



## STATEMENT ON RECENT PUBLICATIONS ON THE ECG PSP CONCESSION

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**Millennium Development Authority  
(MiDA)**

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## Contents

|   |   |
|---|---|
| Introduction .....                          | 1 |
| Role of MiDA.....                           | 1 |
| PSP Procurement Process.....                | 2 |
| The Meralco Consortium .....                | 4 |
| Negotiation of Transaction Agreements ..... | 5 |
| Conditions Precedent (CP) Committee .....   | 5 |
| Transfer Date .....                         | 5 |
| Payment and Demand Guarantees .....         | 6 |
| Challenges to acquiring Guarantees.....     | 6 |
| Uniform rules for Demand Guarantees .....   | 7 |
| Due diligence .....                         | 7 |
| Conclusion .....                            | 8 |

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## Introduction

The Millennium Development Authority (MiDA) is aware of the recent media and public conversations on the ECG Concession. The conversations reveal pervasive misunderstanding of the processes leading to the selection of the Meralco-led Consortium as the Acceptable ECG Private Sector Participation (PSP) Provider, the issue of the Demand Guarantee as a condition precedent to the transfer of ECG's Assets and operations, and the role MiDA played in its capacity as the Accountable Entity. As a State Institution working for and in the interest of Ghana, we wish to share the facts and information on the transaction.

## Role of MiDA

The Millennium Development Authority (MiDA) was established by an Act of Parliament (Act 702, 709 & 897 as amended) to oversee, and manage the implementation of the Programs funded by the United States Government through the Millennium Challenge Corporation (MCC). MiDA is currently implementing the US\$535m second Compact Program, referred to as the "Power Compact", following the successful implementation of the US\$547m Agricultural Transformation Compact from 2007 to 2012. MiDA's operations are geared towards the sustainable reduction of poverty in Ghana through projects that stimulate economic growth. MiDA may also implement any other national development program assigned to it by the Government.

Operating under the oversight of the Office of Government Machinery, in the Office of the President, MiDA's Governing Board has eleven (11) Voting Members and three (3) Observers. The Voting Members are a Chairperson and six Ministers of State; (i.e. Finance; Energy; Office of the Attorney-General & Ministry of Justice; Gender, Children, and Social Protection; Trade and Industry; and Business Development). Representatives from the Association of Ghana Industries (AGI), Private Enterprises Federation (PEF), Ghana Association of Private Voluntary Organizations in Development (GAPVOD) and the CEO of MiDA, are the other Members with Voting Rights. The Observers were the Board Chairs of the Electricity Company of Ghana (ECG), the Volta River Authority (VRA), and the Resident Country Director of the Millennium Challenge Corporation (MCC). The Chairperson of MiDA is the Government's Principal Representative in Ghana's relationship with MCC.

In relation to the activities related to the ECG Concession, Ghana's Cabinet in February 2016 designated MiDA as the procuring entity and the MiDA Board as the decision-making body. Cabinet also directed that MiDA should involve ECG and other stakeholders in the process towards the procurement of the Concessionaire. MiDA has kept to this directive, working with all key stakeholders such as ECG, PURC, Energy Commission, Ministry of Energy (formerly Petroleum and Power), Office of the Attorney-General and Ministry of Justice, Ministry of Finance, and the Public Utility

Workers Union. The MiDA Board conducted its business by building consensus. For all major decisions on the transaction, the MiDA Board invited these key stakeholders to its Meetings. Policy decisions were routinely referred to the Office of the President and Cabinet.

In performing its role as the entity procuring the services of the Concessionaire, MiDA was careful not to usurp the roles of the key stakeholders. In other words, ECG, PURC and Energy Commission continued to perform their roles as utility operator and regulators and decisions related to these functions were made by the respective governing boards and commissions.

### PSP Procurement Process

Following the signing of the Millennium Challenge Compact (The “Power Compact”) between the Republic of Ghana and the United States of America on August 5, 2014, MiDA initiated and completed the essential preliminary activities towards the procurement of an acceptable Concessionaire for ECG.

In September 2015, MiDA commenced an international, open, and competitive tendering process to procure the services of a private sector Entity with the requisite technological, financial and operational expertise, to operate and manage the electricity distribution assets of ECG, as agreed in the Power Compact.

In accordance with international best practice, the process opened with the publication of a Request for Expression of Interest (RoI) on September 30, 2015. Eighty-three (83) local and foreign entities expressed interest to participate in the process.

The September 2015 RoI was followed by the publication of a Request for Qualification (RfQ) in April 2016. This activity required the interested entities to present documents which confirmed compliance with the qualification criteria outlined in the RfQ. The qualification criteria comprised the legal, financial, technical, and operational capabilities deemed essential to operate and manage a distribution utility of the size and complexity of ECG. Eleven (11) Companies submitted Applications for Prequalification. The details of the Applicants were published by MiDA on the MiDA website on 30<sup>th</sup> August, 2016, and are still available on the website.

In keeping with MiDA’s commitment to transparency, the MiDA Board constituted a seven (7)-member Panel of experts to evaluate the Applications. The Panel comprised representatives from ECG, Ministry of Finance, Energy Commission, Ministry of Petroleum, Ministry of Power, and two representatives from the Office of the Attorney-General and Ministry of Justice. MiDA was not a member of the Evaluation Panel. At the end of the evaluation exercise, the Panel shortlisted six (6) out of the eleven (11) Applicants.

The six (6) Shortlisted Applicants were:

1. Manila Electric Company (Meralco) from the Philippines,
2. Consortium of the CH Group/ EDF SA/LMI Holdings/Veolia SA,
3. BXC Company Ghana Ltd/Xiaocheng Technology Stock Company Limited/Shaanxi Regional Electric Power Group Company Limited,
4. Engie Energie Services, SA
5. Enel S.P.A and
6. The Tata Power Company Limited/CDC Group Plc.

The six Shortlisted Applicants were subsequently issued the Request for Proposal (RfP) document on August 30, 2016. The RfP outlined the requirements of the tender, instructions to the bidders, evaluation, and selection process, draft transaction agreements, draft PURC Tariff Setting Guidelines, draft Distribution License, and draft Sale License.

In November 2017, after extensive discussions with GoG stakeholders and two Bidders' Conferences, MiDA issued an Amended and Restated RfP that reflected among other things the Government's new policies, most importantly, of increasing the minimum Ghanaian equity participation from 20% to 51% and reducing the term of the Concession from 25 years to 20 years.

The two Bidders' Conferences were held in May and October 2017. The Conferences afforded bidders the opportunity to seek clarification on the RfP, meet potential investors and service providers and seek assurances from Government Officials, ECG, the Regulators, and other Stakeholders. Other participating stakeholders included civil society organizations such as ACEP, the Coalition of Stakeholders on the ECG Concession Arrangement (COSECA), financial institutions, and development partners.

By the deadline for submission of Proposals on March 26, 2018, MiDA received proposals from Meralco and BXC. On the same day, the CH Group Consortium including EDF and Veolia submitted a letter withdrawing from the bidding process. Earlier withdrawals included Enel S.P.A on 7<sup>th</sup> October 2016, Engie Energie Services on 28<sup>th</sup> September 2017, and The Tata Company/CDC Group Consortium on 12<sup>th</sup> February 2018.

The Minister for Finance, acting on behalf of Government, constituted the Proposal Evaluation Panel. The Panel was composed of technical, legal, and financial experts drawn from within Ghana and abroad. As with the applications submitted in response to the RfQ, MiDA was not a member of the Proposal Evaluation Panel.

By the end of the technical and financial evaluation, the Meralco-led consortium emerged as the Preferred Bidder. The BXC consortium was disqualified prior to the financial evaluation.

Throughout the three-year procurement process, MiDA engaged the public, through the media, at each phase of the process. There are several media publications that

further demonstrate MiDA's compliance with the terms of the Compact requiring adherence to the principles of openness and transparency throughout the bid process. The integrity of the procurement process has been upheld as the technical and financial criteria used to pre-qualify the six (6) Shortlisted Applicants and approved by the MiDA Board in August 2016, were never altered. Consequently, the Meralco Consortium (now PDS), remains qualified and in full compliance with the selection criteria.

### The Meralco Consortium

A due diligence exercise carried out on Meralco, in 2016 and 2018, established that the Entity supplies power to over 6.3 million customers across 22 cities in the Philippines. This exceeds the minimum qualification criteria in the bid, which stipulated that the technical operator of the Concession must have, among others, operated an electric utility with not less than one million customers or two electric utilities, with a minimum of five hundred thousand customers each. Founded in 1903, the 116-year old power distributor had a market capitalization of \$7.4 billion in 2017.

To meet a major requirement for local participation in the RfQ released to Pre-qualified Applicants in April 2016, Meralco partnered with three Ghanaian private sector entities as equity partners. The Consortium incorporated Power Distribution Services (PDS) Ghana Ltd, with Meralco being the technical and financial lead in the PDS Consortium.

Documents submitted to MiDA indicate that Meralco is the largest single Shareholder in the PDS Consortium with 30% shareholding. Meralco demonstrates the requisite technical expertise, financial capacity, and overall experience to manage the assets and operations of ECG.

### Local Content

Ghanaian ownership is pivotal to the Concession, and consecutive Governments have emphasized the need to ensure that Ghanaians share in the efforts and rewards of improvements in ECG's performance. This local content policy was entrenched when the Government after consultations with the Millennium Challenge Corporation, increased the Ghanaian ownership requirements ahead of the bidding process from 20% to a minimum of 51%. Ghanaian firms therefore form the majority shareholder block within the PDS Consortium.

It is standard practice in many international tenders, such as the ECG Concession, to permit one Member of a Consortium to bring in the required technical expertise, in this case the Meralco Consortium, while the principal role of the other Members is to act as equity investors. These structures were adopted by Ghana to ensure that the Bidding Consortia combined international expertise with local experience and knowledge.

Besides the essential checks on their capacity to meet the required qualification criteria, MiDA had no hand in the selection process for members of the PDS Consortium or the share-structuring arrangements of the Consortium. Since no Ghanaian entity has ever operated any such utility, it was apparent that Ghanaian Members of the winning Consortium could only be equity investors.

### Negotiation of Transaction Agreements

Once MiDA had finalized the bid process and had declared Meralco as the Preferred Bidder, the Minister for Finance, acting on behalf of Government, constituted the Government-led Ghana Negotiating Team. Respected Lawyer, Mr. Anthony Akoto Ampaw was the Chair of the Ghana Negotiating Team. Other members were technical, legal, and financial experts drawn from both the public and private sectors. The team was supported by representatives from the key stakeholder institutions, including five (5) representatives from ECG.

After an eight-weeklong negotiation, Cabinet and Parliament approved the related Transaction Agreements; namely, The Lease and Assignment Agreement, the Bulk Supply Agreement and the Government Support Agreement.

### Conditions Precedent (CP) Committee

The Transaction Agreements as executed by the Parties and approved by Parliament had 45 Conditions Precedent to the Transfer Date. PDS, ECG, and Ghana (the Parties) had 180 days from July 3, 2018 (i.e. December 30, 2018) to satisfy the CPs, or otherwise waive or convert the CPs to Conditions Subsequent.

To ensure that the Parties worked to meet this deadline, the CP Committee was setup by the Government of Ghana. The Ghana CP Committee was inaugurated by H.E. the Vice President on July 30, 2018. The 21-member Committee was drawn from the Office of the Attorney-General and Ministry of Justice, Ministry of Finance, Ministry of Energy, Energy Commission, PURC, and ECG. MiDA's role in the Committee is that of a coordinating unit, aggregating information, providing advice to Government and facilitating the timely execution of activities by the Parties to the Transaction Agreements.

The Ghana Conditions Precedent Committee has since the Transfer Date been converted into the Conditions Subsequent Committee.

### Transfer Date

By December 18, 2018, it was clear that the Parties would not meet the Transfer Date deadline of December 30, 2018. The Parties therefore agreed to extend the deadline to February 1, 2019. However, by January 30, 2019, it became evident that the Parties would again miss the new deadline. The major CPs that remained unsatisfied

included, Tariffs set in accordance with the PURC Rate Setting Guidelines, List of Portfolio Power Purchase Agreements, BSA Payment Security, Lease Payment Security, and Transfer Date Moveable Property Price.

Although the above major CPs all had grave impact on the transaction, MiDA singled out the BSA Payment Security and the Lease Payment Security and recommended to Government that the two CPs should not be converted to Conditions Subsequent. In other words, MiDA recommended that the Transfer Date should be postponed once again until these key documents were submitted. A new deadline of March 1, 2019 was approved by the MiDA Board and the Stakeholders. In allowing the extension of time, the Parties agreed that it was in the best interest of Ghana that the Transfer Date was delayed by one month to ensure that PDS submitted compliant Securities prior to the Transfer Date.

## Payment and Demand Guarantees

### Challenges to acquiring Guarantees

A key element for the transaction was the PURC's Major Tariff Review. PDS argued that PURC had been unable to review tariffs and that at prevailing tariffs, its projected losses were too significant to enable it to arrange a project financed letter of credit facility, which would have enabled it to issue letters of credit as the Payment Securities, as envisioned by the Transaction Agreements. Through Cal Bank, PDS therefore proposed to provide Payment Securities issued by insurance companies, with local insurance companies taking the lead as is required by Ghanaian law, and reinsured by one or more re-insurers.

After several iterations and meetings among Cal Bank, Donewell (the local insurance company), PDS, the joint CP Committees, the MiDA Board and Government, a Demand Guarantee structure was approved. The approval also took into account the need to meet the final transfer deadline date of March 1, 2019 communicated to GoG by MCC. The issued Demand Guarantees were accepted by ECG, Ministry of Finance, and the Office of the Attorney General and Ministry of Justice before the Transfer Date of March 1, 2019.

It is worthy to note that each step of the transaction process prior to the handover of assets to PDS required in-depth reviews of various pertinent issues, including submitted documents. ECG and GoG's advisors, the International Finance Corporation (IFC) and Hunton Andrews Kurth of the USA, also discussed, prior to the Transfer Date, the process that ECG, as the direct beneficiary of the Demand Guarantees, should follow in order to verify the authenticity of the signatures on the Demand Guarantees prior to the Transfer Date. MiDA also played various roles aimed at authenticating the Demand Guarantees.



## Uniform rules for Demand Guarantees

To ensure that ECG and the Government of Ghana had the requisite legal protection for the guarantees, the Guarantees were governed by international rules stipulated in the Uniform Rules for Demand Guarantees. These Rules provide several layers of legal protections for ECG, including the fact that the Guarantee is deemed to have been issued and effective when it leaves the control of the Guarantor; that the Guarantee is irrevocable on issue, even if this is not stipulated on the Guarantee; and that the Advising Party, (in this case Cal Bank) represents and warrants the authenticity of the signatures of the Issuer. Therefore, as soon as the Guarantee was issued to ECG, the Guarantee became an irrevocable legal instrument.

Despite the fact that the Guarantee was governed by the Uniform Rules for Demand Guarantees, an additional layer of protection was provided by the inclusion of a legal cut-through provision granting ECG access to Al Koot directly. Essentially, what this means is that ECG ordinarily would only have had recourse to Donewell who will in turn have recourse to their re-insurer. However, in this instance, ECG could make claims directly to Al Koot.

## Due diligence

It is important to note that in international transactions of this nature, the Parties are required to carry out their respective due diligence on the various aspects of the transaction. Due to the cost of the Guarantees and the time within which transfer usually occurs, it is industry practice and typical for Guarantees to be issued on the date of Transfer or very close to the Transfer Date making it impossible to carry out extensive due diligence on Guarantees received. The presumption in law is that a Guarantee which is tendered is valid. This is based on the principle in law that the Parties are acting at all times in good faith. In the instance of the ECG Concession, the Guarantees were received at approximately 4.00 p.m. on February 26, 2019. On February 28, ECG wrote to Al Koot to verify the validity of the Guarantees. This process commenced prior to the Transfer Date, not because there was any indication of any problem with the execution of the Demand Guarantees, but simply because it is the normal process in transactions of this nature. Throughout the transaction, MiDA at all times followed the necessary due diligence procedures to ensure that the interest of Ghana was duly protected.

In order to ensure the enforceability of the Guarantees, MiDA insisted on having the Guarantees notarized by Al Koot in Qatar. These Guarantees were duly notarized in accordance with Qatari law verifying their authenticity.

## Conclusion

It has taken MiDA some four (4) years to work with all stakeholders, namely the Electricity Company of Ghana, Energy Commission, the Public Utility Regulatory Commission, Ministry of Finance, Ministry of Energy, the Office of the Attorney General and Ministry of Justice, the Government of Ghana, Parliament of the Republic of Ghana, and the Millennium Challenge Corporation in order to follow through all the processes towards the procurement of the services of a competent private sector operator to operate and manage the assets of ECG. This collaborative effort culminated in the birth of Power Distribution Services Ghana Limited. (PDS).

Every decision taken on the transaction and coordinated by MiDA was duly screened by all relevant stakeholders and received due authorization and approval. Therefore, and contrary to widely circulated publications, discussions, and allegations, MiDA has never acted against the supreme interest of Ghana. As an institution, MiDA works within stringent governance structures that meet international standards. These structures comprise oversight by the Board, the Government of Ghana, and the Millennium Challenge Corporation. Every decision on the transaction was made within this governance structure.

As an example and specific to ongoing discussions, MiDA, acting as the aggregator of the transaction documents and upon receipt of the demand guarantees on February 26, 2019 duly forwarded the documents to ECG, Ministry of Finance, and Office of the Attorney General and Ministry of Justice for review and approval. MiDA did not declare the occurrence of the Transfer Date until it received the approval of all these stakeholders.

MiDA's officials have worked painstakingly on this transaction. The team was meticulous and thorough, upholding the highest level of professionalism and personal integrity throughout this process. The success of Compact I attests to MiDA's commitment to creating excellent value out of Compact Funds and ensuring sustainable contributions to some essential requirements of Ghana's development agenda.

MiDA remains open to all stakeholders and we are ready to welcome and share with any interested party the details of the processes employed to date. We also encourage media commentators to cross check facts before engaging in public discourse in order to correctly inform and educate the public.