

Public procurement in the energy sector in Ukraine

Introduction

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Ukraine's energy infrastructure has suffered catastrophic damage as a result of Russia's military aggression. Ukrainian energy supply companies are facing a severe and ever-growing need to repair and restore their damaged facilities. Therefore, efficient procurement of equipment necessary for Ukraine's energy sector, while adhering to the principles of maximum economy and proportionality, is of critical importance.

1. Public procurement of energy equipment

The purchase of the equipment required by the state and municipal energy sector of Ukraine is carried out, inter alia, through the public procurement procedure.

The following procurement methods are currently available:

- through the use of open tenders with special features, including the so-called 'eurotenders';
- through the use of an electronic catalogue;
- by concluding framework agreements;
- without the use of the ProZorro electronic procurement system – via so-called direct contracts between the procuring entity (an energy company) and the supplier.

The open bidding procedure via the ProZorro electronic procurement system is the most common procurement method. The procedure is subject to the peculiarities established for the period of martial law in Ukraine.

Starting from April 2024, procuring entities have the right to conduct the so-called 'eurotenders' regardless of the expected procurement value. Eurotenders are open tenders that are held in 2 stages. At the first stage, following the deadline for submitting bids, all information from participants is disclosed in the system, except for the price. The bids are subsequently reviewed for compliance with the requirements of the tender documentation, a process known as prequalification. The bidders whose bids meet the requirements of the tender documentation (i.e., those not rejected due to non-compliance) are allowed to proceed to the second stage. The second stage, the auction, is held only among the prequalified bidders. In such auctions, the minimum deadline for submitting bids is 30 calendar days. Prequalification at the first stage is carried out within 20 working days (i.e., the maximum period for consideration of a proposal in eurotenders is fixed at 20 working days, while in open tenders with certain peculiarities such a period is 5

working days, and it can be extended by the procuring entity with a reasonable justification up to 20 working days). Furthermore, if less than two tenderers are admitted to the auction after prequalification, the auction will be automatically cancelled.

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 separate documents to confirm the establishment (foundation, registration) of a legal entity being a participant;
- submission of documents confirming compliance with the technical requirements, calculation of the tender price, etc.

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 the use of 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 of 2024/2025.

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 issue of energy service procurement is separately regulated by the Law of Ukraine On the Introduction of New Investment Opportunities, Guaranteeing the Rights and Legal Interests of Business Entities for Large-Scale Energy Modernisation (hereinafter – "the Law").

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 itself:

- 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:

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

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 of Ukraine

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).

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