

Comparative Summary Analysis of the Draft Government Tender and Procurement Law 2017

Introduction

Saudi Arabia is currently attempting an ambitious reorientation of its economy. The National Transformation Program 2020 and the Saudi Arabian Vision 2030 comprise the most comprehensive change of strategy in Saudi Arabian economic policy since oil was found in the country. The two programs are expected to ease existing restrictions, liberate the market and create great opportunities for local and foreign companies.

The Saudi Arabian General Investment Authority (SAGIA) has released its semi-annual report for 2017, showing a quite impressive 133% increase in the value of investment projects compared to the same period in 2016. The surge in the figures – from SR 1.39 billion in 2016 to SR 3.25 billion this year – comes as SAGIA issued 158 new licenses in the first half of 2017, up from 127 in the first six months of 2016.

The procurement of products and services by the Saudi government is currently governed by the Government Tenders and Procurement Law 2006, as enacted by Royal Decree No. M/58 dated 04/09/1427H = 27 September 2006 (the “Current Law”) and its Implementing Regulation as enacted by Minister of Finance Resolution No. 362 dated 20/02/1428H = 10 March 2007. The law was adopted shortly after the Kingdom joined the World Trade Organization (WTO), in December 2015.

Now the Saudi Arabian government intends to change the way it procures goods and services, in order to save money, make the process fairer and aid local suppliers. The Ministry of Finance published on its website a draft of a new law on procurement (the “Draft Law”) and invited public comments until October 28. The Draft Law was then removed from the website, on November 15.

The Draft Law is probably a fruit of recently reinforced Saudi-US cooperation in updating the Kingdom’s procurement regulations (“US, Saudi Arabia join forces on public procurement reform”, Arab News, 29 October 2017, <http://www.arabnews.com/node/1185371/saudi-arabia>).

We will discuss, in this analysis, the most important changes proposed by the Draft Law.

1. Promotion of Local Content and Local SMEs

- **A new objective**

Art. 2-5 of the Draft Law adds a new objective to the objectives of the Current Law: promoting economic development including support to local businesses and local small and medium local enterprises (SMEs).

- **A new principle**

To implement this new objective, the Draft Law asserts as a principle that a Government entity (GE) may contract with a foreign company regarding any project only if there is none or only one local business capable of executing the project, and after obtaining the approval of the Minister of Finance (art. 3-2).

- **Priority**

Local businesses and local SMEs are being given general priority over other bidders (art. 9).

If the GE chooses to use closed tenders, it shall give priority to SMEs when inviting to bid (art. 32-3).

Similarly, in direct purchases for project amounts below SAR 100,000, priority must be given to local SMEs (art. 35-3).

Finally, according to art. 16, a committee shall be established to determine a priority ratio for local content and for SMEs, their method of calculation and their enforcement. Thenceforth, the committee shall be entitled to make recommendations to prescribe a certain percentage of local content on the total value of a contract or to award a certain percentage of the value of a contract to local SMEs.

The Draft Law does not define the term 'local' but it must be assumed that it refers to local presence (place of registration = KSA), not to local ownership (shareholders = KSA nationals). Actually, prioritizing companies according to local ownership would contravene not only WTO principles but also the provisions of Saudi Arabia's Foreign Investment Law 2000, which expressly guarantees that licensed foreign investment projects, even fully foreign-owned, are treated on an equal footing with purely local ventures.

The threshold, or thresholds, as per which an enterprise shall be deemed 'small or medium' are also not defined by the Draft Law.

- **Bid bond exemption**

SMEs shall be exempted from providing the initial guarantee against an undertaking to provide the final guarantee if the contract is awarded to them (art. 52).

2. Unified ePortal

- A unified e-portal shall be created through which all tender procedures will be conducted including the publication of tenders and the reception of bids (art. 17 et seq.). Also, through the unified e-portal, the 'blacklist' of tenderers will be accessible to all GEs.

3. Strategic Procurement Unit

- According to art. 13 et seq., the Draft Law intends to establish a "strategic procurement unit" (SPU) which shall coordinate purchases of commonly used goods and services across the GEs, thereby ensuring that contracts are priced at competitive rates. In this respect, the SPU will unify technical specifications, launch tenders, receive and review bids and select the best bidder. It will also conclude framework agreements and prepare model tender documents.
- A GE tendering out a project must send feasibility studies, evaluation studies and other tender documents to the SPU for their review and approval. The SPU may then impose amendments on the GE. If no response is given within a period to be defined by a future Implementing Regulation, the SPU is deemed to have accepted the amendments.
- The Draft Law is not very clear as to whether the role of the SPU is limited to a certain number of commonly used goods and services or whether its scope of intervention will extend to all government procurement processes. Although the different provisions describing the role of the SPU are somehow conflicting about this subject, it seems more likely that the role of the SPU is meant to be non-general, but rather limited to certain categories of goods and services. The Implementing Regulation will certainly clarify this point.

4. Framework Agreements

- The goods and services listed by the SPU must imperatively be provided through a framework agreement prepared by the SPU (art. 15). Also, a GE is obliged to use framework agreements whenever financial savings can be expected (art. 36).
- **Different types of framework agreements**
The GE must inform the tenderers whether a framework agreement is an 'open' or a 'closed' agreement, and whether it includes one or several parties (art. 37).

5. New Contracting Methods

- **Five new contracting methods:**

The Draft Law describes eight different methods of contracting that must be used by the GEs. As compared with the Current Law, which regulates only general tenders, closed tenders and direct purchases, five of these methods are new.

- **General Tenders (art. 30 and 31):** These are the standard method, whereas other means of contracting are deemed exceptional.
- **Closed Tenders (art. 32):** These are possible in three different situations.
 - Limited providers;
 - Project value not exceeding SAR 500,000; and
 - Emergency situations.
- **Direct Purchases (art.35):** These are allowed in five different areas and situations.
 - Weaponry;
 - Internal State security;
 - Only one provider exists with no equivalent;
 - Project value not exceeding SAR 100,000; and
 - Emergency situations.

No initial guarantee is required in case of direct purchase (art. 51). By way of comparison, under the Current Law, direct purchases are possible only in two situations: emergencies and whenever the project value does not exceed one million SAR (art. 44 and 45 of the Current Law).

- **Multi-phase Tenders (art. 33).**
- **Framework Agreements (art. 36 et seq.).**
- **Electronic Reverse Auctions (art. 39).**
- **Requests for Consultancy Services (art. 40 et seq.).**
- **Contests (art. 43, 44).**

6. Pre-qualification and Post-qualification

- The Draft Law intends to introduce a system of pre-qualification and post-qualification of bidders, making pre-qualification compulsory in some cases. According to article 21 and 22 (as well as art. 1, which contains the two definitions) of the Draft Law, the GE may check the financial, technical and management qualifications and capabilities of the bidders, either before requesting them to submit an offer (pre-qualification) or after selecting the winning bidder before sending him the letter of award (post-qualification). In some cases, which are to be defined by the future Implementing Regulation, it will be compulsory upon the GE to pre-qualify the bidders.

7. Waiting Period to File Complaints

- After the publication of the results of the tender, the GE must observe a waiting period, the duration of which must be determined in the tender documents, to enable the bidders to file complaints. The legal minimum of that period is five days. The GE must rule within two weeks after filing, otherwise the claim will be deemed rejected. The claimant is then entitled to appeal against the rejection before the Settlement Commission within three days. The Settlement Commission must issue a decision also within two weeks. The contract can be awarded only after all complaint procedures have been concluded (art. 103). The Current Law does not provide for any such waiting period. It also does not contain any specific procedure to handle complaints.

8. Performance Based Payment Reduction

- Whenever a contractor's performance is poor, the GE will have at its disposal a new mechanism to reduce payments. A detailed description of the mechanism will be included in the future Implementing Regulation. For example, the GE shall, at the end of the contract execution, evaluate the performance of the contractor using a model approved by the Minister of Finance (art. 96). The results of the evaluation will be accessible to all GEs through the unified e-portal which may have positive or negative consequences for the contractor regarding future tenders.

9. Increased Delay Penalty

- As compared with the Current Law, the maximum penalty in case of delay in the execution of the contract, and in case of bad performance in maintenance and operation contracts

or continuous execution contracts, is being increased from 10% to 20% (art. 89 and 90). The maximum percentage of the penalty may be increased further if so stipulated in the tender documents, based on an ad hoc decision of the Minister of Finance.

10. Compulsory Termination and Confiscation of Final Guarantee

- Under the Current Law, proof of corruption only gives the GE an option to terminate the contract. The Draft Law makes it an obligation for the GE to terminate the contract. Furthermore, art. 92-1 assimilates other action to corruption, namely: cheating, fraud and manipulation.
- In case of termination due to corruption, cheating, fraud, manipulation, bankruptcy, delay, breach of the contract or unauthorized subcontracting, the final guarantee shall not be released (art. 94).

11. Dispute Resolution

- Under the Current Law, in case of a breach of the contract by the GE, the contractor must bring his claim in front of the Settlement Commission and then, if no amicable settlement can be achieved, in front of the Board of Grievances (Administrative Court). Under the Draft Law, however, the contractor must directly file a case in front of the Board of Grievances (art. 95-1).
- Furthermore, the Draft Law allows the parties to resort to arbitration or any other means of dispute resolution; the future Implementing Regulation will specify the details (art. 95-2). It will be very interesting to see under what conditions a GE may resort to arbitration because under the current laws and regulations, no GE has the right to agree to arbitration as a means of dispute settlement except with the express authorization of the Prime Minister (i.e. normally the King). Art. 95-2, if adopted in the new law in the same wording as the Draft Law, would indeed carry revocation of Council of Ministers Resolution No. 58 of 1383H (25 June 1963), which had enacted the said prohibition, after an arbitration panel had ruled against the Saudi Arabian Government in the landmark arbitration case *Saudi Arabia v. Arabian American Oil Co. (Aramco)* (1958).

Conclusion

- The future Implementing Regulation is expected to contain many more detailed rules and clarifications.
- Due to the preference given to local SMEs, foreign companies intending to participate in Saudi Arabian Government tenders may seek to:
 - establish a presence (branch, subsidiary) in the Kingdom;
 - invest in local companies; or
 - develop a network of Saudi suppliers.
- After more than 50 years, GEs may regain their freedom to resort to arbitration for the settlement of disputes.

Done in Riyadh, on 16 November 2017

Yassen Azeroil, LL.B, LL.M (Aix-en-Provence), LL.B (Medina Islamic)

Jochen Hundt, LL.B (Montpellier), LL.M, (Strasbourg), LL.M (Sussex)

Alattas&Hundt

**The Law Office of Khalid O. Alattas
in association with Hundt Legal Consultancy**

yassenzeroil@hundtlegal.com

jochenhundt@hundtlegal.com

Tel. +966 11 279 5132

Fax +966 11 279 5101

Mob. +966 504 233 752