

The Nigerian Content Development and Monitoring Board ('the Board') recently issued Draft Regulations which sets out the procedures for effective management of Nigerian content development and monitoring, capacity building and sustenance activities relating to the implementation of the Nigerian Oil and Gas Industry Content Development Act, 2010, ('the Act').

The Act among other things, strives to build local capacity, increase value creation/addition in country, and defines minimum Nigerian Content ('NC') value for particular goods and services. The Act also seeks to domicile the production of certain goods and services in-country and gives priority to local companies and NC compliant companies in all aspects of industry operations.

We highlight below, some of the major provisions of the Draft Regulations.

Key Definitions

The Draft Regulations, for the purposes of award of oil blocks, oil field licences, oil lifting licences etc by the Federal Government of Nigeria, defines a Nigerian Independent Operator ('NIO') as a company having at least 51% equity participation by Nigerians.

This definition is identical to the provision of the Act which defines a 'Nigerian Company' as a company formed and registered in Nigeria in accordance with the provisions of Companies and Allied Matters Act with not less than 51% equity shares by Nigerians.

Similarly, the Draft Regulations define a 'Nigerian Indigenous Service Company' as a company registered under the laws of Nigeria, and is wholly owned or has at least 51% of its equity and ownership structures held by Nigerian entities or nationals.

Contract Award/Bid Evaluation

The Draft Regulations, consistent with the Act, provides that the federal government shall give first consideration to NIOs in the award of oil blocks, oil field licenses, oil lifting license and the right of first refusal in all projects for which contract is to be awarded in the Nigerian oil and gas industry. In line with the provisions of the Act on the award of oil blocks, oil field licenses, oil lifting licenses to

Operators in the industry, the Draft Regulations go further to spell out the criteria for qualification of those NIOs to be given first consideration on any award of oil blocks, oil field licenses, oil lifting licenses and the right of first refusal in all projects for which contracts are to be awarded.

Some of the criteria include a demonstration by the NIO of: proven track record and experience in oil and gas field operations, and effective/physical presence in Nigeria, showing manpower and asset domiciliation.

The Draft Regulations further require that qualification for first consideration for NIOs shall be on the basis of their production capacities and ownership status. NIOs may take advantage of the provisions which permit alliances to be formed with other NIOs for the purpose of enhancing their chances at so qualifying.

Notwithstanding the provisions of the Act which stipulates that Nigerian indigenous service companies will be given exclusive consideration to bid for contracts and services on land and swamp operating areas in the industry, the Draft Regulations provide that the Minister may allow other companies registered in Nigeria to do business in land and swamp areas for purposes of capacity building among others.

Minimum Nigerian Content/Inadequacy of Capacity

In order to give effect to the provision of the Act relating to minimum NC for certain items and services listed in the schedule to the Act, the Draft Regulations outline the requirements for the exercise of the power of the Minister to extend the continued importation of certain items or services upon application by relevant company. The requirements for the waiver include:

- § Submission of a development schedule for the production of those particular items.
- § Submission of a program for the formation of a joint venture between foreign and local manufacturers to increase the production capacity and capability of the item
- § Submission of a program of initiatives which will lead to production of the item in Nigeria.
- § Where an item requires a significant capital expenditure for

its development and production, and/or hi-tech in nature, the Board may grant waiver without submission of a development schedule.

- § Where an item is not specified in the schedule, not available in the country and based on current level of industrialization is not likely to be available within the next few years

Such applications for continued importation are expected, under the Draft Regulations, to be approved within a period of 30 days from the date of application. Approval for such applications becomes automatic in the event of a default to give express notice of acceptance or denial of the application within the required period of 30 days.

The Plan

Further to the provision of the Act which makes it mandatory for operators to submit a Nigerian Content Plan ("the Plan") towards qualifying for bidding for any license, permit or interest in the oil and gas industry, the Draft Regulations provides that a proper and acceptable Plan shall succinctly detail how the operator intends to give first consideration to goods and services of Nigerian origin; and how Nigerian nationals shall be given priority in employment and trainings under the work program for which the Plan is submitted.

Upon satisfactory review and assessment of the Plan submitted, the Board will then issue a certificate of Authorization to the operator. The entire process including issuance of the Certificate of Authorization or notice of denial is expected to be concluded within 30 days from the date of commencement of the review or assessment.

1% Deduction

Since the enactment of the Act, there have been concerns amongst stakeholders as to how the provision relating to the payment of 1% of every contract awarded in the upstream sector into the Nigerian Content Development Fund ('the Fund') will be implemented. This seems to have been clarified by the Draft Regulations which provides that where the operator, contractor, subcontractor, alliance partner or any other entity involved in any project, awarding a contract has deducted and paid 1% of the

total milestone payments, other sub-contractors or suppliers in respect of any goods or services which form part of the total value of the same contract will no longer be required to make deductions.

The Board has the responsibility to manage the Fund and may take other initiatives to invest in projects, programmes and activities aimed at developing and utilizing local capacity and capabilities in the Nigeria oil and gas industry

Fiscal Incentives

As part of the federal government's general policy towards encouraging FDIs in Nigeria especially in the oil and gas industry, the Minister is consequently empowered under the Act to grant tax incentives to companies which establish facilities, factories, production units or other operations within Nigeria for the purposes of manufacturing goods or providing services which were previously imported.

The Investment Guide under the Draft Compliance Manual stipulates that for investors that pioneer new categories of product and services that are critical to the industry, the Board will take steps in liaison with appropriate agency of government to determine and apply for appropriate tax breaks commensurate to the investment by the company. Such tax breaks will however, not limit the investor's other tax obligations as may be required by law.

Employees and Expatriates

In line with the NC objective and local capacity development goal of the Act, operators and companies in the oil and gas industry must now engage Nigerians in all the junior and intermediate cadres of their operations. Only a maximum of 5% of management positions may be retained by operators or project promoters for expatriates. In determining the number of management positions occupied by Nigerians, the Board will take into consideration the number of Nigerians in management positions who are on work assignments outside Nigeria.

Operators are required to submit succession plans to the Board for positions not already held by Nigerians. The plans must include a

scheme whereby Nigerians shall understudy the expatriates for a maximum of 4 years, after which the position shall become 'Nigerianised'.

For the purpose of introducing and domiciling new or improved technology for which specialists are not available in Nigeria the Board may consider approval for specialized expatriate positions in a company. Such positions will not be reckoned as management positions and presentation of the succession plan will be a pre-requisite for approval for such positions.

The general effect of this provision both in the Act and the Draft Regulations creates an additional criterion for companies to meet in order to make an application for expatriate quota to the Ministry of Internal Affairs.

The Draft Regulations, in relation to the employment of expatriates extends the requirement to follow the procedure set out therein to contractors, subcontractor and service companies in the oil and gas sector.

Ownership of Equipment

As part of the objective to grow indigenous capacity, international and multinational companies are required to show that at least 50% of the equipment used for execution of work in the country is owned by their Nigerian subsidiaries.

The Draft Regulations provide however, that where equipment is supplied, or loaned by the parent company, or being paid for through intercompany arrangement, it will be sufficient to show that the equipment is owned by the Nigerian subsidiary for the duration of the project.

Additionally, the requirement to own equipment will not apply to equipment leased (rigs, jack-up barges etc.) for specific temporary purpose by an operator.

Offences and Penalties

The Act contains serious penal provision and states that any operator or company that fails to comply with the provisions of the Act commits an offence and is liable upon conviction to a fine of 5% of the project sum, or cancellation of project.

Members of the public are generally permitted, if they notice a breach by an operator of any of the provisions of the Act, to report the observations to the Board who will take appropriate action to enforce the Act.

The Draft Regulations provide that the Board has the discretion to demand an explanation for any breach and a commitment to correct or remedy the situation reported within an agreed remedial period. Where a company fails to explain or correct the wrong alleged, the Board will issue a warning and shall allow a further 5 business days to remedy the situation after which an offence would be established against the operator and the penalty prescribed by the law will be applied.

Where the operator disagrees with reported situations or with the decision of the Board, the operator shall have right to appeal to the Minister, who may set up an appellate committee to review within 3 business days, the outcome of the investigation and recommend resolution as may be appropriate or may seek legal redress as it may consider appropriate.

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