NIPP AND THE GREAT NIGERIA POWER PRIVATISATION - MOVING NIGERIA UP THE GLOBAL COMPETITIVENESS RANKINGS

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In autumn 2013 it was announced that 82 consortia had been prequalified to bid for the sale of the 10 NIPP Gencos . This marks the beginning of phase 2 of the Nigerian power privatisation programme.

Phase 1 was the privatisation of 15 generation and distribution companies which took place over the last two years. Reports indicate that 13 out of 15 of these companies have now been sold. With most of the new owners having paid the 75 per cent balance due to the government.

Full operational takeover of these companies is expected to happen soon and this should kick start the advent of the transitional electricity market in Nigeria. In addition, successful bidders have been announced for the remaining two companies - Afam Genco and Kaduna Disco. One recent report announced that: "Nigeria now stands on the verge of completing the largest electricity assets sale ever done in the history of the world."

Currently, the NIPP Gencos are wholly owned by the Niger Delta Power Holding Company (NHPDC) which is running the phase 2 tender process, along with the Bureau of Public Enterprises (BPE). BPE and NHPDC are referred together in the rest of this article as the Government.

The sifting process

Although 82 consortia were pre-qualified, the following requirements should whittle this number down significantly:

- Payment of US$20,000 for the documents and access to the data room for each NIPP Genco. If 82 consortia paid this, that would be US$1,640,000 – a good start to recouping the investment that has been made in constructing the plants?

- Delivery of a US$4 million on-demand payment bond. This was due on submission of bids in November 2013.

- Delivery of a bank guarantee equal to 15% of the amount bid by a bidder for the relevant NIPP Genco. This was to be delivered within 15 business days of official notification by the Government that a bidder has been made Preferred Bidder or Reserve Bidder. A painful pill for the Reserve Bidder to swallow – not only coming second but also having to come up with this guarantee! I suspect that most bidders would want to be either the Preferred Bidder or any other bidder but not the Reserve Bidder. However, there could be instances when the Reserve Bidder could step into the shoes of the Preferred Bidder .

- The bank guarantee can be called if a bidder fails to:
    - accept the terms of any of the draft final Share Sale Agreement (SSA) or the draft final Shareholders' Agreement included in the bid documents.

    - pay the required deposit upon signing of the Share Sale Agreement. The initial deposit is 25% of the purchase price for plants that are fully commercially available on the date of the SSA, and 10% of the Purchase Price for plants which are not fully commercially available on the date of the SSA.

The Bidders Conference

A Bidders Conference was held in Abuja in October 2013. This was an opportunity for:

- the Government, its transaction advisers and other related parties to explain the structure of the projects, the key documents underlying the project , key issues and some timing and practical issues on the transaction; and

- bidders , advisers and suppliers to network and connect with a view to forming consortia and teams to bid for the NIPP Gencos.

The PPA and NBET – can they pay?
As is normal, the transactions have been structured with payments for power being made under a Power Purchase Agreement (PPA). The buyer of the power from the NIPP Genco will be a new company called the National Bulk Electricity Trader (NBET).

The key concerns for bidders on NBET is whether it is creditworthy enough to pay for:

- the monthly payments due to NIPP Gencos for generating power; and
- the termination payments that are due if the PPA is terminated.

The answer was that the Government was going to capitalise NBET adequately to cover its contingent liabilities. The issue that will be worrying bidders and lenders is how this money is going to be ring-fenced to pay for these contingent liabilities and whether the amounts are enough to cover the monthly payments and termination payments.

Bidders were told that NDHPC had enough funds to fund eight months worth of payments to the ten Gencos. The details around this will be pored over by bidders and their funders in the coming weeks. Funders, being the conservative bunch they are, will probably require a great deal more financial cover and security over any monies that are allocated to pay for such claims.

There was also a discussion that the current structure of the NIPP was meant as an interim arrangement. That NBET would cease to exist once the recently privatised distribution companies were financially robust enough to covenant directly with the Generators. The mechanics of how this would happen and when was unclear – no doubt all will be revealed in due course but this is a critical bankability issue that will have to be overcome.

It is likely that NBET will need to have some form credit enhancement for these projects to be bankable. Possible options are a federal government guarantee, partial risk guarantees or MIGA. The solution to this particular issue will have to be found over the coming weeks and is critical to the bankability of these projects.

Handover and condition of the plant
There was a lot of discussion about the condition of the plants that bidders will take over. Understandably the Government has taken the stance that the plants will be taken over on an 'as is where is' basis. So bidders will have the opportunity to inspect the plants and the information in the data room and make their own assessment of the conditions of the plant and price their bids accordingly. This may be challenging for bidders bidding for plants that have not been commissioned and if time is not sufficient for bidders to made a proper assessment.

A related issue is the ability of an NIPP Genco to claim under the EPC Contracts for any defects in the plant. It did not seem clear if the original EPC Contract was entered into by the NIPP Genco or NDPHC. A point to consider when carrying out the due diligence is to review these EPC Contracts to understand what rights and obligations the Project Company has. If the contracts were entered into by NDPHC, it would be normal to have the benefit of the rights (but not the obligations which should remain with NDPHC) transferred to the Project Company. One for the due diligence team.

Gas supply
The concerns on whether there will be gas to power these plants to their full capacity was also the subject of much discussion in Abuja. Gas supply infrastructure continues to be a key target for those seeking to attack foreign oil companies. One report stated that electricity generation in Nigeria has fallen 40% from its peak of 4,500 MW in December 2012 to 2,628 MW in August 2013. This was said to be largely attributable to interruptions in gas supply resulting from pipeline damage or sabotage.

Therefore, although NBET is taking fuel supply risk through the PPA (fuel supply failure is an Availability Event under the PPA), this 'paper promise', together with concerns on NBET's creditworthiness, could affect the bankability and pricing of the projects.

Evacuation
It is generally accepted that the transmission and distribution network has integrity issues affecting the adequate evacuation of the generated power. This was echoed in Abuja where the Transmission Company of Nigeria's (TCN) representative outlined plans to upgrade and develop the transmission network. It came across quite clearly that TCN did not currently have the requisite funds to be able to carry out all its plans.

In the context of NIPP, Capacity Payments under the PPA will continue to be made even if power cannot be evacuated as long as the plant is available. However, the NBET covenant issue will continue to worry bidders in this context as well.

Funding
A key issue for the NIPP process is not only whether these projects are bankable but also whether banks will be willing to lend money to bidders wishing to buy them. Part 1 of the Great Nigeria Power Privatisation, together with other projects like Dangote's refinery, has sucked a lot of cash out of the Nigerian banking sector. Some say that this issue is further exacerbated by CBN restrictions on how much exposure a bank can have to any one sector such as the power sector. The development banks will not lend to these projects because there is no development element (for example, the construction of the power plant). So will the international banks step in? Have they got the appetite for power projects in Nigeria?

Global competitiveness – a footnote
Finally, in the World Economic Forum's Global Competitiveness Report 2013-14, published in autumn 2013, Nigeria's ranking slipped to 120 in the index of 148 countries, from the previous year's position of 115 (out of 144 countries). It stands at number 18 among African countries and sixth in West Africa. Respondents were also asked to name their five most problematic factors in doing business. Infrastructure and corruption lead with weighted shares of 23.5% and 21.3%. Perhaps the NIPP process will help move Nigeria's rankings upwards.