

EXPLANATORY NOTE

to the Resolution of the Cabinet of Ministers of Ukraine # 694 of June 28, 1997

“On Organisation and Fulfilment of International Tenders
for State Procurements of Goods (Services) of Foreign Origin
in Ukraine” and

“The Regulations on the Procedure of Organisation and Fulfilment
of International Tenders for State Procurements of Goods (Services)
of Foreign Origin in Ukraine”

The Ministry of Foreign Economic Relations and Trade of Ukraine has prepared the above mentioned documents on the instruction of the Cabinet of Ministers of Ukraine # 12800/2 of July 19, 1997 and with the purpose of fulfilment of the Protocol of the meeting held on July 15, 1995 under the chairmanship of Vice Prime Minister R. V. Shpek and in compliance with the plan of the preparation of draft Decree of the President of Ukraine and the Cabinet of Ministers of Ukraine.

Amendment of the developed Regulations (Resolution of the Cabinet of Ministers of Ukraine # 871 of October 21, 1995) is conditioned by the necessity to further improve of established rules, to implement modern generally accepted standards and to organise a more effective mechanism of consideration of projects of fulfilment of import procurement of goods, services and to introduce an adequate control and accounting of the use of foreign exchange holdings of the state, the state and local budgets and the loans guaranteed by the Government.

A new variant of “The Regulations on the Procedure of Organisation and Fulfilment of International Tenders for State Procurements of Goods (Services) of Foreign Origin in Ukraine” has been prepared for the mentioned reasons.

When developing the new variant of the Regulations the model Law of the UNCITRAL and the GATT Rules for state procurements have been used.

These Regulations have been prepared with regard for the established practice of carrying out importation in Ukraine and the requirements of the present situation and represent quite a complex mechanism because they regulate such a complex sector as state procurements.

Taking into account the situation that exists in respect of the utilisation of tender procedure for import purchases financed out of loans guaranteed by the Government, the Order of the President of Ukraine instructs to develop and adopt the procedure of making decisions on granting state guarantees that can, we think, provide for the compulsory utilisation of tender procedures that was specified in the Resolution # 871 of October 21, 1993.

The draft Regulations consists of 7 chapters.

Chapter 1 specifies general provisions applied to the sphere of utilisation of these Regulations and principles of insuring non-discrimination.

Chapter 2 incorporates general provisions for all the types of procurement procedures. The main purpose of this chapter is to determine the compulsory requirements that are to be met under all the procurement procedures including such requirements as advertising, transparency, guarantees of the fulfilment of obligations that the customer organising a tender may demand from the suppliers (contractors) as well as the requirements as to standards, specification and technical characteristics.

Chapter 3 and Chapter 4 provide requirements for holding of open tenders and open tenders with preliminary qualification - generally accepted in the international practice procedures. The difference between the two lies in the fact that an open tender with preliminary qualification include the procedure of carrying out a preliminary qualification of potential suppliers (contractors). Due to the existence of the procedure of preliminary qualification, a customer organising the tender can select potential suppliers (contractors) in order to insure their compliance with the qualification requirements for the fulfilment of procurement agreements concluded with them and to establish the procedure requirements that would promote fairness and participation of qualified suppliers (contractors) in tenders.

In exceptional instances specified in Chapter 5 of the Regulations, customers organising the tender may carry out procurement by means of the procedure of competitive negotiations. Using this type of procurement procedure, the customers inform the suppliers about the result of their selection and conduct negotiations with one or several suppliers. This mechanism is flexible enough and facilitates the direct conclusion of agreements.

This method of procurements' fulfilment must comply with general requirements of these Regulations for example as far as the issues of non-discrimination, guarantees of obligations, guarantees of standards, terms of rejection of suppliers, etc.

The Regulations also include the Chapter specifying the procedure of appeal which sets general principles that regulate the protection of suppliers (contractors) in cases of violation of provisions these Regulations.

From the other hand, under the conditions that Ukrainian enterprises and organisations lack practical experience of preparing, organising and holding international tenders, the draft Decree of the President of Ukraine provides rendering of adequate, generally accepted in the international practice support to interested enterprises, organisations and institutions in preparation, organisation and holding of international tenders.

Rendering of such support will be entrusted to the State Information and Analytical Centre for Monitoring of Foreign Commodity Markets (established by the Ministry of Foreign Economic Ties and Trade of Ukraine in accordance with Decree # 124/96 of

February 10, 1996 of the President of Ukraine) and may include performance of the following in the field of holding the tenders:

- development of tender documentation;
- organisation of analysis and expertise of tender offers;
- fulfilment of analysis of contracts concluded on the basis of tenders;
- rendering of consulting services on organisation and holding of international tenders in Ukraine for the Ministries, Departments, enterprises and foreign investors;
- preparation of the pool of offers and provision of information about the project subject to tenders for foreign suppliers (contractors) and investors;
- provision of distribution of sets of tender documents amongst the participants of a tender;
- organisation of international tenders with participation of national and foreign business activity entities for the supply (performance of a contract) by them at the expense of foreign exchange holdings of the state or foreign credits guaranteed by the Government and funds of central and local budgets;
- organisation of international tenders for attraction of foreign investments;
- determination by the instruction of the Cabinet of Ministers of Ukraine of Ukrainian business activity entities that could perform state procurements through the international tender procedure;
- selection of domestic consulting, engineering, public and commercial firms, foreign consulting firms for participation in organisation and holding of international tenders by instruction of the organisation which orders the tender;
- selection of specialised domestic and foreign firms, verification of their qualification for participation in tenders as potential suppliers (contractors), maintenance of a data bank of qualified suppliers (contractors).

We would like to draw your attention to the fact that the mentioned Centre could first of all act as a educational model centre for preparation, organisation and holding of international tenders when holding tenders (provided that interested customers have applied) and at the same time could directly hold international tenders of exclusive importance for the state.

The draft Regulations provide that the Cabinet of Ministers of Ukraine shall adopt normative acts for realising these regulations. This is conditioned by the necessity of regulating the system of state procurements exclusively by laws and normative acts in order to ensure the unified state policy in this area with regard for international obligations of Ukraine and the necessity to win the trust of suppliers (contractors) in tender procedures in Ukraine.

Besides, it is necessary a reporting form on the results of a tender should be developed taking into account the need to implement an efficient procurement system.

This reporting form must be filled in from the very start of holding tenders and provide the possibility to control the preparation and holding of tenders and to analyse the rightness of selection of one of the suppliers (contractors) by the organisers and finally is a condition for actual allocation of funds for carrying out import procurements together with the contract registered with the Ministry of Foreign Economic Ties and Trade of Ukraine.

Proceeding from the above mentioned we consider that without the implementation of the specified measures aimed at the creation of an integrated mechanism-system of state procurements these draft Regulations (that by all means are thoroughly developed) will have limited and inefficient practice of application (taking into account the role and place of international tenders in the system of state procurements).

In general, the mentioned draft Regulations have been developed in compliance with the international standards and the requirements of the GATT/WTO and after the creation of necessary infrastructure and under availability of professional staff could be replaced by the Fundamental State Procurement Law of Ukraine that must be applied to procurements both on foreign and on the domestic markets and will regulate only procurement procedures not allocation of funds.