

LAW ON CONSTRUCTION BIDDING: THEORETICAL ISSUES, CURRENT SITUATION, CONTRADICTIONS, AND ISSUES RAISED

LEI DE LICITAÇÃO DE CONSTRUÇÃO: QUESTÕES TEÓRICAS, SITUAÇÃO ATUAL, CONTRADIÇÕES E QUESTÕES LEVANTADAS*

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Abstract: Construction is an important industry in any modern society. It creates products that meet people's essential needs and economic and social development needs – houses and other structures that form an artificial environment convenient for people. live and work. In Vietnam, construction bidding is widely used and strictly regulated by law, but in practice, there are always potential problems and problems that arise. Although the law is always amended and supplemented to catch up with the actual problems that arise with negative trends, it is difficult to control all of them. A procurement law cannot cover all such issues. Therefore, the need for perfection is always placed on the law on bidding in general. This study focuses on analyzing the theoretical legal background of construction bidding, on that basis, analyzing the current situation of the current legal regulations and practical implementation to find out the inadequacies and causes of the shortcomings. Inadequacies aim to improve this area of law in legislative, judicial, and practical aspects.

Keywords: Law. The law on construction bidding. Theory and reality. Vietnam.

Resumo: A construção é uma indústria importante em qualquer sociedade moderna. Ela cria produtos que atendem às necessidades essenciais das pessoas e às necessidades de desenvolvimento econômico e social - casas e outras estruturas que formam um ambiente artificial conveniente para as pessoas. viver e trabalhar. No Vietnã, a licitação de construção é amplamente utilizada e estritamente regulamentada por lei, mas na prática, sempre há problemas e problemas potenciais que surgem. Embora a lei seja sempre emendada e complementada para acompanhar os problemas reais que surgem com tendências negativas, é difícil controlar todos eles. Uma lei de compras não pode cobrir todas essas questões. Portanto, a necessidade de perfeição é sempre colocada na lei de licitações em geral. Este estudo se concentra na análise do contexto jurídico teórico da licitação de construção, com base nisso, analisando a situação atual dos regulamentos legais atuais e a implementação prática para descobrir as inadequações e as causas das deficiências. As inadequações visam a melhorar esta área do direito nos aspectos legislativo, judicial e prático.

Palavras-chave: Direito. A lei de licitação de construção. Teoria e realidade. Vietnã.

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1. INTRODUCTION

According to legal experts, with many existing shortcomings, the Law on Bidding for Construction needs to be comprehensively revised, not just "amended and supplemented with several articles" to ensure uniformity and uniformity. of the legal system.

After nearly 8 years of implementation, the Law on Bidding for Construction (effective from July 1, 2014) has created an essential legal framework governing procurement the company's procurement, management, and use of capital and assets contributing to improving the efficiency of investment and procurement with the state budget. However, the actual implementation of the Law on Bidding in recent years also poses an urgent need for a comprehensive revision before the current reality has changed a lot.

For example, many laws related to the Law on Bidding for Construction (2022) have been amended, supplemented, or promulgated after the Law on Bidding took effect such as effect Law on Construction (2014 & 2021), Law on State Budget (2015); Enterprise Law (2005 & 2017); Law on management and use of state (2014) capital to invest in production and business in enterprises, Law on supporting small and medium enterprises (2017), etc. The recent Covid-19 pandemic has shown more clearly than ever the need to amend and supplement regulations of the bidding law, specifically bidding in construction, to meet urgent requirements in construction. infrastructure and economic recovery. In the process of practical investment implementation, there have been many cases where it is necessary to select contractors and investors but not yet regulated by the Law. Therefore, it is necessary to promptly improve the process of selecting contractors and investors to promote public investment capital's disbursement, promptly to serve socio-economic development tasks.

Besides, Vietnam has signed several free trade agreements such as CPTPP, EVFTA, etc. There is a Chapter on Government Procurement in these Agreements, which has some differences from the Law on Procurement. Therefore, it is necessary to amend and supplement several provisions in the Law on Bidding by international treaties to which Vietnam is a member.

2. RESEARCH RESULTS AND DISCUSSION

2.1. Concept, characteristics, and necessity of construction bidding

2.1.1 The concept of construction bidding

The market economy promotes the development of competition. Sellers of goods and services always have friction to compete with buyers. That mechanism makes the buyer get the best choice for him. On that basis, the bidding appeared. The bidding mechanism allows buyers to select one or several sellers who are capable of providing the goods and services they need in order to achieve optimal efficiency in terms of quantity, quality, price, etc. and engineering, technology, etc.

The Law on Bidding 2014, which has just been passed by the National Assembly of the Socialist Republic of Vietnam, provides a legal definition as follows: “Bidding is the process of selecting a contractor to sign and execute the contract. contracts for the provision of consulting services, non-advisory services, goods procurement, construction, and installation; select contractors to sign and perform contracts on investment projects in the form of public-private partnerships, investment projects using land on the basis of ensuring competition, fairness, transparency, and economic efficiency. ". This definition covers in general the basic requirements of current procurement activities in Vietnam. This is a rather detailed definition, which is different from the general definition of UNCITRAL that: “procurement is the procurement of goods, construction and services in some way” (UNCITRAL Model Law, Article 2).

Collectively, the above definitions, whether academic or common sense, aim to show that: procurement is a term 5 to refer to a process of procuring goods, works, and services through a process. the standardized process applied by the procuring entity to select a contractor in accordance with the criteria set by the procuring entity for the provision of goods, construction, and services. From the above studies, the concept of construction bidding can be defined as follows: Construction bidding is a form of bidding with the aim of selecting a contractor or a group of contractors (joint venture) that meets the needs of the public. requirements set by the bid solicitor for the construction of works.

2.1.2 Features of construction bidding

Although also of the nature of the choice of supplier of goods or services, construction bidding has the following unique characteristics that distinguish it from other types of bidding (Government, 2016 & 2020):

- (1) The first characteristic is: Construction bidding is complex.
- (2) Second characteristic: Technical construction bidding.
- (3) The third characteristic: Construction bidding is of great value.
- (4) The fourth characteristic: The bid execution time is long.

Because of such unique characteristics, construction bidding always takes special attention to the law.

2.1.3 The necessity of construction bidding

Construction products from an economic perspective are special goods. It can be knowledge (e.g. in consulting services). It can be construction items or construction works. These products are often of great value, are made for a long time, and have a very long shelf life. Therefore, construction bidding is very necessary, and has a very important position, related to most economic, cultural, and social fields, especially for industry and science and technology. It is thanks to bidding that the situation of irresponsibility and loss of capital for the project is overcome, and the quality of the works is improved (National Assembly, 2014 & 2022).

From an investor's perspective, it is a tool to help investors choose the best quality construction works at the most reasonable prices, and how to use capital effectively. In addition, for contractors, this is a way to find business opportunities and develop businesses. Through the criteria provided by the bid solicitor, the bidders can self-assess their ability to decide whether to participate (Ministry of Planning and Investment 2015 & 2018). Thus, bidding has established a competitive environment in which bidders can proactively make proposals that best match the requirements of the procuring entity (Ministry of Planning and Investment, 2020).

Thanks to the fair competition of the bidding, the contractors jointly offer their optimal conditions in terms of experience, capacity, finance, technology, etc. to win the tender. This helps limit the situation of assigning the contract to an incompetent party, leading to a prolonged project and arising disputes. Through bidding activities, the bid solicitor can select the contractor that best meets the set requirements while minimizing corruption factors. Moreover, through the openness and transparency of the bidding, the investor can monitor the contractor more easily or the contractors can monitor each other to avoid negative phenomena. Bidding, from the perspective of state management, is a macro-management tool that helps the state preserve the budget and be transparent in construction matters.

The promulgation of the Law on Bidding in 2014 and the Law amending and supplementing a number of articles of the laws related to capital construction investment in 2021 along with the system of guiding documents for the implementation of these two Laws have contributed to establishing a transparent and competitive environment for bidding activities in line with international practices, creating a basis for investors to select contractors with sufficient capacity and experience in providing goods, services, and works, helping to save the limited capital of the state.

However, in recent years, bidding activities using state capital also revealed a number of shortcomings, which are prominently reflected in such aspects as professionalism and professionalism in bidding activities are not uniform and still limited in some localities; the quality and efficiency of some preparatory work for bidding activities are not high; post-bid management issues have not been done regularly and have not been given due attention, etc. One of the reasons affecting the quality and effectiveness of bidding activities using state capital is due to the limitations of the legal system on bidding, specifically as follows:

First: The regulations on construction bidding are scattered, and lack of uniformity and consistency. The field of bidding is divided and managed not centrally because it is regulated in many different legal documents, causing overlapping and inconsistency among documents, causing difficulties in the procurement process. perform, specifically:

Bidding for selection of contractors: prescribed in the Law on Bidding, the Law on Construction, and the Law amending a number of articles of the laws related to capital construction investment (Law No. 38/2009/QH12);

Procurement by centralized procurement method: stipulated in Decision No. 179/2007/QD-TTg dated November 26, 2007, of the Prime Minister on promulgating Regulation on the organization of asset procurement, goods from the state budget in a centralized manner, Circular No. 22/2008/TT-BTC dated March 10, 2008, of the Ministry of Finance guiding the implementation of a number of contents of the Regulation on the organization of procurement. assets and goods from the state budget by centralized method promulgated together with Decision No. 179/2007/QD-TTg;

Bidding for service provision in the construction of public works: regulated in Decision No. 39/2008/QD-TTg dated March 14, 2008, of the Prime Minister on promulgating regulations on bidding, ordering customers, assigning tasks to provide public non-business services using the state budget;

Bidding for the supply of products and services in construction and installation managed by the State: specified in the Government's Decree No. 31/2005/ND-CP issued on March 11, 2005, on production and supply. application of public products and services, Decision No. 256/2006/QD-TTg dated November 9, 2006, of the Prime Minister on the promulgation of Regulations on bidding, ordering, and assigning production implementation plans and supply of public products and services (replaced by the Government's Decree No. 130/2013/ND-CP dated October 16, 2003).

Stemming from the above fact, it is necessary to promulgate the Law on Bidding as a general law, codify the contents of other legal documents regulating bidding activities in construction, overcome the conflict and overlap between legal documents in the same field and ensure the consistency and transparency of the legal system.

Second: The scope of regulation of the Law on Bidding in 2014 is still limited, not meeting the requirements of managing many procurement activities using state capital that has arisen in the past time. Activities for public purposes such as providing public services do not form a project; activities using state capital to invest abroad; Bidding activities to select investors to implement investment projects in the form of public-private partnership (PPP) and land use projects have not been specified. Therefore, the scope of regulation of the Law on Bidding needs to supplement the above contents.

Thirdly, the decentralization in bidding activities for procurement of assets for state agencies has not been specified as for construction investment projects; The approval process has not been streamlined, which takes a lot of time to organize bidding activities. The evaluation of bids according to the lowest evaluated price method prescribed in the Law on Bidding 2014; Amending and supplementing in 2022 is an advanced method, in line with international practices, but has not taken into account the specific conditions of Vietnam, so it is difficult to apply in some cases. Therefore, it is necessary to add new evaluation methods to create initiative and flexibility for investors in selecting contractors for bidding packages of different sizes and properties.

Fifth: The mechanism for supervision, inspection, and handling of violations in construction bidding activities has not been specified and strictly regulated. Some acts of circumvention or failure to fully comply with the provisions of the bidding law have arisen in the past time, but the sanctions for handling violations are not strong enough and inadequate for all. parties participating in bidding activities; the mechanism for resolving complaints in bidding is not reasonable and unclear in the case of dispute settlement in court.

Sixth: The procurement data system is still poor, making it difficult for state agencies in charge of procurement in the process of monitoring and managing bidding activities as well as formulating procurement policies, and at the same time does not create conditions for transparency of information for community monitoring activities, especially when implementing the strong decentralization policy and aiming to carry out online bidding procedures.

Seventh: Not meeting the requirements of the ministries, branches, localities, and the business community

In the Report on reviewing business laws (reviewing 16 Laws and nearly 200 sub-law documents related to business activities, including the Law on Bidding 2014, with the participation of more than 2000 enterprises). experts, 182 papers and 879 recommendations) implemented by the Vietnam Chamber of Commerce and Industry (VCCI) in 2011 recommended: “to codify regulations related to contractor selection in the implementation guidelines. Law on Bidding and Law on Construction as well as in regulations related to contractor selection”; amending and supplementing the Law on Bidding in the direction of the General Law to govern all bidding activities, “other laws such as the Law on Construction, the Law on Investment, the Law on Commerce only regulate specific management contents in each case field, does not re-stipulate the process and general contents in the Law on Bidding”.

For the above reasons, the development of the Law on Construction Bidding is an objective requirement in the process of building and perfecting the legal system on procurement using state capital.

2.2 Legal nature and governing law of construction bidding

2.2.1 Legal nature

Construction bidding is fierce competition. It always requires bidding parties to understand the es of bidding to promptly respond to the increasing requirements in bidding.

The selection of a partner in a certain way is always under the initiative of the subjects who wish to choose, except for a limited number of subjects who must comply with certain constraints.

The basis for contractors to compete on an equal basis is a strict bidding process along with a strict supervision mechanism for the implementation of the entire project.

This monitoring mechanism is only effective with openness and transparency in bidding. Construction bidding also has a buyer and a seller. Buyers are investors: they want like

consumers in other pure commercial activities that their investment is the most profitable, and the purchased goods must be of good quality. and affordable price. The seller here is the contractor, they want to sell as many goods as possible at the most favorable price for the business ($T' > T$) and the contractor's goal is to create many other T' values. more or the winning bid in many bidding packages. Thus, in the bidding process, the contractor who offers the best suitable goods and services is accepted by the buyer.

2.2.2. Laws governing construction bidding

Construction bidding has its characteristics, so the regulations governing this field also have certain characteristics in terms of governing principles, the scope of regulation, and subjects of application. As follows:

Bidding principles Construction bidding has the following basic principles that the law on construction bidding must recognize:

- (1) The principle of attaching importance to efficiency;
- (2) Full data principles;
- (3) The principle of fair competition;
- (4) Principles of fair evaluation;
- (5) Principles of transparency;
- (6) Principle of accountability;
- (7) Principle of proper guarantee;
- (8) Principles of encouraging domestic contractors;
- (9) The principle of respect for international treaties.

Scope of regulation and subjects of application of the law on construction bidding:

The scope and subjects of application of the law on construction bidding are domestic organizations and individuals, and foreign organizations and individuals investing in construction in the Vietnamese territory. These subjects will have to meet certain conditions as prescribed by law such as construction practice capacity or construction activity capacity.

Some results achieved

Recognizing that the Law on Construction Bidding has created the basis and legal corridor for the promotion of bidding in construction in recent years, ensuring the requirements of publicity, transparency, competition, and economic efficiency (2020). online bidding saves about 1,725 a billion VND in direct administrative costs). However, the new law has only principled provisions for the implementation of online bidding but has not yet codified

the regulations on online bidding to further promote this activity and at the same time shorten the time required for bidding. organize the selection of contractors and investors, and reduce unnecessary administrative procedures in bidding.

Many legal experts warn that violations of the law on bidding in general and construction bidding, in particular, tend to decrease in general, but the act of "communicating tenders" is still complicated and sophisticated in Vietnam. There are few projects and bidding packages, while the Bidding Law currently does not fully stipulate the process of inspection, supervision, and handling of violations, especially the inspection of the results of the implementation of inspection and inspection conclusions. , monitoring.

Moreover, the law also only focuses on regulations on sanctions for violations of contractors and investors, but there is no specific regulation on sanctions for violations against bid solicitors and owners or investors, and competent people are important parties in deciding the effectiveness and transparency in bidding, etc.

According to the Ministry of Planning and Investment, one of the important goals in developing the draft Law on Construction Bidding (amended) is to perfect mechanisms and policies and create a favorable and healthy business and investment environment. , fair for all economic sectors; improve the efficiency of the use of state capital through bidding; create an equal, competitive, and transparent environment in public procurement, contributing to limiting negativity, corruption, and waste, creating a new driving force for the rapid and sustainable development of the country.

2.3. Some recommendations to improve the law on construction bidding

2.3.1 Suggested directions

From the situation and causes of limitations and weaknesses in the construction bidding activities mentioned above, we can draw some recommendations to improve the law as follows:

Applying strong mechanisms and solutions in bidding activities to clarify the responsibilities of individuals and groups in each stage such as investors, project owners, consultants, designers, and contractors;

Improve quality, long-term vision, uniformity, and legality. Reviewing the entire planning including the socio-economic master plan, sectoral and territorial master plan, in association with goal 22 of socio-economic development, and economic restructuring, on that basis, abandon plans with low feasibility.

Maintain regularly and sufficiently in terms of area and depth of expertise and improve the quality of inspection, inspection, audit, and supervision activities; focus on clarifying wrongdoings, specifying responsibilities, and strictly and thoroughly handling weak points and having a lot of public opinion in the bidding process;

Perfecting the legal system, renovating mechanisms and policies, how to use them effectively, prevent loss and waste;

Focusing on administrative reform in bidding activities, choosing the first and second stages, assigning clear and specific decentralization in terms of responsibilities and scope of state management between sectoral officials, between Central and local.

2.3.2 Some other recommendations

For regulations on evaluation criteria for construction and installation bids, specifically:

+ It is necessary to amend the regulations on evaluation criteria for construction and installation bids in the direction that the Investor considers the satisfaction level of the contractor's experience and capacity compared to the requirements of the work to be performed.

+ The setting of technical evaluation standards should be evaluated on the conformity between construction technical solutions, measures to organize the total construction site with the construction progress, and bids approved by the Ministry of Planning and Investment. offer.

+ The State needs to have specific guiding documents to develop specific standards and methods for evaluating bids, avoiding the subjective evaluation of the bid solicitor.

For regulations on construction and installation bid evaluation methods: Consider and evaluate simultaneously the technical proposals of the bidding package with the evaluation of other proposals on the progress of implementation and the level of quality assurance. quantity, bid price, etc (Dua, 2009; Diep, 2016). When considering bids, it is possible to reduce the steps in the bid evaluation process, thereby shortening the time to organize the bidding and the progress of the project.

There must be a mechanism to manage, supervise and strictly sanction negative acts in bidding activities.

An alternative bid may be allowed to be submitted to obtain a time- and cost-saving option. DBecause risk, interest, and competition factors have not been taken into account, bids that exceed the estimate may still be considered.

Due to the volatile market price situation, the construction time is often long, so the law needs to have stricter regulations on price determination, technical plan determination, etc. to avoid risks to contractors and ensure transparency in payment and settlement of construction capital.

When selecting a consultant to carry out bidding, it is necessary to go through competitive bidding to select a qualified, experienced, and ethical consultant.

It is possible to study the application of artificial neural networks in bidding work (Luan & Giang, 2018), specifically:

- + One of the most important aspects of bidding is the fair, accurate and transparent bid evaluation, achieving economic efficiency;
- + The role of the expert group is considered to be very important in the bid evaluation process. However, in practical terms, sometimes these experts also face confusion in making decisions, or investors do not have the conditions to invite suitable experts. Therefore, the current application of artificial intelligence is an area that should be studied and applied.

3. CONCLUSION

Currently, there is no legal basis for optimal evaluation and management of the results of bidding and winning activities. Therefore, it is difficult to assess whether the winning results are fraudulent or not, there is no basis to investigate, and there is no evidence to prove that during the bidding process, illegal actions took place. Therefore, even though it is certain that during the bidding process, the bidding results have been interfered with, the managers have not yet found a solution, and the contractors continue to use all kinds of tricks to get the results. contract.

The bidding documents management system is not uniform. The functions of the departments and the responsibilities of the head are not clear, the management overlaps, it is difficult to separate the responsibilities, and the status of managing tender documents is still messy so far, although there have been many guiding documents to guidance from superiors. However, for construction projects with or without investment capital from the Government, they are still managed in the style of "the king loses the village rule".

During the bid review process, the professional ability and capacity of the dossier evaluation team were not strictly censored, it was difficult to avoid the situation that many people were bribed with the results of the evaluation and classification of documents.

Moreover, even though the bidding is public, the process of document approval is kept secret, so transparency and fairness are not guaranteed. In the future, the Government and functional agencies need to make stricter and clearer regulations to ensure the transparency and fairness of the bidding market.

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