GUIDELINES ON
HOW TO PARTICIPATE IN PUBLIC TENDERS
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How to Participate in Public Tenders

The volume of Ukraine's public procurement market was nearly 300 billion UAH (some €30 billion) in 2016. The new e-procurement system Prozorro, introduced as mandatory by the Law on Public Procurement in 2016, has simplified access for economic operators to public contracts, making it easier to participate and compete.

All procurement information is freely available online at the official procurement web-portal: www.prozorro.gov.ua, where relevant notices and tender documentation may be found and downloaded free-of-charge. In cases where the procuring entity amends tender documentation, all previous editions remain available in the system for access and downloading.

The web-portal also allows access to all documents submitted by bidders as well as the eventually concluded contract and any amendments to the contract. It is also possible to find all payments/transactions between procuring entities and contractors by using the free service known as “007” (http://www.007.org.ua/).

I. PURCHASER (WHO IS OBLIGED TO USE PUBLIC PROCUREMENT PROCEDURES WHEN BUYING)

The Buyer/Client in Ukraine is called a “Contracting authority” (“Zamovnyk” in Ukrainian) and all procurements of contracting authorities are regulated by the special Law “On Public Procurement” (PPL).

Contracting authorities may be generally sub-divided into 3 groups:

1) Traditional budget-funded contracting authorities directly financed from State or local budgets - these include public authorities, local self-government bodies, social security bodies and other entities (health care facilities, educational, scientific and cultural institutions etc.) financed from the State Budget or local budgets;

2) Utilities – these are mostly monopolists (mainly State-owned enterprises or municipal companies) enjoying a monopoly in the areas of public interest explicitly listed in the Law “On Public Procurement” (sub-paragraph 4, Article 1, e.g. utilities, power supply, airports and sea ports, rail transport, urban electric transport etc.);

3) Enterprises - which include State-owned or communal enterprises and their associations providing for the needs of the State or a territorial community, if such activities are not carried out on an industrial or commercial basis, and if they have any of the following characteristics:
   • the legal entity is an administrator, recipient of budget funds;
   • public authorities or local self-governing bodies, or other contracting authorities have the majority of votes in the supreme governing body of the legal entity;
   • more than 50% of shares (interests, participatory interests) in the legal entity's authorised capital belongs to the State or a local community.

II. BIDDER (WHO CAN BID FOR CONTRACTS)
A potential seller to, or business-partner of, the public sector in the Law “On Public Procurement” is called a “Tenderer”. This includes a natural person, including a sole trader, or a legal entity (whether resident or non-resident) that submitted a tender or took part in the negotiations, if a negotiated procedure is applied.

In Ukraine, almost any economic operator - whether a natural person or a legal entity - may participate in a procurement procedure. It is important to note that, a natural person does not necessarily have to be a registered sole trader\(^1\), which means that it may be any natural person (a citizen of Ukraine, a foreigner). Meanwhile, for legal entities, it should be specified that subsidiaries and/or branches without the status of a legal entity may not participate in procurement procedures on their own behalf, but only through their parent companies.

Also, it is important to note that temporary associations of legal entities (so-called consortia, a common international practice) without the status of a legal entity may not participate in tenders under the current Law “On Public Procurement”.

From 1 August 2016, all procurement procedures of all contracting authorities of Ukraine must be done through the electronic procurement system Prozorro (www.prozorro.gov.ua). In order to buy or to bid via the system, it is necessary to be registered there.

NB: There is no registration facility at www.prozorro.gov.ua as this is essentially a publication portal. But there is link via the button “Registration” (the button in upper right corner of the start page of www.prozorro.gov.ua) where a new business user can select the status of “Tenderer” and go to a page with a list and links to the accredited e-platforms – user registration must be done on any of the listed e-platforms selected by the new user.

Participation in public tenders in Ukraine involves a fee - but only for the submission of a bid in a specific tender and not for registration. Tariffs (fees for bid submission) are set by the Cabinet of Ministers of Ukraine (Decree №166 of 24 February 2016, poky, point 4).

NB: For the submission of a bid, a tenderer pays a fee to the operator of an accredited e-platform. The fee level depends on the value of the contract as follows:

<table>
<thead>
<tr>
<th>Value of procurement</th>
<th>Fee</th>
</tr>
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<tbody>
<tr>
<td>&lt;20,000 UAH</td>
<td>17 UAH</td>
</tr>
<tr>
<td>20,000 &lt; 50,000 UAH</td>
<td>119 UAH</td>
</tr>
<tr>
<td>50,000 &lt; 200,000 UAH</td>
<td>340 UAH</td>
</tr>
<tr>
<td>200,000 &lt; 1,000,000 UAH</td>
<td>510 UAH</td>
</tr>
<tr>
<td>&gt; 1,000,000 UAH</td>
<td>1,700 UAH</td>
</tr>
</tbody>
</table>

\(^1\) The way in which a natural person carries out his/her economic activity depends on the kind and frequency of such activity, and is regulated primarily by tax legislation, in the first instance. Thus, for example, if a natural person sells his/her own house on a one-off basis, the law does not require him/her to register as a sole trader. Instead, if a natural person provides any services on a continuing basis (legal, auditing, cleaning, rental, etc.), the tax law provides that such person is required to register as a sole trader. Tax authorities are in charge of conducting control over the legitimacy of economic activities carried on by natural persons.
If a tender is cancelled before the opening of bids, the e-platform operator will return the fee for bid submission to the tenderer.

III. WHAT IS PURCHASED

The procurement object in the wording of the Law “On Public Procurement” is called the “procurement item” - supplies, works or services purchased by the contracting authority within a single procurement procedure, in respect of which tenderers are permitted to submit tenders or proposals for negotiation (in cases where a negotiated procedure applies).

The meanings of the categories of goods, services and works are set out in Article 1 of the Law “On Public Procurement”. The main thing to note is that the definition “works”, unlike “goods” and “services” is limited to certain activities. The distinction between goods/services procurement items and those concerning works is very important because these two groups have different value thresholds as criteria determining whether or not the Law “On Public Procurement” applies. There are also different rules for these groups regarding the determination of the procurement item.

For the Law “On Public Procurement” to apply, the minimum value threshold for goods/services is 200,000 UAH and for works it is 1.5 million UAH.

For contracting authorities in the utilities sectors (e.g. energy production and supply, water, transport, postal services and telecommunications), the relevant value thresholds are:

For goods/services - 1 million UAH,
For works - 5 million UAH.

Finally, if the value of the procurement item equals or exceeds 50,000 UAH but is lower than the thresholds indicated above, the contracting authority may conduct a simplified e-auction through Prozorro or conclude a direct contract with a supplier selected at its own discretion. In these cases, it is mandatory for the contracting authority to publish a report about the contract at the Prozorro website.

According to the Ministry of Economic Development and Trade’s Order No. 454 of 17 March 2016, from 1 January 2017 the procurement item in the case of goods and services must be is defined on the basis of EU Common Procurement Vocabulary (CPV) codes². In the case of works, the relevant State construction standards apply (ДСТУ Б.Д.1.1-1:2013 approved by Order of Ministry of Regional Development and Construction No. 293 of 5 July 2013).

NB: The web-portal prozorro.gov.ua has a search service based on key words, CPV-codes, dates of publication, names of contracting authorities, regions and types of procedure.

IV. PROCUREMENT PROCEDURES

² The EU classification of public procurement subjects/items is called the Common Procurement Vocabulary (CPV). The latest version is valid from 2008 and includes a main vocabulary that contains a set of codes with names for goods, works and services in public procurement and a supplementary vocabulary that helps customers to create more precise and specific description of subject of contract.
As mentioned above, if the value of the procurement item is lower than the indicated thresholds, a contracting authority may (at its own discretion) conduct a simplified e-auction through the Prozorro system according to procedural rules defined by a separate specific Order No. 35 of 13 April 2016\(^3\).

For procurements above the value thresholds, the Law “On Public Procurement” requires the use of specific procurement procedures: two which are competitive (open tender and competitive dialogue) and one of which is non-competitive (negotiated procedure).

**The most popular and main procedure - the open tender.**

In an open procedure, any economic operator/tenderer that has examined the procurement notice and tender documentation may submit a tender. The open tender procedure can be used for any procurement items except in cases where the market is objectively limited by the absence of or very limited competition.

The Table below summarises the rules which apply to e-auctions above and below thresholds.

<table>
<thead>
<tr>
<th>Regulated by</th>
<th>UNDER-THRESHOLD SIMPLIFIED E-AUCTION</th>
<th>OPEN TENDER E-AUCTION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Order No.35 dated of 13 April 2016 and approved by the Administrator of the Prozorro system.</td>
<td>Law “On Public Procurement”</td>
</tr>
<tr>
<td>Minimum price reduction in e-auction (per round)</td>
<td>0.5-3% of procurement value, concrete size selected by contracting authority within this range.</td>
<td>Not regulated, set by contracting authority</td>
</tr>
<tr>
<td>Digital signature</td>
<td>Not mandatory</td>
<td>Mandatory</td>
</tr>
<tr>
<td>Time Limits</td>
<td>Mandatory clarification period (phase) for possible questions from bidders and answers of contracting authorities – minimum 3 working days after publication of tender notice (1 day if procurement value &lt; 50,000 UAH).</td>
<td>Bid submission – minimum 15 days, clarifications are possible within this period.</td>
</tr>
<tr>
<td></td>
<td>Bid submission phase – minimum 2 working days after completion of clarifications phase (1 day if procurement value &lt; 50,000 UAH).</td>
<td></td>
</tr>
<tr>
<td>Amendments to Tender Documents</td>
<td>No effect on time limits.</td>
<td>Time limit for bid submission must be extended for not less than 7 days.</td>
</tr>
<tr>
<td>Answers to</td>
<td>Not regulated</td>
<td>A contracting authority is obliged to</td>
</tr>
</tbody>
</table>

requests of Bidders (In clarification period) | (a contracting authority may ignore requests). | answer requests through the e-system. All answers are published and available for public access.
---|---|---
Qualification (verification) of awarded bidder | Not regulated but contracting authority is obliged to conclude contract or cancel tender within 30 days after deadline for bids submission. | Limited time for verification of qualification (Article 16 of the PPL) and grounds for exclusion (Article 17 of the PPL) - 5 working days (may be expanded to 20 working days).
Appeals | Specific review commission but decisions have status of recommendations. Complaint does not stop ongoing procedure and there is no standstill period. | Detailed review process is stipulated in Article 18 of the PPL. Decisions of review body (Anti-monopoly Committee of Ukraine - AMCU) are binding for parties. Complaint stops ongoing procedure and there is a standstill period of 10 days after award decisions for possible appeals.
Grounds for Cancellation of Tender | • No bids received  • All bids rejected Then the e-auction is cancelled | • Less than 2 bids received  • All bids rejected Then the Tender is cancelled

The Competitive dialogue

This procedure is used when a contracting authority cannot define the precise technical and/or qualitative characteristics of the procurement item and thus negotiations are needed.

A Competitive dialogue is a 2-stage procedure envisaging negotiations at first stage. The goal of the negotiations is the preparation of optimal technical, qualitative and other characteristics of the procurement item.

This procedure is most useful where the procurement item is of a complex and specialised nature – e.g. construction works which require the use of various well-elaborated technical solutions.

The Negotiated procedure - only by exception

The negotiated procedure is the least competitive procedure and allows for the direct award of a contract without a tender when a contract is concluded after negotiations with one or several economic operators. This procedure can be applied only in the limited cases precisely listed in the Article 35 of the Law “On Public Procurement”.

A contracting authority may apply the negotiated procedure, as an exception, only in the following cases:
1) For the procurement of works of art, procurement related to the protection of intellectual property rights, or the completion of a procurement contract with the winner of an architectural or artistic contest;

2) Where there is lack of competition (including for technical reasons) in the relevant market, and, as a result, the procurement contract may be concluded with only one supplier, provided that there is no alternative;

3) In cases of urgent need for the procurement due to special economic or social circumstances that make it impossible for the contracting authority to comply with the timeframes for the competitive procurement procedures, i.e. in cases related to the urgent elimination of consequences of emergencies, as well as provision of humanitarian aid by Ukraine to other countries according to the established procedure. The negotiated procedure in such cases shall apply based on the relevant decision of the contracting authority in respect of each particular procedure;

4) If the contracting authority has cancelled a procurement procedure twice due to an insufficient number of tenderers, but the procurement item, its technical and qualitative characteristics and the requirements to the tenderers shall not differ from the requirements established by the contracting authority in the tender documents;

5) Where there is a need for additional procurement from the same supplier in order to ensure unification, standardisation or compatibility with existing supplies, technologies, work or services and if the replacement of the previous supplier (works contractor or service provider) would result in incompatibility or cause technical problems associated with operation and maintenance;

6) When there is a need to perform additional construction works not included into the original project, but which turned out to be necessary for the completion of the project due to force majeure circumstances, provided that the contract is awarded to the previous contractor for the works, if the additional works are technically or economically related to the original contract and the total value of additional works does not exceed 50 per cent of the original contract value;

7) For the procurement of legal services related to the protection of the rights and interests of Ukraine, including the legal protection of national security and defence interests, legal services for a dispute settlement procedure, for representation in proceedings in foreign jurisdictions that involve a foreign entity and Ukraine based on a relevant decision of the Cabinet of Ministers of Ukraine or decisions of the National Security and Defence Council of Ukraine enforced pursuant to the law.

NB: The negotiated procedure is a favourite target of State control bodies and of public and media monitoring.

The Process of the e-auction

The e-auction module is publicly available for anyone at this link - auction.openprocurement.org, and this allows observation of any e-auction in real-time mode.

Tenderers participating in an e-auction receive the link to the e-auction from their selected platform (where they are registered). By using this link, it is possible to bid in the e-auction. At the beginning of the e-auction, the system allows 5 minutes for each tenderer to see the number of tenderers and their initial prices, but without identifying the actual tenderers.

The e-auction is conducted in 3 rounds. The right of first price change is given to the tenderer with the highest initial price and it may reduce its price or stay with its initial price.
Each tenderer then has 2 minutes for its own action (price reduction or no changes). After each round the system takes a 2 minute break to build a table showing the new reduced prices from the highest to lowest price - and then next round happens.

After the third round, the final results of the e-auction are published with a simultaneous disclosure of the names/titles of tenderers.

**NB:** *If price alone is used as the award criterion, the e-auction is conducted through price reduction. If price is supplemented by other measurable evaluation criteria (terms of delivery, warranty period etc.), the so called 'adjusted price' will be used in the e-auction. This price is automatically calculated by the system on the basis of the weight of each criterion (set by contracting authority for each particular tender but in any case price cannot be lower than 70%).*

**V. TENDER DOCUMENTATION.**

Tender documentation refers to the documents specifying the terms and conditions of a public procurement as *developed and approved by the contracting authority*. These are published for free access on the procurement web portal and authorised e-platforms. Tender documentation is the main source of information for potential tenderers.

Requirements regarding the *content* of tender documentation set out in Article 22 of the Law “On Public Procurement” and some additional formal requirements are also determined by the Ministry of Economic Development and Trade’s Order No.680 of 13 April 2016.

The general structure of tender documentation includes instructions for the preparation of bids, a description of technical specification/requirements for the procurement item, qualification requirements for tenderers and the evaluation criteria and methodology to be used in preparing the draft contract.

The content and volume of tender documentation for each tender depends on the complexity of the procurement item.

**Qualification criteria and grounds for exclusion**

Tender documentation must include one or several qualification criteria as determined by Article 16 of the Law “On Public Procurement”, together with the grounds for refusal in respect of tender participation (exclusion grounds) as set out in Article 17 of the Law.

**NB:** *Documentary confirmation of the absence of exclusion grounds is not required for information which is publically available from open state registers.***

If a tenderer is not complaint with the qualification criteria or the exclusion grounds apply, its bid is required to be rejected. It is worth underlining that contracting authorities *MUST* set qualification criteria but *MAY* select one, two or three such criteria, e.g.:
Some examples of qualification criteria

Availability of equipment, resources and technology at the tenderer’s disposal.

On this, the Law does not require tenderers to have their OWN equipment. Thus, rented or leased or borrowed equipment may be used by the tenderer.

Availability of staff with the relevant qualifications and necessary knowledge and experience at the tenderer’s disposal.

Demonstrated experience in the performance of a similar contract.

On this, the correct meaning of “similar contracts” depends on the procurement item. Similarity cannot be associated with similar clients, places of delivery etc. It is also important that similar contracts must be presented as performed - not simply contracted.

Exclusion grounds are listed in Article 17 of the Law “On Public Procurement”. – There are 11 such grounds (including attempts to bribe, bankruptcy or tax debts). In order to simplify business access to public tenders, the Law allows for the “post-qualification” of tenderers; meaning that tenderers submitting bids need only declare their compliance with the exclusion grounds of Article 17 and documentary confirmation of these declarations must only be provided by the winner of the tender.

Technical specifications

Technical specifications (i.e. the description of necessary technical, qualitative and functional parameters of the procurement item) are perhaps the most important element of tender documentation. Technical specifications must meet two main conditions – they need to be set out in detail what is required and they must be non-discriminatory.

The second aspect is clarified by the Law “On Public Procurement” which forbids the inclusion in tender documentation of references to a specific trademark or firm, patent, construction or a type of the procurement item, its origin or a particular manufacturer. If such a reference is objectively necessary, it must be reasoned and the wording “or equivalent” must be added in the specifications.

Typical violations/mistakes in tender documentation

- The setting of conditions limiting competition as well as discriminatory conditions;
- The absence of mandatory elements of tender documentation as stipulated in Article 22 of the Law “On Public Procurement”, for example the draft contract;
- Conflicts in formulations between different parts/elements of the tender documentation (for example “terms of payment” as evaluation criteria vs. concrete terms in the draft contract);
- Setting of unjustified evaluation criteria not connected with the procurement item.
HARMONISATION OF PUBLIC PROCUREMENT SYSTEM IN UKRAINE WITH EU STANDARDS
www.eupublicprocurement.org.ua

Guidelines on how to participate in public tenders

It is worth underlining that the Law “On Public Procurement” does not specify in detail what may constitute a discriminatory condition. This depends strongly on the procurement item and the specific market. Accordingly, a contracting authority must pay additional attention in setting requirements and take into account the market situation and legal regulation associated with certain procurements (for example, licensing or technical regulation). Sometimes it is real challenge for contracting authorities to formulate requirements without signs of discrimination.

While the existence of discrimination depends on the specific case, there are general situations where discrimination is obvious. These include:

- **Discriminatory qualification criteria** – e.g. requirements to have own equipment, unjustified quantity and volume of similar contracts;
- **Setting unjustified requirements to submit unnecessary additional documents** – e.g. confirmation of the status of the tenderer as a manufacturer, submission of copies of previous contracts only with State authorities;
- **Discriminatory conditions on the technical specification of the procurement item** - technical parameters related to the manufacturer, references to technical standards not legally recognised in Ukraine or not directly related to the procurement item.

VI. TENDER AND CONTRACT SECURITY

According to Article 24 of the Law “On Public Procurement”, a contracting authority has the right to demand from tenderers a tender security that may only be provided in the form of a guarantee. The aim here is to reduce the risks of “non-serious” tenderers.

The size of the tender security cannot be higher than 0.5% of the estimated procurement value in case of works and not higher than 3% of the estimated procurement value in the case of goods/services tenders.

Tender securities may be given in the following forms:

- A bank guarantee;
- An insurance guarantee;
- A guarantee from a non-bank financial institution.

The most frequently used form is the bank guarantee.

The tender security must be returned to tenderers within 5 banking days of the contract award.

The tender security will **not be returned in the following situations**: 

- in the event of withdrawal of the tender by the tenderer upon the expiry of the term for submitting tenders but before the expiry of the period during which tenders are deemed valid;
- where the successful tenderer fails to sign the procurement contract;
- if the successful tenderer fails to provide documents confirming the inapplicability of exclusion grounds under Article 17 of the Law within the term specified in, paragraph 3(2) of that Article 17;
VІІ. SOME ADVICE ON PARTICIPATION IN PUBLIC TENDERS

1) It is recommended to designate at least two specialists to work with the e-procurement system if the tenderer plans to participate in many procedures. This will allow the first specialist to concentrate his/her efforts on the preparation of bids while the second specialist may analyse previous procurements, possible competitors and the market situation in order to develop the company’s tender strategy.

2) Careful observation of other actors. This means a diligent selection of an e-platform (taking into account its usability, the services provided etc.), monitoring of payments by certain contracting authorities, monitoring of cancelled tenders of contracting authorities etc.

3) Communication with contracting authority. A potential bidder should not be shy to ask questions – all questions and answers are stored in the system and are available at any time.

NB: Questions of tenderers are published as anonymous and only as text (additional files cannot be uploaded). Contracting authorities answer all questions in the system and can upload files if needed (i.e. additional technical information, photos etc.).

4) Do not wait until the last minute to submit a bid. The e-system is designed in such a way that, if submitted bids have the same prices, the last move/action in the first round of the e-auction is given to the tenderer that submitted its bid first.

5) Initial lowest price has the stronger chance to win. The e-auction is organised in such a way that the tenderer with the lowest price has the last move/action in each of the three rounds of the e-auction. In any event, it is not possible to increase prices, only to reduce them or keep them the same during the e-auction.

6) In order to actually bid, it is important to be registered as a “Tenderer” - not as an “Observer”.

- where the successful tenderer fails to provide the procurement contract performance security after the receipt of the notice of intent to award the contract, if provision for such security is provided for by the tender documents.

Similar to the tender security, a contracting authority has the right to require a contract security from tenderers, not later than the day of contract conclusion - if such a requirement was previously set in the tender documentation. Unlike the tender security (that can be provided only as a guarantee), a contract security may be provided in any form determined by the contracting authority and without limitations.

The contracting authority must return the procurement contract performance security after the successful tenderer completes the performance of the contract or where the results of the procurement procedure or the procurement contract have been recognised as invalid by a court (Law “On Public Procurement”, Article 37) and in accordance with the terms and conditions laid down in the contract, within five banking days of the day when the said circumstances occur.

The size of the contract security cannot be higher than 5% of the contract value.
7) Check the time when the e-auction is appointed to take place and be sure that you will have stable internet access for this appointed time (it is possible also to bid via smartphones).

8) Do not be unduly concerned if a competitor reduces its price to an unrealistic level. There is no need to leave the e-auction because such a “dumping” competitor may fail in regard to post-qualification and may be rejected by the contracting authority. Also, in such cases, the contracting authority will verify the second best bid - which may be your bid.