

# Deepening the Nigerian Power Sector Liberalization through the Nigerian Content Regulations: An appraisal of Recent Industry Legislative Development \*

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Energy and Natural Resources



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## Background:

The local content concept, now well-known in the resource sectors and the energy industry across many jurisdictions, originates from the efforts of the resource-owning states aimed at taking substantial part in the extraction, production, processing, sale and enjoyment of their nature-endowed resources. It is within that context that the Nigerian Oil and Gas Industry Content Development Act 2010<sup>1</sup> (“Oil and Gas Content Act”) was enacted and has been implemented so far. The new wave of restructuring in the electric power industry in Nigeria has followed similar trajectories as in many other resource-owning states.

With the liberalization of the electricity industry under the Electric Power Sector Reform Act,<sup>2</sup> 2005 (EPSR Act), the regulator – the Nigerian Electricity Regulatory Commission (NERC) has now issued a subsidiary legislation on “Nigerian Content”, known as the *Regulations on National Content Development for the Power Sector 2014*<sup>3</sup> pursuant to sections 32(1) and 96 of the EPSR Act. After a rigorous process of enactment, the then NERC Chairman, Dr. Sam Amadi signed the Regulation (which has profound Nigerian content provisions) into law on 24<sup>th</sup> December 2014. We appraise the contents of the said regulation in the light of its similar

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<sup>1</sup> Act No. 2 of 2010.

<sup>2</sup> Act No. 6 of 2005.

<sup>3</sup> Pursuant to sections 32(1) and 96 of The Power Sectors Reform Act, No. 6 of 2005.

objectives and success recorded in implementing the Oil and Gas Content Act with comments on the prospect, adequacy or otherwise of the Regulation vis-à-vis the expected benefits to the electricity industry in Nigeria.

## **I. General Obligations**

The fulcrum of the philosophy behind the regulation is encapsulated in its general obligations as specified in Regulations 4(a), 5, 9(a), 10, 14(a), 15(a), 16(a) and 17(a). All licensees in the Nigerian Electricity Supply Industry (NESI) are mandated to have the development of Nigerian content as a key component of their philosophy in their general operation, including execution of their projects. Similarly, in award of contracts all licensees shall ensure that first consideration is given to all qualified Nigerian companies for the supply of goods and works and provision of services and shall give first consideration to goods made in Nigeria and services provided by Nigerian firms. Regulation 10(a) mandates also all licensees to give first consideration to suitably qualified Nigerians for employment and training.

Furthermore, Regulations 14(a), 15(a), 16(a) and 17(a) make it compulsory for all licensees to patronize the services of Nigerian Engineers, Insurance and Reinsurance Businesses, Legal Services and Financial and Capital Market Services. Apart from stating the obligations very clearly in mandatory terms, the Regulation further provides steps, rules and procedures to be followed by all the licensees in the power industry to conform to the regulation in the performance of their obligations.

## **II. Overall Policy Objectives:**

The Nigerian content policy objectives and the overall obligation imposed in respect of transactions within the electricity industry applicable to all the licensees of NERC are provided in Regulation 3, which states the objectives as being to promote the following:

- a. Deliberate utilization of Nigerian human material resources, goods and services in the industry;
- b. Opening NESI at all levels of its complexity to involve Nigerian people and expertise;
- c. Building capabilities in Nigeria to support increased investment in the sector; and
- d. Leveraging existing and future investment in the NESI to stimulate the growth of the Nigerian and the Nigeria-located enterprise.

## **III. Nigerian Content for Nigerians and Nigerian Professional Services Firms**

From the examination of the contents of the rules, procedures and quantum requirements for compliance with the Regulations, it is clear in our view, that the Regulations are deliberately made compulsory for all the licensees whether in the generation, distribution and the transmission and market operation sides of the industry. The central aim is to ensure that Nigerian human and material resources are deployed in a way that gives first line priority to Nigerians and Nigerian companies as a result of their being Nigerians.

In pursuance of the objective of supporting the Nigerian indigenous peoples and businesses, the Regulations give preferential treatment to all Nigerian companies operating in the industry. The basic focus is the promotion of Nigerian content development in all projects, services and operations in the power industry. This explains why the Regulations provides essentially that Nigerian licensees shall have first consideration in the award of contracts in the generation, transmission and distribution and allied licenses and in all projects for which contracts are to be awarded. Crucial indication of this can be found in Regulations 14, 15, 16 and 17, which make specific provisions for the engagement of the professional services of Nigerian Engineers, insurance and reinsurance businesses, legal service providers and financial and capital market professionals, except where a waiver is obtained pursuant to Regulation 9(g) & (h). This approach also applies to the entire gamut of the industry not only to “contracting” work but also in the employment of staff and labour, staff training and procurement of goods, materials and services.

#### **IV. Minimum Nigerian Content Specifications and Bid Evaluation**

- a. Nigerian Content:** Like the Oil and Gas Content Act, Regulation 2 defines “Nigerian Content” as the quantum of composite value added to or created in the Nigerian economy by a systemic development of capacity of indigenous capabilities through the deliberate utilization of Nigerian human and material resources and services in the NESI.
- b. Joint Qualification System:** As a precursor to taking advantage of the support for the Nigerian firms, Regulation 4(b) provides that the NERC shall establish, maintain and administer a Joint Qualification System (JQS) in consultation with the Nigerian Content Consultative Forum in accordance with the provisions of the Regulations. The aim of JQS as highlighted in Regulation 4(c) is to serve as the sole system for the Nigerian content registration and prequalification of contractors in the NESI, to act as a source of verification of contractors capabilities, a source of information and review of applications of the Nigerian content, a data bank of skills development pool, and ranking and categorization of service companies.

- c. **Bid Evaluation:** Under the Oil and Gas Content Act, during bids for contracts, operators are mandated to consider Nigerian content when evaluating bids and bids that are within 1% of each other at the commercial stage will be selected on the basis of the bid with a higher Nigerian content. However, Regulation 9(f) mandates all operators to consider Nigerian content when evaluating any bid at commercial stage and that the bid containing the highest level of Nigerian content shall be selected. A “labour clause” mandating the use of a minimum percentage of Nigerian labour in specific cadres of project execution must also be provided in all contracts or projects awarded by licensees. This presupposes that compliance with the labour clause is also a mandatory part of the bid evaluation process.
  
- d. **Labour and Human Resources Specification:** With regards to the consideration for employment and training of labour and human resources in the NESI, the Regulation is very ambitious. Regulation 10 anticipates that a whopping 95% of the employment at the management level of a licensee should go to Nigerians; leaving only 5% or such as may be (except as otherwise) approved by the NERC, for expatriates. Even at this, the regulation expects the licensee to appropriately train their local workers so as to enable them progress within the organizational structure of the licensee. As for the junior, intermediate and unskilled workers, the licensees are under obligation to employ only Nigerians to fill those vacancies. See Regulation 10(d).
  
- e. **Training:** Giving the significance of training and retraining of the human resources for the NESI, Regulation 11 of the Regulation provides that all licensees shall have and submit to the NERC, a yearly training plan with provisions for succession plan where Nigerians will take over from the expatriates. It expressly requires that Nigerians be closely involved in the research and development and training work programme; and where collective agreement is executed between the employer and the employees, the same must contain provisions that are consistent with Regulation 11.

## V. **Technology Acquisition**

Transfer of technology to the local manpower is a cardinal part of the regulation, given the dependency of the NESI on technology. It stands to reason that if the regulation is about local content, technology to drive the idea must be transferred to the local manpower/firms at some point, to achieve the overall objective of the regulation. Thus, by virtue of Regulation 12, every licensee is to maintain a Technology Transfer Plan which details the modalities of transferring the technologies being deployed by such operator to Nigerians. This can be achieved via

encouraging or facilitating the formation of joint ventures, partnerships, and the execution of licensing agreements between Nigerian and foreign contractors and service or supplier company's agreements for all such joint ventures.

Regulation 12 (d) also provides that the Commission shall make recommendation to appropriate arms of Government to give fiscal or tax incentives to both foreign and indigenous companies who establish facilities, factories, production units or other operations in Nigeria towards reducing or stopping and replacing the importation of foreign imported products and services with local production. Where granted, such tax and other fiscal incentives will be a sweetener, which will encourage the licensee/operator to participate and facilitate the transfer of technology.

Submission of the Technology Transfer Plan is however not optional as Regulation 13 clearly states that a failure to submit a Technology Transfer Plan when required by the Commission shall render the licensee liable to fines and sanctions.

#### **VI. NESI Nigerian Content Consultative Forum (NNCCF)**

Another unique addition to the local content agenda is the establishment of the NESI Nigerian Content Consultative Forum ("NNCCF"), by Regulation 18. Essentially, this forum is to allow the other stakeholders in the NESI to participate in monitoring the implementation of the Nigerian content regulation provisions. The NNCCF which consists of representatives from the fabrication, engineering, financial services, legal and insurance, information and communication technology, education and training, and any other professional services (as may be determined by the Commission from time to time), is saddled with the responsibility of advising the Commission on the availability of local capacities and deployment of such as may be relevant to the local content in the NESI and its members shall have 3 years tenure renewable only once. It should be noted that unlike under the Oil and Gas Content Act which established the Nigeria Content Development and Monitoring Board as the sole body to make procedural guidelines and monitor compliance by operators within the oil and gas sectors, the NNCCF is created to act as an advisory body to the NERC, which shall appoint the chairperson of the NNCCF from among the forum while the secretary shall be a staff of the NERC. In the performance of its functions, Regulation 19 states that the NNCCF shall meet quarterly to conduct its meetings and voting shall be by simple majority of members present, with the chairperson having a casting vote where there is equality of vote. It should be noted that while conferences and enlightenment campaigns might have been held under the auspices of consumer forum before the regulation became law, the NERC has only instated the Forum established by Regulation 18 to advise the NERC on the minimum threshold of the local content just yet in December 2015.

## VII. Submission and Publication of Compliance Reports

In the spirit of transparency, Regulation 21 requires the operators and licensees to submit an annual report of compliance in terms and format approved by the Commission, which the Commission is obliged by Regulation 22 to publish annually.

### **Conclusion:**

It appears that the NERC prefers gradual implementation of the regulation given that capacity is yet to reach a threshold where local investors may be preferred to foreign investors. This is particularly moreso because the NNCCF was not set up until 10<sup>th</sup> December 2015 when the Regulation itself has signed into law since about a year earlier. The Commission is just now in a position to establish a JQS that will produce the electricity industry data bank for the Nigerian content registration and pre-qualification of contractors in the NESI. In other words, if there is any investor willing to invest in the critical segment of the NESI as presently constituted, such investor can apply for a waiver under Regulation Regulation 9(g) & (h) and it is likely that subject to the applicable timeline, the NERC will be willing to waive the mandatory requirements of the regulation for the sake of building capacity first before enforcing the bias for building local capacity. Moreso, the implementation may not pose a major issue but the quality expected of the operators in the face of perceived dwindling investment, may result in services and products of lesser quality; unless the investment capacity of the local operators is enhanced by some other means.

On the whole however, the enactment of the Regulation is timely and commendable. If well implemented with the cooperation of all relevant stakeholders, it will be beneficial to all stakeholders and hopefully achieve the intended objectives. It is our hope that the implementation of this regulation in the NESI will create jobs for the teeming unemployed Nigerian youths, build indigenous technical expertise, inspire other segments of the Nigerian economy and ultimately kickstart the industrial revolution needed to enable Nigeria not only to take the lead in the comity of MINT (Mexico, Indonesia, Nigeria and Turkey) countries but also begin the process of taking its place among the 20 largest global economies in the near future.

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