KSA's public procurement reform

Stephen P. Matthews writes about the new Saudi Arabian Government Tenders and Procurement Law - introduced in line with the goals of Vision 2030.

On July 16, 2019, the Saudi Arabian Council of Ministers approved the new Government Tenders and Procurement Law, Royal Decree No. M/128 of 1440 H (the "New Law"), superseding most of the previous Government Tenders and Procurement Law issued under Royal Decree No. M/58 dated 04/09/1427 H. (the "Old Law"). The New Law, which came into force on December 1, 2019, constitutes a substantial reworking of the framework for government procurement in the Kingdom of Saudi Arabia while preserving certain practices from the Old Law. The New Law incorporates many of the core principles of Vision 2030 and represents an effort to further centralise government procurement. The New Law establishes the Ministry of Finance ("MoF") at the pinnacle of government ministries and reflects a firm commitment to break down the silo structures that have long existed within the Saudi Arabian government. The Executive Regulations for the New Law have been published and are in effect from December 1, 2019.

GENERAL PRINCIPLES

The objectives of the New Law are to regulate procurement activities in the Kingdom while protecting public funds and enhancing economic development, with an emphasis on integrity, fair competition and transparency. Article 2 expressly states that the New Law is designed to protect against the abuse of authority and the exertion of personal influence in public procurement.

PREFERENCES IN GOVERNMENT PROCUREMENT

That public procurement should be used to spur development of the non-oil sector of Saudi Arabia's economy in line with Vision 2030 is embodied in Article 9 of the New Law, which provides for preferences in government tenders to be given to SMEs, companies listed on the Tadawul exchange, and companies providing significant local content. Article 96 of the New Law tasks the MoF, in coordination with the newly created Local Content and Government Procurement Commission (the "Commission"), the Small & Medium Enterprises General Authority (the "SME Authority"), and the Capital Market Authority ("CMA"), with drafting regulations to implement these preferences. These regulations are to include mechanisms for giving preference to: (i) local goods and services, with means of calculating local content; and (ii) goods and services from domestic SMEs and

Tadawul-listed firms. They are also to contain a schedule of fines to be imposed on contractors who do not comply with the local content requirements.

APPLICABILITY

The New Law applies to procurements by: (i) ministries and government agencies; (ii) public organisations; (iii) departments and institutions; and (iv) independent public entities with a legal personality. Certain elements of the New Law, in particular the principles of fairness, transparency and competitiveness as well as preferences for local content, SMEs and Tadawul-listed firms, are applicable to commercial companies in which the Saudi Arabian State owns “more than 51 per cent” of the share capital. The Public Investment Fund (“PIF”) has been tasked with drafting the regulations in this regard.

ROLE OF MINISTRY OF FINANCE – THE PORTAL AND ECUP

The Portal

The MoF plays a central role in public procurement and has been directed to create, develop and implement a unified web-based portal (the “Portal”) for government procurement efforts. The procedures for all tenders and procurement by governmental entities are to be posted on the Portal, along with electronic versions of the tender documents, with the only exceptions being for reasons of national security or where technical reasons prevent such posting. The MoF must also compile and publish on the Portal a list of “blocked” or “blacklisted” persons.

Likely by design and not mere coincidence, the Portal will enable much greater integration through the sharing of data on procurement activities among Saudi Arabian governmental bodies including the Commission, the General Authority for Zakat & Tax (“GAZT”) and the Ministry of Labor and Social Development.

Entity in Charge of Unified Procurement (“ECUP”)

The New Law references the creation of the ECUP, which will be tasked with identifying those works or purchases required by more than one governmental entity. The ECUP will develop standardised technical requirements for such items, initiate tender procedures for their purchase, and receive and evaluate offers to sell such items to the government. The ECUP will then enter into a framework agreement with the supplier, which is to be used by all governmental bodies requiring the particular item. The ECUP will publish on the Portal a list of all framework agreements it has entered into with suppliers.

The ECUP is designed to centralise procurement of commonly used items, e.g., desks, laptop computers, etc., and thereby reduce the cost to the government of such items. Notably, the General Authority for Military Industries (“GAMI”), the body in charge of procurement in the defense sector, is partly exempt from the ECUP procurement regime.

METHODS OF CONTRACTING

The New Law retains three methods of contracting long used in Saudi Arabian government procurements: (i) Public Tenders (the default option) ; (ii) Limited Tenders (where the number of providers is limited and for consulting services) ; and (iii) Direct Procurement (for military / national security and low-value tenders). To these have been added: (iv) Two-Stage Tenders (for complex matters / projects that may develop over time) ; and (v) the Electronic Reverse Auction (where a competitive market for the products exists).

INDUSTRY SAUDISATION & KNOWLEDGE TRANSFER; COMPETITION TECHNIQUE

In line with Vision 2030, the New Law empowers the Commission to enter into contracts on its own volition for Saudisation of a particular industry or for knowledge transfer. Further, procurement contracts entered into under the New Law may include provisions on knowledge transfer, training and the transfer of operating skills to employees of the government entity.

The New Law also reflects some core principles of Vision 2030 in providing for a new form of government contract in Saudi Arabia to encourage the best idea or design or other form of intellectual property right by adopting a competition technique. This is consistent with the Kingdom’s desire to become a hub for R&D activities to help grow the non-oil sector of the economy.

BID MECHANICS

The procurement regime under the New Law largely follows that of the Old Law in respect of bid submission, validity of bids,

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bid bonds, bid opening and performance bonds. The New Law eliminates the requirement to post a bid bonds in direct procurements, tenders applying the competition technique, contracts between government entities, contracts with companies in which the State owns at least 51 per cent , and contracts with domestic SMEs, NGOs and non-profit organisations.

STANDSTILL PERIOD & BID PROTEST

The New Law has introduced the concept of bid protest to the government procurement process. Once the government entity has announced the contract award, it must observe a "standstill" period of 5-10 working days before the entering into the contract. This is to afford any other bidder the right to protest the award decision before one of the tender review committees to be established by the Minister of Finance To file a protest, a bidder must post a financial guarantee equal to 50 per cent of the value of the bid bond for the tender at issue, which will be returned if the grievance is found to be valid.

Requiring the bidder to post financial security for a protest should eliminate "knee-jerk" protests to adverse bid awards while providing a path to challenge an award where the bidder has good reason to believe that the award was not made consistent with the requirements of the New Law and the Executive Regulations.

FINANCIAL CONSIDERATIONS

The New Law reaffirms that government contracts are to be priced in Saudi Arabian Riyals but may also be in another currency with MoF approval. The contract price must be for the full cost of contract implementation, including any charges and taxes due from the contractor. Moreover, Article 65 provides that the contract may include no exemptions from Saudi Arabian tax on: (i) the profits of the contractor; or (ii) the income of its employees. This establishes the supremacy of the MoF on all matters related to government contracts.

The New Law preserves the unilateral right of the government body to increase the contract price by up to 10 per cent or to decrease it by as much as 20 per cent.

ASSIGNMENT & SUBCONTRACTING

Similar to the Old Law, a contract may be assigned with the express approval of the contracting government body and the MoF. Subcontracting is permitted with the prior written approval of the contracting government body, with the prime contractor to be jointly liable with the subcontractor for the subcontracted works. The government may now pay the approved subcontractor directly, a substantial departure from prior practice.

DELAY PENALTIES

The New Law has maintained the capped delay penalty for the late delivery of goods at six per cent but has increased the capped delay penalty on contracts for services / works and under continuous performance contracts to 20 per cent (from 10 per cent).

CONCLUSION

The New Law and the Executive Regulations represent a substantial effort to liberalise the procurement regime in Saudi Arabia, consistent with the goals of Vision 2030. While many elements have remained unchanged, a number of important new concepts and approaches are embodied in the New Law that can help deliver more broad-based economic and social development through the government procurement process.

References 1 - 31 and information on sources are available on the online version of the article.

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