

## Subcontractors in international technical assistance projects in Ukraine

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International technical assistance (ITA) in Ukraine is financial and other resources and services provided by development partners on a free and non-refundable basis in accordance with Ukraine's international treaties to support Ukraine. Subcontractors are widely involved in the implementation of ITA projects.

Agreements with subcontractors are concluded on a general legal basis, however, there are certain peculiarities.

It is important for non-resident contractors in international technical assistance projects in Ukraine to be aware not only of these peculiarities, but also of the procedure for concluding agreements with subcontractors in Ukraine in general. This helps to reduce risks and to ensure proper use of resources of Ukraine's international partners.

## 1. Concluding agreements in Ukraine

Ukrainian law allows, as a general rule, for any contracting work to be performed with the involvement of third parties.

Agreements in Ukraine must contain certain components, namely:

- mutual agreement on all material terms of the agreement;
- submission of a proposal to enter into (an offer);
- acceptance of the offer;
- indication by the parties of the place and time, the moment from which the agreement is considered concluded;
- other specific features for certain types of agreements.

The content of an agreement is the terms and conditions on which it is concluded. These are divided into 2 types: terms determined at the discretion of the parties and agreed by them and terms that are mandatory under Ukrainian law.

An agreement is considered to be concluded if the parties have duly agreed on all of its essential terms and conditions.

An agreement is usually concluded in the form of a single document. Amendments to the agreement shall be made in the same form as the main agreement, unless the agreement sets out a special procedure for this purpose.

It is necessary to comply with the procedure for issuing notices that have consequences determined by the agreement: termination of the agreement, deferral of obligations, return of goods or refusal to fulfil the obligation in general (e.g., complaints about the improper quality of goods: the agreement may set the term and content of the notice of improper quality of goods), notice of force majeure (the agreement may set a deadline for providing such notices), etc.

## 2. Counterparty verification

Counterparty due diligence includes confirmation of the counterparty's legal standing, powers of its representatives and assessment of sanctions risks.

### Confirming the counterparty's legal capacity

Confirmation of the counterparty's legal capacity is based on:

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- the counterparty's registration documents (extract from the state register, extract from the trade or court register, depending on the counterparty's jurisdiction);
- constituent documents (charter, agreement, etc.).

These documents should confirm the counterparty's proper registration and the absence of restrictions that may affect the conclusion and performance of a supply agreement.

### **Verifying representatives' powers**

The powers of the counterparty's representatives are verified on the basis of the information contained in:

- registration documents (statement or extract from the register);
- constituent documents (charter, minutes/resolutions of the meeting of participants, shareholders);
- separate documents confirming the powers of representatives individually (power of attorney);
- identification documents of the representative (passport or other identity document).

Agreements are usually complex documents that require the signing of additional documents (specifications, invoices, agreements to amend and supplement the supply agreement). The counterparty's representative must be authorised to sign not only a specific agreement, but also any and all of the above documents.

### **Assessing sanctions risks**

In the context of the war in Ukraine, careless dealings with a counterparty subject to sanctions not only pose a risk to the performance of an agreement, but also carry significant reputational risks.

Based on the registration data received from the counterparty, it is possible to check it using international and national sanctions and blacklists or databases, such as:

- EU Sanctions Decision;
- UK Sanctions List;
- Sanctions list of the Office of Foreign Assets Control (USA);
- Canada's Consolidated Autonomous Sanctions List;
- State Secretariat for Economic Affairs (SECO) – search for sanctioned persons, Switzerland.

It is also worth conducting additional due diligence on the counterparty, following the recommendations of the Financial Crimes Enforcement Network (FinCEN). According to these recommendations, you should proceed with caution if:

- there is information about changes in the ownership structure of the counterparty over the past 3-4 months;
- the structure of the chain of ownership to the ultimate beneficiary is non-transparent and convoluted;
- open data on the counterparty indicates its long-term cooperation with sanctioned companies and/or individuals;
- the counterparty's bank accounts were opened shortly before the conclusion of the agreement;
- the counterparty insists on entering into an agreement with companies that have been recently established and have not been publicly associated with it before.

### **3. Peculiarities of concluding and executing contracts during the war in Ukraine**

#### **Restrictions imposed by law**

When entering into agreements, it is necessary to take into account the legislative restrictions that may affect the performance of such agreements.

In most cases, payments related to the implementation of ITA projects (programmes) are regulated separately. However, the regulation is dynamically changing, so it is necessary to analyse the legislation and requirements for each individual agreement with subcontractors at the time of its conclusion.

#### **Force majeure**

Circumstances that may be considered force majeure in the current security environment in Ukraine include not only hostilities and related security and legal restrictions and consequences, but also:

- trade and legal restrictions imposed by the state;
- sanctions imposed on the parties to an agreement or on participants in logistics and commercial chains;
- obligations to the Ukrainian state due to martial law (employees and equipment mobilisation).

Given these circumstances, contracts concluded with Ukrainian counterparties and/or performed in Ukraine should contain a force majeure clause, which describes in detail the circumstances that may be considered force majeure.

The party to the agreement that refers to such circumstances must prove their existence, compliance with the criteria of force majeure, as well as the connection between them and the failure to perform the agreement.

In Ukraine, the existence of force majeure is certified by the Ukrainian Chamber of Commerce and Industry and its authorised regional chambers of commerce and industry through the issuance of a certificate. The regional Chambers of Commerce and Industry of Ukraine are not authorised to issue certificates in respect of foreign economic contracts.

#### **4. Peculiarities of agreements with subcontractors of an ITA project**

##### **A subcontractor's status**

According to Ukrainian legislation, a subcontractor of an ITA project is any person (resident or non-resident) who has a written deal (agreement) with the implementer or recipient, ensures the implementation of an international technical assistance project in part or in whole and conducts procurement procedures at the expense of international technical assistance under the ITA project.

To implement an ITA project, a deal/agreement is concluded between the implementer and the subcontractor.

##### **A subcontractor's accreditation**

Unlike the implementer of an international technical assistance project, accreditation of a subcontractor with the Secretariat of the Cabinet of Ministers of Ukraine is not required. Therefore, subcontractors do not need to undergo any additional registration procedures.

##### **Engaging a subcontractor**

Ukrainian legislation does not contain any requirements for the procedure and criteria for selecting a subcontractor for an ITA project.

The decision to engage a subcontractor can be made by either the implementer or the recipient of an international technical assistance project, subject to the conclusion of a written agreement.

Even after the registration of the ITA project, it is possible to make changes to the procurement plan due to the selection of subcontractors. To this end, the development partner (implementer) or recipient of international technical assistance must submit an updated procurement plan to the Secretariat of the Cabinet of Ministers of Ukraine, together with a copy of the subcontract.

## **Peculiarities of agreements with subcontractors**

Agreements with ITA project subcontractors are generally concluded under the general procedure for concluding and executing agreements in Ukraine.

However, it should be noted that an agreement with a subcontractor of international technical assistance projects shall not contradict the contract concluded between the development partner and the implementer, or other documents that define the terms and conditions of the international technical assistance project.

## **5. Taxation and reporting of ITA project subcontractors**

### **Tax benefits for subcontractors**

A subcontractor of an international technical assistance project is entitled to tax benefits in Ukraine, in particular:

- tax exemption on the supply of goods and services within the customs territory of Ukraine and the importation of goods into the customs territory of Ukraine as international technical assistance;
- tax exemption for the supply of goods and services within the customs territory of Ukraine and the importation of goods into the customs territory of Ukraine financed through international technical assistance.

### **Subcontractor's reporting**

A subcontractor of an international technical assistance project entitled to tax benefits shall prepare and submit an information confirmation in writing and electronically to the State Tax Service of Ukraine, where it is registered as a taxpayer, by the 20th of each month.

The information confirmation must, inter alia, contain:

- the name of the ITA project (programme);
- date, state registration number of the ITA project;
- name of the development partner;
- the estimated cost of the ITA project (the estimated cost is indicated in the currency specified in the ITA project);
- information about the seller of goods, works, and services subject to preferential treatment received at the expense of international technical assistance, and other information.

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The subcontractor's general tax and financial reporting is carried out in accordance with the general procedure established by the legislation of Ukraine, taking into account the specifics of accounting and reporting when using tax benefits.