October 2012

Abu Dhabi Oil & Gas Update

Perspectives on latest developments

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Joint Bidding for Upstream Assets

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Most upstream oil and gas projects in Abu Dhabi are joint investments between two or more international oil companies (IOCs). We anticipate that new investment opportunities, such as those expected following the expiration of the existing onshore concession in 2014, will likely also be awarded to consortia. Therefore, IOCs and national oil companies (NOCs) seeking to approach the Abu Dhabi government may wish to do so jointly.

Why a Joint Bid?

As set out in the first edition of this newsletter series, we anticipate that prospective bidders for upstream oil and gas projects in Abu Dhabi will adopt an approach based on four core elements:

1. Technical expertise
2. Acceptance of challenging economic terms – very low margin, high volume
3. Ability to invest and access to financing
4. Commitment to, and relationship with, Abu Dhabi

One strategy for new entrants that have some, but not all, of these four core elements covered may be to partner with companies that have the required complementary strengths. This could be an IOC partnership, an IOC-NOC partnership, or a "tag-along" arrangement, by which one or two minority partners follow the lead of a well-positioned contractor who would act as operator. In any given scenario, we would expect that companies would combine their respective strengths and approach ADNOC as a joint candidate. These types of arrangements are common in the upstream oil and gas industry globally, including in Abu Dhabi.

Recent years have seen an increase in partnerships between IOCs and the international arms of NOCs. NOCs and IOCs bring complementary resources and strengths to any project. Such a partnership may be limited to a tender-by-tender basis, or an IOC-NOC partnership could result in, or be part of, broader strategic alliances. Decision-makers who have a stake in the sustainable and efficient development of resources are considering a broader range of standing cooperative ventures between the two types of enterprises. (More on this topic is available here.)

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Joint Bid Agreements

The Association of International Petroleum Negotiators (AIPN) publishes a suite of model contracts for the oil and gas industry, one of which is titled the "International Study and Bid Group Agreement." This model agreement is a common starting point for companies looking to commit to a joint bid. In the case of Abu Dhabi, where there may not be a formal tender process, such an agreement can be adapted relatively easy to meet the needs of companies seeking to commit to a coordinated joint approach.

Some companies may reject the formal nature of a joint bid agreement and instead opt for a non-binding term sheet or a memorandum of understanding. But there are benefits to a binding joint bid agreement, the negotiation of which can force the parties to discuss the core commercial terms at the outset, so as to reduce uncertainty throughout a joint bid process.

A joint bid agreement used in Abu Dhabi, as a minimum, should cover the following terms:

- **Why:** The purpose and scope of the agreement should be specified. The agreement should automatically terminate if the purpose of the agreement falls away.
- **When:** Most joint bid agreements are for short-term periods. An agreement for use in Abu Dhabi may be comparatively long-term (perhaps a year). Termination may be an option if a commercial deadlock arises where key terms cannot be agreed. In the case of three or more participants, it may be desirable that the agreement allows for one party to withdraw without the agreement terminating amongst the remaining parties.
- **What and Where:** The scope of the joint bid may be for all projects in Abu Dhabi, or it may be narrowly defined, such as to one field or one project. If the agreement only covers some areas or projects, the areas and projects not subject to the agreement should be expressly carved out.
- **Exclusivity:** The parties to the joint bid should be locked into their relationship. Naturally, none of the parties will want to commit resources and time to a relationship that could see the other party walk away and partner with another contractor.
- **Formation and Operation of Joint Bid Committee:** The agreement should establish a joint bid committee through which the parties coordinate their joint bid by way of nominated representatives. The committee should meet regularly, share information, and evaluate the economics of any potential investment. Announcements by all parties to the agreement regarding their prospective bid should always be made jointly. Bid committee procedures, including voting thresholds, should also be pre-agreed.
- **Funding:** Typically, each party bears its own costs, except where otherwise approved by the bid committee. The representatives of each party on the bid committee may be authorized to commit certain funds on behalf of the parties for use in the joint bid.
- **Confidentiality:** A confidentiality agreement should be signed prior to the discussions that precede the negotiation of a joint bid agreement. The prior agreement may be incorporated into the joint bid agreement or replaced by the new provisions of the joint bid agreement.
- **Anti-Corruption and Anti-Bribery:** Each party will want to make sure that the joint bid agreement does not contravene with global compliance policies. In addition to the penal laws of the UAE prohibiting bribery, many companies operating in Abu Dhabi may be subject to the US Foreign Corrupt Practices Act or the UK Bribery Act.
- **Post-Bid Coordination:** Ordinarily, a joint bid agreement will not contain detailed provisions that cover post-bid matters. However, one key issue to consider at the outset is that, if the bid will result in the companies entering into a joint venture with ADNOC, the companies may wish to establish a

separate decision-making body to make sure that they "speak with one voice." This issue is addressed in greater detail at the end of this newsletter.

We would not ordinarily expect consortium members to seek to incorporate a special purpose company for use by the consortium prior to a successful bid. Rather, consortium members will typically incorporate their own special purpose vehicles and possibly a joint vehicle, only if a bid is successful.

Joint Bid Agreements Under the Law of the UAE and Abu Dhabi

The relationship established by a joint bid agreement will be covered by the provisions relating to "joint participations" under Articles 56 to 63 of the Commercial Companies Law (UAE Federal Law No. 8 of 1984). As such, the joint bid agreement will be a valid contract and the relationship would be treated as an unincorporated joint venture. No registration or publication of the agreement is required.

Under these provisions, third parties dealing with the joint bidders will only have recourse against the party with which it dealt. Therefore the law does not create joint-and-several liability among the parties.

The Commercial Companies Law provides that unanimous approval of the joint participants shall be required to make any decision, unless the agreement provides for a decision to be made by a simple majority. The parties should consider the level or type of governance that will best suit its needs and the joint bid agreement should structure the governance of the committee accordingly.

The law does not contain provisions that clarify how a joint participation is terminated. This is a matter left to the agreement made between the parties.

It has been announced that a new corporate code will replace the existing Commercial Companies Law in the near future. Based on our review of draft editions of the new law, corroborated by other information, we expect there will be no substantial changes in the provisions regarding joint participations.

Joint bid agreements may be subject to scrutiny in some jurisdictions on the basis that they violate anti-competition laws. We do not anticipate such issues in Abu Dhabi.

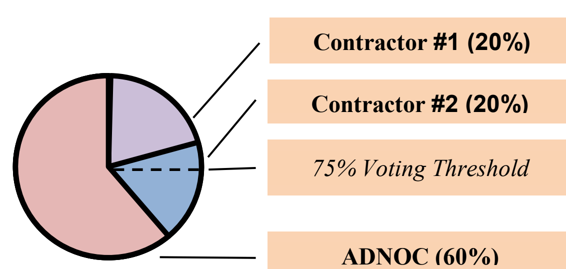
If the Bid Is Successful…

If joint bidders are successful, it is likely that the Abu Dhabi National Oil Company (ADNOC) will be a majority partner (ADNOC holds a 51% to 60% majority stake in most concessions and projects). As such, any company should anticipate that they will be a minority partner with ADNOC. This minority stake will be further diluted if the stake is divided among multiple companies.

Most upstream oil concessions and all gas projects in Abu Dhabi have ADNOC as a majority holder of the working interest or as a majority shareholder. Major decisions of the joint management committee require super-majority approval of 75% of the stakeholders. If ADNOC holds a 60% stake, this gives a single contractor the right to veto any decisions ADNOC attempts to make unilaterally.

However, if a project has multiple companies in an ADNOC partnership – such as in the scenario in the figure to the right, by which ADNOC holds a 60% stake and two contractors each hold a 20% stake – then ADNOC could agree with just one contractor (thus exceeding the 75% approval threshold with approval of parties holding a total 80% stake). This would effectively force the other contractor to participate in a way that it

Working Interest / Voting Share



does not approve.

There are two ways for companies to coordinate their post-bid decision-making with regards to such a partnership with ADNOC:

- **Incorporate a joint venture company** (in an offshore jurisdiction that, unlike the UAE, does not have foreign capital restrictions) that is the only party to the concession or project contracts; or
- **Form a separate committee** that meets and decides matters prior to joint management meetings with ADNOC to ensure that all minority stakeholders "speak with one voice" and to allow those companies to exercise a veto right on management decisions. This approach is not uncommon in the upstream oil and gas industry when multiple IOCs partner with a state-owned company.

The management of operations following the grant of a concession may seem too distant to consider when signing up to a joint bid agreement, but it is critical to get the details right and establish the ground rules for decision-making from the beginning.

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