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PUBLIC PROCUREMENT

Bidders may prevent exclusion form a tender

From 19 April, 2016 Latvia is obliged to follow the European Union's new procurement directives.¹ Although all of the directive's requirements will only be implemented in Latvian laws in autumn, important provisions for obtaining European Union funding under the Public Procurement Law² (PPL) and the Law on Procurement of Public Service Providers³ (LPPSP) will enter into force on 20 May 2016. The new regulation will reduce the volume of tender documents to be submitted and examined and will increase the possibility for applicants to avoid disqualification from tenders.

In brief, the new amendments bring the following changes:

1. Applicants/candidates can prove their trustworthiness despite the presence of grounds for exclusion;
2. Qualification documents can initially be substituted by an applicant's statement;
3. The clients shall check tax debts and other grounds for exclusion on the date of submitting the application/offer. Tax support measures will no longer considered to be tax debts. (These do not apply to LPPSP);
4. The applicant may replace a subcontractor which is subject to grounds for exclusion;
5. The list of services subject to so-called small tenders rules has been revised;⁴

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Katrīne Pļaviņa

Head of Public Procurement
Practice
LL.M.
katrine.plavina@vilgerts.com

Debora Pāvila

Partner
M.Jur.
debora.pavila@vilgerts.com

¹ Latvia had to implement Directives 2014/24/EU and 2014/25/EU by 18 April 2016. Some of the requirements of the directives are clear enough for Member States to simply copy them into their laws. Thus the European Court of Justice has ruled that such provisions can be applied directly from the Directive without copying them. For example, if a municipality organises a tender for a project funded by the European Union after 19 April 2016, these clear Directive rules must be followed regardless of Latvian laws.

² In Latvian: Publisko iepirkumu likums.

³ In Latvian: Sabiedrisko pakalpojumu sniedzēju iepirkumu likums.

⁴ See: the new PPL and LPPSP Annex 2, which lists the CPV codes for so-called light touch procurement.



6. Turnover requirements may not exceed double the anticipated contract price.⁵

We will explain the first four changes below, so clients and applicants can adjust their approach to participating in and organising public procurements. Please take into account that the new procedures apply to all tenders announced after 19 April 2016.⁶ These new requirements will probably remain unchanged after the new PPL and LPPSP are adopted in autumn.

Restoration of reliability

Henceforth applicants will be able to prove they have reformed and that exclusion due to various infringements is unreasonable.⁷ Every time an applicant submits a bid, which the contracting authority should reject pursuant to PPL Article 39¹ or LPPSP Article 42, it may submit explanations and proof of measures, which prevent future misconduct.

The laws stipulate that such measures may include (i) compensation for damages or an agreement to this effect, (ii) cooperation with investigating authorities and (iii) technical, organisational or personnel measures. While the first two indicators are clear, the third indicator regarding applicant's measures may cause some confusion.

In international practice, such measures are dismissal of a bribe-giving board member, monitoring of possible bribery cases in business expenses and accounting policy requirements or regular audits of competition law compliance and internal guidelines.

The client must evaluate claims of reliability

In the event of receiving the aforementioned description of measures, the contracting authority will be obliged to decide whether the submitted explanation and proof permit it to trust the bidder. The contracting authority will have to evaluate the evidence submitted by the applicant and explain the evaluation in the procurement documentation⁸ (in a similar way to describing evidence about relying on subcontractors' capabilities and to address concerns about abnormally low tenders). Moreover, if it wishes, the contracting authority may approach government bodies for assistance in evaluating reliability measures. We stress that the client will not have the obligation to request such assessments from relevant government bodies if it would delay the tender procedure.

During drafting of the new PPL and LPPSP, this provision has raised concerns about how contracting authorities will ensure objective evaluation of reliability measures. We anticipate that companies penalised for breaches of the Competition Law will seek to restore reliability most often. In such cases, we advise bidders to apply for references (*uzzigna*) from the Competition Council after their staff has received training on competition law and the company has established internal compliance guidelines.

“The client will be obliged to decide whether the submitted explanation and evidence permit it to trust the applicant.”

⁵ See: PPL 41.3 and 41.2.1. The period to which turnover is applied is not regulated. The client has the right to state reasons for exceptions to this provision.

⁶ See: PPL Transitional Regulations Article 65 and LPPSP Transitional Regulations Article 21.

⁷ PPL 39³ and LPPSP 42¹.

⁸ PPL 39.4³ and LPPSP 42.4¹.

To contracting authorities we recommend (i) relying on references (*uzziņa*) issued to bidders by the Competition Council or (ii) asking the Competition Council to provide an opinion on whether the specific reliability explanation and its evidence should be taken into account. During the drafting of the laws, the Competition Council promised to provide such an opinion within 10 days.

New applicant/candidate verification procedures

The new procedures permit PPL and LPPSP subjects to shorten the procurement procedure at the cost of fewer applicant or candidate verification procedures. In other words, applicants will only have to submit statement of their compliance with the qualification criteria instead of voluminous qualification documentation.⁹ Applicants must prepare these statements in accordance with the European Single Procurement Document (ESPD);¹⁰ other statement forms are unacceptable. The advantage of the ESPD is that an applicant can fill it out just once and submit it for as many tenders as needed. Even though it is possible to fill out the ESPD on a portal created by the European Commission,¹¹ this option will most likely be linked to the introduction of e-procurement in Latvia by 2018.

Upon receiving the ESPD, the contracting authority shall verify the qualification information as usual and may ask the bidder to submit evidence regarding information therein, for example client references.¹² However, subsequent action differs for tenders regulated by PPL and LPPSP.

The PPL contracting authority will check the ESPD for the absence of grounds for exclusion in accordance with the new procedure. In other words, irrespective of the an ESPD, the PPIL contracting authorities will continue checking for grounds for exclusion, but only for the applicant declared the winner of an open tender or a candidate invited to submit a bid in other procedures.¹³ Contracting authorities must abide by these regulations regardless of whether an ESPD is used.

Therefore, PPL contracting authorities first check a bid's compliance with the technical specifications or compliance of the candidate's application with qualification criteria, and only then they check for the presence of disqualification indicators. The contracting authority is not obliged to check for the grounds of exclusion if it can exclude an applicant or candidate from the tender on the basis of the other submitted documents. We stress that the LPPSP already permits such a procedure for verifying ESPD or bids/applications only at the stage of determining the winner without additional rules.

Taxation payment regulations

The only area where an applicant cannot restore reliability is tax. However, the new regulations provide clearer and more applicant-friendly rules for tax checks, which render additional reliability restoration options unnecessary.

“An applicant will not be disqualified from participation in a tender if it has reached an agreement with the State Revenue Service on tax payment or tax support measures.”

⁹ PPL 44¹ and LPPSP 45¹.

¹⁰ The ESPD form is governed by European Commission Implementing Regulation 2016/7 of 5 January 2016, which sets out the standard form for the European Single Procurement Document.

¹¹ See: <https://ec.europa.eu/growth/tools-databases/espd/filter?lang=lv/>.

¹² PPL 37. 4¹ and SPSIL 47. 2¹.

¹³ PPL 39.3¹.

Firstly, a bidder will not be disqualified from participation in a tender if it has reached an agreement with the State Revenue Service on tax payments or tax support measures.¹⁴ Previously the Procurement Monitoring Bureau instructed contracting authorities to disqualify bidders, who had signed such agreements.

Secondly, contracting authorities will check the tax compliance of potential winners of PPL tenders on two dates - (i) the moment of submitting the application/bid and (ii) the day the contracting authority decides the winner.¹⁵ The first verification date essentially restores the old procedure, while the second date gives additional assurance to the contracting authority that the winner is an honest taxpayer.

We stress that the LPPSP does not impose the obligation to recognise tax support measures as tax payment or to check tax payment before determining the winner.

The bidder can replace an excluded subcontractor

If the subcontractor of an bidder or candidate falls under one of the grounds for exclusion, the contracting authority shall allow the bidder or candidate to replace this subcontractor with another equivalent subcontractor within 10 workdays.¹⁶

Conclusions

Although the primary aim of all of these provisions is to ensure the compliance of tenders with the requirements for securing European Union funding, the government does not have affirmation from the European Commission that the new provisions of PPL and LPPSP are sufficient for ensuring such compliance. In our opinion, by the coming autumn, when the draft laws will probably enter into force, contracting authorities should check the directive provisions regulating the specific procurement procedure, for example a negotiated procedure, and how the directive's clear and unambiguous provisions align with Latvian laws.

For example, pursuant to PPL Article 63 the contractual price for additional work may not exceed 50% of the framework contract price. Directive 2014/24/EU Article 72 expands these rights of the client, stipulating that the 50% restriction applies to each case of additional work rather than the entire sum for additional work. Therefore, the contracting authority may conduct negotiated procedures without a notice if it requires additional work for a technically unique procurement twice a year and each time it comprises 50% of the previously agreed contract price.

On the other hand, bidders must ask the contracting authority to apply procedures for restoring reliability and to consider the bidder's arguments for rectifying grounds for exclusion. As with any decision made during a procurement procedure, failure to consider arguments for restoring reliability may be appealed before the Procurement Monitoring Bureau.

¹⁴ PPL 39.6.2¹.

¹⁵ PPL 39.1.5¹.

¹⁶ PPL 39.8¹.

VILGERTS latest experience

We provide legal advice to the State Environment Service regarding a EUR 40 million ERDF-funded project to clean up tar ponds at Inčukalns. We evaluate the legality of the tender documentation and its compliance with European Union law, represent the client before the Procurement Monitoring Bureau and advise on the application of the Public Procurement Law in the tender procedure.

We helped the Riga Municipality Property Department prove to the Procurement Monitoring Bureau that the applicant did not adequately involve a subcontractor, on whose resources it relied, in the implementation of the procurement contract. The applicant has appealed the bureau's ruling, which was favourable to the department.

Law firm VILGERTS

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Public Procurements Practice Group



Katrīne Pļaviņa
Associate, Head of Public Procurement Practice
+371 26 164 110
katrine.plavina@vilgerts.com



Debora Pāvila
Partner
+371 29 149 110
debora.pavila@vilgerts.com

Contact Information

Latvia:	Elizabetes iela 33, LV-1010, Riga	latvia@vilgerts.com
Lithuania:	Ukmerges 322, LT-01402 Vilnius	lithuania@vilgerts.com
Estonia:	Tõnismägi 3A, 10119, Tallinn	estonia@vilgerts.com
Belarus:	Timiryazeva 72, 220035, Minsk	belarus@vilgerts.com