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OALP Client Update

Oil & Gas

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The Nigerian Oil & Gas Industry Content Development Act 2010: A Primer

The Nigerian Oil and Gas Industry Content Development Act 2010 (“the Act”) came into force in April, 2010. The Act seeks to provide for the development supervision, coordination, monitoring and implementation of Nigerian Content in the Nigerian Oil and Industry (“the Industry”).

Although yet to be gazetted, it is evident that the Act represents the Federal Government of Nigeria’s (FGN) latest initiative at growing local participation, competence and expertise in the Industry. Since its enactment, the Act has drawn widespread approval from stakeholders in the Industry on a number of fronts. It is also seen as an answer to the injustices perpetrated in the Niger Delta region and an apt follow up to the FGN’s amnesty programme in that area. It has also been lauded as the first comprehensive policy statement on local content in Nigeria.

The Act applies to all operators in the Industry including the Nigeria National Petroleum Corporation (NNPC), its joint venture partners as well as any Nigerian, foreign, or international oil and gas companies and is to be implemented and enforced by the Nigerian Content Monitoring Board (NCMB).

First Consideration vs. Exclusive Consideration

A close read of the Act throws light on the twin concepts of **first consideration** and **exclusive consideration**. Under the Act, **Nigerian independent operators** are now to be accorded **first consideration** in the award of oil interests, projects and contracts. Also required of all operators is a detailed plan showing how operators and contractors will accord first consideration to Nigerian goods and services. Further, Nigerians are to be given first consideration for employment and training in all operator executed projects.

Whilst not specifically defined, ‘Nigerian independent operators’ may be construed to be ‘Nigerian companies’ as defined in the Act to be companies registered in Nigeria with not less that 51% equity shares held by Nigerians. Thus, If properly implemented, **First Consideration** may potentially have an adverse effect on the businesses of foreign operators. This is of course premised upon the presumption that there are, or at least would be, Nigerian

CORE PROVISIONS

- First Consideration vs. Exclusive Consideration
- Nigerian Content Plan
- Nigerian Company Defined
- The Minimum 10%
- Nigerian Content Performance Report
- Nigerian Content Development Fund

Prior to the enactment of the Act, it is noteworthy that the philosophy of local content has been a part of Nigerian law via a number of statutes already in force such as the Cabotage Act, 2003 and the Immigration Act amongst others.

Nigerian Company

For the first time, the Act provides the definition of a Nigerian Company - i.e. a company registered in Nigeria under the Companies and Allied Matters Act with not less than 51% equity shares held by Nigerians.

Nigerian Content-

“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 Industry.”

-Section 109



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Nigerian Content Performance Report (NCPR)

Every operator is required to submit to the Board within the first two months of every year, an annual NCPR which imposes several reporting obligations on the submitting operators. Related to this is the requirement for operators to provide access to their facilities and all documentation to the Board for the purpose of substantiating the contents of the NCPR.

In addition, an operator is required to ensure that its partners, contractors, and subcontractors are bound by way of contract, to provide access to their records in order to ensure compliance with the NCPR.

Nigerian Content Development Fund (NCDF)

1% of every contract awarded to any operator, alliance partner or indeed any entity involved in any project, operation, activity or transaction in the upstream sector is to be deducted from source and paid into the NCDF.

Minimum requirement for use of Nigerian Labour

Labour clauses are also a new initiative. These are required to be inserted into all contracts and projects with a total budget in excess of \$100 Million mandating the use of a minimum percentage of Nigerian labour.

operators with enough capacity, manpower and resources to take on the oil interests.

On the other hand, **Exclusive Consideration** is to be given to **Nigerian Indigenous service companies** that are able to demonstrate ownership of equipment, Nigerian personnel and capacity for the bidding and provision of services and contracts in the Industry.

Clearly, the intendment of the Act is to place Nigerians at the core of activities in the Industry. This objective though laudable, remains to be tested as Nigerian participants in the Industry have been hitherto unable to muster the resources, (economic and otherwise) for sustained participation even in auxiliary services in the Industry.

Nigerian Content Plan

In bidding for licenses, permits or other interests in the Industry, all operators are required to submit a Nigerian Content Plan ("Content Plan") demonstrating compliance with the prescriptions of the Act and where satisfactory, are issued with a Certificate of Authorization.

Succession plans are also required of operators in relation to expatriate positions. To give effect to this, Nigerians are to understudy incumbent expatriates for a maximum period of about 4 years, at the close of which the position is to be "nigerianised". As part of nigerianisation, all operators in the Industry are required to employ only Nigerians in their junior and intermediate cadre grade levels.

Preference is to be given to bids with higher Nigerian Content. This approach is also applied in bid evaluation.

The Minimum 10%

Another innovation in the Act is the requirement that all operators, contractors and subcontractors are to each maintain Nigerian bank accounts into which shall be paid a minimum of 10% of its total revenue accruing from its Nigerian operations.

This introduction will be of particular concern to foreign operators in the upstream subsector of the Industry as well as their counterparties and investors who are typically inclined to sweep the entirety of their revenues and proceeds into offshore accounts. Such operators are now bound by law to retain a minimum of 10% of their total revenue in Nigeria. Though a small per centum of the revenues of an average operator, we believe this introduction is a welcome development for the banking industry and the economy as a whole.

Still, the provision is somewhat unclear and may require judicial interpretation. By way of example, the provision does not specify the nature of the accounts which must be maintained i.e. whether a naira or dollar denominated account. We suspect that this will be of interest to operators who typically maintain an array of accounts denominated in different currencies.

Professional Services

There is a requirement in the Act that operators are required to retain the services of only Nigerian legal practitioners and Nigerian law firms. Another related requirement is a Legal Services Plan (LSP), which is to be submitted bi-annually. The LSP is to forecast the legal services required by the relevant operator for the next six months, projected expenditure in that regard and an annual legal budget.

In a similar vein, only the services of Nigerian financial institutions can be retained by operators requiring financial services in the Industry. A bi-annual Financial Services Plan in this regard, is required of all operators.

In relation to the insurance and reinsurances of operators, the Act requires that all insurable business, operations and contracts in the Industry be insured with insurance companies through an insurance broker registered under the Insurance Act, 2003. This requirement is however as to a registered Nigerian insurance *broker* only and not the insurance company itself. Though it should be noted that there is a separate stipulation that no insured risk will be placed offshore unless it is established that local capacity has been fully exhausted. However, the Act does not state how this is to be established by the National Insurance Commission.

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Operations in Nigeria

The Act empowers the Minister to make regulations which shall require any operator to invest in or establish operations in Nigeria for the purposes of manufacturing goods otherwise imported into Nigeria and providing services.

A FEW RED FLAGS

Reduced Opportunities for Foreign Operators

The twin concepts of First and Exclusive Consideration though praiseworthy, present the risk of a significant dip in business opportunities and engagements for foreign operators in the Industry. Further, the 'nigerianization' of expatriate positions may have negative implications for knowledge transfer and development.

Management and Control

The implication of the Act's definition of a Nigerian Company is that the foreign equity investments in Nigerian operators companies must now be limited to 51% of the equity shares in such companies.

Increased Costs

The 1% deduction in favour of the NCDF is an extra expense particularly for fledgling Nigerian operators. This is particularly worrisome in view of pre-existing statutory and Industry required levies, payments and fees. This may be counter productive as this head of deduction further increases the cost of doing business for Nigerian operators in the Industry.

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