



REVISED GUIDELINES
ON
NEGOTIATION AND DRAFTING OF
CONTRACTS AND AGREEMENTS BY
GOVERNMENT PARTIES TO PREVENT
CORRUPTION, ILLICIT FINANCIAL
FLOWS AND ENSURE SUSTAINABLE
DEVELOPMENT



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For further information, please contact:

Correspondence

The Chairman

Independent Corrupt Practices and Other Related Offences Commission (ICPC)

Plot 802, Constitution Avenue

Zone A9, Central Business District, Abuja

www.icpc.gov.ng

The Independent Corrupt Practices and Other Related Offences Commission (ICPC) was established in 2000 by Act No.5 of year 2000. Its mandates include enforcement, prevention, public education and enlightenment.

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Inter-Agency Committee on Illicit Financial Flows (IFFs)

This guidelines was revised by Professor Bolaji Owasanoye, SAN, OFR, Chairman, Independent Corrupt Practices and Other Related Offences Commission (ICPC), Mrs. Adenike Lawal; with contributions from Dr. Simeon Igbinedion, Professor Jonathan Aremu, Professor Dayo Ayoade and Mrs. Patience Okala

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Preface

The Report of the High-Level Panel on Illicit Financial Flows (IFFs) from Africa, otherwise known as the Thabo Mbeki Panel revealed that the commercial sector of the economy is a major source of illicit financial flows from Africa and accounts for about 65 percent of all IFFs from the continent; yet commercial IFFs are the least understood due to the range of methods through which commercial IFFs occur. Although governments are concerned by the huge losses from IFFs, many countries lack legislation and guidelines to stem the flow. The Thabo Mbeki Panel called on countries to develop required capacities, establish and strengthen necessary institutions.

Nigeria's recent experience with award of its oil prospecting license OPL 245 and contentious investment by P&ID, both cases still subject to judicial processes, buttress the findings of the Thabo Mbeki Panel that commercial IFFs, including bogus commercial agreements, poorly negotiated agreements, unfair contracts, unrealistic tax incentives and waivers, trade mis-invoicing and profit shifting and corruption in the investment process can lead to IFFs, loss of revenue, and impede government's development agenda.

Another negative side of commercial, trade, and investment agreements, is that negotiators often naively or by deceit are made to believe that such agreements as negotiated would lead to transfer of technology, know-how, economic development and industrialization. There are instances where government negotiators agreed to odious terms without deeper reflection on how their decision can negatively impact the nation and generations yet unborn.

Cognisant of the threats that IFFs constitute to national development, peace and security, the Inter-Agency Committee¹ on Stopping Illicit Financial Flows from Nigeria comprising relevant agencies engaged experts to examine current negotiation practices and parameters in sectors highly prone to IFFs notably the extractive sector e.g. oil and gas, trade, taxation, foreign investment and the environment, and to revise the existing but not much known and largely ignored 1989 Guidelines on

¹The Inter Agency Committee on Illicit Financial Flows comprises ICPC as the Secretariat. Other members are The Presidency (OVP) CBN, FIRS, NEITI, Nigeria Customs, NFIU, NDLEA, EFCC, NBS, Federal Ministry of Justice, the Presidential Advisory Committee Against Corruption (PACAC). The Committee is chaired by the Presidency (Special Adviser to the President on Economic Matters (OVP) and co-chaired by Chairman, ICPC.

Negotiating and Drafting of Agreements² to guide line officers in various government agencies in the negotiation of commercial agreements to avoid pitfalls that lead to fraud, corruption and odious terms and IFF facilitating clauses to the disadvantage of the nation.

The principles within the guidelines were tested via different capacity building activities between 2020 and 2022 implemented by the ICPC with local and international experts as part of the agency's statutory mandate in section 6(b and c) to review systems, processes and practices of government and advise reform of those that facilitate fraud and corruption. Furthermore, the review was subjected to peer-review and have been encouraged and supported by the Chief Law Officer and chief negotiator of the nation the Honourable Attorney-General of the Federation and Minister of Justice Abubakar Malami SAN, CON. The ICPC hereby acknowledges the support of the Ford Foundation for the work of the Inter Agency Committee and its project on Illicit Financial Flows (IFFs).

Professor Bolaji Owasanoye, SAN, OFR
Chairman, ICPC
February, 2023

²Prepared under former Attorney-General of the Federation, Judge Prince Bola Ajibola SAN, KBE

Foreword

Interdependence amongst sovereign nations has continued to make the world a global village. No nation, no matter how economically and technologically advanced depends solely on itself. Human, material and socio-economic needs drive the relationship of countries and such relationships in the financial and economic space are guided by Legal Agreements, Memoranda of Understanding and such other Legal Framework aimed at protecting the interests of contracting parties. Such legal documents therefore, ought to be negotiated on behalf of state parties by representatives and experts with requisite knowledge of the subject matters of the intended engagement between nations or nations and multi-national groups in order to achieve intended development objectives and guide against failed aspirations. More importantly the legal instruments should not result in capital flight directly or indirectly, deliberate or ignorant via tax evasion, illicit financial flows, trade mispricing, money laundering and other vices the ultimate of which is terrorism financing.

In order to avoid such negative outcomes, developing a nationally acceptable framework on Negotiation and Drafting of Contract and Agreements by Government Parties becomes imperative specially to avoid situations of the past where Nigerian people lost huge sums of money due to poor negotiation and drafting of legal documents with binding effect. In this regard, I was delighted to encourage and support a review of the Contract Negotiation Guidelines introduced about 35 years ago under my predecessor in office HE Judge Prince Bola Ajibola SAN. Whilst the current update may not have envisaged all practical situations, it calls attention to a major factor of capital flight from Nigeria viz Illicit Financial Flows (IFFs) and it is without doubt a formidable tool for negotiators and drafters of government agreements in their day to day work of ensuring that Nigeria achieves value for money and sustainable economic development.

Abubakar Malami SAN, CON

Honourable Attorney-General of the Federation and Minister of Justice
February, 2023

Acronyms

AfCFTA	African Continental Free Trade Area
BITs	Bilateral Investment Treaties
CAMA	Companies and Allied Matters Act
CBN	Central Bank of Nigeria
CCB	Code of Conduct Bureau
ECOWAS	Economic Community of West African States
ENFP	Enlarged National Focal Point on Trade
EPA	Environmental Protection Agency
EU	European Union
FDI	Direct Foreign Investment
FIRS	Federal Inland Revenue Service
ICPC	Independent Corrupt Practices and Other Related Offences Commission
IFFs	Illicit Financial Flows
IAs	International Investment Agreements
ISDS	Investor-State Dispute Settlement
MNCs	Multinational Corporations
NOTN	Nigerian Office for Trade Negotiation
OECD	Organisation for Economic Cooperation and Development
OPL 245	Oil Prospecting Licence 245 (defined deep-water offshore area)
PI & D	Process and Industrial Development Company Limited
RIBS	Responsive, Inclusive, Balanced and Sustainable
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

Part I

**Revised Guidelines on the Negotiation and
Drafting of Contracts and Agreements by
Government Parties to Prevent Corruption,
Illicit Financial Flows (IFFs) and Ensure
Sustainable Development**

1.0 INTRODUCTION

The Federal Government of Nigeria is involved in Contract Agreement worth enormous sums of money especially in foreign exchange. Conclusion of contract, which encompasses a lot of negotiations between the Government and Foreign Investors, often ends with the imposition of contractual obligations on both sides. Nigeria, being a developing country, is sometimes at a disadvantage in her dealings with these corporations. It is therefore necessary to provide a set of guidelines to govern all negotiations as well as contracts and Agreements for and on behalf of the Government. For the avoidance of doubt, these guidelines are applicable to contractual Agreements between the Federal Government and Multinational Corporations (MNCs) and all companies registered under Companies and Allied Matters Act (CAMA).

1.1 PURPOSE OF THE GUIDELINES

These guidelines are provided for parties that will represent the Federal Government of Nigeria in negotiations and drafting of Agreements as well as highlighting some of the common problems encountered in the process of negotiating contracts generally.

2.0 PREPARATION FOR NEGOTIATION

Negotiation refers to the prediction of what an Agreement will later turn out to be. It is therefore vital that adequate preparation is made before embarking on negotiation.

There should be a preliminary meeting of all members of the negotiation Team in order to familiarise themselves with the policy direction of government on the subject and map out the Team's negotiating strategies. These strategies should include:

- (a) Identification of issues to be negotiated;
- (b) Fall back and bottom-line positions on those issues; and
- (c) Identification of person(s) to articulate the view on specific issues.

2.1 IDENTIFICATION OF THE SUBJECT MATTER

At the preparation stage, it is important for the subject matter to be clearly identified. This should include the formation of Project and

Technical Teams to set out in clear terms the objectives and goals of the project. Matters to be identified in advance should include:

- (i) The comparative benefits of the project in terms of the overall development of the country;
- (ii) Project capacity and utilization;
- (iii) The selection of appropriate technology;
- (iv) National or local content;
- (v) Sources of funding;
- (vi) Current loan or debt profile; and
- (vii) The availability or otherwise of competent local personnel.

This exercise could be carried out in-house.

2.2 COMPOSITION OF THE TEAM

The Negotiation Team must be selected on the basis of expertise and experience relevant to the project. The Team should basically consist of between 3-10 members, depending on the scope and size of the project. The fewer the members in the Team the better. In all cases, the Negotiation Team should comprise at least the following:

- (i) Project, Subject Matter and Technical Experts;
- (ii) Financial and Economic Experts; and
- (iii) Legal Experts.

2.3 TEAM LEADER

It is important that the Team Leader for the negotiation is well informed on the subject in respect of which negotiation is to take place. However, he needs not be one of the experts mentioned above. He should be chosen on the basis of strong character, calm temperament and should have the ability to manage people and resources, among other things.

2.4 TECHNICAL LEAD

It is important to have a Technical Lead for the negotiation. He should be a subject matter expert or one of the experts listed in 2.2 above.

2.5 TEAM DISCIPLINE

There should be Team discipline, which should include regularity of attendance, punctuality, alertness and participation in line with the Team's overall strategy.

2.6 INFORMATION ON THE OTHER PARTY AND ITS NEGOTIATORS

The Team should be well informed about the other Party. Background research to cover such information should include Nationality and Ownership Structure of the party and its operations (home and abroad), financial base, technical capacity for the type of project, past performances in similar and other projects and its political and/or ideological affiliation (if any).

3.0 RECOMMENDATIONS FOR NEGOTIATORS ON SPECIFIC AGREEMENTS

Negotiation Team should consider the following recommendations on specific Agreements:

3.1 TRADE AGREEMENTS

- (i). To prepare appropriate “Trade Policy Development Strategy” that agrees with current development plan.
- (ii). To review the existing Enlarged National Focal Point on Trade Matters (ENFP) of the country in line with the emerging realities.
- (iii). To put in place effective and efficient trade negotiation strategy that recognizes the multiplicity of trading Agreements.
- (iv). To establish Nigerian Office for Trade Negotiation (NOTN) and staff it with competent negotiators.
- (v). To secure the buy-in of the relevant stakeholders through sensitization on future trade negotiations.
- (vi). To review the country's position in the existing economic integrations with bodies such as Economic Community of West African States (ECOWAS), United States Environmental Protection Agency (EPA) with EU, African Continental Free Trade Area (AfCFTA) and World Trade Organization (WTO). (vii). To domesticate the AfCFTA Treaty in line with **Section 12 (1) of the Constitution of the Federal Republic of Nigeria 1999.**

3.2 ENVIRONMENT AGREEMENTS

- (i) Negotiation Team should always include Lawyers with specific knowledge of the thematic areas under consideration.
- (ii) Government should give capacity building to relevant

stakeholders on environmental issues in respect of multilateral/bilateral environmental Agreements.

3.3 INVESTMENT AGREEMENTS

Negotiation Team should:

- (i) Continue to employ a model that attracts Responsive, Inclusive, Balanced and Sustainable (RIBS) investments.
- (ii) Always include Lawyers with intimate knowledge of International Investment Agreements (IIAs).
- (iii) Be a consistent standing Team to build professional competence.
- (iv) Always conduct adequate background research on multilateral and Bilateral Investment Treaties (BITs) signed by the prospective treaty partners in order to acquaint itself with the treaty history of such partners and better prepare itself for the negotiations.
- (v) Identify Nigeria's investment priorities and red lines that negotiators should not cross.
- (vi) Periodically revise Nigeria's International Investment Agreement model to make it more responsive to the attraction of qualitative investments.
- (vii) Be exposed to periodic capacity building and technical support from renowned development organisations such as UNCTAD to enable it keep up with evolving developments in investment regulation and policymaking.
- (viii) Ensure that the agreement contains such clauses as definition of terms, training and technical assistance, grant of rights, transfer of licence, technology payments, confidentiality, duration of Agreements, territorial restraints on licences, best endeavour covenant, promotion and publicity, supply of machinery components and materials, tie-in provisions, warranty and performance test, post-expiry restraint use, access to improvement, government approval, termination of agreement, jurisdiction, controlling language, authorization and signatures, and renegotiation clause.

3.4 TAX AGREEMENTS

- (i) Negotiation Team should insert in the agreement that where there is double taxation with the Government of any country, such can only have effect upon ratification by the National Assembly pursuant to Section 12(1) of the Constitution of the

- Federal Republic of Nigeria 1999.
- (ii) The Team should issue Guidelines and Information Circulars to clarify any issues that may arise in the application of Tax Agreements.
 - (iii) Negotiation Team must have intimate knowledge of the provisions of Tax Laws and Practices in both countries entering into Agreements.
 - (iv) Particular attention should be paid to the Articles on Permanent Establishment, Withholding Tax, Shipping and Airline and Technical Services.

3.5 NATURAL RESOURCE AGREEMENTS

- (i) Negotiation Team must be aware of Government's aspirations and goals for the natural resource sector. This must drive its negotiation objectives and be reflected in negotiated contract.
- (ii) Negotiation Team must be knowledgeable about contractual terms in competing jurisdictions, model contracts, and general international practice, for example, OECD Guiding Principles for Durable Extractive Contracts.
- (iii) Stabilization/renegotiation clauses must be carefully negotiated to ensure they do not impinge on national legal, fiscal and economic interests. Also, renegotiations should be periodic and trigger consequences if it does not occur within a reasonable time.
- (iv) Excess profits/windfall profits tax should be imposed on natural resources companies in the event of a sudden hike in commodity prices.
- (v) Negotiation Team must balance the need for foreign direct investment (FDI) against extracting maximum economic value for the nation.

4.0 EVALUATION AND PROPOSAL

The Negotiation Team is advised to adhere strictly to the relevant provisions of the Public Procurement Act, 2007 and the Local Content Act and other extant Laws on Bid Proposal and Evaluation.

5.0 PERFORMANCE

Performance is a very important aspect of any contract as the beneficiary expects to receive services, materials, etc. that he contracted for and within the time limit stipulated in the contracts.

5.1 CONTRACT GUARANTEE

Contract guarantee is mandatory where mobilization fee is paid. The Negotiation Team should familiarize itself with Section 36 of the Public Procurement Act, 2007.

6.0 PREVENTION OF ILLICIT FINANCIAL FLOWS

Illicit Financial Flows (IFFs) remains one of the challenges facing developing countries including Nigeria. Transfer pricing, trade mis-invoicing, trade mispricing, tax evasion and clauses that promote IFFs are some of the ways IFFs is perpetrated. It is estimated that Nigeria loses between \$15-18 billion annually to IFFs.

Therefore, Negotiation Team and Legal Draftsmen should as a matter of duty prevent IFFs in all ramifications during negotiation and drafting of contracts for and on behalf of the Federal Government.

Negotiation Team should be particularly observant during negotiations in order to detect clauses that facilitate IFFs as this constitutes the principal method by which Multinational Corporations siphon money out of Contracting Developing Countries.

For Multinational Corporations, the objectives of IFFs are as follows:

- (a) To minimize global taxes on profit;
- (b) To avoid royalties and customs duties;
- (c) To avoid exchange controls on profit/dividend capital repatriation; and
- (d) To limit political risks.

Illicit Financial Flows may also be perpetrated through terms and conditions of contract, credit facilities, discounts and rebates. The following methods may be adopted in dealing with problems of IFFs:

6.1 CONTRACTUAL PROVISIONS

Negotiation Team should insist on the inclusion of an affiliate transactions clause in the contract by making it an IFF where a company buys for less or more the prevailing market price from an affiliate.

6.2 ARM'S LENGTH TRANSACTION

Any transaction with an affiliate must be in the "ordinary course of business" and at arm's length basis regarding terms and conditions, price, credit, specifications, delivery date, etc. as will apply between unrelated parties. An affiliate may be any Shareholder, Director, Officer, Employee or any other person, Firm or Corporation, directly or indirectly controlling or indirectly controlled by or in common control with the company with which the contract is signed.

6.3 LAWS AND REGULATIONS

Tax Laws which allow for the reflection of fair market prices will help to reduce IFFs.

6.4 SELF-REPORTING

The Contractor should be required to report affiliate transactions and failure to do so shall amount to a material breach which may result in the forfeiture of assets.

It is not necessary that every affiliate transaction should be reported. However, a threshold amount should be fixed beyond which there should be an obligation by the Contractor to report any affiliate transaction.

Provisions should be drafted to make reports available quarterly

or annually for review by the Project Department. The report must always be certified by the most Senior Member of the Multinational Corporation or the Chief Accountant.

6.5 **AFFILIATE TRANSACTIONS**

The contract should also provide that in any series of transactions with any affiliate involving substantial sums the prior approval of the government party should be mandatory.

6.6 **MONITORING UNIT**

It is recommended that a small Monitoring Unit should be established in the Central Bank of Nigeria (CBN) or at the Federal Inland Revenue Service (FIRS) to monitor large exporters and importers. The functions of the unit should, inter alia, include strict monitoring of cash flows of Multinational Corporations rather than mere examination of profit to prevent IFFs.

7.0 **TRANSFER OF AND PAYMENT FOR TECHNOLOGY**

“Technology” has been defined as:

- (i) Advanced systematic knowledge used for practical purposes especially in industry, the application of process or rendering of service;
- (ii) Machinery and equipment developed from the application of scientific knowledge; or
- (iii) A branch of knowledge dealing with engineering or applied sciences.

Negotiation Team should familiarize itself with the provisions of **Section 4 of National Office for Technology Acquisition and Promotion (NOTAP) Act, Cap N65, Laws of the Federation of Nigeria (LFN) 2004** on Technology Acquisition and Promotion in Nigeria. However, it should be guided by **Section 6(2) of NOTAP** which provides for Agreements/contracts that should not be registered. Such provision is also contained in **Section 6(2) of National Office of Industrial Property (NCIP) Act No. 70 of 1979**.

7.1 **INAPPROPRIATE TECHNOLOGY**

Care must be taken that inappropriate, obsolete or non-

competitive technology is not imported. Also, onerous terms and conditions should not be imposed on technology recipients by way of over-pricing and restrictive business practices, imposition of expatriate personnel chosen by the suppliers and unnecessary labour cost.

7.2 TECHNOLOGY TRANSFER PROVISIONS AND NATIONAL INTEREST

There should be clear and specific provisions on technology transfer. It is therefore necessary to make provisions for transfer on fair terms and in line with national interest.

7.3 DURATION OF PAYMENT FOR TECHNOLOGY

There is also the important question of excessive duration of transfer transaction which prolongs technology payments to the suppliers and, in many cases, ends up tying the recipient to outdated technology, apart from deterring absorption and adoption of the transferred technology.

7.4 TRAINING OF LOCAL STAFF AND TECHNICAL ASSISTANCE

Any contract for the transfer of technology should contain clear and detailed provisions on the training of local staff and the rendering of technical assistance. The local staff should be adequately prepared to take over the operation of the project at the end of the contract period. In appropriate cases, there is the need to make payments to the foreign partner conditional on the foreign partner's performance or commitment relating to staff training and technical assistance.

7.5 PURCHASE OF MACHINERY OR FACILITY

Where the purchase or installation of a machinery or facility is the subject matter of negotiations, the machinery or facility must be tested for a reasonable minimum time period. Thereafter, the Owner/Purchaser should accept the machinery or facility provisionally for 12 months during which period the Contractor is required to provide technical assistance. During the 12-month period, the machinery or facility must be operated at the contracted levels of performance before its final acceptance by

the Owner/Purchaser.

8.0 STAFF TRAINING AND TECHNICAL ASSISTANCE PROGRAMME

Government contracts should be negotiated and drafted so as to describe the training and technical assistance provisions with specificity. The Negotiation Team must ensure that a separate 13 document containing details of the staff training and technical assistance programme is incorporated and annexed to the Agreement.

8.1 THE FOLLOWING RELEVANT QUESTIONS PROVIDE USEFUL GUIDE

- a. How many workers are to be trained?
- b. Where will the training take place?
- c. What level of skill must any particular group of workers possess?
- d. How many hours of training will the workers undergo?
- e. In what language and at what proficiency level? (As much as possible, this should be in English Language).
- f. How many workers does a similar plant previously built by the Contractor or similar require?
- g. What is the general pattern of employee turnover?

8.2 THE FOLLOWING FACTORS SHOULD BE TAKEN INTO CONSIDERATION

- (i) In the case of on-the-job-training, there should always be more than one person to be trained for a post;
- (ii) Training at other Multinational Corporations projects;
- (iv) Establishment of Local Vocational Training Centre;
- (v) Scholarship and Fellowship Programmes;
- (vi) Specific training programme requirements keyed to localization schedule;
- (vii) "Wastage" and non-compliance;
- (viii) Obtaining from the Multinational Corporations guarantee for the training of the local staff; and
- (ix) Provision for the replacement of expatriate personnel who are not keen on the training of local personnel.

9.0 OWNERSHIP

The Nigerian Enterprises Promotion Act 1977 has been repealed and replaced with the **Nigerian Investment Promotion Commission Act, Cap N117, LFN 2004**. The negotiation Team needs to be familiar with 14 the provisions of this Act particularly as it relates to Ownership of Enterprises.

10.0 CONTROL AND MONITORING

10.1 PROBLEMS OF CONTROL

It is difficult for any owner to maintain full control of a project managed or supervised by a Foreign Contractor, since in most cases the Owner/Government may lack the Technical Expertise necessary to see the project through to successful completion. However, the acquisition of a majority equity position confers upon the Government the right to nominate a majority of the members of the Governing Board or Committee. But such right may not imply effective government control.

10.2 NOMINATION OF BOARD MEMBERS

In appointing government nominees on company board, emphasis should be placed on expertise in order to reduce the imbalance in the boardroom where Multinational Corporations' representatives are invariably experts in their own fields.

10.3 APPOINTMENT TO EXECUTIVE POSITIONS

Negotiation Team must ensure that some key Executive Positions in the Joint Venture are reserved for Nigerians who should serve as Members of the Board in the project. However, the Team should note that the actual responsibilities and powers conferred by the position are more important than the job title.

10.4 APPOINTMENT TO EXPATRIATE POSITIONS

There is the need to confirm the availability or otherwise of expertise in Nigeria before exploring the option of hiring foreign Technical Staff directly.

10.5 INSPECTION

There should be a provision allowing any of the parties to undertake inspection of the Project site at any time during the subsistence of the project. Any person authorized by the 15 shareholders should carry out inspection. The agreement must provide that the Management / Multinational Corporation should make their staff available for inspection.

10.6 OTHER MEANS OF CONTROL AND MONITORING

10.6.1 ANNUAL BUDGET

The contractual terms and conditions should provide for annual budget which will break down all the costs to the smallest expenditure to be submitted to the governing board within 60 days before the commencement of any financial year. The relevant documents are:

- (i) Budget approved for the previous years;
- (ii) Actual budget; and
- (iii) Budget proposed for the next year.

10.6.2 REPORTS

A well negotiated and drafted agreement should provide for the rendering of the following reports:

10.6.3 MONTHLY REPORT

There is need for monthly management report to show the financials and other necessary explanations. There must be a clause providing for this in the Agreement. In terms of mutually acceptable books, government could request that any monthly management report sent to home office be simultaneously sent to all shareholders. This will help to reduce the phenomenon of Illicit Financial Flows (IFFs) which are mainly for the benefit of the Multinational Corporations network rather than for the project.

10.6.4 QUARTERLY FINANCIALS

These should include:

- (a) Balance sheets; and 16
- (b) Sources and application of funds. Furthermore, the reports should

be filed within 30 days from the end of each quarter.

The relevant documents are:

- (a) Budget proposed for the previous quarter;
- (b) Actual budget; and
- (c) Budget proposed for the next quarter.

10.6.5 ANNUAL FINANCIALS

These should be available within 90 days or preferably within 60 days of the end of each financial year.

10.6.6 PRODUCTION REPORT

There should be quarterly production report which must be made available within 30 days of the end of each quarter.

10.6.7 RECORD KEEPING

The agreement should provide for the keeping of all books of accounts and records and the establishment of a Centralised Record System.

10.6.8 THE APPOINTMENT OF INDEPENDENT AUDITORS

There should be a provision in the agreement proscribing the appointment of an Accounting Firm retained by any affiliate of the partner as the Independent Auditor of the Project.

11.0 MANAGEMENT CONTRACTS

Negotiation Team must clarify and agree on the following issues relating to management fees:

- (i) Incentive fees should be linked to net profit;
- (ii) Where basic fee is payable, salaries and other entitlement of the expatriate staff should be the responsibility of the Management Contractor;
- (iii) Where Management Contractor insists that expatriate staff should be paid directly from project account, then the basic fee should be a fixed amount as opposed to a percentage of the gross 17 operating profit. In any case, the amount payable should reflect the services rendered similar to that of recruitment agencies;
- (iv) Where the salaries and other entitlements of the expatriate staff

are chargeable to the projects, independent of the management fee, such expatriate staff should be made to travel on economy class provided that senior expatriate staff may travel on business class; and

- (v) Where fee is chargeable for technical assistance under any project, there should be no further payment of management fee.

11.1 EXTERNAL INVESTMENT AND FINANCING CONTRACTS

The Negotiation Team should:

- (i) Determine projects suited for external investment and financing based on statutory obligations and government development objectives.
- (ii) Be familiar with the current loan profile as well as Government Borrowing Guidelines as issued by the Debt Management Office as well as current international financing and commercial law.
- (iii) Gather background information on actual and potential investment financing partners before negotiation. Such information should indicate the legal and regulatory environment of the other party, nature and types of past Agreements with whom, status of projects covered to determine success or failure, reputation in the market, testimonies of previous partners or anecdotal information from independent sources.
- (iv) Develop a Best Alternative to Negotiated Agreement (BATNA) in advance of every negotiation.
- (v) Ensure that recurrent obligations in such Agreements are captured using standard clauses, for example, obligations on transparency, accountability, reporting or returns to lenders, etc.
- (vi) Make sure that there is deployment of information technology infrastructure for arrangement and monitoring of such Agreements with variable interest and irrational exchange rate movement.

12.0 SPECIAL CLAUSES IN CONTRACTS

12.1 MOBILISATION

Mobilization is an advance of a certain percentage of the contract sum paid to the contractor to enable it meet up with the commencement of work. 18 The Negotiation Team should familiarize itself with the provisions of Section 36 of the Public Procurement Act, 2007 and be

guided by national interest and international best practices for contracts not governed by the Act. Where the payment of mobilisation is necessary, the Negotiation Team must ensure that the Project is large and capital-intensive, for example, a construction project. Also, the Team should make sure that the Contractor provides adequate bank guarantee as a precondition for receiving the mobilisation. Finally, the Negotiation Team should ensure that, in view of the need to encourage the development of local competence, capacity and technology, payment of mobilisation is restricted to wholly-owned indigenous construction firms.

12.2 VARIATION

Every variation should be covered by a Supplementary Contract Award and Contract Agreement regardless of the percentage increase or decrease of the contract sum. This will ensure clarity and transparency.

12.3 ESCALATION

This is an increase over the original contract sum at the time of tendering brought about by factors such as variation in prices, of materials or labour rate by acts of government or any increase in scope of work. No escalation clause should be included in any contract document of the Federal Government or its parastatals since such clause has been covered by such contract terms ad fluctuation, variation and demurrage.

12.4 DEMURRAGE ON SITE

12.4.1 This is sometimes wrongly defined as charges arising from plants and equipment being kept at the work site without having to use them during the period of execution or the project.

12.4.2 Demurrage cost should not be paid to any contractor, who left his plants or equipment on the project site knowing full well that the project has been suspended.

12.4.3 The term '*demurrage*' should be confined to the ports only and not extended to construction industries since in most of the contract Agreements there is usually a provision for penalties for nonperformance.

12.4.4 Payment for demurrage arising from the ports should be that of

the party responsible for the delay.

12.5 FLUCTUATION

12.5.1 Fluctuation refers to a change in basic rates for labour and materials due to changes in the market prices between the time of contract and the period of completion.

12.5.2 Fluctuation should be limited to radical and unforeseeable changes that would render the performance of the contract based on existing rate inequitable. Fluctuation should be allowed in contracts lasting more than 12 weeks.

13.0 FURTHER SPECIAL CLAUSES IN CONTRACTS

13.1 FORCE MAJEURE

No Force Majeure clause should apply to situations that can be reasonably foreseen or avoided. The wording of the provision should address at least:

- a) The definition of events falling within the coverage of the Clause;
- b) The definition of the rights of the parties in the event a force majeure occurs; and
- c) Change in law, rules and regulations, and government policies should not be regarded as force majeure. Consequences of Force Majeure should be reciprocal.

13.2 INDEMNITY CLAUSES

The negotiation Team should, where appropriate, ensure that an indemnity clause is inserted in the agreement.

13.3 LIABILITIES

The liability of Operators or Contractors should be limited to instances of “**Gross Negligence**” and not all acts of negligence and omissions.

13.4 APPLICABLE LAW

In negotiating applicable law clauses, there should be no limitation in the choice of law. As a general rule, the applicable law in any contract should be Nigerian Law. However, where the Contract is for mere purchase of goods, installation, provision of financial and off-shore services, Foreign

Law may apply.

13.5 TERMINATION

The contract should specify clearly the circumstances in which the contract may be terminated and the consequences thereof.

13.6 ASSIGNMENT AND TRANSFER

Provisions should be made for assignment and transfer of rights and obligations with the prior consent of the other party.

13.7 PROFESSIONAL TRAINING ON DISPUTES SETTLEMENT

There should be capacity building for relevant professionals in the management of Investor-State Dispute Settlement (ISDS) and other relevant areas of interest. Negotiation Team should be conversant with relevant policies and best practice, use subject matter experts to help guide practice as well as employ mediation before issues escalate to disputes, and prioritize dispute prevention and de-escalation.

13.8 SETTLEMENT OF DISPUTES

There should be a provision that where disputes are not settled amicably, they should be referred to arbitration. The place of arbitration should be Nigeria except where a substantial part of the Contract is to be performed outside the country or the project is outside the country.

14.0 MORE SPECIAL CLAUSES

14.1 INSURANCE

The Negotiation Team should request and negotiate for the type of insurance best suited to each Agreement/Contract to be negotiated, for example, Property Insurance, Fire Insurance, Liability Insurance, etc.

14.2 ANTI-CORRUPTION CLAUSE

In line with global best practices, the negotiation Team and drafters should ensure that the Anti-Corruption Clause is incorporated in such negotiations and Agreements. The wording should address the following:

- (i) Broad coverage of corrupt, fraudulent, coercive or collusive

- behaviour or practice;
- (ii) Consequence(s) of such unlawful behaviour, for example, “the government (agency) may cancel or terminate the contract or take any appropriate corrective action.”

SAMPLE ANTI-CORRUPTION CLAUSE:

The Contractor hereby represents that it has not promised, made or given and undertakes not to promise, make or give any gratification, commission, bribe or similar reward in any form or manner in connection with or as a result of the award or performance of this contract.

The Contractor shall declare its commissioned Agents, if any.

In the event that it is proved that such gratification or reward was promised, made or given, the contract shall be terminated at no cost whatsoever and without prior notice to the Contractor notwithstanding any provision to the contrary contained in this Agreement and without prejudice to any other remedy or action which may be available under this Agreement.

14.3 APPROVAL AND AUTHORITY TO EXECUTE

Appropriate approval of negotiated contract and authority to execute the negotiated Agreement is key to ensuring validity of such contracts.

14.4 EXPROPRIATION CLAUSE

Remedies for acts of expropriation which may lead to a breach of contract should be incorporated in the negotiation and contract drafting.

14.5 LABOUR AND HUMAN RIGHTS PROTECTION CLAUSE

Minimum standards of environmental, labour and human rights protection should be negotiated and incorporated into the contract.

14.6 CORPORATE SOCIAL RESPONSIBILITY CLAUSE

The Negotiation Team should be familiar with government's corporate social responsibility policies and ensure that they are well incorporated

into the contract.

14.7 ENVIRONMENTAL IMPACT ASSESSMENT CLAUSE

For any contract which could have negative impact on the environment or host communities, environmental impact assessment should be incorporated pursuant to Environmental Impact Assessment Act 2004.

15.0 POST-NEGOTIATION ACTIVITIES

The closure or conclusion of Negotiation crystallizes into a Final Agreement. This is followed by the Post-Negotiation/Agreement Activities which are geared towards an effective realisation of the goals and objectives of the Agreement.

Focus should be on documentation and compliance by the Negotiation Team. In order to assist the corporation, stay within the terms of myriad Agreements signed by it, extracts from the Agreement must be made available to its relevant Unit/Department/Project for which the Agreements are made for the purpose of informing them about their special or specific obligations in the Agreement. The following practices are recommended:

- (i) Every agreement successfully negotiated should be followed by an in-house draft prepared by the Negotiation Team no matter how brief it may be. The draft should as much as possible cover the obligations of both parties.
- (ii) Preparing a draft helps to build the capacity of in-house Lawyers whose drafts may be compared to the final version as a learning tool. The biggest advantage is that this practice forces in-house Lawyers to think through a process that would have otherwise entirely depended on External Advisors.
- (iii) Every successfully negotiated and signed Agreement should be reduced into tabular information/compliance matrix by the Legal Department. The matrix should cover:
 - a. Name of the Parties
 - b. Date and Duration of Agreement
 - c. Project involved
 - d. Principal sum and Nature/Rate of Interest (fixed or floating)
 - e. Repayment terms (summary)
 - f. Special Obligations (summary, if any)
 - g. Other Party Special Obligations (summary, if any)
 - h. Reporting Obligation (if any)
 - i. Special Clauses (if any)
 - j. Remarks, that is, Observation of Lawyers on the agreement.

- (iv) The Legal Department / Negotiation Team should design a feedback / evaluation template for each project / financing agreement. The template is a simple evaluation by the unit/department / subsidiary that is implementing specific projects to inform the Legal Department on the status of the project, that is, whether it is running according to the anticipation of clauses in the agreement or otherwise.
- (v) The objective is to enable the Negotiation Team note clauses that are not working as anticipated for whatever reason. The Legal Department will create a databank of “failed clauses” with a short note on why the clauses failed in the particular agreement or project. The databank serves as background information and source material in preparation for future Agreements.
- (vi) The Legal Department/Negotiation Team will share the information and note the fact in order to avoid similar pitfalls in future Agreements. Preparation for future negotiation must be preceded by a review of the databank once it is in place.
- (vii) Depending on the nature of the project, Negotiation Team members who are professionals in areas – such as Engineering, Architecture, or Project Management – related to the project could be assigned to always liaise with the other party to ensure the execution of projects according to specifications.

16.0 CONCLUSION

The Negotiation Team must ensure that the final agreement reflects the terms that were discussed and agreed during the negotiations. In the event that any of the provisions of this Agreement is later shown or determined to be invalid, ineffective or unenforceable, then such invalidity, ineffectiveness or unenforceability shall not cause invalidity, ineffectiveness or unenforceability of the Agreement as a whole. In such event both parties shall undertake without undue delay to subsequently clarify any such provision or replace after mutual agreement such invalid, ineffective or unenforceable provision of the Agreement by a new provision that is not inconsistent with the laws and regulations of the Federal Republic of Nigeria.

Part 2

Ethical Standards

The Negotiation Team must:

- a) Consist of persons who are patriotic, reputable and uncompromisable.
- b) Ensure that all pages of the Contract Agreement are properly initialed and signed and no insertion of blank pages should be allowed.
- c) Make sure there is full disclosure of all Contract Agreements.
- d) Ensure that re-negotiation clauses form part of the contract Agreements, where necessary.
- e) Avoid ambiguous clauses in all Agreements.
- f) Avoid situations where personal interest will conflict with assigned duties and responsibilities.
- g) Reject a gift in cash or kind from the other party.
- h) Avoid unsolicited invitations from the other party.
- i) Avoid unnecessary socializing (entertainment) with the other party.
- j) Refuse to accept a loan or any benefit of whatever nature from the other party.
- k) Not do or direct to be done in abuse of office any arbitrary act knowing that such act is unlawful or contrary to any government policy.
- l) When connected with project execution avoid taking up any appointment either as servant, agent, or consultant of the other party to the contract during the period of the project and within 24 months of his leaving the services of the government.

Any allegation of breach or non-compliance with the above against a member of the Negotiation Team shall be reported to the Independent Corrupt Practices and Other Related Offences Commission (ICPC), Code of Conduct Bureau, (CCB) and other relevant Law Enforcement Agencies.

