

## **Procurement Contracts and Their Impact on Pharmaceutical Companies**

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Concerns raised by the Thai pharmaceutical industry in recent years of alleged corrupt practices by employees of state hospitals, has led to the implementation of more stringent legislation to combat the problem of state funds seeping through a porous pharmaceutical procurement system.

Due to the fact that sales of pharmaceutical products to state hospitals by pharmaceutical companies have typically been conducted through procurement contracts, the existing system has long been open to possible abuse, which has stoked increasing concerns among legislators and administrators, both within the government and in state hospitals.

However, with the active enforcement of the US Foreign Corrupt Practices Act, and the recent implementation of the UK Bribery Act, foreign pharmaceutical companies are finally delving deeper into the practices of their sales teams and demanding more transparency.

The main concern is that companies without a strong culture of compliance may not attempt to implement these stricter sales rules, which would result in an unbalanced market.

### **Notification on Procurement Contracts**

This objective of raising transparency in government and state agencies has led to the recent implementation of the Notification re: *Rules and Procedures Concerning the Preparation and Disclosure of Revenue and Expenses Accounts of Projects in which Individuals or Juristic Entities Are Contractual Parties with Government Agencies* (Notification), on August 11, 2011, by the National Anti-Corruption Commission (NACC). This notification arose as a direct result of the amendment of the Organic Act on Counter Corruption dated April 12, 2011.

The Notification, which will become effective on January 1, 2012, stipulates that private sector entities that enter into procurement contracts with government agencies will now be required to prepare, and electronically submit, annual revenue and expense accounts to the Revenue Department, as well as their Corporate Income Tax Return for juristic entities.

The Notification will significantly impact entities in the private sector that enter into government procurement contracts, including individuals, Thai companies, and foreign companies with a local presence. The definition of “government agencies” is quite broad and includes government hospitals such as Siriraj Hospital, King Chulalongkorn Memorial Hospital, and Bhumibol Adulyadej Hospital

One important factor introduced is that the threshold for reporting is set relatively low, as all government procurement contracts with a value of THB 500,000 or more will be subject to the disclosure requirement. Businesses will also be required to submit one revenue and expense account for each contract, and to retain supporting documents for at least five years.

The Notification also states that government agencies should set a condition requiring businesses that enter into procurement contracts to receive and make payment via a current account, with the exception of payments that do not exceed THB 30,000, which can be made in cash.

Government contracts executed before January 1, 2012, will not be subject to this new disclosure requirement. However, if any material amendments are made to such contracts after January 1, 2012, they will also be subject to the disclosure requirement.

Although failure to comply with the new disclosure requirement does not entail criminal penalties, the sanction imposed under the Notification is commercially severe: violators will be disqualified from entering into new procurement contracts with government agencies. In addition, failure to comply with the reporting requirement, or incorrect reporting, could result in scrutiny by the NACC, the Revenue Department, and other relevant government authorities.

The new reporting requirement will place a substantial burden on the private sector, because it requires a separate detailed report for each contract, and contract values exceeding the low threshold of THB 500,000 will subject entities to the reporting requirement.

### **Impact on Pharmaceutical Companies**

Pharmaceutical companies frequently enter into procurement contracts with government agencies, as defined in the Notification. Since most of these procurement contracts exceed the threshold of THB 500,000, pharmaceutical companies will now be required to provide detailed information for each procurement contract. When pharmaceutical companies provide discounts or donations to hospitals, these are sometimes not officially part of the procurement contract. It is therefore questionable whether these items need to be disclosed under the Notification.

Nonetheless, foreign companies must carefully assess the legality of such discounts or donations in pharmaceutical procurement contracts and the impact of the Notification on these aspects of procurement.

The approach adopted by the pharmaceutical company's headquarters is also an important factor that must be taken into consideration. In any event, the company must ensure legality by implementing measures to lower the possible risk of action being taken by Thai regulators as well as foreign governments. In principle, the firm must at least ensure that a receipt is issued, the recipient is not an individual, and also verify that the money is used by the hospitals, etc.

The worldwide legal framework on corruption is changing, leading to more harmonized rules. However, the environment still remains a difficult one for companies to operate in, because some practices are strongly ingrained in some countries. Thus, despite the introduction of the new regulations in Thailand, the extent to which the new requirements will be implemented by the new government still remains uncertain.