

INTRODUCTION

The Presidential Executive Order for Planning and Execution of Projects, Promotion of Nigerian Content in Contracts and Science, Engineering and Technology (“**Order 5**”) was signed by President Muhammadu Buhari in February 2018.

Order 5 is a general provision for “Local content” in Federal Government contracts. It is not sector-specific as some other local government regulations are (*e.g.* the Coastal and Inland Shipping (Cabotage Act), 2003 for the maritime industry; and the Nigerian Oil and Gas Industry Content Development Act, 2010 for the oil and gas industry).

Below, we consider the content, scope and efficacy of Order 5 with an eye on the challenges that it presents to foreign investors.

CONTENT OF ORDER 5

Procuring Entities:

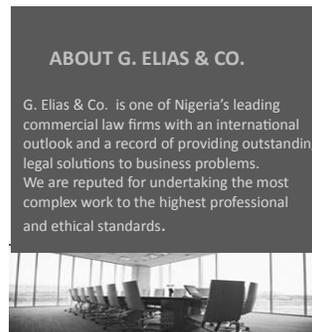
Order 5 directs “procuring entities” to give preference to Nigerian companies and firms in the award of contracts in line with the Public Procurement Act (2007) (the “PPA”). “Procuring entity” is not defined under Order 5, but it is defined under the PPA as any public body engaged in procurement). This implies that the PPA definition of “procuring entities” applies under Order 5. A “Nigerian company” is defined as a company incorporated in Nigeria under the Companies and Allied Matters Act (1990) with no less than 51% equity shares held by Nigerians.

Margins of Preference:

Order 5 provides specific “margins of preference” to be given to indigenous contractors and suppliers of goods in Federal Government bids for works and goods. “Margin of Preference” is defined as an extra mark-up on price allowed to any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price. For example, Federal ministries, departments and agencies (the “MDAs”) are directed to maintain a 15% margin of preference for domestic contractors in respect of international “Competitive Bidding” for goods, and 7.5% for works. The same applies for national competitive bidding.

(National competitive bidding means solicitation of bids from only domestic contractors and suppliers duly incorporated in Nigeria while international competitive bidding means the solicitation of bids from both domestic and foreign contractors and suppliers.)

Disclosure by MDAs:



Further, by Order 5, any document issued by MDAs regarding contract awards must expressly indicate the preference to

be granted to domestic manufacturers, contractors, suppliers and service providers (**the “Dealers”**) to make bids eligible for such preference. Since margins have been fixed by Order 5, this direction implies that those

margins would serve as the minimum margins which must be maintained by MDAs in granting preferences to domestic manufacturers.

Disclosures by Bidders

Also, solicitation documents are to compel Dealers to provide verifiable statements on the local content of goods and services. In addition, MDAs are to ensure that foreign companies who are granted consultancy contracts provide engineering drawings with necessary calculations, designs and so on to be disclosed to their corresponding Nigerian partners towards local production of needed materials. (This last is to encourage the “transfer of technology” to Nigerians.)

Tax

Under Order 5, the Federal Inland Revenue Service and the Federal Ministry of Finance are to ensure that existing machine tools companies and indigenous artisans are granted tax incentives to boost production of their output. They may also give tax incentives to SMEs and foreign firms utilizing local raw materials after same has been authenticated by the Raw Materials Research and Development Council. The effective scope of this provision is debatable and it is discussed below under the legal effectiveness of Order 5.

Exemptions:

Where local expertise is unavailable, the local content requirements under Order 5 would not strictly apply. In those circumstances, the relevant MDA may award the contract to a foreign entity. The award of the contract is contingent on the foreign company training such number of Nigerians as may be required for the execution of the contract or project.

LEGAL EFFECTIVENESS OF ORDER 5

No express definition of an “executive order” can be found in Nigerian laws. We understand Nigerian executive orders to have the same significance as USA ones (see *e.g.* Okebukola and A. Kana “Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools” (2012), Nnamdi Azikiwe University Journal of International Law and Jurisprudence vol. 3, 59-68 at 62). An executive order is essentially a directive issued by the President to Federal MDAs and their personnel as to how they should make decisions and regulations going forward. They do not impose duties on persons outside the Federal Government.

Order 5 is expressly made pursuant to the authority vested by section 5 of the Constitution of the Federal Republic of Nigeria 1999 (the “Constitution”) in the President of the Federal Republic of Nigeria.

Section 5 extends the executive powers of the Federation (represented by the President) to the execution and maintenance of “all laws made by the National Assembly and all matters with respect to which the National Assembly has, for the time being, power to make laws”. Order 5 cannot grant to the President powers wide enough to override tax or other statutes. That remains the mandate of the legislature.

The sanctions for violations of Order 5 will include those set out in the Public Service Rules and relevant laws governing the conduct of Federal Government officers in Public Procurement and Professional Practice in Nigeria. Order 5 is an executive directive to government officers and they are bound to obey its provisions as long as its provisions are not contrary to extant laws.

COMPARISON WITH EXTANT LAWS

Order 5 applies only to Federal MDAs. It echoes the provisions of extant laws dealing with local content but covers a broader range of items. For example, although the PPA provides for margins of preference for domestic bidders, the margins in it apply only to international competitive bidding as different from Order 5 which applies also to domestic competitive bidding.

Furthermore, Order 5 is not as detailed as some laws regulating local content in specific sectors. The Nigerian Oil and Gas Industry Content Development Act, 2010 for example, provides for exclusive consideration in some instances to Nigerian indigenous service companies. It also provides for specific local content percentage levels in various facets of the oil and gas industry.

In addition, Order 5 is sector-neutral as against some other laws providing for local content development. Again, Order 5 commands only government bodies and personnel as the order is a directive to government MDAs. This is as different from other laws which apply to persons within and outside government.

Order 5 is a useful and commendable directive to MDAs and their officials in the award of contracts by the Federal Government. It is still not as rich in detail as it could be. How it will be applied in practice by Federal MDAs or replicated by the states and their MDAs remains to be seen.



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