

Telecom Hotline

December 05, 2012

GOVERNMENT DEPARTMENTS COMPELLED TO GRANT PREFERENTIAL MARKET ACCESS TO INDIAN TELECOM EQUIPMENT MANUFACTURERS

The Department of Telecommunications, Government of India ("DoT") has on October 5, 2012 issued a notification¹ which grants preferential market access to domestic telecom equipment manufacturers ("Notification"). The said Notification has been issued following the lead of the Department of Information Technology's notification² providing preference to domestically manufactured electronic products as a part of procurement process for the electronic products that have security implications for the country decision of providing preference to domestically manufactured telecom products.

The DoT in May 2011 had amended the Universal Access Service License, Basic Service License and the Cellular Mobile Telephone Service License superseding the various notifications issued in the past which imposed onerous obligations and restrictions particularly with respect to foreign telecom vendors. The May 2011 amendment had mandated that all telecom licensees are required to ensure that network elements used by them are tested in Indian laboratories commencing from April 1, 2013. Additionally, the amendment also requires telecom licensees to ensure that their vendor agreements with their vendors contain provisions enabling the either the telecom licensee and/or DoT (or its agencies) to inspect the hardware/software, design, development, manufacturing facility and supply chain and subject all software to a security/threat check at any during the supply of telecom equipment by such vendors.

The Notification, similarly mandates that domestically manufactured telecom products must be given preference, when the same is being procured by Government departments and agencies (with the exception of the Ministry of Defense which has been exempted) for their own use and not with a view to commercially resell or with a view to use in the production of goods for commercial sale. It is proposed that the policy will be in force for a period of 10 years from the date of its notification in the official gazette.³

The Notification appears to be in line with the roadmap laid down under the National Telecom Policy, 2012 framed by the Government which inter-alia lays down its main objectives to:

"Promote the ecosystem for design, Research and Development, IPR creation, testing, standardization and manufacturing i.e. complete value chain for domestic production of telecommunication equipment to meet Indian telecom sector demand to the extent of 60% and 80% with a minimum value addition of 45% and 65% by the year 2017 and 2020 respectively; and

Provide preference to domestically manufactured telecommunication products, in procurement of those telecommunication products which have security implications for the country and in Government procurement for its own use, consistent with our World Trade Organization ('WTO') commitments."

The principle of 'National Treatment', under the WTO / General Agreement on Tariffs and Trade ("GATT") calls for equal treatment of domestic and internationally manufactured products. The Notification is in compliance with India's international obligations under the GATT, since it applies only to those products which are purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. Such use has been specifically recognized as an exception to the principle of National Treatment under Article III.8.(a) of The GATT.

Additionally, the Government Procurement Agreement ("GPA") is a plurilateral agreement on government procurement under the aegis of the WTO and places certain obligations on its signatories with respect to government procurement. India however, is only an observer to this agreement and is not party to the GPA,

Provided below is a brief synopsis of the salient features of the Notification:

- **Minimum percentage to be procured:** Each Government ministry or department will now have to procure minimum percentage of their telecom product requirement fulfilling minimum value addition prescribed against each item. The Notification lists various telecom products indicating preferential market access and the criteria to qualify as domestically manufactured product year wise.
- **Minimum value addition:** The policy also provides the minimum value addition to be achieved by the domestic manufacturers to qualify as domestically manufactured telecom products and lays down that efforts should be made by domestic manufacturer to achieve higher value addition. Different (successively increasing) rates of minimum value addition have been prescribed for the next 5 financial years.⁴ All the telecom products which do not meet the minimum value addition criterion for that year shall be treated as imported telecom products and dealt accordingly.

If the product does not meet the minimum value addition requirements it will be treated as imported equipment.

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Since the Notification prescribes that the ministries have to fulfil (purchase) a minimum percentage of their telecom product needs by purchasing domestically manufactured telecom products, therefore the imported equipment cannot be purchased as long as the minimum percentage has not already been bought.

- **Preference in Bids:** During the bidding process in case a domestic manufacturer is not the lowest bidder, the bid will be awarded to the lowest technically qualified domestic manufacturer, subject to matching with the lowest bidder's price.

Also the tender conditions should ensure that domestically manufactured telecom products are not subjected to restrictive product specifications and mandatory requirement of prior experience.

- **Reference of doubt:** In case of a question whether an item being procured is a telecom product covered by this policy or any other queries relating to Telecom Products, the matter will be referred to Telecommunications Engineering Centre, Department of Telecommunications for the purpose.

ANALYSIS

The aim of the government behind bringing out such a Notification seems to be manifold. Firstly, it wishes to provide an impetus to manufacturing of high quality domestic telecom products in India and has therefore prescribed the minimum value addition that must be done each year, which is successively increasing. Secondly it is bound to have a lowering effect on costs that have been associated with telecom equipment. Thirdly, it wishes to protect the security interest of India in light of various concerns being raised against foreign telecom equipment. The government has by the prior notification of May 2011 laid down the requirement that all network elements be tested in Indian laboratories commencing from April 1, 2013. This requirement read with the Notification may foster some controversy in the industry.

This Notification is bound to affect the business projections and operations a host of foreign companies who act as vendors of telecom products in India and are or intend to supply to government departments. It is also likely that the Notification will provide a much needed boost for local innovation and development in the telecom manufacturing industry.

An important point in this Notification is that the Notification itself does not define 'domestic manufactured products'. However The Telecom Regulatory Authority of India (TRAI) in its recommendation paper titled "Recommendations on Telecom Equipment Manufacturing Policy" dated April 12, 2011 has set out three categories of equipments: (i) domestic manufactured products (ii) Indian manufactured products and (iii) Indian products. The recommendation paper states that domestic manufactured products means 'products manufactured in India that meet the minimum value addition criterion prescribed in the policy'. Domestically manufactured products can either be Indian Manufactured Products⁵ or Indian Products⁶.

While the Notification does not make reference of the TRAI recommendation paper, if one were to consider the definition in the TRAI recommendation paper, it appears that foreign telecom equipment manufactures may be able to manufacture such products via their Indian group companies, subject to compliance with the other requirements laid down under law. It will be interesting to observe the industry reaction to this development.

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¹ Notification No. 18-07/2010-IP, dated 5th October, 2012.

² Notification No. 8(78)/2010-IPHW dated 10th February, 2012.

³ The policy is yet to be published in the official gazette.

⁴ Please refer to Table-A in the notification for the exact minimum value addition prescribed for different years.

⁵ The TRAI recommendation paper defines Indian Manufactured Products (IMP) as the products for which the following conditions hold good:

(i) The products have been manufactured in India by an entity duly incorporated in India

(ii) The product meets the minimum value addition criterion

(iii) The IPR of the product resides outside India

⁶ The TRAI recommendation paper defines Indian Products as products for which the following conditions hold good:

(i) The products have been designed, developed and manufactured in India by an entity duly incorporated in India

(ii) IPRs for the products reside in India.

(iii) Commercial value of the IPRs accrue to India

(iv) The product meets the minimum value addition criterion prescribed in the policy.

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