

PETROLEUM COMMISSION

GUIDELINES FOR THE FORMATION OF JOINT VENTURE COMPANIES IN THE UPSTREAM PETROLEUM INDUSTRY OF GHANA

Promoting Local Content and Local Participation

MARCH 2016

1.0 INTRODUCTION

Pursuant to Regulation 43(1) of the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204) these guidelines are issued to guide upstream petroleum industry players on the formation and structuring of joint venture companies. Adherence to these guidelines will not only ensure compliance with L.I. 2204, but will also enhance local content and local participation in the upstream petroleum industry.

Since the commercial discovery of petroleum in 2007 and the subsequent production in 2010, most indigenous Ghanaian companies have shown keen and commendable interest in the upstream petroleum industry. Expectedly, these companies are constrained by the financial, human capital and the technological demands of the industry.

In recognition of these challenges, the government of Ghana through the Petroleum Commission has developed strategies aimed at creating an enabling environment for indigenous Ghanaian companies to effectively participate in the industry.

The promulgation of L.I. 2204 was a significant milestone to the accomplishment of this agenda.

The incorporation of joint venture companies under Regulation 4(6) of L.I. 2204 is expected to stimulate growth, commercial viability, business skills, competitiveness and technology transfer among Ghanaian businesses.

It is envisaged that, in the not too distant future, indigenous Ghanaian companies will independently bid for and execute contracts on their own.

2.0 DEFINITION OF A JOINT VENTURE COMPANY (JVC)

For the purpose of upstream petroleum operations, a joint venture company is defined as a company incorporated in Ghana, in accordance with the laws of the Republic of Ghana, between a non-indigenous (foreign) Ghanaian company and an indigenous Ghanaian company or companies for the purpose of undertaking petroleum activities.

2.1 Features of the Joint Venture Company

- *Incorporation* – the joint venture company must be incorporated in Ghana and in accordance with the laws of the Republic of Ghana.
- *Joint control and net assets* – the parties are expected to have joint control and rights to the net assets of the company.

- *Profits and Losses* – the parties are expected to share profit and losses of the company.
- *Not just an Investment* – both parties are expected to contribute skills, manpower etc. to the company.

3.0 LEGAL BASIS FOR THE RECOMMENDED STRUCTURE OF THE JOINT VENTURE COMPANY

The recommended structure for the joint venture company in these guidelines is based predominantly on the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204).

Below are the relevant provisions of the L.I. that informed the recommendation:

3.1. Interest of a Citizen in Petroleum Operations

Regulation 4(6)

“A non-indigenous Ghanaian company which intends to provide goods and services to a contractor, a subcontractor, licensee, the Corporation or other allied entity within the country shall incorporate a joint venture company with an indigenous Ghanaian company and afford that indigenous Ghanaian company an equity participation of at least ten percent.”

Regulation 4(7)

“A contractor, subcontractor, licensee or other allied entity shall before the commencement of petroleum activities submit a plan to the Commission specifying:

- (a) the role and responsibilities of the indigenous Ghanaian company;*
- (b) the equity participation of the indigenous Ghanaian company; and*
- (c) the strategy for the transfer of technology and know-how to the indigenous Ghanaian company.”*

3.2 Basis of Bid Evaluation

Regulation 12(5)

“Where a non-indigenous Ghanaian company is required to provide goods and services to a contractor, subcontractor, licensee, or other allied entity, that non-indigenous Ghanaian company shall;

- (a) incorporate a company in Ghana as provided in regulation 4(6) and operate it from Ghana; and*

(b) provide the goods and services in association with an indigenous Ghanaian company, where practicable.”

3.3 Support for Technology Transfer to Indigenous Ghanaian Companies

Regulation 25(1)

“A contractor, subcontractor, licensee or other allied entity shall support and facilitate technology transfer as regards the formation of joint ventures, partnering of licensing agreements between indigenous Ghanaian companies or citizens and foreign contractors and service companies or supply companies.”

4.0 GUIDING PRINCIPLES FOR OPERATING A JOINT VENTURE COMPANY IN THE UPSTREAM PETROLEUM INDUSTRY

The guiding principles for operating a joint venture company in the upstream petroleum industry shall be as follows:

1. A non-indigenous Ghanaian company, other than a joint venture company, cannot operate in the upstream petroleum industry.
2. To operate in the industry, the non-indigenous Ghanaian company must incorporate a joint venture company with an indigenous Ghanaian company/companies.
3. The indigenous Ghanaian company/companies must have a minimum of ten percent (10%) equity participation in the joint venture company.
4. For the avoidance of doubt, the transfer of shares to an individual or company shall not be recognized as a joint venture.
5. The joint venture company shall be the vehicle through which the non-indigenous Ghanaian company shall transact all its businesses in the upstream petroleum industry.
6. The objects of the joint venture company must be in accordance with both companies' line of businesses.

7. Both parties must provide fair consideration for their equity in the joint venture company.
8. The indigenous Ghanaian company/companies must be actively involved in the management and operations of the joint venture company.
9. The management structure of the joint venture company must take into account the equity participation of the parties.
10. The joint venture parties must state, clearly, their roles and responsibilities in the joint venture company.
11. The joint venture companies shall prepare and submit to the Commission, for approval, a detailed plan for the transfer of technology and know-how to the indigenous Ghanaian company.
12. Parties to the joint venture must disclose all forms of 'agreements' and 'arrangements' to the Commission at the point of registration.
13. Both indigenous and non-indigenous companies as well as the joint venture company shall initially register with the Commission and be issued with a valid Registration permit. However, the joint venture company shall not pay any fees. Subsequently, upon renewal, the joint venture company shall renew its permit and pay the prescribed fees.
14. Except contracts that are awarded to indigenous Ghanaian companies, all other contracts shall be signed and executed only by the joint venture company.
15. The parties must give full consideration to existing laws and regulations at the point of incorporating the joint venture company.
16. The Commission will determine whether the parties, including the joint venture company, have met the requirements of the L.I. 2204 and Commission's guidelines before a Permit will be issued.

5.0 DOCUMENTS TO BE SUBMITTED TO THE COMMISSION PRIOR TO THE ISSUANCE OF PERMIT TO THE JOINT VENTURE COMPANY

In addition to the other documents that may be required for registering with the Commission, the following documents should also be submitted to the Commission for the purposes of obtaining a PC Registration Permit for the joint venture company.

1. Incorporation documents:
 - i. Certificate of Incorporation
 - ii. Certificate to Commence Business
 - iii. Forms 3&4 (Company Registration documents)
 - iv. Regulations of the Company covering, among other things, the following:
 - i. Shares structure and the shareholders rights (including classes of shares and voting rights).
 - ii. Reserved Matters
 - iii. Dividend policy
 - iv. Transfer of Shares & Pre-emptive Rights
 - v. Obligatory Transfer Events
 - vi. Board of Directors (Executive & Non Executive)
 - vii. Deadlock Provisions
 - viii. Tag-Along Rights
2. Board resolution of the two companies approving the incorporation of the joint venture company.
3. Audited Financial Statement of the indigenous and non-indigenous Ghanaian companies for the last three (3) years.
4. Key Personnel (CEO, COO, CFO and other senior Management Personnel) and brief

description of their jobs, mandates, roles and responsibilities.

6.0 MONITORING

In accordance with Regulations 44 and 45, the Commission will closely monitor the activities of each of the parties to the joint venture to ensure compliance with L.I 2204 and all other laws and regulations. To this end, the Commission will monitor the effectiveness of the joint venture during and at the end of each contract.

7.0 OFFENCES

It is instructive to note that, knowingly submitting false documents and making false statements to the Commission as well as fronting for a foreign individual or a company is an offence under the Petroleum (Local Content & Local Participation) Regulations 2013 (L.I. 2204).

7.1 Knowingly making false statements

According to Regulation 46(1), “A person who submits a plan, returns, report or other document and knowingly makes a false statement, commits an offence and is liable on summary conviction to a fine of not less than one hundred thousand penalty units and not more than two hundred and fifty thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both.”

7.2 Fronting

Regulation 49 of L.I. 2204 defines fronting as *“to deceive or behave in a particular manner to conceal the fact that a company is not an indigenous Ghanaian company.”*

8.0 PENALTIES

The applicable penalties for these and other related offences under L.I. 2204 are:

8.1 Fronting

Regulation 46(2) stipulates that, *“a citizen who acts as a front or connives with a foreign citizen or company to deceive the Commission as representing an indigenous Ghanaian company to achieve the local content requirement under these Regulations, commits an offence and is liable on summary conviction to a fine of not less than one hundred thousand penalty units and not more than two hundred and fifty thousand penalty units or to a term of imprisonment of not less than one year and not more than two years or to both.”*

8.2 Deceiving the Commission

Regulation 46(3) states that, *“a person who connives with a citizen or an indigenous Ghanaian company to deceive the Commission as representing an indigenous Ghanaian company to achieve the local content requirement under these Regulations commits an offence and is liable on summary conviction to a fine of not less than one hundred thousand penalty units and not more than two hundred and fifty thousand penalty units or to a term of imprisonment of not less than one year and not more than two years or to both.”*

8.3 Failure to support or facilitate technology transfer

Regulation 46(4)(b) stipulates that *“a person who fails to support and facilitate technology transfer as regards the formation of joint ventures, partnering of licensing agreements between indigenous Ghanaian companies or citizens and foreign contractors and service*

companies or supply companies in contravention of regulation 25 is liable to pay to the Commission an administrative penalty of one hundred thousand penalty units in the first instance and a further penalty of five percent of the penalty for each day that the contravention of the regulation continues.”

PETROLEUM COMMISSION

GUIDELINES ON COMPANY REGISTRATION AND PARTICIPATION IN TENDER PROCESSES

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1. No company shall bid for a contract or participate in the upstream petroleum industry without a valid Petroleum Commission (PC) Registration Permit.
2. Companies intending to bid for contracts must be registered with the PC and have a valid PC Registration Permit at the time of receiving the tender documents. All contractors and subcontractors shall ensure that companies possess a valid PC Registration Permit prior to the Invitation to Tender (ITT) stage.
3. In exceptional circumstances, the Commission may allow a company without a PC Registration Permit to bid for a contract by obtaining a PC Bidding Permit.
4. A PC Registration Permit is a requirement before any contractor or subcontractor can accept a tender document from any company for bidding purposes.
5. Companies can be prequalified without necessarily having a valid PC Registration Permit. However, the contractor or subcontractor shall before issuing a prequalification notification to prospective bidders, furnish the Commission with the information specified in Part A of the Third Schedule of the L.I. 2204.
6. In responding to request for approval of vendor list from contractors or subcontractors, the PC shall furnish the contractor or subcontractor with the names, Registration Permit numbers and Permit expiry dates of relevant vendors.
7. The contractor or subcontractor shall ensure that at all times the bidders and companies awarded with contracts have a valid PC Registration Permit.
8. In accordance with Regulation 4(6) of the L.I. 2204, a non-indigenous Ghanaian company shall have a JV in place in a manner satisfactory to the Commission before submitting tender documents (ITT stage).
9. The JV Company shall be formed in accordance with PC's approved procedure and Guidelines.
10. All contracts involving a non-indigenous Ghanaian company must be awarded to the incorporated JV Company.
11. The PC will send renewal notices, via emails to companies at least two months before their PC Registration Permits expire. However, the responsibility to renew lies on the company. All companies must submit their renewal application at least one

month before expiry of their current permit. Upon fulfilling the requirements for registration, the Commission shall process and issue the permit within three (3) weeks of the date of receipt of application.

12. To ensure transparency and fairness, unless otherwise approved by the Commission, the contractor or subcontractor shall advertise all contracts intended for competitive bidding in accordance with Regulation 13(2) of the L.I. 2204 and in a manner determined by the Commission.
13. In tender evaluation, the contractor or subcontractor shall use the technical competence and financial capabilities of parties in the JV structure. The weighted score should reflect the shareholding structure of the JV Company.
14. The "indigenous or non-indigenous" status of the companies shall remain unchanged at all times during the contracting process.
15. Each party intending to form a JV Company shall apply for a PC Registration Permit separately and pay the prescribed fee.
16. The JV Company must apply separately for the initial PC Registration Permit at no fee. Subsequent renewal will attract the prescribed fees.