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The main changes to the new act on public procurement which affect potential bidders

On November 1, 2015 several important changes may come into effect which will affect potential bidders taking part in public procurement tenders. This will result in the bidding procedures becoming simpler and easier. The main changes affect the regulation of business secrets, the grounds for the exclusion of bids and the verification thereof.

Regarding business secrets, the new act would be more detailed and clearer regarding the scope of the data which cannot be classified as a business secret by the bidder. This means that the bidder cannot classify the whole bid as a business secret.

Moreover, the new act requires reasoning from the bidders regarding what a business secret is in their opinion and why. The reasoning has to specifically explain on which grounds the bidder classifies data as a business secret and, furthermore, why and how the publication of this data would cause disproportionate harm to the bidder. Furthermore, the bidder can only access the bid documents of other bidders in duly justified cases and to a limited extent.

The new act would also contain several novelties regarding the conditions of the tender that must be fulfilled by the bidders.

The bill also proposes, like the current act, that the bidder can use another entity which only makes available its capacities to the bidder so that the bidder can comply with the prescribed conditions of the tender. For instance, it can provide to the bidder a specialist in a particular profession, or a service, to help the bidder to carry out the tender. Such an entity does not actually take part in the performance of the contract directly as a company in a subcontractor relationship with the bidder would. However, the new bill also provides, with regards to certain criteria (educational and professional qualifications, licences, etc.), that the bidder can only involve entities that will directly perform such works or services which fall within the prescribed criteria.

This also means that a bidder cannot involve its own parent company if the parent company will not directly perform that certain part of the contract itself.

According to the bill, the contracting authority can require that the bidder itself or one of the joint bidders has to directly perform certain critical tasks of public work contracts, service contracts, or the setup or installation operations in connection with supply contracts, not a subcontractor.

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In order to reduce administrative costs, rather than having to pay for an apostille etc., the bidder would only need to submit a declaration stating that they do not fall within exclusion grounds and that they fulfil the necessary conditions of the tender. As such, only the winning bidder would have to prove its compliance with all the requirements of the tender and bear the necessary administrative costs.

Another well-received provision of the bill makes it possible for the successful bidder to divide or merge with another legal person during the performance of the tender contract and for the whole business group of the bidder to be transferred to a legal successor. This is significant because the current act does not allow a company to transfer its tender contract to another company as a legal successor. This new provision would therefore remove a significant obstruction on the market and could possibly result in increased activity on the M&A market.

In summary, it can be said that the bill simplifies and clarifies the rules on public procurement bidding procedures. More potential bidders would be able to participate thanks to a reduced, speedier and more efficient administrative burden and a relaxation of the rules regarding the mergers of participating bidders.

This summary is a publication of Szecskay Attorneys at Law intended for guidance purposes only. It should not be regarded as legal advice or a legal opinion. Should you have any legal questions on a specific matter or require more information, please contact our colleagues on the contact details below:

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