



REPUBLIC OF GHANA

## MINISTRY OF FINANCE

Our Ref: **MoF/OHM/MCC/PDS**

Your Ref:

Tel No:

18<sup>th</sup> OCTOBER, 2019

### **Termination of Power Distribution Services (PDS)** **Concession**

This letter follows a meeting between the Secretary to the President, Nana Bediatuo Asante, and I, on the one hand and the Principal Deputy Vice President of the Millennium Challenge Corporation (MCC), Kye Kim, and the Resident Country Director-Ghana of the MCC, Kenneth Miller, on the other hand, held in Washington DC on Friday October 18<sup>th</sup>, 2019.

We requested for time through Monday 21<sup>st</sup> October to enable us complete internal consultations. However, the MCC team indicated that the Government of Ghana needed to execute the enclosed implementation letter (Principles and action steps to move forward on the Ghana Power Compact) by midnight of the 18<sup>th</sup> October if the Compact was to move forward. Failing that, a "De-obligation Letter" would be issued which would effectively end the Compact.

We indicated that a response would be provided by the midnight deadline. Following consultations with Government, we wish to emphasize that Government remains strongly committed to the Compact and to private sector participation in the Electricity Company of Ghana. We also wish to reiterate the position communicated to the CEO of the MCC by the President of Ghana during their meeting on the sidelines of the United Nations General Assembly in New York on September 23<sup>rd</sup> to the effect that, the current concession had to be terminated in view of the facts uncovered regarding the failure by PDS to satisfy conditions precedent under the relevant transaction documents AND, however, that every effort would be employed to ensure a suitable replacement within the relevant timelines in order to complete the Compact. The Government decision to terminate the PDS concession



and find a replacement in a timely manner to successfully conclude the Compact is based on two key points.

First of all, it is Government's view that the meeting between the CEO of MCC and the President of Ghana produced an understanding that the existing concession would be discontinued and a concession restoration and restructuring plan executed within existing timelines and in any event before December 31, 2019. It is worth recalling that following this understanding Mr. Cairncross and President Akufo-Addo shook hands and committed to expeditiously putting the understandings into effect. Following the meeting, however, MCC sent an implementation plan, which in our opinion did not accurately reflect the outcome of the New York meeting.

Secondly, the facts detailed below clearly justify the discontinuance of the current concession which, it should once again be emphasized, does not in any way diminish the Government of Ghana's commitment to private sector participation in Ghana's energy sector. Indeed, Government intends to see this PSP through in a manner that respects due process and fidelity to the relevant transaction documents and underlying Compact.

### **Background to the Government's Decision.**

I refer to the Millennium Challenge Compact (the Compact) signed on 4<sup>th</sup> August, 2014 between the Millennium Challenge Corporation (MCC) acting on behalf of the Government of the United States and the Government of Ghana acting through the Minister for Finance, which had the object of achieving lasting economic growth and reducing poverty through increased private sector investment.

I further refer to the Programme Implementation Agreement (PIA) entered into by the parties to the Compact which provided further detail on the implementation of the Compact.

Reference is also made to the Lease and Assignment Agreement (LAA) and the Bulk Supply Agreement (BSA) entered into between the Electricity Company of Ghana (ECG) and Power Distribution Services Ghana Limited (PDS) as well as the Government Support Agreement (GSA) entered into between the Republic of Ghana and PDS (collectively called the Transaction Agreements), all of which were the culmination of the commitment of the Government of Ghana and the MCC to undertake private sector participation (PSP) in the energy sector with the object of ensuring efficiency in the management, operation and investments in the electricity distribution business of ECG.

As you are aware, a key condition under the private sector arrangement was to introduce a Concessionaire into the distribution sector, who would inject private capital into the operations of the ECG. The two key advisors to the managers of the Compact, the

Millennium Development Authority (MiDA), were the International Finance Corporation (IFC) and Hunton and Williams, an international law firm based in New York.

Through an international competitive tender, Meralco of the Philippines was selected as the concessionaire. In order to satisfy the local content requirement under the transaction, a special purpose vehicle, Power Distribution Services (PDS), was incorporated in Ghana to be the operator. PDS has the following shareholding:

- i. Meralco (Philippines) – thirty percent (30%) shares
- ii. Anergia S.A (Angola) - nineteen percent (19%) shares
- iii. GTS Engineering Services of Ghana, Santa Baron Ventures of Ghana and TG Energy of Ghana- together fifty one percent (51%) shares

In consequence thereof, the Transaction Agreements were executed. Over forty (40) Conditions Precedent, five (5) of them considered critical and essential, were required to be fulfilled by PDS under the LAA and BSA. Two of the essential and critical Conditions Precedent were the provision of a BSA Payment Security and an LAA Payment Security (Conditions Precedent 24 and 31 respectively). They were preconditions to the occurrence of the Transfer Date and the exercise of the rights and obligations of the parties, and in terms of the Transaction Agreements, constituted security for PDS' obligations under the BSA and LAA.

Conditions Precedent 24 and 31 required PDS to furnish to ECG payment securities in the form of either a Demand Guarantee or a Letter of Credit issued by a Qualified Bank. Owing to difficulties experienced with raising a bank guarantee, PDS formally requested MiDA to accept a demand guarantee issued by an A-rated insurance company. Upon the advice of IFC and Hunton and Williams, the MiDA Board accepted the request of PDS.

Consequently, PDS submitted the Payment Securities in the form of Demand Guarantees issued by a Qatari insurance firm, Al Koot Insurance and Reinsurance (Al Koot) on 27<sup>th</sup> February, 2019, two days before the Transfer Date of 1<sup>st</sup> March, 2019.

Following failure to receive satisfactory confirmation by IFC and Hutton and Williams of whether adequate due diligence had been performed on the validity of the Demand Guarantees purportedly issued by Al Koot, by a letter dated 28<sup>th</sup> February, 2019, ECG took the initiative to ascertain from Al Koot itself proof of or confirmation of the due authorisation for the execution of the Demand Guarantees by that firm. ECG also requested Al Koot to confirm compliance with relevant laws and regulations to which the Demand Guarantees would be subject, in relation to the substantial exposure in the total sum of Three Hundred and Fifty Million United States Dollars (US\$350, 000, 000.00) that Al Koot had undertaken in favour of ECG.

ECG did not receive the requested confirmation and proof of due authorisation from Al Koot by the Transfer Date. Out of a desire to ensure the occurrence of the Transfer, ECG was compelled to confirm acceptance of the form of the Demand Guarantees, with an

expectation that upon receipt of satisfactory reply from Al Koot, it would subsequently confirm the Demand Guarantees in substance and in form. By a letter dated 13<sup>th</sup> March, 2019, forwarded to ECG by MiDA, Al Koot purported to confirm the Demand Guarantees.

Dissatisfied with the purported confirmation by Al Koot, ECG on 24<sup>th</sup> June, 2019 through MiDA, requested for relevant documents proving due authorisation by Al Koot to the alleged signatory to the Demand Guarantees, Yahaya Al Nouri. However, on 24<sup>th</sup> June, 2019, ECG received a letter dated 16<sup>th</sup> June, 2019 from Al Koot in which it made among others, the following assertions:

- i. Al Koot is not authorised by its constitutional documents to underwrite counter party and trade risk;
- ii. The Guarantees purportedly issued in respect of the Transaction is not an approved product line;
- iii. The Demand Guarantees were not executed by authorised signatories of Al Koot
- iv. The letter dated 13<sup>th</sup> March, 2019 forwarded by MiDA to ECG purporting to confirm the issuance of the Demand Guarantees was part of the misrepresentation in respect of the purported issuance of Demand Guarantees to secure the transfer of assets of ECG to PDS, as the signature on the letter was forged;
- v. Al Koot denied the existence of the Guarantees;
- vi. Al Koot refused to accept any present or future legal obligations in connection with the purported Guarantees;
- vii. Criminal action will be instituted by Al Koot against personnel and all reinsurers who might have aided and abetted the fraudulent issuance of the unlawful Guarantees.

Having regard to the fact that in terms of Articles 2.6 and 3.2(l) of the LAA, the existence of a valid Payment Security is a condition precedent to the occurrence of the Transfer Date and the failure of PDS to deliver and maintain the Payment Securities constituted a Company Event of Default, ECG by a letter dated 30<sup>th</sup> July, 2019, suspended the LAA and BSA. In consequence thereof, by a letter dated 31<sup>st</sup> July, 2019, the Ministry of Finance on behalf of the Government of Ghana suspended the GSA, pending the completion of a full inquiry into the circumstances of the letter written by Al Koot. A formal complaint was accordingly lodged with the Criminal Investigation Division (CID) of the Ghana Police Service.

### **Investigations by Ghana in Qatar**

Towards establishing the primary fact of whether a valid Demand Guarantee was provided by PDS as a condition for the occurrence of the Transfer of assets of ECG to PDS, the Government of Ghana mandated her mission in Qatar to visit the official premises of Al Koot in Doha. Al Koot, at the meeting with officers of the Ghana Embassy in Qatar held on 30<sup>th</sup> July, 2019, affirmed the content of their letter of 30<sup>th</sup> July, 2019.

Consequently, Cabinet on 1<sup>st</sup> August, 2019, constituted a team led by the Minister for Interior to visit Qatar on a fact-finding mission. During the visit to Qatar, Al Koot, among others, confirmed the following to the Ghanaian delegation:

- a. The first time the matter of the purported issuance of demand guarantees as security for the LAA and BSA came to Al Koot's attention was when it received the first letter from the Electricity Company of Ghana (ECG) dated 28<sup>th</sup> February, 2019. The company had no previous record of such a transaction. No application for such a facility had been received by the company from any entity.
- b. The letter dated 13<sup>th</sup> March, 2019 in purported reply to the ECG letter of 28<sup>th</sup> February, 2019, was a fabrication and part of the fraud perpetrated by the proponents of the false Demand Guarantees.
- c. The staff of Al Koot who forged the signature on the letter purportedly emanating from Al Koot dated 13<sup>th</sup> March, 2019, Yahaya Al-Nouri had since 21<sup>st</sup> July, 2019, been suspended without pay.
- d. It was not possible for the demand guarantees to have been issued by the company for the following reasons:
  - i. Al Koot does not have the capacity to engage in such a transaction based on their net worth.
  - ii. The company is not authorised to issue demand guarantees. It does not have the mandate to engage in counter party and trade risk contracts which involve the issuance of demand guarantees.
  - iii. The alleged signatory to the Demand Guarantee, Yahaya Al-Nouri by himself did not have capacity to commit the company financially in any transaction of big value. As Manager of Reinsurance, Al-Nouri had capacity to bind the company to the tune of only the equivalent of about US\$15,000.
  - iv. There was no approval by competent signatories or by the Board. The guarantees were witnessed by a junior officer of the company who had been working under Al-Nouri for only a month. The transactions, accordingly, lacked the due authorisation and approval of the company.
  - v. Al Koot has an underwriting policy and guidelines which requires the approval of the Central Bank of Qatar. No such approval was granted by the Central Bank of Qatar.

In the spirit of dialogue, the Government of Ghana dispatched a delegation led by the Minister for Foreign Affairs and Regional Integration to Washington to meet the MCC to discuss matters affecting the Transaction and the Compact and their findings and proposed next steps. The MCC expressed the intention to conduct an independent forensic audit and emphasised on due process as the only permissible way to terminate the transaction with PDS.

## **The FTI investigation**

FTI Consulting (FTI), the auditors chosen by MiDA to undertake the forensic audit requested by the MCC, has completed its exercise and presented a Summary of Findings Report (Final Report). FTI's Final Report, which was prepared after a study of the documentation given to the Ghanaian delegation which travelled to Qatar, confirms the position of Al Koot on the purported Demand Guarantees as having been issued without due authorisation and in excess of the mandate of the firm.

FTI makes the following observations and conclusions, among others:

- i. Based on a review of Section 8 of Al Koot's Delegation of Authority, Al Nouri did not have authority to bind Al Koot in relation to the Demand Guarantees.
- ii. Based on a review of Al Koot's Underwriting Guidelines, Al Koot would avoid coverage of guarantees and product warranty and quality.
- iii. However, as noted in a legal analysis by a Qatari law firm, K&L of a "Cassation Court" judgment, the doctrine of apparent authority could apply where an employee submitted a purchase order with company stamps in circumstances where she indicated that she represented her employer.
- iv. The same Qatari law firm, K&L indicated that it was difficult to determine whether or not Al Nouri had apparent/due authority to bind Al Koot.
- v. There was no information available to FTI to suggest that PDS, Cal Bank or Donewell and/or personnel from MiDA committed fraud in relation to the Demand Guarantees.

## **Validity of the Demand Guarantees**

On the strength of all the information gathered about the purported Demand Guarantees provided by PDS as security for the transfer, the Government of Ghana is of the firm opinion that there is no valid Payment Security. Al Koot has clearly denounced and repudiated the instruments and expressed a clear intention not to be bound by any present or future obligation arising out of same. It is quite apparent that the alleged signatory of the purported Demand Guarantees, Yahaya Al Nouri, was not duly authorised by Al Koot to execute same according to the company's Delegation of Authority instrument. The product was also not one of the company's product lines.

It would be illusory for Ghana or any of the parties to the LAA and BSA to consider that a valid and enforceable Payment Security was furnished by PDS in fulfilment of an essential Condition Precedent for the Transfer to PDS. In direct response to an observation in the FTI Final Report about the possibility of Ghana prevailing in a law suit against Al Koot, we say that the people of Ghana would consider it highly irresponsible on the part of government to act on the remote possibility that a Qatari court may find that there was a valid guarantee in place when Al Koot has unequivocally repudiated same as not its act. In any event, the

Demand Guarantees are governed by the laws of Ghana, and not Qatar. Further, Qatar does not subscribe to Common Law for the doctrine of judicial precedent to be applicable.

### **Future of the Transaction with PDS**

A consideration of the future of the Transaction with PDS will have to be made within the compass of what due process requires, as well as, what the constraints of time dictate for the Government of Ghana to achieve the objects of the Compact.

It is correct to say that a proper interpretation of the relevant provisions of the LAA – Articles 2.6 and 5.11 (also applicable to the BSA) will lead to the obvious conclusion that there has been a non-occurrence of the Transfer Date stipulated under the Transaction Agreements, and consequently, Termination of the Transaction Agreements should follow as a necessary consequence provided under the Agreements.

The express denial of the existence of the Demand Guarantees submitted by PDS to ECG and the declaration by Al Koot of its intention not to be bound by any present or future legal obligations arising thereunder, amply shows that the Transaction was never backed by a valid Payment Security. The transfer to PDS thus never became effective.

Due process will thus justify a termination of the Transaction Agreements in accordance with Articles 2.6 and 5.1- a declaration of the non-occurrence of Transfer and consequently termination, or termination pursuant to Article 3.4 – failure of Company Event of Default in light of the provision in Article 3.2(l).

The provision by PDS of invalid and unenforceable Demand Guarantees, as contended by Al Koot, necessitated scrutiny by the Government of Ghana of the processes leading to the impugned act by PDS. Our investigations revealed that the local shareholders of PDS funded US\$11.5 million of the US\$12.5million payments it made to procure the demand guarantees using funds taken from operating accounts.

The actual details of the purported insurance cover for the Transaction furnished by PDS disclose further gross deception and unprofessional conduct on the part of PDS. Whereas Al Koot was produced by PDS as the primary insurer, the reality of the scheme deployed by PDS in the procurement of the invalid Demand Guarantees suggests that Al Koot was only put forward by PDS as a “front” with the actual obligation retroceded to a number of unknown and obscure insurance firms from unfamiliar jurisdictions around the world. This at best, betrayed a trivialisation of or a lack of appreciation by PDS of the seriousness of the Transaction in which about three (3) billion United States Dollars (US\$3bn) of the assets of Ghana was at stake.

The records will also show that by a letter dated 5<sup>th</sup> July, 2019, PDS forwarded to MiDA Payment Securities purportedly notarised in Qatar and stamped in Ghana for onward presentation to ECG. The Payment Securities were purportedly sealed and signed by a Naharb Bin Rashid Al Nuaimy (Lawyer and legal consultant). It stated as follows:

### *"Acknowledgment & Agreement*

*The Reinsurer indicated below has executed and delivered this Guarantee for the purpose of accepting rights granted to it and obligations imposed on it by the Guarantee, including, without limitation, the rights and obligations contained in sections 2 and 3 thereof.*

**Al Khoot Insurance & Reinsurance Company S. A. Q."**

The presentation of that allegedly notarised and stamped Payment Security by PDS to MiDA for onward presentation to ECG as a notarised and stamped Payment Security by Al Koot when in fact, same was issued by **Al Khoot**, amounted to the making of a false declaration and a misrepresentation of facts. It violates the representations and warranties by PDS contained in the LAA.

In light of all of the above, the position of PDS as a PSP in the private sector enterprise which constitutes the driving factor for the Compact, has become untenable. It is our respectful view that the Government of the United States of America should be seriously concerned about the lack of security for a transaction involving the commitment of funds of the American people as colossal as the amounts in question, as well as the general unethical and unprofessional conduct of PDS.

ECG and the Government of Ghana have no option but to terminate the LAA and BSA as well as the GSA respectively dated 3<sup>rd</sup> July, 2018.

### **Going forward**

As indicated regularly in interactions between officials from the Government of Ghana and the MCC/MiDA, Ghana is desirous of ensuring a successful completion of Compact II. As such, the Government of Ghana remains fervently dedicated to the ECG PSP Transaction and fully intends to conclude the PSP transaction within the remaining term of the Compact II Program.

Whilst recognising the prerogative of the MCC in the determination of a particular procurement method in the selection of a PSP, in view of the limited time (approximately two years) until the expiration of the Compact II Program, Ghana hereby recommends the adoption by the MCC/MiDA of a restricted tender process to replace PDS. This restricted tender process shall be undertaken timeously by fast-tracking some of the processes without compromising the integrity and transparency of the procurement processes.

## Conclusion

Government of Ghana acknowledges the challenges that privatization of ECG has faced. However, this does not in any way diminish the Government of Ghana's commitment to working with MCC on private sector participation in Ghana's energy sector. Government intends to see this process through in a manner that follows due process and protects the interest of all parties.

God Bless,

  
KEN OFORI-ATTA  
MINISTER

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