



Discourse: Executive Order on ‘Support for Local Contents in Public Procurement by the Federal Government’

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Introduction

One of the three Executive Orders (EOs) signed same day in May 2017 by the Acting President, Prof Yemi Osinbajo, (SAN) focused on promoting made in Nigeria products in public procurements. Given Nigeria’s notoriety for import dependence, *vis a vis* government’s goal of weaning the economy off over dependence on oil revenues, the EO titled, ‘**Support for Local Contents in Public Procurement by the Federal Government**’ (LCEO) is a welcome initiative. It is not surprising that the eight (8) paragraph LCEO which became effective immediately - has attracted several commendations for the FG from diverse sector players – ranging from ICT to manufacturing.

In this Newsletter, we discuss on a paragraph by paragraph basis, the implications of the LCEO, while iterating FG’s previous and ongoing attempts at promoting Nigerian content/participation in various sectors of the economy.

Promotion of Local Content in Public Procurement

Paragraph 1, of the LCEO sets the tone by prescribing that “*all Ministries, Departments and Agencies (MDAs) of the FGN shall grant preference to local manufacturers of goods and service providers in their procurement of goods and services.*”

Comment: This EO portends significant positive impact on local businesses in terms of increased patronage by MDAs, in pursuance of the preferential treatment. Coming at a time when - owing to reduced oil revenues and budget deficits - Nigeria needs to manage its foreign reserve with a high sense of stewardship, this would bolster Nigeria’s import substitution drive on the way to attaining positive balance of trade. The spill over effects on the economy in terms of increased capacity utilisation and profitability, employment generation, retention and poverty reduction, increased taxes, etc all makes for a very optimistic outlook. Effective implementation could make the LCEO a veritable plank of the government’s Economic Recovery and Growth Plan (ERGP).



Per **Paragraph 2**, “any document issued by any MDA ... for the solicitation of offers, bids, proposals or quotations for the supply or provision of goods and services (Solicitation Document) ... **shall expressly indicate the preference to be granted to domestic manufacturers, contractors and service providers and the information required to establish the eligibility of a bid for such preference.**”

Comment: In addition to the full weight of Presidential authority behind the LCEO, it is trite that “shall” as used in Para. 2 above is mandatory: **Achineku v. Ishagba [1988] 4 NWLR (Pt.89) 411; Oyedipo v. Oyinlola [1987] 1 NWLR (Pt.50) 356.** The language is similar to **section 34 Public Procurement Act (PPA), Cap. P44 LFN, 2004.** Section 34(1) which, employing equivalent phraseology to **Para 1 LCEO** uses “may” which is (usually interpreted to be) discretionary: **Oko v. Igweshi [1997] 4 NWLR (Pt.497) 48,** instead of “shall” used by the latter. However, **Para 2 LCEO** and **section 34(2) PPA,** both uses “shall”. Can the use of “may” versus “shall” in **section 34(1) PPA vis a vis Para 1 LCEO** justify a charge that the LCEO is a “back door amendment” of the PPA and therefore objectionable? It is instructive that in the recent constitutional amendment exercise, the Senate has proposed amendments to curtail the presidential use of EOs – viewing issuance of EOs as usurpation of their law making function. However, on this very subject, Nigerian businesses would be pleased that LCEO imposes a higher standard.

According to **Paragraph 3:** “all Solicitation Documents shall require bidders or potential manufacturers, suppliers, contractors and consultants to **provide a verifiable statement on the local content of the goods or services to be provided.**”

Comment: This provision further reinforces government’s LC expectations from bidders; applications are incomplete without such verifiable statement, which in turn would make bidders have a robust LC strategy in order to ensure their competitiveness. Wholly owned Nigerian companies with

divergent local content quotients will rank differently in this regard.

MDAs may need to develop specific guidelines upon which bidders can streamline their ‘verifiable statement’, otherwise it would turn up in different formats and subject to different interpretations. The MDAs therefore need to have a uniform code which typifies their local content requirement in the goods and services they intend to procure from local manufacturers. MDAs can amongst others, leverage existing guidelines from LC focused regulators like the *Nigerian Content Development Monitoring Board* (NCDMB, oil and gas LC regulator), and *National Office for Technology Acquisition and Promotion* (NOTAP, regulating transfer of technology agreements with foreign service providers), in this regard. Maybe



the Bureau of Public Procurement (BPP) can, pursuant to its functions under **section 5 PPA** (especially 5(m) to “prepare and update standard bidding and contract documentation”), prepare template verifiable statement which could be used by bidders.

Paragraph 4 provides that: “made-in-Nigeria products shall be given preference in the procurement of the following items and **at least 40% of the procurement expenditure on these items in all MDAs of the FGN shall be locally manufactured goods or local service providers:** (a) Uniforms and Footwear; (b) Food and Beverages; (c) Furniture & Fittings (d) Stationery; (e) Motor Vehicles; (f) Pharmaceuticals; (g) Construction Materials; and (h) Information and Communication Technology.”

Comment: The foregoing provision raises some questions. Are the sectors/products on this list, ‘low hanging fruits’ in respect of which non-compliance for example, because there no capacity issues - would be inexcusable? Does this listing typify “let’s start from somewhere”, such that it could be expanded in the medium term? Could the list have been longer (more likely) or shorter? Could the 40% minimum threshold in the list be higher minimums for items like ‘food and beverages’, ‘furniture and fittings’? Presumably government had access to baseline studies and statistical data that informed the minimum threshold at this time. The listing is also apparently to ensure that some sectoral initiatives get further boost; an example is inclusion of motor vehicles, given the *National Automotive Industry Policy Development Plan*. Apart from personnel cost, the bulk of FG’s N2.36tn recurrent expenditure in the 2017 budget spend would be on procurement (not to talk of capital expenditure). Therefore vigorous implementation would accelerate Nigeria’s economic recovery and growth as well as curb capital flight.

In terms of **Paragraph 5:** “within 90 days of the date of this Order, the heads of all MDAs of the FGN shall:

a. **assess** the monitoring, enforcement, implementation, and compliance with this Executive Order and local content stipulations in the Public Procurement Act or any other relevant Act within their agencies;

b. **propose policies** to ensure that the Federal Government’s procurement of goods and services maximises the use of goods manufactured in Nigeria and services provided by **Nigerian citizens doing business as sole proprietors, firms, or companies held wholly by them or in the majority;** and

c. **submit such findings** to the Honourable Minister [HM] of Industry, Trade & Investment.”

Comment: After issuance of the LCEO, the Council for the Regulation of Engineering in Nigeria (COREN) threatened to take legal action if MDAs

fail to comply with the LCEO. This brings salient question of compliance and enforceability to the fore. Can an unsuccessful contract bidder sue for non-compliance with the LCEO and for what remedies, because where there is a wrong there must be a remedy: *ubi jus ibi remedium*? This should be possible in proven cases of non-compliance, although bidding documents typically contain disclaimers that participation does not give rise to contractual relationships until preferred bidder enters into contract with the procuring entity. Of course where non-compliance also disclose commission of offences, section 58 PPA as well as other applicable criminal law provisions could provide basis for prosecution of the relevant actors.

Para 5's compliance monitoring timeframe could be the first time some

for government contracts.

Contrast may be made with the **Nigeria Oil and Gas Industry Content and Development Act, Cap. N124A LFN 2004 (LCA)**, which in **section 106** defines “Nigerian company” as a company incorporated in Nigeria and having majority Nigerian shareholding, *vis a vis* the **Coastal and Inland Shipping (Cabotage) Act, Cap. C51 LFN 2004 (CA)**'s definition.

It may therefore be prescient to consider the implications of the LCEO on the PPA, LCA and CA. Is the LCEO a unique delegated legislation (pursuant to constitutional enablement in **section 315(2)**), and therefore not inferior to Acts of the National Assembly, since they also derive their legislative powers from the same Constitution? Or such view is

paragraph 5 above. This report shall include specific recommendations to strengthen the implementation of Local Content Laws and local content procurement preference policies and programmes.”

Comment: Again, this is a pragmatic approach and could have far reaching impact in addressing Nigeria's multi sectoral local content development strategy. The interagency cooperation involved in the effort (given MDAs inputs to the Minister who is then mandated to collaborate with BPP in producing the Para 6 deliverable) is commendable, and aimed at producing wholistic results. Although not expressly mentioned, nothing stops MITI from also proposing amendments to LC laws, not just making “specific recommendations to strengthen implementation” of LC laws/procurement preference policies and programmes. However, the imperative of getting the most out of current legislative framework (as legislative enactment could take time), is optimal.

Although provision was not made for public exposure of the draft Ministerial report, comments from stakeholders such as research agencies and think tanks like the Nigerian Bureau of Statistics (NBS) and Nigeria Economic Summit Group (NESG) could be helpful. The draft report could also benefit from feedback from industry associations like Manufacturers Association of Nigeria (MAN), Nigerian Economic Consultative Association (NECA) and labour unions, etc. It is heart-warming that the LCEO envisages a mechanism for scientific measurement of its impact. Statutory provisions in legislation like **Nigeria Export Promotion Zones Act (NEPZA, Cap. N107 LFN 2004)** and **NIPC Act** mandating periodic evaluation/impact assessment of the initiatives under those laws have historically been complied with more in breach than otherwise.

Paragraph 7 defines “local content” for purposes of the EO as meaning “the amount of Nigerian or locally produced human and material resources utilised in the manufacture of goods or rendering of services.”

Comment: The LCEO definition of local



MDAs consciously and systematically review the LC implications of their operations; hence it is a welcome development. However, pending when the envisaged **Para 5** subsequent actions happens (see **Para 6** below), such MDAs could slack off on LC compliance monitoring and corrective actions. What is the HM to do with this?

Para 5(b) is two pronged: “goods manufactured in Nigeria” and “services provided by Nigerian citizens...” with the latter prong being rehashed as definition of local content in **Para 7**. The implication is exclusion of Nigerian companies wholly or majority owned by foreigners, making them less competitive in bidding

extreme and EOs cannot rank *pari passu* with laws made by the legislature? Accordingly, the LCEO, regardless of its lofty intentions cannot override existing laws. At best, the recommendations made by MITI should be channelled through appropriate legislative process into amending existing laws or sponsoring the passage of new laws, as contemplated by **Para 7**.

By **Paragraph 6**: “within 180 days of the date of this order, the Minister of Industry, Trade & Investment in consultation with the Director-General of the Bureau for Public Procurement shall submit to the President, a report on the Made-in-Nigeria initiative that includes findings from

content utilises similar principles/denominators as LCA's: "...the quantum of composite value added to or created in the Nigerian economy by a systemic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services..." (section 106 LCA). On its part, the CA provides per section 23 "...a vessel shall not be registered for use in the domestic trade unless the Minister is satisfied that – the vessel is wholly and beneficially owned by Nigerian citizens or by a company wholly and beneficially owned by Nigerian citizens..." Section 3 CA absolutely prohibits non Nigerian vessels from Cabotage business. The Nigerian Broadcasting Corporation (NBC)'s Draft Broadcasting Code, 2010 (Code) on its part, defines local content to mean "production with substantially indigenous inputs in which Nigerians have editorial and creative control." The Code essentially places an obligation on broadcasters (Network, Subscription services, and Internet broadcast) to include respective minimum thresholds of LC in their broadcast. The Minister of Information and Culture, in a bid to push for increased Nigerian content announced that there would be an amendment of the Code. This was misconstrued as placing a ban on digital content produced outside Nigeria. The FG however subsequently included the Creative Industry as one of the pioneer industries eligible for tax holiday.

One key observation is whether implementation of the LCEO would not discriminate against Nigerian companies with 100% or majority foreign participation irrespective of their utilisation of Nigerian human and material resources? Obviously different national strategic considerations have to be balanced against one another, depending on level of priority ascribed to specific ones. Firstly, to attract foreign capital, Nigeria is party to *Bilateral Investment Treaties* (BITs) undertaking to give similar/equal treatment to nationals/residents of BIT counterparties or entities owned by them as it does to Nigerian citizens or entities owned by them. The NIPC Act also exemplifies this by permitting all Nigerian companies (irrespective of shareholders'

nationality) to invest in all sectors, except "the negative list", as a means of attracting foreign investment (sections 17 and 18 NIPC Act).

Space constrains discussion of justifiable defensive actions, akin to permissible use of discriminatory tariffs to check dumping in international trade without incurring wrath of the World Trade Organisation (WTO). In the same vein, the LCEO and Nigerian LC initiatives should not really be a cause for too much concern as they are a way to achieve import substitution, and eventually achieve export status for Nigerian products. Foreign owned Nigerian companies are not totally excluded, since LCEO (e.g. Para 5(b)) still emphasizes "goods manufactured in Nigeria" such companies can benefit from the preferential treatment for locally manufactured goods and services.

Conclusion

The LCEO evinces intention FG intention to put its money where its mouth is, in line with its "encouragement" mantra that the populace "Buy Nigerian to grow the Naira." This is vintage leadership by example, and such positive signal would be reinforced by faithful implementation, ultimately tackling capital flight and boosting both local production and consumption.

These efforts however need to trickle down to other tiers of government (State and Local). The States and their Local Government counterparts must put in place similar approach to promote locally manufactured commodities, to complement FG's efforts and ensure a robust implementation of local content development plan for the country. If regulatory frameworks needs to be developed at the SG and LG levels to achieve this, then by all means, as same would be a worthwhile investment.

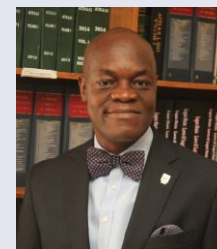
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