

17 January 2018



Mining (Local Content) Regulations now operational

- **Priority given to qualified Tanzanians in employment and on-job training**
- **Allowed to only employ Tanzanians in junior level or middle level positions**
- **Preference given to local service providers and locally manufactured goods**
- **Indigenous Tanzanian company must hold an equity participation of at least 20% in a mandatory Joint Venture arrangement for supply of goods and services**
- **Use of local insurance and financial services**
- **Legal services to be provided only by local legal practitioners or local law firms**
- **Acquisition of goods, works and service through bidding**
- **Indigenous Tanzanian companies given first preference in the grant of a mining license**
- **Indigenous Tanzanian companies must have at least 5% equity participation in a mining company**
- **Sets the timeframe for local content levels to be attained in the mining sector**
- **Non-compliance with the Regulations attracts hefty criminal and administrative sanctions**
- **Fines up to USD 5M**
- **Compliance within 3 months from now**

On 10 January 2018, the Mining (Local Content) Regulations, 2018, made by the Minister for Minerals (the Minister), were published as GN. No. 3 of 2018. The Regulations' major objective is to 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. To achieve this objective, the Regulations establish a Local Content Committee (Committee) whose major function is to oversee, coordinate, manage and monitor the development and implementation of the local content plan. The role of this committee is very powerful in as far as local content is concerned, and it shall have a full-time member of the Mining Commission (Commission) as its Chairman.

Indigenous Tanzanian companies given preference

The Regulations require that an indigenous Tanzanian company should be given first preference in the grant of a mining license. An 'indigenous Tanzanian company' is defined as a company incorporated under the Companies Act with at least 51% of its equity owned by Tanzanian citizens, and at least 80% of the executive and senior management positions held by Tanzanian citizens with 100% of non-managerial and other positions are held by Tanzanians. It is clear that these conditions have been imposed, all of which must be satisfied, to prevent foreign companies and individuals entering into creative structures whereby locals and local companies merely 'front' the foreigners' interests.

The Regulations further provide that an indigenous Tanzanian company should have at least 5% equity participation in a foreign company for such foreign company to qualify for grant of a mining licence. However, the Minister has powers to vary this requirement in circumstances where an indigenous Tanzanian company is unable to satisfy the requirement of 5% equity participation. The Regulations provide categorically that participating interest of an indigenous Tanzanian company arising from a mining license is not transferable to a non-indigenous Tanzanian company.

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According to the Regulations the 5% equity participation of indigenous Tanzanian company is in addition to the mandatory requirement of 16% Government free carried interests under the new section 10(1) of the Mining Act. The Regulation provide that Government interests will be held by entity established or designated for purposes of holding control of Government mineral assets (referred to as the Corporation).

Further to that, the Regulations oblige a non-indigenous Tanzanian company which intends to provide goods or services in the mining industry in Tanzania to incorporate a joint venture company in which an indigenous Tanzanian company must hold an equity participation of at least 20%. The Regulations also oblige the contractor, subcontractor, licensee or other allied entity (collectively contractor for the purposes of this Legal Update), before carrying out any work or activity in the mining industry, to set up a project office within the district where the project is located.

Local Content plan for approval

The Regulations impose a requirement for the Contractor to prepare and submit a local content plan for approval by the Commission, which the Commission shall then forward to the Committee. The local content plan should contain provisions to ensure that: first consideration is given to services provided within the country and goods manufactured in the country; qualified Tanzanians are given first consideration for employment; adequate provision is made for the training of Tanzanians on the job; guarantee to use locally manufactured goods. It is also stated that a local content plan must also contain 5 sub plans on (a) employment and training, (b) research and development, (c) technology transfer, (d) legal services and (e) financial services. Additionally, the Regulations in the First Schedule sets the levels of minimum local content from date of effectiveness of license, thereafter for a period of 5 and 10 years, to be attained by the Contractor. Notably catering, cleaning and laundry and security services requires 100% local content levels by amount from the outset.

Bidding process

The Regulations makes it mandatory for the Contractor to establish and implement a bidding process for the acquisition of goods works and services. The Commission has been mandated to set up the bidding rules. The Regulations also oblige the Contractor to submit periodic plans and reports on the implementation of the local content requirements. In a bid to be transparent, the Regulations permit any citizen to access and inspect records that relate to local content kept by the Commission and designated as public records. Citizens can also request to be furnished with a certified copy or extract from any document that that person is entitled to access.

It is further provided that contracts shall not be solely awarded based on principle of lowest bidder, and where the total value of the bid by an indigenous Tanzanian company does not exceed the lowest bid by 10%, the contract shall be awarded to the indigenous company. And when bids are equal, the bid containing the highest level of local content shall be selected.

The commission must be informed in writing of each proposed contract or purchase if such goods or services are to be sole sourced, or if these are to be sourced by way of competitive bidding whose value is estimated to be in excess of USD 100,000. A Contractor must submit to the Commission for approval advertisements relating to the expression of interest, request for proposals, prequalification criteria, technical bid documents, technical evaluation criteria and other information as may be requested, and the Commission must communicate its decision within 10 working days of receipt of these documents.

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There is also a requirement to provide the Commission for approval relevant documents as provided in the Regulations before issuing a prequalification notification, before issuing a request for proposals/quotations and before awarding a contract or purchase order, and should the Commission without good cause not confirm within 14 working days, the documents will be deemed approved.

The Regulations empowers the Commission to monitor and investigate the activities of the Contractor to ensure the achievement of the purpose of these Regulations. The Commission has powers to access records of Contractor for purposes of assessment and verification of the local content information reported to the Commission. In doing so, the Commission may initiate an investigation into an activity of the Contractor to ensure, among others, that the Tanzanian company principle is not diluted by the operation of a front or to prevent bid rigging and canalization in the procurement process.

The Employment and Training sub plan and Succession Plan

The Employment and Training sub plan requires the contractor to provide the commission with a forecast of the hiring and training needs of the Contractor including specification of the skills needed, anticipated skill shortages in the market, training requirements and the anticipated expenditure to be incurred by the Contractor in implementing this sub plan as forecasted. This sub plan must also include a time frame within which the Contractor will provide employment opportunities for the Tanzanian workforce for each phase of mining and the efforts made including procedures adopted for accelerating training of Tanzanians.

The Regulations require a quarterly report to be filed by the Contractor with the Commission on employment and training activities for the reporting period with a comparative analysis of the sub plan to monitor compliance, in addition to the number of Tanzanians employed during the reporting period and their job descriptions.

As part of the employment sub plan, the Contractor is required to have in place a Succession Plan for any employment position held by a non-Tanzanian, to enable such position to be ultimately assumed by a Tanzanian. The Regulations also categorically state that junior or middle level positions must be only filled by Tanzanians.

Programme for Research and Research Development sub plan

The Contractor is required to submit annually a programme for research, development and budget to the Commission for the promotion of education, practical attachments, training and research and development in Tanzania.

This sub plan shall outline revolving 3 to 5 year programme for mining research development initiatives to be undertaken in Tanzania with expected expenditure in implementing this sub plan. The sub plan shall also provide for public calls for proposals for research and development initiatives associated with the activities of the Contractor, and provide for criteria for selecting proposals which qualify for support.

Technology Transfer sub plan

According to the Regulations, the Commission shall in consultation with other agencies and Ministries develop a national policy on technology transfer with respect to the mining industry, and publish it in the Gazette. A contractor will then be required to carry out a programme in accordance with the national plan on technology transfer.

In support of technology transfer, the Minister for Minerals shall propose fiscal incentives to assist foreign companies which aim to develop technological capacity and skills of citizens and assist indigenous Tanzanian companies which establish factories and production units in the country.

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All insurance in Tanzania

It is also notable that the Regulations require all insurable risks relating to mining activity in Tanzania to be insured through an indigenous brokerage firm or where applicable an indigenous a reinsurance broker. The Regulations permit, with a written approval of the Commissioner of Insurance, for a person to obtain an offshore insurance service relating to a Mining activity in Tanzania. In granting an approval for procuring insurance services offshore, Commissioner of Insurance shall ensure that Tanzanian local capacity has been fully exhausted.

Legal and Financial Services sub plan

Any entity engaged in a mining activity that requires legal services in the country is now required to only retain the services of a Tanzanian legal practitioner or a firm of Tanzanian legal practitioners whose principal office is located in Tanzania. This sub plan must include a comprehensive expenditure report on legal services utilized in the preceding 6 months, forecast of legal services required during the following 6 months and an annual legal services budget.

Similarly, the Contractor must only retain the services of a Tanzanian financial institution or organization. The Contractor requires an approval of the Commission to engage the services of a foreign financial institution or organization. Further to that a Contractor is required to maintain a bank account with an indigenous Tanzanian bank and transact business through banks in the country. An indigenous Tanzanian bank means a bank that has one hundred percent Tanzanian or a majority Tanzanian shareholding. This Financial Services sub plan must specify the financial services utilised in the past six months and forecast of financial services required during the following 6 months.

Local content reporting

The Regulations state that within 45 days of the beginning of each year, all Contractors are required to submit to the Commission an annual local content performance report covering all its projects and activities. The report is to be in a format that the Commission shall prescribe and shall specify by category expenditure incurred in addition to hours worked by Tanzanians as well as foreigners, amounts they earned and their job positions. To verify the report, any Commission employee or an agent appointed by the Commission must be granted access to the Contractor's facilities.

Data and information on local content

The Regulations establish a Common Qualification System to serve as the sole system for registration and pre-qualification of local content in the mining industry. This system shall be used for verification of contractors' capacities and capabilities, evaluation of application of local content submitted by a Contractor, tracking and monitoring of performance and provision of feedback and ranking and categorization of mining service companies based on capabilities and local content.

Compliance 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 to both.

It is also a criminal 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 to both.

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The Regulations also make it 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.

A person who fails to support and carry out a programme in accordance with the national plan on technology transfer; fails to support and facilitate technology transfer, or fails to communicate local content policies, procedures and obligations to all its personnel 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 a 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.

Also under the Regulations, 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.

The Regulations also provide that a person who is aggrieved by the decision of the Commission in relation to the implementation of these Regulations should lodge a complaint with the Minister for Minerals who shall, within 30 days of receipt of the complaint, make a decision.

Finally, the Regulations provide that, within three months after coming into force of these Regulations, all Contractors must make arrangements and plans to the satisfaction of the Commission as are necessary for complying with these Regulations.

It is to be seen how these Regulations will play out with the stability clauses in the already signed Mine Development Agreements that current mining operators have in place.

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