

## E-ALERT | Anti-Corruption

December 8, 2011

### CHINA'S STATE COUNCIL APPROVES DRAFT TENDER REGULATIONS Regulations Seek to Prevent Corruption in Tendering

On November 30, 2011, China's State Council approved for internal review draft regulations on tendering ("the Draft Tender Regulations"). While the full text of the regulations has not yet been publicly released, an [official announcement by the State Council](#) (Chinese) and reports from state-run media explain that the Draft Tender Regulations will interpret the Law of the People's Republic of China on Tenders and Bids ("Tender Law"), with the goal of further cracking down on corruption in the tendering and bidding process.

#### Scope

The Draft Tender Regulations further clarify the scope of projects necessitating public tender. Unless otherwise exempted by other law or regulation, firms must offer for public tender certain projects where a state-owned firm controls or takes a leading position, including any project entirely or partially funded by state capital. According to the State Council, the goal of the Draft Tender Regulations is to protect fair and impartial tendering, prevent and punish corruption, and safeguard the normal order of tendering requirements. It is expected that the full text of the Draft Tender Regulations will be publicly released in the near future following further refinement by the State Council.

#### Response to Corruption in Tendering in China

In China, tendering and bidding is one of the areas most prone to corruption. In 1999, the Tender Law was promulgated, setting out the basic rules for the tendering and bidding process. However, a lack of further legislative interpretation and weak enforcement resulted in continued manipulation of the tendering and bidding process, and tender fraud, improper administrative intervention, and bidding collusion have persisted, drawing extensive attention from both the public and authorities. In October 2009, the Legislative Affairs Office of the State Council published [a draft tender regulation](#) (Chinese) to solicit public opinion on this issue. Following two years of discussion, the State Council has now formulated and approved a final draft regulation.

#### Tendering Regulations and Anti-Corruption Compliance

Based on the State Council announcement and official media reports, five aspects of the Draft Tender Regulations are particularly relevant to anti-corruption compliance:

- The Draft Tender Regulations would impose strict rules to prevent tender fraud, such as prohibiting both the imposition of unreasonable requirements designed to exclude bidders and the application of differing qualification/evaluation criteria for bidders. The Draft Tender Regulations prohibit setting qualification/eligibility requirements for matters not related to the actual performance of the contract or requiring special conditions on behalf of bidders such as specific achievements, awards, patents, trademarks, brands, or suppliers. This appears to add detail to the provisions in the existing Tender Law, which provide only that “No tenderer shall restrain or exclude potential tenderers by imposing unreasonable conditions, nor shall it discriminate against potential tenderers.”
- The Draft Tender Regulations would clarify the committee selection process for tender evaluation. The Draft Tender Regulations require the members of the evaluation committee to be picked randomly from a pool of experts. The evaluation committee is prohibited from certain improper acts such as: privately contacting the bidder; accepting money, property, or other benefits from the bidder; seeking the tenderer’s opinions about the successful bidder; accepting any opinions from individuals or entities favoring or excluding certain bidder(s); or other improper acts. The acceptance of money, property, or other benefits may lead to fines, disqualification of the bribe-payer, or, in serious cases, criminal responsibility. This provision appears to represent a modest expansion of the Tender Law by adding prohibitions on seeking the tenderer’s intentions for determining the successful bidder and on accepting any opinions favoring or excluding certain bidder(s).
- The Draft Tender Regulations would expressly prohibit collusion between the tender and bidder. The contract signed after bidding should be consistent with the tender documents and the successful bidder’s documents. The tenderer and the bid winner shall not conclude other agreements deviating from any substantial provisions of the contract. This is largely duplicative of existing provisions in the Tender Law, though the Draft Tender Regulations do not have an explicit consistency requirement.
- The Draft Tender Regulations would further prohibit the abuse of administrative power to interfere with or manipulate the bidding process. The Draft Tender Regulations prohibit government officials from interfering with the bidding process in any manner. The Tender Law already includes penalties for “resorting to irregularities for favoritism, abuse of power, or neglect of duties”; the Draft Tender Regulations appear to restate this prohibition in a slightly different form.
- The Draft Tender Regulations would include further refining measures to fight against bid-rigging and fraudulent acts. Where such acts are found, then the bid will be invalidated, any illegal income will be confiscated, and a fine will be imposed. For serious violations, participation in the bidding process may be suspended for a period of time, or a company’s business license may be revoked. Criminal sanctions may also be applied. Based on the announcement by the State Council and reports by state-run media, these provisions appear to restate existing measures contained in the Tender Law, though the full text of the Draft Tender Regulations may include additional language.

The effectiveness of the Draft Tender Regulations will, of course, depend significantly on implementation and enforcement. The details of the Draft Tender Regulations will become clearer once the full text is publicly released.

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

<b>Eric Carlson</b>	86.10.5910.0503	<a href="mailto:ecarlson@cov.com">ecarlson@cov.com</a>
<b>Shaoyu Chen</b>	86.10.5910.0509	<a href="mailto:schen@cov.com">schen@cov.com</a>
<b>Tim Stratford</b>	86.10.5910.0508	<a href="mailto:tstratford@cov.com">tstratford@cov.com</a>

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