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09 NEW POINTS OF

THE LAW ON TENDERING 2023

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On 17 July 2023, the Office of the President officially announced the President's Order on the Law on Tendering No. 22/2023/QH15 passed by the 15th National Assembly at the fifth Session (**"Law on Tendering 2023"**). Accordingly, the Law on Tendering 2023 contains adjustments to the scope and subjects of the law, as well as amendments to the process and procedures for selecting contractors and investors, and promoting the application of online tendering. Additionally, the Law on Tendering 2023 adds many new regulations to remove problems with Tendering in the medical field.

In this article, CNC analyzes some important new points of the 2023 Law on Tendering compared to the Law on Tendering No. 43/2013/QH13 ("Law on Tendering 2013").

The scope of the Law on Tendering 2023 is both narrowed and expanded

Compared to the Law on Tendering 2013, the Law on Tendering 2023 changes the scope of law regarding projects on development investment financed by state-owned enterprises. Specifically, according to the Law on Tendering 2013, projects financed by state-owned enterprises with a level equal to 30% or more, or less than 30% but more than 500 billion VND in total investment of the project must go through the Tendering process[1].

Nevertheless, the Law on Tendering 2023 shall be applied to projects on investment of state-owned enterprises (which means 100% of the project's funds shall be managed by the state), besides, projects of enterprises that have 100% of its charter capital to be owned by state-owned enterprises shall fall within the scope of the Law on Tendering 2023[2].

Supplementing some cases of direct appointment and competitive quotation

Compared to the Law on Tendering 2013, the Law on Tendering 2023 supplements some cases of direct appointment and competitive quotation.

Most notably, direct appointment applies to:

(i) Packages for the procurement of drugs, chemicals, test equipment, medical devices, spare parts, and accessories used in providing emergency aid to patients as prescribed in the Law on Medical Examination and Treatment whenever health facilities lack such drugs, chemicals, test equipment, medical devices, spare parts, accessories; packages for procurement of drugs or medical devices which can be manufactured by the only one manufacturer in the market[3];

[1] Clause 2, Article 1 the Law on Tendering 2013 .

[2] Point a, clause 2 Article 2 the Law on Tendering 2023.

[3] Point c, clause 1, Article 23 the Law on Tendering 2023.

(ii) Consulting service packages for preparation of construction planning which are designated to the authors of construction planning schemes or initiatives that have been successful in the construction planning competition[4];

(iii) Packages for which there is only one contractor capable of performing the contract in the market due to specific technological solution requirements[5];

(iv) Packages of nationally important projects eligible for direct appointment according to the National Assembly's resolutions issued when deciding investment guidelines[6].

The competitive quotation method is applied to procurement and construction packages whose price does not exceed 5 billion VND, as well as their construction parts have already obtained approved for construction drawings design[7].



[4] Point g, clause 1, Article 23 the Law on Tendering 2023.

[5] Point i, clause 1, Article 23 the Law on Tendering 2023.

[6] Point k, clause 1, Article 23 the Law on Tendering 2023.

[7] Clause 4, Article 24 the Law on Tendering 2023.

Decentralizing the authority to determine the contractor selection method in special circumstances

According to the Law on Tendering 2013, the Prime Minister directly checks and determines the contractor and investor selection method in all special circumstances. However, the Law on Tendering 2023 amends this regulation and decentralizes the authority to manage the method applied to contractor selection cases to other authorities besides the Prime Minister^[8]:

Prime Minister	Minister of Health	Ministers, heads of ministerial agencies, Governmental agencies, and other central-government agencies, Chairperson of provincial People's Committees
Packages with strict national defense and security, external affairs, border and territorial security requirements	Packages for procurement of drugs or vaccines under trials that are only purchased under their manufacturer's specific purchase-payment, guarantee, security requirements and other conditions imposed during execution of the contract	Selection of lawyers or solicitors providing legal services for protection of legitimate rights and interests of the State of Vietnam and regulatory authorities at foreign or international jurisdictional bodies
	Packages for procurement of drugs, vaccines and medical devices through international organizations	Packages for direct provision of intensive training for regulatory authorities and public sector entities by foreign training institutions in foreign countries...
		Packages for performance of political tasks assigned by the Communist Party or the State of Vietnam

^[8] Clause 2, Article 29 the Law on Tendering 2023.

Supplementing some types of contracts used in contractor selection

In addition to lump sum contracts, fixed unit price contracts, adjustable unit price contracts, and time-based contracts, the Law on Tendering 2023 includes some other types of contracts as indicated below[9]:

- (i) Cost plus fee contracts;
- (ii) Performance-based contracts;
- (iii) Percentage-based contracts;
- (iv) Mixed contracts.

The cost plus fee and mixed contracts are two types of contracts prescribed in the Law on Construction 2014[10], however, neither have been regulated in the Law on Tendering 2013.

Features of the aforementioned contracts:

Cost plus fee contract	Performance-based contract	Percentage-based contract	Mixed contract
Applied to tasks & services when the scope of work, factors in overhead costs to perform the estimated task of the contract that cannot be defined	Applied to tasks or services for which payment is based on contract execution outcomes with accepted quality and quantity, and other factors	Applied to construction insurance service packages where the contract price is exactly determined on the basis of the value of works actually accepted	A contract whose scope comprises different types of contracts such as lump sum contracts, fixed unit price contracts, adjustable unit price contracts and time-based contracts, cost plus fee contracts, performance-based contracts, and percentage-based contracts

[9] Clause 5, 6, 7, 8 Article 64 the Law on Tendering 2023.

[10] Point dd, clause 3, Article 140 and point e, clause 3, Article 140 the Law on Construction 2014.

In addition to tender security, the Law on Tendering 2023 removes escrow and supplements a new measure – a tender bond insurance certificate issued by a domestic non-life insurer or branch of a foreign non-life insurer duly established under the law of Vietnam (“**insurance company**”)[11]. Accordingly, the insurance company (the guarantor) will utilize their financial capacity and reputation to commit in writing to the (the beneficiary) that the insurance company’s client (the guarantee) must fulfil the contract’s obligations, otherwise, the insurance company will perform the financial obligation on behalf of the guarantee.

In essence, the tender bond insurance is quite similar to a bank guarantee, however, the guarantor in this case will be an insurance company (instead of a credit institution or foreign bank branch as in a bank guarantee).

Supplementing the investor selection method

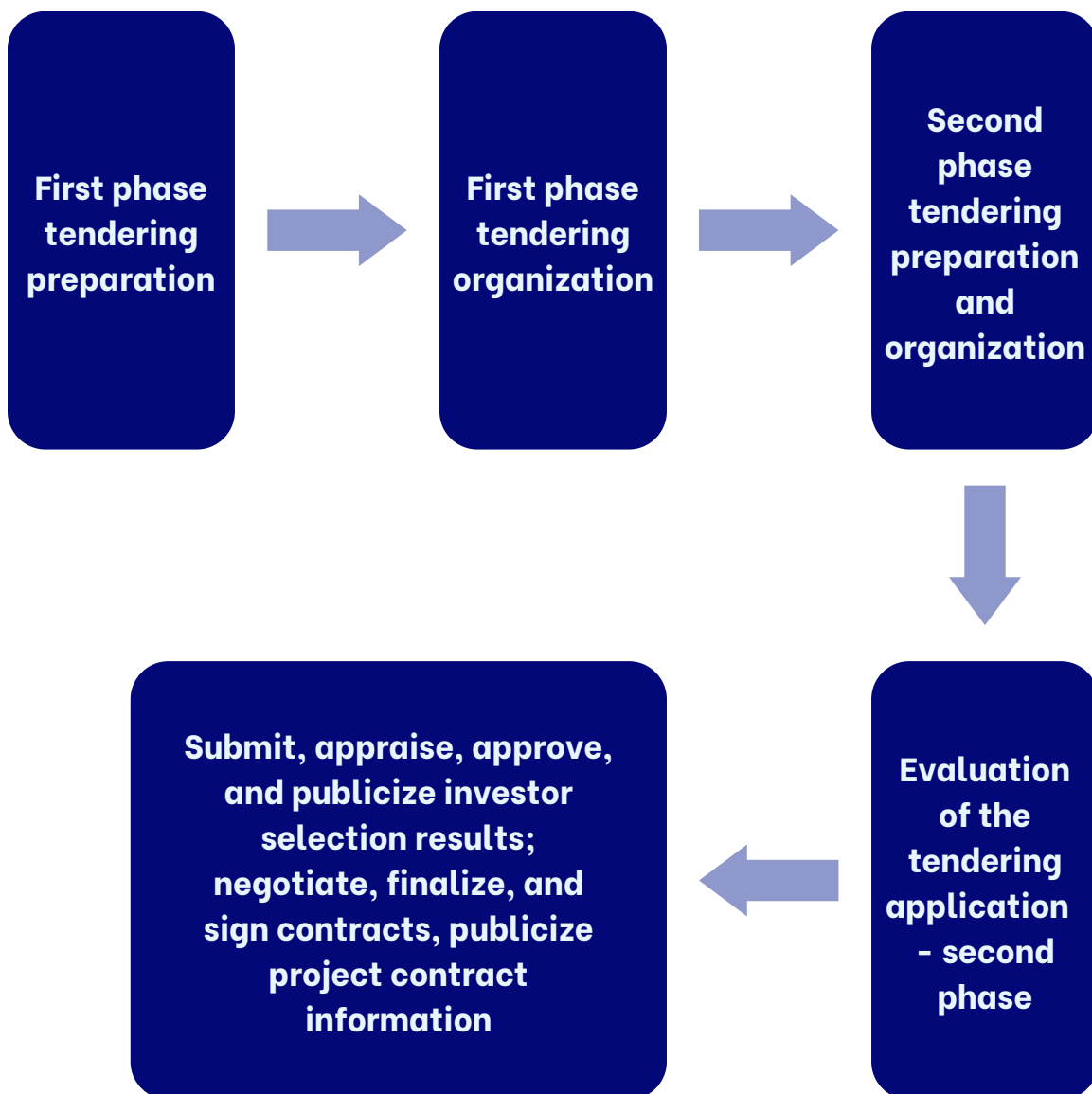
According to the Law on Tendering 2013, the methods of selecting an investor includes: (i) One-phase: Single Envelope Tendering Procedure and (ii) One-phase: Dual Envelope Tendering Procedure.

The Law on Tendering 2023 adds the Two-phase: Single Envelope Tendering Procedure which is applied to open tendering for investment projects which have specific sectoral, regional, or local socio-economic development requirements but of which specific technical, social, economic, and environmental standards are not yet determined[12].

[11] Clause 1, Article 14 the Law on Tendering 2023.

[12] Clause 3, Article 35 the Law on Tendering 2023.

The process and procedure for selecting the investor, in this case, is instructed by the Decree on detailed guidance on some articles and the way to implement the Law on Tendering for investor selection. According to the first draft of this Decree (promulgated along with Document No. 7254/BKHDT-QLDT dated 5 September 2023 by the Ministry of Planning and Investment), the process and procedure to select the investor using the Two-phase: Dual Envelop Procedure is as follows:



Eliminating the regulation on selecting the investor in special circumstances

The Law on Tendering 2023 eliminates the regulation on investor selection as prescribed in Article 26 of the Law on Tendering 2013. One of the reasons for removing this regulation is because the latest draft being prepared for submission to the National Assembly, the Law on Land 2023, will also regulate the issue of tendering to select investors to implement projects using land, however, there are no regulations on tendering to select investors in special cases.

Hence, eliminating the case of selecting investors in special circumstances ensures the consistency between the law on land and the law on tendering.

Regulating in detail the investment project contract signed with the investor

In the Law on Tendering 2023, issues relating to the contract between state authorities and selected investors (“investment project contract” in accordance with the Law on Tendering 2023) are regulated in detail and clearly. Accordingly, Article 73 of the Law on Tendering 2023 outlines the basic contents of the investment project contract, including:

- (i) Contractual parties’ information;
- (ii) Investment project information;
- (iii) Responsibility to compensate and manage relocation procedures and organize construction of auxiliary works (if any); allocation or lease of land (if any);
- (iv) The investor’s obligations to fulfil commitments proposed in their tender; establishment of an enterprise in charge of managing the investment project (if any);
- (v) Performance security; rules and conditions for modification and termination of contract; transfer of rights and obligations by the parties;
- (vi) Governing law and dispute settlement mechanism.

In addition, the Law on Tendering 2023 specifically stipulates that in the event that an investor transfers an investment project, the parties can amend the investment project contract, rather than sign a new contract with the investor receiving the project.

Some changes in the way of submit petition in tendering

If the Law on Tendering 2013 only allows contractors and investors to be the subject of petitions submitted in tendering, the Law on Tendering 2023 broadens the scope of subjects to have this type of right. Specifically, authorities or organizations having an interest in the package or investment project maintain the right to submit petitions regarding the tender submission[13].

Additionally, the content of the petition under the Law on Tendering 2023 is also amended. Specifically, the Law on Tendering 2013 allows contractors and investors to submit petitions relative to the contractor or investor selection result. Meanwhile, the Law on Tendering 2023 narrows the scope of the petition, accordingly, the contractor or the investor can only submitting a request relating to the result of evaluating the tender submission of such requesting investor or contractor[14].

Tightening the provision on prohibited acts in tendering

With respect to prohibited acts in tendering, the Law on Tendering 2023 provides stricter provisions. Specifically:

Firstly, regarding ***Collusive practice***, the Law on Tendering 2013 primarily focuses on the expression “agreement” (for example, reaching an agreement of withdrawing from Tendering or withdrawing the tender submission previously submitted allowing one party or more in the agreement win the tender or agreeing to let one or many parties prepare a tender submission for the tendering parties so that one party may win the tender).

[13] Point a clause 1 Article 90 the Law on Tendering 2023.

[14] Point a clause 1 Article 90 the Law on Tendering 2023.

However, the Law on Tendering 2023 broadens the scope of collusive practices, accordingly, if the parties “arrange”, or “coerce” a party or parties to withdraw the tender dossier for one party to win the tender or without agreement but deliberately refuses to perform an obligation to facilitate one party to win the tender, these practices are considered collusion[15].

Secondly, regarding **Fraudulent practice**, the Law on Tendering 2023 does not consider situations in which “Individuals who directly assess EOI (Expression of Interest) responses, Applications, Tender Submission, Proposals, evaluate the result of selection of shortlist, result of selection of investor, contractor, intentionally providing erroneous reports or false information falsifying the result of selection of contractors/investors” as prescribed in point b Article 89.4 of the Law on Tendering 2013 as a fraudulent act[17]. Besides, the act of “Forging or falsifying information of a dossier or document in tendering” is considered a Fraudulent act[18] without any pecuniary or miscellaneous interest or aim to avoid any obligation as required in the Law on Tendering 2013.

Thirdly, regarding **Interference practice** in tendering, in addition to cases as prescribed by the Law on Tendering 2013, the Law on Tendering 2023 broadens the scope of prohibition on interference relative to (i) the act of selecting contractors, and investors; (ii) tendering and (iii) online tendering[19].

Fourthly, regarding Inequality and non-transparency, the Law on Tendering 2023 broadens the scope of familial relationships between the tenderer and the individual of the party calling for tenders or competent authority, the head of the employer, or the party calling tenders compared to the Law on Tendering 2013[20]. Accordingly, the 2023 Law on Tendering does not itemize

[15] Clause 3 Article 89 the Law on Tendering 2013.

[16] Clause 3 Article 16 the Law on Tendering 2023.

[17] Clause 4 Article 16 the Law on Tendering 2023.

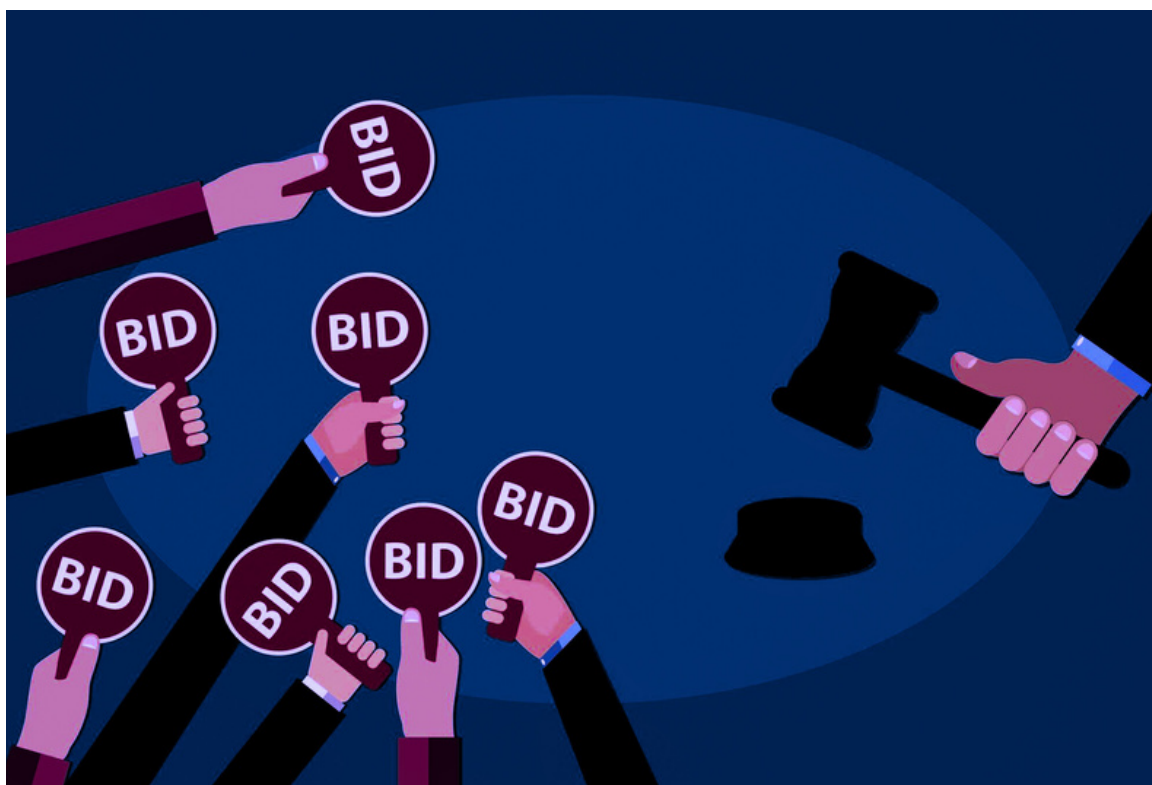
[18] Point a clause 4 Article 16 the Law on Tendering 2023.

[19] Clause 5 Article 16 the Law on Tendering 2023.

[20] Clause 6 Article 16 the Law on Tendering 2023.

the cases in which the tenderer is considered to be in a familial relationship with the party calling for tenders, instead, the Law 2023 references the definition of a familial relationship in the current Law of Enterprise.

Further, according to the Law on Tendering 2013, if the individual named in the tender submission has worked at the entity, calling for tenders, for 12 months, then the act of submitting a tender dossier for this entity is considered inequality and non-transparency[21]. Meanwhile, according to the Law on Tendering 2023, this practice only constitutes inequality and non-transparency when the individual named in the tender submission has worked at the entity calling for tenders and held an executive or managerial position[22].



[21] Point e clause 6 Article 89 the Law on Tendering 2013.

[22] Point e clause 6 Article 16 the Law on Tendering 2023.



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