

Myanmar Telecom Tender Committee Clarifies Experience Requirement, Foreign Joint Venture co's, Consortium Changes, License and Other Issues

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Today is a busy day for the telecom operators that are lining up for Myanmar's 2 nationwide mobile licenses. The "Telecommunications Operator tender Evaluation and Selection Committee" (the Committee) published, as promised, the "Pre-qualification Questions and Answers" (the Q&A). The 70 page document provides an insight into the Committee's priorities, the required structure for the operators and some of the tender logistics. We analyzed the document and present here the issues we find the most notable.

Required experience is a hard and fast rule

The Pre-Qualification Rules (PQR) have stated as main requirements for the operational experience of the Applicant as follows:

1. Primary experience (country 1): at least 4M mobile subscribers, management control for at least 4 years, revenue exceeding 400M\$ (2012), in existence since at the latest 31 December 2008; and
2. Secondary experience (country 2): at least 1M mobile subscribers, significant management responsibility for at least 3 years, in existence since at the latest 31 December 2009.

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It appears from the questions that not all interested operators can meet these requirements. In question 74, an interested party questioned how rigid these requirements will be interpreted. For example, whether having 4M subscribers over 2 countries but 600M in revenue would qualify.

The Committee did not relent: "The Rules do not permit an Applicant to aggregate multiple smaller operations to satisfy these requirements. After careful consideration, the Committee established these requirements that are consistent with the Union Government's fundamental objectives and appropriate to assess, amongst other elements, whether an Applicant has the experience necessary to deploy a network of sufficient size to serve the population in the Republic of the Union of Myanmar".

Based on this reply, it seems that the quantitative requirements are not up for interpretation and there is no room for flexibility. The Committee wants a major Experienced Operator that can run operations away from its home base, and these happen to be the numbers that have been chosen to establish this. This is a bit surprising within the Myanmar context, where the Government often needs to exercise a fair amount of good judgment on investment projects. Much in the Application is up to the appreciation of the Committee. For example, if an Applicant had an operation which had its telecom license revoked, the Committee does not disqualify the Applicant but is prepared to listen to the Applicant's side of the story. It seems the same does not go for the experience numbers...

The License will include network, ISP, international interconnection and gateway

It was confirmed that the licenses that are up for bid will enable the holder to offer a very broad range of telecommunications services in Myanmar. In question 40 a party inquired whether the licenses were just for the provision of mobile services, to which the committee replied "the license shall grant the holder the right but put them under no obligation to provide both fixed line and mobile services. The licensee will also

have the ability to provide internet services. International gateways will also be allowed." Further, in question 373 it was asked whether a licensee could apply for an ISP license as well, to which the committee noted that the licenses (that will be up for bid) will allow for the provision of all "application services such as internet services." Regarding national roaming, the committee stated in response to question 363 that it may be allowed, but will neither be encouraged or discouraged.

In question 372 the committee was asked whether a licensee would be able to deploy their own networks (nationwide fiber optic cables, satellite transmission systems etc.). The committee answered that the licensee will have the right to deploy their own networks. In response to question 349, the committee also confirmed that the new licensees can negotiate with operators currently here to lease lines, and if negotiations break down the committee will assist with dispute resolution.

Foreign JV or Holding companies are expected

Interested parties working on the legal structure of a bid will be interested to read in Q&A that, in our interpretation, MCIT expects that Applicants will be able to setup a joint venture company or a holding company overseas to hold their 100% interest in the Myanmar-registered company that will receive the license. We deduce this from the conscientious use by the Committee of "Myanmar-registered" for other entities, and from other elements in the context. The Q&A, in question 30, explains:

"The selected Pre-qualified Applicants are required to establish a Myanmar-registered company, to which the Licence will be granted. The ownership structure of this Myanmar-registered company must be fully aligned with the proposed ownership structure specified in the Application. If the Applicant is a single entity, the Myanmar-registered company must be fully owned by the Applicant. If the Applicant is a Consortium, the Myanmar-registered company must have equity interests that are aligned with the equity interests proposed by

the Consortium, as stipulated in Part 4.4 (b) of the Rules.

[...]

MCIT expects that a successful Applicant will be able to establish a 100 percent owned Subsidiary (holding company) which, in turn, could hold a 100 percent Ownership Interest in the Myanmar-registered company to which the Licence will be granted. If the successful Applicant is a Consortium, the Members of the Consortium may establish a holding company, provided that their Ownership Interest in the holding company precisely mirrors the equity interests specified in the Application. As an example, the holding company, in turn, would be required to have a 100 percent Ownership Interest in the Myanmar-registered company to which the Licence will be granted. Any alternative arrangements would need prior approval."

Given the fact that only international operators can qualify based on the pre-qualification rules, it is only logical that once the Committee makes it clear it allows JV/Holding companies, such foreign vehicles will be used. Now, to be clear, the Q&A does not state that one has to establish a foreign holding/JV co. In fact, we only deduce that the holding/JV is expected to be foreign based on the context. One can also choose to use a Myanmar holding company, it appears, although this would have to fit within the wider framework of the Foreign Investment Law.

What is more, the Q&A states that the Applicant "may" or "will be able to" establish a holding/JV co. In other words, you would not have to, but you would have the right to do so post-selection, and presumably pre-establishment of the Myanmar registered company that will receive the license. If the Applicant/consortium wishes, one can simply use the Myanmar registered company as the JV company..

Establishing a Myanmar company after prequalification

The committee confirmed, in its answer to question 31 that the Myanmar company that must be established to hold the license is not required to be established prior to the announcement of the winning bidders, and further that the company will need to be established in accordance with the 2012 Foreign Investment Law. Specifically the committee noted:

"The Myanmar-registered company may be established before or after the announcement of the two selected Pre-qualified Applicants, but must be established no later than the award of the License.

[...]

Incorporation of a foreign Myanmar-registered company and registration of a Myanmar branch of a foreign company in Myanmar are subject to the procedures and requirements set out in the Myanmar Companies Act and by the Directorate of Investment and Company Administration ("DICA"). Foreign investors are expected to invest in accordance with the Foreign Investment Law."

Establishing a company in Myanmar does take some time, but we anticipate that the winning bidders will have plenty of time to incorporate in Myanmar after the announcement of the winners is made.

No changes to the consortium in midstream

It is fairly tough to put together a fully-fledged international telecommunication JV in just a few months. Judging from the questions posed in the Q&A, some interested parties are not yet fully set in their consortium. The question was asked, for example, if an Experienced Operator could, after being pre-qualified in a consortium with a local partner, drop that local partner afterwards and put in a bid by itself. Or, whether the ownership

percentages could be changed after pre-qualification.

The Committee replied negative on both cases. The position of the Committee is clearly that to make a bid, one must have been pre-qualified as such.

“After submission of a Pre-qualification Application, an Applicant cannot alter the membership structure of the Consortium if the Applicant is a Consortium. If an Applicant that is a single entity is pre-qualified, it will be required to submit a response to the ITT as a single entity. If an Applicant that is a Consortium is pre-qualified, it will be required to submit a response to the ITT as a Consortium with the identical ownership structure as stated in the Pre-qualification Application submitted by the Consortium”

In summary, one cannot put in a bid alone if one was pre-qualified as part of a consortium. One cannot put in a bid with a consortium if one was pre-qualified as a member of another consortium. The same applies for wholly-owned subsidiaries. One cannot have oneself replaced on a consortium by one’s wholly-owned subsidiary after the pre-qualification (Question 107 and 108).

Transfer of shares in the Myanmar company that receives the License

After the license is awarded, the shares in the Myanmar registered company can be transferred. However, the Committee will set out the conditions for these transfers in the Draft License (expected to be issued 11th April). In question 122, the Committee replies that it expects that share transfers are subject to MCIT approval, which is not unusual.

Only one Experienced Operator in a consortium

The Committee had to repeat several times in the Q&A that there can only be one Experienced Operator. The PQR state that the Experienced Operator has “the largest Ownership Interest of any Member of the Consortium, which will be at least

40%”. The marketing and technical activities can only be conducted by the Experienced Operator, not by others. There cannot be a 50/50 equity participation, as there cannot be two Experienced Operators.

The Committee also clarified that if an Experienced Operator forms a consortium with only affiliates, it must hold at least 50.1% of the ownership. This is because the shares of the affiliates are all counted together (PQR 2.2., page 9).

All Applicants that meet the conditions will go to the next round

The Committee confirms that it will not make a comparative selection in the pre-qualification round. In other words, every Applicant that meets the requirements will go on to the next round, the invitation to tender. This also means that there is no maximum number of pre-qualified Applicants.

Taking into consideration the timing, the Committee indeed has very little opportunity to actually compare applications. The prequalified applicants will be announced on April 11th, just 7 days after the Applications need to be submitted. The sealed applications will be opened on April 4th in front of representatives of all applicants, in typical fashion we are accustomed to in Myanmar.

License duration and renewal

Many questions were posed to the committee regarding the 15 year initial duration for the telecommunications licenses as well as the process to renew the licenses. The committee takes the position that 15 years seems to match international standard practices in this regard. On the issue of renewal of the licenses, the committee stated in response to question 16 that:

“The License is expected to contain a provision, pursuant to which the licensee will have an expectation that, if it substantially complies with the conditions in its License, the existing License will be renewed for an additional period. The License renewal would be on broadly the same conditions as the

initial License. More information on License renewal terms will be provided in the ITT and draft License.”

Narrowing the scope of the application

Some of the information called for by the prequalification instructions could lead to enormous amount of material being included, as the questions did not always restrict the timeframe or scope of the information the committee was looking for. In response to question 202, the committee confirmed that under part 4.9 of the application it is alright to limit listed finance activities to those in excess of 1 Million US dollars. Additionally, in response to question 222 the committee confirmed that under the disclosure of information on directors and officers section of the application (4.11) there is no need to include information regarding that occurred prior to 1 January 2008.

Only changes “beneficial to the operator” in the new telecommunications law

The new Myanmar Telecommunications Law which will govern this sector is still in draft form and has been submitted to parliament for comment and

approval, with a final version is expected to be promulgated in June/July of this year.

In response to question 23, the committee revealed that the latest draft of the telecom law will be provided to all prequalified applicants on April 11 along with the Invitation to Tender (ITT) and a draft license. The committee also notes that any changes post that date “will be beneficial to potential investors.” MCIT anticipates that prequalified applicants will be able to consult and comment on the draft law as well as the draft license. Comments on the draft license will only be considered via e-mail however, as any face to face meetings could be perceived as an attempt to influence the selection committee.

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