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NEW RULES FOR GOVERNMENT TENDERS

Myanmar has precious little regulation governing Government tenders, but what it does have, has just been revamped and enlarged. Presidential Notification 1/2017 dated 10 April 2017 (the Notification) has reset and strengthened rules on certain types of Government procurement (primarily the Government purchasing goods or services, selling assets, or leasing out land). In this note, we examine the salient features of the new rules, and we try to understand how they will affect some of the common projects and transactions in Myanmar.

To which tenders does the Notification apply?

Mainly to the Government purchasing goods and services including construction services. The Notification also applies to tenders where the Government sells or leases out assets to private parties. It replaced the must shorter Notification 1/2013 with the same subject matter. The Notification does not apply to Public Private Partnerships, construction of electric power stations, telecommunication license tenders, oil and gas block tenders and mining. It states that separate rules will be created for those activities, but to date none have been published as far as we know.

Is a tender obligatory in all cases?

The Notification, though in convoluted language, requires agencies to undertake a tender for procurement

Highlights of this note

- ▶ To which tenders does the Notification apply?
- ▶ Is a tender obligatory in all cases?
- ▶ Who can authorize a tender?
- ▶ Funding and currency issues
- ▶ How are tenders to be publicised?
- ▶ Who is on the Tender Committee?
- ▶ How to decide who wins?
- ▶ Security
- ▶ Disputes

of goods and services, sale of assets and leasing out in case the price exceeds 10,000,000 MMK (approximately 8,000 US\$). In such cases and up to this amount the agency may collect 3 price quotes from companies without going through a tender. In excess of this amount, Government agencies must conduct a tender in case we are talking about the procurement of goods and services or the sale or the leasing out of a Government asset.

It does seem clear that if the agency does initiate a tender, it must do so following the rules laid out in the Notification.

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Who can authorize a tender?

The Notification does not specify which Government agency can initiate a tender, or who within an agency has the power to make legally binding decisions in connection with the tender. As mentioned, the Notification does state that “for large scale projects”, the State/Region agencies must obtain approval by the State/Region Government. It also mentions that Union level agencies must obtain the approval of the President’s Office and the Cabinet.

It is unhelpful that the Notification does not define what a “large” project is, which severely limits the practical use of this rule.

The Notification also requires the creation and approval of a procurement plan, which is to be approved by the head of the Union Ministry or, as the case may be, the state/region Minister.

Funding and currency issues

For those tenders where the Government has to pay something, the Notification puts much emphasis on making sure the needed funds are secured. The Notification requires not only sufficient appropriations for the main cost, but also for raw materials, training materials, etc.

The Notification also addresses the issue of foreign currency. It states that for international tenders, foreign currency is

permitted. It also states that foreign currency is permitted for other tenders “where the use of foreign currency is necessary”. In all cases, the agency organizing the tender has to apply for the foreign funds to the appropriate budget.

How are tenders to be publicised?

That depends on the nature and size of the tender. This table reflects the publication obligations:

Tender Publications		
Goods and services, including construction		
1.	Below 10,000,000 MMK	No publication, no tender, the agency invites three companies for a price quote
2.	Between 10,000,000 MMK and 100,000,000 MMK	Announcement on the notice board at least two weeks in advance
3.	Above 100,000,000 MMK	Two announcements in state-owned newspapers at least one month in advance and on the website also one month in advance
Sale and lease out of assets		
1.	Below 10,000,000 MMK	Announcement on the notice board at least two weeks in advance
2.	Above 10,000,000 MMK	Two announcements in state-owned newspapers at least one month in advance and on the website also one month in advance

Who is on the Tender Committee?

The Notification now prescribes which committees are to be formed, and who serves on those committees. A Union level tender committee will be headed by a Deputy Minister or a Permanent Secretary. U state/region level tender committee must be headed by a state/region minister. The Notification also requires for, depending on the amount involved, for two or three representatives to be included of Government



agencies not involved in the tender. This is praiseworthy, but the regulation should have spelled out from which other ministry those independent representatives should be delegated.

In addition to other committees, the Tender Committee forms a "Floor Price Calculation Committee" in case an asset is to be sold or leased out to set a minimum price, and a "Tender Receiving and Scrutinizing Committee" consisting of 3 to 5 members.

How to decide who wins?

The Tender Committee assigns the scrutiny and selectin of the winner to the Tender Receiving and Scrutinizing Committee. The Notification now imposes the use of scorecards. The scorecards set out the marks for the Tender Committee to follow, with some flexibility.

Security

Bidders must under the new Notification provide security for their performance under the tender process. The security must be 1% of the value concerned for the period of the tender plus 28 days. In the case of selling and leasing out assets, the security must be 10%.

Disputes

A final innovation the Notification has made is in the area of complaints and settlements of disputes. In case of any complaints, the Tender Committee is first to investigate and decide on the matter. If the complainant is not satisfied with the outcome, a Complaints Settlement Team formed by the Ministry of Planning and Finance shall decide the matter.

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