

PUBLIC PROCUREMENT ROADMAP UKRAINE

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1. INTRODUCTION

Ukraine is a large European country, with the population of over 40 million, on the path to becoming a market economy. Public procurement represents a large chunk of economic activity in Ukraine corresponding to approximately 13% of the country's GDP, according to the Ministry of Economy of Ukraine.

The new Law on Public Procurement, which is scheduled to come into force on August 1, 2016 (the "**2016 Law**"), is designed to facilitate and streamline the government procurement procedure in Ukraine. Certain contracting authorities active in specific fields excepted to start applying the new Law as early as April 1, 2016.

The present brochure is aimed at providing an insight into the public procurement governed by the Ukrainian law for companies interested in offering goods and/or services to contracting authorities in Ukraine.

We hope you will find it useful and wish you success in your business venture.

2. PREPARATORY STEPS

- **Structuring legal presence in Ukraine**

It is advisable from the practical viewpoint to structure the legal presence in Ukraine as early as possible to avoid risks of time delays or cancelation of the award and additional tax expenses.

Although to bid in a public procurement tender in Ukraine a foreign company does not need to register its legal presence, however, in numerous cases tax registration and licenses will be required and, where applicable, will need to be in place no later than at the signing of the contract.

Acquisition of an existing, even dormant, company on the relevant market holding necessary licenses could be a solution as well.

- **Teaming-up with a local partner**

Depending on the industry, a number of specific qualification requirements may apply to potential bidders, including, inter alia, certification and licensing, previous experience or availability of specific assets or employees certified in Ukraine.

The 2016 Law does not recognize the principle of free movement of goods and services. Professional certificates and qualification documents, e.g. diplomas, from the EU are not automatically recognized in Ukraine.

To meet the tender qualification requirements, teaming-up with a local partner could be a good solution. A bid may be submitted solely by the leading partner or by a formal consortium of several partners registered as a single legal entity in Ukraine.

- **Requirements on anti-corruption policy**

The Ukrainian Public Procurement Law provides for the requirement of compliance with anti-corruption policies for bidders participating in medium-to-large size tenders. More specifically, if the bidder does not have an anti-corruption programme or a person responsible for implementation thereof this will constitute the ground for a refusal of participation in any tender for the value exceeding UAH 20 million (approx. EUR 700,000).

- **Access to information**

Announcements of all upcoming calls for bids in relation to a significant number of public procurement contracts are made available on the official web-portal www.tender.me.gov.ua in the Ukrainian language. Other web-sites containing information on public procurements are listed in the Annex 1 hereof.

The 2016 Law provides for a possibility for contracting authorities to use privately run web-sites authorized by the Ukrainian Ministry of Economy to conduct public tenders. The list of such web-sites is expected to be adopted soon, whereby the 'ProZorro' portal (<http://prozorro.gov.ua/ua/>) may be seen as the first experimental example of e-procurements in Ukraine.

3. CASES WHEN A PUBLIC TENDER IS REQUIRED

- **Contracting authorities**

Open public tenders are mandatory for contracting authorities, which are in charge of public services controlled by central or municipal authorities, which also includes companies with a state or municipal stake of more than 50%.

Importantly, the Ukrainian Public Procurement Law excludes from the definition of contracting authorities state companies, which activities have industrial or commercial nature, in line with a similar principle existing in the EU law.

- **Financial thresholds**

A public tender is mandatory if the contemplated procurement reaches or exceeds:

- UAH 200,000 (approx. EUR 7,000) - for procurement of goods or services;
- UAH 1.5 Mln. (approx. EUR 52,000) - for procurement of works (e.g. civil works).

At the same time, no tender is required for procurement of goods or services by natural monopolies and other similar contracting authorities for the amount of UAH 1 Mln. (approx. EUR 35,000), or for procurement of works for the amount of UAH 5 Mln. (approx. EUR 173,000), as long as such procurements are not funded from the state budget of Ukraine.

- **Public procurements funded by international financial institutions (IFIs)**

Procurement of goods, services or works funded fully or partially by proceeds from loan agreements executed between the Ukrainian government and international financial institutions (EBRD, EIB, IFC etc.) are governed by procurement policies and rules of the respective international financial institutions, rather than the Ukrainian law on public procurement.

- **Public procurements under PPP, concession and similar agreements**

Besides, under the 2016 Law, procurement made by holders of special or other exclusive rights granted on the basis of public tenders are not subject to public tender requirements. This rule concerns, first of all, private concessionaires and other private operators under various PPP and semi-PPP agreements in Ukraine.

4. TIMING, COSTS AND FORMALITIES

- **Timing**

A typical tender takes 2 – 3 months to proceed with (please see the Annex 2 for more details).

The minimal term for submission of bids is increased from 15 calendar days to 30 calendar days in case of procurement of goods or services in the amount of EUR 133,000 or more or civil works in the amount of EUR 5,15 million or more.

- **Costs**

Typical costs involve payments for translation / certification services, legal and technical consultancy. A moderate payment for the registration as a bidder / obtaining of the tender documentation through the dedicated web- site is also possible.

For the sake of completeness, in industry-specific tenders additional costs may arise in connection with, inter alia, registration of legal presence, legal and financial due-diligence of local partners in Ukraine, issue of bank guarantees and other securities etc.

- **Form of documents**

The 2016 Law requires for all bids to be submitted in electronic format by completing e-forms made available on the national public procurement web-site and delegated web-sites. All further correspondence, including award notices and appeals, should be made through the electronic exchange as well.

Bidders are released from the obligation to provide documentary confirmation of compliance with the formal requirements if the respective information is available in any of the open public registers of Ukraine.

Copies of documents issued abroad need to be notarized and, usually, certified by an Apostille, as well as translated into Ukrainian.

- **Confidentiality**

Under the current Ukrainian law on public procurement, contracting authorities are released from the obligation to ensure confidentiality of any information submitted by bidders throughout the procurement procedure. Furthermore, the law requires publishing procurement contracts on the web-site. As a matter of practice, there are various ways how to balance this requirement with the requirements of confidentiality, especially where technically sophisticated and complex procurement is concerned.

5. BIDDING ELIGIBILITY AND SELECTION CRITERIA

- **Bidding eligibility**

A typical public tender by default does not envisage any limitations as to participation of residents or non-residents of Ukraine, unless certain qualification or pre-qualification criteria are established in the tender documentation. The non-discrimination principle is well-recognized, including in the courts' practice.

A bidder is expected to express its interest and inform the contracting authority through the e-procurement web-site.

As in many other jurisdictions, industry-specific tenders may be limited to participants with only specific qualifications, such as previous experience or availability of specific assets or employees.

It is worth mentioning that the 2016 Law does not limit the eligibility of foreign bidders registered in "off-shore jurisdictions" (i.e. low taxation countries) to participate in Ukrainian public procurement tenders.

- **Competitive and non-competitive tenders**

A typical public tender is usually an open one, whereby the winner must be selected among at least two participating bidders whose bids satisfy the formal requirements.

One bidder is generally not allowed to submit several bids. Absence of the second participating bidder is a frequent ground for the tender's cancellation.

The contracting authority is given the right to announce a negotiated procedure, as an exception, in complicated and well-justified cases (e.g. services or works which can be rendered or performed by one contractor only due to technical reasons).

- **Selection criteria**

Under the 2016 Law, each contracting authority is required to set a starting price of the procurement when initiating an open tender, whereas potential bidders are expected to supply products for the lowest price. The starting price must include VAT and other applicable taxes. The weight of the price criteria in the open tender should be at least 70% and cannot be reduced.

If a contracting authority is not able to define a starting price, a competitive dialogue replaces an open tender. Under this form of procurement, other (non-price) criteria have priority over the lowest price. Importantly, under the new Law the competitive dialogue applies to procurement of consultancy and legal services.

No specific protection is offered against formally compliant, but otherwise obviously unserious or dumping bids within a typical open tender. More specifically, it is not allowed to reject formally compliant bids in cases where the contracting authority has established that the bid is based on the abnormally low price or costs.

6. CONTRACT AND PAYMENT TERMS AND CONDITIONS

- **Contract signing**

The contract should be signed within maximum 35 calendar days following its award (in certain cases a shorter period of 20 days may apply). The essential provisions of the contract should correspond to the ones indicated in the tender book. Besides, the public procurement contracts must not contradict the mandatory rules of the Ukrainian civil and commercial laws. Importantly, this rule does also apply to internationally funded tenders.

- **Contract's amendment after signing**

It is possible to amend the contract after its signing and without a new tender but strictly in specific cases, such as adjustments of the price further to the exchange rate fluctuations or reduction of the procurement due to financial difficulties of the contracting authority or prolongation of the contract due to unforeseen circumstances. At the same time, it is not possible under the Ukrainian Public Procurement Law to amend the contract in a number of other practical cases, e.g., in order to replace the defaulting contractor.

- **Subcontracting**

Depending on the tender conditions, the contract may envisage a subcontracting option. It is required to disclose to the contracting authority the names and registered addresses of all significant subcontractors, i.e. subcontractors, whose fees are expected to take up at least 20% of the contract's price.

- **Payment terms and conditions**

Any public procurement funded by the state budget is conducted strictly for the period of one calendar year. That is the maximum budget period set out by the state budget law in Ukraine, save for projects funded/co-funded by loans of international financial institutions.

In exceptional cases 20% of the contract's price can be paid in the next calendar year and prior to the new tender. However, the contracting authority is again required to undertake a new public tender for each new calendar year to allocate funds in excess of the 20% threshold.

The Ukrainian Public Procurements Law provides for the possibility to execute long-term framework agreements in cases specifically provided for by the Ukrainian government.

It is possible to negotiate with the contracting authority an advance payment, but within certain limits. More specifically, any goods, works or services may be purchased with a 30% advance payment, provided that the maximum delay of supplies should not exceed 1 month. Such period may be even longer in a number of exceptional cases, including, without being limited to, construction works (maximum 3 months), importation of specific goods (maximum 3 or 6 months), and implementation of specific environmental projects (1 year or even longer).

7. MEANS OF APPEAL

- **Appeal before the Antimonopoly Committee of Ukraine**

The more frequently used way of out-of-court protection is to file an appeal before the Antimonopoly Committee of Ukraine (the "AMC").

Appeals before the AMC may be filed through the e-procurement web-portal at any stage of the tender process against any decision, action or omission of the contracting authority, but subject to a strict adherence to procedural deadlines.

More specifically, appeals with respect to tender announcements and documentation must be submitted no later than 4 calendar days before the designated date of submission of bids; appeals with respect to bids' evaluation – within 10 calendar days from the day of publication of the tender's award.

If found formally admissible the appeal does automatically suspend the tender proceedings and the contract's signing.

Appeals before the AMC are highly formalized and sophisticated. The material admissibility of complaints on tender results is conditional upon availability of solid and professionally drafted legal arguments in support of the alleged violation of rights.

The AMC decisions may be appealed in court within 30 days from the day after their publication on the e-procurements web-portal.

The latest information about the process, costs and formal requirements can be found on the AMC web-site <http://www.amc.gov.ua> (available in Ukrainian only).

- **Court appeal**

Signed contracts may be challenged in court if there is a potential claimant with a fair interest to do so. The general statute of limitation is 3 years according to applicable laws of Ukraine, save for a number of specific cases.

According to Ukrainian procedural law, disputes in connection with public procurements contracts may be resolved by the commercial courts of Ukraine. In terms of timing, according to the general rule of law, a case should normally be resolved within 2 months. Moreover, non-appearance of a party or absence of the defendant's reply to a claim does not prevent the court from continuing the hearing and taking the final decision.

Although the Ukrainian law does not prohibit disputes between contracting authorities and foreign contractors to be settled before an international arbitration institution, the recognition and enforcement in Ukraine of the respective arbitral award is not always easy in practice. Besides, one should note that disputes relating to certain subjects, such as the registration of titles over immovable property contracted under a public procurement contract must be settled exclusively by the commercial courts of Ukraine.

8. LAW REFORMS OUTLOOK

- **Delegation of public procurement to private operators**

The 2016 Law declares a possibility for a contracting authority to delegate entirely the operation of public procurement to private operators acting under the authority of the Ukrainian government (the so called “centralized procurement organizations”).

Moreover, procurement organizations may be empowered to sign even long-term (up to 4 years) procurement contracts.

Now the Ukrainian governments is expected to elaborate detailed regulation and procedure of appointment of the said private operators to make the above law provision work in practice.

- **Transposition of the EU law**

The Ukrainian Public Procurement Law has already incorporated certain elements of the relevant EU law (e.g. negotiated procedures).

Further obligations to transpose the EU law are set in the EU-Ukraine Association Agreement. More specifically, within 3 to 8 years after ratification Ukraine is required to bring its legislation in line with selected basic elements of:

- EU Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and
- EU Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors - within 4 years upon ratification respectively.

Foreign businesses expect the EU law transposition efforts will focus on, inter alia, ensuring recognition in Ukraine of diplomas, certificates or other evidence of formal qualifications issued in EU member states.

ANNEX 1**REFERENCES TO MAIN WEB-SITES ON UKRAINIAN TENDERS**

- Announcements of nationally-funded public procurements: www.tender.me.gov.ua
- First e-procurements portal of Ukraine: <http://prozorro.gov.ua/ua/>
- Announcements of EBRD-funded procurements in Ukraine:
http://www.ebrd.com/saf/search.html?type=procurement_notice
- Tenders of EIB on Ukraine: <http://www.eib.org/about/procurement/index.htm>
- IFC Projects Database: [https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/\\$\\$Search?OpenForm](https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/$$Search?OpenForm)
- World Bank procurement plans for Ukraine's projects:
<http://documents.worldbank.org/query?sortBy=date&pageSize=20&docType=739941>

ANNEX 2**TIMELINE OF A TYPICAL OPEN PUBLIC TENDER IN UKRAINE**