

LAW & POLICY UPDATE

CORPORATE & COMMERCIAL



Restrictions in bidding process for public procurement contracts

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Department of Economic Affairs (DEA) on July 23, 2020 issued an office memorandum amending Rule 144 of General Financial Rules, 2017 (GFR) by inserting a new sub-Rule (xi) under Rule 144. The new sub-Rule (xi) empowers DEA to impose restrictions, including prior registration and screening requirements, in relation to procurement from bidders from certain countries on grounds of defence or national security of India. No procurements shall be made in violation of any restrictions that may be imposed by DEA in this regard.

In exercise of its powers under Rule 144 (xi), DEA has, on July 23, 2020 issued an order imposing restrictions on bidding process in procurement of goods, services (including consultancy and non-consultancy services) or works (including turnkey projects) in India (**Order**). A brief summary of the Order (including restrictions thereunder) have been set out below in greater detail.

Registration of bidders

Pursuant to the Order, any bidder from a country that shares a land border with India should register itself with Competent Authority, being DPIIT, in order to be eligible to bid in procurement of goods, services (including consultancy and non-consultancy services) or works (including turnkey projects) in India. The process for registration and guidelines in relation to composition of committee of DPIIT in this regard has been prescribed in this Order.

For purposes of this Order, 'bidder from a country that shares land border with India' shall mean following:

- An entity incorporated, established or registered in such country
- Subsidiary of an entity set out above
- An entity substantially controlled through entities incorporated, established or registered in such a country
- An entity whose beneficial owner is situated in such country
- An Indian (or other) agent of such entity
- A natural person who is citizen of such country
- A consortium or JV where a member thereof falls under any of the above categories

Beneficial Owner for the purposes of (iv) above shall be:

- **In case of LLP:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s), has a controlling ownership interest/entitlement of more than 25% of shares/capital/profits
- **In case of a partnership firm:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s) has ownership or entitlement to more than 15% of capital/profits of such partnership
- **In case of an unincorporated association or body of individuals:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s), who has ownership of entitlement to more than 15% of the property/capital/profits of such association or body of individuals
- **In case of a trust:** Identification of author of trust, trustee, beneficiaries with 15% or more interest in trust and any other natural person exercising ultimate effective control over trust through a chain of control or ownership

Where no natural person(s) is identified, beneficial owner shall be relevant natural person who holds position of a senior managing official.

Such registration of the bidder with DPIIT shall be valid at the time of submission and acceptance of bids. In relation to supply (other than by way of tenders), such registration should be valid at the time of placement of order. If registration is valid at the time of acceptance/placement of order, then such registration shall not be a necessary pre-requisite at time of execution of contracts.

In all tender documents (including sub-contracting, and tenders in transitional cases), bidder shall submit a certificate in prescribed form, to the effect that it is in compliance with provisions of this Order. The tender or sub-contract shall be liable to be immediately terminated if certificate submitted by a qualified/accepted bidder is found to be false.

In tenders issued after July 23, 2020, restrictions imposed under this Order (including aforesaid registration) shall be a pre-requisite to be an eligible bidder and shall be incorporated as conditions in such tenders.

Exemption from registration

Bidders from a country that shares a land border with India shall be exempted from requirement of registration in following circumstances:

- Orders that have already been placed or contracts that have been concluded and a letter of award/ acceptance (LoA) has been issued, on or before July 23, 2020
- Procurement of medical supplies directly related to containment of Covid-19, till December 31, 2020
- Procurements made through GeM or small procurements made without knowing country of bidder
- Procurement by Indian missions and by offices of Government agencies/undertakings located outside India

Further, the Order shall not be applicable to bidders from those countries (even if they share a land border with India) to which Government of India has extended a line of credit or in which Government of India is engaged in development projects.

Transitional tenders

Tenders that have not been concluded or in cases where no LoA has been awarded, the restrictions set out above shall be applicable, in the following manner:

- For tenders that have not been opened until July 23, 2020 or in cases where evaluation of technical bid has not been completed or qualification of tenderees are not evaluated and unqualified bidders are not excluded (**First Exclusionary Qualificatory Stage**), no contracts shall be placed in contravention of restrictions imposed above and any tenders received from such countries shall be deemed to be in non-compliance of this Order
- For tenders that have crossed First Exclusionary Qualificatory Stage as on date of this Order, and qualified bidders include bidders from countries specified above, entire tender process shall be considered as *de novo*

Sub-contracting in works contract

Works contracts (including turnkey contracts) shall not be sub-contracted to a contractor after July 23, 2020, in contravention of conditions mentioned above. 'Contractor from a country that shares a land border with India' shall have same meaning as ascribed to a 'bidder from a country that shares land border with India' set out above. Needless to state, any sub-contracts awarded before date of this Order shall not be subject to aforesaid condition.

Applicability of this Order

The applicability of this Order shall extend to:

- All autonomous bodies
- Public sector banks and financial institutions
- Central public sector enterprises, subject to orders from DEA
- Procurement in public private partnership projects receiving financial support from Government or public sector enterprises
- Union Territories, National Capital Territory of Delhi and all agencies/undertakings thereof

This Order seeks to curb the participation of a bidder from countries that share land borders with India (namely, Pakistan, Afghanistan, China, Nepal, Bhutan etc), without having a valid registration with competent authority in India. This move by DEA appears to be in alignment with similar amendments effected in FDI policy of India.

