative processes in petroleum licensing. Ghana at the moment does not apply open and competitive process in oil concessions.

Clause 10(3) of the Bill establishes an open and competitive tender regime for the acquisition of oil blocks. However, there are exceptional clauses in the Bill that threaten to introduce significant governance risks in the proposed open and competitive tender process. For example:

In clause 10(4) the Minister can veto the outcome of an open and competitive tender process and to use direct negotiations. In this case, the Minister is not obliged to give reasons to the public why the process is set aside. Further, the conditions under which the Minister can veto a public tender process are not provided in the Bill. In Sierra Leone's Petroleum Law of 2011, it is a requirement for the Minister to give reasons in a public notice why a public tender process has been vetoed. This provides room for the Minister's decision to be challenged, as required by standard principles of accountability.

The danger of this provision is that the Minister may use his power to shield companies that do not want to go through the competitive process, and turn back to negotiate directly with those companies. Also, the process may be used to expose the terms offered by the companies that go through the competitive process to give competitive advantage to those that eventually go through direct negotiation. The Ministry of Energy has explained that this flexibility is necessary because the Minister may not find any of the competing companies satisfactory, which thereby warrants him to go into direct negotiation with a company that may have the technical and financial capacity to undertake petroleum exploration in the area. However, one wonders why the Minister may not encourage a company with the requisite capacity to enter into the competitive process if by its capacity, the company is most likely to win the bid.

Also, in clause 10(6), the Minister may decide to enter into direct negotiation without public tender if in consultation with the Petroleum Commission, direct negotiations offers the most "efficient manner" to achieve optimal exploration, development and production of petroleum. The Bill falls short of providing conditions supporting the "efficiency" criteria particularly because "efficiency" has not been defined in this Bill. Also, if there is a company that can be deemed to have satisfied the "efficiency criteria" to the extent it posses the required technical and financial capacity, the company will certainly not be the only one with these qualifications. The potential for abuse in this regard is quite high.

To discourage this practice, Angola's Petroleum Law of 2004; and Kenya's new Petroleum Bill provide some checks that limit the Minister's powers to use direct negotiations instead of an open public tender process. For instance in Angola, *when a proposal for direct negotiations is received, the Minister is required to declare it through public notice, and can commence negotiations with the company if, within fifteen days from the date of the notice, no other entity declares an interest in the area in question. But if any entity declares an interest, a tender shall open for competitive process.* Kenya has extended the grace period for negotiation to 30 days in its Petroleum Bill.

We recommend as follows:

The Bill should provide clear conditions under which the Minister may decide not to enter into a Petroleum Agreement after a public tender process. Further, the Minister must give reasons in a public notice when he decides to exercise this option.

Direct negotiations should be entered into only when all competitive processes are exhausted. It will be appropriate to adopt the Angolan and Kenyan models rather than the "efficiency criteria" provided for in the Bill.

Review of Terms and Conditions (Clause 20)

This clause provides that the parties to a Petroleum Agreement may review the terms of the Agreement if it can be established that there exist a significant change in the circumstances that prevailed at the time the Agreement was executed or the last review of the Agreement.

We recommend as follows:

In our view, the circumstances that could cause a review should be set out either in the Bill or in all Petroleum Agreements to avoid arbitrariness on either side to the Agreement. Alternatively, there should be a requirement that subjects such changes to parliamentary approval.

Contract Disclosure (Clause 56)

One of the most important provisions on governance relates to contract disclosure. Ghana already publishes petroleum contracts. However the process is not mandatory but based on ministerial discretion. The Bill provides for *the establishment and maintenance of a register of petroleum agreements, licenses, permits and authorizations by the Petroleum Commission* (c.56(1)) and opening of the register to the public ((c.56(2)). This is very important and responds to one of the highest transparency standards of general application in the oil and gas sector.

However, a public register of petroleum contracts and other authorizations in some cases only provides a list of these contracts but does not require the disclosure of the material primary contracts. There is no clear indication that this is not going to be the case in Ghana.

Also, the contents of the public register as provided for in the Bill exclude important information of material significance such as; *Justifications for granting Petroleum Agreements, beneficial ownership information, Marketing Agreements related to sales of the state's share of petroleum, audited accounts of the National Oil Company and List of beneficiaries from the Local Content Fund*. In some jurisdictions, all assets of the state relating to its participation in the oil and gas industry are also disclosed. Failure to include this provision will promote rent seeking behavior and corruption in the oil and gas industry.

Section 79 of the Petroleum Law of South Sudan provides a comprehensive framework for open contracting as follows:

"The Minister shall make available to the public either on the Ministry's website or by any means; justification of award of petroleum agreements, beneficial ownership information for the contractor and documentary proof of the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity of the contractor".

We recommend that:

Ghana adopts the practice in South Sudan explained above. This provides opportunity for Ghana to rise to the challenge given that South Sudan is a new country with no prior democratic governance standards.

Petroleum Contracting and Corruption

The petroleum industry has been associated with some of the mega corruption cases in the World. Ghana's young petroleum industry must therefore be protected against corruption, which could undermine the efforts of the country at translating its oil wealth into development for the people. Corruption involves public officials; oil companies and politically connected powerful people. Commonly, corruption manifests in the design of rules and criteria both for pre-qualification and for the main tender process in an attempt to manipulate governance standards set for the licensing of oil blocks. Three ways by which corruption occurs in the petroleum industry are:

i. It may occur as a *direct but secret violation of procedures by, for* example, providing confidential information to one of the bidders about bids or selection criteria in exchange for bribes;
ii. It may occur as a *misuse of rules that allow for legitimate deviations* from set procedures. This may involve, for example, awarding contracts on the basis of direct negotiations with one of the bidders, by falsely referring to extraordinary circumstances or to diplomatic or environmental concerns;
iii. The criteria for pre-qualification can be designed so as to single out certain companies, and officials may threaten to do so as a means of extracting bribes;
iv. Politically connected individuals and firms use their connections to secure contracts through *"local content requirements"* for their foreign collaborators, who carry them through as reward for their service. Such local firms in turn sell their stakes for profit before and after discovery of petroleum.

There is no doubt that Ghana's proposal for petroleum licensing in the new Bill provides convenient space for corruption through any of the ways stated above. Further, the Bill does not subscribe to any anti-corruption provisions that check corruption in the industry. This makes it imperative for significant revisions in the proposals, limiting broad and wide discretionary powers in the contracting process.

There are international anti-corruption instruments, which could check corruption in the petroleum industry. These include:

a. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1977, which entered into force on February 15, 1999,
b. The United States of America Foreign Corrupt Practices Act 1977;
c. The United Kingdom Bribery Act 2010
d. The African Union Convention against Corruption

The Government of Ghana has already demonstrated its willingness to fight corruption in the petroleum industry by incorporating the following anti-corruption clause in three new Petroleum Agreements signed recently.

"Each contractor party warrants that neither it nor any of its Affiliates or any of its or their officers, directors or employers has made, offered, or authorized and will not make, offer, or authorize with respect to the matters which are the subject of this Agreement, any payment, gift, promise or other advantage, whether directly or through any other person or entity, to or for the use or benefit of any public official (I.e. any person holding a legislative, administrative or judicial office, including any person employed by or acting on behalf of a public agency, a public enterprise or a public international organization) or any political party or political party official or candidate for office, where such payment, gift, promise or advantage would violate to the extent applicable to such Party (i) the applicable laws of Ghana; (ii) the laws of the country of incorporation of such Party or such Party's ultimate parent company; (iii) the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1977, which entered into force on February 15, 1999, and the Convention's Commentaries; (iv) the United States of America Foreign Corrupt Practices Act 1977; and (v) the United Kingdom Bribery Act 2010."

The anti-corruption clause above covers public officials, oil companies and political parties. However, the practice so far indicates that the Minister of Petroleum reserves the power of discretion to decide which contracts to apply the clause to. The three contracts containing the clause were approved at the same time with five other contracts, which do not have the clause.

We recommend that:

There should not be selective application of the anti-corruption clause stated above. The clause should be incorporated in the new Bill in order to ensure its application to all petroleum agreements signed between the Government and contractors.