

Participation of consortia in public tenders in Ukraine

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The unmatched support of the international community during the war has enabled Ukraine not only to effectively resist Russia, but also to launch reconstruction processes. Thanks to the shift in Ukrainian budget spending and financial assistance from partners, public procurement in Ukraine has become the most financially secure and stable market for goods and services.

1. Why create a consortium in Ukraine

The peculiarities of licensing for certain types of activities (e.g., construction), the scale of reconstruction projects, and the peculiarities of public procurement procedures in Ukraine prompt companies to join forces, in particular to participate in public procurement. Most often, such a joint undertaking is implemented in the form of a consortium.

It may be necessary to form a consortium to participate in public procurement if:

- the services to be procured require that the participants have a certified contractor to perform the work necessary to provide such services;
- the participant must meet the qualification criteria in terms of having the necessary licences and permits to participate in the procurement;
- the presence in the consortium of a participating company experienced in providing the procured services, a history of executed contracts for the provision of similar services, certified employees, etc. constitutes a competitive advantage for participation in the tender.

2. Consortia in Ukraine

Ukrainian legislation defines a consortium as a temporary statutory association of enterprises aimed at achieving a certain common business goal by its members (implementation of targeted programmes, scientific, technical, construction projects, etc.). If the purpose of its establishment is achieved, the consortium ceases to operate.

A consortium is a legal entity that must be registered in accordance with the procedure established under Ukrainian law. The requirement for registration of a consortium does not depend on its purpose (type, establishment period and

terms).

The decision to form a consortium and its association is subject to approval by the Antimonopoly Committee of Ukraine in accordance with the procedure established under Ukrainian law.

Ukrainian legislation does not provide for any special requirements limiting the participation of foreign companies in consortia established with the participation of Ukrainian residents and registered in Ukraine. However, such restrictions may be imposed in the future, given the dynamic changes in legislation during wartime. For instance, such requirements may potentially relate to the degree of the so-called production localisation. In public procurement procedures, the local content indicator refers to the share of raw materials, units, assemblies, parts, elements and components of products, works, services and other inputs of domestic production in the cost of the goods being procured. When procuring services and works, this indicator shall be applied if the performance of works or provision of services involves the procuring entity's acquisition of ownership of goods.

3. Consortia in public procurement in Ukraine

Ukrainian legislation allows consortia to participate in public procurement, whereby:

- if the consortium includes at least one legal entity that is a resident of Ukraine, the consortium must have the status of a legal entity to participate in public procurement;
- if the consortium consists of only non-resident legal entities, such a consortium may participate in public procurement without establishing a separate legal entity.

When establishing and registering a consortium in Ukraine for the purpose of participating in public procurement, the following peculiarities should be taken into account:

- the establishment agreement and the consortium charter must ensure that the consortium members have competitive obligations to the consortium in the event of a contract being concluded as a result of the procurement procedure;
- the consortium agreement and the consortium charter must provide an effective algorithm for the use of licences and permits owned by a consortium member;
- the agreement on establishment and the charter of the consortium shall provide for procedures for concluding and executing agreements signed by the consortium, taking into account the algorithm for the use of licences and permits owned by a consortium member;
- the documents underlying the establishment and registration of a consortium should take into account the specifics of the project for which it is established.

4. Peculiarities of consortia participation in public procurement in Ukraine

If a tender proposal is submitted by a consortium, it must include a document on the consortium establishment. The decision to establish the consortium and its

charter shall be approved by the Antimonopoly Committee of Ukraine in line with the procedure established by law.

The current practice of public procurement in Ukraine shows that procuring entities often require participants to provide a merger (concerted actions) clearance or a preliminary conclusion of the Antimonopoly Committee of Ukraine that the consortium does not need to obtain such clearance. In Ukraine, concerted actions may include, inter alia, the establishment of a consortium (or joining it) for the purpose of coordinating competitive behaviour between the business entities having established the consortium. This also applies to cases where the coordination of competitive behaviour is a consequence of the establishment of or accession to a consortium.

Concerted actions may be permitted and may not require the approval of the Antimonopoly Committee of Ukraine. This type of action is determined by the Antimonopoly Committee of Ukraine based on the requirements approved by it. In other cases, the Antimonopoly Committee of Ukraine issues a respective approval for the establishment of a consortium.

The legitimacy and legality of the procuring entity's request in public procurement for a merger (concerted actions) clearance or the preliminary conclusion of the Antimonopoly Committee of Ukraine on the absence of such actions should be examined on a case-by-case basis.

First of all, it is necessary to take into account the procedure for establishing a consortium, its legal form, composition of participants, etc., and then to formulate an appropriate legal stance and strategy, in particular, to challenge such a requirement.

In practice, to confirm the formation and status of a consortium, procuring entities may request the following documents and information

- a document confirming the consortium establishment;
- a decision (order, permit, etc.) of the supreme (general) body of the consortium regarding its participation in the relevant procurement procedure, indicating the name of the procurement procedure, the unique number of the announcement of the competitive procurement procedure, the authorised person of the consortium who will be signing the tender proposal documents and the procurement agreement, etc;
- a document confirming the establishment of each member of the consortium in accordance with the legislation of the country of such member (certificate, extract from a trade or other register, etc.);
- a letter of confirmation that the consortium members will have obligations to the consortium to perform the agreement concluded as a result of the bidding;
- a letter of guarantee from each consortium member stating that it has not filed an application for withdrawal from the consortium;
- a concentration and concerted practices clearance or a preliminary conclusion of the

Antimonopoly Committee of Ukraine that no concerted actions clearance is required.

An important peculiarity of a consortium's participation in public procurement in

Ukraine is the ability to jointly confirm compliance with the criteria set out in the tender documentation, e.g.:

- on the availability of equipment, material and technical base and technologies;
- availability of employees with appropriate qualifications, knowledge and experience;
- documented experience in performing a contract (contracts) similar to the subject of procurement;
- financial solvency, which is confirmed by financial statements.

The consortium members individually might not meet the qualification requirements set out in the tender documents. However, if they collectively fulfil them (for example, one member meets the criteria for the availability of equipment and employees, while another member fully satisfies the criteria for experience in performing a similar contract and financial solvency), the consortium is deemed to meet such requirements.

In addition, according to the general procedure, if a relevant licence or permit is required for the sale (supply, performance) of the procurement object, it is sufficient for one of the participants to hold such a licence or permit.

At the same time, it is necessary to check the agreement and tender documents to ensure that the consortium member that has such licences (permits) can carry out works or provide services subject to a licence.

This is an important issue, as the lack of clarity may result in the consortium's failure to perform the contract awarded by the tender. In turn, if a consortium has a history of failing to perform a previously concluded contract, procuring entities will have grounds and the right to reject subsequent bids from the consortium.

Under Ukrainian public procurement law, the procuring entity is also obliged to specify the terms and conditions for providing information and the method of confirming the consortium's compliance with the established qualification criteria and grounds in the tender documentation.

Sometimes this leads to the procuring entity requiring the successful bidder to provide documents that it is unable to provide for objective reasons. An example is a requirement for a non-resident to provide extracts from information and analytical systems of Ukraine (extract from the system "Accounting of information on bringing a person to criminal liability and having a criminal record" or an information certificate from the Unified State Register of persons who have committed corruption or corruption-related offences), in which it cannot be objectively and legally registered.

Similar situations may arise in relation to consortia, e.g., whether the procuring entity may require confirmation in respect of the consortium as a whole, or in respect of individual consortium members, or both from the consortium and the members at the same time? The practice of applying the conditions for such confirmation is ambiguous, and there is currently no official position of the regulator.

In such circumstances, it is most appropriate to carefully analyse the tender

documentation and assess the procuring entity's requirements on a case-by-case basis.

5. Recommendations for consortia

When planning to participate in public procurement in Ukraine by forming a consortium, it is necessary to take into account the following:

- the tender documentation should be examined in each specific case. It is necessary to establish its compliance with the legislative requirements, in particular, regarding the participation of the consortium in the tender;
- in each case, it is necessary to establish whether the tender conditions are consistent with the consortium's interests and capabilities;
- if issues that require clarification are identified (absence of certain conditions for participation of the association, ambiguity in the interpretation of such conditions, etc.), or if the terms of the tender documentation make it impossible or difficult for the association to participate or are discriminatory towards the association, the established mechanisms for resolving such issues should be used (e.g., applying to the procuring entity for clarification or demanding the elimination of discriminatory conditions);
- in case of failure to receive clarification on a certain issue or unsatisfactory clarification or in case of refusal to eliminate discriminatory requirements, it is worth filing a complaint against the terms of the tender documentation. This can be done if the terms of the tender documents contradict the public procurement legislation and, as a result, violate the rights or legitimate interests of the consortium. The complaint is to be filed with the Antimonopoly Committee of Ukraine and considered by the commissions for consideration of complaints about violations of public procurement legislation;
- when establishing a consortium, it is necessary to conduct due diligence of the consortium members with respect to their compliance with the general conditions for participation in public procurement in Ukraine on the whole as well as with the terms and conditions of the tender for which the consortium is being established;
- before participating in public procurement, it is necessary to analyse the need for licences and permits provided for by the legislation of Ukraine for the performance of the contract in case of winning the tender;
- a detailed algorithm for the use of relevant permits and licences in the process of execution of contracts concluded by the consortium should be developed and reflected in the documents on the establishment and operation of the consortium.