

client alert

PROJECTS (FINANCE & INFRASTRUCTURE) | UKRAINE

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PUBLIC PROCUREMENT LAW: NEW AMENDMENTS PASSED

The draft Law *On Amending the Public Procurement Law to Improve International Compliance and Fight Corruption* was approved by the Verkhovna Rada (Parliament) of Ukraine on 15 September 2015. If signed by the President, this law will bring a revision of a number of substantial rules on how to proceed with public procurement in Ukraine.

Below are selected changes that will be of importance for potential bidders, both domestic and foreign.

INCREASE OF FINANCIAL THRESHOLDS

The Parliament has revised financial thresholds: now, contracting authorities must conduct a public tender if the following thresholds are reached or exceeded:

- UAH 200,000 (approx. EUR 8,300) - for procurement of goods or services;
- UAH 1.5 mln. (approx. EUR 62,000) - for procurement of works (e.g. civil works);

These thresholds will be further reviewed every 12 rather than 24 months.

At the same time, the definition of the contracting authority itself remained unchanged. More specifically, public deputies refused to vote for a catch-all inclusion into the scope of contracting authorities of all joint-venture companies, in which the state or municipality holds 50% or more. Thus, depending on their functions and by-laws, it is still possible that some of the relevant companies may not fall into the scope of the Public Procurement Law (a thorough qualification is required in each case).

PROCUREMENT PLANS PUBLICATION

The draft law requires annual procurement plans of contracting authorities to be published on the website of the Antimonopoly Committee of Ukraine and within a strict deadline - no longer than five days from the date of their approval. This provision should increase accessibility of information about planned public procurement to potential bidders.

INCREASE OF THE SUBMISSION DEADLINE IN MEDIUM-TO-LARGE TENDERS

The minimal term for submission of bids was increased from 20 business days to 40 calendar days in case of procurement of goods or services in the amount of or exceeding EUR 133,000 or civil works - in the amount of or exceeding EUR 5,15 million.

LESS FORMALISM IN TERMS OF EVIDENCE

Bidders will be released from the obligations 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.

At the same time, the list of the above registers will need to be approved by the Antimonopoly Committee of Ukraine.

EXCLUSION OF SURETYSHIPS FROM SECURITY INSTRUMENTS

The draft Law limits permissible instruments to secure performance under a tender bid or procurement agreement. More specifically, suretyship agreements, which were quite popular until current, will no longer be permitted for securing performance both under a tender bid and procurement agreement.

Instead, the draft law makes more stress on the use of banking instruments, such as guarantees, which is rather positive for solid bidders.

REQUIREMENTS ON ANTI-CORRUPTION COMPLIANCE OF BIDDERS

The draft law provides for less formalism in terms of compliance with anti-corruption policies for bidders participating in small-to-medium size tenders.

According to the draft law, the lack on the bidder's side of an anti-corruption programme or a person responsible for implementation thereof will constitute the ground for a refusal of participation in the tender only if its expected value equals or exceeds UAH 20 million (approx. EUR 830,000).

CHANGES TO FRAMEWORK ("LONG-TERM") PROCUREMENT

The draft law empowers local governments to act as direct customers under framework procurement agreements concluded for more than one budget period (i.e. more than 1 year).

At the same time, the draft law is less flexible in terms of procedures applicable to procurements of this type. More specifically, framework agreements will need to be concluded only per the results of open public tenders; no other forms will be permitted, such as negotiated or pre-qualification procedures.

It is worth mentioning that long-term public procurements as such remain permitted only in exceptional cases, specifically provided by the regulation of the Ukrainian government.

USE OF PLATTS INDICES

Fluctuations in *Platts* commodity indices published by *McGraw Hill Financial* will be one of the allowed criteria for revision of the essential conditions of concluded procurement agreements, most practically their price.

MORE SOPHISTICATED GROUNDS FOR APPEALS

The admissibility of complaints on tender results will be conditional upon availability of solid and professionally drafted legal reasoning in support of the alleged violation of rights. This provision is obviously designed to prevent abuse of the right to challenge results of a tender.

NEW EXEMPTIONS FROM PUBLIC PROCUREMENT LAW

The draft law provides that services related to supply of heat energy and water supply and sewage may not require a public tender if such services meet certain conditions.

Besides, consulting services of international financial organizations, of which Ukraine is a member, will not require a public tender until 31 December 2015.

SEVERAL NOVELTIES LOOK RATHER QUESTIONABLE

Notwithstanding the generally positive effect of the draft law, it contains several novelties which look rather questionable, as their implementation in practice in Ukraine may be misused.

More specifically, the draft law gives contracting authorities the following new possibilities, which may potentially lead to a rather negative scenario for some of bidders:

- Contracting authorities will have the right to accept documents connected with the bid even in case if such documents are not signed on behalf of the bidder, which may potentially lead to increase of unserious bids;
- Contracting authorities will no longer be required to ensure confidentiality of any information submitted by bidders throughout the procurement procedure, which may potentially harm commercial interests of solid bidders;
- Contracting authorities will be able to unilaterally stop negotiated procedures if they will no longer need to procure or in the event of cutbacks in financing.

CONTACT LAWYER

OLEKSIY SOLOVIOV
soloviov@gide.com

RESIDENT PARTNERS

BERTRAND BARRIER
barrier@gide.com

DR JULIAN RIES
julian.ries@gide.com

DR OLEKSIY FELIV
oleksiy.feliv@gide.com

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GIDE LOYRETTE NOUEL

вул. Володимирська, 4 - Київ 01001 / 4, Volodymyrska Street - Kyiv 01001 | тел. / tel. +38 (044) 206 0980 - факс / fax +38 (044) 206 0981
ukraine@gide.com - gide.com