

### LEGAL UPDATE

### 28 February 2020

#### **Understanding the Tanzanian Mining Local Content Regulations**

#### 1. Background

On 10 January 2018, the Government of Tanzania enacted the Mining (Local Content) Regulations, 2018, GN. No. 3 of 2018 (the "Regulations"). The Regulations aim at implementing the amendments of the Mining Act, 2010 which were introduced by the Written Laws (Miscellaneous Amendments) Act, 2017 (Act No. 7 of 2017). The amendments, among others, introduced the local content requirements (See new ss 102-104 of the Mining Act 2010). The Regulations became operational on 10thApril 2018. Further to that, on 8th February 2019, the Regulations were also amended vide **Mining (Local Content)** (Amendments) Regulations 2019 (G.N No. 139 of 2019).

The Regulations' major objectives are to:

- A. Promote the maximization of value-addition and job creation through the use of local expertise, goods and services, businesses and financing in the mining value chain;
- B. Develop local capacities in the mining industry value chain through education, skills transfer and expertise development, transfer of technology and know-how and active research and development programmes;
- C. Achieve the minimum local employment level and in-country spend for the provision of the goods and services in the mining industry value chain as specified in the First Schedule;
- D. Increase the capability and international competitiveness of domestic businesses; and;
- E. Create mining and related supportive industries that will sustain economic development.

In terms of scope, the Regulations cover all mineral rights holders (holders of mineral licenses), subcontractors and other allied entities carrying out mining activity/ies in Tanzania. Therefore, all mineral rights holders, subcontractors and other allied entities are obliged to include local content as a component in their mining activities/plans/operations. The ensuing obligations and responsibilities under the Regulations are outlined below.

#### 2. Compliance Requirements

The Regulations set two compliance stages, namely:

- The qualifications of entities engaged to provide services and supply goods in the mining sector.
- The ongoing obligations for qualifying entities.

These stages are analyzed one by one below.

# 2.1 Entities qualified to provide services or supply goods in the mining sector

# 2.1.1 An indigenous Tanzanian company

The Regulations set a general rule that indigenous Tanzanian companies should be given priority in the provision of service or supply of goods in the mining sector. Under these Regulations, an "indigenous Tanzanian company" is defined as a company incorporated under the Companies Act that; (i) has at least 20% percent of its equity owned by a citizen or citizens of Tanzania; and (ii) has Tanzanian citizens holding at least 80% of executive and senior management positions and 100% of non-managerial and other positions occupied by citizens.

In this regard, to qualify as "an indigenous Tanzanian company", a foreign company is required to issue at least 20% of its shares to citizen(s) of Tanzania. This can be done by way of transfer of shares or by allotment of new shares. Through transfer of shares, one of the existing shareholders may sell its shares or part thereof to a citizen(s) of Tanzania. The major disadvantage of transfer shares by way of sale is that it attracts tax liability in terms of capital gains tax and stamp duty.

As regards to allotment of new shares, it can be done if there are existing unissued shares, which can be issued to a citizen of Tanzania. However, in the event that there are no unissued shares, the company can resolve to increase its share capital and thus create new shares that can be issued to a citizen(s) of Tanzania up to at least 20% of the total shares.

# 2.1.2 Joint venture Company with indigenous Tanzanian company

As an exception to the general rule (that indigenous Tanzanian companies should be given priority in the provision of goods or services in the mining sector), Regulation 8(6) of the Regulations, provides that a foreign company ("non-indigenous Tanzanian company") which intends to provide goods or services to a mining company or its subcontractors must incorporate a joint venture company with an "indigenous Tanzanian company" and afford that "indigenous Tanzanian company" an equity participation of at least 20%. This position is cemented by Regulation 15(5) which makes it mandatory for a non-indigenous Tanzanian company in Tanzania and operate it from Tanzania; and (b) provide the goods and services in association with an indigenous Tanzanian company. For ease of reference, Regulation 8(6) is reproduced herein below:

8(6) a non-indigenous Tanzanian company which intends to provide goods or services to a contractor, a subcontractor, licencee, the corporation or other allied entity within Tanzania shall incorporate a joint venture company with an indigenous Tanzanian company and <u>afford that Tanzanian indigenous</u> company an equity participation of at least twenty percentum.

Based on the provision of the Regulation above, a foreign company does not qualify to provide services and goods in the mining sector until when it incorporates a joint venture company with an "indigenous Tanzania company". In this joint venture company, the "indigenous Tanzania Company" must have equity participation of not less than 20%.

The JV Company will be a completely new entity with its distinct certificate of incorporation. The JV Company will also have to apply and get all relevant licences to trade in Tanzania including Tax Identification Number (TIN), Value Added Tax Registration Number (VRN) and business licence. The major disadvantage of this option is that the JV Company is not tax

efficient as it creates another layer of taxation. This implies that the JV Company will be liable to corporate income tax on its profits while the dividends to shareholders will also be liable to withholding tax.

# 2.2 Continuous obligations of qualifying entities

As indicated above, the Regulations impose continuous local content obligations on all qualifying entities. These obligations include:

- Setting up local offices within the district where the project is located;
- Submission of minimum local content levels to be achieved within 10 years;
- Submission of a local content plan for approval by the Mining Commission. The Local Content Plan must contain information on:
  - Employment and training of locals
    - Succession plan
    - Procurement of goods and services
    - Legal services sub plan
    - Programme for Research and Research Development sub plan
    - Technology Transfer sub plan
    - Insurance and reinsurance sub-plan
      - Financial services sub plan
- Putting in place Local Content Policy and Communicating the same in the Company's website;
- Operation of bank account in Tanzania with a local bank;
- Submission of proposed contracts for sole sourced or those of value above USD100,000;
- Registration in Common Qualification System managed by the Mining Commission where all services providers are required to be registered;
- Requirement for third party reporting: ensure that partners, subcontractors and allied entity are contractually bound to report local content information;
- Submission of Local content Performance Reports covering all projects and activities within 45 days of the beginning of each year;
- Submission of quarterly forecasts;
- Establishment and implementation of a bidding process for the acquisition of goods, works and services to give preference to indigenous Tanzanian companies;
- Submission of an integrity pledge;
- Submission of a declaration to ensure that first consideration is given to goods and services provided in Tanzania and employment and training of Tanzanians;

### 3. Transitional period

The Regulations contain a transitional provision under Regulation 51 which is reproduced below for ease of reference:

51.Within three months after coming into force of these Regulations, a contractor, subcontractor, licensee, or other allied entity engaged in a mining activity shall make arrangement and plan to the satisfaction of the Commission as are necessary for complying with these Regulations.

In our view, this is a transitional provision does not set the specific time within which existing entities are required to be compliant with the Regulations. Instead, existing entities are required to make <u>arrangement</u> and <u>plan</u>, to the satisfaction of the Mining Commission, necessary to comply with the Regulations. The imports of this interpretation is that existing entities are required to present to the Mining Commission plans or arrangements on measures

taken for them to be considered "qualifying entities" (i.e change ownership structure under the Local Content Regulations) as well as complying with ongoing obligations for qualifying entities. The plans and arrangements ought to have been filed on 10 April 2018 which was the exactly three months after the Regulations came into force.

As regards to change of ownership structure, there are two options for foreign companies ("non-indigenous Tanzania Company") as described above. First, the Company can be transformed into an "indigenous Tanzania company" by selling/issuing 20% equity to Tanzanian citizen(s). The second option, is to form a new Joint Venture Company where the foreign company will retain a maximum of 80% of the equity while a minimum of 20% will be held by "indigenous Tanzania Company".

# 4. Offences and penalties

- The Regulations criminalizes submission of a false plan, return, report or other document and making of false statement in respect of local content. This offence attracts a fine of between TZS 50M and TZS 500M or to a term of imprisonment of not less than two years and not more than five years or both.
- It is also an offence under the Regulations for a citizen to act as a front or to connive with a foreign citizen or company to deceive the Commission as representing an indigenous Tanzanian company to achieve the local content requirement. This offence is punishable by a fine of between TZS 100M and TZS 250M or to a term of imprisonment of not less than one year and not more than five years or both.
- It is an offence for a foreigner to connive with a citizen or an indigenous Tanzanian company to deceive the Commission as representing an indigenous Tanzanian company to achieve the local content and is liable on summary conviction to a fine of up to TZS 10B or to a term of imprisonment of not less than five years and not more than ten years or to both.
- Where a person fails to communicate local content policies, procedures and obligations to all its personnel, he/she is liable to pay to the Commission an administrative penalty of TZS 100M in the first instance and a further penalty of 5% for each day during which the contravention continues.
- A person who fails to comply with a request to furnish information or record under the Regulations within the period specified in the request is liable to pay to the Commission an administrative penalty of TZS 2B in the first instance and a further penalty of 10% percent of the penalty for each day during which information or record is unfurnished.
- Carrying out mining activities without the required local content requirement attracts an administrative penalty of 5% of the value of the proceeds obtained from the mining activity in respect of which the breach is committed or USD 5M whichever amount is greater and further liable for cancellation of a contract in respect of the mining activity.
- All these penalties, when not paid in time, become debts owed to the Republic and recoverable by the Commission under summary procedure.

# 5. Conclusion

Based on the discussion above, we would like to conclude as follows:

(i) The Local Content Regulations set two compliance stages. The first stage relates to qualifications of entities engaged in the mining sector and the second stage is in relation to ongoing obligations for qualifying entities.

- (ii) The Regulation contains a transitional provision which require existing entities, to make <u>arrangement</u> and <u>plan</u>, to the satisfaction of the Commission, necessary to comply with the Regulations.
- (iii) The Regulations impose hefty penalties for non-compliance.

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