

Purchasing state property on Prozorro.Sale in Ukraine

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1. Auctions and the Prozorro.Sale electronic trading system

Under the effective legislation of Ukraine, property held by state-owned enterprises and, accordingly, owned by the state (e.g., equipment, machinery and mechanisms, other fixed assets) is sold on a competitive basis through electronic auctions.

An electronic auction is a method of selling property whereby the buyer of the property is the bidder in an auction (bidding) in an electronic trading system having offered the highest price (the auction winner).

Currently, such auctions (bidding) are conducted using the Prozorro.Sale electronic trading system, a two-tier information and telecommunication system that ensures the conduct of auctions (bidding), creation, posting, publication, information and document exchange in electronic form, which includes a central database and electronic platforms that provide automatic information and document exchange (hereinafter referred to as the ETS).

All actions related to holding an auction in the ETS are carried out by the organiser and auction participants through electronic platforms.

At present, there are 40 authorised electronic platforms, each of which has its own interface features and certain additional services (e.g., Telegram auction search bots).

A participant may register (have an account) on several platforms at once, but it is prohibited for a participant to simultaneously participate

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in the same electronic auction on one or more electronic platforms as two or more participants.

Through the account (personal profile), one can search for auctions for the sale of the relevant property by setting up filters.

2. Preparing for an auction

A state-owned enterprise announces an electronic auction for the sale of the relevant property (publishes an auction announcement in the ETS) and acquires the status of an auction organiser. The organizer publishes the announcement of the sale of property in the ETS no later than 7 calendar days before the auction date.

The auction announcement must contain:

- 1) information about the owner and/or balance holder of the property who is selling it;
- 2) the date of the electronic auction, the terms and procedure to register for participation in the electronic auction, the list of documents to be submitted by the participants and the requirements for their execution;
- 3) the deadline for accepting applications to participate in the electronic auction;
- 4) information about the property, its composition, characteristics, description by generic or individual characteristics;
- 5) location of the property, its photographs (if any);
- 6) a starting price of the lot;
- 7) an electronic auction step;
- 8) the amount of the guarantee and registration fees;
- 9) essential terms and conditions of the property sale or a draft of the relevant property sale and purchase agreement;
- 10) requirements of the organiser to the potential buyer (if any) and the list of documents to be submitted by potential buyers;

11) information on the organiser's payment details.

The announcement may contain additional information as determined by the organiser. At the same time, the auction announcement must not contain requirements that restrict competition and lead to discrimination of participants.

After the auction announcement is published, potential buyers (users) intending to participate in the electronic auction shall pay the registration and guarantee fees to the account of the electronic platform operator and submit an application for participation in the electronic auction through their personal account before the deadline for accepting applications for participation in the electronic auction.

The registration and guarantee fees to be paid by a potential buyer (user) to acquire the status of a participant depend on the starting price of the lot.

The starting price of the lot, i.e., the initial sale price of the property, at which the auction begins, is determined by the organiser independently, taking into account the requirements of the current legislation of Ukraine, in particular industry-specific regulations.

Guarantee fee is a method of ensuring that a participant fulfils its obligations to participate in an electronic auction by transferring funds to the account of the electronic platform operator. The auction organiser sets its amount between 5% and 10% of the starting price of the lot and indicates it in the auction announcement.

The organisers independently compile a list of criteria and/or requirements that must be met by the participant (potential buyer) and a list of documents that must be submitted to confirm compliance with these criteria/requirements.

It should be noted that after the announcement is published in the ETS, the organiser, based on a well-grounded decision, but not later than 5 calendar days before the auction date, may change the following:

- the starting price of the lot (the guarantee fee and the auction step in this case shall be calculated from the changed starting price);
- the auction name, auction description, lot number, lot value, brief description of the property.

The participants may cancel their price offers, but not later than the deadline for accepting applications for participation/acceptance of closed price offers. If a price offer is cancelled, all information about it shall be deleted from the ETS, and the guarantee fee shall be returned to the participant.

3. Procedure for conducting auctions, determining the winner

At the qualification stage, after the auction is completed, the organiser reviews the documents uploaded by a participant within the deadline for submitting bids in accordance with the terms of the announcement (documentation).

If no bids are submitted by the deadline for a particular auction or there are fewer than 2 bids, the ETS automatically assigns the status 'Auction Not Held' to the electronic auction. If more than 1 price offer is submitted, the ETS activates the electronic auction module.

However, if only one participant (sole bidder) applied for the electronic auction for the sale of property, the organiser may conclude a sale and purchase agreement with such a participant as the sole bidder at the price offered by him/her, but not lower than the starting price of the lot. This is possible only if the organiser has made such a decision in the course of preparing for the auction and has indicated this in the announcement.

The winner of the electronic auction shall be obliged to:

- provide documentary evidence of their compliance with the organiser's requirements for the buyer (if any). The organiser shall not be entitled to impose additional requirements/require additional documents from the winner of the electronic auction, other than those specified in the announcement of the property sale;
- sign the electronic auction protocol within 4 working days and submit it to the operator through whose electronic platform the price offer was submitted (the electronic auction protocol is generated automatically in the ETS after the electronic auction is completed);
- enter into a sale and purchase agreement with the organiser within 18 business days from the day following the day of the generation of the electronic auction protocol and make payments to the organiser in accordance with the terms of the agreement.

Upon completion of the electronic auction, the auction organiser shall verify the application for participation in the electronic auction together with the documents and information of the auction winner attached thereto for compliance with the requirements of the auction announcement (auction documentation).

If the information and/or documents provided by the participant/winner do not meet the requirements of the auction announcement, such participant/winner shall be disqualified.

Accordingly, the organiser effectively independently decides on the disqualification of the winner, based on its internal conviction, with the generally accepted need to comply with the principles of objectivity and non-discrimination of participants.

It should be noted that the auction winner is also obliged to pay the remuneration to the electronic platform operator (participation fee). I.e., this is the amount of money payable to the operator (through whose electronic platform the highest price offer was submitted) for organising the electronic auction. The winner of the electronic auction pays such remuneration in addition to the amount of money offered for each lot purchased.

The participation fee (operator's remuneration) shall be 5% of the lot sale price (including VAT) and shall be deducted by the operator from the amount of the guarantee fee paid by the winning bidder (within 3 working days from the date of publication of the sale and purchase agreement for the relevant lot in the ETS). If the amount of the participation fee exceeds the amount of the guarantee fee, the winner shall make a full settlement with the operator (make an additional payment) after the electronic auction protocol is generated, but before the sale and purchase agreement for the relevant lot is published in the ETS.

In case of a winner's disqualification, the paid guarantee fee shall not be refunded.

If an electronic auction is cancelled or declared failed, the operator shall refund the paid guarantee fees to the participants within 3 working days from the day following the day when the electronic auction is assigned the 'Auction cancelled' or 'Auction not held' status.

Registration fees shall be refunded to the participants only in case of cancellation of an electronic auction or its recognition as failed before the conclusion of the sale and purchase agreement.

4. Appeals against the procedure for conducting auctions

The ETS Regulations envisage the establishment of a Commission, which is a permanent collegial advisory body acting on a voluntary basis, to consider complaints (appeals) regarding the conduct (violation of the procedure) of electronic auctions for the sale/lease of certain types of property (assets) or transfer of rights in the ETS.

However, until the end of the month when martial law is lifted, the ETS Administrator shall consider complaints, appeals and proposals regarding electronic auctions directly (without establishing a Commission). Based on the results of such a consideration, the ETS Administrator makes an informational and recommendation decision, which is issued in an official letter and sent to the applicant.

At the same time, the ETS Regulations directly stipulate that in case of non-compliance of a lot with the requirements of the Regulations, changes of essential characteristics of the lot at any stage of organisation or conduct of the electronic auction (but before signing the asset (property) sale and purchase agreement), presence of court decisions and other factors that may affect the starting price and/or sale price of the lot or the interest of a potential buyer in purchasing it, etc., the ETS Administrator has the right to contact the organiser to cancel such

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electronic auction. Furthermore, the ETS Administrator has the right to send letters (appeals, notifications, proposals) to the organiser and/or the central executive authority managing the organiser or other controlling authorities regarding violations of the ETS Regulations by the organiser.

In any case, decisions of the ETS Administrator made upon consideration of appeals (complaints) from participants (users), as well as in case of independent detection of violations during electronic auctions, regarding the appropriate measures to eliminate (prevent) the detected violations during electronic auctions, are not binding, but are advisory in nature. There is also no enforceable mechanism for the implementation of such decisions by the ETS Administrator (e.g., blocking an auction in case of discriminatory requirements for its participants; impossibility to conclude an agreement with another participant until the complaint against the winner's disqualification is considered, etc).

At the same time, it is still potentially possible to influence a particular auction organiser violating the procedure for conducting electronic auctions established by the Regulations indirectly through the ETS Administrator's appeal to the central executive authority managing such organiser or other regulatory authorities regarding the violation of the ETS Regulations by that organiser. However, neither the obligation of the ETS Administrator to apply to such authorities in these cases, nor the procedure for such authorities to respond to the application is enshrined in the law.