



Participation in foreign procurement - opportunities and challenges

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The main challenges:

- ▶ Access to information for tendering (e.g. public notice for the invitation to bid)
- ▶ Tender documentation development in case of language barrier
- ▶ Lack of access to records on the procedure (difficulty for unsuccessful tenderers to challenge a procurement decision)
- ▶ Certificates and other documentation necessary for exclusion grounds clarification, incl. beneficial owners indication in case impossibility to identify them
- ▶ Restrictions regarding covid-19, how to fulfil contractual obligations

Where to find information?

- ▶ <http://www.ted.europa.eu>  Ted-tenders electronic daily
- ▶ <http://www.ungm.org> - United Nations Global Marketplace (UNGM)
- ▶ https://ec.europa.eu/info/funding-tenders/tenders/tender-opportunities-department_lv - Summary of competitions announced by the European Commission
- ▶ <https://www.innovation-procurement.org> - Platform for innovation procurement

Where to find information?

- ▶ <http://www.simap.europa.eu> - Systeme d'Information sur les Marches Publics (SIMAP) information system for public procurement
- ▶ https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers/public-procurement-eu-countries_en - summary list of national public procurement information systems and sources

What certificates and documents are valid for checking the conditions of exclusion grounds

e-CERTIS

- ▶ <http://ec.europa.eu/markt/ecertis>

E-signature format challenge

- ▶ Problem - Customer has specified in the electronic procurement system that files can only be attached in certain format (for example .edoc)

What to do for to solve this issue?

- ask the Customer to change requirement

e-signature requirement

- ▶ If a submission, application or documents attached to proposal are signed by secure electronic signature issued in foreign countries, in addition an address shall be indicated where the electronic document signed by secure electronic signature can be verified.
- ▶ If a submission planned in foreign tender, it is recommended to sign proposals in the **ASIC-E format**, then the document will be signed with the time-stamp conforming to the standards of the European Union.

Originals of documents and proposal signing

- the originals of the documents must not be required to be submitted, with exemption in case of bank guarantee
- the tender may be signed and submitted by an authorized person registered in the electronic system of public procurements. In case this authorized person is not official representative of the company, as well relevant authorization letter must be attached

European Single Procurement Document (ESPD) to be completed electronically - <http://espd.eis.gov.lv/filter?lang=lv>

- ▶ Can be used as a self-declaration of a company's financial standing, capabilities and suitability for a public procurement procedure. It is available in all EU languages and is used as prima facie evidence that the conditions required for public procurement procedures across the EU have been met.
- ▶ Easier to prepare necessary documentation despite language barrier, because full package of qualification documents Customer will ask only in case of decision about possible award of the contract

What is the significance of the design / content of a certificate obtained / issued abroad?

- ▶ It does not matter if the statement is addressed to someone else. It matters what information it represents!
- ▶ No need to provide the originals of the certificates!
- ▶ Not important format - issued or hand-printed from relevant web- site!
- ▶ There is no need for a notarized translation!

Permissible tax debt thresholds in different countries

- ▶ Denmark DKK 100'000 (approx. EUR 13'000)
- ▶ Estonia - 0
- ▶ Lithuania - 50 EUR

(!) In Latvia a foreigner will be checked for tax debts both in the country of its registration and in Latvia! For a Latvian enterprise in foreign procurement - exactly the same!

Partnership with foreign merchants for participation in procurements

- ▶ The contracting authority may not require the partnership between two economic operators to be officially registered - nor before submission of the tender, nor may require such registration before the contract signing.
- ▶ The law does not impose any restrictions on the formation of partnerships with a foreign-registered company, exempt exclusion ground for offshore-registered companies

If you participate in the procurement together with a foreigner, then it is important to take into account:

- ▶ Subcontractor can always can be replaced, but a member of a suppliers group - never!
- ▶ Mutual cooperation agreement before submission of the tender, incl. agreement of dispute settlement procedures.
- ▶ Division of responsibilities and intellectual property rights

Discriminatory procurement requirements for foreigners

- ▶ at the moment of submission of the tender / application - Registration in the existing registers of the Customer's state in accordance with the requirements of Customer's state regulatory
- ▶ at the moment of submission of the tender / application - Recognition of certificates and educational documents in Customer's state
- ▶ Knowledge of the Customer's state language (it is permissible in special, exceptional cases)

Branch as tenderer

- ▶ The branch cannot independently assume the obligations as a legal entity, therefore the obligations are legally assumed by the parent company.
- ▶ As the parent company is considered to be the legal entity, the parent company is subject to the exclusion grounds.

Covid-19 restrictions, how to deal with possible impact on possibility to fulfil contractual obligations?

- ▶ A force majeure is an event which is:
 - *external* (beyond the parties' control);
 - *unforeseeable* (could not have reasonably been foreseen by the invoking party on the date of the agreement);
 - *insurmountable*;
 - and *inevitable* (neither the impediment nor its consequences could be avoided or overcome by the invoking party).

Hardship constitutes an exceptional change in circumstances that renders the performance by one party of its contractual obligations if the following conditions are met:

- ▶ The change in circumstances occurred after the conclusion of the agreement;
- ▶ The possibility of a change of circumstances could not have reasonably been anticipated at the time of the conclusion of the agreement;
- ▶ The *agreement does not include specific clauses* providing or indicating that the Party bears the risk of the change in circumstances;
- ▶ The Party tried to renegotiate amendment of the agreement.

Thank You for attention!

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