

## 招标投标法律热点问题

### 国家发改委《必须招标的工程项目规定》简评

2018年3月27日，国家发展和改革委员会（以下简称“**国家发改委**”）颁布了《必须招标的工程项目规定》（以下简称“**16号令**”）。16号令将自2018年6月1日起施行，并将于施行之日起替代现行《工程建设项目招标范围和规模标准规定》（2000年5月1日原国家发展计划委员会发布，以下简称“**3号令**”）。16号令和3号令均针对必须招标的工程项目进行界定，且均采用了“范围+规模”这种界定模式，即同时符合范围和规模要求的项目均必须进行招标，除非依法豁免。

#### 一、新规有何变化

##### 1、设置政府资助项目触发招标的标准

概括来说，16号令和3号令规定的必须招标的工程项目的范围均包括：（1）使用国有资金或国有融资的项目；（2）使用国际组织或者外国政府贷款或援助资金的项目；（3）不属于第（1）项和第（2）项的大型基础设施和公用事业等关系社会公共利益、公共安全的项目。但此次16号令就使用国有资金或国有融资的项目范围新设置了触发招标的标准，即项目使用的预算资金需达200万元人民币以上且该资金占项目总投资额10%以上。这将使得仅需求少量政府资金支持的项目可以不再必须招标。

##### 2、必须招标的合同金额标准翻倍

16号令将原3号令规定的合同估算金额的标准

提高了一倍：（1）施工单项合同的合同估算金额从200万元人民币提高到400万元人民币；（2）重要设备、材料等货物的采购单项合同的合同估算金额从100万元人民币提高到200万元人民币；（3）勘察、设计、监理等服务单项合同的合同估算金额从50万元人民币提高到100万元人民币。

此外，16号令删除了3号令中备受争议的“兜底”标准：即使单项合同的合同估算金额低于各分项标准，但如果项目总投资额超过3000万元人民币，也必须进行招标。该规定可能会导致不合理的情况出现，比如在项目总投资额超过3000万元人民币的情况下，每一次项目采购均需要进行招标，无论该次采购金额的大小如何。

##### 3、不再允许地方规定更高的强制招标标准

16号令取消了对省级政府在本地区就必须招标的项目设置更严格的范围和标准的授权。这将有助于统一全国各地的强制招标标准。

#### 二、新规有何不明确之处

16号令似乎试图制止实践中将一个合同拆分成多个小合同以避免达到16号令规定的必须招标标准的做法。为此，16号令增加了一个条款，即规定“同一项目中可以合并进行的勘察、设计、施工、监理以及与工程建设有关的重要设备、材料等的采购，合同估算价合计达到前款规定标准的，必须招

标”。

该条的措辞比较模糊。该条似乎应当解读为：如果在16号令第5条第1项至第3项所列的各类合同中，同一类型合同的合同估算总金额超过其规定的该类合同的标准，则该类合同应当进行招标，即使某一该类合同的金额可能低于该类合同的标准。

### 三、新规有何后续期待

让人意外的是，16号令本身并未像3号令那样直接规定必须招标的大型基础设施和公用事业等关系社会公共利益、公共安全的项目范围。相反，国家发改委将该部分的相关规定留待由其按照“确有必要、严格限定”的原则进一步制订。由于修订3号令的讨论已经持续多年，此次未在16号令中一次性明确所有细节的原因尚不清楚。若国家发改委在2018年6月之前未能对其进行明确，则将会对私人投资项目的强制招标范围带来很大的不确

定性。

### 四、新规有何影响

16号令取消了3号令中的不合理之处，并提高了触发强制招标要求的标准。此外，16号令让地方政府不再拥有在其管辖范围内扩大必须招标的工程项目的范围的权力。

16号令对于国有或国有控制的项目而言，影响并不那么重大。尽管合同金额标准翻倍，但在如今的工程市场，100万的服务合同、200万的供货合同或者400万的施工合同，即便不是微不足道，也不过是一碟小菜。

16号令对于私人具有控制权的项目的具体规定尚不明晰。不过，16号令明确了这类项目必须招标的范围须严格限制在“确有必要”的范围内。让我们拭目以待。

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## New Bidding Regulation

### Brief Review of the New Provisions on Construction Projects Subject to Mandatory Bidding

The newly-promulgated *Provisions on Construction Projects Subject to Mandatory Bidding* (“NDRC Decree No.16”) of March 27, 2018, from the National Development and Reform Commission (“NDRC”) will enter into force on June 1, 2018 and replace the *Provisions on the Scope and Threshold of Construction Projects for Bid Invitation* (“NDRC Decree No.3”). Both NDRC Decree No.16 and NDRC Decree No.3 address the same subject, which is construction projects subject to mandatory bidding, and they do so in the same “Scope + Threshold” fashion, which means projects that meet both scope and threshold requirements shall be subject to mandatory bidding, unless otherwise exempted.

#### A. What is Changing?

##### 1. Setting out a Threshold for Government Aid to Trigger Bidding

Generally speaking, the scope of construction projects subject to mandatory bidding in both NDRC Decree No.16 and NDRC Decree No.3 includes (i) projects using state-owned funds or state financing; (ii) projects using loans or aid funds from international organizations or foreign governments; (iii) major infrastructure and public utility construction projects concerning public interest and safety which are not included in items

(i) to (ii). In terms of projects using state-owned funds or state financing, NDRC Decree No.16 establishes a new threshold for the amount of funds of fiscal budgets used by a project, which is two million yuan or more AND accounts for more than 10% of total project investment. It will remove the bidding requirement only where an insignificant amount of government funding support is involved.

##### 2. Doubling the Contract Amount Thresholds for Bidding

NDRC Decree No.16 doubles the amount threshold for estimated contract values: (1) from RMB 2 million up to RMB 4 million for a single construction contract; (2) from RMB 1 million to RMB 2 million for a single procurement contract for major equipment, materials, or other commodities; and (3) from RMB 0.5 million to RMB 1 million for a single contract for surveying and prospecting, engineering, supervision, or other services. NDRC Decree No.16 removes the controversial catch-all threshold of NDRC Decree No.3, which states that even if the estimated value of a single contract is lower than the relevant threshold amount specified, it shall also be subject to mandatory bidding if the total project investment is more than 30 million yuan. That

provision could lead to an absurd result in which every purchase of a project whose total investment is over 30 million yuan would require a bidding process, regardless of the individual purchase amount.

### **3. No Higher Local Requirements Any Longer**

NDRC Decree No.16 revokes authorizations for provincial governments to impose stricter rules on the scope and thresholds of the projects subject to mandatory biddings in their respective jurisdiction. It will help to streamline the bidding process nationwide.

#### **B. What is Unclear?**

It seems that NDRC Decree No.16 is intended to prevent the practice of dividing one contract into several smaller contracts to avoid reaching the mandatory bidding thresholds required in NDRC Decree No.16. It does this by adding a provision stating “if surveying and prospecting, engineering, construction, supervision and procurement of major equipment or materials for project construction in a project can be combined together and the estimated contract value for the combined work in aggregate reaches the above thresholds, such contract work shall be subject to mandatory bidding.”

The Chinese wording is ambiguous. It seems to say that if the aggregated estimated value of contracts of the same kind of work exceeds the correspondent threshold listed in items (i) to (iii) in Article 5 of NDRC Decree No.16, then such work must be put out to bidding, even if the particular contract in question may have an amount lower than the threshold of that kind.

#### **C. What is Missing?**

It is surprising that NDRC Decree No.16 itself does not directly specify the scope of

infrastructure public utility construction projects that relate to public interest and safety and which are subject to mandatory bidding, as NDRC Decree No.3 did. Instead, the NDRC has left this area for further separate formulation by itself, stressing that it must be formulated in accordance with the principle that the projects to fall in such scope shall be strictly limited to those truly necessary to be put out for bidding. Given that the need to amend NDRC Decree No.3 has been discussed for many years, it is unclear why all relevant details have not been specified at the same time. The lack of clarity on these matters, if not addressed before the June 2018 commencement, will create significant uncertainty in the bidding requirements for privately controlled projects.

#### **D. What is the Impact?**

NDRC Decree No.16 removes the various technical absurdities in NDRC Decree No.3 and increases the thresholds at which mandatory bidding requirements are triggered. Furthermore, it removes any temptation for a local government to exercise regulatory power to alter the mandatory bidding standards for local construction projects.

For state owned or controlled projects, the changes may not be that significant. While the contract value thresholds have doubled, a 1 million service contract, 2 million supply contract or 4 million construction contract represent a small potato, and perhaps just a peanut, in today’s construction market.

For privately controlled projects, the rules are as yet unknown. Nevertheless, NDRC Decree No.16 does suggest that the scope of those projects subject to mandatory bidding must be strictly limited to those that are truly necessary. As for the final details, we will need to wait and see.

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