

Participation of foreign companies in public procurement in Ukraine

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1. Participation of non-resident legal entities 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 the 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.

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.

3. Online tender platforms in Ukraine

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 UAH 4,080, i.e., about USD 100 (for procurements of UAH 4 million, approx., USD 98,400 or more).

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

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 documents are allowed to participate in the auction, which is held among the prequalified bidders. In such auctions, the minimum deadline for submitting proposals is 30 calendar days, and the prequalification period is 20 business days.

Note that if less than 2 bidders are admitted to the auction after prequalification, the auction is automatically cancelled.

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.

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:

- availability of equipment, material, technical facilities and technologies;
- availability of qualified employees possessing the necessary knowledge and experience;
- documented experience in fulfilling agreements similar to the procurement subject matter;
- financial solvency, confirmed by financial statements.

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

7. Appeal against the terms of the 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 the 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 such requests are ignored, an interested party may appeal against the terms of the tender documentation.

When challenging the terms of the 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.

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:

- analyse the tender documentation for compliance with the requirements of Ukrainian legislation and the interests of the potential participant;
- determine the procedure for submitting a tender proposal, requirements to the tender proposal;
- 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;
- if necessary, prepare requests to the procuring entity for clarification of certain terms of the tender documentation;
- if necessary, draft and duly submit requirements 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;
- 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.