

## Public procurement in Ukraine: opportunities for foreign businesses

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The Russian Federation's armed aggression against Ukraine has been the largest conflict on European soil since World War II. But the unprecedented support of the international community allows Ukraine not only to effectively resist the aggressor, but also to initiate reconstruction processes. Over nearly 9 months of war, the system of provision and use of international financial aid in Ukraine has become truly fine-tuned, thus creating economic opportunities for foreign, particularly European, businesses.

Financial injections from partner countries and refocused spending in the Ukrainian budget have made public procurement in Ukraine the most financially secure and stable market for goods and services.

Public procurement in Ukraine enables fair and transparent use of funds provided to Ukraine by international donors. Ukrainian legislation allows foreign companies to participate in public procurement in Ukraine.

### 1. Peculiarities of wartime public procurement

The regulations established by the Ukrainian Government during wartime provide an opportunity for effective, economical, and expeditious

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public procurement procedures.

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According to these rules, there are 3 main ways of carrying out public procurement in Ukraine

- without the use of the electronic procurement system ProZorro – by concluding so-called direct agreements between a customer (administrator, recipient of budget funds) and a supplier;
- by means of conclusion of framework agreements;
- by using open tenders or an electronic catalogue.

The most common method of public procurement is the open tender procedure via the electronic system ProZorro.

## **2. Participation of foreign companies in public procurement**

Foreign companies can participate in tenders with openness and transparency at all stages of procurement.

It should be noted that individuals resident in the Russian Federation and the Republic of Belarus, as well as companies that are resident or have ultimate beneficiaries in these countries, are banned from participating in public procurement in Ukraine. Also, goods, works and services originating from the Russian Federation or the Republic of Belarus cannot be admitted to public procurement.

To participate successfully in public procurement in Ukraine, foreign companies need to consider several basic aspects:

- determining whether the company and its products comply with the procurement terms and conditions;
- submission of bids;
- settlement of disputes.

## **3. Determining a company's and its products compliance with the public procurement terms**

Open tenders are held for the purchase of:

- goods and services (other than maintenance services) with a value of at least UAH 100,000 (approx. EUR 2,580);
- maintenance services with a value of at least 200,000 UAH (approx. EUR 5,160);

- works, the value of which is at least UAH 1,500,000 (about EUR 38,705).

When evaluating the new possibilities of participating in public procurement in Ukraine, foreign companies should bear in mind that, according to the new rules, procurement announcements are published in Ukrainian only. Therefore, the proper search for opportunities (announcements, etc.) must be made with due consideration of an adequate translation.

In order to assess the potential opportunity and feasibility of participating in a particular public procurement procedure, the relevant tender documentation must be examined. Tender documentation sets out qualification requirements for the participants, technical, qualitative and quantitative characteristics of the goods (works, services) to be procured, as well as other conditions of the procurement procedure (certain special requirements that must be met in order to successfully submit a bid and be awarded the tender).

The analysis of tender documentation is probably the most important step for the participation in a public procurement procedure. At this stage, the potential for participation in a particular procurement is determined and the requirements set forth in the tender documentation are carefully analysed. For instance, if a company is only selling medical x-ray diagnostic equipment, it is not advisable to participate in the procurement of industrial machines for x-ray non-destructive testing. Also, tender documentation or legislation may impose product localisation requirements (some goods procured in tenders in Ukraine must contain at least 10% local content).

At the same time, it is quite common for tender documentation to set forth unnecessary, redundant or unreasonable requirements. Such requirements can be considered discriminatory and such that effectively block participation in the relevant procurement (e.g., setting technical requirements that are specific to one manufacturer when there is no objective need for this). Such cases may also include the use of vague or unclear requirements and conditions that can be abused and manipulated when examining and evaluating tender proposals.

In order to avoid unnecessary costs, as well as to maintain a reasonable opportunity to participate effectively in a tender, it is necessary to:

- analyse tender documentation for compliance with Ukrainian legislation and the interests of the potential bidder;
- determine the procedure for submitting a tender proposal, as well as the requirements for the tender proposal; and
- carefully define and clarify the terms of supply (performance of works, provision of services) and product requirements (localisation, specifications) and to match them with the capabilities, status, and interests of the applicant company;
- draw up appropriate requests to the procuring entity for clarification of particular tender documentation conditions;
- draft and duly submit requests for the elimination of discriminatory requirements and conditions as well as requirements that infringe on the rights and interests of the potential bidder during the fair and competitive evaluation process;
- draft and duly submit to the Antimonopoly Committee of Ukraine complaints against such tender documentation conditions.

#### 4. Submission of tender proposals

The procedure for tender proposal submission shall take into account both the requirements of Ukrainian legislation on public procurement and the specific requirements of the specific tender documentation.

It should be noted that the time limits for holding public tenders and for appealing thereof under the new rules are rather short. For example, the deadline for submission of a tender proposal can be as short as 7 days after the announcement of a public tender, while a procurement contract must be concluded no later than 15 days from the date of the decision on the intention to conclude a contract for the procurement. Consequently, the deadlines for appeal have been shortened as well and are as follows:

- for the terms and conditions of tender documentation – no later than 3 days before the deadline for tender proposals submission;
- for the decisions made after the evaluation of the tender proposals – within 5 days.

The procedure for submission and evaluation of the bids was also simplified and made more flexible:

- in certain cases, the price of the tender may exceed the expected value;
- the tender shall not be cancelled if only one participant submits a tender;
- there is an opportunity to correct inconsistencies in the information or documents submitted by the bidder, even in terms of satisfying technical specifications, when reviewing the bidder's proposal.

Such a pace and flexibility of public procurement procedures require applicants to prepare their tender proposal carefully (there is less time to correct it). In addition, it is necessary to react very dynamically to changing circumstances in the public procurement process and to manage to submit the necessary documents and information.

In order to do so, it is necessary to:

- check tender offers for compliance with the requirements of the tender documentation (e.g., availability of all necessary documents and information required by the tender documentation);
- make (or receive) in a timely and appropriate manner, clarifications or explanations required by the terms and conditions of the tender documentation (e.g., an explanation that a particular document is missing when it is not required or when a document of similar content and validity is available). Sometimes such documents are not explicitly mentioned in the tender documentation, but they are found to be necessary in the process.

## 5. Resolving disputed

Ukrainian legislation on public procurement provides ways to protect participants (including potential participants) in public procurement. For this purpose, the Antimonopoly Committee of Ukraine has established a special appeal body, i.e., a board (commission) to consider complaints on violations of public procurement legislation.

This body considers complaints about decisions, actions, or inaction of the customer that violate the legislation on public procurement and the rights or legitimate interests of the participants and companies interested in participating in public procurement.

A complaint may be filed by companies, who:

- intend to participate in the procurement, but due to certain conditions of the tender documentation cannot expect an objective and impartial examination of their proposal or cannot participate at all, in particular through the establishment of discriminatory requirements (appeal against the conditions of the tender documentation);
- have participated in the procurement if their tender proposals have been unreasonably rejected by the procuring entity, or if another tenderer's proposal that should have been rejected was accepted in violation of the principle of objectivity and non-discrimination (appeal against the decisions made after the evaluation of the tender proposals).

The preparation and submission of a complaint requires careful compliance with the procedural and formal rules established by law. In addition, it is necessary to prepare and properly document evidence of the violations that gave rise to the complaint.

In certain cases, in-person participation of a representative of the applicant company or participant in the handling of the complaint is and effective.

## 6. Public procurement without bidding

The possibility of procuring goods and services in Ukraine without open bidding should not be overlooked either. Among other things, such procedure is applicable to:

- the procurement of goods, works, and services for construction, reconstruction, overhaul, and improvement of places of residence of internally displaced and evacuated persons;
- the construction, reconstruction, overhaul or maintenance, installation of protective structures of civil defence, including dual-purpose structures, simple structures, shelters;

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- the preparation for heating season (except for purchase of energy resources);
- the procurement of goods, works, and services aimed at ensuring the operation of critical infrastructure facilities.

The public procurement rules and procedures in force in Ukraine allow foreign exporters to expand their markets in crisis conditions and effectively support transparency and efficiency of the use of financial aid provided to Ukraine.