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New Government Tender And Procurement Law (GTPL) In Saudi Arabia

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NEW GOVERNMENT TENDER AND PROCUREMENT LAW (GTPL) IN SAUDI ARABIA

The Kingdom of Saudi Arabia (KSA) is the prime economy in the Middle East and North Africa (MENA) region. The Kingdom’s public expenditure in infrastructure, healthcare, transport, and other government-driven sectors is eminent in the MENA region. In an unmatched reform program under its vision 2030, the Kingdom is aiming to build an economic, social, and legal stepping-stone for the upcoming generations. The Kingdom’s economy has grown to become the ultimate destination for worldwide investors, considering the unmatchable capabilities, investment facilities, programs and opportunities, constant reforms, and decisive aim towards credibility, accountability, anti-corruption, and transparency.

Public procurement reform is believed to spur development of the non-oil sector of Saudi Arabia’s economy, in line with Vision 2030. In this context, KSA introduced a new Government Tender and Procurement Law (GTPL). The GTPL aims at protecting public funds and stimulating economic expansion, in addition to encouraging investment by advocating equality and emphasizing integrity, fair competition, and transparency.

The GTPL introduced extensive reforms, adjustments and updates to the procurement process.

The main modifications are observed within five primary sections in the GTPL:

- General Principles of Contracting
- Contracting Procedures
- Methods of Contracting
- Etimad Portal
- Procurement forms

General Principles of Contracting

The GTPL introduces amendments to a set of contractual principles, particularly:

- **Delay Penalties**: stricter penalties are now in place when the execution of the contract is overdue. However, if the delay is due to reasons attributed to the Government Entity or instigated due to a state of emergency, the penalty would not apply.
- **Dispute Resolution**: Government Entities are given the possibility to resort to arbitration based on the approval of the Minister of Finance.
- **Assignment and Sub-Contracting**: Similar to the previous Law, written consent has to be secured from the Government Entity and the Ministry of Finance (MoF) in order to assign or enter into a subcontract. The Government Entity, according to the new GTPL, may now pay the sub-contractor directly.
- **Prioritization of local companies**: the Law stipulated that the Ministry of Finance shall draft a regulation governing the prioritization of local small and medium-sized enterprises (SMEs), and companies listed in the Saudi Financial Markets.
Contracts must be paid in Saudi Riyals. Nevertheless, the Government Entity, upon the approval of the MoF, may accept another currency. As for the contract value, it may be amended post ratification, if there’s a change in prices of materials or services included in the tender provisions; if there’s a change in custom tariffs, fees, or taxes; if there are unforeseen financial difficulties developing during the execution of the contract.

In addition, and as for the delay penalties, the Law stipulates that the contract period may be extended, without any penalty: (i) if the contractor was assigned additional works, provided the extension period granted aligns with the volume, nature and deadline of the added works; (ii) if the annual financial appropriations to complete the project are not enough to finalize the same in the preset date; (iii) if the delay in delivery is attributed the Government Entity or force majeure; (iv) if the contractor was delayed due to external factors and beyond his control; and (v) if the Government Entity issued a decision to pause or stop the project for reasons not attributed to the contractor. In other terms, the law grants the contractor an extra period if the delay is caused by a force majeure or an external factor beyond his control. The Council of Chambers backed this idea by issuing a statement solidifying the above exception and clearly authorized the extension of time in certain contracts due to Covid-19, as an effort to mitigate the damages of Covid-19 fallen upon contracts concluded with Government Entities under the GTPL.

In favor of the above, the Council of Ministers in Saudi Arabia issued a resolution, as instructed by Article 96 of the Law, consolidating and emphasizing the importance of prioritizing local SMEs and companies listed on the financial markets when conducting works and procurements. For instance, local SMEs are granted a ten percent (10%) discount for tender submissions. Additionally, the local Content and Government Procurement Authority (LCGPA) must establish a portal exclusive to local SMEs and companies listed on the financial markets, as well as other incentives for said local establishments.

**Contracting Procedures**

Key updates were introduced to the new GTPL, for instance:

- **Guarantees**: Bidders are still required to submit their bids with preliminary and final guarantees. However, with the new exemptions, such obligation is not required in direct purchases, competitions, contracts concluded between Government Entities, contracts concluded with a civil institution, association or non-profit entity and contracts concluded with local small and medium-sized enterprises (SMEs).

- **Standstill Period**: a new concept introduced to allow bidders to appeal the awarding decision of the Government prior to contract execution.

- **Advance Payments**: Government Entities may now pay the contractor in advance, in exchange for a bank guarantee equal to that advancement. The new GTPL did not set a limit on the advance payment. Previously, the advance payment was limited to five percent (5%) of the total contract value (provided it does not exceed SAR /50,000,000/ fifty million threshold).

The Minister of Finance issued a communication mandating that the estimated value enclosed in the bidding offer for Direct Purchases, must include the Value Added Taxes (VAT). The Government Entity shall study the current market prices in depth in order to set internally an upper threshold for the total estimated value of the contract.

**Methods of Contracting**
Under the new GTPL, Public Tenders remain the predominant and general method for contracting with Government Entities. However, the GTPL instituted five new methods of contracting, as follows:

i. **Two-stage Tender**: allows the tender procedure to be carried out within a scope of flexibility for complex topics in which it is challenging to establish early on all the terms and conditions as well as the technical specifications of the contract.

ii. **Electronic Reverse Tender**: bidders submit successively lower bids for a specific period of time. This procedure increases competition and widens the scope of the market. Hence, such a procedure would promote one of the core objectives of the Saudi Government which is to attain the optimal value of public funds.

iii. **Framework Agreements**: such a procedure is implemented when there is a demand for frequently obtained goods or services. On 23 May 2020, the Ministry of Finance approved and issued unified templates for Framework Agreements to be adopted by all Government Entities.

iv. **Knowledge Transfer**: implemented when the need arises for training and the transfer of operating skills to employees of the Government Entity.

v. **Competitions**: A Government Entity can prompt competitions to gather the best ideas, designs, and copyrights and consequently conclude a contract with the winner. This contributes to achieving the Kingdom’s vision to become a hub for R&D activities, hence, contributing to the growth of non-oil sectors.

The Minister of Finance approved by Resolution No 4149 dated 30/09/1441H. template framework agreements to be adopted by government entities as of 09/10/1441H. corresponding to 01/06/2020G.

The newly issued Royal Decree No M/82 dated 04/06/1444H. provided for the exemption of framework agreements from the provisions of Article 41 of the GTPL, requiring bidders to submit an initial bid bond of 1% to 2% of the value of their proposals and providing for the disqualification of bids that fail to submit such a bond.

**Etimad Portal**

One of the most important provisions in the GTPL is the unified web-based portal. The Electronic Government Procurement System – Etimad Portal (Portal) is one of the cornerstones of the Kingdom’s E-government. The procedures for all tenders and procurement by Government Entities are to be posted on the Portal. It works to consolidate the process of bidding and government procurement for all government sectors, enhancing transparency amongst sectors of government on the one hand, and among competing entities on the other. The portal allows the largest segment of competitors to access bids, enhancing competitiveness and improving the quality of government projects undertaken.

The Saudi Council of Ministers issued a resolution setting out the fees charged by the Ministry of Finance for the services of the Etimad Portal for government tenders and procurements. The fees are SAR /10.000/
ten thousand Saudi Riyals per annum for general normal services provided through the Etimad Portal. An extra SAR /500/ five hundred Saudi Riyals shall be added if the member requires further specific services.

**Procurement forms and templates**
The GTPL requires government entities to use approved forms of tender documents and contracts as may be required by the nature of the works or procurements. A comprehensive diversity of more than a dozen templates for contracts – such as Operations and Maintenance Contracts, Consultancy Services Contracts, General Procurement Contracts, Information Technology contracts, etc. – is currently in place and is consistently being revisited and updated by the Ministry of finance.

The new GTPL is a significant stride towards development for the Kingdom of Saudi Arabia. Although the GTPL provides for a centralized approach to government procurement, it enhances the Kingdom’s position in the international market. Efficiency, transparency and equality generally attract international bidders and investors. As an effort towards even higher transparency, the Government Expenditure and Projects Efficiency Authority (EXPRO) issued standards-setting controls for the evaluation of offers. The standards included the proposed methods for advancing and enhancing the evaluation criteria of bids, an understanding of the scope of work and type of tender, specific evaluation criteria, prime and basic considerations when drafting requests for proposals and evaluation criteria, procedures for evaluation of bids, weighing and classifying and prioritizing the criteria, practical examples for guidance when assessing the bids, categorizing and prioritizing the evaluation criteria, mandatory standards for upper and lower thresholds for the evaluation criteria, etc.

The GTPL was first put to the test during the Covid-19 Pandemic, where it has successfully proved to be able to cater to and accommodate the needs of the government during unprecedented events with major risks to public health, without requiring legislative amendments in this respect.

The pandemic was acknowledged as a state of emergency defined under the GTPL as a state wherein the risk to public safety, security, or health is serious and unforeseen, or involves an abrupt disorder that may cause loss of life or property; Furthermore, a supreme court judgment endorsed the latter, in which the Court expressly recognized the Covid-19 Pandemic as a state of emergency.

In a recent development, the Council of Ministers issued Resolution No 377 dated 03/06/1444H. approving the rules for government entities contracting with companies that do not have a regional headquarters in the Kingdom (the “Rules”). Based on the Rules, government entities are not allowed to contract with foreign companies which do not have a regional headquarter located in the Kingdom except as per the Rules. Works and purchases with estimated costs that do not exceed SAR /1,000,000/ one million or which are carried out outside the Kingdom are excepted from the scope of the Rules. The Rules will become effective as of 19/06/1445H. corresponding to 01/01/2024G.

Lastly, it is worth noting that the Kingdom’s commitment to global economic growth can be detected and discerned through the many legislative amendments and reforms it has introduced during the past couple of years, constantly bringing the Kingdom closer to the achievement of the ambitious Saudi vision 2030.
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