

## client alert

PROJECTS (FINANCE & INFRASTRUCTURE) | VIETNAM |

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### THE NEW TENDERING RULES IN VIETNAM

On 26 November 2013, the National Assembly of the Socialist Republic of Vietnam approved a new Law No. 43/2013/QH13 on Tendering (the "**New Law on Tendering**"). The New Law on Tendering will enter into force on 1 July 2014 and will repeal as from that date Law No. 61/2005/QH11 on Tendering as amended ("**Law 61**"), as well as a number of articles relating to public tendering under the Law No. 16/2003/QH11 on Construction. The aim of the changes is to clarify previously overlapping or imprecise texts, and to promote transparency and competitiveness in the field of public procurement.

Implementing regulations of the New Law on Tendering are expected to be issued in the coming months.

This Client Alert highlights the most significant changes introduced by the New Law on Tendering from the perspective of foreign bidders.

#### WIDER SCOPE OF APPLICATION

As was previously the case, the new Vietnamese tender rules shall apply to contractors who provide consulting service<sup>1</sup>, non-consulting service<sup>2</sup>, goods and civil works to capital investments projects using State funds in an amount of 30% or more of the total investment capital of the project.

It also clarifies that public tendering is required for all capital investment projects of State-owned enterprises<sup>3</sup> and for projects "*in which the State or State-owned enterprise funds account for less than 30% of the total investment but amount to over VND 500 billion*" (currently equivalent to approximately USD 24 million).

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<sup>1</sup> "*Consulting service*" means one or a number of activities including: preparation, assessment of the planning report, overall development diagram, architecture, survey and formulation of pre-feasibility study report, feasibility study report, environmental impact assessment report, survey and formulation of engineering, estimate, preparation of dossiers of invitation for expression of interest, dossier of invitation for pre-qualification, bid dossiers, dossiers of requirements, assessment of dossiers of expression of interest, dossiers of prequalification participation, bid dossiers, dossiers of proposals, verification, appraisal, supervision, management of project, arranging finance, audit, training, transfer of technologies and other advisory services (*New Law on Tendering, Article 4.8*).

<sup>2</sup> "*Non-consulting service*" means one or a number of activities including: logistics, insurance, advertisement, installation (apart from construction and installation of construction works), pre-acceptance test and operation run, training, maintenance, drawing maps and other activities that do not fall within the scope of "consulting service" (*New Law on Tendering, Article 4.9*).

<sup>3</sup> State-owned enterprises are defined as enterprises in which the State owns more than 50% of the charter capital under the Law on Enterprises (Article 4-22).

*“Capital investment projects” are defined broadly as “programs, projects for new construction; projects for rehabilitating, upgrading or expanding existing facilities; projects for acquiring assets including equipment and machines without installation; projects for repairing and upgrading assets and equipment; projects for developing master plans; projects for scientific research, technology development, technology application, technical assistance and baseline surveys; and other programs or projects for capital investment”.*

*The notion of “State funds” is also widely defined, comprising “funds from the State budget, sovereign bonds, funds for development of public service delivery, State credit for capital investment, government-guaranteed credit, loans secured by State assets and funds for capital investment by State-owned enterprises” as well as “government bonds, municipal bonds, official development assistance, concessional loans from donors and the value of land use rights”.*

It is also clearly stated that the procurement of national reserve goods (such as rice or other essential goods) using State funds, the procurement of pharmaceutical and medical supplies using State funds, and the selection of contractors in the oil and gas sector (save for selection of contractors to supply petroleum services regulated by Vietnam's laws and regulations on petroleum) as well as in relation to outbound (i.e. outside Vietnam) investment projects using 30% or more State funds or at least VND 500 billion of State funds in total investment will be subject to the requirement for a public tender under the New Law on Tendering.

One of the most interesting features of the New Law on Tendering is that it now expressly applies to the *“selection of investors for implementation of investment projects in the form of Public-Private Partnership (PPP) and investment projects that use land”*. It is therefore intended that investors in PPP projects implemented under new regulations applicable to PPP projects currently under development will have to be implemented in accordance with the New Law on Tendering<sup>4</sup>, although different criteria will apply to contractors and investors.

## EXCEPTIONS - DIRECT APPOINTMENT

The New Law on Tendering is more detailed as to the circumstances in which it is possible to resort to direct appointment.

Cases in which direct appointment of **contractors** was permitted under Law 61 remain in place, including:

- urgent procurement in case of force majeure or national emergency situations;
- procurement in which direct appointment was necessary to protect national secrets or for ensuring technological compatibility and copyright requirements; and
- procurement of public goods and services of value below prescribed thresholds set by the Government<sup>5</sup>.

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<sup>4</sup> A draft Decree consolidating Decree No. 108/2009/NĐ-CP on BOT projects and Decision 71 is being prepared and scheduled to be submitted to the Government in final form for approval in May 2014.

<sup>5</sup> Under Decree 85, a contractor may be directly appointed in the following cases:

- (i) consultancy services with a value of less than VND 3 billion (around USD 150,000);
- (ii) procurement of goods with a value not exceeding VND 2 billion (around USD 100,000);
- (iii) tender packages for construction and installation, and selection of a general construction contractor (but not a general design contractor) with a value not exceeding VND 5 billion (around USD 250,000); and
- (iv) procurement of assets to maintain regular activities of State bodies with a value of less than VND 100 million (around USD 5,000).

Updated thresholds are expected to be issued along with the regulations implementing the New Law on Tendering.

The New Law on Tendering also sets out certain new situations in which direct appointment may apply, such as:

- in the field of civil engineering design, to the author of the winning architectural design; and
- for the relocation of infrastructure facilities under direct management of a specialised agency for site clearance.

However, the possibility for foreign donors to specify the direct appointment of contractors has been removed.

Procedures and conditions applicable to direct appointment are also more detailed and regulated than in Law 61. For instance, all of the investment decisions, the contractor selection plan, funding and budget estimates (except for engineering and procurement, engineering and construction or engineering, procurement and construction and turn-key packages) will have to be approved by the competent persons and in accordance with the law. In addition, the term of the appointment will be limited to 45 days to 90 days (in the case of large-scale complex packages).

**Investors** may also be directly appointed in three different scenarios, namely if:

- only one investor applies for project implementation;
- only one investor is capable to perform due to intellectual property rights or commercial secrets or funding arrangements; or
- the investor proposes the project which meets the requirements of feasible project implementation and provides the highest efficiency according to the Government's regulations.

It must also be noted that the New Law on Tendering maintains the possibility for the Prime Minister to approve the direct appointment of a contractor (and now an investor) in special cases for projects and packages with unique conditions, where traditional selection methods are not applicable.

## PARTICIPATION OF FOREIGN BIDDERS

International bidding, as opposed to domestic bidding, is a procurement process in which domestic as well as foreign bidders and investors are allowed to bid. To be eligible to participate in the bidding process, foreign bidders must register themselves on Vietnam's national bidding network system<sup>6</sup>.

The New Law on Tendering maintains, in general terms, fairly restrictive scenarios where international bidding is permitted, including (i) the donor of the bidding package stipulates international bidding and/or (ii) the bidding package relates to goods that are not yet able to be sourced locally or that do not satisfy technical, quality or price requirements, or domestic bidders are not able to satisfy the requirements of the bidding package. The New Law on Tendering also opens international bidding to all "*investment projects under PPP arrangements and investment projects using land, except for cases of restricted investment stipulated by investment law*"<sup>7</sup>.

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<sup>6</sup> Since 15 September 2010, Vietnam's Ministry of Planning and Investment has implemented a pilot online public procurement scheme via the website <http://muasamcong.mpi.gov.vn>. This may be the first step in an effort to set up the national bidding network system.

<sup>7</sup> Annex III and IV of Decree No. 108/2006/ND-CP providing detailed provisions and guidelines for the implementation of a number of articles of the Law on Investment dated 22 September 2006 list the sectors in which investments are conditional or prohibited. Vietnam's schedule of commitments in services upon its accession to the WTO also contains limitations regarding investment in certain sectors.

The New Law on Tendering maintains **the obligation to associate with domestic contractors in international bidding**, either through a consortium or through subcontracting, except when there are no domestic contractors capable to execute any portion of the procurement package.

**National preferential treatment** in international bidding is maintained and applicable to foreign bidders where (i) in the case of supply of goods, costs for domestic production of such goods amount to 25% or more of the value of the bidding package or more; or (ii) in the case of provision of consulting services, non-consulting services and civil works for capital investments projects, domestic bidders (who are in consortium with the foreign bidders) take over 25% of the value of the bidding package or more. The thresholds for preferential treatment entitlement under Law 61 were 30% and 50% for limb (i) and (ii) respectively.

The preferential treatment may be implemented by either (i) adding more points to the assessment of bidders eligible for the preferential treatment or (ii) adding monetary amount to the bidding price of other bidders who are not entitled to preferential treatment.

## BIDDING PROCESS

Procurement activities must comply with the principles of fairness, transparency and economy.

### Bidding features

International bidding documents shall be published on the national bidding network system and/or "*Đấu thầu*" ("*Vietnam Public Procurement Review*") newspaper<sup>8</sup> either in English or in both English and Vietnamese. The bid currency must be stipulated in the bidding documents but there can be no more than three different currencies. The New Law on Tendering expressly provides that international costs related to the implementation of the package can be quoted in foreign currencies but maintains the obligation to quote local costs in Vietnamese Dong.

The amount of the bid security shall range from 1% to 3% of the estimated price of the package for contractor selection (no minimum was provided for in Law 61) and between 0.5% and 1.5% of the total investment for investor selection, depending on the size of the project.

The New Law on Tendering provides details related to bid security submission in case of a consortium. Consortium members have a choice between each providing their own bid security or to arrange for one member to provide one bid security for all the members of the joint-venture.

The bid security shall not be returned if the bidder:

- (i) withdraws its bid after the bid submission deadline;
- (ii) is shown to have been guilty of bribery, collusion, fraud or abuse;
- (iii) fails to provide a performance guarantee; or
- (iv) fails to finalise the contract (i) 20 days after the award notice for contractor selection (compared to 30 days under Law 61) or (ii) 30 days after the award notice for investor selection in line with the provisions of Decision 71.

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<sup>8</sup> An online version of "*Đấu thầu*" ("*Vietnam Public Procurement Review*") newspaper may be found at <http://muasamcong.vn/>

Regarding the availability of bidding documents, the New Law on Tendering provides that requests for expression of interest and prequalification documents shall be supplied for free to bidders participating in contractor selection, but that bidding documents and requests for proposals can either be sold or provided for free. On the contrary, in investor selection, requests for proposals and bidding documents must be sold to investors.

A key change in the New Law on Tendering is that it provides for clear and detailed time limits in contractor/investor selection. There are now maximum time limits provided for actions to be undertaken by public entities and minimum time limits to be granted to bidders. The maximum validity period of a bid or proposal is maintained to 180 days but there are conditions under which an extension to 210 days is possible (namely, in case of large and complex packages or for two-stage bidding packages).

### Evaluation Procedures

The New Law on Tendering sets out the same evaluation procedures for contractors and for investors.

Previously existing evaluation procedures are maintained under the New Law on Tendering, with the addition of a new “two-stage, two envelope” procedure.

This new procedure shall apply to open and limited packages which require technology of innovative, complex or highly specialised nature.

Under this new procedure, bidders must submit both a technical and a financial proposal in separate envelopes during the first stage. Based on the evaluation of technical proposals, technical adjustments are made to the bidding documents and a list of bidders is invited to participate in the following stage. Financial proposals are not to be opened.

The second stage requires bidders to adjust their bid following technical adjustments made during the first stage. A bidder is selected based on this new technical proposal as well as the initial financial proposal which are opened simultaneously.

### Evaluation Criteria

- Contractors

The New Law on Tendering has maintained the possibility to use both merit point or pass/fail systems on any package. In comparison, Law 61 imposed a specific method of evaluation depending on the nature of the procurement package: the merit point system applied to packages for consultancy services, and a mix of merit point system and pass/fail criteria applied to the procurement of goods, civil works and EPC packages.

The New Law on Tendering has clarified which criteria (price or quality) should be taken into account in each type of procurement:

- **Non-consulting services, goods, civil works and mixed packages:** depending on their scope and technical and financial requirements, the evaluation shall be conducted using either of the lowest bid price method, lowest evaluated price method or the combined technical and price method;
- **Consulting packages:** based on their complexity and technical requirements, proposals shall be evaluated using the least cost selection method, fixed budget selection method, quality and cost-based selection method or quality-based selection method.

These different methods - which mark a significant move away from the pure "lowest cost" approach - are expected to be further detailed in its implementing regulations.

The aim is to avoid awarding contracts to bidders quoting the lowest price, but who lack the capacity or technical skills to implement the package.

- Investors

The Government is expected to provide detailed regulations on investor selection methods in the coming months. The New Law on Tendering simply provides in broad terms that methods of bid evaluation may include service tariffs, State capital contribution, social benefits, State benefits and combined methods. Bid evaluation criteria are also quite wide as they shall include qualification and experience criteria, technical criteria and financial criteria.

## **CENTRALISED PROCUREMENT**

The New Law on Tendering creates a centralised procurement system that will apply in procurement of large volumes of the same types of goods and services by one or more State organisation and agency.

This centralised procurement system will be implemented by a centralised procurement body in order to comply with the objectives of the Government that are to reduce the cost and time of procurement as well as to improve professionalism in procurement.

Detailed regulations on this centralised procurement body and the process shall be provided by the Government.

## **CONTRACTUAL SCHEMES AND PERFORMANCE SECURITY**

The New Law on Tendering provides for four types of contracts applicable to public procurement of contractors: lump sum contracts, fixed unit price contracts, adjustable unit price contracts and time based contracts. Lump sum contracts are considered to be the default contract and the use of an alternative type of contract will have to be justified in the contractor selection plan.

In addition, the specified amount of performance security shall range from 2% to 10% of the award price in procurement packages. In order to enhance attractiveness for investors, the New Law on Tendering has reduced performance security in case of highly-risked procurement packages. In contrast, Law 61 provided the amount of performance security could reach up to 30% in such cases.

The types of contract in investor selection are also more varied, including BOT, BTO, BOO, BT and other types of contract under investment laws. The specified amount of performance security ranges from 1% to 3% of the total investment.

## **DISPUTE RESOLUTION**

Disputes in relation to procurement activities are to be handled either (i) via the filing of a petition to the procuring entity (and then, as the case may be, to the authority that manages such procuring entity and approves the procurement or a "complaint settlement consulting council" formulated by the Ministry of Planning and Investment (centrally) or the relevant ministries (industry-specific) or by local People's Committees (locally) or (ii) by petition before a court of competent jurisdiction.

It is clearly stated in the New Law on Tendering that the courts are competent to handle the dispute in accordance with the laws on civil proceedings. This brings a major clarification to the question that arose under Law 61 as to whether disputes in relation to public procurement are handled as a "civil" disputes (i.e. disputes among commercial/contracting parties) or an "administrative" dispute (i.e. disputes arising from acts/decisions of State authorities).

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