

Peculiarities of defence procurement in Ukraine

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The defence procurement procedures in Ukraine are carried out using the same procedures as other public procurements. However, given the specific nature of the goods, works, and services being procured, as well as the special status of the procuring entities, defence procurement has several important peculiarities which will be discussed below.

1. Who carries out defence procurement in Ukraine?

State procuring entities in the field of defence procurement are central executive authorities, other state bodies and military formations established under the laws of Ukraine as determined by the Cabinet of Ministers of Ukraine. In addition, state procuring entities include organisations authorised by the decision of a state defence procuring entity to carry out procurement and conclude state contracts.

For instance, the Ministry of Defence of Ukraine is designated as the main defence procurement authority. The State Enterprise 'Defence Procurement Agency' was established by the Ministry of Defence to carry out defence procurement.

2. Who can participate in defence procurement in Ukraine?

Foreign companies can participate in defence procurement in Ukraine. However, it should be noted that a foreign company will not be able to participate in defence procurement if:

- the company is established and registered in accordance with the laws of the Russian Federation or the Republic of Belarus, unless its assets are seized by Ukraine;
- the ultimate beneficial owner, member, or participant with a 10% or above share in the authorised capital of the company, although established and registered under the laws of Ukraine, is the Russian Federation or the Republic of Belarus, or citizens of these countries;
- the goods offered by the company for procurement originate from the Russian Federation or the Republic of Belarus.

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Therefore, when planning its participation in defence procurement, a foreign company should carefully analyse its ownership structure and the origin of the goods it offers for defence procurement.

3. What goods, services, and works are procured in the defence sector?

The peculiarities of defence procurement in Ukraine primarily apply to:

- defence-related goods, works and services, other goods, works, and services to guarantee fulfilment of security needs;
- defence goods, works, and services that constitute a state secret;
- weapons, military and special equipment, ammunition, and their components;
- services for the development, repair, modernisation of weapons, military and special equipment, ammunition, and their components;
- goods, works and services for the construction of military engineering and fortifications.

At the same time, defence procurement is carried out in respect of:

- defence goods and services, other goods and services to guarantee fulfilment of security and defence needs, the value of which is equal to or exceeds UAH 200,000 (approx. USD 4,800);
- defence works and works to guarantee fulfilment of security and defence needs, if their value equals or exceeds UAH 1,500,000 (approx. USD 36,300).

4. How defence procurement is conducted in Ukraine

As a general rule, state procuring entities carry out defence procurement in an electronic procurement system in one of the following ways:

- through open tenders;
- through the simplified procurement procedure;
- by selecting a supplier by requesting proposals from suppliers;
- by using a framework agreement.

It should be noted that procurement of certain defence goods, works and services is carried out without the use of these methods. In particular, these include:

- goods that constitute a state secret;
- armaments, military and special equipment, ammunition, and their components;
- services for the development, repair, modernisation of weapons, military and special equipment, ammunition, and their components;
- goods, works and services for the construction of military engineering and fortifications.

When procuring such goods, works, and services, the procedure for concluding state contracts (agreements) is determined by the state procuring entity. In this case, contracts are concluded bypassing procurement procedures and the supplier selection procedure by requesting suppliers' proposals, based on the commercial offer submitted by companies.

5. Peculiarities of simplified procurement

One of the peculiarities of simplified procurement in the defence sector that should be taken into account by potential tenderers is the procedure for eliminating discrepancies.

If a public procuring entity, when considering a simplified procurement tender, finds discrepancies in the information or documents submitted as part of the tender or in the documents required by the simplified procurement announcement, it must place a notice requiring the correction of such discrepancies. Such a notice shall be posted by the state procuring entity not later than two business days before the expiry of the deadline for proposal consideration. In this case, the correction is made by uploading revised or new documents through an electronic procurement system. Such documents must be uploaded within 24 hours from the moment the notice requiring the elimination of such discrepancies is posted.

In this case, a discrepancy in information or documents means, in particular:

- the absence of information and/or documents required by the tender documentation in the tender proposal;
- errors, correction of which does not lead to a change in the subject of procurement proposed by the tenderer in its tender proposal (name of the product, brand, model, etc.).

A notice of non-conformity is published only once. If the simplified procurement participant fails to correct the discrepancies within the specified period, its offer is rejected.

To avoid this, it is necessary to prepare the offer carefully and to constantly monitor the customer's notifications in an electronic procurement system.

6. Can contract terms and conditions be changed?

As a general rule, the essential terms of a state contract, whether concluded through competitive procurement procedures or a direct state contract, may not be amended after its signing until the parties have fulfilled their obligations in full.

However, according to the Ministry of Economy of Ukraine, in certain cases, significant terms of contracts may be amended, namely:

- in case of reduction of procurement volume, in particular, taking into account the actual amount of the procuring entity's expenses;
- in case of approval of changes in the price per unit of goods in the procurement contract due to price fluctuations of such goods on the market;
- in case of improvement of the quality of the subject of procurement, provided that such improvement does not lead to an increase in the amount specified in the procurement contract;
- due to the extension of the term of a procurement contract or the term of fulfilment of obligations (for this purpose, it is necessary to provide documentary evidence of the circumstances that led to such an extension. For instance, force majeure circumstances, delay in financing of the procuring entity's expenses). At the same time, such changes should not lead to an increase in the amount specified in the procurement contract;
- as a result of the agreement to lower the price in the procurement contract

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- (without changing the quantity and quality of goods, works, and services);
- if the price in a procurement contract has changed due to changes in the rates of taxes and duties or changes in the conditions for granting tax benefits;
 - if a contract establishes a procedure for price changes depending on certain parameters (changes in consumer price index statistics, changes in foreign exchange rates, etc.) and these parameters change;
 - if the change of conditions is related to the extension of the contract term to conduct the procurement procedure;
 - if the volume of procurement and/or prices under contracts for the procurement of works on construction of real estate objects have decreased.