

Coronavirus (COVID-19) impact on public procurement in China

Information applicable as of 3 April 2020

1. Are public procurement procedures due to the Corona pandemic automatically suspended? (If not: Are contracting authorities suspending procedures on their own initiative? Or if not: Do they suspend upon request of bidders?)

According to a notice issued by the PRC Ministry of Finance (Cai Ban Ku [2020] No. 29) on 6 February 2020, for non-urgent procurement activities, if they cannot be carried out due to the epidemic or cannot be continued within the prescribed time, they may be suspended or postponed as appropriate, and relevant information will be released and the parties concerned will be notified as required.

2. Does the current situation allow for extended use of simplified procurement procedures (direct award or negotiated procedure without notification)?

The *PRC Government Procurement Law* stipulates six methods for government procurement. Each method shall follow the respective statutory procedure, which cannot be simplified. However, according to Article 85 of the *PRC Government Procurement Law*, the aforesaid procurement procedures do not apply to emergency procurements in case of serious natural disasters and other force majeure incidents, or to procurements that have to do with State security and State secrets. In our view, the current epidemic situation fulfills the circumstances for making such emergency procurements. This has also been confirmed in a notice of the PRC Ministry of Finance (Cai Ban Ku [2020] No. 23) on 26 January 2020. For further details on the special measures for procurement set out in such notice, please refer to item 3 below.

3. Does the current situation allow for special measures during a procurement procedure (shortening of deadlines)?

According to the notice of the PRC Ministry of Finance (Cai Ban Ku [2020] No. 23) of 26 January 2020, for the procurement of goods, projects and services related to epidemic prevention and control, so-called “green channels”, i.e. special measures for procurement, can be used. This means that the methods and procedures prescribed by the *PRC Government Procurement Law* can be skipped, and the approval on procurement of relevant imported goods may not be required.

4. Is it possible to use electronic means for presentations or rounds of negotiations?

Yes, according to the notice (Cai Ban Ku [2020] No. 29) mentioned above, for government procurement activities and related work that are really necessary during the epidemic period, it is suggested to choose off-site methods such as Internet, telephone and e-mail. Whether the epidemic period still continues is to be decided by the governments on provincial level. According to the information available to us, as of 1 April 2020, the PRC is, currently, still in the epidemic period.

During the epidemic period, if government procurement review experts need to be selected, in principle, no on-site selection method shall be adopted. The purchaser can randomly select one through the Internet or according to actual situation.

To the extent possible, the procurement documents and bidding (response) documents shall be submitted online and electronic bidding openings and electronic review processes shall be implemented.

5. Are the deadlines for remedies automatically suspended?

No, this shall be negotiated between the parties concerned.

6. Which possibilities does a contracting authority have, if no offer has been submitted?

According to the *PRC Government Procurement Law*, if no supplier submits any offer after the bidding has commenced, the procurement can be implemented by way of competitive negotiations.

The procedures of competitive negotiations are stipulated in Article 38 of the *PRC Government Procurement Law*. The procedure, generally, is as follows:

(1) Setting up of a negotiation team:

The team shall be composed of three or more representatives of the procuring entity and experts in the relevant fields. The number of the team members shall be odd, and the number of experts shall be not less than two-thirds of the total team members.

(2) Drafting of documents for the negotiation:

The documents shall clearly indicate the negotiation procedure and contents, the terms of a draft contract and the criteria on whether a contract can be concluded.

(3) Deciding on the name list of the suppliers to be invited to participate in the negotiation:

The negotiation team shall choose not less than three suppliers from among all qualified suppliers and list them in the name list to participate in negotiations and provide them with the documents for negotiations.

(4) Actual Negotiations:

All members of the negotiation team together shall negotiate with the suppliers individually. In the course of negotiations, neither side may disclose other suppliers' technical data, prices or other information related to the negotiation. Where there are any substantive changes made in the documents for the negotiations, the negotiation team shall inform all the suppliers participating in the negotiations of the changes in writing.

(5) Decision on the successful supplier:

Once the negotiations are completed, the negotiation team shall request all the suppliers participating in the negotiations to quote their final offered prices within a specified time limit. The procuring entity shall decide on the successful supplier from among the candidates recommended by the negotiation team on the principle that the supplier must meet the need of the respective procurement and that the price it quotes is the lowest among the prices quoted for goods of equal quality and for equal services. The procuring entity shall inform all the unsuccessful suppliers who participated in the negotiations of the result.

7. Modifications of existing contracts in the context of the current situation?

This shall be negotiated between the parties concerned.

For any further information and legal assistance, please contact [Dr Ulrike Glueck](#), the Managing Partner of CMS China