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New tendering law

April 2006

>>> *This update discusses the implications of Vietnam's new Law on Tendering 2005, which became effective as of 1 April 2006.*

A. Introduction

On 29 November 2005, Law 61-2005-QH11 on Tendering was passed (**Tendering Law**). Effective as of 1 April 2006, the Tendering Law represents the 6th update of Vietnam's tendering regulations since 1996. Regrettably, it does not greatly improve the previous framework which was already confusing and contradictory (see our April 2005 and July 2003 Tendering Law Updates on www.vietnamlaws.com).

To implement the Tendering Law, the Ministry of Planning and Investment (**MPI**) has prepared the necessary Government decree (**Draft New Decree**). Following discussions held by the MPI on the Draft New Decree in Hanoi and Hue over the last 2 months, the Draft New Decree is understood to have been submitted to the Government for approval. We had hoped that the Draft New Decree would be issued before the effective date of the Tendering Law but we have been informed that it is now planned to be issued during April.

As currently drafted, the Draft New Decree will repeal the previous framework enshrined in Decree 88-1999-ND-CP of the Government dated 1 September 1999 (as amended by Decree 14-2000-ND-CP dated 5 May 2000 and Decree 66-2003-ND-CP dated 12 June 2003) on tendering (**Old Tendering Regulations**).

We had been informed that the earlier draft of the Draft New Decree also repealed the controversial Decree 16-2005-ND-CP of the Government dated 7 February 2005 (see our April 2005 Tendering Law Update on www.vietnamlaws.com). However, the reference to Decree 16 has been omitted from this (second draft) Draft New Decree. We are now informed by an official from the MPI's Department of Tendering that the Government will issue a separate legal instrument to deal with Decree 16. Based on Notification 46-TB-VPCP of the Office of Government dated 2 March 2006, we expect the short-lived reforms under Decree 16 to be extinguished completely by the upcoming separate legislation - Deputy Prime Minister Nguyen Tan Dung has called for the "provisions in Decree 16 on selecting tenderers in construction activities ... [to] be amended and supplemented to comply with the Law on Tendering...".

B. Contracts which must be put to tender

As under the Old Tendering Regulations, the Tendering Law requires tendering in respect of the following three types of contracts:

1. Contracts for consulting services, defined as including:
 - > Consultancy services on project preparation, comprising formulation and assessment of planning reports, charts on overall development, architecture, pre-feasibility and feasibility study reports.
 - > Consultancy services on project implementation, comprising surveying, design, total estimated budgets and estimated budgets, preparation of tender invitation documents, assessment of tenders, and supervision of execution of building and installation of equipment.
 - > Consultancy services on project management, arranging finance, training, technology transfer and other consultancy services.
2. Contracts for procurement of goods (including machinery, equipment, raw materials, fuel, supplies, consumer goods, and services other than consultancy services).
3. Contracts for construction and installation which is part of the process of building and installing equipment in construction works and items of works and of renovation and major repairs.

C. Application to foreign invested projects

Unlike the Old Tendering Regulations, the Tendering Law does not make any specific reference to foreign invested projects. The Old Tendering Regulations expressly applied to joint venture enterprises (**JVEs**), business co-operation contracts (**BCCs**) and foreign invested shareholding companies in which the Vietnamese party is a State owned enterprise (**SOE**). However, the scope of the Tendering Law does extend to (among others) "investment and development projects financed by

the State as to thirty (30) percent or more"; and applicable entities include "foreign organizations and individuals participating in tendering activities". We understand, and this has been confirmed by the MPI, that JVEs, BCCs and foreign invested shareholding companies in which the Vietnamese party is a SOE with a capital contribution of 30% or more do fall within the ambit of the Tendering Law and are subject to the requirement to conduct tendering in accordance with Vietnamese tendering rules.

Exemptions from the requirement to conduct tendering are available (for foreign invested, domestic and State investment projects alike) in the following cases:

- > Upon occurrence of events of *force majeure*, wars, breakdowns, and the like.
- > Tender packages in which the foreign donor stipulated that there be direct appointment of a contractor.
- > Tender packages belonging to national confidential projects or urgent projects in the national interest or for the safety and security of energy as decided by the Prime Minister.
- > Tender packages for procurement of material and equipment to restore, maintain or expand the capacity of equipment/technological production lines which were previously purchased from the one supplier; and in order to ensure compatibility of facilities and technology if it is not possible to purchase such materials and equipment from other suppliers.
- > Tendering packages having a value of less than VND1 billion in respect of procurement of goods or for construction and installation where the project is for investment and development; tendering packages having a value of less than VND100million in respect of procurement of goods for recurrent procurement; and tender packages of less than VND500 million in respect of consultancy. (However, tendering still applies where "deemed necessary".)

If an exemption is available, appointment of a contractor is permissible. However, the selection process must comply with procedures yet to be stipulated by the Government.

D. Approval of tendering process

As under the Old Tendering Regulations, the Tendering Law requires approval to be obtained from the "authorized person" at various stages in the tendering process (tender plans, tender invitation documents and tender results). The "authorized person" varies according to the type of project as follows:

- (i) In the case of projects partly financed by the State (eg JVEs with 30% or more SOE capital), the authorized person is the board of management or authorized representative of the capital contributing parties.
- (ii) In the case of projects 100% financed by the State, the authorized person is the person with the right pursuant to law to make project decisions.

In a welcome reform from the Old Tendering Regulations, the tendering process for foreign invested projects falling within (i) is no longer subject to "external" State intervention in the form of State consent or approval of any steps of the tendering process.

E. Forms of selection of tenderers

The forms of selection of tenderers under the Tendering Law are:

1. Open tendering: the main form of tendering, whereby the number of participating tenderers is not limited. As previously, the conditions and time-limits for participation in the tendering must be publicly announced prior to issuing tender invitation documents. It is not clear exactly when the announcement must be made (under the Old Tendering Regulations it was 10 days) but this is expected to be detailed in implementing guidelines. As did the Old Tendering Regulations, the Tendering Law provides for such announcement to be made in the tendering information newsletters and web pages of the State and of ministries, branches and localities, as well as via the mass media.

2. Limited tendering: a form of tendering, whereby at least 5 experienced and capable tenderers are invited to participate, which may only be applied upon satisfaction of one of the following 3 conditions:
 - > Only a limited number of tenderers are capable of satisfying the requirements of the tender package where the tender package is of a research and experimental nature;
 - > The foreign donor requires limited tendering; or
 - > The tender package has highly technical requirements or technical peculiarities. .

Where there are less than 5 potential tenderers, an investor may make a submission to the authorized person for consideration and decision.
3. Appointment of tenderer: this form applies in the exemption cases discussed in C above.
4. Competitive offers: as previously, competitive offers are permitted in the case of tender packages for procurement of goods valued at less than VND2 billion and where those goods are commonly used goods which are readily available on the market. A minimum of 3 offers from 3 different tenderers on the basis of the order request in the tender invitation documents must be obtained.
5. Self implementation: this applies where the investor is also a contractor. The contractor must have sufficient capability and experience and an estimated budget for the package must be approved in accordance with "regulations". An independent entity must supervise implementation of the tender package.
6. Special cases: where the forms of selection above cannot be applied, the investor must prepare a plan for selection of a contractor which ensures competitiveness and economic effectiveness and submit the plan to the Prime Minister for approval.

F. Conditions for tenderers

Under the Tendering Law, all participating tenderers must satisfy the following basic conditions:

- > If an organization, must have a business registration certificate (or relevant equivalent in the case of foreign tenderers); if an individual, must have appropriate professional certificate and have full capacity for civil acts.
- > Must be an independent cost accounting entity.
- > Must not be in an unhealthy financial status, bankrupt, insolvent or in the process of dissolution. Also, if an individual, must not be subject of investigation for a criminal offence.
- > Must submit only one tender in respect of each tender package, either in the capacity of an independent tenderer or as part of a tender partnership.
- > Must satisfy the requirements in the tender invitation documents.
- > Must satisfy the requirements relating to ensuring competitiveness.

As previously under the Old Tendering Regulations, the Tendering Law requires pre-qualification of tenderers in the following cases:

- > Contracts for construction and installation valued at VND200billion or more; and
- > Contracts for procurement of material and equipment valued at VND300billion or more.

G. International tendering and restrictions on foreign tenderers

Under the Tendering Law, an international tender may only be organized in the following cases:

- > Where there is no local tenderer meeting the project requirements or for projects in which domestic tendering has been held without selection of a winner;
- > Where the project is financed by ODA and the funding agreement stipulates that the project is to be put to international tender;
- > Where the tender is for procurement of goods which are not manufactured domestically.

Specific restrictions on the participation of foreign tenderers in tendering in Vietnam continue to apply. The restriction that a foreign tenderer must enter into a partnership with a Vietnamese contractor or undertake to use Vietnamese sub-contractors still applies.

Preferential treatment in international tendering is available to:

- > A tenderer being an enterprise established and operating under the Law on Enterprises and the Law on Investment (which now covers domestic and foreign invested enterprises).
- > In the case of tenders for consultancy services or construction and installation or EPC contracts, tender partnerships in which an enterprise established and operating under the Law on Enterprises and the Law on Investment will undertake works constituting at least 51% of the tender package.
- > In the case of tenders for procurement of goods, whoever offers a ratio of domestic manufacturing costs of at least 30%.

H. Tendering process

The tendering process may be generalized as follows:

1. Tender plan:

A tender plan for the whole project must be prepared, itemizing:

- name of tender package;
- tender package price;
- financing source;
- form of selection of contractor; method of tendering;
- scheduled time for selection of contractor;
- form of contract;
- scheduled period for performance of contract;

There is no prescribed form for tender plans.

Where it is not yet possible to prepare a tender plan for the whole project, the authorized person may permit the preparation of a tender plan for each part of a project as appropriate for each phase of implementation.

Tender plans must be approved by the authorized person.

2. Three methods of tendering are permitted:

- > Single envelope tendering: applicable to tenders for procurement of goods, for construction and installation and for EPC tender packages.
- > Dual envelope tendering: only applicable in respect of tenders for selection of consultants. In dual envelope tendering, first the technical proposals are opened for assessment and then the financial proposals (of those tenders that satisfy the technical requirements) are assessed.
- > Two-phase tendering: applicable to tender packages with technical, new technological, complex and diversified requirements.

3. Tender invitation documents:

Tender invitation documents must be prepared in accordance with prescribed rules and approved by the authorized person. Notices inviting tenders must be advertised at least 10 days prior to the issuance of the tender invitation documents.

4. Tender guarantee:

Tenderers must provide the tender guarantee stipulated in the invitation documents (not exceeding 3% of the approved tender package price) prior to the deadline for tender closing.

5. Tender closing:

The deadline for tender closing must be at least 15 days in the case of domestic tendering and 30 days in the case of international tendering, as from the date of issuance of tender invitation documents.

6. Tender opening:

As previously, the Tendering Law require tenders to be publicly opened immediately after tender closing, on the date and at the location stated in the tender invitation documents. The main information set out in the tender of each tenderer must be publicly announced during the tender opening session as well as recorded in the minutes of the tender opening.

The Tendering Law still requires a representative of the party calling for tenders to sign the minutes of the tender opening, however representatives of participating tenderers are only required to sign if they are present.

7. Tender consideration:

As previously, the Tendering Law requires the party calling for tenders to study, assess in detail and classify the opened tenders on the basis of the requirements of the tender invitation documents and the criteria for assessment approved by the authorized person prior to tender opening.

Either the marking method or the pass/fail method can be used for the assessment of tenders for the procurement of goods, for construction and installation and EPC tender packages. The marking method is used for assessment of tenders for consultancy services. Assessment criteria (as formulated in the tender invitation documents) must stipulate a minimum technical requirement of 70% of the total points for technical aspects (80% in the case of a tender package with high technical requirements).

A consultancy tenderer which satisfies the following conditions will be the winning tenderer:

- > Has a valid tender;
- > Has technical proposals comprising capability, experience, solutions and personnel which have been assessed as satisfying requirements;
- > Has the highest overall score for technical aspects and for financial aspect;
- > The proposed contract sum does not exceed the approved tender package price.

A supply, construction or EPC tenderer which satisfies the following conditions will be the winning tenderer:

- > Has a valid tender;
- > The tenderer is assessed as having satisfied the requirements on capability and experience;
- > Has technical proposals which have been assessed as satisfying the requirement pursuant to the marking method or pass/fail method;
- > Has the lowest price on an equal footing basis;
- > The proposed contract sum does not exceed the approved tender package price.

8. Tender results:

It remains mandatory for tender results to be approved by the authorized person and to be evaluated. After the authorized person has issued its approval, the tender results must be announced and the contract negotiated and entered into with the successful tenderer. In the case of contracts to be signed with foreign tenderers, the contents must be approved by the authorized person.