



Public procurement for foreign companies in Ukraine

Content

01

General issues

- 1.1. Participation of non-resident legal entities in public procurement
- 1.2. Local content of production
- 1.3. Online tender platforms
- 1.4. “Eurobids”
- 1.5. A sample guide for participation in public procurement
- 1.6. Qualification criteria
- 1.7. Appeals against the terms of tender documentation
- 1.8. Recommendations to participants in a public tender

02

Peculiarities of procurement of certain types of goods and services

- 2.1. Construction works
- 2.2. Energy sector
- 2.3. Defence sector

03

Frequently asked questions

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Introduction

Ukraine's public procurement system offers ample opportunities for non-resident legal entities looking to expand their market presence. However, navigating Ukraine's procurement landscape requires a comprehensive understanding of its procedures and nuances.

While recent legislative amendments aim to simplify the participation of foreign bidders, the process is still complex and demands thorough preparation. Non-resident entities must familiarise themselves with sector-specific requirements, understand tender documentation, and effectively leverage the electronic platforms.

At DLF attorneys-at-law, we understand the challenges that foreign businesses face in this space. Drawing from our extensive experience in assisting international clients, we have prepared this guide to equip your business with the tools and insights needed for successful participation in tenders.

Special focus is placed on the most promising sectors in terms of public procurement currently, such as:

- ◆ energy,
- ◆ defence,
- ◆ construction works,

where many tenders are largely oriented towards non-resident participants.

This guide is also aimed to address the most frequently asked questions about public procurement in Ukraine. If your question is not listed here, [please drop us a line](#).

Sincerely yours,
Team DLF

01/ GENERAL ISSUES

1.1. Participation of foreign companies in public procurement

According to Ukrainian law, non-resident legal entities, as well as associations of participants (legal entities) that include a non-resident legal entity, are entitled to participate in public procurement (tenders).

In cases when an association includes at least one legal entity resident in Ukraine, such an association must be a separate legal entity to participate in tenders. If the association consists of only non-resident legal entities, it may participate in public procurement without establishing a separate legal entity.

There is a tendency in certain public procurements in Ukraine to target non-resident suppliers. This applies in most cases to the procurement of specific products manufactured by foreign companies and related services. Examples include:

- ◆ installation of high-tech special equipment;
- ◆ instruction and/or training of the customer's personnel in certain aspects of using such equipment;
- ◆ dredging and water treatment services, etc.



1.2. Local content of production

Ukrainian legislation does not set any special requirements for non-residents to be allowed to participate in public procurement. In order to be awarded a particular tender, a non-resident, like other bidders, must meet the qualification requirements set by the customer for the tender.

There are also no restrictions on the participation of foreign companies in public procurement on an industry basis. However, for a certain category of goods purchased in public procurement procedures, Ukrainian legislation establishes a requirement for the local content of production. This requirement stipulates that the Ukrainian component as a percentage of the cost of the goods offered by the bidder must

meet the minimum established by law.

This requirement does not apply to procurements that fall under the provisions on public procurement of international treaties to which Ukraine is a party. For instance, localisation requirements will not apply to the procurement of goods if both of the following apply:

- ◆ the procuring entities are central government agencies of Ukraine, companies operating in the gas and energy sectors, providing services of bus stations, ports, airports, postal services, etc.
- ◆ the cost of procurement of such goods is complied with.



1.3. Online tender platforms

13

authorised electronic platforms in operation

All actions of procurement participants are carried out through a personal account on an authorised online platform. There are currently 13 authorised electronic platforms in operation. Each of them ensures registration of participants, automatic posting, receipt and transmission of information and documents during procurement, use of services with automatic information exchange, etc.

Each platform implements its own tools to perform the above actions, in particular, through specific interface features (e.g., adaptation to mobile devices), as well as introduces additional services, such as push notifications on all important events in Viber/Telegram/other, competitor analytics, etc.

It should be noted that currently, when registering a non-resident on online platforms, a predefined list of countries and company registers available in such countries (trade, court registers, etc.) with which the Ukrainian online procurement system is integrated is offered. This allows for automatic identification of a company from such a country for the purposes of creating an account (profile).

As of today, this list includes 65 countries, including most European countries (Austria, Germany, Switzerland, Denmark, the Netherlands, France, Sweden, etc.), Canada, South Korea, the UAE, the USA, Japan, and many others.

A participant can register on several online tender platforms at once, but will be able to take part in a particular tender only via one platform. Similarly, having worked on one platform, one can later register on

another, work with it and ultimately choose the most convenient platform in terms of interface, availability of useful services, etc.

Registration on an online tender platform is free of charge. However, to submit a tender proposal in a particular tender, a fee is charged, which depends on the procurement value, with:

the maximum amount being	~\$ 100
€ 4,080	
for procurements of € 4 million	~\$ 98,400
	or more

In most cases, operators of online tender platforms enter into a bilingual (Ukrainian-English) agreement with non-residents.



1.4. “Eurobids”

Starting from 9 April 2024, contracting authorities have the right (but not the obligation) to conduct so-called “Eurobids” regardless of the expected value of the procurement and taking into account the specifics.

Eurobids are tenders when, after the deadline for submitting bids, the system discloses all information from bidders, except for the price, and reviews such bids for compliance with the requirements of the tender documentation (the so-called “prequalification”).

The bidders whose proposals meet the requirements of the tender documentation are allowed to participate in the auction, which is held among the prequalified bidders.

In such auctions, the timeframes are as follows:

30

calendar days –
minimum deadline for submitting proposals.

20

business days –
the prequalification period.

Note that if less than two bidders are admitted to the auction after prequalification, the auction is automatically cancelled.

1.5. A sample guide for participation in public procurement

In a nutshell, to participate in Ukrainian tenders, a foreign company shall:

- ◆ choose an authorised online platform and register on it;
- ◆ choose a tender (procurement) to participate in;
- ◆ prepare a tender proposal in accordance with the requirements of the tender documentation;
- ◆ offer a competitive price within the expected value range;
- ◆ become the winner and sign the procurement agreement.

If only one tender proposal is submitted, it is automatically recognised as the most economically advantageous and is immediately reviewed for compliance with the requirements of the tender documentation.

If two or more bids are submitted, the system holds an auction. The winner is the one who offers the lowest price.

The auction is held in three rounds, with the minimum price reduction step ranging from 0.5% to 3% of the expected procurement value. The specific amount, which is set by the procuring entity, is displayed in the system when the tender is announced.

The bidder with the highest proposal price is the first to make a reduction, while the bidder with the lowest price always has the last word. The same principle applies in each round and taking into account the results of the previous round.

The procurement agreement is signed in writing. As a rule, the procurement agreement is written in Ukrainian. However, in cases where the tender itself is aimed at foreign supplier companies, the contract may be drawn up bilingually (mostly in Ukrainian and English).

As a rule, payment is made upon delivery of goods (provision of services, performance of works). This is due to the peculiarities of the procedure for managing budgetary funds in Ukraine, as in

most cases, customers' financial plans provide for the fulfilment of monetary obligations after the delivery of goods (provision of services, performance of works).

At the same time, the current legislation provides for the possibility of prepayment for goods, works and services procured with budgetary funds in certain amounts and terms, which is determined based on the need, which is justified, in particular, by the actual state of delivery of goods (performance of works, provision of services), monthly distribution of budgetary allocations, seasonality of work, and production cycle.

1.6. Qualification criteria

According to the current legislation of Ukraine, procuring entities may set one or more of the following qualification criteria for bidders when conducting tenders:

01

availability of equipment, material, technical facilities and technologies;

03

documented experience in fulfilling agreements similar to the procurement subject matter;

Technical requirements are a description of all necessary characteristics of the goods or services to be procured, including their technical, functional, and quality characteristics.

02

availability of qualified employees possessing the necessary knowledge and experience;

04

financial solvency, confirmed by financial statements.

1.7. Appeals against the terms of tender documentation

Procuring entities may not set any discriminatory requirements for bidders. Similarly, the tender documentation may not contain requirements that restrict competition and lead to discrimination of participants. If tender documentation contains unnecessary, excessive or unreasonable requirements, such requirements may be recognised as discriminatory.

In this case, it is advisable to contact the procuring entity with a request or demand to amend the tender documentation accordingly and remove the discriminatory requirements (such requests /demands can also be submitted through the account on the online tender platform). If they are ignored, an interested party may appeal against the terms of the tender documentation.

When challenging the terms of tender documentation, it is necessary to prove and document

the need to amend the tender documentation, taking into account the requirements of the Ukrainian legislation on public procurement. In particular, it is necessary to document the impossibility to meet a particular condition of the tender documentation and prove that it violates the complainant’s rights and legitimate interests related to participation in a particular procurement procedure.

Preparing and submitting a complaint requires careful compliance with the procedural and formal rules established by law. It is also necessary to prepare and properly document evidence of the violations that gave rise to the appeal.

Complaints are filed with the Commission for Review of Complaints on Violations of Public Procurement Legislation of the Antimonopoly Committee of Ukraine.

1.8. Recommendations to participants in a public tender

In order to avoid unnecessary expenses and not to miss a reasonable opportunity to participate effectively in a tender, a potential participant should:

01

analyse the tender documentation for compliance with the requirements of Ukrainian legislation and the interests of the potential participant;

02

determine the procedure for submitting a tender proposal, requirements to the tender proposal;

03

define and clarify in detail the qualification criteria for the procurement participants, requirements for the procurement subject matter, terms of supply of goods or provision of services, and compare them against the capabilities, status, and interests of the potential participant;

04

if necessary, prepare requests to the procuring entity for clarification of certain terms of the tender documentation;

05

if necessary, draft and duly submit requests to the procuring entity to eliminate discriminatory requirements and conditions, as well as requirements that violate the rights and interests of the potential participant in the process of objective and competitive selection;

06

if necessary, draw up and duly submit complaints to the Antimonopoly Committee of Ukraine against such conditions of the tender documentation, if the procuring entity fails to eliminate them.

02/ PECULIARITIES OF PROCUREMENT OF CERTAIN TYPES OF GOODS AND SERVICES

2.1. Public procurement of construction works

1) Terminology peculiarities

Procurement legislation distinguishes between the procurement of services and works. In order to successfully prepare for participation in public procurement in the construction sector, these terms need to be differentiated.

Thus, works are defined as:

development of project documentation for construction projects;

construction of new facilities, expansion, reconstruction, overhaul and restoration of existing facilities and structures for production and non-production purposes;

construction of facilities involving the development of project documentation;

work on construction standards;

geological exploration works;

technical re-equipment of existing enterprises;

development of scientific and design documentation for the restoration of architectural and urban landmarks;

services accompanying the works, including geodetic works, drilling, seismic surveys, aerial and satellite photography, and other services included in the estimated cost of works, if the cost of such services does not exceed the cost of the works.

Thus, from the point of view of procurement legislation, **major overhaul is considered to be works**. At the same time, **current repairs**, including current repairs with the development of project documentation, **are services**.

This distinction is important both for the purposes of determining the subject matter of the procurement and for selecting and conducting the appropriate procurement method.

For instance, **procurement of maintenance services** through open tenders is required if the value of such services equals or exceeds

\$ 4,900
(approx. ₹ 200,000)

At the same time, **procurement of works**, including overhaul, is required if their cost equals or exceeds

\$ 36,000
(approx. ₹1,500,000)

Accordingly, when the cost of maintenance or overhaul services is less than the specified thresholds, a direct contract may be concluded between the procuring entity and the contractor without the open tender procedure.

In addition, there are different minimum deadlines for submitting proposals in open tenders, namely:

7 days

for the procurement of services (including maintenance services);

14 days

for the procurement of works.

In most cases, when it comes to restoration, in particular as a result of russia's armed aggression, it is works on:

- ◆ construction,
- ◆ reconstruction,
- ◆ restoration,
- ◆ overhaul

of the relevant facility which are procured.

Design works (development of design documentation for construction objects) may be procured either as a separate procurement item or as a complex consisting of both design and construction works.

2) Peculiarities of construction works procurement

The procedure for procurement of construction works (overhaul and reconstruction) is carried out taking into account the specific requirements of Ukrainian legislation in the field of construction, including the specifics of construction in certain industries (e.g., road repairs).

Regulatory and legal acts to be considered during the procurement procedure, as well as for the development of tender documentation and technical specifications to it, include:



01

Laws

including those specifically regulating construction, licensing, permits, etc;

02

By-laws

including those specifically regulating the peculiarities of concluding and performing capital construction agreements;

03

Special construction norms and standards, etc.

These acts define the following:

- ◆ the necessary technical requirements for the relevant procurement item (technical specification);
- ◆ conditions and procedure for submitting a tender proposal, in particular, its commercial part (price proposal);
- ◆ terms and procedure for concluding and implementing a construction procurement agreement, etc.

Based on the type of procurement objects in the construction sector, the technical specification will be determined:

- ◆ for the procurement of design works – based on the design specification;
- ◆ for construction procurement (restoration, overhaul) – based on the project documentation.

In practice, there are cases when the technical specification does not contain sufficient information on the type and scope of works, their location, etc. to allow the bidder to properly formulate the tender proposal taking into account all factors and requirements.

Sometimes, technical specifications include project documentation that is extremely voluminous, while the deadline for preparing and submitting tender proposals is minimal. In such a situation, the bidder is objectively unable to review all the project documentation before the deadline for submitting bids.

Therefore, **technical specifications for the procurement of construction works require a separate and thorough review.**

If necessary, it is advisable to contact the procuring entity to provide clarifications or even challenge the technical **documentation as containing discriminatory or incomplete (inaccurate), or vice versa, excessive (unnecessary, unreasonable) requirements.**

Construction activities and most related works require relevant licences and/or permits. In this regard, bidders are often required to provide such licences (permits) as part of their tender proposal, or to provide information on the

availability of such licences (permits). In such cases, it is necessary to indicate the source where the information can be verified (public registers).

It is important to note that if a bidder does not have the relevant licences or permits, it has the right to engage subcontractors who have such permits to perform the relevant works. At the same time, the procedure for obtaining certain permits is significantly simplified for the period of martial law in Ukraine.

The bid price of a participant in the construction procurement procedure (i.e., the agreement price to be included in the procurement agreement) is calculated on the basis of:

- ◆ the normative demand for labour and material and technical resources required to implement design solutions for the construction project;
- ◆ current prices for these resources;
- ◆ aggregate indicators of the cost of works, the scope and types of which are provided for in the approved project documentation.

At the decision of the procuring entity, the statement of work may be prepared in accordance with the international measurement system determined by the procuring entity.

To calculate a bidder's proposal price (agreement price), the procuring entity shall provide the following:

- ◆ a statement of the scope of work;
- ◆ a statement of resources to the statement of scope of work without prices, or approved design documentation.

To calculate the bid price (agreement price) for certain types of overhauls, the procuring entity may submit a defect report in the prescribed form.

The bid price is formed on the basis of the cost of construction works, which includes the following:

direct, general production and other costs for the construction of the facility;	profit;
funds to cover administrative expenses of construction organisations;	funds to cover risks in cases established by law;
funds to cover additional costs associated with inflationary processes;	funds for payment of taxes, duties, mandatory payments.

The bid price shall also include a separate section to cover the costs associated with the purchase and delivery of equipment, furniture and inventory to the construction site, which shall be provided by the participant of the procurement procedure (contractor).



The agreement price is an estimate of the cost of contracting works agreed by the procuring entity and used for mutual settlements.

When entering into a procurement agreement, both procurement legislation and special legislation in the field of construction must be taken into account. These include, in particular, the regulations governing the conclusion and execution of contractors' agreements in capital construction.

Thus, in a contractor agreement, the parties are obliged to specify:

- ◆ the name of the construction object;
- ◆ the location of the construction object;
- ◆ the main parameters (capacity, area, volume, etc.), composition and scope of works envisaged by the project documentation and to be performed by the contractor;

- ◆ other indicators characterising the subject matter of the contract.

The schedule of works is an integral part of the contractor's agreement, which sets forth the start and end dates of all types (stages, complexes) of works stipulated by the contractor's agreement.

As noted above, the agreement price in a contractor's agreement is determined on the basis of an estimate as either approximate or firm.

An approximate estimate
(dynamic contract price)

is an estimate that is subject to adjustment in the event of changes in the market prices of the resources included in the agreement price, as well as on other grounds specified in the agreement terms.

A firm estimate
(firm agreement price)

is an estimate that may be adjusted only in certain cases by mutual consent of the parties under the procedure specified in the agreement.

At the same time, regardless of the type of agreement price (dynamic or fixed), since the price is an essential condition of the construction procurement agreement, any change shall be subject to the special provisions of the relevant procurement legislation.

3) Pilot project for reconstruction

The Government of Ukraine has implemented a pilot project to restore settlements affected as a result of Russia's armed aggression.

01

The bodies responsible for the restoration and development of infrastructure in the regions act as procuring entities and recipients of budgetary funds under the pilot project.

03

The restored real estate objects (individual residential buildings) in settlements must be suitable for permanent residence. Also, all the works required by the project documentation to ensure permanent residence in such facilities must be completed.

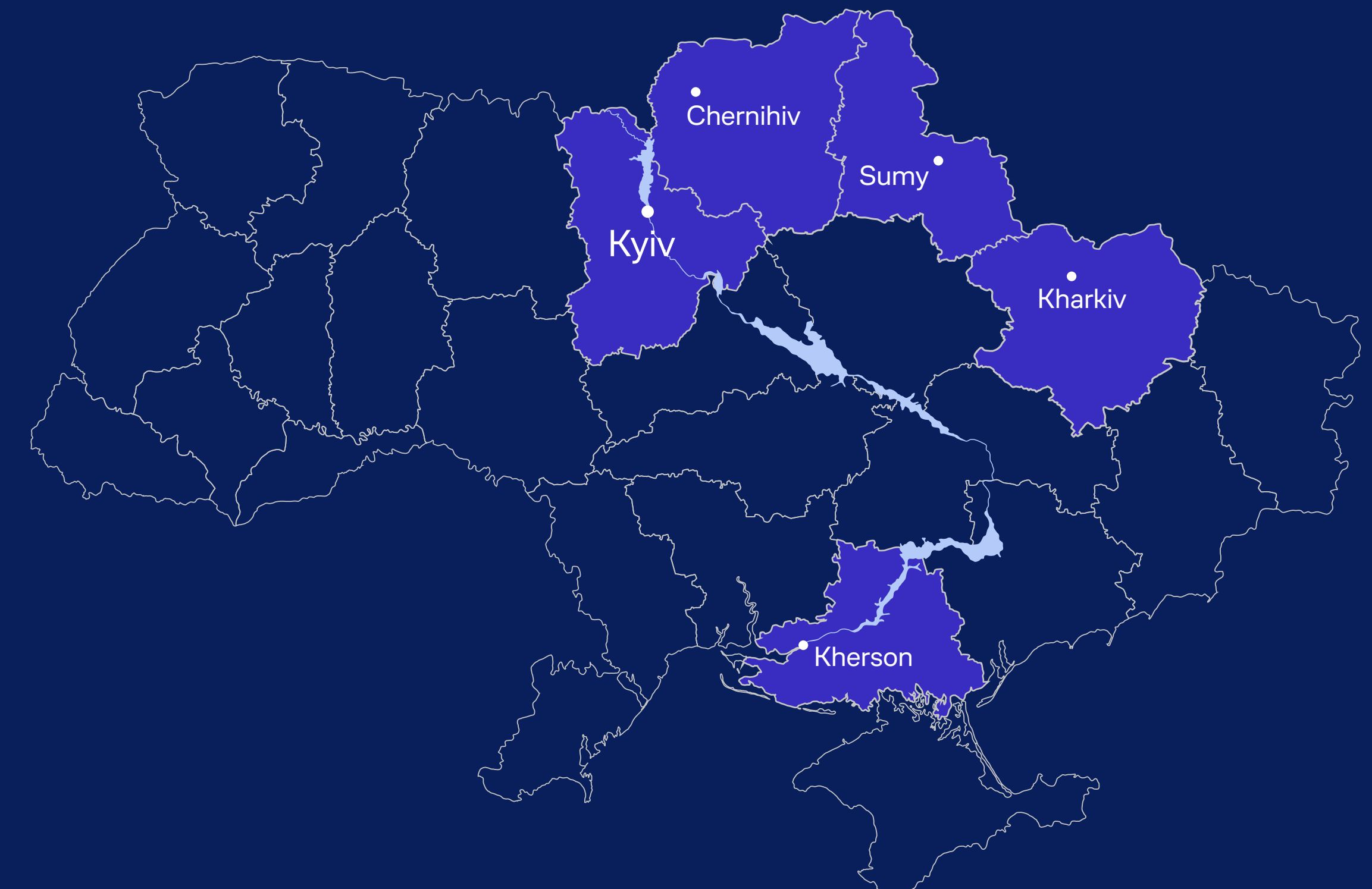
02

The restoration of settlements includes the development of project documentation (design estimates), new construction, reconstruction, restoration, overhaul, maintenance, and purchase of goods.

04

The procurement of goods, works, and services within the pilot project is carried out in compliance with the requirements of the procurement legislation, in particular under martial law.

The pilot project is aimed at restoring certain affected settlements located in Kyiv, Kherson, Sumy, Kharkiv, and Chernihiv regions.



2.2. Public procurement in the energy sector

1) Public procurement of energy equipment

Currently, there is a tendency to focus on non-resident suppliers in the procurement of equipment necessary for the restoration of Ukraine's energy sector, including high-voltage equipment.

For instance, in such tenders, the tender documentation contains separate instructions on the preparation of tender proposals for resident and non-resident participants, in particular, regarding the following:

- ◆ peculiarities of affixing a participant's electronic signature to a tender proposal;
- ◆ submission of documents confirming compliance with the technical requirements, calculation of the tender price, etc.
- ◆ submission of separate documents to confirm the establishment (foundation, registration) of a legal entity being a participant;

The tender documentation for the aforementioned tenders establishes the possibility for non-resident bidders to determine the price of their tender proposal in foreign currency (usually USD or EUR).

However, the Prozorro system does not currently offer the technical possibility to indicate the bid price directly in foreign currency in the relevant fields of the participant's electronic account. Accordingly, the auction itself is held in hryvnias. To address this problem, procuring entities:

- ◆ determine in the tender documentation the special formulas for converting the price of a tender proposal into UAH (for the purpose of indicating such a price in the relevant fields and for the auction);
- ◆ establish requirements for adjusting (changing) such a price in UAH as of the relevant date;
- ◆ establish the relevant formulas for converting the tender price into the currency based on the results of the auction (for the purposes of fixing it in the procurement agreement), etc.

Such formulas and approaches often have flaws, and therefore require a separate study and, if necessary, clarification by the procuring entity, or even appeal as discriminatory or ambiguous (inaccurate).

It should be noted that the Ukrainian government has made relevant amendments to the procurement legislation. Specifically, the list of grounds for the procurement of goods, including equipment for the needs of the energy sector, without open tenders and/or an electronic catalogue has been clarified and somewhat expanded to include, for instance:

- ◆ when procuring goods, works, and services for construction, repair, and other engineering and technical measures to protect critical infrastructure facilities of the fuel and energy sector of critical infrastructure;
- ◆ when goods, works, and services are procured to carry out activities aimed at ensuring the protection of facilities of enterprises, institutions, and organisations of the electric power, nuclear industrial, coal industrial, oil and gas complexes and critical infrastructure facilities of the railway transport subsector of the transport and postal sector, including the protection of their employees with regard to the construction, creation, and arrangement of facilities of the civil defence fund, and the restoration of destroyed or damaged facilities;
- ◆ when procuring gas piston, gas turbine cogeneration units, gas turbine units and block-modular boiler houses (their components), leasing them, as well as procuring goods, works, and services related to their construction and commissioning to prepare for the heating season.



2) Public procurement of energy services

Energy service is a set of energy-saving measures aimed at reducing the energy service customer's consumption and expenses for fuel and energy resources and utility services compared to consumption (expenses) without such measures.

The Ukrainian government has established specifics for public procurement of energy services under the martial law regime. This was done in order to simplify and clarify certain issues of such procurement to meet the needs for improving energy efficiency of the infrastructure.

For energy service procurement, the following elements (conditions, indicators, and criteria) serve as important components of the tender documentation, tender proposal and the procurement process:

- ◆ baseline consumption of fuel and energy resources and utility services;
- ◆ annual cost reduction for energy service customers efficiency of energy service agreements, etc.

Public procurement of energy services has its own particularities, for instance:

01

the aforementioned annual baseline is approved by the executive body of local councils or a central executive body;

02

essential terms of an energy service agreement are subject to approval by the relevant authorities. Hereby, the failure to approve the essential terms of an energy service agreement within the established timeframe is a ground for cancellation of the tender.

At the same time, under the simplified procedures during martial law the annual base level is not subject to approval. Furthermore, after making a decision on the intention to enter into an energy service agreement

with the winning bidder, **the procuring entity does not submit the essential terms of the agreement for approval to the State Agency on Energy Efficiency and Energy Saving of Ukraine (SAEE) with respect to state-owned facilities or to the relevant local council with respect to communally owned facilities. Nor does the procuring entity cancel the tender due to non-approval of the essential terms of the energy service agreement.**

Thus, we can talk about a rather significant simplification and deregulation of certain stages of energy service procurement under martial law.

3) Public procurement with international assistance for the energy sector

To meet the urgent needs of Ukraine's energy sector, which includes reconstruction of the infrastructure damaged by the Russian invasion, the European Commission, in partnership with the Ministry of Energy of Ukraine, has established the Ukraine Energy Support Fund.



The Fund enables governments, international development organisations and corporate partners to provide financial support to Ukrainian energy sector companies for the restoration of damaged equipment.

The procurement of the equipment required for the energy sector of Ukraine at the expense of the Fund is carried out on a competitive basis through an independent procurement agent, **the Energy Security Project of the United States Agency for International Development (USAID ESP).**

that manages the Fund on behalf of the Ministry of Energy of Ukraine), makes payments to selected suppliers.

The USAID ESP conducts procurement on behalf of Ukrainian energy companies whose applications meet the eligibility criteria, after which the Energy Community Secretariat, as a fiduciary of the Ukraine Energy Support Fund (a trustee

2.3. Peculiarities of defence procurement

Given the specific nature of the goods, works, and services being procured, as well as the special status of the procuring entities, defence procurement has several important peculiarities which will be discussed below.

1) Who carries out defence procurement?

State procuring entities in the field of defence procurement are central executive authorities, other state bodies and military formations established under the laws of Ukraine as determined by the Cabinet of Ministers of Ukraine. In addition, state procuring entities include organisations authorised by the decision of a state defence procuring entity to carry out procurement and conclude state contracts.

For instance, the Ministry of Defence of Ukraine is designated as the main defence procurement authority. The State Enterprise



‘Defence Procurement Agency’ was established by the Ministry of Defence to carry out defence procurement.

2) Who can participate in defence procurement?

Foreign companies can participate in defence procurement in Ukraine. However, it should be noted that a foreign company will not be able to participate in defence procurement if:

- ◆ the company is established and registered in accordance with the laws of the Russian Federation or the Republic of Belarus, unless its assets are seized by Ukraine;
- ◆ the goods offered by the company for procurement originate from the Russian Federation or the Republic of Belarus.
- ◆ the ultimate beneficial owner, member, or participant with a 10% or above share in the authorised capital of the company, although established and registered under the laws of Ukraine, is the Russian Federation or the Republic of Belarus, or citizens of these countries;

Therefore, when planning its participation in defence procurement, a foreign company should carefully analyse its ownership structure and the origin of the goods it offers for defence procurement.

3) What goods, services, and works are procured in the defence sector?

The peculiarities of defence procurement in Ukraine primarily apply to:

01

defence-related goods, works and services, other goods, works, and services to guarantee fulfilment of security needs;

02

defence goods, works, and services that constitute a state secret;

03

weapons, military and special equipment, ammunition, and their components;

04

services for the development, repair, modernisation of weapons, military and special equipment, ammunition, and their components;

05

goods, works and services for the construction of military engineering and fortifications.

At the same time, defence procurement is carried out in respect of:

Defence goods and services, other goods and services to guarantee fulfilment of security and defence needs, the value of which

is equal to or exceeds
€ 200,000
~\$ 4,800

Defence works and works to guarantee fulfilment of security and defence needs, if their value

equals to or exceeds
€ 1,500,000
~\$ 36,600

4) How defence procurement is conducted

As a general rule, state procuring entities carry out defence procurement in an electronic procurement system in one of the following ways:

- ◆ through open tenders;
- ◆ through the simplified procurement procedure;
- ◆ by selecting a supplier by requesting proposals from suppliers;
- ◆ by using a framework agreement.
- ◆ services for the development, repair, modernisation of weapons, military and special equipment, ammunition, and their components;
- ◆ goods, works and services for the construction of military engineering and fortifications.

It should be noted that procurement of certain defence goods, works and services is carried out without the use of these methods. In particular, these include:

- ◆ goods that constitute a state secret;
- ◆ armaments, military and special equipment, ammunition, and their components;

When procuring such goods, works, and services, the procedure for concluding state contracts (agreements) is determined by the state procuring entity. In this case, contracts are concluded bypassing procurement procedures and the supplier selection procedure by requesting suppliers' proposals, based on the commercial offer submitted by companies.

5) Peculiarities of simplified procurement

One of the peculiarities of simplified procurement in the defence sector that should be taken into account by potential tenderers is the procedure for eliminating discrepancies.

If a public procuring entity, when considering a simplified procurement tender, finds discrepancies in the information or documents submitted as part of the tender or in the documents required by the simplified procurement announcement, it must place a notice requiring the correction of such discrepancies. Such a notice shall be posted by the state procuring entity not later than two business days before the expiry of the deadline for proposal consideration. In this case, the correction is made by uploading revised or new documents through an electronic procurement system. Such documents must be uploaded within 24 hours from the moment the notice requiring the elimination of such discrepancies is posted.

In this case, a discrepancy in information or documents means, in

particular:

- ◆ the absence of information and/or documents required by the tender documentation in the tender proposal;
- ◆ errors, correction of which does not lead to a change in the subject of procurement proposed by the tenderer in its tender proposal (name of the product, brand, model, etc.).

A notice of non-conformity is published only once. If the simplified procurement participant fails to correct the discrepancies within the specified period, its offer is rejected.

To avoid this, it is necessary to prepare the offer carefully and to constantly monitor the customer's notifications in an electronic procurement system.

6) Can contract terms and conditions be changed?

As a general rule, the essential terms of a state contract, whether concluded through competitive procurement procedures or a direct state contract, may not be amended after its signing until the parties have fulfilled their obligations in full.

However, according to the Ministry of Economy of Ukraine, in certain cases, significant terms of contracts may be amended, namely:

- ◆ in case of reduction of procurement volume, in particular, taking into account the actual amount of the procuring entity's expenses;
- ◆ in case of approval of changes in the price per unit of goods in the procurement contract due to price fluctuations of such goods on the market;
- ◆ in case of improvement of the quality of the subject of procurement, provided that such improvement does not lead to an increase in the amount specified in the procurement contract;
- ◆ due to the extension of the term of a procurement contract or the term of fulfilment of obligations (for this purpose, it is necessary to provide documentary evidence of the circumstances that led to such an extension. For instance, force majeure circumstances, delay in financing of the procuring entity's expenses). At the same time, such changes should not lead to an increase in the amount specified in the procurement contract;
- ◆ as a result of the agreement to lower the price in the procurement contract (without changing the quantity and quality of goods, works, and services);
- ◆ if the price in a procurement contract has changed due to changes in the rates of taxes and duties or changes in the conditions for granting tax benefits;
- ◆ if a contract establishes a procedure for price changes depending on certain parameters (changes in consumer price index statistics, changes in foreign exchange rates, etc.) and these parameters change;
- ◆ if the change of conditions is related to the extension of the contract term to conduct the procurement procedure;
- ◆ if the volume of procurement and/or prices under contracts for the procurement of works on construction of real estate objects have decreased.

3. Frequently asked questions

1. Can a non-resident participate in procurement procedures (tenders) in Ukraine?

Yes, a non-resident may participate in procurement procedures as a supplier or contractor.

To determine whether a non-resident can participate in a particular tender, it is necessary to review the tender documentation.

2. How does one get acquainted with the tender documentation for a particular tender?

Tender documentation is available on the tender page [on the Prozorro website](#) or on a procurement platform.

3. Does a non-resident need a representative office, material and technical base or a warehouse to participate in a tender?

In general, non-residents do not need a representative office, material and technical base or a warehouse to participate in a tender. However, sometimes such requirements may be imposed due to the specifics of a

particular procurement. To check this, the tender documentation for a particular tender should be examined.

4. What legislation applies to the procurement procedure and the resulting agreements?

All issues related to the public procurement procedure in Ukraine and the subsequent agreements are regulated by the laws of Ukraine.

5. What is the Prozorro system?

Prozorro is an umbrella term for the public procurement system in Ukraine. Participation in bidding conducted in the Prozorro system is carried out through online platforms of various trading sites.

6. Which platform to choose for participation in public procurement in Ukraine via the Prozorro system?

To participate in public procurement in Ukraine, a potential bidder can choose the most convenient platform on the Prozorro website and, by following the

link to the website of the selected platform, get acquainted with the pricing, public agreement, and functionality.

7. Where can I find information about platforms for participation in public procurement?

The accreditation and main functions of such platforms are published [on the Prozorro website](#). Information about procurement on Prozorro-accredited platforms is identical and synchronised with the Prozorro system. Thus, a procurement selected on the Prozorro website can be found on any accredited platform and a proposal can be submitted through a chosen platform.

8. How can a non-resident selling a certain type of goods (or providing certain services) find a suitable procurement?

Enter the name of the product (service) in the Procurement tab [on the Prozorro website](#) or use search filters. You can also find procurements on the accredited platforms using their search functionality.

9. What parameters can be refined using filters?

Filters are applied to the following parameters:

- ◆ 'Price', where the potential participants indicate the minimum price at which they are ready to participate in the auction;
- ◆ 'CPV' ('DK021:2015'). It is better to add the selected CPV code to the 'Price' filter. This is a set of unified codes that classify procured goods, services, and works, harmonised with the European Common Procurement Vocabulary (CPV).
- ◆ 'Buyer'. If the tenderer wishes to participate in the procurement of a specific contracting authority, it is possible to select the filter 'Buyer' and specify the name or code of the contracting authority.

3. Frequently asked questions

10. What to consider when searching using filters?

Procured goods do not always match the corresponding 'DK021:2015' (CPV) code, as some goods, services, or works may be very specific. In this case, it is better to use the procurement name as a search term rather than the code filter.

11. What to look for in an announcement?

To assess the potential value of an announcement, pay attention to the following fields:

- ◆ **'Request for clarification'**, which allows you to determine how much time is left to get acquainted with the terms of the tender documentation and ask the buyer questions that have arisen during the review of the tender documentation;
- ◆ **'Deadline for submission of tender proposals'**, by which the participant must prepare and submit a proposal with documents for participation in the auction;
- ◆ **'Auction start'** – to know when the auction will take place and to join in time.

12. What does the information in these fields mean?

- ◆ **'Request for clarification'** allows the participant to contact the procuring entity for clarification, and the procuring entity is obliged to respond to the requests. During this period, it is also possible to appeal against the terms of the tender documentation;
- ◆ **'Deadline for submission of tender proposals'** helps to estimate the time available for document preparation and, if this period is unreasonably short, it is possible to request an extension;
- ◆ **'Auction start'** defines when the auction starts. It is not displayed immediately in every procurement; most often, it is displayed when at least one participant has submitted a proposal.

13. What should I pay special attention to when studying tender documentation?

- ◆ **Participation conditions for non-residents.** Not all procuring entities set clear conditions for the participation of non-residents. If document submission for non-residents is not clearly defined, one should contact the procuring entity for clarification and suggest changes.
- ◆ **Terms of supply agreement performance.** Sometimes, procuring entities specify a condition for representatives of the participant (winner/supplier) to be present during the transfer of goods or signing of certain documents.
- ◆ **Agreement terms and conditions.** Procuring entities may include in the agreement terms the provision of additional accompanying services related to the procurement subject matter, without specifying this in tender documentation. For instance, these may include training of the procuring entity's employees on how to use the goods or provide after-sales service, etc.

14. Can a procuring entity unexpectedly change the tender documentation?

A procuring entity may amend tender documentation and the agreement only before the deadline for submission of proposals. After the deadline, no changes are allowed, so the winner can be sure that they know the agreement terms and conditions.

15. What is a tender proposal security?

Procuring entities often require participants to provide a tender security. The security is a guarantee of a participant's obligations under the tender results. In most cases, procuring entities require security in the form of cash-covered guarantees issued by banking institutions. The security is returned to the participant after the tender is completed. If the participant violates the bidding rules (e.g., wins the auction but fails to enter into an agreement), the security is not returned.

It is important to check this requirement, as the procuring entity may stipulate that it accepts guarantees issued only by Ukrainian banking institutions or by institutions that meet certain requirements.

3. Frequently asked questions

16. What is an agreement performance security?

Procuring entities may require the winner to provide a performance security. This condition must be specified in the tender documentation.

An agreement performance security is a bank guarantee with a cash cover, which is returned to the participant (winner) after the successful execution of the agreement concluded between the participant and the procuring entity.

17. Is it possible to appeal against the terms of tender documentation?

Yes, it is possible. An appeal is allowed if the terms of tender documentation restrict competition, lead to discrimination of participants, are unclear or contradictory, allowing for ambiguous interpretation. The complaint is filed with the Antimonopoly Committee of Ukraine (AMCU).

If the AMCU accepts the appeal for consideration, the procurement will be suspended until the decision on the appeal is made.

18. Can I delete my tender proposal if I change my mind about participating in a tender?

Any participant who has submitted a tender proposal may cancel and delete it without any consequences until the date of the tender submission deadline.

19. What is the localisation requirement?

For a certain category of goods, a requirement for the degree of production localisation is established.

The degree of localisation is an indicator of the local content in the share of the cost of raw materials, materials, nodes, assemblies, parts, elements and product components, works, services and other inputs of Ukrainian origin in the cost of goods. This percentage must not be less than the minimum established by law (respectively, the imported component must not exceed the calculated maximum).

20. When do localisation requirements not apply?

Localisation requirements do not apply to tenders covered by the Public Procurement Agreement and other international treaties of Ukraine, including free trade agreements. If there is a localisation condition, it should be checked against this.

21. How is the tender winner determined?

Currently, the winner is determined as follows:

- ◆ if only one tender proposal is submitted in the tender (bidding), it is automatically recognised as the most economically advantageous, and is immediately reviewed for compliance with the requirements of the tender documentation;
- ◆ if at least 2 proposals are submitted, an auction is held (all actions within the auction are performed through the personal profile on the website). The most economically advantageous proposal is determined based on the results of the auction, and it is the

proposal with the lowest price. If it meets the requirements of the tender documentation, the participant wins the auction. Within 1 day, a notice of intention to enter into an agreement with the winner is published in the electronic system;

- ◆ if the proposal does not meet the requirements of the tender documentation, it is rejected (the participant is disqualified), and the procuring entity considers the next lowest price proposal based on the auction results;
- ◆ if all submitted proposals are rejected (inter alia, if there was 1 proposal that was rejected by the procuring entity), the tender is automatically cancelled.

3. Frequently asked questions

22. How are auctions held?

An auction is carried out by way of price reduction, in 3 rounds, with a minimum price reduction step ranging from 0.5 to 3% of the expected procurement value (the size of the step is set by the procuring entity and is displayed in the system during the announcement of the tender).

- ◆ The participant with the highest price offer is the first to decrease the price;
- ◆ the participant with the lowest price has the last word;
- ◆ this principle applies in each round, taking into account the results of the previous one.

23. Is it possible to specify the bid price in dollars or euros?

Currently, the electronic system does not have the technical capability to indicate the bid price directly in foreign currency. Accordingly, auctions are held in UAH.

24. How is the issue of determining the proposal in hryvnias resolved?

Procuring entities may:

- ◆ include formulas for converting the price into UAH in the tender documentation (to indicate the price in the relevant fields and for the auction);
- ◆ set requirements for adjusting the price as of a certain date;
- ◆ establish formulas for converting the price into a foreign currency based on the results of the auction (to be fixed in the procurement agreement), etc.

Often, such formulas and approaches have flaws, so they need to be carefully studied and, if necessary, clarified by the procuring entity or challenged as discriminatory or ambiguous (inaccurate).

25. When is the procurement agreement concluded with the winner?

A procurement agreement may be concluded no earlier than 5 days after the date of publication of the notice on the intention to conclude a procurement agreement in the electronic system.

The agreement shall be concluded no later than 15 days after the date of the notice's publication, though this period may be extended up to 60 days.

If an appeal is filed, the time limit for concluding the agreement is suspended.

If the agreement is concluded out of time, it will be deemed null and void.

26. What to do if certain terms of tender documentation are unclear or contradictory?

You can ask the procuring entity to clarify, specify, coordinate, delete or change specific terms of the tender documentation ([see question 12](#)).

27. Is it possible to appeal against an open bidding?

Yes, it is possible. Open bidding can be challenged by filing a lawsuit in court or a complaint with the AMCU, which has a Commission for reviewing complaints about violations of public procurement legislation.

The only way to challenge a procurement agreement concluded as a result of a bidding process, including its validity due to non-compliance with the requirements of public procurement legislation, is through court proceedings.

3. Frequently asked questions

28. Why is it worth appealing open tenders to the AMCU Commission?

Appealing against open tenders to the Commission is a more efficient and faster mechanism for protecting rights.

The complaint is filed electronically through a personal profile. The Commission makes a decision to accept the complaint for consideration (or a well-grounded decision to leave the complaint without consideration) within a period not exceeding 2 working days from the date of filing the complaint. The term of consideration shall be 7 working days from the date of acceptance of the complaint for consideration, which may be extended by the Commission up to 12 working days.

29. What can be subject to a complaint to the AMCU Commission?

A complaint may be filed against:

- ◆ unlawful and unreasonable conditions of tender documentation (discriminatory requirements; unreasonably complicated and excessive technical requirements; unreasonable qualification criteria that go beyond the necessary ones);
- ◆ inaccurate, ambiguous, contradictory terms of tender documentation that allow the procuring entity to choose the grounds for rejecting (disqualifying) tender proposals at its own discretion;
- ◆ unlawful rejection of a tender proposal (disqualification);
- ◆ unlawful recognition of another participant as the tender winner (when it should have been disqualified);
- ◆ unlawful cancellation of a tender.

30. Can a non-resident who did not participate in the tender file a complaint?

Yes, it can. For instance, discriminatory conditions in the tender documentation that deprive a non-resident of the opportunity to participate in the tender may be a violation of its rights and interests.

31. How much does it cost to file a complaint with the Commission?

The fee for filing a complaint with the Commission is as follows:

- ◆ 0.3% of the expected value of the procurement item (or its part (a lot) in case of appealing against such part), but not less than UAH 2,000 (under USD 50) and not more than UAH 85,000 (approximately USD 2,050) in case of appealing against the tender documentation or any decisions, actions or inaction of the procuring entity that occurred before the deadline for submission of tender proposals;

- ◆ 0.6% of the expected value of the procurement item (or its part (a lot) in case of appealing against such part), but not less than UAH 3,000 (approximately USD 70) and not more than UAH 170,000 (approximately USD 4,100) – in case of appealing against decisions, actions or inaction of the procuring entity that took place after the evaluation/review of tender proposals.

32. Is the fee for filing a complaint refundable?

The fee for filing a complaint shall be refunded to the complainant in case of:

- ◆ full or partial satisfaction of the complaint;
- ◆ leaving the complaint without consideration if the procuring entity eliminates the violation before the complaint is accepted for consideration;
- ◆ termination of the complaint consideration if the procuring entity eliminated the violation after the complaint was accepted for consideration.

3. Frequently asked questions

33. How can a complaint be resolved?

If the complaint is upheld, the Commission may:

- ◆ oblige the procuring entity to cancel its decisions (e.g., a decision to disqualify the complainant or to select another participant as the winner);
- ◆ oblige the procuring entity to provide the necessary documents, explanations, eliminate any discriminatory conditions, bring the tender documentation in line with the requirements of the law, etc.;
- ◆ cancel the procurement procedure if it is impossible to remedy the violation.



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