
Liberia's Oil Block Bid Round

Comments and Questions | September 18, 2014

These comments come at a time of enormous challenge and tragedy in Liberia. The Ebola outbreak has resulted in a public health crisis and tremendous economic pressures for the country. We underscore our strong sympathy for the Liberian people during these difficult times and appreciate that in this context the Liberian Government must seek funds to address immediate needs. Our comments are not intended to detract in any way from the gravity of Liberia's present situation or to undercut the governance priority of countering the current crisis. Our organizations' involvement to date in Liberia's petroleum sector reform has been driven by the aim of supporting responsible development of the sector in a way that maximizes benefits for the country. It is with this same goal and in the interest of facilitating stakeholder dialogue and information sharing even in these challenging times that we provide these comments.

Executive Summary¹

Liberia recently [announced](#) it is conducting a competitive bid round for exploration and development of four offshore oil blocks (LB-6, LB-7, LB-16 and LB-17).¹ The structure of this new bid round incorporates commendable elements meant to ensure that it is conducted in a professional and transparent manner, including:

- a licensing process conducted through competitive bidding, rather than opaque direct negotiations as has often been the case in other countries
- a model production sharing contract (PSC) that attempts to mirror many provisions of the draft petroleum legislation currently before Liberia's legislature
- a commitment to transparency in the licensing process and with regard to contracts that ultimately result.

¹ These comments are an updated version of earlier comments dated September 5, 2014.

Nevertheless, the context in which the bid round is occurring presents some fundamental risks. Most significantly, international experience has shown that proceeding with a bid round without a solid legislative framework in place (currently the situation in Liberia due to a stalled legal reform process) can produce suboptimal results, including inconsistency between contracts and law. While we are not in a position to question the decisions being made by the government of Liberia in the extraordinarily challenging context of the Ebola public health emergency and associated financial difficulties, we feel in our role as international analysts that it is important to note that deals signed in times of acute crisis traditionally tend to be sub-optimal or otherwise problematic in the long term. When short-term financial needs are extremely severe, government officials often lack the bandwidth to thoroughly analyze deals destined to last decades, and the attention of citizens and watchdog groups are diverted.

As the government proceeds with the bid round and the finalization of the model PSC, we raise the concerns and recommendations outlined below. Our analysis is based primarily on review of the Bid Invitation Letter, the model PSC, and the various documents regarding pre-qualification and local content released to date via the [bid round website](#).²

- *Communication.* Clearer communication is important around the government's expectations for the bid round and the rationale for reversing the previously stated position that there would be no new bid rounds until the legislative reform is finalized.
- *Liberian investor preference.* The inclusion of a preference for bidder groups including an upstream petroleum company from the Economic Community of West African States (ECOWAS) in which Liberian investors have an interest may be targeting laudable goals, but it also poses important risks. This is particularly the case where Liberian investors are "carried" (i.e. not contributing capital). In order to strengthen the credibility of the process, it is imperative that the government include particularly strong pre-qualification criteria and heightened transparency measures (as outlined below). In addition, in order to ensure that the preference contributes to developing Liberia's private petroleum sector and positive economic spillovers, we recommend that the government require in the PSC that the relevant Liberian entity hold the interest in the contract for a certain period of time after commercial discovery.
- *Pre-qualification and associated transparency.* The pre-qualification procedures as drafted could be improved by (i) specifying thresholds for financial and technical capacity, (ii) requiring bidders to demonstrate both technical and financial capacity at the time of

award (as per the draft legislation³), rather than one or the other, (iii) providing, as in the draft legislation, that pre-qualification information (e.g., beneficial ownership, technical/financial basis for qualification) will be made publicly available, (iv) specifying that the information to be publicly disclosed on beneficial ownership should set out the ultimate “natural person” owner, and (v) increasing the specific pre-qualification requirements for Liberian and ECOWAS investors. With respect to this last issue we recommend that the government require that Liberian investors not only be existing companies but also meet minimum requirements as to available capital, number of employees and experience and/or plans for the sector.

- *Use of data fees.* The government should clarify its policy regarding use of the data fees payable almost immediately upon signature of the PSCs (\$34 million in aggregate for all blocks). While these payments will be made directly to TGS-NOPEC, a company contracted by the government to assist with data management and bid round administration, past experience suggests that it is likely that a significant percentage will be paid to the National Oil Company of Liberia (NOCAL). Given the country’s urgent fiscal needs and the plan under draft legislation to transfer payments of this type to the petroleum directorate (to be formed), we recommend that Liberia clarify that any data payments owed to the state be transferred to the Consolidated Fund.
- *“Profit oil” tiers.* The model PSC’s fiscal regime includes only two tiers for the split of “profit oil,” with the top tier covering all investor rates of return above 15 percent. This does not provide the state with a higher share of the return in the event that a project proves particularly profitable (i.e., well above 15 percent). In the long term, this may artificially limit the benefits Liberia gains from highly profitable petroleum projects, and may imperil the long-term stability of the contracts.

The Natural Resource Governance Institute (NRGI) and the African Center for Economic Transformation (ACET) have been involved in various capacities in Liberia’s petroleum law reform since 2011, including supporting the government during the [petroleum policy](#)⁴ formation, providing [public comments on draft legislation](#)⁵, and participating in public consultations on legislation in Monrovia earlier this year. It is with the same goal of supporting responsible development of Liberia’s oil sector and facilitating stakeholder dialogue and information sharing that we now provide these initial thoughts on the current bid round. As the process progresses and further information is made available, we may update or revise our comments as appropriate in light of new developments and feedback received.

I. Inherent Risks of the Bid Round

The licensing of these blocks is being carried out at a time when Liberia faces several grave challenges, including a public health crisis of massive proportions and serious financial difficulties. We are not privy to government decision making and cannot pass judgment on the outcome of the government's balancing of a range of political and economic factors. But as analysts with experience tracking the impacts of policy decisions and licensing processes throughout Africa, we can simply highlight the following risks associated with licensing significant areas in the absence of final legislation.

International good practice frameworks such as the Natural Resource Charter emphasize the need for governments to “establish as much of the legal and regulatory framework as possible before allocating rights to companies.”⁶ Awarding licenses in the absence of an agreed legal framework can:

- Result in inconsistent fiscal and operational regimes, between different contracts and between contracts and legislation.
- Impede effective enforcement, as regulators and other government bodies are forced to develop customized monitoring strategies for a range of contracts with varied clauses.
- Create public confusion in the event that the draft legislation changes before it ultimately passes, leaving the legislation and contracts (with stabilization clauses) out of step and prompting accusations like those included in last year's [LEITI report](#) that Liberia's contracts are non-compliant with its legal regime.⁷

After recognizing the importance of a strong legal framework and the shortcomings of the existing legislation, the Liberian government undertook a reform process beginning with the petroleum policy in 2012 and draft legislation in 2013-2014. As Liberia's petroleum policy points out, the petroleum sector “needs to be bound by policies, laws and regulations to avoid problems.” We believe that it was also in this light that the [government](#)⁸ and the [legislature](#)⁹ indicated (as early as 2012) that new bid rounds were to wait until completion of the legal reform process.

Beyond the overall risks inherent in conducting any bid round before planned legislative reforms are enacted, there are particular risks associated with NOCAL being responsible for a major bid round at a moment when it faces the loss of significant power. The draft petroleum

law calls for the creation of a separate petroleum directorate that would administer bidding rounds. The fact that a key element of the legislative reform is to limit NOCAL's role makes it particularly important for any last bid round conducted by NOCAL to be subject to strong oversight.

Finally, while reiterating the complexity of the government's decision-making amidst the Ebola crisis, we feel it is worth noting that traditionally the execution of oil and mining contracts in times of acute crisis—when short-term financial needs can be desperate, government officials lack the bandwidth to thoroughly analyze deals destined to last decades, and the attention of citizens and watchdog groups is diverted—tends to result in deals that are sub-optimal or otherwise problematic in the long term. One such example is the case of [undervalued licenses](#) allocated in the Democratic Republic of Congo at a time when the country was ravaged by war and in desperate need of cash.¹⁰

II. Risk Mitigation Strategies and Suggestions for the Bid Round

If the Liberian government determines that its needs justify conduct of the bid round despite the concerns noted above, there are several steps that will serve to mitigate (though not eliminate) the risks. It is clear from the terms already announced for the bid round that the organizers are heeding many of the lessons learned internationally and have taken several steps to promote a competitive and transparent bidding process and harmonize the process to a certain extent with the terms of the draft legislation. These steps include:

- The terms of the [model PSC¹¹](#) released as part of the bid process mirror the proposals of the legislation in many ways, namely:
 - requiring that payments (including signature bonuses [Art. 16.2]) are made directly into Liberia's Consolidated Fund, which has not always been the case under previous PSCs.
 - requiring signatories to acknowledge that regulatory functions may be transferred from NOCAL to a new entity created by new legislation (Art. 35.13)
 - creating a relinquishment regime meant to counter potential speculative tendencies of companies (Art. 3.6)
 - requiring signatories to acknowledge certain NOCAL transparency requirements per the draft legislation (e.g., Art. 9.13 on publication of the contract and any eventual amendments, and Art. 9.14 on NOCAL's ability to publish the pre-qualification register and the bid assessment report, amongst others).

- The bid round has been organized in a professional manner and has incorporated procedures to increase competition and transparency, including limiting the number of biddable items and fixing many of the fiscal terms and the work program in the model PSC. The bid letter sets out a relatively clear process for conduct of the bid round and the supporting materials (e.g., pre-qualification forms, model PSC, data room) signal the seriousness of the bid round presentation. The participation of internationally recognized firms such as Ernst & Young further reinforces the credibility of the process.
- The fact that Liberia is conducting a competitive bid round (and thereby hopefully achieving substantial value) on the basis of blocks that were previously bid on or contracted¹² is itself an important achievement. This should allow the state to get full value from these blocks, rather than falling into the relatively common situation in which an allocated block is transferred by one company to another, with at least part of the value going to the transferor rather than the state.
- The bid package also establishes a serious approach to the pre-qualification process, which per the bid round timetable would be conducted ahead of the actual bid submission. This includes a relatively thorough pre-qualification form requiring, among other elements, information on ultimate beneficial owners of all entities in the bidding group. We do however set out further below some suggestions/concerns regarding the prequalification process, including with respect to beneficial ownership.

As the state proceeds with the bidding process, currently envisioned to culminate in December with execution of the PSCs, we recommend that it consider the following additional measures, likely to reduce risks and increase potential benefits associated with this licensing.

1. Importance of communication

The shift in strategy toward awarding these licenses in advance of the passage of the legislation heightens the always-important need to communicate regularly and effectively around the licensing round. The process has been launched transparently, with terms and deadlines stated on the NOCAL website. But we recommend that the government offer a clearer explanation of the rationale behind the shift in strategy and the need to carry out this licensing round now.

The government position seems to be that the suspension of new bid rounds does not apply to the four blocks it is now planning to award, as each of these blocks was already part of a previous bid round and was either ultimately unallocated or was allocated and subsequently relinquished. The technical and legal merit of the government's interpretation is debatable.¹³ (Blocks 6 and 7 were specifically included in the group of blocks initially referenced in the

legislature’s call for a [suspension](#).)¹⁴ In any event, holding a bid round prior to legislative reform seems contrary to the spirit and purpose of the suspension (i.e., to not allocate further blocks without a clear legal framework in place). A clearer explanation of the government’s decision would support the credibility of the legal reform process.

We also recommend that the government clarify that the recently published model PSC is subject to comment from all stakeholders and not just prospective bidders, as seems to be implied by the bid letter. Furthermore, we recommend that the period for public comment be extended beyond the 30 days announced, which is likely insufficient during the Ebola crisis in which the attention of key stakeholders is understandably fixed on other issues. Under the draft legislation, the model PSC is specifically mentioned as being developed pursuant to regulations (Section 77). Establishing the model PSC through regulations would, under the draft legislation, mean that it would be subject to a public comment period of at least 60 days and would need to be published at least 30 days prior to becoming effective. In addition, the recently revised schedule for the bid round envisions a very limited amount of time (between one day and one week) for parliamentary review and ratification.

2. Risks associated with preference for groups containing “a West African upstream petroleum company in which Liberian investors have an interest”

As well explained in the [Local Content Requirements document](#)¹⁵ produced for the bid round and set out in our earlier comments on Liberia’s draft petroleum legislation, local ownership requirements (or preferences, as in the case of this bid round) target laudable goals of developing local content and creating positive spillovers in the broader Liberian economy. Nevertheless, they also risk impeding equitable development by involving companies with inadequate capacity and by concentrating benefits in the hands of an elite few at the expense of the broader population. This is particularly the case where the local private investors are “carried” (i.e. not contributing capital) which could occur (and in fact is contemplated in the [Local Content Requirements document](#)¹⁶) given the proposed structure of the bid round.

Insofar as Liberia has decided to pursue a preference for bids including “Liberian investors,” it is critical that the bid round include protections to ensure that this does not result in elites leveraging political connections to acquire interests in licenses at below-market prices which they could subsequently sell or subcontract to international companies at a premium. Local ownership requirements in countries such as Nigeria and Angola have enriched the elites involved, without significant diffusion of broader benefits such as employment for citizens more generally.

We commend the inclusion in the recently released local content documents of a requirement that transfers of the Liberian participation be restricted, until a commercial discovery, to other Liberian entities. We would note however that while this addresses the risk of quick flips to international investors, it still leaves the door open to speculation in the sense that if “carried”², the Liberian investor could have contributed little to the project’s development and could look to cash out at the very moment where the project’s value increases significantly due to a commercial discovery. This could also be well before the project’s development, which could significantly reduce the types of linkages and positive spillovers to the rest of Liberian economy that are cited as the principal motivation for including the Liberian investor preference. We therefore recommend that the government consider a requirement that the relevant Liberian entity hold the interest in the block for a period of time that goes beyond commercial discovery so as to make the sought after positive impacts more likely.

We further recommend that any restriction on transfers be included in the PSC along with the other prohibited changes of control (Art. 26) and not as a separate undertaking from the ECOWAS company as presently envisioned in the bid materials. Violation of this requirement would be much less likely, and would be monitored by all parties to the PSC, if it entailed the recourse that a breach of the PSC affords the government (e.g., termination, transfer being null and void, etc.). If the requirement is not included in the PSC, the undertaking by the ECOWAS entity should be subject to separate security such as a bank guarantee for recourse.

3. Risks associated with ambiguities in pre-qualification requirements

As noted above, the bid documents set out a process for pre-qualification, which is an important way of ensuring that the right companies are selected to develop the sector. Nevertheless, the bid round’s prequalification materials contain ambiguities that create important risks.

Specific requirements. Whereas the draft legislation (Sec. 15(2)) requires pre-qualification guidelines specifying technical and financial requirements, the bid round generally does not establish specific requirements (e.g., financial or technical thresholds), potentially creating a level of ambiguity and discretion in deciding whether qualification has been achieved.

² Whether the interest is “carried” may not be readily apparent. For instance the other participants could lend the Liberian entity the funds necessary to finance its portion on a non-recourse basis secured only by its interest in the property. Thus the Liberian entity would have no funds at actual risk.

Problematic optionality on pre-qualification. While the draft legislation references both technical and financial requirements in order to qualify for a bid round, the approach taken in Sec. 6.2(a) of the bid letter and page 11 of the model PSC allows for bidders (or bidding groups) that only qualify on the basis of either financial or technical capacity at the time of award, allowing license holders to meet the second requirement before the end of the first exploration phase (first three years). This is an important distinction and could lead to selection of companies that, at least initially, are not in a strong position to deliver on all elements of the PSC's obligations.

Pre-qualification for all participants. The draft legislation (Sec. 15.4) requires some level of qualification for any participant in a bid round, whereas the bid letter (Sec. 6.2(c)) only requires that certain information be provided (i.e. no specific standards for prequalification) for members of a bidding group that are not being used to establish the bidding group's technical or financial capacity. This means that a qualified bidding group could include member entities that have not cleared any particular qualification hurdle other than provision of information.

Need for strengthened transparency of pre-qualification/beneficial ownership information. This bid round does not clearly adopt certain key transparency elements included in the draft legislation with respect to pre-qualification (Sec. 15(8)), namely a publicly accessible registry of pre-qualified bidders setting out the grounds for each bidder's pre-qualification and including all documentation provided during pre-qualification (e.g., technical/financial capacity, beneficial ownership information). The model PSC does reference (Art. 9.14(a)) a pre-qualification registry that NOCAL "may" make publicly available and the bid package's pre-qualification forms require different types of information on beneficial ownership (see comments below on shortcomings of the information requested), but there is no commitment to make this information public. In fact the model PSC provision (Art. 32.3) requiring companies to provide and update beneficial ownership information is conditional upon regulations issued by the Ministry of Finance. No such regulations exist to date and the provision should instead provide for disclosure subject to whatever additional information is required by generally applicable regulations. Similarly the Liberian entity pre-qualification form requires that beneficial ownership information be provided to various ministries, but is silent on public disclosure.

The bid materials should clarify that pre-qualification information will be public and ideally available at the time of the pre-qualification decision and prior to the overall decision on bid winners. With respect to timing, we also note that the bid round schedule does not currently specify a date for the announcement of prequalified companies. This is an important missing element that we would recommend be corrected from a governance and transparency

perspective as well as to practically allow international oil companies to select among pre-qualified Liberian and ECOWAS companies.

Shortcomings of current approach to beneficial ownership. In addition to the lack of a clear requirement to publicly disclose beneficial ownership information (see above), there are important shortcomings or at least ambiguities in the way beneficial ownership seems to be understood in the bid round. It would be a shame if this undermined, perhaps unintentionally, the commitment to use beneficial ownership disclosures to combat corruption and strengthen public trust.¹⁷ In order to address this, we recommend that the bid materials be revised to make clear that the concept of beneficial ownership is specifically aimed at identifying what the EITI Standard refers to as “the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.”¹⁸ As presently drafted, the pre-qualification documents are not clear on this. The general pre-qualification form to be used by bidding groups and international oil companies refers (Sec. 2(b)(v)) to identifying “holders” of equity or voting interests in an “ultimate parent company,” but never specifies that holders are to be natural persons. This could mean other companies being a “holder,” thereby not identifying actual ultimate owners. The fact that disclosure is limited to interests in the “ultimate parent company” (itself described as the legal entity that “ultimately controls the bidder”) could lead to important ownership interests in the bidder, well over the 15 percent threshold, not being caught at all.

The Liberian entity pre-qualification form, where beneficial ownership issues are perhaps the most important, also does not clearly specify that ownership information should be with respect to the ultimate natural person owner. Sec. 2(f) here again refers to each “holder” without defining the term, opening the door for shell companies to be identified as the holder. While the subsequent Section 2(c) [sic] requires a statement from each such holder that it is the “beneficial owner,” this is without defining the beneficial owner as a natural person or the ultimate owner. In fact the formulation of the statement as, “that he, she or *it* is the beneficial owner” (emphasis added), seems to signal that a company can be the “beneficial owner.” This may well just be a drafting issue, but it could have an important impact. The ECOWAS pre-qualification document is also problematic in that it refers (Sec. 2(b)) to listing the ten largest stockholders in the parent company, without defining the parent company or requiring that the identified stockholders in fact be ultimate natural person owners. Accordingly, nothing would prevent a list of shell company names revealing almost nothing about the ultimate owners.

It is important that the bid documents take a strong and relatively consistent approach to beneficial ownership reporting, particularly as the corruption and perception risks that this reporting is looking to address could be an issue in any of the ownership categories.

Liberian and ECOWAS prequalification criteria. We commend the recent issuance by NOCAL of specific pre-qualification guidance and forms for Liberian and ECOWAS investors. It is important that these requirements be structured with the relevant policy objectives in mind. The preference for Liberian investors is targeting the fundamental overall goal of promoting positive economic spillovers from Liberia’s petroleum industry by ensuring that the local private sector plays an important part. In order to better pursue these policy goals and reduce potential risks, we recommend that additional elements be added to the important requirement that the relevant Liberian investment be through a Liberian company in existence for a minimum period. Specifically, the government should consider further requiring that the relevant Liberian company meet certain minimum capital requirements and a minimum number of employees in Liberia, as this would help ensure a more widespread economic impact. Similarly, qualified companies should have some experience in the sector or related sectors (acknowledging that this would need to be broadly interpreted given the infancy of the Liberian hydrocarbon sector). At a minimum, the companies (possibly together with other companies in the bidding group) should set out a plan for the Liberian company’s potential role in the sector (i.e., as part of the “project linkages plan”).

Given the potential risks and public perception issues associated with the Liberian preference, the pre-qualification criteria should require that all Liberian investor beneficial ownership be disclosed, irrespective of percentage ownership. The bidding criteria should also specify that no public official (or an official’s family member or intermediary) can have an interest in the PSC. Wording along these lines is included in the 2002 petroleum law (Sec. 2.4.8) though the term “public official” is not defined and the restriction is subject to limitations. (A restriction in the context of this bid round and its Liberian investor preference could be built on the definition of “official” included in Art. 32.2(b) of the model PSC.)

4. Criteria for bid evaluation

The draft legislation (Sec. 16(2)) requires that the tender protocol specify the percentage weight assigned to each bid component in the calculation of the final score in the evaluation of each bid. The bid letter specifies the biddable items (signature bonus and West African/Liberian investor content)¹⁹ and requires (Sec. 3.3) that the same methodology be applied to each bid to determine aggregate value. The original bid letter did not specify what that methodology will be, but subsequently released materials have made clear that that in light of Liberia’s focus on achieving significant signature bonus payments, this will be the principal basis for evaluation. The West African/Liberian investor content shall count as a supplement in the sense that those

bids including such a component will receive a 20 percent uplift on the signature bonus amount bid. Detailing the bid evaluation formula in advance is important because it helps ensure that the government evaluates bids on an objective and consistent basis, rather than on a discretionary basis.

The bid valuation methodology also allows for analysis of whether the bid round is promoting the correct state objectives. For example, while the announced prioritization in this bid round of the upfront bonus²⁰ is understandable when a government is in difficult financial circumstances, emphasizing a high signature bonus while still maintaining a financial package attractive to companies may mean sacrificing other important elements of the fiscal package, including, potentially, at the expense of higher revenues from higher “profit oil” thresholds; see below). Given this focus on the signature bonus and the accompanying risks, the government should consider including a minimum threshold for the signature bonus, with the contract not being awarded if the threshold is not met by any of the bids for a block.

The draft legislation (Sec. 16(8)) specifies the composition of a bid evaluation panel, including a representative from each of the ministry of finance and LEITI. The bid letter does not specify any bid evaluation panel or mention the composition of the body conducting the state’s evaluation. The draft legislation also requires the preparation of a bid assessment report providing detailed information about all of the bids (Sec. 16(10)) and specifies that this bid evaluation report is to be made public (Sec. 16(13)). The bid letter does not mention any of these important transparency protections. The model PSC mentions (Art. 9.14(a)) that NOCAL “may” publish a bid assessment report but provides no information as to what is to be included in such a report. These ambiguities on transparency elements should be clarified in the bid materials.

5. Flow of funds: need for clarity on fees to be paid to TGS-NOPEC under the model PSC, and any revenue retention by NOCAL

As highlighted in our previous comments on the draft legislation, the issue of the flow of funds and allocation of petroleum revenues to different state entities is critical. We still recommend that the government first channel all petroleum revenues to the Consolidated Fund and then allocate them through the budgetary process, rather than allocating certain revenue streams directly to particular recipient parts of the government. This is particularly important in the context of Liberia’s current financial difficulties, since the government must prioritize various demands on state resources. While the model PSC does not contain a provision requiring *all* revenue to be paid to the Consolidated Fund, we commend the inclusion of a provision making such payments the default (Art. 35.2) unless otherwise specified. We interpret this to mean that

any payment with respect to the state share of production (per Art. 14.8) shall be paid to the Consolidated Fund. We also recommend that the model PSC be clarified (Art. 17.1) to ensure that the revenue from the sale of petroleum belonging to the State Participation held by NOCAL is deposited to the Consolidated Fund and that the revenue allocated to Citizen Participation (Art. 17.2) is deposited with an eventual citizen participation fund.

We note the significant payments for existing data that companies are to make to TGS-NOPEC Geophysical Company under this bid round. Per Art. 16.3 of the model PSC, licensees will pay TGS-NOPEC an aggregate sum of \$34 million (\$15 million each for blocks 16 and 17 and \$2 million each for blocks 6 and 7) within 15 days of effectiveness of the various PSCs. Given the large sums involved and the concerns expressed to date by Liberia's General Audit Commission regarding financial interactions between NOCAL and TGS-NOPEC²¹, NOCAL should clarify the basis for the payments to TGS-NOPEC and identify any portion to be paid to NOCAL. In line with our recommendation above regarding the allocation of petroleum revenues and in light of the Liberian state's present financial difficulties, it may be appropriate for any data payments to NOCAL to instead be paid into the Consolidated Fund. It is also important that the sums to be retained by TGS-NOPEC not be excessive by market standards for the relevant data being made available, as any excess paid by a bidder could in fact be at the expense of what that bidder proposes for the signature bonus.

6. Other comments on the model PSC

We set out below our principal comments on the model PSC that are not otherwise covered above. These comments are based on our limited review of the model PSC to date.

Fiscal elements. We commend the model PSC for incorporating a large number of the fiscal terms, though see section II.4 above for our comments on the risks of focusing on the signature bonus and the need to consider a minimum threshold for the signature bonus.

The model PSC uses a "rate of return" trigger for profit oil allocation rather than the daily rate of production triggers used to date in Liberia's PSCs (including in the most recent [Block 13 PSC²²](#)). The sensitivity of the rate-of-return approach to profitability of a project means that it ensures progressivity in the fiscal regime (i.e., ensuring that the state receives a greater share of revenue as a project becomes more profitable), a stated aim of Liberia's petroleum policy. As per [IMF recommendations²³](#), using a rate-of-return-based trigger rather than a proxy for profitability such as the daily rate of production should allow for a more accurate basis to achieve progressivity and should facilitate negotiations with oil companies.

We also note however that the proposed approach (Art. 14.4) only features two tiers with a 15 percent rate of return as the trigger. We query the lack of a third tier allocating a higher share for the state where a project's rate of return significantly exceeds 15 percent, which can easily be envisioned in the case of a significant discovery. This is why countries like Afghanistan, Angola, and Azerbaijan use PSCs with more than two tiers in order to allocate a greater share of "profit oil" to the state as a project becomes particularly profitable.²⁴ The absence of a higher tier in Liberia's model PSC limits the progressivity of the fiscal regime, and should be reevaluated, particularly as this could, in the case of very profitable projects, leave very substantial amounts of government revenue "on the table."

We further note the concerns previously raised by Liberian tax authorities regarding the complexity of the rate-of-return approach and the difficulties this may eventually pose for Liberia in effective tax collection from companies. Given the potential significance of the change, it is important that the relevant Liberian tax authorities are sufficiently comfortable with the approach and that the expedited bid round conducted under challenging conditions not overlook this important matter.

Change of control tax consequences and stabilization. The model PSC (Art. 26) appropriately places conditions on assignments and commendably specifies that indirect transfers of control are subject to these same conditions. We question however the extent to which the model PSC (Art. 26.8) relies on the Revenue Code for the taxation of an assignment or transfer. While we understand that Chapter 8 of the Revenue Code governs the taxation of non-residents, it is important that the government feel comfortable with the clarity and effectiveness of the relevant Revenue Code provisions in collecting the required tax revenue from a transfer. Insofar as these provisions are not presently sufficient, it may be prudent to specify in the PSC that the Contractor acknowledges that gains from any transfers, direct or indirect, may be deemed by the government to be Liberian source income and subject to relevant tax. Moreover, to facilitate taxation of such transfers, the Contractor should be under an affirmative obligation to report such transfers, and where the appropriate tax has not been paid, the Contractor should be made a "withholding" entity for the tax.

With respect to the scope of the stabilization clause more generally, we reiterate our recommendation from our comments on the draft legislation, namely that stabilization should be limited to specifically identified elements, as in the relevant Revenue Code provision. The broader formulation of the model PSC's stabilization clause risks having new obligations imposed by international treaties or by ECOWAS be subject to the stabilization clause.

Endnotes

¹ <http://www.nocal.com.lr/news-and-media/competitive-bidding-for-oil-blocks-lb-6-lb-7-lb-16-and-lb-17>

² <http://info.tgs.com/liberia-basin-bid-round-2014>

³ The draft petroleum law and NOCAL Act are currently before the Liberian legislature. Drafts of the legislation made available during public consultations may be found at www.resourcegovernance.org through the following links: http://www.resourcegovernance.org/sites/default/files/nrgi_Bill_NOCAL_Act2013_draft.pdf; http://www.resourcegovernance.org/sites/default/files/nrgi_PetroleumBillSenate_draft.pdf

⁴ *Republic of Liberia, National Petroleum Policy*, http://www.nocal.com.lr/pdf/Resource_Library/National_Petroleum_Policy.pdf

⁵ *Revenue Watch Institute and ACET, Comments on Liberia Petroleum Act and NOCAL Act* (December 12, 2013), <http://www.resourcegovernance.org/news/comments-liberias-proposed-oil-laws-moving-closer-good-governance>

⁶ *Natural Resource Charter, Second Edition*, http://www.resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf

⁷ *Liberia Extractive Industries Initiative (LEITI), Post Award Process Audit* (May 2013),

http://www.leiti.org.lr/uploads/2/1/5/6/21569928/leiti_post_award_process_audit_final_report.pdf

⁸ *New Dawn Liberia, Oil Bids Suspended, Not Explorations* (August 2, 2012)

⁹ <http://legislature.gov.lr/content/senate-sets-committee-collaborate-members-house-representatives-more-detail-study-oil-and-ga>

¹⁰ *Washington Post, Dan Gertler earns billions as mine deals fail to enrich Congo* (December 27, 2012)

http://www.washingtonpost.com/business/dan-gertler-earns-billions-as-mine-deals-fail-to-enrich-congo/2012/12/27/c37d0100-4e31-11e2-8b49-64675006147f_story.html

¹¹ <http://info.tgs.com/liberia-basin-bid-round-2014>

¹² Blocks 16 and 17 were awarded in 2004-2005. We understand that Repsol, Tullow and Anadarko have relinquished their interests in the blocks. Blocks 6 and 7 were bid out in 2007-2008, but no contract was apparently ever signed and negotiations fell apart in 2013.

¹³ When rumors of a bid round including the four blocks began surfacing in March in the Liberian press, the related leaked presentation stated that the bid round would be “upon completion of [the] law.” See:

<http://www.frontpageafricaonline.com/index.php/politic/918-liberia-oil-firm-chief-attempts-to-ride-nocal-into-bid-rounds>

¹⁴ <http://legislature.gov.lr/content/senate-sets-committee-collaborate-members-house-representatives-more-detail-study-oil-and-ga>

¹⁵ Available at <http://info.tgs.com/liberia-basin-bid-round-2014>

¹⁶ Available at <http://info.tgs.com/liberia-basin-bid-round-2014>

¹⁷ It is worth noting that LEITI is currently participating in a beneficial ownership disclosure pilot.

¹⁸ See Sec. 3.11 of the EITI Standard at http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf.

¹⁹ An earlier version of the bid materials also invited companies to bid on profit oil shares (above a floor level included in the MPSC), but later materials only refer to the signature bonus and local investor content.

²⁰ This is reflected in the bid assessment approach as well as provisions in the model PSC such as the cost recoverability of the signature bonus (Art. 16.2).

²¹ See <http://allafrica.com/stories/201408042093.html> and https://archive.org/stream/292064-general-auditing-commission-leaked-report-on-nocal/292064-general-auditing-commission-leaked-report-on-nocal_djvu.txt

²² http://www.nocal.com.lr/pdf/operations/LB-13_PSC.pdf

²³ <https://www.imf.org/external/np/seminars/eng/2013/liberia/PDF/McPherson.pdf>

²⁴ See Section 10.1 of the Amu Darya EPSC (Afghanistan) and Section 11.4 of the Shah Deniz PSA (Azerbaijan), available at www.resourcecontracts.org. For Angola, see Article 12 of the model Production Sharing Contract (2008), available at www.eisourcebook.org.