

NIGERIAN OFFSHORE & MARINE SECTORS – NEW COMPLIANCE STRATEGY FOR THE COASTAL AND INLAND SHIPPING (CABOTAGE) ACT 2003

¹ Section 2 of the Cabotage Act defines “Coastal Trade” or “Cabotage” to include “(a) the carriage of goods by vessel, or any other mode of transport, from one place in Nigeria or above Nigeria waters to any other place in Nigeria or above Nigeria waters, either directly or via a place outside Nigeria and includes the carriage of goods in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of Nigeria whether in or under Nigerian waters; and (b) the engaging, by vessel, in any other marine transportation activity of a commercial nature in Nigerian waters and, the carriage of any goods or substances whether or not of commercial value within the waters of Nigeria.”

Overview

The Nigerian Maritime Administration and Safety Agency (“NIMASA”) issued a [Marine Notice](#) dated January 28, 2019 and addressed to all [Oil and Gas Operators and International Oil Companies](#) with respect to a New Cabotage Compliance Strategy (the “Notice”).

The Notice indicates that it was issued following the consensus reached at the meeting between NIMASA and Oil Producers Trade Section (“OPTS”) of the Nigerian Chamber of Commerce in July 2018 towards the actualisation of the objectives of the Coastal and Inland Shipping (Cabotage) Act, 2003 (“Cabotage Act”).

NIMASA via the Notice, [mandates all Oil and Gas Operators](#) to mandatorily submit the following to NIMASA:

- (a) Five (5) year Marine Service/Vessels chartering or engagement plans;
- (b) Schedule of existing contracts or ongoing marine projects detailing:
 - (i) the particulars of each contractor (including nationality, vessel ownership profile, head office address, etc);
 - (ii) details of type of Vessels/equipment, Vessel classification;
 - (iii) Zone or location of engagement;
 - (iv) Vessel ownership, crewing, Maintenance and Flagging/registration plans;

- (v) Nature and Scope of Contract/Service;
- (vi) Duration of engagement/Tenure (Commencement and expiration dates); and
- (vii) Contract value (both in local and foreign currencies).

Paragraph 2 of the Notice further [mandates all Oil and Gas Operators to advertise for Expression of Interest and Prequalification of Tender for award of marine contract/vessel engagement](#) in at least three (3) National Newspapers and Nigerian Petroleum Exchange (NIPEX) Platform, citing [compliance with Cabotage as a pre-requirement for award of such marine contract and vessel engagement in Coastal Trade](#)¹. The publication is to allow a minimum of three (3) months bid due date. This is more like a move towards improving local content.

Paragraph 3 of the Notice also mandates all [Oil and Gas Operators](#) to inform NIMASA in writing of the date of the expiration of every existing marine contract six (6) months prior to expiration of such contract.

Paragraph 4 of the Notice provides that all [Oil and Gas Operators](#) must obtain NIMASA’s Certificate of No Objection [prior to award of any marine related contract to a foreign firm on the basis of non-availability of local capacity to satisfactorily execute such job](#).

Finally, the penultimate paragraph of the Notice states that NIMASA has mandated all its Cabotage [Enforcement] Officers to ensure strict compliance with “this directive”.



2 Section 105 of the NCA provides that the NCDMB, in conjunction with NIMASA, shall have powers to enforce compliance with relevant sections of the Cabotage Act in relation to matters pertaining to Nigerian Content Development.

Comments

The Notice is addressed to all **Oil and Gas Operators** and **International Oil Companies**. However, the definition of "Oil and Gas Operators" is neither provided in the Notice nor in NIMASA's enabling act - the Nigerian Maritime Administration and Safety Agency Act No. 17 of 2007.

However, we note that the definition of "Oil and Gas Operators" is provided in Section 106 of the Nigerian Oil and Gas Industry Content Development Act 2010 (as amended) ("**NCA**") to mean "*the Nigeria National Petroleum Company (NNPC), its subsidiaries and joint ventures partners and any Nigerian, foreign or international oil and gas company operating in the Nigerian oil and gas industry.*"

We also understand from NIMASA that reference to **Oil and Gas Operators** includes oil and gas service companies and contractors that are engaged by oil and gas operators and international oil companies.

There is also the issue regarding the propriety or otherwise of NIMASA issuing a mandatory requirement that **Oil and Gas Operators** must obtain NIMASA's Certificate of No Objection prior to the award of any marine related contract to a foreign firm on the basis of non-availability of local capacity to satisfactorily execute such job. It is instructive to note that the NCA takes precedence over all statutes or laws that ensure measurable and continuous growth of Nigerian content in all oil and gas arrangements, projects, operations, activities or transactions in the Nigerian oil and gas industry. In addition, the Nigerian Content Development and Monitoring Board ("**NCDMB**") established pursuant to the NCA is vested with the powers to implement the provisions of the NCA, with a view to ensuring a measurable and continuous growth of Nigerian content in all oil and gas arrangements, projects, operations, activities or transactions in the Nigerian oil and gas industry.²

To the extent that (i) the NCA takes precedence over all laws relating to local content in the oil and gas industry; and (ii) the NCDMB, not NIMASA, is the body saddled with the responsibility of implementing the provisions of NCA;

we are of the view that NIMASA lacks the power to have issued a notice (which is in itself not a regulation) that has the effect of (i) usurping the powers of the NCDMB; or (ii) creating an additional layer of approval other than that of the NCDMB when it comes to ensuring local content objectives are met when awarding contracts in the oil and gas industry.

On a practical note and assuming NIMASA has the power to make such Certificate of No Objection mandatory, the Notice does not indicate whether the Certificate of No Objection from NIMASA should be obtained prior to any relevant approval(s) required from the NCDMB. Similarly, it is not clear if obtaining the Certificate of No Objection is an alternative or is in conjunction with approvals that would otherwise have been within the remit of the NCDMB to give. It is also arguable that the proposed Certificate of No Objection from NIMASA is a duplication of the NCDMB's existing Marine Vessel Utilisation Scheme (the "**Scheme**") which seeks to encourage construction of vessels in Nigerian yards, promote ownership of marine vessels by Nigerian entities, stimulate flagging and registration of vessels in Nigeria and deepen Nigerian manning of marine vessels.

In light of the foregoing, we are of the opinion that any enforcement of the Notice, by NIMASA's [Enforcement] Officers, can be successfully challenged in court.

Though the intention behind the Notice is laudable and welcomed, it is imperative that Nigerian Oil and Gas Operators (including members of OPTS) and Nigerian oil and gas service companies under the leadership of the NCDMB quickly resolves the apparent ambiguity of the Notice and the legality of same to avoid a clash in functions between the NCDMB and NIMASA, particularly the well enshrined Scheme. Failure to act swiftly may have the effect of frustrating and stifling exploration and production activities in the Nigerian oil and gas industry.

For more information on this Briefing, please contact



Adedoyin Afun
Partner
adedoyin.afun@bloomfield-law.com

Chukwudi Ofili
Senior Associate
chukwudi.ofili@bloomfield-law.com

or your usual contact at Bloomfield LP.



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