

## PEC Newsflash

### New Circular Strengthening the Bidding and Tendering Process in Beijing

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The establishment of a fair, competitive, and transparent bidding and tendering process is essential for market-oriented reforms, especially for the construction industry, in the PRC.

On 1 December 2011, *the Circular on Further Strengthening and Regulating Bidding and Tendering in Construction Projects, Beijing MOHURD Regulation No. 12 of 2011* took a step in this direction.

The Circular was entitled *关于进一步加强和规范建设工程招标投标工作的通知, 京建法〔2011〕12号* in Chinese and was first released by the Beijing Municipal Commission of Housing and Urban-Rural Development on 12 October 2011, focusing on the construction industry in Beijing.

The Circular is an addition to the array of existing law and regulations regarding the bidding and tendering process in China, including the followings:

- The Bidding and Tendering Law in the PRC 《中华人民共和国招标投标法》
- The Beijing Municipal Regulations on Bidding and Tendering 《北京市招标投标条例》
- The Opinions on Comprehensive Regulation of the Construction Market and Further Strengthening Quality and Safety Control in Relation to Construction Projects in Beijing 《全面规范本市建筑市场进一步强化建设工程质量安全管理工作意见》

The Circular contained a total of 19 articles, and focused on various aspects of the bidding and tendering process, including the following areas.

#### Invalidation of a Bid

Article 4 of the Circular set out various circumstances when a bid would be invalidated:

- When bidding documents from different bidders are prepared by the same unit or individual.
- Different bidders entrusted the same unit or individual to carry out bidding affairs.
- Same members of a project management organization appear in different bidding documents.
- Different bidders entrusted the same person to conduct onsite surveys.
- Copying and pasting between different bidding documents.
- The bidding bonds for different bidders are transferred from the bank account of the same unit or individual.

As can be seen above, the above measures are taken to ensure that each bidder will prepare and submit bidding documents independently, and that resources would not be combined or repeatedly used, in order to create a fair and competitive bidding environment.

However, the Circular also contains some provisions which may be considered as quite strict. For example, Article 9 of the Circular provided that at the meeting for opening bids, the project leaders proposed in the bidding documents should attend the meeting, failing which the bidding documents would be invalidated.

#### Information to be provided when announcing the winner of the Bidding and Tendering Process

Article 10 of the Circular provided that when announcing the winner of the bidding and tendering process, the following information should be provided:

- The results at the pre-qualification stage (if any).
- The records for bid opening.
- The bidders whose bidding documents have been declared invalid, and the reasons for the invalidation.
- The reasons and the results for any amendments to the bidding price.
- The score given to each bidder by the bid evaluation committee.
- The list of winning candidates recommended by the bid evaluation committee.

The above measures will enhance transparency in the bidding and tendering process. However, the scope of the information to be provided is quite far reaching, and it remains to be seen whether the owners would be prepared to fully disclose all such information, at the risk of being challenged by losing bidders.

#### Enforcement Issues

Even though there are measures to strengthen and regulate the bidding and tendering process as set out above, if the measures are not enforced or are not sufficiently enforced, the measures will have no impact in reality.

In this connection, the Circular provides for concrete steps to enforce the measures.

For example, Article 14 of the Circular provided that the municipal, district or county bidding regulatory authorities may arrange for experts to select samples for examination and assessment purposes. The contents shall include pre-qualification review, bid evaluation, written report on the

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bidding and tendering process, etc. Article 15 of the Circular provided that a public supervisor shall be engaged to conduct "real time" supervision to supervise the relevant entities involved in the bidding and tendering process.

The Circular also contained provisions regarding the record filing procedure (i.e. 备案). Article 17 of the Circular provided that parties to the construction project contract should, in accordance with the relevant rules and regulations, promptly record file the relevant contracts following the conclusion thereof as well as any major amendments. Failure to do so would result in the municipal, district or county Commission of Housing and Urban-Rural Development issuing a rectification order upon the discovery thereof. Upon the completion and final acceptance of the project, if the parties still failed to carry out the relevant record filing procedure, the municipal, district or county Commission of Housing and Urban-Rural Development shall (1) investigate and sanction the parties in accordance with the law, (2) report the failure to the higher level authority in charge of the parties, and (3) make a public announcement of the same.

Now that the concrete steps are set out in the Circular, it would be important for the authorities to allocate sufficient resources to implement the same.

## **Conclusion**

The Circular is a welcome addition to the array of existing law and regulations regarding the bidding and tendering process in China. It contains articles aiming to create fairness and competitiveness, as well as enhancing the transparency in the bidding and tendering process, even though some of the provisions may be quite strict and/or far reaching. The Circular provides for concrete steps to enforce the measures. It remains to be seen how successful would the Circular be implemented in practice, and to what extent other cities in the PRC would adopt the same or similar measures.

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