

Bidding In Construction: Law And Issues Raised

Chu Minh Anh

University of Transport and Communications, No.3. Cau Giay Street, Lang Thuong Ward, Dong Da District, Hanoi, Vietnam.

Abstract: *Bidding is the process of selecting a contractor that meets the requirements of the bid solicitor to perform a bidding package for the provision of consulting services, procurement of goods, and construction and installation on the basis of competition, fairness, and transparency. and economic efficiency. It is a process by which the owner selects a contractor that meets his requirements. Bidding in construction is the activity of searching for potential construction work to carry out the construction based on investment capital from investors and this activity can be said to be a competition for construction. In order to have the best quality construction work, the first requirement is that the work must find a quality contractor in the construction, and vice versa, the conditions that the contractors in the construction industry need. It is necessary to execute this bidding package to carry out the work successfully. On the basis of studying the current situation of the law on bidding and bidding in construction, the legal basis for bidding in building, this study points out the difficulties and problems posed in the construction bidding process in Vietnam.*

Keywords: *Bidding, Bidding law, construction bidding, issues raised*

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I. Introduction

The nature of the bidding act is a form of civilized competition in the developed market economy because, through this activity, the contractors meet the investor's economic, technical, and cost requirements. will be selected. Therefore, bidding was born and exists with the goal of achieving competitiveness, fairness, and transparency.

Currently, there are overlapping and inconsistent regulations on contracts between the Law on Bidding and the Law on Construction. Accordingly, Clause 7, Article 67 of the Law on Bidding stipulates: in case the adjustment of the contract performance schedule prolongs the project completion schedule, it must be reported to the competent person for consideration and decision; Meanwhile, point c, Clause 3, Article 143 of the Law on Construction stipulates: when the contract adjustment changes the investment objective, the contract performance time, exceeds the approved construction bidding package estimate, it must be approved. authorized investment decision maker. The inconsistency between the two laws is causing many problems in implementation.

In addition, it is very difficult to determine the risk factors and provision for price slippage right from the bidding package pricing step to calculate provision costs; At the same time, investors face many difficulties when using risk provisions and slippage in the bid package price. In particular, it is difficult for some types of bidding packages for procurement of goods to accurately determine the actual volume to be used because it depends on the demand for use, so applying a package contract, will not be appropriate and effective.

From that, it can be seen that bidding activities ensure 4 contents: efficiency, competition, fairness, and transparency. Effectiveness can be financial or time or some other criterion depending on the objective of the project. To ensure the effectiveness of the project, it is necessary to create conditions for contractors to openly compete on the widest possible scale in order to create fairness and ensure benefits for all parties. For projects with a large total investment, with economic or social value, the bidding is an indispensable and important step and the bidding must comply with the regulations of the State or financial institutions.

II. Literature Review

What is a tender?

According to Clause 12, Article 4 of the Law on Bidding 2013, bidding is the process of selecting a contractor to sign and perform a contract for the provision of consulting services, non-advisory services, procurement of goods, and construction and installation; select investors to sign and perform investment project contracts in the form of public-private partnership, investment projects using the land. Thus, it can be seen that bidding is the process by which the investor selects a contractor that meets his requirements.

Bidding is essentially a commercial activity. In which the bidders are qualified traders with the goal of profit, and the bid solicitor has the goal of establishing a contract for the sale of goods and use of services with the best conditions for Surname.

What is a construction tender?

Bidding is the process of selecting a construction contractor that meets the requirements of the bid solicitor to perform a bidding package for the provision of consulting services, goods procurement, construction, installation, etc. All activities are based on competition, fairness, transparency, and economic efficiency. Bidding is also a process by which the owner selects a contractor that meets his requirements.

In a market economy, buyers (investors) organize bidding so that sellers (contractors) compete with each other. The buyer's goal is to get goods and services that satisfy his technical and quality requirements at the lowest cost.

The seller's goal is to have the right to supply the goods or services at a price that covers input costs and ensures the highest possible profit.

Understanding fully exactly about the bidding operation in the current conditions will help managers, and bidding participants, in general, have a legal basis and foundation in the process of contractor selection, and implementation of the bidding process. healthy social relations in the field of using capital and land of the State, and at the same time attracting and creating many sources of capital. Below are details of the construction bidding process.

What is a construction contract?

Construction bidding packages, or using the right technical term, are construction and installation bidding packages, which are bidding packages aimed at selecting contractors to perform jobs in the process of construction and installation of works or work items.

Bidding packages for construction and installation according to the Law on Bidding 2013 are divided into small-scale bidding packages (with a package price of not more than 20 billion VND) and normal construction and installation bidding packages with a bidding package price of over 20 billion VND. In addition, construction and installation bidding packages with a bid package price of less than 5 billion VND are only allowed for contractors who are small and micro enterprises in accordance with the law on enterprises to participate in bidding.

Legal basis

- Law on Bidding 2013;
- Decree 63/2014/ND-CP guiding the Bidding Law on contractor selection;
- Decree 30/2015/ND-CP guiding the Bidding Law on investor selection;
- Decree 50/2016/ND-CP on sanctioning of administrative violations in the field of planning and investment;
- Circular 01/2015/TT-BKHDT detailing the preparation of the Dossier of Expression of Interest, Bidding Documents, and Request for Consulting Services;
- Circular 03/2015/TT-BKHDT detailing the preparation of bidding documents for construction and installation;
- Circular 05/2015/TT-BKHDT detailing the preparation of bidding documents for procurement of goods;
- Joint Circular 07/2015/TTLT-BKHĐT-BTC guiding the provision and posting of information on bidding and online contractor selection by the Minister;
- Circular 10/2015/TT-BKHDT detailing the contractor selection plan;
- Circular 11/2015/TT-BKHDT detailing the preparation of dossiers of requirements for the appointment of contractors and competitive offers;
- Circular 19/2015/TT-BKHDT detailing the preparation of appraisal reports during the contractor selection process;
- Circular 23/2015/TT-BKHDT detailing the preparation of reports on bid evaluation;
- Circular 09/2016/TT-BYT on the List of drugs for bidding, drugs for concentrated bidding, drugs for which the form of price negotiation is applied;
- Circular 10/2016/TT-BKHDT detailing supervision, monitoring, and inspection of bidding activities.

Research Results and Discussion

Governing scope of the Law on Bidding in Construction

The Law on Bidding 2013 regulates the state management of bidding; responsibilities of related parties and procurement activities, including:

First, select contractors providing consulting services, non-consulting services, goods, construction, and installation for:

- Investment and development projects using state capital of state agencies, political organizations, socio-political organizations, socio-political-professional organizations, socio-professional organizations, and socio-professional organizations. social organizations, units of the people's armed forces, public non-business units;
- Development investment projects for state-owned enterprises;

- Development investment projects not specified at Points a and b of this Clause using 30% or more of state capital or state-owned enterprises' capital, or less than 30% but over VND 500 billion in total investment. investment in the project;
 - Procurement using state capital to maintain regular operations of state agencies, political organizations, socio-political organizations, socio-political-professional organizations, socio-professional organizations enterprises, social organizations, units of the people's armed forces, public non-business units;
 - Procurement using state capital to provide public products and services;
 - Purchase of national reserve goods using state capital;
- Second, select a contractor to provide consulting services, non-advisory services, and goods in the Vietnamese territory to execute an outward direct investment project of a Vietnamese enterprise whose project using state capital of 30% or more or less than 30% but over 500 billion VND in the total investment of the construction project;
- Third, select investors to implement investment projects in the form of public-private partnership (PPP), investment projects using land in construction
- Fourth, the selection of contractors in the oil and gas field, except for the choice of contractors providing petroleum services directly related to prospecting, exploration, field development, and oil and gas exploitation as prescribed by law.

Some issues raised in the construction bidding law

Clause 1, Article 1 of the Law on Bidding (2013) stipulates: "This Law stipulates the bidding activities to select contractors to provide consulting services, purchase goods, and construct and install for bidding packages of projects under the Law on Bidding. The following projects: 1. Projects using 30% or more state capital for development investment objectives, including:

- a) New construction investment projects, upgrading and expansion projects already invested in construction;
- b) Investment projects for asset procurement, including equipment and machinery that do not need to be installed;
- c) Projects on regional development planning, sectoral development planning, and urban and rural construction planning;
- d) Projects on scientific research, technology development, and technical assistance;
- dd) Other projects for development investment purposes".

But the problem is, the Law has not clearly defined what is "development investment project". Besides, Point dd Clause 1 uses the phrase "Other projects for development investment purposes". This is a broad phrase and it is impossible to determine the specific scope of application, it contradicts the very internal of the legal document, leading to confusing implementation and lack of uniformity in practice. The essence of "state capital" is not clearly defined by the law, even allowed to be understood as too broad, including some specific capital sources and "other capital managed by the State". The guiding documents also do not specify what "other capital is managed by the State" and therefore, it is difficult to determine whether some specific sources of capital are considered capital managed by the State. or not. For example, can a project financed by a state-owned bank be considered state-funded?

The Bidding Law also does not specify how to determine the state capital contribution of 30% or more. In Clause 1, Article 2 of Decree 85/2009/ND-CP - the guiding document for the implementation of the Law on Bidding - it is simply stated that the determination will be based on the state's participation in the total investment or total capital investment of the approved project. This Decree also does not specify clearly what to do, if a state-owned enterprise establishes a subsidiary and this subsidiary uses its equity capital to implement a development investment project, can this subsidiary's project use 100% state capital?

How will the answer change if the subsidiary's equity includes capital contributions from non-state enterprises? In other words, if in a company a state-owned enterprise contributes 30% of the equity, the private sector contributes 70% of the equity, and when this company uses its equity to invest investment in a project, is that project governed by the Law on Bidding? Next, if the company's equity is later added from other sources - perhaps capital from business profits left by the company - how is the state capital determined?

The failure to create a unified legal environment for application and application in bidding is due to the fact that the regulations on bidding related to the use of state capital are scattered, not concentrated, and lack consistency. The current procurement regulations are scattered in many legal documents, such as bidding for contractor selection is stipulated in the Law on Bidding, the Law on Construction, and Law No. 38/2009/QH12; bidding for selection of investors in projects using land; perform BOT, BTO and BT contracts as prescribed in the 2005 Investment Law; bidding according to the method of centralized procurement specified in Decision 179/2007/QD-TTg, Circular 22/2008/TT-BTC; bidding for selection of investors to build educational, vocational, health, sports, and environmental institutions as prescribed in Decree 69/2008/ND-CP; bidding for the provision of public non-business services is regulated in Decision 39/2008/QD-TTg; bidding for the supply of public utility products and services is specified in Decision 256/2006/QD-TTg. This situation causes overlapping and

inconsistency among documents and makes it difficult for units, organizations, and individuals to implement, so the unification of regulations on bidding in common law is essential.

It can be said that, in addition to using budget capital, investment uses public assets such as land, water, sea, etc. have been clearly defined and naturally required to apply the Bidding Law and the State's regulations, while other sources of capital and expenditures are managed by other specific subjects such as the banking sector, agencies management of loan guarantees, money and capital sponsors, etc., but the form of management is very diverse depending on the source of money mobilized and the investment and spending goals for each object. For example, state-owned corporations and corporations have issued internal regulations and regulations, including regulations on bidding that cover the entire use of all capital sources, including investment purposes. and spending on other production and business activities.

Some issues to discuss

In order to conduct construction bidding, the first thing that a construction work/work item needs to be approved is an investment project containing that work/work item. After the investment project is approved, the next step is to approve the construction drawing design and work estimate (For small-scale projects, simply approve the economic and technical report, which includes construction drawing design and cost estimate), this is a very important set of documents as a basis for conducting bidding to select a contractor because a detailed design must be approved. estimates for the investor to estimate funding sources for implementation. Particularly for other forms such as turnkey or EPC bidding, the construction drawing design step may not be necessary at this stage, but preliminary design and the actual scope of work must be included. presently.

After the design estimate is approved, before bidding, it is necessary to clearly identify the capital source and ensure that the capital source is only paid for in the bidding package. For the Investor/Tenderer using public capital or foreign state capital for public investment, investment in the form of a public-private partnership (PPP), is necessary to carry out the procedures for registration of eligibility on the Procurement System. country, register a digital certificate to use. After completing the registration steps, publish the project: Upload the contractor selection plan, and publish the invitation to bid.

For bidding packages implemented in accordance with the Law on Bidding 2013, after the design estimate is approved, based on that, the Procuring Entity or the consulting unit for the Investor shall prepare the Bidding Documents. When approving the Bidding Documents, the bidding documents will be issued after the bidding documents are issued until the prescribed time will close the bids (contractors submitted after this time will not be eligible/or not submit the bidding documents). (c), bid opening and announcement of the Bid Opening Minutes, then the Procuring Entity will conduct bid evaluation, and contract negotiation and submit the contractor selection results for the Investor to approve the contractor selection results, then When approving the contractor selection results, the bidding results will be announced and the construction contract will be signed. This is basically a general process, but depending on the package and size, there may be some additional steps such as technical evaluation, approval of technically responsive bidders, financial opening, and financial assessment.

III. Recommend solutions

In order to define the scope of application of the Law on Bidding in a clear and scientific way, and to promote effective bidding, it is necessary to amend and supplement the Law on Bidding in construction towards:

- Provide a clear list of projects that are considered for investment and development purposes and omit generic words such as "other projects for investment and development purposes" in Clause 1, Article 1 of the Law on Competition. contractor.
- Article 4.1 of the Law on Bidding should list capital sources that are considered "state capital" and omit generic words such as "other capital managed by the state".
- The law should clearly stipulate how to determine the proportion of state capital in the total investment capital of a construction project, for example, in a project with capital contribution by SOEs, whether it is necessary to trace the origin of the project. Is the capital used by that state-owned enterprise to contribute to the project and is it feasible?
- The law needs to confirm whether construction projects specified in Clauses 2 and 3 of Article 1 must always comply with the Law on Bidding or not. What percentage of public and private capital is used for joint bidding, the Law on Bidding shall apply, or in the case of projects not using state capital, can this law be applied to regulate or not?

IV. Conclusion

Procurement is an essential tool to help the Government manage expenditures and use state capital in an efficient manner and to prevent loss and waste. Bidding brings great benefits to investors, contractors, and the national economy in general. Especially in the public sector, bidding contributes to improving production and

business efficiency, improving the efficiency of state management of investment and construction, and limiting and eliminating losses-waste of state budget capital.

Because bidding needs to be open and transparent, bidding will create a fair and healthy competitive environment among construction units. This is a great driving force to promote the development of our country's construction industry and facilitate the application of science and technology, innovation in construction technology, step by step integration with the region and the world. Together with the law on thrift practice and anti-waste, the law on anti-corruption constitutes an effective tool to combat fraud, corruption, and wastefulness in the spending of public funds. The State contributes to healthy social relations by conducting public procurement activities in accordance with the laws of the State.

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