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MAY 2024

LEGAL UPDATE

NEW LAW ON BIDDING IN VIETNAM



On 23 June 2023, the National Assembly of Vietnam passed the Law on Bidding 2023 (the “**2023 LOB**”), which replaces the Law on Bidding 2013 (the “**2013 LOB**”). The 2023 LOB officially took effect as of 01 January 2024.

The 2023 LOB introduces several amendments to the 2013 LOB that address issues in investor selection for projects. Additionally, the 2023 LOB seeks to improve efficiency, transparency, and fairness in bidding transactions.

This legal update will outline the key provisions and amendments stipulated by the 2023 LOB compared to the 2013 LOB.

1. Expanding subjects of application

The scope of application of the 2023 LOB is extended as follows:

Firstly, the 2023 LOB currently includes the activities of enterprises which are wholly owned by a state-owned enterprise(s).¹

Secondly, the 2023 LOB clarifies provisions for the selection of investors to implement investment projects, which include:

- a. Investment projects involving land use require bidding in accordance with the 2024 Law on Land (which takes effect from 01 January 2025) (2024 Land Law). Under the Land Law 2024, land-use investment projects must be approved for land allocation or land lease through bidding procedures set by the Provincial People's Council. The previous 2013 Land Law and 2013 LOB did not have provisions regarding this condition; and
- b. Other investment projects require bidding to select investors in accordance with relevant specialized laws. The Government has specifically stipulated in Decree 23/2024 guiding the 2023 LOB a list of investment projects subject to bidding according to specialized laws. These projects include, for example, projects for renovating and rebuilding apartment buildings, projects for constructing solid waste treatment

facilities. The 2013 LOB did not have clear provisions regarding these projects according to specialized laws.

The 2023 LOB clarifies that during the period between 1 January 2024 and the effective date of the amended Law on Land, the selection of investors for executing investment projects with land use shall continue to be carried out in accordance with the 2013 LOB and its guiding documents.

2. Introducing the concept of international bidding

The 2023 LOB specifies two forms of bidding i.e., domestic bidding and international bidding. Domestic bidding is only open for participation from domestic bidders or investors, whereas both domestic and foreign bidders or investors may participate in international bidding.

International bidding for investor selection is applicable to all circumstances falling within the scope of the 2023 LOB (as stated in section 1 of this legal update), except for the following five specific circumstances.

- a. Projects involving business lines having no market access for foreign investors as prescribed by the Law on Investment;
- b. Projects relating to national defence and security, social order and security for which the domestic bidding is compulsory;
- c. Projects to be located in land or sea areas are restricted to foreign investors and foreign-invested business organizations as prescribed by the Law on Land and relevant laws;
- d. Projects with a total investment capital of less than VND 800 billion; and
- e. Projects that do not fall within the above-mentioned four circumstances and have been publicised and invited for expressions of interest for international bidding, although no foreign investor has participated or expressed interest.



3. Modification of contractor and investor selection methods

The 2023 LOB allows for applying other forms of contractor selection besides those specified in the 2023 LOB, provided that the chosen form meets specific requirements (for example, the use of modern electronic means, ensuring competitiveness and fairness). Additionally, the 2023 LOB has abolished the form of direct appointment for investor selection. This form was previously applied under the old 2013 LOB for investment projects with only one registered investor.

Starting from 01 January 2025, certain bidding methods such as (a) open bidding, (b) restricted bidding, and (c) competitive tendering must be conducted through the national bidding system. The Government will provide specific guidance on the roadmap, online bidding procedures, and cases exempt from online bidding.

4. Modification of contractor and investor selection procedures

Regarding contractor selection procedures under the 2023 LOB, project owners can develop an overall contractor selection plan for approval by the competent authority, depending on the scale and nature of the project. The overall contractor selection plan includes evaluating the project owner's capacity, managing risks in bidding, and implementing the schedule.

Regarding investor selection procedures, the 2023 LOB requires the competent authority to publicly announce business investment projects on the national bidding system before preparing tender documents. Additionally, to be selected, interested investors and tender documents must be evaluated based on several new criteria, such as land use efficiency, investment efficiency in industry development, sector, and locality.

5. Introducing new types of agreement with contractors

The 2023 LOB specifies several new types of contracts applicable to specific cases during the bidding process. These new contract types include (a) cost-plus-fee contracts, (b) output-based contracts, (c) percentage-based contracts, and (d) hybrid contracts.

6. Other new key highlights

- a. Additional criteria for the bid assessment
The bid assessment criteria, which mostly focuses on the capacity of the investor under the 2013 LOB, has been broadened under the 2023 LOB:
 - Criteria for evaluating the investor's capacity, including financial and funding arrangement capacity and experience in executing similar investment projects;
 - Criteria for evaluating the investor's investment plan, including technical, social and environmental criteria; and
 - Criteria for evaluating efficiency in land use and investments in sectoral or local development.
- b. Providing regulations on core provisions of investment project contracts
An investment project contract shall include, but not limited to, the following six primary contents:
 - Particulars of the contracting parties, effective date and duration of the contract;
 - Details of the investment project, such as objectives, location, and execution schedule; scale and total investment; conditions for land use and other resources (if any); etc.
 - Responsibility to follow compensation and relocation procedures and organize construction of auxiliary works (if any); allocation or lease of land (if any);



- The investor's obligations to fulfil commitments proposed in their bid; establishment of the enterprise in charge of managing the investment project (if any);
- Performance security; rules and conditions for modification and termination of contract; transfer of rights and obligations by the parties; and
- Governing law and dispute settlement mechanism.

Investors are allowed to engage in any negotiations with the relevant state authorities regarding any further contents of an investment project contract.

c. New regulations on work portion allowed to be allocated to the subcontractor.

The specific regulation of the value of the work portion transferred by a contractor to another contractor as stipulated in the 2013 LOB (from 10% upwards or below 10% but exceeding 50 billion VND (after deducting the portion of work under the responsibility of the subcontractor) calculated on the signed contract price) has been abolished. The 2023 LOB now specifies the maximum value of the work portion allocated to the subcontractor and the volume of work allocated to the subcontractor, which is particularly mentioned in the contract that the

contractor transfers to another contractor.

Regulating according to the above content leads to prohibited behaviours under the 2023 LOB, including:

- The contractor transfer to another contractor a work portion outside the maximum value allocated to the subcontractor and the volume of work allocated to the subcontractor, which is specified in the contract;
- The contractor transfers to another contractor a work portion that has not exceeded the maximum value of the work portion allocated to the subcontractor as stipulated in the contract, but beyond the scope of work proposed in the bid dossier, the proposed dossier that has not been approved by the investor or the supervising consultant;
- The behaviour of the investor, the supervising consultant in approving the contractor to transfer the work as specified in (a), or transferring the work as specified in (b), beyond the maximum value of the work portion allocated to the subcontractor stated in the contract.

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