GUIDELINES ON HOW TO PREPARE TENDER DOCUMENTS
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GUIDELINES ON HOW TO PREPARE TENDER DOCUMENTS

These Guidelines include advice on specific aspects of tender instructions and draft contracts as well as another important element of tender documents mentioned in Article 22 of the Law on Public Procurement (PPL): “information about the required technical, qualitative and quantitative characteristics of the procurement item” - commonly known as technical specifications.

The proper preparation of these documents often poses practical challenges for contracting authorities and new challenges will arise from the substantial approximation reform of the PPL envisaged by the Ukrainian Government for 2018.

Tender Planning as a first Step

Behind any set of well-prepared tender documents lies a comprehensive process of tender planning.

Typically, the role of planning is illustrated by a cyclical process where planning precedes tender preparation, including the development of tender documents. At the end of the cyclical process, the monitoring and audit of contract performance following contract award feeds into the planning of the next procurement.

Thus, experience from any previous contract should be captured systematically and used in the preparation for the tendering of a new contract. However, it is not considered sufficient merely to base the planning on past experiences. Markets sometimes change quite rapidly in terms of price.

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1 Cabinet of Ministers Resolution No. 175 on the adoption of the Strategy for Public Procurement Reform (Road-Map) of 24 February 2016.
levels, products and suppliers. Furthermore, new needs may have arisen within the various user-groups for purely practical reasons or due to changed policies and legislation.

Circumstances may also differ depending, for example, on the complexity of the supplies, services or works at issue. In some cases, there is a fairly clear situation in regard to needs and markets. Nonetheless, best practice recommends a systematic approach in any case with a planning phase divided into the following key stages:

1. Needs assessment, including a review of previous deliveries to identify shortcomings in performance as well as ensuring that there is consensus at the level of users and of policy makers as to the type of needs/policy aims to be fulfilled by the procurement and the volume or quantity required;

2. Market research updates and complements existing information on prices, costs and possible technical solutions that can be derived, for example, from relevant previous contracts. In particular, market research identifies new suppliers, innovations and cheaper solutions. Tender conditions based on limited market knowledge may often turn out to be too restrictive and, thus, unnecessarily reduce the number of interested bidders. This type of risk is particularly relevant in the case of IT contracts and other areas involving dynamic technological development.

The results of the needs assessment determine the initial scope of the market research. The outcome of the market research may in some extreme cases reveal entirely new solutions that need to be discussed with user groups and perhaps result in revision of the definition of needs. In this manner the stages are interlinked.

The results of this entire process will clarify the overall intention behind the procurement, economic requirements as well as technical possibilities. Accordingly, the basis will be set for the subsequent development of tender documents, including the important elements of technical specifications and the draft contract.

**Tender Documents**

Article 22 of the PPL reflects good international practices by the general requirement that tender documents:

“shall not contain requirements that restrict competition and result in the discrimination of (bidders).”

This is an important consideration of relevance to all aspects of tender documents. For this reason and to facilitate the task of developing high quality tender documents the Ministry of Economic Development and Trade has issued Order No. 680 of 2016 on the Model Tender Documentation².

**Instructions for preparing tenders**

² [http://www.me.gov.ua/LegislativeActs/List?lang=uk-UA&id=6e190ba6-3c35-4244-8a3f-bc8733ca97de&tag=NormativnaBaza](http://www.me.gov.ua/LegislativeActs/List?lang=uk-UA&id=6e190ba6-3c35-4244-8a3f-bc8733ca97de&tag=NormativnaBaza)
The instructions issued for the preparation of tenders will very much depend on the specific tender procedure and this will also determine the manner of structuring the bid. Otherwise, the instructions will include the various factual information mentioned in Article 22 of the PPL which is mostly quite straightforward. In addition, the following points are worth considering:

**Errors in bids**

Too many procurement procedures have suffered from an unnecessary rejection of bids as non-compliant due to errors that were of little significance for the material content of the bid. To solve this problem, the following provision was included in the current PPL as an addition to the earlier version of Article 22(3):

“Tender documents may contain description and examples of typical technical (unessential) errors that shall not result in rejecting a tender if detected therein. Technical (unessential) errors shall mean errors related to the form of the tender that do not affect the tender’s content, namely technical and typing errors”.

This provision must according the PPL Commentary³ be understood as exhaustive as regards the specific errors that need not result in rejection. The Commentary mentions, as an example of technical (unessential) errors, the lack of page numbers or of signatures on each page of the bid. However, it is clear that the concept is also intended to cover other types of errors that affect only the form and not the content.

Article 22(3) raises some issues of interpretation. While it is unmistakably in the interest of contracting authorities to avoid having to reject a bid due to mere formalities, it may prove difficult to establish the a full list of formality errors to be regarded as unessential. The obvious alternative is to review all formal requirements in the tender documents and then to consider for each of them whether errors would be acceptable. In such cases, the formal requirements could in fact be deleted as unnecessary. Such a “formality check” would solve the problem which it is the actual intention of the PPL provision to deal with.

**Instructions concerning Consortia**

The EU Public Procurement Directives⁴ allow consortia to submit bids without having any specific manner of organisation at the time of submission. Thus, a contracting authority may only require the consortium to incorporate themselves if they win the tender. While this is not yet required by the

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PPL, a similar provision is envisaged as part of the reform of the PPL in 2018. As a result, it will be important for contracting authorities dealing with consortia bids to ensure that the consortium is actually behind the bid being submitted.

In consortium bids, it is desirable to have the bid signed/acknowledged either by all consortium members or by the member expressly authorised to do so by the other members. Such an authorisation would often be included in a consortium agreement which, in addition, could include

1) a common expression of intent to participate in the consortium;
2) a commitment to be jointly and severally liable for the tender and for the contract, in case of award;
3) a commitment as regards incorporation in case of award; and
4) the specific physical person appointed to represent the consortium – for example a person from the management of the nominated leading member.

The format for such a consortium agreement could be included in the tender material.

Technical Specifications

Article 22 of the PPL includes detailed requirements as to the content of the tender documentation that must be developed and made electronically available in connection with procurements. The previously cited Commentary to the PPL highlights the over-arching requirement of objectivity and non-discrimination in the context of Article 22, including prohibition against undue references to brands and the need to include any mandatory environmental requirements. These requirements are particularly important in connection with the technical specifications.

Ideally, the technical specification should set out the outcome of the tender preparation process precisely in terms of specific needs and technical choices. Otherwise, the technical specifications have been developed without paying attention to concrete needs and market possibilities. In such cases, time and money may be wasted when the tender is later either cancelled or produces inadequate solutions.

Technical specifications must fulfil various functions before, during and after the tender process.
The role of tender specifications

- As part of the tender preparation, the draft technical specifications should be re-checked with user groups and other stakeholders in respect of budget estimates and the definition of actual needs.

- During the tender, the technical specifications should provide precise descriptions to the bidders of what the contracting authority requires. Otherwise, it will not be possible for bidders to determine exact needs and develop suitable bids.

- During the tender process, the technical specifications are also used as the basis for the initial evaluation of the compliance of the bids. Tenders which do not comply with the specifications must be rejected. Any lack of precision will make this task difficult and problems may arise later, e.g. in the form of complaints concerning any acceptance of non-compliant bids.

- After the tender process and the signing of the contract, the technical specifications will serve as the main reference document for determining what the winning bidder has promised to deliver. Thus, technical specifications are of particular importance for the management of the contract and, for this reason, they are annexed to the contract.

Optimal fulfilment of these various functions requires that tender specifications are not just clear, precise and easy to understand. The requirements of the tender specifications must also be verifiable and therefore suitable for conversion into contractual obligations that can be controlled.

“Normal” and “suitable” are many things

It is often tempting to use general formulations such as “performance normal for machinery of this type” or “equipment suitable to be used for...”; especially when the tender is urgent and information is lacking.

However, these formulations do not allow for any verification of what a bid offers in terms of specific capacities and whether this fulfils the minimum requirements that it is also the purpose of the technical specifications to define.

Attention should also be given to the following:

- The tender documents should provide optimal guidance to bidders on the reasons behind the various requirements. This includes, for example, an explanation of the user groups involved, why a particular requirement has been included and how it promotes the interests of the contracting authority. Such texts are important and very helpful for the bidder when preparing his bid but less relevant at later stages. A practical solution often used is to highlight this text (e.g. by presenting it in a text box) so that it can be easily identified as
purely descriptive. This will make it clear to bidders what are the exact technical specifications.

- The technical specifications should include only minimum requirements. Any additional requirements not specifically indicated as minimum requirements are, in fact, award criteria. A distinction on this point is important because it is only the failure to fulfil minimum requirements that makes the bid non-compliant and resulting in its rejection. Moreover, it is only the award criteria that are subject to competition whereas a mere pass/fail test applies in the case of minimum requirements. It is important from the outset, therefore, to determine what should be subject to competition. This will often depend on the concrete market and can be clarified by market research as part of the preparation of the procurement.

It is the contracting authority that decides the specific requirements to be included in the technical specifications based on the needs assessments and market research mentioned earlier. In the case of supplies and service contracts, the technical specifications could include the following type of requirements:

- performance in terms of efficiency, environmental, and safety aspects;
- quality and design;
- testing and conformity assessment;
- labelling, packaging and user instructions.

In the case of works contracts, there would normally be additional requirements concerning inspection during the work and procedures for the acceptance of the works as well as a specification of any particular construction methods or techniques to be used.

Requirements concerning many aspects of the technical specifications are subject to standardisation. In fact, standards are essentially technical specifications characterised by having been approved by a recognised standardisation body for repeated and continuous application.

The use of international standards is already a possibility under the current PPL. However, the forthcoming 2018 approximation of the Ukrainian PPL with the EU Public Procurement Directives will require the PPL to be adjusted also on the point of the use of international standards, especially concerning the priority use of EU harmonised standards.

**EU Harmonised Standards**

The objective of EU technical harmonisation has been to facilitate trade between EU Member States by abolishing special national requirements that would make market access difficult. The so-called “New Approach” to technical harmonisation was an important element of the EU Single Market Strategy of the 1980s. It is based on developments in the case-law of the Court of Justice of the European Union\(^5\) which identified a basic obligation of mutual recognition in trade between EU

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\(^5\) Case 120/78: Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), [1979] ECR 649.
Member States and confirmed that special national requirements could only be justified for public policy reasons: notably health, safety and environmental protection. Accordingly, the EU New Approach to technical harmonisation essentially consists of the following:

- legislative harmonisation is limited to essential requirements concerning health, safety and environmental protection;
- EU harmonised standards should be developed to spell out the essential requirements in technical terms;
- The use of EU harmonised standards creates a presumption of conformity with the essential requirements;

This explains why the EU does not harmonise everything but only those areas with some risk element. Risky areas include any kind of machinery, electrical equipment, pressure vessels, construction materials as well as a number of services and processes for the purpose of e.g. quality control, data protection and energy management. In the broad category “machinery” there are basic risks due to the actual mobility of machinery, including its moving parts, as well as risks due to high temperatures. Moreover, particular risks are present in respect of e.g. any machinery for lifting operations and hand-held machinery.

The development and adoption of harmonised standards in these and other areas has been delegated to the following European standards organisations: **CEN** (European Committee for Standardisation), **CENELEC** (European Committee for Electro-technical Standardisation) and **ETSI** (European Telecommunications Standards Institute). Ukraine’s standardisation bodies are affiliated members of CEN and CENELEC and can in this way follow EU standardisation activities.

The EU Public Procurement Directives require that contracting authorities, as a matter of priority, must use European or international standards in technical specifications. Other standards may only be used where no EU or international standards exist. The aim here is to ensure the highest degree of market interest, including cross-border interest, in the bid. However, mandatory national technical requirements will remain in place to the extent that they are abolished as part of the EU approximation process.

Therefore, in the case of public procurement, the use of available EU/international standards is mandatory – but only for contracting authorities. For the convenience of bidders and to encourage wide participation in tenders, the bidders are not obliged to use such standards in their bids - provided that the equivalence with the essential requirements in the technical specifications can be documented in an alternative manner. Such alternatives include test reports or certificates from recognised compliance checking bodies or the relevant technical dossier from the producer.

As a result of the EU approximation process required by the EU-Ukraine Association Agreement, EU harmonised standards are being gradually introduced in Ukraine and thus replacing existing national standards.
Sources of further information on EU harmonised standards in Ukraine

Further information concerning the present position and the availability of EU standards can be obtained at SE“UkrNIUTS” which is the entity in charge of standardisation issues under the Ministry of Economic Development and Trade.

Performance and Functional Requirements

There are other situations where, instead of specifying a particular and exact technical solution, a contracting authority may find it desirable or necessary to simply describe the problem that needs to be solved and the desired results via the procurement contract. In these instances, bidders can be given the possibility of using their technical know-how and innovative capacities to design the optimal technical approach.

For these reasons, the use of functional and performance requirements is allowed by the EU Public Procurement Directives as an alternative to technical specifications in the traditional sense, including the mandatory use of EU/international standards. In such cases, the tender evaluation may involve bids with different technical approaches which are only comparable in terms of what they produce. The design of award criteria must, of course, take account of this in the sense that such criteria should be output-oriented and not presume a specific technical solution.

Where the needs assessment and the market analysis show a wide potential for competition, it will often be important to design the specifications in such a way that there is no unnecessary reliance on specific technical solutions or designs. The scope for this depends, of course, on the outcome of the needs assessment. If needs are very specific, then this will need to be reflected in the specifications.

In many cases, the specifications can be formulated as functional specifications with an emphasis on performance for the user (involving a description of the results to be obtained, rather than what the product should look like technically).

In the case of buying Ambulances

In the case of a procurement of ambulances or other vehicles for the transport of hospital patients or the elderly, one approach is to lay down very precise technical specifications concerning noise levels, wheelbase, shock-absorbers, air-condition capacity, leg room etc. The risk in such cases is that alternative equally suitable or innovative solutions are ruled out. The alternative is to replace the detail with functional requirements concerning the types of patients to transport, types of safety risks, availability of lifts etc.

For service contracts, there is a similar distinction to be made between types of specifications.
**In the case of Cleaning services**

In the case of cleaning services, the specification can be focused on results e.g. that rooms must continuously be in a certain state of cleanliness – either defined in general terms or as the outcome of specific checks. This is the functional approach where the methods to be used are entirely left to the service provider. Alternatively, the specifications can require the performance of specific cleaning operations (washing floors, cleaning windows, emptying waste bins etc.) over a certain period. This is the technical-oriented approach where little is left for the service provider to decide.

The two approaches have their respective advantages and disadvantages. Input based specifications focus on specific actions and compliance is relatively easy to verify. On the other hand, the approach needs to be well thought through to ensure that all activities and the frequency of such activities ensure a generally clean environment.

In the example, the functional specification essentially requires that all offices are labelled as clean but this may be difficult to verify in practice. There are no specific actions to check and the parties may disagree as to what “clean” means. The use of various checks (dust on top of furniture, smears on windows etc.) for the purpose of verifying that everything is “clean” might be a solution.

Performance and functional requirements are frequently used in Public Private Partnerships where the core idea of these arrangements is to allow optimal freedom to identify structures, operations and technology in, for example, a hospital project.

**Draft contract and Contract Performance Management**

There are various requirements for contracts in current Ukrainian legislation.

**Contract requirements in Ukrainian Law**

The Civil Code includes requirements concerning the content of contracts in general. Thus, the contract should, in addition to the parties and the subject of the contract, also indicate quality requirements which, according to the Civil Code (Article 15), include various points and which, in any case, will be based on the commitments of the winning bid.

Among other main requirements are provisions concerning price, including the issue of designing contractual mechanisms for addressing currency fluctuations in an objective manner, as well as contract duration, the liabilities of the parties in the event of performance failure and mediation/arbitration procedures.

There are also, in other legislation, specific requirements that must be taken into consideration for special types of contracts. An example is Resolution No. 668 "On the approval of General conditions for the execution of contracts and in the major overhaul of construction" of 1 August
There are numerous types of standard contracts and standard contract terms issued by business associations, both nationally and internationally. The latter include standard contracts for works and various other types of projects issued by the International Federation of Consulting Engineers (FIDIC) and the International Chamber of Commerce (INCO) delivery terms. A standard contract will always be useful as a basis for developing a concrete contract. However, the standard clauses should not be used unless they are fully understood and fully respond to what is required in the specific tender.

The contract is sometimes incorrectly seen as a mere formality for concluding the tender process. What is ignored is that the contract has important functions as tool for the subsequent contract management process. Contract management is important for ensuring that the winning bidder ultimately delivers what has been promised in the bid. This is relevant in all contracts but is of particular importance for long-term and more complex contracts.

There are several key elements that require specific attention for the purpose of ensuring good contract management:

**Subject of the Contract:** The subject of the contract is essentially a combination of the requirements of the annexed technical specifications and any specific commitments as regards price, costs or quality of the winning bid. It is critically important to have all these elements spelled out in the contract with references to the annex as appropriate. As it has been pointed out earlier, a high degree of precision in technical specification is important also for the purpose of contract management. It clarifies to the parties what needs to be delivered and makes it easy to identify deliveries that fall short of these requirements.

**Receipt and monitoring procedures:** It is important to lay down precise terms concerning not just the time of delivery but also the receipt and testing of what has been delivered. Even in the case of simple contracts concerning the delivery of goods, it is important to have procedures in place with rights and obligations for the parties concerning such matters as: delivery during a specific time period, verification of the delivery in terms of quantities and quality and a signature by the contracting authority to confirm that the contract has been duly fulfilled.

In the case of works projects and the provision of services over a longer period, it will be necessary to establish regular monitoring involving particular procedural steps to ensure that the results of the monitoring are acceptable to both parties. There is a broad scope for designing such rules to suit concrete circumstances. In long-term and complex contracts, the reporting requirement should include at least an obligation for the operator to submit regular reports on performance (e.g. on a quarterly basis) as well as special reports in case of any extraordinary events or at the request of the contracting authority.

The rights of the contracting authority in regard to information are normally ensured by prescribed regular meetings, e.g. in connection with the submission of regular reports. There is often a right for the contracting authority to call meetings at its own discretion to clarify specific issues. In addition, there may be a right for the contracting authority to inspect building sites, for example, for the purpose of verifying the content of the submitted reports.

**Compensation and termination** are key aspects in any contract. Contracts must clearly specify what happens if the contract is breached - which means when the parties do not fulfil their duties according to the contract. This typically arises either when payment is not made or the delivery of
goods, services or works is not performed. In such cases, the question of compensation or even termination arises. Other typical breaches relate to the quantity or quality of deliveries or the delays in the delivery schedule. The more complex the delivery is, the greater is the scope for contract breaches. A well designed procurement contract will take account of all breaches of relevance to the goods, services or works in question.

Especially in works contracts or long-term contracts, the contract should include a possibility for terminating the contract for “anticipated breach of contract”. The purpose here is to enable one party to leave the contract in circumstances where it is clear (e.g. as a result of contract monitoring) that the other party, for economic or other reasons, is unlikely to be able to fulfil his contractual obligations.

The consequences of contractual breaches depend on the severity of the breach and can include termination of the contract, payment of compensation or minor fines. Larger contracts will normally define what is considered a severe breach - for example, that a delay in performing certain tasks may not exceed a certain amount of time. Likewise, repeated minor delays over a certain shorter period will often be defined as a severe breach.

**Fines or liquidated damages** are sanctions just like termination and compensation. Fines are often used in construction contracts or long-term supply/service contracts where many minor breaches of contract may become a problem. In such circumstances, it may serve little purpose to invoke termination as a threat if the parties are still generally happy with their business relationship. On the other hand, there remains the need to ensure continuous good performance. Thus, it is not uncommon in such cases to establish a system of fines – often referred to as “liquidated damages”.

A liquidated damages scheme is based on a system of negative points, which are triggered each time the enterprise fails to meet the contractual requirements, e.g. concerning delivery. The system is not dependent on proven negligence (and this excludes the use of the system in certain jurisdictions). Moreover, the scheme can provide for a different amount of negative points for different types of failures. If the operator accrues a certain amount of these negative over a certain period, then this will automatically result in some form of economic sanction – the fine.

**Risk evaluation**

Article 22 of the PPL requires that a full draft contract is included in the tender dossier from the outset. This helps to ensure that the contracting authority analyses possible risks and considers contractual mechanisms for mediating such risks at an early stage in the process.

A contract essentially allocates risk between the parties. The contract conditions will depend very much on what needs to be delivered. For standard deliveries - where the risks for the parties are straightforward and easy to quantify and allocate between the parties - contracts need not be particularly complex. Thus, in a contract concerning e.g. the supply of office stationery, the delivery and quality can be easily described and the risks are limited essentially to delays in delivery and failure to pay.

In other cases, and especially for works contracts, or contracts for complex equipment or service delivery over a longer period, it will be necessary to include such matters as performance indicators, monitoring and reporting obligations as well as sanctions to address the risk of insufficient performance.
Contracts for Elevator repairs and maintenance

In the case of a contract concerning the repair/maintenance of elevators in an apartment block, it would be critical by means of both technical specifications and very precise contractual obligations to ensure a sufficient level of safety in the performance of the contract, including service checks and emergency measures.

Evaluation of Resources

The ultimate aim of good tender documents, including a good draft contract, is to ensure the correct delivery of goods, the competent supply of services and the full performance of works. Even a contract with strict performance requirements, monitoring procedures and sanctions does not in itself guarantee anything if the contracting authority lacks the technical staff or other resources to ensure that these various requirements and procedures are effectively applied.

International experience, especially in regard to large works projects, indicates that it may be difficult for the contracting authority to match the expertise and resources of the private party. An evaluation of a contracting authority’s contract management resources is therefore an important element in ensuring that the contracting authority can, in fact, carry out the required process of contract management.

Sources for further information

SE “UkrNIUTS” website: http://ukrndnc.org.ua

HARMONISATION OF PUBLIC PROCUREMENT SYSTEM IN UKRAINE WITH EU STANDARDS

www.eupublicprocurement.org.ua

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