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GUIDELINES for non-Ukrainian suppliers on participation in public procurement tenders in Ukraine

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I. GENERAL INFORMATION

One of the most notable examples of successful reform over the last few years in Ukraine is the public procurement (PP) reform. The PP reform has contributed to ending several corruption mechanisms/schemes and has increased the interest of new businesses in the PP market. The importance of the reform was recognized and is supported by the main international donors and partners of Ukraine such as the EU, EBRD, WB, USAID, IMF, GIZ, Canadian Government, and the UNDP.

A core role in the success of the reform belongs to the current Public Procurement Law which entered into force in 2016 (PPL2016). This introduced mandatory use of the full-range eProcurement system PROZORRO (which means “transparently” in Ukrainian). In April 2020, the current PPL2016 was replaced by new edition of the law, PPL2020.

Public tenders in Ukraine are open to a broad range of economic operators, including private individuals, sole traders and registered companies – domestic or foreign without limitations. **From April 2020 groupings (consortia) of companies also have the possibility to participate in tenders.**

In terms of the bodies which are obliged to publish their tenders and apply the PPL, they include public authorities, local self-government bodies, social security bodies and other entities (health care facilities, educational, scientific and cultural institutions etc.); utilities (e.g. in the energy, transport and telecommunications sectors) and State-owned or controlled enterprises. The eProcurement system Prozorro has simplified access for economic operators to public contracts, making it easier to participate and compete.

The volume of Ukraine's public procurement market in 2019¹ was 581,3 billion UAH (equivalent to 22,4 billion USD). In terms of value, the largest contracts concern construction and repair works, fuel, energy, transport means and transport services, construction materials, medical equipment and medicines.

The statistics shows positive trends over the last three years for the promotion of stronger and fairer competition conditions in Ukraine for suppliers from GPA countries:

) Bidders from 48 countries participated in Ukrainian tenders in 2019, which shows a notable improvement compared to previous years. In terms of contract values, the most successful bidders were from Bilorus (1,6 bn UAH), Czech Republic (1,158 bn UAH), Canada (1,113 bn UAH), Poland (1 bn UAH) and the USA (0,97 bn UAH).

) The share of non-competitive (negotiated and direct award) procedures (in terms of value) was 44% in 2015, 32.25% in 2016, 19.5 % in 2017 and 21.9 % in 2018. This reflects a very positive trend for reducing non-competitive procedures²;

¹ <https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=5cc39077-e96a-40fd-815b-b03f9e0187fa&title=ZvitSferiPublichnikhZakupivelZa2019-Rik>

² Significant part of non-competitive procedures is related to the procurement of municipal utility services or postal services (i.e. 22.05 % of all procurement contracts or 67.3 % of non-competitive procedures in 2016, or 12.5 % of all contracts values or 57% of negotiated contracts in 2018) which are mainly monopolised. A notable portion of negotiated contracts as non-competitive procedures was conducted for the purposes of the defence, mostly caused by the on-going war in the East of Ukraine.

) At the end of 2019, there were approximately 29 000 of active procuring entities that conducted at least 1 procurement process in PROZORRO (including a few procuring units under the same contracting authority in case of large authorities) and app. 160 000 active suppliers (“active” means participation at least in 1 procurement operation).

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.

Tender notices can be searched by keyword, by CPV code, by the name of the procuring entity or some other search criteria. Operators can register to bid via e-platforms linked to (accredited by) ProZorro. A small fee is payable for the submission of bids. Different rules and timelines for the submission of bids apply, depending on whether the contract is below or above threshold and on which procedure is used.

The majority of contracts are awarded through the open tender procedure, meaning any operator may submit a bid. The contracting authority may apply one or several qualification criteria relating to bidders' equipment and resources, staff and previous experience.

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/>).

The openness, comparative simplicity and convenience of using ProZorro to access the Ukrainian PP market makes it quite attractive for foreign businesses. Last but not least, Ukraine joined the WTO Government Procurement Agreement in 2016, meaning its procurement regime is similar to that in other GPA countries.

II. PURCHASERS

Contracting authorities (or Procuring Entities) in Ukraine are called “**Zamovnyk**” and all procurements of contracting authorities are regulated by the PPL.

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

- 1) **Traditional budget-funded contracting authorities directly financed from State or local budgets** – including 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 State-owned enterprises or municipal companies enjoying a monopoly in the areas of public interest explicitly listed in the PPL (i.e. power and/or heat 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:

-) enterprises that are recipients of public 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 authorized capital belongs to the State or a local community.

Central procurement bodies (CPBs) are very new actors conducting procurement procedures on behalf of contracting authorities in Ukraine. Currently (and of 2020) there are 2 CPB acting at central level (CPB “Professional Procurements”) and specific CPB in the health care sector “Medical Procurements of Ukraine” as well as a several new CPBs were established in 2020 at regional level.

II. BIDDERS (WHO CAN BID FOR CONTRACTS)

A potential seller (contractor) to the public sector under the PPL is called a “**Tenderer**” (“**Uchasnyk**”). This includes a natural person, including a sole trader, or a legal entity (whether resident or non-resident) that submits a tender or takes 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 as private entrepreneur³, which means that it may be any natural person (a citizen of Ukraine or 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. Finally, from April 2020 temporary associations/groupings of companies also have a possibility to participate in tenders.

NB! Local content, specific exclusions and sanctions. There are no local preference provisions in the public procurement legislation in Ukraine. Moreover Art.5 of the PPL strictly forbids discrimination on national or related grounds, stating that “Domestic and foreign tenderers, regardless of their form of ownership and business legal structure, shall participate in procurement procedures on equal terms”.

In terms of **specific exclusions** – we may mention the publicly available official Unified State Register of Perpetrators of Corruption or Corruption-Related Offences (<https://corruptinfo.nazk.gov.ua/>) including officials and legal entities found to be liable for corruption offences. Such listed entities are not allowed to participate in public procurement. There is also a mandatory exclusion for bidders who have been found liable for bid rigging within the previous three years. All decisions of the Anti-monopoly Committee of Ukraine (competition protection authority) on bid-rigging cases are published at official web site (<http://www.amc.gov.ua>).

In terms of **international sanctions** (EU or UN sanctions) the Ukrainian PPL does not have any provisions except for one recent addition. The Law of Ukraine “On sanctions” (2014) and respective Decision of the National Security and Defense Council (enforced by Presidential Decree № 467/2016 dated 17.10.2016) approved a concrete list of Russian-registered or Russian state-owned companies that are forbidden to participate in public tenders.

³The 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 an entrepreneur. On contrary, if a natural person provides any services on a continuing basis (legal advice, auditing, cleaning, rental, etc.), the tax law provides that such person is required to be registered as entrepreneur. Tax authorities are in charge of conducting control over the legitimacy of economic activities carried on by natural persons.

III. WHAT IS PURCHASED

The object of a procurement in the wording of the PPL 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 Ukrainian PPL also has a limited number of exemptions similar to most EU countries (state secrets, some financial services, purchase of immovable property etc).

The meanings of the categories of goods, services and works are set out in Article 1 of the PPL. The main thing to note is that the definition of “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 the PPL applies. There are also different rules for these groups regarding the determination of the procurement item.

- 1) The minimum value threshold to apply one of four procurement procedures is 200,000 UAH for goods/services and 1.5 million UAH for works.
- 2) For contracting authorities in the utilities sectors (e.g. energy production and supply, water, transport, postal services and telecommunications), the relevant value thresholds to apply one of four procurement procedures are:
 -) For goods/services - 1 million UAH,
 -) For works - 5 million UAH.
- 3) If the contract value exceeds the EU thresholds for goods/services (133 000 euro) or for works (5,150,000 euro) all tender notices must be published on PROZORRO in English.

Finally, **from April 2020** if the value of the procurement item **equals or exceeds 50,000 UAH** but is lower than the thresholds indicated above, the contracting authority is obliged to conduct a simplified eAuction through Prozorro or conclude a direct contract with a supplier selected at its own discretion in limited cases listed in the PPL. Even in the latter cases (direct award), it is mandatory for the contracting authority to publish a report about the concluded contract on the Prozorro website.

According to the PPL, each procurement item must be defined on the basis of EU Common Procurement Vocabulary (CPV) codes⁴. In the case of works, in addition to CPV the relevant State construction standards are also applied to identify works procurement item (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

For procurements above the value thresholds indicated above, the PPL requires the use of specific procurement procedures: three of which are competitive (open tender, restricted tender and competitive dialogue) and one of which is non-competitive (negotiated procedure).

⁴ The EU classification of public procurement subjects/items is called the Common Procurement Vocabulary (CPV).

Statistics show that the most popular and main procedure is 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.

The Table below summarizes the rules which apply to all procedures except for the simplified eAuction for low-value contracts (although these are likely to be of little interest for foreign businesses, they are still fully available for their participation).

	UNDER EU THRESHOLD (Open tender or Competitive Dialogue)	EU OPEN TENDER or COMPETITIVE DIALOGUE	EU RESTRICTED TENDER	NEGOTIATED PROCEDURE
Way of publication	Notice in Ukrainian only on PROZORRO (www.prozorro.gov.ua) and on own web-page of procuring entity.	Notice in Ukrainian and in English on PROZORRO (www.prozorro.gov.ua) and in Ukrainian on own web-page of procuring entity.	Notice in Ukrainian and in English on PROZORRO (www.prozorro.gov.ua) and in Ukrainian on own web-page of procuring entity.	Only contract award notice in Ukrainian on PROZORRO (www.prozorro.gov.ua)
Deadlines for submission of tender	In case of open tender – not less than 15 days for submission of bids from publication of tender notice; In case of competitive dialogue – not less than 30 days (from publication of tender notice) for submission of initial bids, and not less than 15 days for submission of final bids.	In case of open tender – not less than 30 days for submission of bids from publication of tender notice; In case of competitive dialogue – not less than 30 days (from publication of tender notice) for submission of initial bids, and not less than 15 days for submission of final bids.	Not less than 30 days (from publication of tender notice) for submission of request to participate in qualification selection, and not less than 25 days for submission of final bids.	N/A
Amendments to Tender Documents	If made –time limit for bid submission must be extended for not less than 7 days.	If made – time limit for bid submission must be extended for not less than 7 days	If made – time limit for bid submission must be extended for not less than 7 days	N/A
Answers to requests of Bidders	A contracting authority is obliged to answer requests (publicised as anonymous) through the e-system. All answers are published and	A contracting authority is obliged to answer requests (publicised as anonymous) through the e-system. All answers are	A contracting authority is obliged to answer requests (publicised as anonymous) through the e-system. All answers are published and	N/A



	available for public access.	published and available for public access.	available for public access.	
Evaluation Criteria	Lowest price only or Lowest price and other criteria (minimum weight of price is 70%, except for competitive dialogue)	Lowest price only or Lowest price and other criteria (minimum weight of price is 70%, except for competitive dialogue)	Lowest price only or Lowest price and other criteria (minimum weight of price is 70%)	N/A
Possibility of negotiations	NO for open tender and YES for 1 st stage of competitive dialogue	NO for open tender and YES for 1 st stage of competitive dialogue	No	Yes
Digital signature for e-submission	Required	Required	Required	N/A

Competitive dialogue

This procedure may be used for works or services 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 two-stage procedure involving negotiations at the first stage. The goal of the negotiations is the identification 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. designing of project for construction works which may involve different options and consideration of various well-elaborated technical solutions.

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 exceptional cases precisely listed in the Article 40 of the Law “On Public Procurement”, namely:

- 1) Where there is an absence of competition, including for technical reasons in the relevant market, procurement of works of art, procurement related to the protection of intellectual property rights, the completion of a procurement contract with the winner of an architectural or artistic contest;
- 2) 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;
- 3) If the contracting authority has cancelled the open tender procedure twice due to an insufficient number of tenderers, but the procurement item, its technical and



qualitative characteristics and the requirements for the tenderers shall not differ from the requirements established by the contracting authority in the tender documents;

4) 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;

5) When there is a need to perform additional construction works not included in 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;

6) 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;

7) Purchase of goods in eAuctions in case of liquidation/bankruptcy of economic operators.

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

Restricted Tender

The restricted tender was introduced by the new PPL 2020.

It may be applied only for contracts above EU thresholds and when there is a need for qualitative selection of tenderers. The procedure is conducted in two stages where qualification selection is the mandatory first stage. The minimum number of participants for the first stage (qualification selection) is four and if there are less than four participants the procedure is cancelled automatically by the eProcurement system. The qualification selection requires application of all of the qualification criteria set out in Art.16 (in other procedures, procuring entities are free to select one or few criteria) and to evaluate the information submitted by tenderers against all criteria. The evaluation method must include minimum indicators for each criterion and the weight of each criterion. All this information is published in advance.

The procedure commences with publication of a tender notice and tender documentation that can be duplicated by invitations (with content similar to the tender notice) sent by the procuring entity through the eProcurement system to the operators selected by procuring entity. Naturally sending of invitations through the eProcurement system requires that the economic operators are registered in the system.

The procuring entity must indicate in the tender notice (and in the invitation if sent by the procuring entity) a concrete quantity of tenderers to be invited for participation in the first stage of the procedure, not less than four. A minimum of three participants must be invited for the second stage, if there were at least 4 participants at first stage (qualification selection) and at least three were not rejected/excluded as result of qualification selection – in other cases the procedure is cancelled by the system.

The second stage involves evaluation of compliant bids of only the invited tenderers, based on an eAuction similar to an open tender.

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 PROZORRO and authorized e-platforms. Tender documentation is the main source of information for potential tenderers.

The general structure of tender documentation includes instructions for the preparation of bids, a description of technical specifications/requirements for the procurement item, qualification requirements for tenderers, the evaluation criteria and the draft contract.

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

Qualification criteria and grounds for exclusion (eligibility requirements)

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

If a tenderer is not compliant 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, three or even all four of such criteria:

<i>List of possible qualification criteria</i>
<p>Availability of equipment, resources and technology at the tenderer’s disposal. The Law does not require tenderers to have their OWN equipment. Thus, rented or leased or borrowed equipment may be used by the tenderer.</p>
<p>Availability of staff with the relevant qualifications and necessary knowledge and experience at the tenderer’s disposal.</p>
<p>Demonstrated experience in the performance of a similar contract. 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.</p>
<p>New criterion “financial capacity” (will be applied from April 2020) It covers both financial and economic standing as demonstrated by official financial reporting indicators such as a statement of turnover, profitability, liquidity or other financial indicators that are reflected in official financial reports. A procuring entity shall not require a level of yearly turnover (if such parameter is demanded within this criteria) which is larger than the estimated value of the contract.</p>

Exclusion grounds are listed in Article 17 of the PPL. There are 13 such grounds (including criminal records, bankruptcy, debts on tax and social security contributions as well as legal liability for offences related to child labour or other forms of trafficking in human beings). In order to simplify business access to public tenders, the PPL 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 set out in detail what is required, and they must be non-discriminatory.

The second aspect is clarified by the PPL, 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.

It is worth underlining that the PPL 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).

While the existence of discrimination depends on the specific case, there are general situations where discrimination is obvious and recognized as such by the Ukrainian review body. 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 certain manufacturer, references to technical standards not related to the procurement item.

Tender and contract security

According to Article 25 of the PPL, 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 five 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 a certain time (10 days from day of award);
-) 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 of 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 recognized as invalid by a court 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**.

VI. SUBMISSION OF BIDS

From 1st 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. **There are NO LIMITATIONS FOR FOREIGN companies to be registered in PROZORRO!**

NB! Registration. There is no registration facility at www.prozorro.gov.ua as this is essentially a publication portal. But there is link via the button “To participate” (“Взяти участь» in Ukrainian – the button in upper left 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 freely selected by the new user**. After successful registration an economic operator will use this platform for submitting tenders while tender opportunities, documentation and other information is available at state official web-portal www.prozorro.gov.ua and at all certified platforms. So registration of economic operators is only needed for submission of bids but not for searching of opportunities etc.

The registration in the e-system shall be made in one of the identification/authorization modes through:

- 1) the use of digital identification means in accordance with the Law of Ukraine “On Electronic Trust Services”;
- 2) the use of identification services provided by banking institutions according to the legislation;
- 3) the identification through receiving of bank’s payment by authorized electronic trading platform from the user. The operator of an authorized electronic trading platform provides an account for payment to the user. After the verification, the operator of an authorized electronic trading platform can either return the payment to the user or credit it as a payment for registration under the agreement between the user and the operator of an authorized electronic trading platform (the average level of confidence);
- 4) the identification through mobile communication operator under the legislation;

5) the identification through signing of the agreement between the user and the operator of an authorized electronic trading platform.

So all tender opportunities of public sector of Ukraine are mandatory published at official portal www.prozorro.gov.ua where these opportunities (as well as all other procurement information incl. tender documentation, submitted bids (BUT only after completion of eAuction), award information, contracts etc) are freely accessible to anyone visiting the portal even without registration.

NB! New “24-hours” rule. From April 2020 it is possible for tenderer to correct formal mistakes/non-compliances in submitted tender but limited to only 2 cases:

-) to update, correct or upload missed information on compliance to qualification criteria under article 16;
-) to update, correct or upload information (if missing) concerning right/authority of relevant manager/representative of bidder to sign procurement contracts.

Such correction can be done during 24 hours from date of respective request published by procuring entity in the eProcurement system. This limitation of 24 hours means that correction will take place only if respective documents and information are already available or exist at disposal of tenderer thus tender can be immediately corrected in regard to existing information missed due to insignificant technical mistake

It is also possible to find all payments/transactions (if contract is financed through State Treasury system from state or local budgets) between procuring entities and contractors by using the free service known as “007” (<http://www.007.org.ua/>). This service became available due to the integration of PROZORRO with the so called E-data system on public spendings (www.spending.gov.ua)⁵ that publishes in on-line the financial operations of State and local budgets in the State Treasury.

Despite such easy and free access to all public tenders information, participation in public tenders in Ukraine requires a **fee - but only for the submission of a bid in a specific tender** and not for registration or not for just searching or reading accessible information.

The fee level depends on the value of the contract as follows:

Current tender participation Fees	
Value of procurement	Fee
< 20,000 UAH	17 UAH
20,000 < 50,000 UAH	119 UAH
50,000 < 200,000 UAH	340 UAH
200,000 < 1,000,000 UAH	510 UAH
1,000,000 UAH < 4,000,000 UAH	1,700 UAH
> 4,000,000 UAH	3,400 UAH

If a tender is cancelled, the e-platform operator will return the fee for bid submission to the tenderer except for case when tenderer’s bid was rejected by contracting authority.

VII. PROCESS OF EVALUATION

The Ukrainian PPL envisages the possibility to use following evaluation criteria:

- 1) lowest price only;

⁵ Established by the specific Law “On Openness of Use of Public Finances”



2) lowest price and other criteria (multi-criteria evaluation) where lowest price cannot be less than 70 % of weight (except for competitive dialogue procedure where there are no limitations for weight of price).

NB! Life-cycle costs. From April 2020 it is also be possible to use life-cycle cost evaluation criteria/approach reflecting the purchase price plus other costs that will be directly incurred by the contracting entity in the use, maintenance or disposal of the procurement item. As with the lowest price criterion, the life-cycle costs can be used solely or in combination with other criteria and in the latter case (combination with other criteria) life-cycle costs cannot be less than 70% of weight (except for competitive dialogue).

An eAuction is the only possible to evaluate bids. It is held to allow bidders to reduce their prices. The identity of other bidders is kept confidential until the end of the eAuction. The auction takes place in three rounds and a minimum percentage price reduction may apply for each round, or bidders may keep their prices the same. Depending on the value of the contract (below or above EU thresholds), evaluation of bids to determine compliance with the tender documentation and qualification criteria takes place either before or after the eAuction. The results of the eAuction and the decision on award of contract are published on the ProZorro website.

NB: If price alone is used as the award criterion, the eAuction 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 eAuction. 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% except for competitive dialogue procedure where there is no minimum weight of price).

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

Bidders participating in an eAuction receive the link to the eAuction from their selected platform (where they are registered). By using this link, it is possible to bid in the eAuction just having stable internet access (it is possible also to bid via smartphones). At the beginning of the eAuction, 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 eAuction 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 two minute break to build a table showing the new reduced prices from the highest to lowest price - and then the next round happens.

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

NB! Abnormally low tender. From April 2020 the new PPL has introduced new rules on "abnormally low tenders" (ALT) – a tender with a price (discounted price in case of multi-criteria) that is more than 40 % lower than the average price of all other tenders before the eAuction and/or more than 30% lower than the second lowest price. ALTs will be identified automatically by the eProcurement system provided that at least three tenders are submitted. In cases where the best tender is an ALT,

a procuring entity shall demand from the relevant tenderer to submit within one working day a justification of its pricing. The justification may relate to:

- 1) savings in connection with the manufacturing (innovative) process, the services provided or with the construction method;
- 2) any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work, including special price sale offer (discount);
- 3) receiving of State aid by the tenderer.

If a requested tenderer does not submit any justification, its tender will be rejected. The procuring entity also has a right (not obligation) to reject an ALT if the justification submitted by the tenderer does not provide an appropriate explanation of the pricing.

VIII. REVIEW MECHANISM (INSTITUTIONS AND PROCEDURE)

The Complaints Review Board within the Anti-Monopoly Committee of Ukraine, is responsible for handling public procurement complaints, which must be submitted electronically. Complaints are submitted via the e-platform where the complainant is registered and a following fee is payable same day when complaint is submitted:

-) As regards the complaints submitted against tender documents, before expiry of the tendering period – 0,3% of the expected cost of a procured item or a part thereof (lot) if challenged, but not less than UAH 2 000 and no more than UAH 85 000.
-) As regards the complaints against final results of the procedures or results of intermediary phases of the procedures – 0,6% of the expected cost of a procured item or a part thereof (lot) if challenged, but not less than UAH 3 000 and no more than UAH 170 000.

The documentation supporting the complaint must be included in PDF format.

NB! Review statistics. During 2019 AMCU as a review body received 11147 complaints on procurement procedures (open tender, competitive dialogue and negotiated procedure), 8784 of which were accepted for review.

The effect of a complaint being submitted is to suspend the procurement procedure, meaning that the contract cannot be awarded until the Complaints Review Board has made a decision. Decisions of the Complaints Review Board can be appealed via the court system (judicial review). In addition to this formal complaints process which applies to contracts above certain values, it is possible to raise issues through the new procurement monitoring portal: DoZorro (<https://dozorro.org>) operated by a civil society network and in particular by Transparency International Ukraine.

It is possible to complain about any decision, action or omission of public entities in connection with their procurements. Practice shows that typical themes for complaints are the following:

-) qualification requirements that go beyond what the specific contract reasonably requires;
-) award criteria that are unnecessarily complex or given excessive weight, for example in the case of standard deliveries;
-) unreasonably sophisticated and exaggerated technical specifications;
-) requirements to use a particular trade mark;
-) unjustified rejection of bids;
-) award of a contract to a non-compliant bidder.

In principle, the right to complain is open to anyone who can demonstrate an infringement of their rights or legitimate interests. This includes typically:

-) Persons that considered submitting a bid, but did not do so, due to the content of the tender material.
-) Bidders that were rejected as unqualified or who had their bids rejected as non-compliant.
-) Bidders who were not awarded the contract.

Complaints must be submitted electronically (supplemented by electronic fee paid) and within certain time limits, depending on the subject of the complaint. To enable the complainant to prove the time of submission of the complaint, the electronic system automatically issues a registration card with an indication of the time and date of submission which is published on the Prozorro web-portal.

Submitted complaint cannot be withdrawn by complainant (so called anti-trolling provision); it must be considered by AMCU and decision on the review shall be made.

Fee for submission of complaints returned when complaint is satisfied by AMCU or procuring entity removes violation itself.

The decisions of the Complaints Review Board of AMCU may only be appealed before the Kyiv District Administrative Court. *For this purpose*, the decision of the Complaints Review Board includes a summary of the complaint, the findings of the Complaints Review Board and its decision and the deadline for appealing against the decision to the Court. Such an appeal will need to fulfil the requirements according to normal court procedures.

Possible compensation claims for damages can be considered only in business courts.

IX. SPECIFICS OF PUBLIC CONTRACTING IN UKRAINE

Ukrainian legislation (mainly the PPL) establishes several specific features of public procurement contracts in Ukraine which distinguish them from other ordinary contracts:

- 1) ***There is a fixed period for entering into the contract*** - the Law sets specific maximum periods for entering into procurement contracts depending on the procedure applied.

Time periods for public contracts under the Law on Public Procurement

Where an open tender procedure, restricted tender or competitive dialogue is used, a contract must be concluded not earlier than 10 calendar days following the date of publication of the notice of intent to award the procurement contract, and not later than 20 days after the date of selecting the winner.

Where a negotiated procedure is used, a contract must be concluded not earlier than 10 calendar days following publication of the notice of intent to award the contract in accordance with the PPL, and not later than 35 days.

- 2) ***A public contract is subject to an exhaustive list of 8 cases when contract amendments or changes are allowed*** namely:

-) the scope of the procurement has reduced, particularly in view of the actual expenditures of the contracting authority;
-) the price for a unit of supplies changed by maximum 10 per cent in case of price fluctuations for such supplies in the market, and provided that such an adjustment does not increase the amount specified in the contract;
-) improvement of the quality of the procurement item, provided that such improvement will not result in the increase in the amount specified in the contract;
-) duration of the contract was prolonged, i.e. the term for the fulfilment of obligations related to the conveyance of supplies, the performance of works and the provision of

services in case of occurrence of documented objective circumstances that caused such prolongation, including the force-majeure, a delay in financing the contracting authority's expenditures, provided that such changes will not result in the increase in the amount specified in the contract;

) a lower price was agreed on (for the same quantity (scope) and quality of supplies, works and services);

) the price was changed due to the changed rates of taxes and duties, in proportion to such changed rates;

) the consumer price index established by state statistics bodies under the law changed, or in case of change of the foreign currency exchange rate or Platts quotes and indicators, the regulated prices (tariffs) and rates applicable to the procurement contract, if the procurement contract provides for a procedure of price adjustment;

) the terms and conditions changed in connection with the application of rule on possible extension of the contract in the beginning of the budget year maximum at 20 % of value.

- 3) **Specific liability rules apply to the parties to the contract** - as contracting authorities often are economic operators engaged in the public sector, when developing contractual provisions regulating the issue of liability, these should be governed by Article 231 of the Commercial Code of Ukraine and the Law of Ukraine "On Responsibility for Untimely Performance of Monetary Obligations". In particular, the minimum set of provisions on the contractor's liability must include the following:

<i>Minimum provisions on the contractor's liability</i>	
<i>Types of breach of obligation</i>	<i>Amount of fine (penalty)</i>
A breach of terms and conditions relating to the quality (completeness) of goods (works, services).	A fine in the amount of 20% of the value of low-quality (incomplete) goods (works, services).
Non-compliance with deadlines for the performance of an obligation.	A penalty in the amount of 0.1% of the value of goods (works, services) to which it applies for each day of delay; for any delay exceeding 30 days, an additional fine amounting to 7% of the above value shall apply.

- 4) **Specific rules on nullity or invalidity the contract apply to public contracts** - the PPL differentiates between the possible invalidity of a contract and its nullity "a priori". A second situation is where the contract is recognized as null "a priori" by the Law namely:

) If the contracting entity has entered into a procurement contract without conducting a procurement procedure in accordance with PPL;

) if the terms and conditions of the concluded procurement contract differ from the awarded tender or where the essential terms and conditions of the contract were modified in cases not permitted;

) if it was concluded during the period of complaint review by the Complaints Review Board within the Anti-Monopoly Committee of Ukraine;

) if it was concluded in violation of the “standstill period” (10 days between award and conclusion of contract).

5) **Advance payments are quite limited in practice in Ukraine** and in generally allowed mainly for construction works or some complex services.

X. USEFUL LINKS

Public Procurement Web-portal PROZORRO	www.prozorro.gov.ua
The PP eAuction module	www.auction.openprocurement.org
Civil society PP monitoring web-portal DoZorro	www.dozorro.org
Financial transactions search service	www.007.org.ua
E-data system on public expenditures	www.spending.gov.ua
Ministry for Development of Economy, Trade and Agriculture of Ukraine as Public Procurement regulator in Ukraine	www.me.gov.ua
Antimonopoly Committee of Ukraine as Complaints Review Body	www.amc.gov.ua
GPAinUA Project	www.facebook.com/gpainua/