

client alert

PUBLIC PROCUREMENT | UKRAINE |

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UKRAINIAN PUBLIC PROCUREMENT AT A GLANCE

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I. INTRODUCTION

The Ukrainian public procurement market makes an important part of the emerging economy of Ukraine. The new Law on Public Procurements came into force on April 20, 2014 (the "**2014 Law**"). The Law is designed to facilitate and streamline the public procurements procedure in Ukraine taking into account the relevant EU law¹.

It is likely that the full text of the Association Agreement between EU and Ukraine will be signed in the nearest future. As a core element thereof, the Deep and Comprehensive Free Trade Area will create opportunities for even closer EU-harmonization of public procurements regime in Ukraine with taking over the relevant EU *acquis*².

The present memorandum is aimed at providing an insight into the public procurements for companies interested in offering products and/or services to Ukrainian public sector customers, which are generally understood as contracting authorities satisfying public needs under control by the state or municipal governments (the "**Public Sector Customers**").³ The below information is thus not relevant for those companies, whose intention is to sell products and/or services to private customers in Ukraine.

¹ The official text of the law is accessible for free, but only in Ukrainian, at: <http://zakon4.rada.gov.ua/laws/show/1197-18/print1389899998231915>. We may not exclude further changes in the law towards closer harmonization with the relevant EU *acquis*.

² For more information about the EU-Ukraine Association Agreement please see: http://eeas.europa.eu/ukraine/index_en.htm

³ The definition includes companies with a state or municipal stake of 50% or more. Importantly, the 2014 Law excludes from definition of Public Sector Customers public companies, which activities have an industrial or commercial character, in line with a similar principle existing in the EU law. However, the way of interpretation of this rule by law enforcement agencies and courts in Ukraine is yet to be seen in practice.

II. PREPARATORY STEPS

2.1. Local registration / local partner in Ukraine (industry-specific)

In principle, 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, shall be no later than on signing of the contract.

In practice it is advisable to prepare for public registration / licensing procedures in Ukraine as soon as possible to avoid risks of time delays or cancelation of the award and additional tax expenses.

As in many other jurisdictions, non-Ukrainian bidders without specific experience in Ukraine are often prevented from participation in large-scale public procurements⁴.

To meet the tender requirements relating to the experience in Ukraine the teaming-up with a local partner could be a good solution, however this is sometimes quite complicated and requires additional structuring. Although no joint bids are allowed in public tenders governed by the Ukrainian law, whereby a single legal identity of the bidder is a must, as a solution, a bid can be submitted solely by the leading partner of a joint-venture contract (*spilna diyalnist'*) or by a formal consortium of several partners registered as a single legal entity in Ukraine.

Acquisition of an existing company on the relevant market and/or a dormant company holding necessary licenses could be a solution as well.⁵

2.2 Investigate technical and/or financial requirements

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.

Despite of the fact that the 2014 Law recognizes the principle of free movement of goods and services, professional certificates and qualification documents, e.g. licenses from the EU are still not automatically recognized in Ukraine.

2.3 Good translation from / into Ukrainian

Save for internationally-financed and/or large-scale procurements, public procurement documents, except for procurements notices, are drafted in the Ukrainian language. To avoid any mistakes and/or confusion you should hire a reputable translator from the Ukrainian language with experience in legal translation.

We usually do not recommend using services of translation agencies located outside of Ukraine, as the level of proficiency in Ukrainian is not always appropriate. In addition, any translations of contracts should be carefully reviewed by bilingual lawyers.

⁴ The 2014 Law introduces a new principle of free movement of goods and service. The way of its application is yet to be seen in practice.

⁵ Please notate that a great number of acquisition of existing companies in Ukraine require a mandatory prior merger clearance by the Antimonopoly Committee of Ukraine, since the minimum financial thresholds are extremely low.

2.4 Professional assistance

Hire a reputable Ukrainian lawyer to verify which public procurement rules / technical and financial requirements are normally applied in relation to the industry and/or potential Public Sector Customer, advice about all peculiarities of legal and/or tax presence in Ukraine and support you in other preparatory steps.

III. GETTING INFORMATION ON PUBLIC PROCUREMENT IN UKRAINE

3.1. Register your account on *www.tender.me.gov.ua*

Announcements of all upcoming calls for bids in relation to the major part of public procurements are made available on the official web-portal *www.tender.me.gov.ua* in the Ukrainian language.

Announcements of tenders, the value of which exceeds EUR 200.000 for goods (EUR 300.000 for services; EUR 500.000 for works) are also made in English through the same web-portal.⁶

Registration is free and easy. Still, *www.tender.me.gov.ua* is far from being user-friendly; the searching process may require considerable time and professional techniques and know-how.

An alternative search engine, maintained by the state company specializing in publication of foreign trade information, is available at *http://ips.vdz.ua/*, but is not always efficient either.

The tender book and supplementary materials can be downloaded in a doc/pdf format free-of-charge from *www.tender.me.gov.ua*.

3.2 Search the EBRD web-site and web-sites of similar international donors for public procurements announced in Ukraine

Ukraine maintains an active financial cooperation with a number of international financial institutions, including, most notably, the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the International Finance Corporation (IFC), the International Bank for Reconstruction and Development (IBRD) and others.

Announcements of all upcoming calls for bids in relation to public procurements financed by EBRD, IFC, EIB and others are accessible through the Internet in English. Please see Annex 1 for further details.

3.3 Monitor corporate web-sites of public enterprises and companies / submit requests for information about tenders opened by public enterprises and companies

There are currently no unified rules or central web-sites in Ukraine specifically dedicated to small value public procurements and certain public procurements, which may be done by natural monopolies and the like.⁷ However, you may still search corporate web-sites of your potential Public Sector Customers, where announcements of tenders of public enterprises are usually accessible through the Internet in Ukrainian free-of-charge. Please see Annex 2 for some examples from selected industries.

⁶ Keyword: International Announcer of Public Procurements.

⁷ Please refer to Section 4.1 below.

You are given the right to request any public enterprise to disclose to you the information about all open / scheduled tenders unless such information contains state secrets or confidential data, which is usually not the case.

3.4 Practical tips

Practical tip 1. There is an alternative web-site where you may order a paid industry/customer-specific search to speed up the process and reach results: <http://www.ua-tenders.com/>.

Practical tip 2. Although no letters of interest or similar applications are mandatory to participate in a tender you should declare your Ukrainian mailing address to the Public Sector Customer (e.g. by sending a registered letter of interest); this is important to ensure timely communications about any changes in the tender book, which the Public Sector Customer may introduce.

IV. OPEN PUBLIC TENDER IN UKRAINE: MAIN FEATURES

4.1. Financial thresholds / source of funding

A public tender is mandatory if certain thresholds are reached or exceeded. These thresholds are subject to periodic revisions but currently they are as follows:

- UAH 100,000 (approx. EUR 6,300) for procurement of goods or services;
- UAH 1 Mln. (approx. EUR 63,000) for procurement of works (e.g. construction works).

On a separate note, no tender is required for procurement of goods or services by natural monopolies and other similar Public Sector Customers for the amount of UAH 1 Mln. (approx. EUR 63,000), or for procurement of works for the amount of UAH 5 Mln. (approx. EUR 312,000),⁸ as long as such procurements are not funded from the state budget of Ukraine.

Tenders for small value public procurements may be done by some Public Sector Customers on a voluntary or case-by-case basis, in line with their respective internal public tendering rules. Please see Annex 2 for some industry-specific examples.

4.2 Timing and costs

Typically, open public tenders take around 3 months, including the following main procedural stages: publication of the announcement and tender book; opening and evaluation of bids; acceptance of the best bid; signing of the contract. Please see Annex 3 for further details.

Typical costs involve payments for translation / certification services, legal and technical consultancy.⁹ Payments for registration as a bidder / obtaining of the tender book and supplementary materials are not required.

⁸ Due to vague and contradictory wording of the 2014 Law the possibility of tender-free procurements of goods, services or works *below* the indicated amounts may become subject of public discussion and claims; we may not exclude an official clarification in this respect in the nearest future.

⁹ For the sake of clarity, 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.

4.3 Form of documents

A typical public tender is conducted in the form of a paper exchange. Bids are submitted in writing in the Ukrainian language, signed by the bidder or its authorized proxy and certified by the bidder's common seal.¹⁰ Copies of documents issued abroad need to be notarized and, usually, certified by an Apostille¹¹, as well as translated into Ukrainian.

The 2014 Law provides for the possibility of procurements with the use of electronically signed documents and for entirely electronic tenders. The way of application of these new rules is yet to be seen in practice.

4.4 Participants

The non-discrimination principle is well-recognized and 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.

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

The 2014 Law's novelty is that bidders from off-shore (i.e. low taxation countries) countries may be excluded from the participation in a tender. The relevant list of countries is yet to be defined by the government.

4.5 Competitiveness

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. On 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 Public Sector Customer is given the right to announce a negotiated procedure or pre-qualification tender, 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).

4.6 Selection criteria

The lowest price criterion is predominant in all typical open tenders.

Subject to the individual decision of the Public Sector Customers in the technically sophisticated tenders the "weight" of price criteria may be reduced to 50%, as an exception and combined with other non-price criteria, e.g. terms of payment, speed of supplies, and scope of the warranty.

Unfortunately, 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 Public Sector Customer has established that the bid is based on the abnormally low price or costs.

¹⁰ We confirm that there is currently no exception from the above rule on common seals for foreign bidders and the latter have to care about the availability of a common seal with the bidder's name on it. It may not be excluded that the common seal requirement will be removed from the public procurement regulations in the nearest future in line with the general law on simplification of business activities voted by the Ukrainian parliament in April 2014.

¹¹ For further details please check: http://www.hcch.net/index_en.php?act=text.display&tid=37

4.7 Awarding the contract

The contract should be signed within 30 calendar days following the bid's acceptance.

Please note, that the essential provisions of the contract should correspond to the ones indicated in the tender book. Besides, the public procurement contracts must be governed by the Ukrainian civil and commercial laws.

It is possible to amend the contract after its signing and without the new tender in a number of 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 Public Sector Customer or prolongation of the contract due to unforeseen circumstances. At the same time, it is not possible to amend the contract in a number of other practical cases, e.g., in order to replace the defaulting contractor. It is therefore that the implementation of step-in rights of third persons (e.g. lenders) is rather difficult in the public procurements governed by the Ukrainian law.

Depending on the tender conditions, the contract may envisage a subcontracting option. In this case the subcontractors' fees must not be lower than 20% of the contract's price.

4.8 Payment terms and conditions

Public procurements funded by the state budget are conducted strictly for the period of one calendar year (the "**Principle of Annuality**"); that is the maximum budget period set out by the state budget law in Ukraine, with exception for projects funded/co-funded by loans of international financial institutions.¹²

The Principle of Annuality appears obviously inappropriate from the perspective of large infrastructure projects. Yet, the principle will not be removed until completion of a more global reform of the state budget planning in Ukraine.

Further on, 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 Public Sector Customer is again required to undertake a new public tender for each new calendar year to allocate funds in excess of the 20% threshold.

The 2014 Law provides for the possibility to execute long-term framework agreements in cases specifically provided for by the Ukrainian government. However, there is yet no example of application by the Ukrainian government of the long-term framework agreements in practice of large infrastructure projects.

In addition, it is possible to negotiate with the Public Sector Customer an advance payment 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 ecology-saving projects (1 year or even longer).

4.9 Derogation from Ukrainian rules on public procurement

Last but not least, it is generally recognized in Ukraine that procurement of goods, services or works funded fully or partially by proceeds from loan agreements executed between the

¹² In which case the Ukrainian law on public procurements is usually derogated in favor of international procurement rules (please see below).

Ukrainian government and international financial institutions (EBRD, EIB, IFC etc.) are governed by procurement policies and rules of the respective international financial institutions.¹³

V. MEANS OF APPEAL

The tender results may be challenged by either tender participant before several institutions, including the Public Sector Customer itself, its supervisory body, the Antimonopoly Committee of Ukraine, the State Prosecutors Office, courts.

5.1 Appeals before Public Sector Customers

Appeals before Public Sector Customers can be submitted during the tender process in the form of written letters (*zvernnya*) explaining which specific alleged breach of the applicable public procurement rules must be remedied by the Public Sector Customer. The latter is required to reply to the request.

Besides, the bidder may potentially appeal with the Public Sector Customer against the tender results prior to signing of the contract; appeals of this type are governed by internal regulations adopted by tender committees created by Public Sector Customers. Some regulations follow the guidelines provided by the rules on appeals adopted by the Ministry of Economy of Ukraine in 2009 even though they are no longer in force,¹⁴ while others are worded differently.¹⁵

Appeals before Public Sector Customers do not suspend the public tender, unless otherwise decided by the management of the Public Sector Customer. In the event of suspension, the later may, however, not exceed the current budget year in line with the Principle of Annuality. In such a case the Public Sector Customer may re-launch the tender in the following budget year.

5.2 Appeals before Antimonopoly Committee of Ukraine

The alternative and more frequently used way of out-of-court protection is to file an appeal before the Antimonopoly Committee of Ukraine (the "AMC"). The appeals before the AMC may be filed at any stage of the tender process against any decision, action or omission of the Public Sector Customer (within 10 days after becoming aware of it) and until the contract is signed.

The appeal before the AMC does not automatically suspend the tender proceedings prior to the acceptance of the bid. At the same time, the appeal before the AMC suspends the contract's signing deadline (i.e. the 30 days period following the bid's acceptance).

The appeals before the AMC are highly formalized and regulated by Article 18 of the 2014 Law. 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).

The AMC decisions can be appealed before a court within 30 days from the day after becoming aware of its issuance.

¹³ Please see Annex 2 for some examples of the relevant web-sites.

¹⁴ For example, the 2010 rules on appeal in public procurements applicable with the Ministry of Health Protection of Ukraine please see http://www.moz.gov.ua/ua/portal/tend_20100428_0.html (in Ukrainian only).

¹⁵ For example, the 2011 rules on appeal in public procurements applicable with the Military Academy of Ukraine - please see <http://www.asv.gov.ua/content/fin/zakon6.pdf> (in Ukrainian only).

5.3 Appeals before State Prosecutor

The public procurement procedure and its results may be appealed before the state prosecutor's office of Ukraine. The latter is required to react and supervise over the compliance of the Public Sector Customer and its managers with the public procurement rules as well as more general rules on spending of public funds, respectively.

The state prosecutor has the right to file a law suit acting on behalf of the state. Depending on a particular situation the law suit filed by the state prosecutor may be more effective as compared to a similar law suit filed by the bidder itself.

5.4 Court appeals

The public procurement procedure and its results may be appealed before a court. The court may suspend the establishment of tender results and/or the contract's signing.

Apart from that, also signed contracts can be challenged in court if there is a potential claimant with a fair interest to do so. The general statute of limitation amounts to 3 years according to applicable laws of Ukraine, save for a number of specific cases.

ANNEX 1

REFERENCES TO THE ORIGINAL WEB-SITES CONTAINING INFORMATION ABOUT UKRAINIAN TENDERS

- Announcements of nationally-funded public procurements: www.tender.me.gov.ua
- Announcements of EBRD-funded procurements in Ukraine:
http://www.ebrd.com/saf/search.html?type=procurement_notice
- Tenders of EIB: <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>
- Procurement notices of Nordic Investment Bank:
http://www.nib.int/news_publications/procurement_notices

ANNEX 2**OTHER PUBLIC PROCUREMENT WEB-SITES OF UKRAINE****1. Energy - PJSC "Zaporizhoblenergo"**

Public Joint-Stock Company Zaporizhoblenergo delivers energy to the city of Zaporizhia (a large industrial hub and an oblast capital in the southern Ukraine).

The company's public procurements are published on <http://www.zoe.com.ua/tenders/> (information is available in Ukrainian only). Public procurements are governed by the Rules of Selection of Counteragents of PJSC Zaporizhoblenergo approved by the Director's Order No. 481-od dated 31 July 2012. A copy of these Rules can be requested in writing from the Company's procurement department.

2. Municipal services - Web-portal "Kyiv City Procurements"

In principle, providers of municipal services are usually financed by local budgets. These public procurements are to be published on www.tender.me.gov.ua. At the same time, pursuant to the local regulations in Kyiv it is envisaged that all public procurements in the municipal area must be published on the web-portal tender.finaudit.kiev.ua/.

3. Water Supply - PJSC Kyivvodokanal

Public joint-stock company Kyivvodokanal renders waters supply services in the city of Kyiv, the capital of Ukraine.

The company's public procurements are made in the electronic form through <https://www.ts.ua/market/> (information is available in Ukrainian only) in accordance with the agreement and relating rules between the company and LLC Trade Systems operating the said web-portal.

The procurement rules and other supplementary materials relating to the web-portal are available at <https://www.ts.ua/toUsers/> (in Ukrainian).

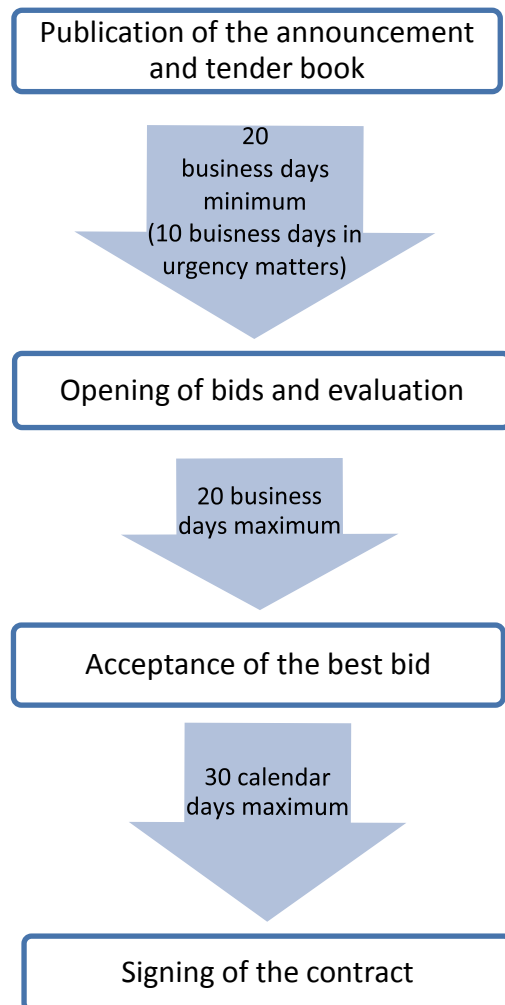
4. Construction - PJSC Kyivmiskbud

Public joint-stock company Kyivmiskbud renders construction services in the city of Kyiv, the capital of Ukraine.

The company's public procurements can be found at <http://new.kyivmiskbud.ua/tenders.php>. The public procurements are governed by internal Rules of Procurements adopted by the company's management. A copy of the rules can be requested in writing from the Department of Complete Procurements. Contact details can be found here: <http://new.kyivmiskbud.ua/contacts.php>.

ANNEX 3

HOW LONG DOES IT TAKE TO GO THROUGH TYPICAL OPEN PUBLIC TENDER IN UKRAINE?



RESIDENT PARTNERS

BERTRAND BARRIER
barrier@gide.com

DR JULIAN RIES
julian.ries@gide.com

DR OLEKSIY FELIV
oleksiy.feliv@gide.com

You can also find this legal overview on our website in the News & Insights section: gide.com

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