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GENERAL NOTICE

NOTICE 287 OF 2002



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

Notice of publication of questions and answers relating to the Invitation to apply (ITA) for the 19% equity interest in the Second National Operator by historically disadvantaged groups or persons.

In terms of the invitation to apply issued by the Minister of Communications in terms of section 34(2) read with sections 32B and 35(4) of the Telecommunications Act as amended under Government Gazette no. 22971 the Independent Communications Authority of South Africa hereby publishes in the attached schedule a summary of questions and answers on the ITA for the 19% stake of the SNO by BEE groups.

Mandla Langa
Chairperson
ICASA

SCHEDULE

SUMMARY OF QUESTIONS AND ANSWERS ON THE BEE ITA

1. The Licensing Process

1.1 There was a proposal that there should be more than one BEE applicant to allow the SEP to have a choice in terms of forming a strategic alliance.

There are two principal objectives, which formed the basis for introducing for the first time in this country a licensing process that is conducted in different and distinct phases. The first of these objectives was to create diversity of ownership by putting in place a specific licensing process that focuses only on the targeted group and thereby ensuring that there is managed introduction of new previously disadvantaged players in the mainstream of the telecommunications market.

Another intention was to create a framework that would enable the regulator to ensure that any BEE applicant who is eventually awarded the 19% stake of the SNO is a credible applicant. Such credibility would be measured in terms of the applicant's ability to sufficiently understand the telecommunications market and the management capacity and experience that an applicant can demonstrate.

An additional factor would be the applicant's ability to source funds, an exercise, which would make such an applicant a sustainable component of the SNO. The expectation therefore from any applicant for the 51% stake of the SNO is that the regulator will then recommend an applicant who meets the criteria and it is this applicant that will then go on and be part of the SNO. There can therefore only be one applicant that will be awarded the 19% stake of the SNO

1.2 Proposal that BEE should be allocated up to 30% of the equity stake

The decision to allocate 19% equity interest to a BEE applicant is a policy decision that was taken by government.

1.3 Are there any restrictions on the number of members that can be in a company or groups or consortiums?

There are no restrictions on the number of members, consortiums and groups. One of the main objectives of this licensing process is to promote and facilitate the diversity of ownership in the telecommunications sector by previously disadvantaged people or groups. Such diversity it is anticipated will not only be in terms of numbers but also in terms of geographic dispensation so as to spread ownership around the country rather than in particular provinces.

1.4 Because the 19% stake is for BEE, does this mean that they cannot, at this stage, form strategic partnerships with international investors or communicate with potential investors?

The principle behind the allocation of the 19% stake in the SNO is to ensure ownership by HDI's of a significant part of the SNO. Applicants attention is therefore drawn to this fact and whilst applicants are not restricted from forming strategic alliances it is those applicants who have retained a significant portion of the 19% for HDI's that will be favorably evaluated by the Authority

1.5 What is the intended process to allow BEE's to evaluate the assets of Eskom and Transtel?

Both Esi-tel and Transtel have established data rooms for purposes of allowing applicants to have access to information relating to these entities. The data room for Esi-tel can be accessed in their offices in Megawatt Park and the data room for Transtel can be accessed at their offices in Braamfontein. Both these entities will provide procedures that have to be complied with in order to obtain access to their data rooms and applicants will have to have regard to such procedures

1.6 Can applicants be provided with a full definition of BEE and HDI's

Applicants must have regard to the contents of the BEE Commission Report.

1.7 What are the Universal Service Obligations and the Conditions of the SNO licence?

The Authority is in the process of formulating these and it is anticipated that they will be issued with the draft ITA for the SNO.

2. Extension of the date for submission of applications

2.1 The deadline of the 14th of March is much too short for all that is required. Can the deadline be extended to at least the 15th of April?

After due consideration of this request it has been decided that the date for submission of applications by BEE applicants will remain the 14th of March 2002. Such applications shall be submitted at no later than 14H00 at the offices of the Authority at 164 Katherine Street Pin Mill Farm Block C Sandton.

3. Limitation of Ownership

3.1 Will the companies presently excluded from the BEE ITA be excluded from the 51% stake ITA?

The exclusions set out herein are intended to maximize participation by HDIs in the 19% allocated to BEE and not necessarily as an exclusion for participation in the 51% allocated.

3.2 Are companies and individuals with a stake in empowerment companies like CellSaf and NEC excluded from participating on the SNO or is it only these structures themselves as legal entities that are excluded.

Regulations in terms of Section 52 of the Telecommunications Act will be published which address ownership and control issues.

3.3 Can a company or individual that has a stake in a present domestic public operator apply for the SNO licence as long as that company or individual makes an undertaking to dispose of such existing interest if successful on the SNO?

Yes. The ITA provides that an applicant with existing ownership interest in any of the domestic public operators may only apply for a stake in the SNO if such an applicant undertakes to dispose of such interest within six months of being successful on the SNO application. This is subject to any regulation promulgated in terms of Section 52.

3.4 If the justification behind the restrictions on ownership is to introduce new faces in telecommunications industry and thereby create diversity, will this restriction be extended to entities like Telkom that have a stake in Vodacom?

Legislation and statutory instruments are generally not meant to have a retrospective effect when applied and are therefore forward-looking documents. The restrictions cited in this ITA were not applicable when Telkom acquired an ownership interest in Vodacom and therefore the same restriction or limitation now applied to applicants on the SNO licence cannot be retrospectively applied to Telkom.

3.5 Does the restriction on ownership apply to entities that hold less than 0,05% on the existing public operators?

The restriction on ownership applies to anyone who holds an ownership interest in a domestic public operator regardless of the value of such ownership, subject to any regulation promulgated in terms of Section 52.

3.6 How will control be measured or determined.

This will be determined by regulations to be promulgated in terms of Section 52.

4. Funding

4.1 How does government plan to facilitate the eventuality of a premium return that BEE's are likely to need in order to successfully fund its empowerment equity in the SNO and receive a satisfactory return, which will be above the cost of funding?

The government in conjunction with the Authority has undertaken and is in the process of establishing a robust and a predictable regulatory framework that will enable applicants to anticipate the regulatory regime within which the BEE applicants will operate as a component of the SNO. This should then pave the way for applicants to then approach financial institutions that could assist in terms of funding.

The attention of the applicants is drawn to the fact that this is a normal commercial venture under private ownership and therefore the risks that can be incurred are similar if not equivalent to those that will be incurred in normal private commercial ventures.

4.2 Clause 5.1 of the ITA refers to costs. Are these the establishment costs of the empowerment funding structure or is it the weighted average costs of capital or does this refer to the combination of the above.

It would be a combination of both.

4.3 Will government obtain indicative pricing for the costs portion of the ITA (paragraph 5.1) at the submission of the expression of interest

No.

4.4 How will Previously Disadvantaged Individuals be able to access funding and what measures and assistance can be expected from government

Once again applicants are encouraged to develop various innovative ways of raising funds.

5. Role of Parastatals: Esi~tel and Transtel

5.1 Given the fact that Esi~tel and Transtel have already prepared their business plans and have awarded contracts to Siemens and Alcatel for network design and roll out, would the BEE applicants then have to factor this into their applications. If the answer is yes, are there any time frames or a process that parastatals would have to follow to make this information available.

Both Esi~tel and Transtel have set up data rooms that can be accessed for purposes of obtaining information about these entities that can then be used at the discretion of the applicants when putting together their applications.

5.2 How will the Infrastructure of Esi~tel and Transtel be incorporated into the SNO and what will be the applicable rules to ensure that these entities do not extend their infrastructure for their continued own use.

The final determination of the equity interest of Eskom and Transnet in the second national operation shall be determined by the value of the contribution of Eskom and Transnet in the second national operator.

5.3 Are the applicants allowed to communicate with Transtel and Esitel during bid stage to prepare for their business plans?

Yes.

6. Undertakings to be made by applicants

6.1 Are the business plans expected to illustrate business skills and funding ability of the BEE applicant rather than the actual financial feasibility of the SNO

Yes.

6.2 Will ICASA hold applicants liable for the unconditional warranties required in clause 4.2 of the ITA when changes occur to these warranties which are beyond the control of the applicant

The Authority accepts that the finality of any undertakings made by applicants will be dependent on further agreements to be entered into with other stakeholders within the SNO.

6.3 How will ICASA ensure that various undertakings made by the BEE applicants are acceptable to other partners like the SEP and the parastatals

The Authority will not unreasonably interfere with commercial agreements entered into by various stakeholders within the SNO, but will formulate license conditions to cater for and give effect to these undertakings.

6.4 How will ICASA ensure that the final business plan of the SNO does not jeopardize the funding arrangements entered into by different applicants i.e. International Investor, the BEE and the parastatals?

As already set out the Authority will view the business plans of the applicants as an illustration of the capacity of the applicant to do certain things and cannot therefore guarantee any funding arrangements made in relation to such business plans.

7. Regulatory framework

7.1 When are the intended facilities leasing and interconnection guidelines for the SNO likely to be issued

These draft regulations are likely to be issued for public comment as is required by our regulation making process early in March 2002.

7.2 Will there be any preference on interconnection models or types of technologies to be used or interconnected

The Telecommunications Act and promulgated regulations set out a technology neutral stance in relation to preference for particular types of technologies.

7.3 What are the regulations that the Authority intends to issue in order to stabilize the regulatory framework for the SNO and when

The Authority has already issued regulations relating to price regulation for PSTS operators and as indicated above will be issuing draft regulations on interconnection and facilities-sharing in March. The Authority will also be issuing in this first quarter of the year regulations which will oblige PSTS operators to prepare Charts of Accounts and Cost Allocation Manuals and thereby streamlining their reporting obligations. The Authority will also issue regulations dealing with carrier pre-selection in accordance with the Telecommunications Amendment Act and will in 2005 issue regulations dealing with number portability.

8. Duopoly period

8.1 What is the likelihood of another PSTS licence being issued by May 2005

As set out in the legislation another feasibility study will be conducted before a third PSTS license can be granted and it is this study which will serve as an indication of when another PSTS operator can be licensed in this country.

8.2 If the intention to licence another PSTS by May 2005 is to give the SNO a three year grace period, should the ITA not be rephrased to say that the three year period will start to run only when the SNO starts to operate

The legislation provides that the 08th of May 2002 shall be the date when competition to Telkom shall be introduced and that this duopoly shall be maintained until May 2005.

9. Post licensing concerns**9.1 Are there any post licensing mechanisms designed to ensure that the successful BEE applicant is not exploited**

One of the key conditions of the SNO licence, as already indicated in the BEE ITA, is that the BEE stake in the SNO shall not be dilutable and this together with the rules of company law which, protect minorities, shall be the cornerstones to protect BEE against exploitation.

9.2 Will the people involved in the adjudication of the SNO be explicitly excluded from taking up positions in the SNO for a minimum of ten years after licensing in order to avoid pre-licensing bias

No.
