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# ENERGY AND INFRASTRUCTURE

## SELECTION OF LOCAL PARTNERS FOR THE 5% EQUITY PARTICIPATION IN A PETROLEUM AGREEMENT: A PREROGATIVE OF THE INTERNATIONAL OIL COMPANY OR THE MINISTER?

*In this newsletter we review regulation 4(2) and 4(4) of the Petroleum (Local Content and Local Participation) Regulations, 2013 (LI 2204) ("LI 2204") to determine whether it gives the Minister of Energy a mandate to select the Indigenous Ghanaian Company ("IGC") that obtains the 5% local equity participation in a petroleum agreement.*

### The Ordinary Meaning of Regulation 4(4) of LI 2204

Regulation 4(2) of LI 2204 provides:

> "*there shall be at least a five percent equity participation of an indigenous Ghanaian company other than the Corporation to be qualified to enter into a petroleum agreement or a petroleum licence*".

Regulation 4(4) of LI 2204 provides:

> *"for the purposes of sub-regulation (2), the Minister shall determine the persons qualified".*

LI 2204 defines "qualified" as technical competence and financial *capability to fulfill all obligations under a petroleum agreement or petroleum licence*.

"Determined" is not a defined term under LI 2204. The ordinary meaning of "determine" is *"to control or influence something directly, or to decide what will happen or to discover the facts or truth about something"*.

From these definitions, in its plain and ordinary meaning regulation 4(4) gives the Minister the power to provide general objective technical and financial criteria which serves as the basis for selection of IGCs to hold the 5% local participation right in a petroleum agreement. It does not give the Minister the power to select a specific IGC that will be entitled to the 5% local interest in a petroleum agreement.

Suggestive of the fact that the Minister's role is a general determination of a class of qualified companies is the fact that regulation 4(4) speaks of 'qualified persons' in the plural. In accordance with this is the practice where the Ghana National Petroleum Corporation (GNPC) and the Petroleum Commission ("PC") provides a list of preferred companies for an International Oil Company's ("IOC") consideration. They do not purport to order any IOC to choose a particular company. Thus, the nature of the Minister's determination (control or influence) over the process of selection under regulation 4(4) is at most a guiding role in the shortlisting of qualified IGCs based on the criteria he provides, not a mandate to select a specific IGC for a specific IOC.

If Parliament had intended to confer on the Minister a mandate to appoint an IGC under regulation 4(4), this would not have been expressed as a mandate to determine the class of IGCs that qualify. Regulation 4(4) would have specifically stated so in clear language as is done every time the law grants a power of appointment. For instance, in petroleum sector regulation, section 13 (2) of the Petroleum (Exploration and Production) Act, 2016 (Act 919) grants the Minister a power to appoint an operator under a petroleum agreement where the contractor parties and the GNPC have failed to agree on the choice of an operator:

> *"The Minister shall appoint an operator where the parties cannot agree on the choice of an operator."*

Further, section 40(5) of Act 919 similarly grants the Minister power to appoint an operator for the installation and operation of petroleum facilities where there are multiple licensees to the licence:

> *"The Minister shall appoint one of the licensees as operator and may approve a change of operator upon the request of the licensees or when there are significant reasons to do so."*

In the above statutory provisions, the Minister's power to appoint is specifically and clearly stated in plain language.

This clarity of language conferring a power of appointment on a Minister is found in numerous statutory provisions outside the petroleum industry. Section 99(12) of the Railways Act, 2008 (Act 779) empowers the Minister *to appoint members of the Complaints, Appeals and Review Panel*. Section 99(1) of the Local Governance Act, 2016 (Act 936) provides for a Regional Minister to *appoint an Appeals Advisory Committee that is considered necessary to determine a dispute concerning a District Development Plan*. In the same vein, regulation 17 of the Electricity Regulations, 2008 (LI 1937) empowers the Minister to *appoint the Electricity Market Oversight Panel in consultation with the Energy Commission*. All the above statutory provisions are clear about the fact that it is conferring on the relevant Ministers a power of appointment.

**Support from Other Laws for the Ordinary Meaning of Regulation 4(4) of L.I.2204**

The above interpretation of regulation 4(4) is the preferred interpretation especially, because it finds support from other petroleum sector laws. Regulation 11(3) of the Petroleum (Exploration and Production) General Regulations (LI 2359) conceives of a general standard-setting role rather than a mandate to appoint an IGC. It provides:

> *"subject to subsection (10) of section 10 of the Act, the minister may decide to set specific qualification requirements for prospective operators and for indigenous Ghanaian companies"*.

Section 10(10) of the Petroleum (Exploration and Production) Act, 2016 (Act 919) provides that *"the Republic may enter into a petroleum agreement with a body corporate that has the requisite technical competence and financial capacity to fulfil the obligations of the petroleum agreement and other requirements as prescribed".* Thus, to be able to determine the *requisite technical competence and financial capacity* there must be an identifiable criteria to which selections can be subjected.

**Petroleum industry practice militates against existence of a mandate of selection under Regulation 4 (4).**

An assertion of a mandate by the Minister under regulation 4(4) to select an IGC does not conform to the general practice in the petroleum industry. The universal practice for the petroleum industry and especially upstream is for IOCs to select their own local partner without the Minister's involvement. The IOCs who will hold the majority interest in a petroleum agreement will have to be satisfied that the qualified IGC is the partner that suits their requirements and standards as a partner. Since the IOC is going to be entering into a private contract with the IGC to govern their relationship inter se, it is also important for the IOC to be able to choose a local company that shares its core values, ethos and business ethics. Thus, LI 2204 cannot be purporting to give the Minister the power to force a local partner on any IOC. An IOC must be free to associate with any qualified indigenous company.

The prevailing practice extends also to petroleum service companies. In the context of the requirement to form joint ventures with an IGC, the PC does not force an IGC on upstream petroleum Foreign Service companies; it only approves the partnership by ensuring the companies meet the application requirement. IOCs are also given a similar freedom of choice in relation to the appointment of an operator under a petroleum agreement. Section 13(1) and (2) of Act 919 allow the IOC(s) and GNPC to choose an operator of choice only subject to the Minister's approval. The Minister may only choose an operator where the IOCs and GNPC have failed to disagree on the choice of operator. Consequently, any assertion of a mandate of appointment under regulation 4(4) by the Minister is contrary to universal industry practice; it is a revolutionary intrusive intervention by Government in an area where private contract has reigned.

Any interpretation of regulation 4(4) by the Minister as conferring on him a mandate to select an IGC partner for a petroleum agreement raises practical problems and gives rise to a host of questions:

- What then becomes of the contractor's own evaluation processes? Does the Minister's choice

supplant the contractor's own evaluation system and its final choice?

- If the Minister can appoint the IGC, does he somehow have the ability to terminate the IGC and select another IGC and somehow insert the new company into the petroleum agreement?

- If such an appointment mandate exists how has it been applied to the fourteen petroleum agreements executed since LI 2204 was enacted in 2013?

- If such a mandate exists by virtue of LI 2204, why has the Minister or the Petroleum Commission not enacted any subsidiary legislation or guidelines on how this discretion is to be exercised as is required by the Constitution?

- How come there is such an incomparably powerful intrusion into private contract in the upstream sector and there is no such intrusion in any other sector despite the pervasive national concern to develop local content?

- The above questions bring to the fore the incompatibility of the view that the Minister has a mandate of selection under regulation 4(4) with current practice in the petroleum industry and with what is generally perceived as the Minister's mandate in the petroleum sector.

**Conclusions**

Regulation 4(4) of LI 2204 does not give the Minister a mandate to select the IGC that obtains the 5% local participation interest in a petroleum agreement. Pursuant to regulation 4(4), the Minister may provide general objective technical and financial criteria by which indigenous companies can apply to be qualified for the 5% local participation right in a petroleum agreement. This interpretation is supported by (i) Article 296(c) of the Constitution of Ghana; (ii) the Petroleum (Exploration and Production) Act, 2016 (Act 919); (iii) the Petroleum (Exploration and Production) General Regulations (LI 2359); and iv) general practice in the petroleum industry, upstream and downstream.

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