04 The Act to Abolish the Bid Premium & its implications for Liberia's revenue flow

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INDEPENDENT FOREST MONITORS

NGO Coalition of Liberia

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Introduction

Since logging restarted in Liberia in 2008, all seven Forest Management Contracts (FMCs) and all Timber Sales Contracts (TSCs) were allocated through a competitive process based on the Annual Land Rental Bid Premium. In order to out-bid their competitors, logging companies offered to pay between $5[1] and $20 per hectare per year for the duration of the contract. Based on the bid amounts and other factors, different companies were awarded logging concessions. Almost all the Land Rental Fees agreed in the concession agreements are based on each company's bid amount, i.e. the amounts they said they could afford to pay to log the concession. To date, no company has paid the full amounts due.

Non-payment of taxes and fees is in breach of the National Forestry Reform Law of 2006. The Forestry Development Authority (FDA) may terminate a company's contract for failure to satisfy "any financial obligations to the Government including payment of taxes, rents or fees) or to local communities"[2] consistent with the terms of a Forest Resources License. This is also a violation of the Voluntary Partnership Agreement (VPA) between Liberia and the European Union (EU). Under the VPA, Principle 9 of the Legality Definition requires *"the contract holder or timber processor is current in its compliance with all fiscal obligations including payment of taxes and fees"*[3] prior to being granted a FLEGT License to export timber out of Liberia.

In September 2013, the national legislature enacted a law to abolish the payment of bid premiums or the amounts the companies said they would pay in their bids.[4] At the time the law was enacted, logging companies owed about $43 million in Area Fees, Land Rental Bid and Contract Administration Fees.[5] As a result of this legislation, however, more than $10 million of the approximately $43 million in arrears was apparently waived for the period 2012 July to June 2013. The current arrears stand at just over $24 million,[6] but it is unclear how much companies have paid since the legislation was enacted. This Briefing Paper discusses the wider implications of this act.

1. The purpose of competitive bidding

Early in 2008, a new era of industrial logging started. The NFRL 2006 and implementing regulations sought to make a break from the past so that the forestry sector could contribute to the economic and social re-development of the country. The FDA adopted new standards to increase accountability and transparency in the sector, including requirements for chain of custody timber tracking and forest management plans. All companies were subject to a pre-qualification process, and all FMCs and TSCs were allocated through competitive bidding processes. The invitations to bid or bid documents state that after all bids have been evaluated in accordance with the law, "the Contract will be awarded to the bidder that submits the highest land rental bid".[7] This is in line with the Public Procurement and Concessions Act.[8]

The purpose of competitive bidding is to ensure the state and its people receive the best possible price for access to the resource; in this case the forest. The area-based payment acknowledges that the full area of the concession is 'occupied' by the company, denying access to the resource by others. This is the reason for making the bid price based on a per-hectare, per-year payment for the entire area.

2. The status of payment arrears

Data provided by Société Générale de Surveillance (SGS) to the Civil Society-Independent Forest Monitors (CS-IFM) of the NGO Coalition of Liberia in October 2013, one month after the Act came into force, shows the total arrears for seven FMCs and ten TSCs was $43 million.[9] About 82 per cent of this figure is represented by the Land Rental Bid or bid premium. During the five years period since the first contracts were awarded, companies have paid a total of $13 million in bid premiums.[10]

Since September 2013, the FDA has made efforts to enforce the NFRL and collect the arrears, without success. Time is crucial because when the VPA goes into operation, possibly in 2016, timber destined for export will not obtain a FLEGT License unless all payments are up to date.[11] Without a FLEGT License a company will not be able to export or sell its logs.

footnotes

1 All monetary figures stated in this report are in United States Dollars (USDs)
2 National Forestry Reform Law of 2006, Section 6.1d.
3 Voluntary Partnership Agreement Between the European Union and the Republic of Liberia, Appendix A: Legality Definition, Matrix and Verification Procedures, Principle 9: Taxes, Fees and other Payments. The VPA came into force on December 1, 2013.
4 An Act to Abolish the Payment of Annual Land Rental Bid Premium on Contract Area and Merging of Export Taxes into Stumpage/ Production Fee in the Forestry Sector of Liberian Economy, 17th September 2013.
5 SGS Chain of Custody Financial Update, October 2013
6 SGS Chain of Custody Financial Update, June 2014
7 Forestry Development Authority, Bid Documents, A-2 Timber Sale Contract, 2008, p.2
8 Amendment and Restatement of the Public Procurement and Concessions Act (2005), Approved September 16, 2010.
9 SGS Chain of Custody Financial Update, October 2013
10 SGS spreadsheet, Surface Rental Fees Status 2008-2013, provided on 3rd September 2013.
11 Voluntary Partnership Agreement Between the European Union and the Republic of Liberia, Appendix A: Legality Definition, Matrix and Verification Procedures, Principle 9: Taxes, Fees and other Payments.

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3. The act to abolish the bid premium

The Liberian legislature enacted the *"Act to Abolish the Payment of Annual Land Rental Bid Premium on Contract Area and Merging of Export Taxes into Stumpage/Production Fee in the Forestry Sector of the Liberia Economy"* on September 5, 2013. The President of Liberia approved the act on September 17, 2013. The act was published into handbills on September 23,2013. NGOs working in the forestry sector were unaware of the process, and were not invited to participate in a public hearing on the act, while efforts to investigate and engage the process were unsuccessful due to the secrecy surrounding its formulation and enactment. The act contains five substantive clauses, which are discussed below.

3.1 Abolition of bid premium **Section I** of the act states: *"That from and immediately upon the passage of this Act and its subsequent approval by the President and publication into law, Annual Land Rental Bid Premium paid on Contract Area is hereby abolished."* As noted above, the Act was approved on September 17, 2013; hence Land Rental Bid premium was abolished as at this time.

The SGS Chain of Custody Financial Update of June 2014 shows arrears brought forward from previous years but does not include the Land Rental Bid premium for the Fiscal Year July 2013 to June 2014.[12] This seems to suggest the act is already being implemented. Based on the figures presented in the SGS Chain of Custody Financial Updates, the annual Land Rental Bid on FMCs is slightly less than US$10 million. The Government of Liberia through this law therefore opted to waive just under $200 million for the remaining 20 years that the FMC holders will be operating. See Table 1 below for a full breakdown of these amounts.

Table 1: Land Rental Bid premium waived over 20 years

Company	Annual LR Bid (US$)	Waived	Total LR Bid waived (US$)
Euro Logging	$2,600,117.50	20	52,002,350.00
ICC	$2,815,900.00	20	56,318,000.00
Geblo Logging	$1,413,259.00	20	28,265,180.00
LTTC	$569,990.40	20	11,399,808.00
Alpha Logging	$1,198,362.00	20	23,967,240.00
Atlantic Resources	$1,062,161.60	20	21,243,232.00
EJ & J	$289,745.72	20	5,794,914.40
Totals	**$9,949,536.22**		**198,990,724.40**

3.2 Revenue-loss to be compensated through "stumpage premium" **Section II** of the act states: *"that In lieu of Annual Land Rental Bid Premium, The Forestry Development Authority (FDA) is authorized to levy, through regulations, a special production-based fee (stumpage premium) to compensate for revenue loss associated with the cancellation of Annual Land Rental Bid Premium."* This is the most difficult part of the Act to implement as it seeks to convert a fixed annual payment into a variable production based payment and yet produce an equivalent level of revenue. Currently, stumpage is levied at rates between 2.5 and 10 per cent of the value of each cubic metre; the high value species are calculated at 10 per cent per cubic meter.[13]

To ensure that the Government and people of Liberia are not further disadvantaged, the FDA needs to develop this regulation in a timely but inclusive manner. A draft of the regulation has been circulated to forest sector stakeholders, a laudable first step. However, the proposed taxes and fees in the draft regulation do not come close to the amount being waived by abolishing the Land Rental Bid Premium.

3.3 Fee structure to be appropriate, ensuring protection of forests **Section III** of the act states: *"That the Forestry Development Authority is hereby authorized to ensure that the fees structure in the Liberian Forestry sector is appropriate to protect the competitiveness of the Liberian forestry industry and to ensure reforestation for the lasting protection of the Nation's forests."* This section simply reconfirms the previous sections, that whilst the basis of generating revenue has been changed, the overall level and purpose of the revenue should not be.

Commercial operations in the forest sector must generate high enough revenue to fully fund the regulation of the sector, as well as provide benefits to affected communities, maintain or increase forest cover, and improve biodiversity conservation and environmental sustainability. This is in line with the nation's forest policy: The aim of the forestry policy of Liberia is "to conserve and sustainably manage all forest areas, so that they will continue to produce a complete range of goods and services for the benefit of all Liberians and contribute to poverty alleviation in the nation, while maintaining environmental stability and fulfilling Liberia's commitments under international agreements and conventions".[14] However, by abolishing the Land Rental Bid Premium, the Government of Liberia has made it harder for the logging industry to make a meaningful contribution to poverty alleviation.

footnotes

12 SGS Chain of Custody Financial Update, June 2014.
13 FDA Regulation 107-07, Section 22(b).
14 National Forestry Policy and Implementation Strategy, 2006.P10.

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3.4 Arrears to be paid fully **Section IV** of the act states: *"That in order to bring relief and encourage logging investment and create incentives for employment, all Land Rental Bid Premium accrued up to the fiscal year 2011/2012 should be fully paid within 36 months or as shall be agreed with the authority and the Ministry of Finance."* This section seems to suggest the law is retroactive, applying only to arrears that accrued up to June 2012. Although it does not explicitly exclude the arrear accumulated between July 2012 and June 2013, the $10 million dollar that is unaccounted for in the June 2014 SGS Chain of Custody Financial Update seems to be from this period.

The CS-IFM team wrote the FDA on June 9, 2014 requesting for a payment plan indicating how logging companies will pay their arrears in the three years period. Since SGS is the entity responsible for reporting on the collection of forest sector revenues, a similar letter was also written to SGS about a payment plan. FDA has neither provided nor formally responded to the request, and SGS replied that it is not aware of any payment plan. As required by the act, FDA and concessionaires are to agree on how the arrears will be paid.

This needs to be discussed and formally documented. Such documentation can then be used as evidence if a concessionaire reneges on its obligation..

3.5 Impacts on the community share of revenues Since logging restarted in 2009 the Government of Liberia has failed to transfer the 30 per cent of Land Rental Fees affected communities are entitled to. On June 4, 2014 CFDC representatives entered into a Memorandum of Understanding (MoU) with the Government of Liberia to agree a payment plan for the $1.4 million the government had collected from the concessionaires. The $1.4 million represents 30% of the $4.7 million Annual Area Fees the Government had already collected. The Government and CFDCs agreed that $500,000 of the $1.4 million would be transferred to the National Benefit Sharing Trust (NBST) upon signature of the MoU. The balance would be paid in the first three quarters of the Fiscal year 2014/15.[15]

As at September 2013 companies owed $7.6 million in Area Fees.[16] 30 per cent of this amount or more than $2.2 million is allocated to affected communities through the National Benefit Sharing Trust. Therefore, when this amount is added to the $1.4 million mentioned supra, the government now owes affected communities about $3.7 million. The logging companies and the government must do more to deliver on their fiscal obligations to affected communities. The government for example, needs to make good on its obligations under the MoU and take steps to collect the current arrears from the companies, in order to transfer the communities' 30 per cent.

Conclusions

Liberia boasts of one of the best forest sector laws in Africa but ironically, a chronic lack of diligent and effective implementation by the institutions responsible has over the years denied the state and affected communities the anticipated revenues. As have been outlined in this brief, approximately $10 million of Land Rental Bid Premium for the period 2012 July to June 2013 was not collected; just under $200 million has been waived for the remainder of the 20 years on the FMC. These amounts represent critical revenue that could be applied to Liberia's dysfunctional health care system, and the education sector to address the chronic lack of educational materials for rural schools.

The law that abolishes the bid premium lacks implementing regulations despite being in force for nine months. Contract holders that are failing to pay their tax arrears, in spite of the generous amounts that have already been waived, are in serious breach of the terms of their contracts. The government's failure to enforce the fiscal provisions of logging contracts, is not only depriving the country of much needed revenue, it also deprives affected communities of their 30 per cent share of the Land Rental Fees.

footnotes

15 MOU between the Republic of Liberia and the National Union of Community Forest Development Committees, provided on June 4th,2014
16 SGS spreadsheet, Surface Rental Fees Status 2008-2013, provided on 3rd September 2013.

Recommendations

To address the widespread non-compliance with the fiscal obligations laid out in the various concession agreements, ensure that forestry taxes contribute meaningfully to national development, and that affected communities receive their legal share of logging revenues:

- **The FDA, Ministry of Finance and other government agencies** must enforce the law regarding non-payment of bid premiums, and other fees and taxes. This should begin with agreeing a time-bound payment plan that is in line with the Act Abolishing the Land Rental Bid Premium. This payment plan should be public.
- **The FDA should request the Ministry of Justice** to initiate proceedings to cancel the contract of those concessionaires that fail to reach an agreement on a payment plan for their arrears. These companies should then be placed on the List of Suspended Companies for failing to pay their taxes.
- **The FDA should request the Ministry of Justice** to clarify the status of the Land Rental Bid Premiums for the period July 2012 to June 2013, i.e. whether in fact the law provides for it to be waived or whether it should be billed and collected. Not to do so would create doubt about the legality of waiving this amount and create legal uncertainty for concessionaires.
- **The FDA should immediately develop the regulation** provided for in the act. This is crucial to facilitate full and effective implementation of the law, and to safeguard the financial interests of the government and communities. Without this regulation the country will continue to loose much needed revenue from the forestry sector.
- **The FDA, in consultation with other government agencies, civil society and industry representatives** must without delay develop a regulation to levy a stumpage premium to compensate for revenue loss associated with the cancellation of Annual Land Rental Bid Premium.
- **The FDA Board of Directors** should bring pressure to bear on the FDA to fulfil its legal obligations under the act including developing the required regulation and establishing a time-bound payment plan with concession holders.
- **The EU and Government of Liberia**, as parties to the VPA, must ensure SGS develop public reporting systems on a concession-by-concession basis to keep affected communities informed as to the amount of money that should be in the National Benefit Sharing Trust.

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