

REVIEW OF NIGERIA'S LOCAL CONTENT LEGISLATION

Most African countries, at post independence, recognised the need for their indigenes to take ownership and control of their natural resources for exploitation and transformation into economic growth. In order to achieve this goal, various policies and laws have been pursued by the Governments. The oil and gas industry in Nigeria was not immune from these Government policies. Some laws enacted in Nigeria include the Petroleum (Drilling & Production) Regulations; Industrial Training Fund 1971; Petroleum Technology Development Fund 1973 and National Office of Technology Acquisition Act 1979.

The Nigerian oil industry was originally the exclusive domain of the International Oil Companies (IOCs) in areas ranging from exploration to production, refining and trading. Even the downstream operations were initially controlled by *expatriate companies* such as Shell, Esso and BP. Intervention by the Federal Government resulted in the nationalization of assets of the major oil players. In 1991, the Federal Government sought to demystify the oil industry by awarding onshore and offshore oil blocks to Nigerian entrepreneurs through competitive bidding. Despite the seeming progress narrated above, the "Nigerianization" process in the lucrative upstream has been comparatively negligible. Research done in 2008 concludes that although the oil and gas industry accounts for 90% of Nigeria's revenue, it contributes less than 38% to the Nation's GDP. In real terms the upstream industry has for decades functioned as an enclave economy with minimal impact on the wider economy.

The primary reason is the absence of a legal or statutory frameworks for Nigeria to harvest the technological, industrial and economic intangible capital assets being generated by oil and gas activities for diffusion into the local economy.

Senator Lee Maeba identified this gap when he said "*... there was no law guiding the activities of Nigerian companies in the oil and gas industry and because of that, there has been a **capital drift**...and that is the reason why there is poverty in Nigeria in spite of the fact that we are sixth largest producer of crude oil*"

The **Nigerian Oil and Gas Industry Content Development Act 2010** (the Act) seeks to increase indigenous participation in the Oil and gas industry by prescribing minimum thresholds for the use of local services and materials and to promote transfer of technology and skill to Nigerian staff and labour in the industry.

The Act is comprehensive, running into 107 sections and applies to all operators, contractors and other entities involved in any project in the oil and gas industry. It takes precedence over all other existing enactments and laws in respect of all matters and operations industry pertaining to Nigerian content carried out in the oil and gas.

A **Nigeria Content Development and Monitoring Board (the Board)** has been established and vested with the responsibility to implement the provisions of the Act, make procedural guidelines and monitor compliance by operators within the oil industry.

Below is a review of the structure of the Local Content Act. The provisions of the Act can be divided into several segments as set out below.

1. General Obligations

The scheme of the Act is to set out general obligations which are applicable either by reference to:

- a) operators and participants in the Oil and Gas Industry; or
- b) activity taking place in the Oil and Gas industry

The provisions of the Act which are of general application are contained in Section 3, Section 7 and Section 11 of the Act. These general provisions are then developed in the body of the act by providing further details of steps, procedures and obligations imposed on operators or on the activity being performed.

2. Overall Policy objectives

The local content policy objective and the **overall** obligation imposed in respect of transactions within the Oil and Gas industry are set out in Section 3 of the Act. Section 3 states as follows:

3. (1) *Nigerian independent operators shall be given **first consideration** in the award of oil blocks, oil field licenses, oil lifting licenses and **all projects** for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister.*

- (2) *There shall be **exclusive consideration** to **Nigerian Indigenous service companies** which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for **contracts and services** contained in the schedule to this Act.*
- (3) *Compliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licenses, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in Nigerian oil and gas industry.*

Focus on Nigerian Content

In our view the primary focus of the Act is on the level of Nigerian Content in the activities carried out in the oil and gas industries. Most of the provisions of the Act deal with obligations imposed on ‘operators’, ‘alliance partners’, and ‘project promoters’. Most of the expressions used in the Act are not defined. However, Section 106 also defines **Operator** as:

“Nigerian National Petroleum Company (NNPC), its subsidiaries and joint venture partners and any Nigerian, foreign or international oil and gas company operating in the Nigerian Oil and gas industry under any petroleum arrangement”

‘petroleum arrangement’ is not defined, nonetheless, the above definition of ‘operator’ is clearly wide enough to accommodate virtually every company whether foreign or Nigerian that is operating in the Nigerian Oil and Gas industry. In so far as all the obligations contained in the Act are imposed on ‘operators’ it becomes clearer that the policy of the Act is *to promote the caring out of activity in Nigeria and the use of “Nigerian human, material resources and services”*

Support for Nigerian companies

In furtherance of this objective, the Act gives preferential treatment to all Nigerian companies operating in the industry. As a basic principle, the Act requires that promotion of Nigerian content development shall be a major concern in all projects and operations in the oil industry. It then goes on to say that Nigerian independent operators shall have first consideration in the award of oil blocks, lifting licenses etc and in all projects for which contracts are to be awarded. This principle applies to all sphere of the industry not only “contracting” but also employment of staff and labour, staff training and procurement of goods, materials and services etc.

By **Section 3(2)**, exclusive consideration is given to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work on land and swamp. This section incorporates a significant pre-condition for getting the coveted exclusive preferential treatment. It stipulates “**demonstrable capacity to perform**” as a key criterion for preferential award of jobs.

Supporting provisions for the policy objectives of Section 3 and for Nigerian companies are contained primarily in Section 11, Section 15 and Section 16.

Benefits in Bid Evaluation

The main support granted in favour of Nigerian companies is contained in Sections 15 and 16 which deals with the bidding process. This advantage is considered further under *Bid Evaluation* below

Benefits in Regulations

In addition to the benefits conferred on Nigerian businesses in the Bid Evaluation process, Section 41 provides that the Minister may make regulations ‘setting out targets to ensure ‘full utilisation and growth of indigenous companies’ in the following areas:

- *Exploration,*
- *Seismic data processing*
- *Engineering design*
- *Reservoir studies*
- *Manufacturing and fabrication of equipment; and*
- *Other facilities as well as the provisions of other support services for the Nigerian Oil and gas industry*

Benefits in Technology Transfer

The benefits to be enjoyed by Nigerian companies by way of technology transfer are contained in Sections 44 and 45 of the Act. Section 44 stipulates that operators are required to have a program of incentives to promote transfer of technology and Section 45 encourages the formation of joint ventures and other forms of alliances.

3. Minimum Nigerian Content Specifications

The provision of Section 3(2) is developed further in Section 11 of the Act which sets out the level of Nigerian Content required for various activities carried out in the Oil and gas industry.

Section 11 of the Act states that the “minimum Nigerian content in any project to be executed in the Nigerian Oil and Gas industry shall be consistent with the level set out in the Schedule”

The Schedule in question lists out various activities that are carried out in the oil and gas industry and then sets out the desired level of Nigerian content in accordance with various units of measurement.

Section 11(3) stipulates that the minimum Nigerian content requirements shall be complied with by “*all operators, alliance partners and contractors*” In so far as ‘Nigerian Content’ is defined (in Section 106) by reference to value received from “utilisation of Nigerian human, material resources and services” then it becomes clear that in performing any of the functions listed in the Schedule then *all operators, alliance partners and contractors* must use Nigerian human material resources or services to the degree specified.

The Schedule to the Act states the minimum specification of Nigerian content imposed on operators in the performance of their operations. It lists a whole load of items, goods, services and activities to be carried out in the oil industry and stipulates a minimum measurement for procuring or carrying out the activity. The items are classified under subheadings such as Front End Engineering Design (FEED) and detailed engineering services; Fabrication and Construction; Materials and Procurement; Well and Drilling Services/ Petroleum Technology; Exploration, Subsurface, Petroleum Engineering and Seismic etc. The minimum Nigerian content is measured in terms of man hours, size and volume, tonnage, certification, number and amount of local expenditure.

However there is an important qualification to the obligation contained in Section 11(1). This is contained in Section 11(4) which permits continued “importation” of any of the functions in the Schedule upon approval by the Minister, where there is inadequate capacity in Nigeria.

4. Nigerian Content Plan

Section 7 of the Act states as follows:

7 *In the bidding for any license, permit or interest and before carrying out any project in the Nigerian oil and gas industry, an operator shall submit a Nigerian Content Plan (“plan”) to the Board demonstrating compliance with the Nigerian content requirements of this Bill.*

Section 7 requires operators to deliver a plan which demonstrates compliance with the Nigerian content requirements of the Act, when bidding not only for licenses or blocks but also "... for any project in the oil and gas industry". There is no definition of project in the Act. Clearly a literal interpretation of this provision can only lead to absurdity because every single mundane activity undertaken by an operator will be caught by this provision. Upon a favourable review and assessment of the plan the operator is to be issued a Certificate of Authorisation to proceed with the project.

Most IOCs and indigenous operators are currently drawing up templates to be used for the submission of content plans for their projects. Although the Act does give some guidelines, it is likely that the contents of the templates will vary significantly depending on the nature, scope and value of the project contemplated. The provisions of Sections 10, 11, 12, 13, 29, 31, 38, 39, 43, 44 and 51 require the information to be submitted by the operators to show how the first consideration principle is to be applied to goods, services, employment and training. These provisions also require the submission of research and development plans, technology plans, legal services plan and financial services plan. These plans will also need to show how the minimum Nigerian content levels are to be achieved.

However, nothing is said about a time frame or limit imposed on the Board for the review and assessment of the plan, save that the Board may at its discretion conduct a public review which must be completed within 30 days of commencement. Hence, operators are faced with the grim possibility that their plans may be caught up in a web of bureaucracy for an inordinate length of time, thus potentially jeopardising the project.

It is important for operators to be able to determine without much ado whether or not their project is one that requires a content plan. There is a need for the Board to stipulate clear thresholds and guidelines for the implementation of this requirement. An obvious yardstick could be the value of the project. In order to avoid the Act stifling industry growth through delayed projects, it is necessary for the Board to make some self imposed duty, stipulating time and regime for the transparent assessment and approval of these plans.

5. Bid Evaluation

In order to promote the Nigerian Content objectives of the Act, the Act makes provisions allowing for consideration of Nigerian Content in the evaluation of bids and for advantage to be conferred on bidders on the basis of the level of Nigerian Content.

The general provisions in this regard are contained in Section 14, 15 and 16 of the Act. These sections state as follows:

- 14 *All operators and Project Promoters shall consider Nigerian content when evaluating any bid; where bids are within 1% of each other at commercial stage, the bid containing the highest level of Nigerian content shall be selected provided the Nigerian content in the selected bid is at least 5% higher than its closest competitor.*
15. *All operators and alliance partners shall maintain a bidding process for acquiring goods and services which shall give full and fair opportunity to Nigerian Indigenous contractors and companies.*
16. *The award of contract shall not be solely based on the principle of the lowest bidder where a Nigerian indigenous company has capacity to execute such job, the company shall not be disqualified exclusively on the basis that it is the lowest financial bidder, provided the value does not exceed the lowest bid price by 10 percent.*

The critical element for consideration in the evaluation of a bid is the Nigerian local content. By assessing the operators plan in conjunction with the minimum specifications of Nigerian content, the Board is able to evaluate the value of the local content in any given project and also monitor its implementation. Where bids received are within 1% of each other, the operator is enjoined to award the contract to the bid with the highest Nigerian content provided the Nigerian content is at least 5% higher than the closest competitor.

In projects valued in excess of \$1,000,000 this overriding rule governing bids, is monitored by an elaborate reporting programme. Operators are required to submit to the *Board quarterly, for approval all adverts for invitation to tender, pre-qualification criteria, proposed bidders list etc (Sections 17-24)*. The Board in turn has a duty to quarterly designate and subject contracts and sub-contracts submitted to it for review (presumably at random). Operators are to be notified of the designation of their contract for review. It must be emphasised again that this reporting programme must be streamlined by the Board to avoid unnecessary delays and thereby pushing up the cost of operations.

Although Section 14 focuses on conferring advantage in the bidding process on companies that utilise the highest Nigerian Content, the provisions of Section 15 and 16 deal more with conferring *advantage on Nigerian businesses*. Accordingly, operators are mandated to *give full and fair opportunity to Nigerian Indigenous contractors and companies*. In addition, in the evaluation of a bid the Act gives a 10% premium in favour of Nigerian companies.

In pursuance of the above mentioned objectives, the Act sets up a procedure for review by the Nigerian Content Development and Monitoring Board (“the Board”) of the process of awarding contracts where the amount involved is in excess of US\$1,000,000. Accordingly advertisements, prequalification criteria, technical bid documents, technical evaluation criteria and proposed bidders lists must be submitted to the Board for approval.

The emphasis on capacity to perform is again seen in section 16 which provides for assessment of bids. This section gives a Nigerian company a 10% premium so long as it has the **capacity to execute the job**. The provision does away with the principle of lowest bid where a Nigerian indigenous company has capacity to execute such job. Where the amount bided does not exceed the lowest bid price by 10%, the job must be awarded to the Nigerian company.

i) other factors to consider in the bidding process

Section 12 and 13 as well as Section 15 and 16 highlight the primary considerations which the Board will have in mind when conducting the review of the bidding process. The emphasis should be on – *Nigerian manufactured goods, Nigerian services, and Nigerian indigenous contractors and companies* – in so far as the goods meet specifications and there is capacity to carry out the project/contract being bided for.

In addition Section 17(2) highlights the fact that the Board will be assessing compliance with the required level of Nigerian Content.

ii) documents to be submitted

The details of documents to be submitted at each stage of the bidding process are contained in Sections 18, 20, 21, and 22 of the Act.

6. Project Offices

Section 25 – 27 of the Act sets out the provisions of the Act in regard to the maintenance of a project office by “operators or any other body” submitting a Nigerian content Plan. The does not however specify when a project office would be mandatory, although power is conferred on the Board to require that an office is maintained in a community where there are significant operations

7. Employment and Training

The promotion of ‘Nigerian human material’ as an aspect of Nigerian Content is dealt with in Section 28 to 35 of the Act

The general clause in this regard is Section 28(1) of the Act which stipulates that “Nigerians shall be given first consideration for employment and training in any project executed by *any operator or project promoter*’.

Based on the above foundation the Act requires that the Nigerian Content Plan submitted by **operator or project promoter** shall include and Employment and Training Plan which complies with Section 29 of the Act. Section 30 and 31 also make it an obligation on **operators** to provide training to Nigerians where Nigerians are not employed because of lack of training and to provide a succession plan for a Nigerian to understudy to an expatriate for a maximum period of 4 years.

By Section 32 the expatriate workforce for an operator or project promoter is limited to a maximum of 5% of its management positions as may be approved by the Board. Further in this regard Section 33 requires that all applications for expatriate quota must first be referred to the Board.

The Act requires in Section 34 that a “Labour Clause” be inserted in “projects or contracts” mandating the use of a minimum percentage of Nigerian workers as may be stipulated by the Board.

Finally all **operators and companies operating** in the Nigeria oil and gas industry shall employ only Nigerians in their junior and intermediate cadre

By the definition “Labour Clause” the minimum labour use is not limited to junior and intermediate cadre, but extends to **professional cadres** also. This is a significant provision when it is considered that the labour cost centre in most oil and gas operations is constituted in the professional cadre i.e. Geologist, Petroleum Engineers and highly skilled Technicians. Relying on this provision the Board is able to channel more work and as such substantial revenue to this category of Nigerian professionals in the industry.

The Act imposes very strict measures on the employment of expatriates in the oil industry. Expatriate management positions are limited to 5% in respect of **each project**. In addition, operators are required to obtain prior approval of the Board before applying for expatriate quota from other Government agencies. What is perhaps innovative is section 42 which requires professional employees engaged in **engineering or other professional services** in the Nigerian oil industry to be registered with the relevant professional bodies. This requirement means that the Board is able to track and monitor the activities of expatriates in order to ensure that the expatriate does not hold a position for more than 4 years (*Section 31*).

8. Research and Development

Section 37, 38 and 39 deal with the R & D requirements of the Act and requires operators to submit a programme for the '*promotion of education attachments training research and development*'

9. Regulations

The Act in Section 40, 41 and 42 empowers the Minister to make regulations in respect of training, growth of indigenous companies in various areas such as exploration, engineering design etc and for ensuring that professional employees are registered with Nigerian professional bodies.

Section 47 also permits the Minister to make regulations which requires operators to invest in or set up facilities factories etc for the purpose of carrying out any production or manufacturing in Nigeria.

10. Technology transfer

Section 43 provides that an operator must have a programme for purpose of promoting the transfer of technology into Nigeria in relation to oil and gas. By virtue of Section 44, the operator is required to submit to the Board annually a plan setting out a programme of planned initiatives aimed at promoting the effective transfer of technologies from the operator and alliance partners to Nigerian individuals and companies.

An operator is required to support the transfer of technology initiative by encouraging and facilitating the formation of the formation of joint ventures, partnering and development licensing agreements between Nigerian and foreign contractors. As well as ensure that the agreements for such joint ventures meet the requirement of the Nigerian content development to the satisfaction of the Board (Section 45 of the Act).

11. Services

- Insurance Services: Section 49 of the Act requires that all investors in the oil and gas industry to insure all its insurable risks relating to the oil and gas business, operations or contracts with an insurance company, through an insurance broker registered in Nigeria under the provisions of the Insurance Act as amended. However, the operators can place their insurance risk outside Nigeria with the written consent of the National Insurance Commission who shall ensure that Nigerian local capacity has been fully exhausted Section 50 of the Act

- **Legal Services:** Section 51 provides that the operators and other investors in any operations, business or transaction in Nigeria oil and gas industry can only retain a Nigerian Legal Practitioner or a firm of Legal Practitioners located in Nigeria.
- **Financial Services:** Section 52 provides that all operators and investors in need of financial services can only retain the services of Nigerian financial institutions except in situations to the satisfaction of the Board it is impracticable to do so.

12. Prohibition of importation of welded products

Section 53 provides that all operators and investors engaged in Nigerian oil and gas industry must carry out all fabrications and welding activities in the country.

13. Impact of the Act on foreign companies

Although there is reference in Section 3(1) and 3(2) to Nigerian Independent Contractors and Nigerian Indigenous Service Companies, the overall focus of the Act does not appear to be on the ownership structure (whether foreign or Nigerian) of the companies or operators participating in the Oil and Gas Industry. Having said that the contents of Section 3(1) and (2) cannot be ignored. The Act does not define '*Nigerian independent operators*' and does not define '*Nigerian Indigenous service companies*' both of which are used in the Section. However, Section 106 of the Act defines **Nigerian Company** as:

“A company formed and registered in Nigeria in accordance with the provisions of the Companies and Allied Matters Act with not less than 51% equity shares by Nigerians

On the reasonable assumption that '*Nigerian independent operators*' and '*Nigerian Indigenous service companies*' will be interpreted in a manner consistent with the definition of Nigerian Company, then it is clear that there is some premium to be gained from being a Nigerian company for the purposes of the two sections.

The point that arises however is how in practical terms will the 2 sections operate. As highlighted above, various sections of the Act deal pointedly with the practical operation of the overall policy objective contained in Section 3.

Aside from the general policy statement contained in Section 3 of the Act, the main provision which impacts on the ownership structure of local companies is Section 41(2) which states that:

International or multinational companies working through their Nigerian subsidiaries shall demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by Nigerian subsidiaries

This section is crucial for the success of the technology transfers initiative of the Act. It is the duty of the Minister (presumably acting through the Board) to set targets on the number and type of such joint ventures and alliances to be achieved by the operator for each project. A provision of the Act which has received some attention in the industry is section 41(2).

The section (though it does not say so) is apparently aimed at International or Multinational “Services” companies (MSC) and requires them to show that 50% of equipments to be applied to a project are in fact owned by their Nigerian subsidiaries who will ostensibly carry out the project.

The aim of this provision seems to be to stop MSCs from setting up paper-Nigerian companies/fronts (with no assets) solely for the purpose of winning local projects, executing the project and repatriating the profits to their home countries with very little benefit to Nigeria. While the objective is laudable, it is unlikely that this provision will meet the mischief which it seeks to address. In the first instance, if the subsidiary companies is 100% owned by the MSC, then transfers of assets back and forth between sister companies is easily done for no consideration. Secondly a large proportion of equipments used by the MSC do not belong to them, because of the high cost, the equipments are on hire or lease etc and as such cannot be transferred.