

E-ALERT | Anti-Corruption

October 2012

**MINISTRY OF FINANCE RELEASES DRAFT MEASURES ON NON-BID
GOVERNMENT PROCUREMENT****Draft Measures Aim to Clarify Processes, Increase Transparency, and Reduce Corruption**

On October 17, 2012, China's Ministry of Finance ("MOF") issued for public comment [Draft Administrative Measures on Non-Bid Government Procurement](#) (the "Draft Measures"), which aim to clarify processes and requirements, increase transparency, and prevent corruption in non-bid government procurement, one of the three types of government procurement in China.¹ The public comment period closes on November 18, 2012.

Compared with public tendering and bidding processes, non-bid government procurement is currently relatively unregulated and lacks transparency. The Draft Measures are the first departmental regulation to outline detailed non-bid government procurement procedures and requirements.

Building on the basic descriptions of procurement mechanisms in the [Government Procurement Law](#), the Draft Measures clarify the scope of government procurement projects eligible to make use of non-bid methods, further explain general procedural requirements for all non-bid procurement, and outline requirements and mechanisms for specific non-bid methods, including competitive negotiation, sole-source procurement, and requests for quotations. The Draft Measures also clarify the selection mechanism and process for evaluation experts and eligible suppliers, the inquiry and complaint processes available to

¹ There are three types of government procurement: (1) projects for which tendering and bidding are required, (2) "non-bid" procurement (the focus of the Draft Measures), and (3) procurement so small that no processes are required. According to the *Government Procurement Law*, government procurement refers to either government purchases of goods, construction, or services (a) that are listed in the relevant central- or local-level government procurement catalogue, or (b) that are not listed in the relevant catalogue but have a value exceeding the prescribed threshold set in that catalogue above which formal government procurement procedures (either tendering and bidding or non-bid procedures) must be followed. According to the Draft Measures, government purchases of goods, construction, or services may be eligible to make use of non-bid government procurement processes if they qualify as government procurement as described above, while also: (i) falling below certain value thresholds under which public tendering is not required, or (ii) are otherwise explicitly exempt from the requirement to go through a public tendering process. For more details on the scope of non-bid government procurement, please see the below section titled "Scope of Government Procurement Eligible to Use Non-Bid Methods."

suppliers, the behaviors that call for blacklisting of a supplier, as well as the penalties for misconduct.

Following the Chinese government's approval of Tendering Regulations (effective February 2012; see our e-alert [here](#)), the Draft Measures reflect continuing effort by the Chinese government to improve government procurement mechanisms, reduce fraud and corruption, address enforcement issues, and foster an open, impartial, and transparent procurement system. If fully implemented and enforced, the Draft Measures could significantly enhance transparency of non-bid government procurement.

Scope of Government Procurement Eligible to Use Non-Bid Methods

Based on the *Government Procurement Law*, the Draft Measures specify the scope of government procurement that is eligible to adopt non-bid methods:

- 1) procurement of goods or services that falls within the relevant central- or local-level government procurement catalogue but below the value threshold at which the relevant catalogue specifies public tendering is required;
- 2) procurement of goods or services that is not in a central- or local-level government procurement catalogue, and that exceeds the value threshold at which the relevant catalogue specifies formal government procurement procedures are required, but that is below the value threshold at which public tendering is required;
- 3) procurement of goods or services that is not in a central- or local-level government procurement catalogue, and that exceeds the value threshold at which the relevant catalogue specifies formal public tendering procedures are required, but that is approved to use non-bid government procurement methods; and
- 4) procurement for certain construction projects that, in accordance with other laws,² does not need to go through a public tendering process.

Non-Bid Government Procurement and Anti-Corruption Compliance

Three aspects of the Draft Measures are particularly relevant to anti-corruption compliance:

(1) Inquiry and Complaint Processes

The Draft Measures build upon brief provisions in the *Government Procurement Law* and the [Measures for Handling Complaints of Government Procurement Suppliers](#) by providing suppliers with a clearer avenue for raising inquiries and complaints. Under the Draft Measures, a supplier would be able to raise an inquiry or complaint with the procuring entity or agency if the supplier believes their interests were damaged as a result of:

² See Article 66 of the *Tender and Bidding Law*, Article 9 of the *Implementation Rules of the Tender and Bidding Law*.

- differential or discriminatory treatment arising from unreasonable conditions set in the procurement documents;
- violation of rules³ in the clarification or revision of the procurement documents;
- participation of procuring staff or related personnel who have a conflict of interest with another supplier and should have withdrawn from the procurement process but did not;
- any collusion in the procurement activities;
- violation of rules⁴ in the procurement process;
- other suppliers winning the contract by providing false materials; or
- other circumstances that damage the supplier's interests.

If the procuring entity fails to reply to the inquiry within three working days, or makes a reply that is unsatisfactory to the supplier, the supplier is entitled to bring a complaint to the local department of finance. These new appeal processes could potentially enable suppliers to better protect their rights and interests in the non-bid procurement process.

(2) Blacklisting of Suppliers

In accordance with the *Government Procurement Law*, for the past ten years central- and local-level departments of finance have been maintaining blacklists of suppliers who have engaged in inappropriate government procurement behavior, with many local governments issuing local implementing measures and publishing blacklists on their respective government procurement websites or by other methods.⁵

Although blacklisting of suppliers during the tendering and bidding processes has been established for a number of years, the Draft Measures clarify what behavior could land a supplier on a government procurement blacklist. Under the Draft Measures, suppliers who engage in any of the following acts would be added to the relevant blacklist and prohibited from participating in government procurement for one to three years:

- offering bribes or other inappropriate benefits to procurement evaluators;
- failing to conclude a procurement contract with a purchaser without justification after entering into a deal;

³ The Draft Measures do not clarify to what rules this provision refers.

⁴ This appears to refer generally to the provisions of the *Government Procurement Law*.

⁵ The *Administrative Measures for Government Procurement Information Announcements* (Ministry of Finance, 2004) require local finance departments to publish their respective blacklists. Several local finance departments have chosen to publish them on their respective the government procurement websites. See, e.g., Liaoning Province <http://www.ccgpliaoning.gov.cn/login.do;jsessionid=cWFnQXBKfvvQ5m7mbJ1fvghTDkX82GJtkp42v13LnFkfqNkdSC!378615461?method=beginlogin>; Xining City, <http://www.xnczq.gov.cn/html/xinwenzhongxin/gongshigonggao/2011/1208/1414.html>.

- failing to conclude a procurement contract in compliance with the provisions specified in the procurement documents;
- failing to perform obligations under a procurement contract;
- arbitrarily altering, suspending, or terminating a procurement contract; or
- fabricating facts, providing false materials, or making use of evidence obtained by other illegal methods when making an inquiry or complaint.

Blacklisted suppliers may face significant loss of potential business opportunities related to government procurement, which may deter suppliers who use bribery or other misconduct to secure government contracts.

(3) Penalties for Misconduct

The Draft Measures clarify what behavior would qualify as collusion, and define misconduct of procurement evaluators and entities, including bribe acceptance, ex parte communications, and other misconduct. The Draft Measures also set penalties for such behavior. Suppliers engaged in collusion would face penalties as detailed in the *Government Procurement Law*, including potential blacklisting (as described above) for one to three years, confiscation of any illegally obtained income, fines between 0.5% and 1% of the total value of the procurement, revocation of the supplier's business license, criminal liability for serious crimes, and other penalties. These clarifications of misconduct and requisite penalties could make it easier to identify and discourage inappropriate behavior related to government procurement.

These provisions, if finalized, could enhance regulation and transparency of non-bid government procurement. Their ultimate effectiveness in improving transparency and reducing corruption, however, will depend significantly on implementation and enforcement. Once the Draft Measures are finalized and made available to the public, we will provide another update.

* * *

If you have any questions concerning the material discussed in this client alert, please contact the following [China-based](#) members of our [Global Anti-Corruption practice group](#):

Eric Carlson
Shaoyu Chen
Tim Stratford

86.10.5910.0503
86.10.5910.0509
86.10.5910.0508

ecarlson@cov.com
schen@cov.com
tstratford@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein. Only qualified PRC nationals working in PRC law firms are permitted to practice PRC law. Accordingly, as is true for all non-PRC law firms, we cannot express any legal opinion concerning the interpretation or application of PRC law. If a formal PRC legal opinion is required in relation to any specific issues discussed in this memorandum, our practice is to arrange for such an opinion to be provided by one of our correspondent law firms in the PRC and to work closely with the PRC law firm in that exercise.

© 2012 Covington & Burling LLP. All rights reserved.