The Nigerian Local Content Act: Is it the Game changer?

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The passage into law of the Nigerian Local Content Bill is one of the significant developments for domesticing the oil industry through local value additions. The bill received presidential assent on 22nd April 2010 and created a Law to provide for the development of indigenous content in the Nigerian Oil and Gas Industry. Previous acts of governments had made feeble policy attempts at developing a local content framework for the industry and the fanfare associated with the recent enactment into law of the Nigerian Local Content Bill is very understandable.

Nigeria is the world's eighth-biggest oil exporter and relies on crude as its main foreign exchange earner. The industry account for over 40% of Nigeria’s GDP and is associated with over a billion dollar worth of investments annually. There is a markedly absence of indigenous players involved in these transactions, where about 90% of goods and services used in the industry are actually imported from overseas. The law seeks to increase indigenous participation by prescribing minimum thresholds for the use of local services and to promote the employment of Nigerian staff in the Industry.

This poses the question, would the Local Content Act be the game changer that transforms the indigenous service providers’ participation in the Nigerian Oil Industry. Can the local industry stymied over the years in becoming a significant player, take full advantage of the new law or would it be business as usual. This article makes a succinct analysis of the provisions of the Nigeria Local Content Act and attempt to address if an antidote has been found for a vibrant Nigerian local industry in the Oil and Gas sector.

Overview of the Nigerian Local Content Act

The Act which takes precedence over all other existing enactments and laws pertaining to Nigerian content in the petroleum industry defines Nigerian Content as ‘the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry’.

1. The Nigeria Content Monitoring Board (NCMB)

The Act set the values for stakeholders to consider Nigerian content as an important element of their project development and management philosophy for project execution. It created the Nigeria Content Monitoring Board (NCMB), vested with the role to make procedure guides, coordinate and implement the provisions of the Law. The Board’s role as the ombudsman for the Local Content policy was strengthened with the requirement that it exercise its functions with a view to ensuring a measurable and continuous growth in Nigerian content in all oil and gas arrangements, projects, operations, activities or transactions.

Achieving this ‘measurable and continuous growth in Nigerian content’ is enhanced with the prescription of minimum thresholds set out in the schedule of the Act. This was a clear departure from previous efforts of indigenization policy as specific performance targets where listed for each of the strategic sectors of the oil and gas industry. However, the power allowed the minister under section 11(4) to dispense with
compliance of these targets where there is inadequate capacity do not bode well for the intendment of the Law given the political configurations of our history in the oil industry.

The operators are required to submit to the Board a Nigerian Content Plan in bidding for a license, permit or interest and before carrying out any project. The Board is empowered to issue a Certificate of Authorization, within 30 days of its review or assessment of the Plan, where it is fully satisfied that the plan satisfies the provision of the Act. The Plan must contain provisions detailing how the operator or its alliance partner intend to ensure the use of locally manufactured goods where such goods meet the specifications of the industry and giving first considerations to goods manufactured in Nigeria and services provided within Nigeria. Also, it must set out the criteria used by the operator and their contractors in assessing how first consideration was given to Nigerian goods and services and the basis for which first consideration is employed in its evaluation of bids for goods and services required by the project.

The ‘first consideration’ was not defined in the Act. Neither did the Act spell out the guidelines for the Board to determine the veracity of the criteria employed by the operator in determining first considerations within the provisions of the Law. Assuming this is determined by the Board conducting a public review as authorized under the Law for the exercise of any of its function, it brings to question the practicability of this all-important element of the Local Content policy. The Board is under a time-frame of 30 days to issue a Certificate of Authorization for every project and this will definitely query the credibility of any exercise of the nature of public review within 30 days.

2. Minimum Nigeria Content specifications and Bid Evaluations

The Act specified minimum Nigeria content in any project to be executed in Nigeria oil and gas industry. It made precise the expectations for the different category of goods and services relevant to the industry. This includes the number of man hours relative to the duration of the project, size, tonnage and volume of certain goods, level of certification and the percentage of spending for procurement of local goods and services. Services like general banking services, Life Insurance, pension funding, security broking and fund management services are required to have 100% usage of Nigeria content. Procurement of steel pipes, plates, pipeline systems and Risers must be 100% tonnage local content and Seismic Data Acquisition for 3D and 2D, Field Development Plan, Marine moving services, Waste Disposal/Drainage services and industrial cleaning services require the use of 100% Nigerian man hours and spend. Incidentally, the Nigerian legal consultancy in the energy and natural services sector which have developed exponentially compared to other professional services were allowed only 50% of the contracts. In addition to these minimum levels of Nigeria content, every project or contract that has a budget exceeding USD 100 Million must contain a ‘Labour Clause’ mandating the usage of minimum percentage of Nigerian labour in specific cadres as may be stipulated by the Board.

In bid evaluations, awards of contracts will not be solely based on the principle of lowest bidder. The Nigerian contractor is reserved the right of full and fair opportunity provided it has the capacity to execute the job. It shall not be disqualified if he is within a margin of 10% to the lowest bidder. Where the bids are within 1% of each other at commercial stage, the bid containing highest level of Nigerian content shall be selected, provided Nigerian content in the selected bid is at least 5% higher than the closest competitor.
3. Contracting and Project Execution Arrangements

The approval of the Board is required for adverts, pre-qualification criteria, technical bid documents and proposed bidders list for all projects, contracts, subcontracts and purchase orders in excess of $1 million. It also required that prior to carrying out any project in Nigeria, an operator is required to establish a project office in the catchment area of the project where project management and procurement decisions are taken and such office shall be managed by approved personnel with decision making authority. It is instructive to note that ‘catchment area’ is not defined for the purposes of the Act and this opens a gap for abuse of the local content policy. However, the Board is given the power to mandate the operator to maintain office in areas that it has significant operations.

Employment and training of Nigerians must be given first consideration in any project executed by the operator. The Act makes a case for a clear and concise human capacity development plan in the oil industry as it prescribes that for any project, the operator must submit an Employment and Training Plan (E & T Plan). The E & T Plan shall include hiring and training needs of the operator with a breakdown of required skills and shortages and the anticipated training requirement, time frame for employment opportunities for each project phase, quarterly reports of the employment activities of the operator and evidence of reasonable efforts to train Nigerians filling skill shortages in the Industry.

The ‘Nigerianisation’ agenda of the local content policy also enjoyed a fillip with the requirement that the operator must submit a succession plan for every position held by an expatriate and such plan has a time-frame of four years for each Nigerian under-study to take up the expatriate position. It makes an allowance of a maximum of 5% expatriates for management positions in respect of the operator for each of its operations and requires that the Board must pre-approve any application for expatriate quota with the relevant authority. The operator is mandated to employ only Nigerians in their junior and intermediate job cadres.

Also, the requirement that the Minister is empowered to make regulations which shall require the operator to have any of its professional employees engaged in the provision of engineering or other professional services is registered with the relevant professional bodies in Nigeria is another avenue to check the surreptitious importation of foreign expertise when the skill is available locally.

Another commendable effort of the Act is in the area of technology transfer which has been the bane of prior existing Laws on the Oil and Gas industry in Nigeria, even though this issue has been legislated severally in the past fifty years. The minister is empowered to make regulations setting targets for Research and Developments and every Plan submitted must make provision for the promotion of education, attachments, training and Research and Development in Nigeria. A duty is reposed on the operator to submit a Research and Development Plan (R & D Plan) on a bi-annual basis which shall indicate a breakdown of its research and development initiatives in Nigeria. Such obligation on the operator will be supported by regulations made by the Minister establishing minimum standards, facilities, personnel and technology for training and targets to ensure full utilization and steady growth of indigenous companies in upstream petroleum activities. The International Oil Companies must also ensure that their Nigerian subsidiaries have 50% of the equipments deployed for their work programme is owned by the Nigerian subsidiaries.
The technology transfer plan of the operator must be submitted to the Board annually and it shall satisfy the Board that the promotion of technology transfer is in accordance with Nigeria’s plan and priorities. The technology transfer plan must show an appropriate programme of the operator in encouraging joint ventures, partnering and licensing agreements with Nigerian contractors and there shall be a Technology Transfer Report for which the operator shall submit annually to the Board showing its initiatives in this regard and the results. The minister is empowered to make regulations setting targets to be achieved on the number of joint ventures between Nigerian and foreign contractors for each project. It shall also make regulations for the operator to make investments for establishing production units within Nigeria of any service otherwise imported into Nigeria.

4. **Professional and Technical Services**

Professional and technical services got honourable mention in the Act. The Act prescribed that all fabrication and welding activities of the operators and contractors must be engaged in-country. This is obviously a tacit attempt to correct situations where most of the contracts for FPSO of major oil projects in Nigeria were conducted abroad. Also, the Act requires that the insurance of all insurable risks must be conducted through an insurance broker registered in Nigeria and any insurance risk placed offshore must be pre-approved by the National Insurance Commission (NAICON). The NAICON is however to ensure that such approval is given only after the absence of local capacity is exhausted.

The operator must retain the legal services of a Nigerian law firm with offices located in Nigeria. It shall also submit bi-annually to the Board a Legal Services Plan showing breakdown of the legal services utilized, list of external solicitors and the annual legal services budget for the past one year. It shall also submit a Financial Services Plan showing that all financial services required by the operator are retained locally except where it is impracticable and a list of the financial services utilized with the nature of services provided. The operators, contractors and sub-contractors are required to maintain bank accounts within Nigeria retaining a minimum of 10% of the revenues accruing from the Nigeria operations.

5. **Petroleum e-Market and Joint Qualification System**

The Nigerian Petroleum Exchange (NiPEX) managed by the National Petroleum Investment Management Services (NAPIMS) as a virtual community that links buyers and sellers in the industry gained legal support under the Act. The Act compelled the Board to create an oil and gas e-marketplace as a virtual platform to facilitate transactions in the industry, provide interface with the joint qualification system and monitor the Nigerian content performance of the operators, suppliers and service providers.

The Joint Qualification System (JQS) which identifies pre-qualified suppliers in NiPEX based on certain criteria is made a compulsory tool of the Board and shall serve as an industry databank for evaluation, verification and ranking of service providers based on capabilities and Nigeria content.

6. **Fiscal framework**

The appropriate fiscal framework and tax incentives for companies that have established outfits for the production of goods and services otherwise imported into
Nigeria is made the responsibility of the minister, acting in consultation with the relevant arm of government.

The Act also created the Nigerian Content Development Fund which is to be funded by 1% of the contract value awarded to the operator, contractor or sub-contractor for the execution of any project in the upstream sector. The Fund is used for the purposes of implementing the Nigeria content development and shall be managed by the Board.

7. Penalties

The Act makes it an offence for the operator or contractor failing to comply with any provisions of the Act in their operations. Such failure is punishable by a fine of 5% of the contract value in which the offence is committed or the cancellation of the project.

Conclusion

The Nigeria Oil and Gas Industry Content Development Act is certainly an ambitious plan by the government to achieve considerable results in local content in the Oil and Gas industry. An appreciative element of the local content policy is government’s will to ensure compliance of companies operating in Nigeria by retaining a significant percentage of industry spends locally and improving local capacity and expertise. A stimulus of this growth for the Nigerian companies, defined as having at least 51% Nigerian equity shareholding, is the special considerations granted them for every project, bid and other sundry contracts in the Industry.

A pertinent question that challenges the Act is determining whether the actual take-off point of the law is in tandem with the spirit of the policy. The Act requires that all subsequent arrangements in the petroleum industry must comply with the provisions of the Law. In effect, all prior existing contracts and arrangements before the enactment of the Law remain unaffected. This position offends the local content policy and leaves a loophole for circumvention of the policy.

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