

THE PLACE OF LOCAL CONTENT IN INFRASTRUCTURE PROJECTS IN KENYA

There has been heightened activity in the infrastructure sector, with the Government embarking on mega projects such as the Standard Gauge Railway (SGR). With the growing pipeline of infrastructure projects coupled with recent discoveries of oil, coal and deposits of rare earths, there are calls for increased participation by Kenyan citizens through the supply of materials, services and labor. There is now a deliberate move to strengthen the existing legal framework - largely premised on public procurement law, through a raft of draft legislation such as the Local Content Bill, 2016, the Energy Bill, 2015 and the Petroleum (Exploration, Development and Production) Bill, 2015.

Some of the affirmative provisions that currently exist in law are as follows:

- exclusive preference to citizen contractors in the case of tenders worth less than Kshs. 500 Million, where such projects are wholly funded by the National Government, County Government or a Kenyan body;
- a requirement for foreign bidders participating in international tenders to source at least 40% of their supplies from citizen contractors;
- a prescribed margin of preference to be extended to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya;
- a requirement for public entities seeking to procure items not wholly or partially manufactured in Kenya to prepare a report detailing evidence of inability to procure local goods. As a condition of award, the successful bidder must cause technological transfer or create employment opportunities for citizens; and
- in the construction industry, a requirement for foreign contractors to be registered in Kenya – a process which in itself requires them to enter into a joint venture with local contractors or to subcontract to such contractors not less than 30% of the value of the contract work for which registration is sought. There is also a requirement for employees of such joint venture to be recruited from the Kenyan labour market

save in areas where requisite skills are not locally available.

Proposals to Enhance Existing Framework

A number of proposals have been made to enhance the existing framework. In the Energy sector, for example, the Energy Bill, 2015 requires all license holders to present annual and long term local content plans to the Energy Regulatory Authority, which shall monitor and enforce local content requirements in the sector. Under such plans, the license holders are required to demonstrate mechanisms for ensuring first consideration to goods and services provided within the relevant County, employment of qualified and skilled Kenyans at all levels of the value chain, adequate on the job training for Kenyans and technology transfer.

In the case of mining, the Mining Act, 2016, goes slightly further by requiring mineral right holders to provide linkages with universities for purposes of research and environmental management and to list 20% of their equity on a local stock exchange within 3 years of commencement of production where the capital expenditure exceeds prescribed thresholds, as a means through which to encourage Kenyan participation in such projects.

The Petroleum (Exploration, Development and Production) Bill, 2015 and the Petroleum Exploration, Development and Production (Local Content) Regulations, 2014 stipulate that petroleum agreements or licenses should only be issued to entities having not less than 5% Kenyan shareholding. It also contains a mechanism allowing such entities to ramp up their local content within prescribed licence periods. Foreign companies seeking to provide goods, works or services to entities engaged in upstream petroleum activities are also required to incorporate joint ventures with indigenous Kenyan companies having a participation of at least 10% equity or contract value.

Entities involved in upstream petroleum activities must also establish and implement a bidding process which gives preference to bids containing a higher level of local content. In instances where the financial bid of a qualified indigenous Kenyan company does not exceed the lowest bid by more than 10%, the tender in question shall be awarded to the indigenous Kenyan company.

Key Concerns

While the efforts of the legislature in addressing local content concerns are commendable, some concerns still persist, namely:

- **universal framework:** it would be preferable for the country to adopt an overarching framework on local content as current efforts have been sector specific. A local content policy would go a long way towards addressing this concern and could form a guiding framework for future legislation;
- **enforcement and monitoring:** the new and proposed laws create independent enforcement organs. It remains to be seen how effective these organs shall be in the enforcement of the laudable provisions of the law;
- **standardization of concession terms:** it is critical that there be a greater degree of uniformity when it comes to concessions issued by Government and in particular, as regards local content, as negotiations on a case to case basis often result in uncoordinated outcomes and a lack of transparency. We have seen a concerted effort towards standardization in upcoming road PPP and power projects; and

- **training:** Government should work closely with training institutions and industry players to roll out a tailor made curriculum which prepares its labour force for the opportunities presented by Vision 2030 in the infrastructure space.

It is clear, judging from the foregoing efforts, that the Government is committed to ensuring that its citizens can share in the opportunities arising from its strong infrastructure drive. There is still a lot to be done to ensure that proper laws are put in place to safeguard citizens including harmonization of such laws and implementation in a predictable and transparent manner. Kenya should also consider a joint regional approach, through which it can leverage on the East African countries to address the common concerns around local content.

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