



Notices of intended procurements: Overview of Russian procurement law and Typical pitfalls in Russia

Lausanne, 6-8 April 2017
AIJA Double Seminar

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Structure of Procurement System



Public procurements

Federal law No. 44-FZ

- Strictly imperative rules
- Public and municipal authorities, budgetary institutions
- Customers are legally and economically public



Corporate procurements

Federal Law No 223-FZ

- Mainly dispositive system
- Public corporations and companies, natural monopolies, its subsidiary companies and budgetary institutions
- Customers are legally private but economically public

Public Procurements: Competitive Methods

- Competitions
(open/close; with limited participation; two-stage)
- Auctions
(in electronic form; close)
- Requests for Quotation
- Requests for Proposals

Open Competition



Notice of the competition shall be placed by the customer in the unified information system no later than 20 days before the opening of applications of the suppliers



Competitive documentation + draft state contract



Winner is determined by a competitive commission based on conditions provided in the applications



The state contract shall be signed no later than 20 days from the date of a protocol of the competitive commission



Law provides the grounds for recognition of the competition invalid

Certain Types of Open Competitions



Competition with limited participation

- Specific purposes of the procurement
- Additional requirements to the suppliers
- Pre-qualification



Two-stage competition

- Specific purposes of the procurement
- Stage 1: Initial applications (in respect of object of the procurement)
- Stage 2: Final application (with price)

Auction in Electronic Form



Notice of the auction shall be placed by the customer



Competitive documentation + draft state contract



Electronic trading platform



Specific requirements for applications of the suppliers
(shall consist of two parts)



The auction shall be conducted by means of reduction of
initial (maximum) price, and winner is determined by
“computer” based on proposed price



Law provides the grounds for recognition of the
competition invalid

Requests for Quotation and Proposals

- “Simplified versions” of auctions and competitions accordingly
- Choice of respective method depends on prices provided in the Law

Close Competitions and Auctions



Notice of the competition / auction is sent by the customer directly to the certain types of the suppliers



Only in cases provided in the Law

- state secret
- insurance, transportation and protection of values of the State Fund of Precious Metals and Precious Stones of the Russian Federation, museum pieces and collections, rare and valuable editions, manuscripts, archival documents
- cleaning services and services of drivers to ensure activities of judges, bailiffs

Public Procurements: Noncompetitive Methods



Procurement from the sole supplier

possible only in cases provided in the Law

Examples:

- natural monopolies
- under the Order of the President or the Decree of the Government
- price of the goods or services is less than 100 000 rubles

Corporate Procurements: Methods

- Competitions
- Auctions



Other methods can be established by the customers in internal regulations

Securing Performance of State Contracts

**Banking
guaranty**

**Deposit of
funds to the
account**

- Rules on security of performance of obligations are directly provided only in respect of public procurements
- Special requirements for banks and content of guaranty

Sub-contracting

- No strict prohibition
- Customers can provide the right to engage sub-contractors in procurement documentation
- In public procurements the Federal Antimonopoly Service qualifies such provisions as invalid

Dispute Resolution before International Arbitration Tribunal



Public procurements:
is prohibited



Corporate procurements:
diverse positions of courts

Black List of Suppliers



Free public resource is operated by the Federal Antimonopoly Agency



Based on information submitted by the Customers



Grounds for inclusion into the Black List:

- Refusal of the supplier to enter into the state contract
- Unilateral termination of the state contract by the customer due to material breach of the contract by the supplier



The information on the supplier shall be excluded from the Black List upon the expiry of 2 years



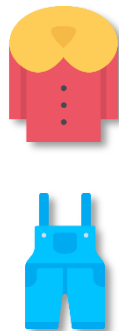
Inclusion of the supplier into the Black List can be appealed to court

Restrictions for Foreign Companies

- Companies registered in offshore territories
- Companies related to Turkey

Prohibition does not concern procurements of goods

- Some types of foreign goods



Thank you!

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Notices of intended procurements Typical pitfalls in Latvia

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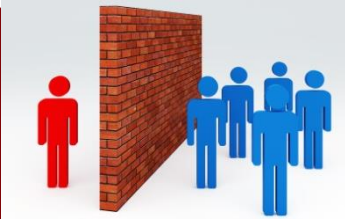
Māra Stabulniece

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- II. Pitfalls by foreign tenderers
- III. Remedies



I. Pitfalls by contracting authorities (1/7)



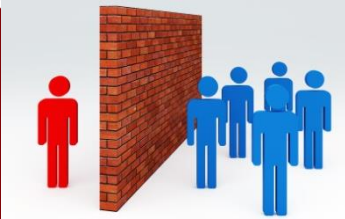
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**Restrictions
to free
movement
in EU**

(1/2)

- **Professional qualification documents and registrations**
 - Recognition certificate required at the stage of offer submission
 - Not always justified request of certificate recognition at the stage of conclusion of the contract (short term activity v. permanent)
 - Obligation to register in Latvian Register of Construction Merchants or other registers at the stage of offer submission
- **Compliance with national standards (goods, services)**

I. Pitfalls by contracting authorities (2/7)



1

**Restrictions
to free
movement
in EU**

(2/2)

- **Specific experience on the basis of national regulations**
 - E.g. construction of specific type of buildings according to national classification system). No description/ criteria for experience in other MS that would be considered as equivalent
- **Exclusion criteria**
 - Documents according to national system required (in case the documents proving compatibility unavailable – shall accept oath or certification)

I. Pitfalls by contracting authorities (3/7)



2

**Financial
capacity
requirements**

- **Too broad reliance to 3rd party's resources**
 - Just certification by the parties that resources will be available is not enough
 - It shall be proven that CA will be able to held respective third party financially liable during execution of the contract (e.g. proof that an association of suppliers jointly liable for execution of the contract will be established)
- **Disproportionate with estimated contract price and other terms**
- **Applied to each undertaking in association separately**

I. Pitfalls by contracting authorities (4/7)



3

**Technical
capacity
requirements**

- Certificates, permissions that are not required by law to do respective works, provide services or supply goods
- Certificate issued by specific institution where there are several institutions authorised
- Minimum time period for the activities in particular sector, e.g. 4 year experience in health sector
- Specific experience in construction in public or private sector

I. Pitfalls by contracting authorities (5/7)



4

**Restricted
sub-
contracting**

- **% of contract that may not be sub-contracted**
- **Qualification requirements (incl. exclusion criteria) applicable to all sub-contractors**
 - According to Latvian Public Procurement Law exclusion criteria are applicable to sub-contractors that perform 10% of the contract value
- **Exclusion criteria not prescribed by law – the same sub-contractor has been found in several offers**

I. Pitfalls by contracting authorities (6/7)



5

**Technical
specification**

- Too detailed technical description and restrictions to offer „equivalent”



6

**Most
advantageous
tender criteria
and
methodology**

- Detaildness of the description assessed – «essay competition»
- Too large diapason of the scores without methodology (unlimited freedom of CA)

I. Pitfalls by contracting authorities (7/7)



7

**Amendments
of the Notice**

- **Amending tender documentation leads to the estimated contract price that exceeds EU thresholds**
 - Different rules on publication. Not only CA's problem
 - Case: High risk to tenderer that CA will notice at later stage and will be forced to terminate the procedure



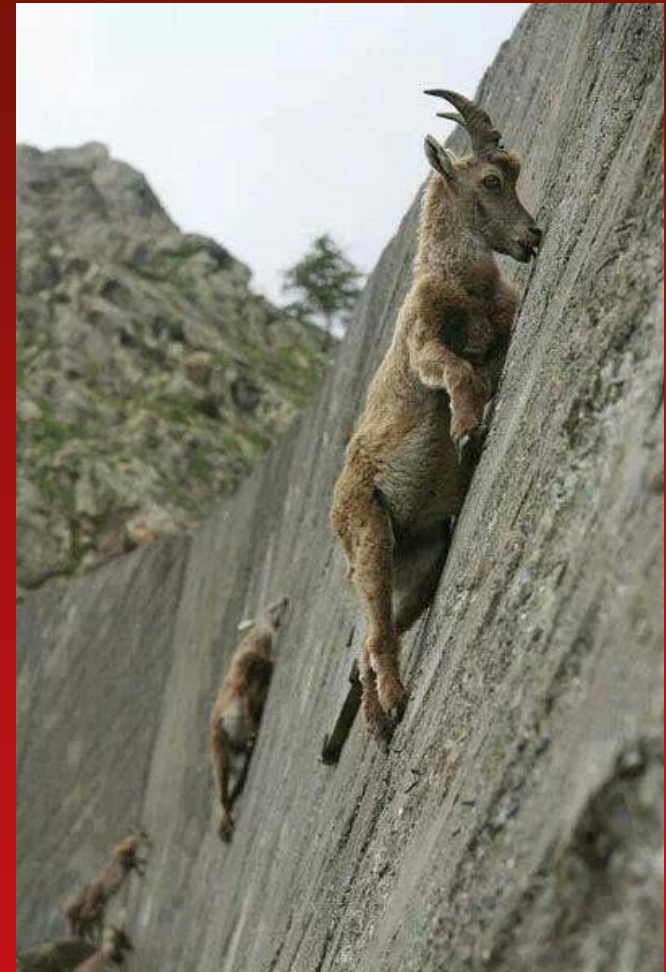
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Tender contract

- **Tender contract contains**
 - Works, goods, services not required by the technical specifications
 - Contractual penalty for failure to perform obligations or delay exceeds max.10% prescribed by Civil Law
- **Too broad possibility to amend**

II. Pitfalls by foreign tenderers (1/4)

How do they manage it?



II. Pitfalls by foreign tenderers (2/4)

1. Failure to consider draft tender contract properly

Case example – Negotiated procedure

- Application letter – offer complies with all documentation
- BUT during negotiations «offer conditional upon agreement on liability clauses»
- According to international industry practice and global policies of the company it cannot undertake liability that is unlimited and for indirect damages
- CA refuses amending draft contract during negotiations
 - According to law, not possible to amend substantially after submission of the tenders, incl. transfer of the risks for the benefit of supplier (reduction of penalty payments, guarantee, etc.)
 - Was not subject to negotiations, according to tender regulations
- + Risk – tender security payment MEUR 2

II. Pitfalls by foreign tenderers (3/4)

2. Say no to “slow motion”

- Strict deadlines for submission of:
 - Clarifying questions (not later than 4/6 days before submission of the application, offer)
 - Appeal of the requirements to Procurement Monitoring Bureau (PMB)
- Later not possible to appeal the requirements, only the results of the tender



II. Pitfalls by foreign tenderers (4/4)

3. Exceptionally supplier may be lucky..

- ..and mistake or unjustified requirement is of such a nature that it is not possible to announce winner in fact or in compliance with the principles of equal treatment, competition and transparency
- 0 in formula – not possible to divide with 0 and get the score according to evaluation criteria
- Objectively different suppliers could and did understand one requirement differently (and submitted different offers respectively)



III. Remedies (1/2)



- **Appeal before PMB**
 - Shall not be submitted later than 2-7 days before submission of the tenders
 - Does not suspend the procurement
- **Deposit before PMB**
 - **0.5%** of the contract price, but not more than **EUR 15'000** (works) or **EUR 840** (goods, services)
 - If not possible to determine contract price – **EUR 3'400** (works), **EUR 840** (goods, services)
- **Review** – 30-33 days from the submission

III. Remedies (2/2)

- **PMB may uphold the documentation or request CA to change respective requirements**
 - **Appeal of the PMB decision before court**
 - Does not suspend execution of the tender contract
 - Temporary protection measure (suspension) may be requested, but mostly rejected
- + Administrative liability to head of the institution/ members of the procurement commission**

Thank you!

Questions?

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In the Centre of Europe, with the EU regulations...



Be prepared to use the electronic system

- CVP IS (Central Public Procurement Information System)
- More than 87% of procurements (one of the best results in the EU)
- Under the draft new law, all communication is through CPV IS only (with minor exceptions)
- CVP IS is not perfect and in almost all cases any technical failure is not an excuse (case law, the PPO practice)



Be quick

- 10 days / 5 b.d. for contesting tender conditions (including the draft contract)
 - In case of failure, all can become obligatory
 - 10 / 15 days / 5 b.d. to contest other decisions
 - 15 (30) to contest a decision to blacklist
- Ban for 3 years



Think of a bid structure twice

- Joint venture restrictions – main partner has an obligation to perform the main works (amendment expected)
- Restrictions to engage quasi-subcontractors (?), future employees
- Compliance with almost all qualification requirements is necessary at the moment of submission of a bid
- Acknowledgement of foreign licences needed
- Pricing: fixed price is used often and there are limited possibilities to amend something

**READY
STEADY
BID**

Be aware of the blacklisting policy

- Strict approach
- Limitations on participation in tenders in the event of substantial breach of even a small procurement contract
- Blacklisting of all joint venture partners
- Self-cleaning in the draft law only (so far)

**THE
BLACKLIST**

Have in mind the review procedure

- Pretrial stage is obligatory (claims are reviewed by the contracting authority itself)
- Court review the decisions of the contracting authority
- But the PPO (Public Procurement Office) is also very active although formally not included in the review procedure



Thank you!

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