

SOME NEW REGULATIONS OF THE LAW ON BIDDING 2023

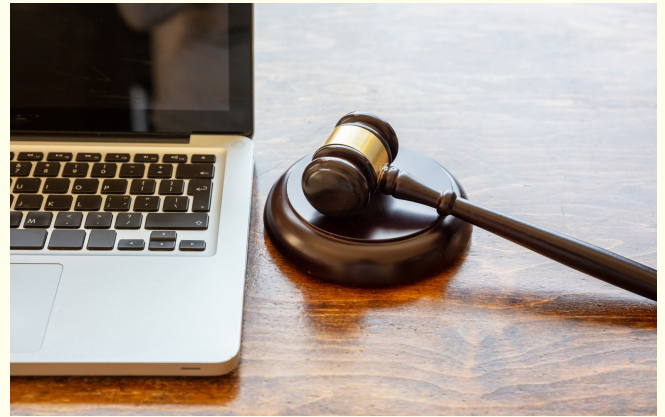
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The promulgation of the Law on Bidding 2013 has created a legal basis for procurement, management, and use of state capital and assets, ensuring openness, transparency, and competition in bidding. However, after more than 9 years of implementation, the provisions of the Law on Bidding 2013 have revealed many limitations and shortcomings when implemented in practice, and are no longer suitable for the current socio-economic situation. Therefore, to improve the regulations on bidding, on June 23, 2023, the National Assembly passed the Law on Bidding 2023, replacing the Law on Bidding 2013 and taking effect on January 1, 2024. In this Legal Newsletter, NHQuang&Associates will analyze some new regulations of the Law on Bidding 2023 that probably affect the business activities of enterprises.

Amending and supplementing prohibited acts in the Law on Bidding

Currently, the Law on Bidding 2013 has not yet addressed many violations and frauds in bidding, thus these violations have not been promptly handled, leading to negative effects in bidding. Amending and supplementing prohibited acts in bidding will help to minimize possible violations, increase transparency in bidding, and ensure fairness among contractors and investors. The Law on Bidding 2023 has amended and supplemented prohibited acts in bidding in Article 16, in particular:

- Supplementing prohibited acts of bid rigging such as pre-arranging or forcing party(ies) to submit or withdraw bids to secure bid winning by a pre-determined bidder; pre-arranging to refuse to provide goods or services, sign subcontracts; or engaging in other forms of agreement in advance to limit competition so that a pre-selected bidder wins the bid;
- Supplementing acts classified as obstruction such as obstruction of competent persons, project owners, auctioneers, contractors, and investors in selecting contractors and investors; intentionally filling false complaints, denunciation; or proposing untruthful information to obstruct bidding;
- Amending and supplementing prohibited acts of bid transfer. Accordingly, several acts of bid transfer are prohibited in the Law on Bidding 2023, including:



- A contractor transfers to another contractor the work portion of the bidding package which is beyond the maximum value allocated for subcontractors and the workload for special subcontractors as stated in the contract;
- A contractor transfers to another contractor the work portion of the bidding package which is within the maximum value of the work allocated for subcontractors as stated in the contract but beyond the scope of work proposed in the bids and documents of proposals without approval from the project owner or supervision consultants;
- A project owner or a supervision consultant approves the contractor to transfer the work that exceeds the maximum value of the work for subcontractors as stated in the contract.

Supplementing regulations on the investment contract

Compared to the Law on Bidding 2013, these are new regulations supplemented in the Law on Bidding 2023 to ensure consistency with procedures for implementing investment projects under investment laws. The regulations on investment contracts are specified in Section 2, Chapter 7 of the Law on Bidding 2023, including conditions for signing investment contracts, documents of investment contracts, and basic contents of the contract, etc.

Firstly, the Law on Bidding 2023 stipulates that the signing of an investment contract must meet the following conditions:

- At the time of signing the contract, the selected investor's bids are still valid.
- At the time of signing the contract, the selected investor must ensure the technical and financial capacity to implement the investment project under the requirements of the bidding document
- The signed investment contract must be compatible with the contents in the bidding documents, bids, decisions on approving investor selection results, and minutes of contract negotiation.

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Secondly, the basic contents of an investment contract include:

- Information about the parties to the contract, the effective date of the contract, and the contract duration;
- Information about the investment project, for example, objectives, location, project implementation progress; scale and total investment capital; conditions for land and other resource usage (if any);
- Responsibility for compensation, support, resettlement, and organizing the construction of auxiliary structures (if any); land allocation, land lease (if any);
- Obligations of the investor in implementing the commitments proposed in the bids; the establishment of an enterprise to manage the investment project (if any);
- Completion bonds; principles and conditions for contract adjustment and termination; transfer of rights and obligations of the parties;
- The governing law and dispute resolution mechanisms.

Thirdly, forms of completion bonds are also regulated as below:

- The investors must ensure responsibility for implementing the investment contract before or at the same time that the contract takes effect by (i) *submitting a letter of guarantee* by a domestic credit institution or foreign bank branch established under Vietnamese laws or (ii) *submitting a guarantee insurance certificate* by a domestic non-life insurance enterprise or a branch of a foreign non-life insurance enterprise established under Vietnamese laws. The total amount of the guarantee is stipulated in the bidding documents, which is from 1% to 3% of the total investment capital based on the scale and nature of the investment project.
- The completion bonds will not be refunded to the investors if they: (i) refuse to implement the contract when the contract has taken effect; (ii) breach the contractual agreements; or (iii) fall behind schedule in contract performance due to the investor's fault but refuse to extend the validity of the completion bonds.

Amending and supplementing regulations on types of contracts with contractors

The Law on Bidding 2023 supplements 4 forms of contracts signed with contractors, including (i) Charge-plus cost-based contracts; (ii) Output-based contracts; (iii) Percentage-based contracts; and (iv) Mixed contracts. Previously, under the Law on Bidding 2013, the lump-sum contract was the most basic form of contract; bidding packages on the provision of consulting services, simple non-consulting services, bidding packages for small-scale procurement of goods, construction, and installation, and combinations must apply the lump-sum contract. The Law on Bidding 2023 has abolished the above regulations and amended the regulations to allow investors and competent persons to decide the appropriate contract form for each bidding package based on the scale, nature, and conditions of each bidding package, aiming to resolve inadequacies in the application of contract forms. For example, the output-based contract is applied to jobs and services where payment is based on the results of contract performance that are accepted in terms of quality, quantity, and other factors.

The Law on Bidding 2023 also specifies regulations on cases of contract adjustments to comply with the principles stipulated in the Civil Code 2015 and construction laws. Accordingly, contracts are adjusted in the circumstances agreed by the parties in the signed contract following the relevant legal provisions, in cases of hardships under the Civil Code, etc. The contents of adjustments may include volume, schedule, price, and the application of additional purchase options, but all adjustments must not result in prolonging the implementation duration of the bidding package as stated in the contract, methods, formulas, and categories. The Law on Bidding 2013 only provides general principles in adjusting contracts in Article 67 without detailed regulations on conditions and contents of contract adjustments.

It can be seen that the Law on Bidding 2023 provides many amendments and supplements to improve the legal framework on bidding, enhance transparency, and ensure fairness in bidding activities in reality. Enterprises need to update and study the regulations of the Law on Bidding 2023 as well as legal normative documents detailing and guiding the implementation of the provisions of the Law on Bidding that will be issued soon for appropriate application in their business. In addition, it is necessary to pay attention to the transitional contents specified in the Law on Bidding 2023 such as the provisions on the application of legal regulations for the selection of investors to implement investment projects using land before the effectiveness of the amended Land Law, the organization of investor selection, signing and management of contract implementation for approved business investment projects and issuance of bidding documents before the effective date of the Law on Bidding 2023 (January 1, 2024).