

TANZANIAN, RWANDAN, AND UGANDAN REPRESENTATIVES EXAMINE CONTRACT NEGOTIATIONS AND PROJECT MANAGEMENT

DELEGATES FROM THE TANZANIA ELECTRIC SUPPLY COMPANY LTD, TANZANIA PETROLEUM DEVELOPMENT CORPORATION, TANZANIAN MINISTRY OF FINANCE AND PLANNING, RWANDA ENERGY GROUP, UGANDA ELECTRICITY TRANSMISSION COMPANY LTD, ENERGY AND WATER UTILITIES REGULATORY AUTHORITY, OFFICE OF THE TREASURY REGISTRAR, AND OFFICE OF THE ATTORNEY GENERAL CONVENE TO DISCUSS PROJECT AND CONTRACT MANAGEMENT

ARUSHA, TANZANIA – Supported by the U.S. Agency for International Development (USAID), participants representing the various regional agencies and companies charged with implementing and regulating electricity generation, transmission, and distribution gathered for a week-long workshop. They discussed drafting and negotiating contracts, project management, dispute resolution, and procurement best practices. Participants included lawyers, project managers, financial analysts, and engineers from Tanzania’s Office of the Attorney General, Tanzania Electric Supply Company Ltd. (TANESCO), Tanzania Petroleum Development Corporation (TPDC), Tanzanian Ministry of Finance and Planning, Rwanda Energy Group (EDCL/EUCL), Uganda Electricity Transmission Company Ltd (UETCL), Energy and Water Utilities Regulatory Authority (EWURA), Office of the Treasury Registrar. The workshop was conducted by the U.S. Energy Association (USEA) as part of the Power Africa initiative.



Participants gathered in Arusha, Tanzania for a five-day workshop

BACKGROUND: USAID's Power Africa and the Nile Equatorial Lakes Subsidiary Action Plan (NELSAP)

Tanzania, Rwanda, and Uganda are part of USAID's Power Africa initiative, a multi-partner initiative launched in the summer of 2013, which aims at increasing electricity access in sub-Saharan Africa by 30,000 MW. All three countries are also part of the Nile Equatorial Lakes Subsidiary Action Plan (NELSAP) program which aims to promote investments in power development and trade, river basin management and development, agricultural trade productivity, fisheries, and watershed management.

EAST AFRICA'S ELECTRICITY MARKET

Tanzania has a vast potential of energy sources from natural gas deposits to hydropower, geothermal, biomass, coal, solar, and wind. Currently, Tanzania has 1,591 MW of installed grid generation capacity and approximately 76 MW in mini-grid systems to serve its population of over 51 million people. And while these numbers are continuously increasing, electricity production meets less than 15 percent of the demand per year and only 30 percent of the population is connected to the grid.

Uganda currently has 850 Megawatts (MW) of installed capacity (with effective generation of approximately 710 MW), of which approximately 75% is made up of hydropower, 12% thermal, and 3% other generating sources. The Government of Uganda is building additional large hydropower facilities, such as the 600 MW Karuma hydro and the 183 MW Isimba Falls hydro project. Uganda has approximately 1500 kilometers of transmission lines (over 33kV), which the government aims to double; there are also plans to upgrade existing transmission lines and develop a 220kV "ring" around Lake Victoria in conjunction with Kenya and Tanzania.

Rwanda is endowed with a number of natural resources, including hydro, solar, and methane gas, and has plans to generate 563 megawatts (MW) of electric power from these sources. However, it currently only has about 186 MW of installed generation capacity to serve a population of more than 10.5 million people. The Government of Rwanda, under its latest Economic Development and Poverty Reduction Strategy, envisions transitioning from a developing country to a middle-income country by 2020. As a result, Rwanda's government is working to target 100 percent access to electricity by 2020.

PRIMARY EXCHANGE OBJECTIVES

Within this energy context, USAID requested a workshop addressing the negotiation of contracts and project management. Three international energy attorneys from the Hogan Lovells law firm in Dubai served as the workshop's speakers, in addition to a speaker from the Midcontinent Independent System Operator (MISO) and an independent consultant on cyber security. The workshop was part of a series of capacity-building exchanges intended to support the various agencies and companies in the East Africa region charged with planning, implementing, and regulating, the exploration, production, transmission, and distribution of energy resources. Topics discussed included:

- RFP language to improve bid quality,
- Prequalification of bidders to legally remove underbids,
- Power Purchase Agreements,
- Contract language to improve compliance,
- Communication with contractors,
- Risk management and allocation of risk,
- Creation of a clearly defined change order process to manage and evaluate change orders,
- Creation of contract notice/documentation procedures to manage contractual obligations and key documents,
- Managing schedules,
- Liquidated damages and notice deadlines,
- Preventing scope creep, and
- Dispute resolution procedures and other remedies for non-performance.

SUMMARY OF KEY ISSUES/DISCUSSIONS

The following are the key topics addressed in the five-day workshop:

1. Contract Negotiation

International energy lawyers, Chris Cross and Craig Brook of Hogan Lovells in Dubai, kicked off the workshop explaining that contract negotiation is the most effective risk management tool to deal with a variety of risk factors, such as: counterparty risk, payment risk, political interference risk, local law risk, currency risk, technical risk, enforceability risk, environmental risk, etc. They emphasized that “your risk is some else’s reward” so the best way to mitigate risk is to look for a win-win solution and write it into the contract. It is important to ensure that the responsibility for each risk is passed on to the party best equipped to manage the risk. That said it is also important to hire your legal, commercial, and technical teams before the completion of the project because they should be involved during the building of the project. Cross and Brook advised that when entering into negotiation, you should:

- Know your walk-away conditions - this will be the lowest price, term, or deliverable that you will accept;
- Use the power of silence to your advantage, however never give the silent treatment because it will weaken your position;
- Use anger as a calculated act, but never as a reaction;
- Be willing to compromise - negotiation is not one-sided, each party must be able to compromise certain conditions;
- Don’t overcomplicate the contract, but make it explicitly clear. If one country becomes too difficult to work with, then developers will leave and go work with another country;
- Build up trust with your contractor by offering refinancing provisions in your power purchase agreement (PPA);
- Finally, you must think like a banker when negotiating a contract. Bankers believe that “you don’t get what you deserve, you get what you negotiate”, so anything you want must be clearly written into the contract.

The participants were then given a class exercise to break up into two groups where one group represented “The Ministry” and the other represented “The Contractor”. In this negotiations simulation, both groups had already entered into a contract, but there were some issues where dinosaur bones were discovered and “The Contractor” failed to give notice within 30 days to the Ministry which had delayed construction of the project, and now, each party is seeking compensation of the time and money lost based on the legal terms of the contract. The outcome of the negotiation exercise was the very positive. The groups did a good job of using silence and holding their ground on certain targeted conditions, but also making reasonable concessions. It was also very clear that the setup of the room plays a significant role changing the environment and behavior of the parties. One room was set up as a formal board room style while the other had a more intimate setting of a roundtable which led to one group acting more formal and objective, and the other behaving more informal and argumentative.



Participants negotiated a contract in a class exercise representing the “Ministry” and the “Contractor”

2. Project Financing and Power Purchase Agreements

The next topic covered was project financing and power purchase agreements (PPAs). Cross and Brook explained that it is often hard to find financing for power generation projects because there is high upfront capital costs. However, a PPA offers an incentive of a contractual lifetime of 10-25 years of profit earning from high operating margins and significant free cash flow from the sale of commodities and a set tariff. The PPA contract should be used as the risk allocation tool because it pre-programs the maintenance of the project over the specified years of the PPA. It is important to create a Risk Breakdown Structure matrix that categorizes the likelihood of risks that may occur over lifetime of the project. Once this is done, then it is easier to determine how much the project is going to cost and how much money is needed in reserve to cover these risks. Banks typically want to add 10% to the debt in order to prevent risk, called the Debt Service Reserve Account. However, this amount should be calculated based on a "1:2 Debt Service Cover Ratio", which takes into account the net project revenue and total debt obligation of the facility.

3. Liquidated Damages and Dispute Resolution

Andrew Mackenzie, from the Hogan Lovells Dubai office, presented on liquidated damages, dispute resolution, force majeure, and the legal challenges to bid awards. In his presentations, Mackenzie emphasized the difference between arbitration and litigation. Arbitration is defined as being a consensual, private process for the submission of a dispute for a decision, comprising one or more independent third persons who are appointed by agreement of the parties. This tribunal's decision is final and legally binding. Compared to litigation, which is the traditional court of law legal process for disputes, the advantages of arbitrating disputes are that the determination of the tribunal is globally enforceable under the New York Convention, which makes it flexible and neutral. The parties choose who will be on the tribunal and the place of arbitration which can reduce cost and increase the speed of the determination. However, Mackenzie also advised that the employer should approach each contractor as if they have never done a project before and explain every aspect of the contract in detail so that the contractors cannot claim ignorance at a later date. This clear communication of the contract often prevents future disputes.

4. Change Order Management and Prequalification of Bidders

Mark Kellaher from the Mid-Continent Independent System Operator (MISO) presented on various project management techniques, such as change order management and prequalification. Regarding change order management, Kellaher stated that a well-defined scope of work is the best way to prevent unnecessary change orders. According to Kellaher, most problems can be solved with 1) a clear process and scope that is fair, equitable, and timely; 2) in-depth analysis and verification of the requested change; and, 3) proactive communication. Employers should create a "process map" or flowchart that details the process of the project and the chain of command. There should also be standardized forms and response letters to make the process simple, clear, and legal. Similarly, the process to setting up a prequalification system for bidders also requires a clear definition of contractual goals, project scope, standardized documentation, and formal internal review process. Kellaher explained that the advantages of creating a strong prequalification process is that it, 1) enhances the participation of serious contractors (bidders), 2) reduces the high cost of bidding and the risk of greater costs in the future, 3) provides early warning to the different competitors, 4) excludes unqualified bidders, and 5) provides peace of mind to the employers that the awarded bidder is qualified to build the project.

5. Cybersecurity and Compliance

Barry Jones, an independent consultant on electric transmission and generation cyber security and Critical Infrastructure Protection (CIP) compliance, provided information on the North American Electric Reliability Corporation (NERC) and how this system can be used as a model for East Africa. Jones gave examples of cyberattacks on substations in California and the actions taken to prevent future attacks.



Participants, Catherine Wamukota and Innocent Owino, of the Uganda Electricity Transmission Company present their recommendations based on what they have learned from the weeks' sessions.

WORKSHOP RESULTS

During each Action Development Plan sessions, the participants would together into “Corporations” to discuss that day’s presentations and come up with recommendations to provide their agencies. The following are some of the top recommendations:

- Create a prequalification process in order to enhance the number of serious bidders and weed-out the unqualified contractors - this means doing proper due diligence on the bidders;
- Identify and allocate all project risks so that each risk is given to the people best able to deal with the risk – a clear risk management process will lead to easier project implementation;
- Enter into contract negotiations well prepared on your terms and walk-away conditions – aim to get win-win contracts between employer and contractor;
- Explicitly define the scope of work for a project in the beginning – this will decrease the number of future change orders. However, employers should also create a clear change order process and a list of standardized forms – this will decrease confusion and delay of the project.

SPEAKERS AND PARTICIPANTS

1. SPEAKERS

MARK KELLAHER	PROJECT MANAGER, MISO
CHRIS CROSS	PARTNER ATTORNEY, HOGAN LOVELLS DUBAI
CRAIG BROOK	COUNSEL ATTORNEY, HOGAN LOVELLS DUBAI
ANDREW MACKENZIE	COUNSEL ATTORNEY, HOGAN LOVELLS DUBAI
BARRY JONES	INDEPENDENT CONSULTANT

2. TANZANIAN MINISTRY OF FINANCE AND PLANNING

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AUGUSTINO SAIBULL	FINANCIAL MANAGEMENT OFFICER

3. RWANDA ENERGY GROUP

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ANTOINETTE HABINSHUTI	CONTRACT ADMINISTRATOR
EVARISTE NSABIMANA	ACTING HEAD OF PLANNING
DONATH HARERIMANA	HEAD OF TRANSMISSION DEVELOPMENT

4. UGANDA ELECTRICITY TRANSMISSION COMPANY LTD

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5. TANZANIA ELECTRIC SUPPLY COMPANY, LTD

FRIDA J MKUMBO	
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SUNDI MAHALU	
GRACE NDIBALEMA	PRINCIPAL QUANTITY SURVEYOR
TOTO ZEDEKIA	MANAGER POWER DEVELOPER, RESEARCH DEPARTMENT
COSMAS GAMBA	

6. ENERGY AND WATER UTILITIES REGULATORY AUTHORITY

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