

New points of Tendering Law 2023

By Vision & Associates

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On 23 June 2023, Law on Tendering No. 22/2023/QH15 was passed by the National Assembly ("Tendering Law 2023"). The Tendering Law 2023 shall take effect on 1 January 2024 and replaces Law on Tendering No. 43/2013/QH13 passed by the National Assembly on 16 November 2013 and amended in 2016 and 2022. ("Tendering Law 2013").

The Tendering Law 2023 has new provisions replacing or supplementing those of the Tendering Law 2013 as follows:

1. Added applicable entities subject to the tendering law

Regarding the applicable entities subject to the tendering law, instead of the provisions in Clauses 2 to 4, Article 1 of the Tendering Law 2013, the tendering law applies to

- (a) Selection of contractors to provide consulting services, non-consulting services, and goods in the territory of Vietnam to implement an overseas direct investment project by Vietnamese enterprise in which that project is funded by the State budget for 30% or more or less than 30% but more than VND 500 billion in the total investment of the project;
- (b) Selection of investors to implement investment projects in the form of public-private partnerships (PPP), and investment projects using land;
- (c) Selection of contractors in the oil and gas field, except for selection of contractors to provide oil and gas services directly related to search, exploration, field development and oil and gas exploitation activities according to the provisions of laws on oil and gas;

As amended by Clauses 2 and 3, Article 2 of the Tendering Law 2023, the tendering law applies to

- (a) Contractor selection activities to carry out:
 - (i) Tender packages belonging to investment projects conducted by the State-owned enterprises according to the provisions of the Law on Enterprises and enterprises with 100% charter capital held by the State-owned enterprises;
 - (ii) Tender package for equipping physical and technical facilities, machineries and equipment to support scientific and technological development from the science and technology development fund of the State-owned enterprises.
- (b) Activities of selecting investors to implement business investment projects include:
 - (i) Investment projects that use land are required to organize tendering according to the provisions of land laws;
 - (ii) Investment projects in cases where tendering to select investors must be organized according to the provisions of law on industry and field management.

Thus, compared to the Tendering Law 2013, the Tendering Law 2023 unitedly uses the criteria "state-owned enterprises", "enterprises with 100% charter capital held by state-owned enterprises" and in cases where a tendering must be organized according to specialized laws in order to identify projects subject to mandatory application of the tendering law.

2. Modified criteria for determining eligibility of contractors and investors

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While the Tendering Law 2013 did not refer to this issue, Article 5 of the Tendering Law 2023 has added to Clause 2 the provisions specifically stipulating that business households are included as participants in tendering activities.

3. Ensuring competitiveness in tendering

Article 6 of the Tendering Law 2023 amends regulations on ensuring competitiveness in tendering compared to Article 6 of the Tendering Law 2023, specifically adding the regulations on:

- (a) Contractors submitting expressions of interest and prequalification applications must be legally independent and financially independent from project manager and supervisor; consultancy contractors that prepare, verify, and evaluate design documents and estimates; consultancy contractors that prepare and evaluate survey and design tasks;
- (b) Contractors participating in tendering must be legally independent and financially independent from project management or supervision consultancy contractors; consultancy contractors that prepare and evaluate survey and design tasks;

and at the same time, legislate the criteria for evaluating the legal independence and financial independence of contractors (which are currently specified in Clause 4, Article 2, Decree No.63/2014/ND-CP dated 26 June 2014, detailing the implementation of a number of articles of the Tendering Law on contractor selection).

4. Tender guarantee for contractor selection

(a) Modification of tender guarantee level for contractor selection

Clause 4, Article 14 of the Tendering Law 2023 provides more detailed regulations on the tender guarantee level for contractor selection compared to Clause 3, Article 11 of the Tendering Law 2013. Specifically, based on the scale and nature of each project, business investment projects, specific tender packages, tender guarantee levels in tender invitation documents are specified as follows:

- (i) From 1% to 1.5% of the tender package price applies to construction and mixed tender packages with a tender package price not exceeding VND 20 billion, tender packages for procurement of goods and non-consulting services with tender package prices not exceeding VND 10 billion;
- (ii) From 1.5% to 3% of the tender package price applies to tender packages that do not fall into the cases specified in point (i) above;
- (iii) From 0.5% to 1.5% of the total investment capital of the business investment project applies to investor selection.

Thus, the Tendering Law 2023 has amended the tender guarantee level for construction and mixed tender packages with package price \leq VND20 billion, tender packages for procurement of goods and non-consulting services with package price \leq VND10 billion and a number of other tender packages.

(b) The tender guarantee return period reduced to 14 days

According to Clause 8, Article 14 of the Tendering Law 2023, the time-limit for returning tender guarantees is reduced compared to Clause 7, Article 11 of the Tendering Law 2013, in particular to only 14 days from the date on which the result of contractor or investor selection has been approved.

(c) Additional cases of non-return of tender guarantees

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Clause 9, Article 14 of the Tendering Law 2023 adds additional cases of non-return of tender guarantees compared to Clause 8, Article 11 of the Tendering Law 2013, in particular including the following cases: Contractor fails/refuses to negotiate contract (if any) within 5 working days for domestic tendering and 10 working days for international tendering from the date of receiving a notice inviting contract negotiation or has negotiated a contract but refuses to finalize the contract and sign contract negotiation minutes, except for force majeure.

5. Additional acts prohibited in tendering activities

Compared to the Tendering Law 2013, the Tendering Law 2023 has added and stipulated in more detail a number of prohibited acts in tendering activities as follows:

(a) Regulations on cases of tender collusion

Clause 3, Article 16 of the Tendering Law 2023 has added the act of tender collusion with the provision: "Qualified and experienced contractors and investors have participated in the tendering and met the requirements of the tender invitation documents but intentionally not provided documents to prove capacity and experience when asked by the party calling for tender to clarify the tender documents or when asked to countercheck documents in order to create conditions for one party to become the winning tenderer", transparency in tendering work shall hence be increased, helping to limit tender rigging.

(b) Regulations on obstruction cases

Regarding obstruction cases, Clause 5, Article 16 of the Tendering Law 2023

- (i) has added and clarified the concept of "*Obstruction acts against contractors and investors*" already provided in Clause 5, Article 89 of the Tendering Law 2013, which means: "*Obstruction of competent persons, owner, party calling for tender, contractor, and investor in selecting contractors and investors*"; and
- (ii) in addition to the previous regulations of the Tendering Law 2013 on obstructive behaviours, also stipulates additional acts of obstructing tendering such as:
 - Intentionally making false complaints, denunciations, or recommendations to obstruct tendering activities;
 - There are acts of violating the laws on network safety and security to interfere in and obstruct online tendering.

6. Amending violations of contract transfer

Clause 8, Article 16 of the Tendering Law 2023 amends specific cases of violations in contract transfer compared to Clause 8, Article 89 of the Tendering Law 2013, including:

- (a) The contractor transfers to another contractor the work part of the tender package in addition to the maximum value for subcontractors and the volume of work for special subcontractors already stated in the contract;
- (b) The contractor transfers to another contractor the work part of the tender package that does not exceed the maximum value of the work for the subcontractor stated in the contract but is outside the scope of work for the subcontractor as proposed in the tender documents and proposal profiles that are not approved by the investor or supervision consultant;
- (c) The investor and supervision consultant approve the contractor's transfer of work specified in Point (a) above;

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- (d) The investor and supervision consultant approve the contractor's transfer of work specified in Point (b) above that exceeds the maximum value of work for subcontractors stated in the contract.

Thus, the regulations of the Tendering Law 2023 on contract transfer have changed, instead of providing a hard framework like Point a, Clause 8, Article 89 of the previous Tendering Law 2013 (the work part of the tender package has value from 10% or more or less than 10% but more than VND50 billion (after deducting the work part of the subcontractor's responsibility) calculated on the signed contract's price), the investor and supervision consultant are assigned to take responsibility for this matter.

7. New regulations on cases of cancellation of tendering

Cases of cancellation of tendering are provided in detail in Article 17 of the Tendering Law 2023 compared to Article 17 of the Tendering Law 2013, which do not fundamentally change but are clearly divided between contractors and investment options. In particular:

(a) Cases of cancellation of tendering for contractor selection include:

- (i) All expressions of interest, pre-qualification documents, tender documents, and proposal profiles do not meet the requirements of the invitation for expression of interest, invitation for pre-qualification, or tender invitation documents, and request documents;
- (ii) Changes in investment objectives and scope in the approved investment decision that change the workload and evaluation standards stated in the invitation for expression of interest, invitation for pre-qualification, tender invitation documents, request documents;
- (iii) The request for expression documents, invitation for pre-qualification, tender invitation documents, and request documents do not comply with the provisions of the Tendering Law 2023 and other relevant laws, leading to the selected contractor's failure to meet the requirements to implement the tender package;
- (iv) The winning tenderer commits prohibited acts specified in Article 16 of the Tendering Law 2023;
- (v) Organizations and individuals other than the winning tenderer commit prohibited acts specified in Article 16 of the Tendering Law 2023, leading to incorrect results of contractor selection.

(b) Cases of cancellation of tendering for investor selection include:

- (i) All tender documents do not meet the requirements of the tender invitation documents;
- (ii) Change of the objectives, scale, location, investment capital, and duration of implementation of investment and business projects due to force majeure, leading to change to the evaluation standards in the issued tender invitation documents;
- (iii) Tender invitation documents contain one or several contents that do not comply with the provisions of the Tendering Law 2023 and other relevant legal regulations, leading to incorrect results of investor selection or selected investors no longer meets the requirements to implement a business investment project;
- (iv) The winning investor commits prohibited acts specified in Article 16 of the Tendering Law 2023;
- (v) Organizations and individuals other than the winning investor commit prohibited acts specified in Article 16 of the Tendering Law 2023, leading to incorrect results of investor selection.

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8. Supplementing a number of tender packages that apply contractor appointment

Article 23 of the Tendering Law 2023 has legislated a number of cases of contractor selection in special cases as stipulated in Decision No. 17/2019/QĐ-TTg dated 8 April 2019 of the Prime Minister, on a number of tender packages and procurement contents in order to maintain regular operations, that are allowed to apply the form of contractor appointment in special cases as provided for in Article 26 of the Tendering Law 2013, with the following tender packages:

- (a) Tender package for transporting national reserve goods for relief and aid in the cases where immediate delivery is required.
- (b) Tender packages for renting warehouses to store temporarily detained goods; tender packages for hiring transportation, loading and unloading temporarily detained goods at seaports, centralized goods inspection locations in the cases where there is only one inside port service provider.
- (c) Tender package for importing sports weapons to serve sport training clubs, schools, and centres for annual practice and competition.

9. Additional tender packages in the form of competitive quotation

According to Article 24 of the Tendering Law 2023, approved tender packages for goods supply and construction (mixed tender packages) not exceeding VND 5 billion are allowed to apply the form of competitive quotation.

10. New points about selecting contractors to supply medicines, chemicals, testing supplies, and medical devices

The regulations of the Tendering Law 2023 on selecting contractors to supply medicines, chemicals, testing supplies, and medical devices have new points compared to the Tendering Law 2013. Previously, Article 48 of the Tendering Law 2013 only generally defined contractors providing medicines and medical supplies; now, Article 55 of the Tendering Law 2023 adds a number of notable new regulations to resolve difficulties and obstacles in tendering activities to purchase medicines, chemicals, testing supplies and medical devices. The highlight of tendering in the health sector is that public health establishments decide by themselves to purchase medicines outside the list of medicines covered by health insurance, and purchase vaccines for vaccination in the form of services.

11. Specific regulations on incentives in purchasing medicines

Regulations on incentives in purchasing medicines under Article 56 of the Tendering Law 2023 are more detailed and clearer than Article 50 of the Tendering Law 2013. In particular, the Tendering Law 2023 has introduced innovative and specific content for medicines of Vietnamese origin, with priority given to Vietnamese contractors in tender packages for procurement of medicines. Specifically, regulations on incentives in purchasing medicines according to Article 56 of the Tendering Law 2023 are as follows:

- (a) Incentives in purchasing medicines are implemented according to the provisions of Article 10 of the Tendering Law 2023 and the following regulations:
 - (i) For medicines produced by at least 3 domestic companies that meet the technical criteria according to the regulations of the Ministry of Health and in terms of quality and price, the investor shall decide to request the contractor to offer the domestically-produced medicines.
 - (ii) For medicines announced by the Ministry of Health, there are at least 3 domestic manufacturers with medicines production lines that meet EU-GMP principles or

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equivalents and meet technical criteria according to the regulations of the Ministry of Health and in terms of quality, price, and supply capacity; the tender invitation documents and request documents must stipulate that contractors are only allowed to offer domestically-produced medicines.

- (b) The Ministry of Health is responsible for publishing the list of medicines mentioned in Point (ii) above.

12. Online tendering is applied to all tender packages as from 2025

According to Point b, Clause 1, Article 50 of the Tendering Law 2023: "As from 1 January 2025, online tendering shall be applied to all tender packages, except for cases where tendering is not conducted on the National Tendering Network System according to Clause 5, Article 50.", while the Tendering Law 2013 did not regulate this issue./.

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