

# Afghanistan

## Relevant Laws

1. Afghanistan Minerals Law, August 16, 2014, Issue No: 1143 (2014 Minerals Law)
2. Afghanistan Mining Regulations 2009, February 14, 2010 (2009 Regulations)

## Conditions for Competitive Bidding

Under the most recent Afghan legislation, reconnaissance licenses are granted by application, while exploration, exploitation, and small-scale mining licenses are granted based on bidding. (Article 19(2), 2014 Minerals Law). In case of justifiable reasons, the Ministry of Mines and Petroleum may grant both an exploration and exploitation licenses in a single bidding process upon the concurrence of the Commission and approval of the Council of Ministers. (Article 19(3), 2014 Minerals Law).

The 2014 Minerals Law refers to “relevant Regulations” as setting forth “the manner of any bidding process and other licensing related issues,” (Article 19(4), 2014 Minerals Law), however, as of this writing, the most recent regulations available for analysis are the 2009 Mining Regulations, enacted pursuant to an earlier law. Under the 2009 Regulations, areas open to competitive bidding include: (1) public or private lands not covered by valid and existing mineral rights or pending mineral rights bids, (2) lands covered by expired, abandoned, cancelled mining rights, and (3) reservation sites identified for future minerals activities by the ministry of mines. (Article 5-6, 2009 Regulations).

## Two-Tier Bidding – Pre-Qualification Criteria

Bidding for mineral rights subject of large or very large mining contracts requires a pre-qualification evaluation of bidders. Prior to the initiation of bidding for mineral rights, the Ministry of Mines shall decide on the requirements for pre-qualification, which may include minimum or threshold standards relating to the bidder’s professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability, experience, business reputation, and personnel. All bidders that satisfy the pre-qualification criteria shall be invited to submit bids and shall be provided with the bidding documents. (Article 10, 2009 Regulations).

## Bidding Process

The announcement of the bidding process is made on the Ministry of Mines website, as well as through national and international media (Article 9, 2009 Regulations). The Ministry of Mines, taking into consideration the conditions and circumstances of the tendering or bidding process shall determine a deadline for the presentation of proposals. If only one bid is received, the ministerial commission must make a decision, based on the contents of the proposal. Once a sufficient number of responses are received, if necessary the bid opening date and location shall be re-announced by Ministry of Mines and bidders shall be invited to attend the bid opening. (Article 13, 2009 Regulations).

The Afghan bidding process includes the public opening of bids once received, which shall be done prior to their actual evaluation. Bids shall be opened as soon as possible after their submission, in a public proceeding and in accordance with the terms and conditions set forth in the bidding documents. The opening of bids shall be performed by the evaluation board of the Ministry of Mines in the presence of bidders or their representatives, all of whom shall be officially introduced to the Ministry of Mines prior to the day of the opening of bids (Article 15, 2009 Regulations).

Bids shall remain valid until a contract is concluded with the preferred bidder in accordance with the terms set forth in the bidding documents. Unilateral withdrawal of bids may cause forfeiture of any bid security. The time of validity of a bid may be extended with the agreement of the bidder. In such case, the bidder must obtain an extension of any required bid security. (Article 15, 2009 Regulations).

The selection of a preferred bidder shall be based on the information given by the bidders in their bids. The Ministry of Mines may seek clarifications of bids in writing, and only written responses may be considered. The Ministry of Mines may not accept requests for changes in the bids, or enter into negotiations regarding any terms of the bids with the bidders (Article 16, 2009 Regulations). After the evaluation of bids, the evaluation board shall announce the preferred bidder and send a notice of acceptance of the bid to them. If the preferred bidder fails to conclude a mining contract in accordance with the terms set forth in bidding documents, the Ministry of Mines shall offer the mining contract award to reserved bidder, which is the bidder in second place (Article 18, 2009 Regulations).

In cases where the actual holder of an exploration license fails to win the bid for the exploitation license covering the same reserve or deposit, such holder shall have priority right to be granted the exploitation license under the same terms applicable to the winning bidder. Otherwise, the winning bidder for the exploitation license shall compensate all expenses incurred by the exploration license holder, including the payment of interest of 25% for costs incurred during exploration. (Article 54, 2014 Minerals Law).

### **Biddable Factors/ Evaluation Criteria**

The award of mining contracts shall be made on the basis of factual and objective criteria, set forth in applicable law and the invitation to bid, which may include the following:

1. The technical and managerial competence and experience of the bidder
2. The financial resources available to the bidder to carry out the proposed work program
3. The business competence and legal and financial standing of the bidder
4. The specific contents of the bid received, including the proposed work programs and related financial commitments and other economic benefits to the extent such criteria are stipulated as subject for bids in the invitation for bid and/or the invitation to pre-qualify
5. The extent to which the bidder will contribute to the development of sustainable Afghan mineral activities
6. Such other criteria as may be stipulated in the invitation for bids (*see below*--Article 12 requirements) (Article 16, 2009 Regulations)
  - a. Article 12: Bidder's information shall include:
    - i. The name, address and nationality of each bidder
    - ii. In the case of a bidder organized as a corporation:
      1. Its place of registration or incorporation, its principal place of business, the names, addresses and nationality of the directors, principal officers and authorized signatories of the company and its capital structure
      2. The corporate structure of the company
      3. Financial information of the bidder, including annual reports, audited balance sheets and profit and loss statements for the past three years; and any reports of relevance for the mineral activities which the bidder may have filed with government agencies responsible for securities regulation during that period
    - iii. How the mineral activities would be financed and method of performance security
    - iv. The bidder's previous experience and technical expertise in relevant mineral activities
    - v. A detailed description of the proposed exploration program, including minimum work obligations and estimated expenditures, if required by the bidding documents
    - vi. A description of the organization and expertise which the bidder will have available in Afghanistan and elsewhere for activities in connection with the license area for which the bid is submitted
    - vii. A description of the bidder's experience and procedures that will apply for securing the health, safety and welfare of persons involved in or affected by the mineral activities
    - viii. A description of the bidder's experience and procedures that will apply for protecting the environment, preventing, minimizing and remedying pollution and other impacts from the mineral activities
    - ix. Proposals with respect to the training of Afghan nationals and expenditures to be incurred therein
    - x. Any additional specific information identified in the regulations for each type of license and authorization (Article 12, 2009 Regulations)

## **Bidding Fee – Revenue/Buy-In**

1. Bidding fee for small-scale mine form and bidding documents shall be up to US\$ 500 in Afghan currency
2. Bidding fee for medium-scale mine form and bidding documents shall be up to US\$ 1,000 in Afghan currency
3. Bidding fee for large-scale is US\$ 2,000 in Afghan currency
4. Bidding fee for very large-scale is US\$ 5,000 in Afghan currency (Article 11, 2009 Regulations)

## **Eligibility**

“Bids may only be considered insofar as the bidder is qualified and eligible pursuant to Article 14. All Bidders shall be treated fairly and without discrimination.” (Article 16, 2009 Regulations)<sup>6</sup>

The material requirements for eligibility are as follows:

1. Afghan natural person older than 18 years who has obtained investment license
2. Afghan legal person established in accordance with applicable laws which has obtained investment license
3. Foreign legal person organized under applicable laws which has obtained investment license in Afghanistan
4. Any legal or natural person who demonstrates the capability of providing capital, machinery, equipment, and the expertise required for the implementation of the license terms and conditions. (Article 16, 2014 Minerals Law).

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<sup>6</sup> The article referenced in the 2009 Regulations refers to an older version of the Afghanistan Minerals Law, corresponding eligibility requirements in the 2014 law of the Minerals Law are described at Article 16, 2014 Minerals Law.