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# Public Procurement & Government Contracts

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# 2020

# SAUDI ARABIA

## Law and Practice

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## Contents

<b>1. General</b>	p.3	<b>3. General Transparency Obligations</b>	p.9
1.1 Legislation Regulating Procurement of Government Contracts	p.3	3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology	p.9
1.2 Entities Subject to Procurement Regulation	p.3	3.2 Obligation to Notify Interested Parties Who Have Not Been Selected	p.9
1.3 Type of Contracts Subject to Procurement Regulation	p.3	3.3 Obligation to Notify Bidders of Contract Award Decision	p.9
1.4 Openness of Regulated Contract Award Procedure	p.4	3.4 Requirement for Standstill Period	p.9
1.5 Key Obligations	p.4	<b>4. Review Procedures</b>	p.9
<b>2. Contract Award Process</b>	p.4	4.1 Responsibility for Review of Awarding Authority's Decisions	p.9
2.1 Prior Advertisement of Regulated Contract Award Procedures	p.4	4.2 Remedies Available for Breach of Procurement Legislation	p.10
2.2 Preliminary Market Consultations by Awarding Authority	p.5	4.3 Interim Measures	p.10
2.3 Tender Procedure for Award of Contract	p.5	4.4 Challenging Awarding Authority's Decisions	p.10
2.4 Choice/Conditions of Tender Procedure	p.7	4.5 Time Limits for Challenging Decisions	p.10
2.5 Timing for Publication of Documents	p.7	4.6 Length of Proceedings	p.10
2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders	p.7	4.7 Annual Number of Procurement Claims	p.10
2.7 Eligibility for Participation in Procurement Process	p.7	4.8 Costs Involved in Challenging Decisions	p.10
2.8 Restriction of Participation in Procurement Process	p.8	<b>5. Miscellaneous</b>	p.10
2.9 Evaluation Criteria	p.8	5.1 Modification of Contracts Post-award	p.10
		5.2 Direct Contract Awards	p.11
		5.3 Recent Important Court Decisions	p.11
		5.4 Legislative Amendments Under Consideration	p.11

## 1. General

### 1.1 Legislation Regulating Procurement of Government Contracts

In the Kingdom of Saudi Arabia, procurement of government contracts is regulated by the Government Tenders and Procurement Law ("Law") and its Implementing Regulations. A new Law was issued by Royal Decree dated 16 June 2019, followed by its Implementing Regulations that were issued by the Ministerial decision dated 19 November 2019 (the Law and its Implementing Regulations are collectively referred to hereinafter as "GTPL"). The GTPL entered into force on 29 November 2019, replacing the previous GTPL issued in 2006. The GTPL regulates government purchasing and procurement procedures to protect public funds. It aims at promoting economic development and encouraging investment, through advocating equality and fair treatment among competitors, ensuring transparency and preventing exploitation of personal interests and abuse of power.

### 1.2 Entities Subject to Procurement Regulation

The GTPL is applicable to the procurement processes conducted by all governmental entities in the Kingdom of Saudi Arabia, with a few exceptions as described hereinunder. Governmental entities are specified as ministries, government agencies, authorities, departments, public institutions and agencies having an independent legal personality ("Governmental Entities").

However, it should be noted that, with regard to certain sectors and/or transactions, the concerned Governmental Entities are exempt from the application of the GTPL. The author shall further highlight cases of exemptions from the application of the GTPL, as described below.

- Private sector participation – public-private partnership (PPP) and Sale of Assets (SOA) transactions in the Kingdom of Saudi Arabia are exempted from the GTPL by virtue of Royal Decree No 101 dated 4 July 2018, which provides that "all contracts necessary for execution of the privatization operations shall not be governed by the Government Tenders and Procurement Law." These transactions are currently governed by the Privatization Project Manual and Program issued by the Saudi National Centre for Privatisation (NCP). A draft Private Sector Participation Law ("Draft PSP Law") was published by the NCP in July 2018. The Draft PSP Law provides that it applies to any infrastructure-related contractual arrangement that results in an SOA or a PPP. The Draft PSP Law expressly states that the GTPL shall not apply to all PPP or SOA projects; however, it does allow the concerned Governmental Entity and the private party to subject any of the PPP or SOA projects and contracts to the GTPL.

- Exemptions provided to certain entities under the laws and regulations governing their establishment – the GTPL provides that it applies to all Governmental Entities, except those that are governed by specific rules ("Specific Rules"). There are Governmental Entities that are governed by Specific Rules, generally taking the form of financial regulations setting out rules governing financial affairs. These Specific Rules also include provisions related to the mechanisms of implementing competitions and securing purchases.
- Saudi Vision 2030 – this programme aims to reduce Saudi Arabia's dependence on oil, diversify its economy, and develop public service sectors such as health, education, infrastructure, recreation and tourism. To achieve the 96 strategic objectives of the Saudi Vision 2030, the Council of Economic and Development Affairs established 13 Vision Realization Programs (VRPs). Specific procurement rules are applicable to the Saudi Vision 2030 procurement activities under the VRPs. Accordingly, some works and procurements initiatives under the VRPs are exempt from the application of the GTPL, unless the specific procurement rules governing procurement activities pertaining to Vision 2030 are silent in relation thereto. For example, it is permissible for the Governmental Entity to carry out works, in the manner it deems appropriate, to secure its purchases that do not exceed SAR1 million.

### 1.3 Type of Contracts Subject to Procurement Regulation

The GTPL grants the Governmental Entity the right to implement its works and procurements according to various types of contracts; ie, General Construction Contract, Supply Contract, Information Technology Contract, Project Management Contract and any other contract necessary for carrying out certain works for the Governmental Entity. The GTPL does not specify a minimum value threshold for the contracts to be subjected thereto; however, it does specify that some tender procedures may only be adopted when the tender value does not exceed a certain threshold. For instance, the Governmental Entity may only carry out a Limited Tender procedure in relation to works and procurements that do not exceed SAR500,000, provided that other requirements are also met. Also, a Direct Purchase procedure may only be carried out by the Governmental Entity when the anticipated tender value does not exceed SAR100,000.

On the other hand, the GTPL also specifies different pre-qualification mechanisms to award the contract depending on its value. For example, the GTPL specifies that the Government Entity must perform a pre-qualification or subsequent qualification, according to its discretion, in works and procurements with an estimated cost of less than SAR20 million.

## 1.4 Openness of Regulated Contract Award Procedure

Under the GTPL, the openness of the regulated contract award procedure depends on the contracting method and the advertisements in relation thereto to be adopted by the Governmental Entity. For example, with regard to the General Tender contracting method, the Governmental Entity publicly announces the competitions on the portal. Such advertisement is addressed and open to all local contractors' participation (ie, those within the jurisdiction of Saudi Arabia), subject to meeting the necessary pre-qualification requirements. The GTPL gives priority to participate to small and medium local enterprises.

Works and procurements executed outside Saudi Arabia are also included within the scope of the GTPL with exemptions from the application of certain provisions (ie, using a language other than Arabic for drafting the contract, its documents and appendices). In the General Tender contracting method, the Governmental Entity may address external contractors in other jurisdictions outside Saudi Arabia with regard to works and procurements to be made abroad, provided that the Local Content and Procurement Commission ensures there are not any or no more than one contractor inside Saudi Arabia that is able to complete the works. In such case, only the contractors in the jurisdiction(s) designated by the Governmental Entity in its advertisement may submit their offers and eventually be awarded the contract.

## 1.5 Key Obligations

Under the GTPL, the key obligations for the Governmental Entities are to treat all the participants to the procurement process equally and without any discrimination, while ensuring transparency and fair treatment. These obligations are relevant before the commencement of the procurement process. The GTPL also provides that after the procurement contract has been awarded and signed, the Governmental Entity must meet its contractual obligations towards the contractor. Another key obligation on the Governmental Entities is to publish its procurement plans in broad terms for the coming year, early in each fiscal year.

With respect to the participants in the procurement process, one of the key obligations under the GTPL is the requirement to submit a bid bond, which amount varies from 1% to 2% of the tender value. Bids submitted without a bid bond shall be rejected. Furthermore, another key obligation on the participant who is awarded a contract is the submission of a performance bond amounting to 5% of the contract value. The performance bonds will not be required for (i) works valued at less than SAR100,000, (ii) government-to-majority government-owned entity contracts, or (iii) additional works. Moreover, the GTPL excludes the requirement for a bid bond and performance

bond for direct purchases; competitions; contracts concluded between Governmental Entities; contracts concluded with a civil institution, association or non-profit entity; and contracts concluded with local small and medium enterprises.

As for the obligations with regard to the awarded contracts' form, the GTPL requires contracts to be drafted in Arabic or in dual language, provided that the Arabic version is used as reference for the interpretation of the contract. The value of goods and/or services in the awarded contracts shall be in Saudi riyals, although the Governmental Entity may provide for another currency with the approval of the Ministry of Finance.

## 2. Contract Award Process

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

The GTPL does mandate the prior advertisement of regulated award procedures. The advertising requirements vary depending on the contracting procedure to be adopted by the Governmental Entity.

The government procurement and tender procedures shall be posted via a unified e-portal called Etimad Portal (the "Portal") (<https://etimad.sa/>) unless this is not possible for technical or national security reasons (such procedures may also be posted on the Governmental Entity's website). The Portal is created and supervised by the Ministry of Finance. It consolidates and facilitates the process of bidding and government procurement for all government sectors, enhancing transparency amongst the different sectors of the government on the one hand, and among participants on the other. The Portal allows the largest segment of participants to access bids, enhancing competitiveness and improving the quality of government projects undertaken, while maintaining the highest degree of privacy, confidentiality, security and transparency of information. The Portal is an entirely digital gateway for posting government tenders, receiving invitations, obtaining fascicles, and surveying bids and awarded contracts. It is worth mentioning that the GTPL allows Governmental Entities in the General Tender contracting procedure to advertise on its website, the Official Gazette or any other means it deems appropriate. Also, under the same procedure, advertisements outside the Kingdom shall be posted on the advertising websites in the country in which the work and procurements are to be carried out, and on the website of the Kingdom's embassy, if any, along with any other means of advertisement the Governmental Entity deems appropriate.

The type of information that must be disclosed in the advertisement varies depending on the contracting procedure to be adopted by the Governmental Entity. For instance, advertise-

ment under the General Tender contracting procedure must include the following information:

- the name of the advertiser;
- the competition number, description and purpose; and
- the deadline for receiving offers and the date for opening them. The same information is required to be disclosed in round one under the Two Round Tender contracting procedure.

When advertising for consulting services under the Limited Tender contracting procedure, the Governmental Entity must disclose, for example, the following information:

- a general description of the nature of the services and works required;
- the objectives to be achieved from the consulting services; and
- the evaluation criteria.

As for advertising under the Competition contracting procedure, the following information must be included in the advertisement as a minimum:

- general business specifications;
- the number of winners and awards granted to them, provided they are not less than three;
- the criteria for the comparison between the submitted offers; and
- the date and place for submitting offers, communication mechanisms and enquiries.

## 2.2 Preliminary Market Consultations by Awarding Authority

The GTPL is silent on whether it is permissible for the awarding authority to carry out preliminary market consultations before launching the contract award procedure.

However, the GTPL does mandate the Governmental Entities to plan and determine their expenditure at the beginning of each fiscal year. A tender may be cancelled if all bids received are higher than the approved expenditure and no compromise can be reached. The Governmental Entities will be required to publish their procurement plans for the coming year, in the first quarter of each fiscal year, without prejudice to the confidentiality required by the National Security. Those interested in procurement opportunities in Saudi Arabia would be advised to monitor any such published plans to assist with their own forward planning. The GTPL also requires that Governmental Entities should update their project and work information before they are adopted, and should further review the technical specifications, drawings and plans and make any amendment

or correction thereto before announcing General Tenders or securing their purchases.

On another note, the GTPL stipulates that participants applying for works and procurements must, before submitting their offer, investigate the nature, data and details of the works submitted to them, the circumstances accompanying their implementation, and what may affect their offer and the risks of their obligations.

## 2.3 Tender Procedure for Award of Contract

As opposed to the old legislation that only provides three contracting procedures, the GTPL provides eight contracting procedures that may be used for the award of a contract, as follows.

### General Tender

This procedure serves as the default procedure of all tenders. The Governmental Entity publicly announces such tender on the Portal (review **2.1 Prior Advertisement of Regulated Contract Award Procedures** for advertisement procedures). Locally advertised General Tenders are open to all local contractors' participation, subject to meeting the necessary pre-qualification requirements. Contractors in other jurisdictions are welcome to participate if they are within the jurisdiction specified by the Governmental Entity. Negotiations are not permitted under this procedure.

### Limited Tender

Limited Tenders are addressed to a limited number of participants upon invitation by the Governmental Entity. Limited Tenders can only be carried out in one of the following circumstances.

- Limited number of providers (no more than five).
- Project value does not exceed SAR500,000. In this case, the Governmental Entity should invite the highest number of participants, provided that they are not less than five. The priority will be to invite local small and medium enterprises to negotiate and present their offers.
- Urgent situations where time is of the essence and General Tender procedures may not be endured.
- If the work can be done by NGOs or non-profit entities, provided that such works are included within their scope of activities for which they were established and that the selected organisation conducts the works itself.
- Consultancy services.

### Two-Round Tender

The Governmental Entity may offer competition in two rounds, if it is not possible to fully determine the technical specifications and the final contractual terms due to the complex and specialised nature of some of the works and procurements. These two rounds are further elaborated as follows.

## Round 1

The Governmental Entity shall provide a general description of the project while specifying the purpose of the contract, expected performance and the qualifications required to complete the business and general information related to conditions, specifications and other technical characteristics, whether for the work to be performed or the equipment and goods to be acquired. Such description is advertised on the Portal and initial offers shall be submitted by the applicants, which shall include their suggestions without the requirement to mention the bid prices. Noting that, the Governmental Entity may ask the applicants – without obligating them to do so – to provide indicative prices or price limits for the works to be implemented, provided that they are not obligated in the second round to amend their offers in line with what they have presented or to evaluate their offers accordingly.

## Round 2

The Governmental Entity shall complete the technical specifications (based on Round 1) and send invitations to the successful bidders to submit their offers.

This type of procedure allows the bidders to contribute in defining the technical requirements and the scope of work. Furthermore, the Governmental Entity may, in Round 1, approach the bidders to clarify their proposed offers and specifications and make the necessary changes to the specifications to be acceptable and feasible in practice, provided that these enquiries and clarifications are published on the Portal and all bidders have access to them.

## Direct Purchases

Direct purchases are only allowed in one of the following situations.

- Securing purchases of weapons, military equipment and spare parts, through the General Authority for Military Industries.
- If the business and purchases are available exclusively with a single contractor.
- If the anticipated tender value does not exceed the amount of SAR100,000. In this case, the priority is to extend the invitation to local small and medium enterprises.
- If the use of this method is necessary to protect the interests of national security, and public or limited competition cannot be used for it. In this case, the Governmental Entity must, after concluding the contract, prepare a report that includes the reasons for using this method and provide a copy of it to the General Supervision Bureau.
- If the works and procurements are only available with one non-profit organisation or community or one of the non-

profit entities, provided that it undertakes to do what it has been contracted for by itself.

- In a state of emergency.

## Framework Agreements

The Governmental Entity may conclude a Framework Agreement with the winner of the tender, in cases where it is not possible to determine the quantities of items, the volume of works or services contracted, or the date of their implementation. Framework Agreements are concluded when there is a need to frequently obtain goods or services or when it is expected that there is a need to purchase goods and services, due to the nature of the goods and services. Provided that it is included in the advertisement, the Governmental Entity may opt for a “closed” or “open” Framework Agreement, where it may be possible for new contractors or suppliers to join as parties to the open Framework Agreement. In all cases, the closed Framework Agreement should not exceed three years and the open one should not exceed four years.

## Reverse Electronic Bidding

This is an electronic method for providing successively reduced offers over a specific period for the purpose of selecting the lowest price offers. This procedure shall be subject to the following, among other, conditions:

- ready-made goods available in the market;
- the cost of the tender does not exceed SAR5 million;
- a minimum of three participants, otherwise the bid is cancelled; and
- provision of an initial guarantee by the participants when submitting their initial offer.

## Knowledge Transfer Contracts

The Local Content and Government Procurement Authority may, on its own initiative or upon the request of a Governmental Entity – after the approval of the Ministry of Finance – conclude contracts for industrial localisation and transfer of knowledge, provided that (i) it does not result in a monopoly of that industry or knowledge, and (ii) changes and developments in technology, industry and knowledge are taken into account when concluding the contracts.

## Competition

The Governmental Entity may conclude contracts on the best idea, design or other intellectual property rights through the competition procedure. This procedure excludes the presentation of any guarantees. The intellectual property related to the content of the winning offers shall be owned by the Governmental Entity.

## 2.4 Choice/Conditions of Tender Procedure

As stipulated in 2.3 **Tender Procedure for Award of Contract**, the GTPL provides eight contracting procedures that may be used for the award of a contract. These procedures may only be used by the Governmental Entity subject to the fulfilment of specific conditions required for each separate procedure.

## 2.5 Timing for Publication of Documents

The GTPL does not impose obligations as to the timing for the publication of any of the procurement documents. However, it requires the Governmental Entity to provide all competitors with information related to the scope of work for the project; enabling them to evaluate the works before obtaining the tender documents, and further provide the necessary clarifications and data on the works and procurement required to be implemented, sufficiently before the deadline for submitting the offers.

Moreover, the Governmental Entity, prior to submitting its projects or works, or prior to carrying out the pre-qualification process – if any – is required to present the feasibility studies, the estimated costs, tender and pre-qualification documents – if any – and what procedures were adopted, to the Unified Strategic Procurement Unit (the “Unit”) for reviewing. If the Unit does not respond within 15 days, the submitted documents and information are deemed to be approved, and if the Unit requests amendments to the foregoing documents and information, the Government Entity shall comply with the amendments the Unit requests.

Furthermore, the Governmental Entity may only use the forms of tender documents, pre-qualification documents, contract forms and contractor evaluation forms, and any other document required by the nature of the works or procurements, that have been approved by the Minister of Finance. The procurement documents should include the minimum information and data for the proposed works and procurement, such as:

- competition instructions and conditions;
- bid evaluation criteria and ratios;
- key terms and conditions of the contract, including terms and conditions related to payment patterns and fines; and
- bid bond and performance bond.

On another note, the Governmental Entity should prepare a list of works and procurements for which a limited number of contractors is available, along with a list of the contractors. These lists are updated annually on the Portal and made available for the public.

## 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The GTPL specifies certain minimum time limits for the submission of tenders that vary depending on the contracting procedure to be adopted by the Governmental Entity and whether certain conditions are met, as elaborated hereinafter.

- **General Tender** – the period from posting the advertisement on the Portal to the deadline for submitting offers varies depending on the estimated cost of the works and procurements, as follows: (i) 15 days for works and procurements with an estimated cost of SAR5 million or less, (ii) 30 days for those with an estimated cost of more than SAR5 million and less than SAR1 million, and (iii) 60 days for works and procurements with an estimated cost of SAR1 million or more. The Governmental Entity may, after obtaining the approval of the Minister of Finance, reduce the above periods, if the nature of the works and procurements does not require the full period to be fulfilled.
- **Limited Tender** – when contracting in works and procurements that are available only to a limited number of contractors, a Governmental Entity should primarily publish an advertisement on the Portal and its website, to ensure that no contractors or other suppliers are available to conduct the required works and purchases, for a period of no less than 20 days from the date of its publication.
- **Direct Purchase** – prior to contracting through this procedure, the Governmental Entity must primarily publish an advertisement on the Portal and its website, for a period of no less than ten working days, to ensure that the works and procurements are only available with a single contractor.
- **Reverse Electronic Bidding** – the Governmental Entity shall announce the bidding on the Portal and its website. The advertisement must include the conditions, technical specifications and the registration deadline for those wishing to participate in the electronic reverse bidding. The period from the date of the advertisement until the date of registration should not be less than 15 days.

## 2.7 Eligibility for Participation in Procurement Process

The GTPL provides that the interested parties should meet certain conditions, required for implementing the works and procurements, to be eligible for participation in a procurement process. The Governmental Entity shall determine the suitability of such interested parties upon assessing their compliance with specific requirements. Such compliance may be showcased through the set of documents required to be submitted by the interested parties (ie, Commercial Register Certificate, Certificate of tax payment).

Another way to assess eligibility is through pre-qualification. This is made to assess the financial, technical and management qualifications and capabilities of the bidders. Although the GTPL does not require mandatory pre-qualification, the Governmental Entity must perform pre-qualifications in the works and procurement with estimated costs that exceed SAR20 million. If the bidders do not successfully pre-qualify, they will not be invited to tender.

Furthermore, in the invitation for an open Framework Agreement, the Governmental Entity should indicate specific qualifications required for the competitors to be eligible to participate.

Separately, the GTPL specifies certain individuals and/or entities that are mandatorily not eligible to participate in a procurement process with Governmental Entities, such as:

- state employees, with certain exceptions;
- those prohibited to be dealt with due to a regulation or judicial ruling;
- those who are bankrupt;
- anyone below the age of 18; and
- incompetent individuals.

It is worth mentioning that the Governmental Entities may also publish, on the Portal, a list of contractors and/or suppliers that are prohibited from dealing with the government. This list shall include, by way of example:

- the name, address and commercial registration number of the entity;
- the reason for the ban;
- the date and number of the judicial ruling; and
- the duration of the ban and/or end date.

Accordingly, such prohibited entities shall not be eligible for participation in the procurement process.

## **2.8 Restriction of Participation in Procurement Process**

Restricting participation in the procurement process to a small number of qualified suppliers is possible depending on the contracting procedure to be adopted. For instance, the General Tender contracting procedure does not allow for such restriction. Whereas in other contracting procedures, such as Reverse Electronic Bidding, a limited number of suppliers may be short-listed. The GTPL does not explicitly stipulate on the basis of such shortlist, but the Governmental Entity should abide with the general objective of the GTPL of being objective and non-discriminatory to ensure fair treatment and equal opportunity.

For instance, the GTPL requires the shortlisting of a minimum of three participants when using the Reverse Electronic Bidding contacting procedure, otherwise, the bidding is cancelled.

## **2.9 Evaluation Criteria**

The Efficiency Expenditure Center (the “Center”) sets forth the criteria on which tenders are evaluated. The Center is responsible for setting the criteria for evaluating the offers for different categories, where such criteria also vary between financial and non-financial offers. The Governmental Entity is obligated to abide by the standards set forth by the Center when preparing the tender documents, especially with regard to the criteria for evaluating offers.

The pre or post-qualification criteria should be objective, measurable and related to the technical, financial and administrative capabilities and the amount of the contractual obligations of the tenderers. Furthermore, it should be commensurate with the nature, volume and value of the project or the work and should not aim to award the works and procurement to specific competitors, while considering the following:

- in works that do not require high technical or complex capabilities, evaluation of the technical offer shall be minimal and the bidder with the lowest price wins the tender; and
- the more weighted evaluation shall be with regard to consultancy services that require high and complex technical capabilities.

Moreover, non-financial evaluation criteria should also be objective and appropriate to the nature of the works and procurement to be offered and should be quantifiable as reasonably practical. Such criteria should be clear, objective and fulfil the public interest.

The tenders shall be evaluated by a Bid Evaluation Committee (the “Committee”) in accordance with the criteria set forth in the tender documents. The offers in violation of the criteria shall be excluded and the bid bonds presented shall be returned. In cases where the offers are submitted in two separate electronic files or sealed envelopes, the Committee shall primarily evaluate the technical offer without evaluating the financial one. If the technical offer is deemed to be unacceptable, the Committee shall not look into the financial offer, instead such offer will be returned to the applicant along with the bid bond. The Committee shall only evaluate the financial offers of the accepted technical offers in accordance with the evaluation criteria specified in the tender documents.

More importantly, no tender may be directly excluded because of its low price, unless it is less than 25% (or more) than the estimated cost and the prevailing prices in the market. The



Committee shall initially request an explanation from the bidder with the low price to justify such offer. If the Committee is not convinced of the bidder's ability to implement the contract, then it may recommend its exclusion. Moreover, if the bidder does not have any of the required certificates and/or licences, or if those are expired, the bidder is granted a period specified by the Committee, not exceeding ten working days, to complete these certificates, otherwise they shall be excluded from the tender and their bid bonds will be confiscated.

In other cases, when two or more offers are equal in the overall evaluation, the lowest-priced offers are awarded.

## 3. General Transparency Obligations

### 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

The GTPL provides that the Governmental Entity must determine, in the tender documents, the criteria for evaluating, comparing and approving the tenders. The evaluation criteria must be disclosed at the start of the process, including the grounds for exclusion as well the objective and non-discriminatory criteria or rules on the basis of which the Governmental Entity will determine the qualified applicants that will be invited to participate in the competition. Equally, the award criteria and their weightings must be disclosed in the procurement documents that are published at the start of the process. This is notable in the requirements provided for when advertising a Limited Tender contracting procedure, where evaluation criteria should be included in the advertisement. Also, in the advertising of a Competition contracting procedure, where comparison between offers criteria should be included in the advertisement.

### 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The Governmental Entity must notify interested parties who have not been selected for participation in the contract award procedure of the outcome of the tender and the reasons for their exclusion, which should also include the technical scores of their offers. The GTPL does not specify when and by what means.

### 3.3 Obligation to Notify Bidders of Contract Award Decision

The Government Entity must announce the tender results on the Portal and notify the winner of the bid. Such announcement should include, at the least, the following information:

- the winning bidder;
- information about the project;
- the total value of the project; and

- duration and location of the contract.

The GTPL does not explicitly specify when such announcement should be made, but in practice, it usually directly follows the award decision.

### 3.4 Requirement for Standstill Period

The GTPL provides that the Governmental Entity should not conclude the contract before the expiry of a "standstill period". During the standstill period, the award decision may not be enforceable, to enable unsuccessful competitors to raise their objections and/or grievances to the tender process. The standstill period shall be no less than five working days and should not exceed ten working days from the date of issuance of the award decision and the announcement thereof on the Portal.

## 4. Review Procedures

### 4.1 Responsibility for Review of Awarding Authority's Decisions

One or more specialised committees shall be formed by a decision of the Minister of Finance, which determines the committees' scope of work, rules and procedures. These committees shall be concerned with the following:

- considering grievances against the award decision or any decision or action taken by the Governmental Entity prior to the award decision;
- considering grievances against the performance evaluation decision by the Governmental Entity; and
- examining requests for adjusting contract prices, when permissible.

The committees' decisions shall be binding on the Governmental Entity.

It should be noted that the grievance should be accompanied with a guarantee equal to half the value of the bid bond, valid for at least 30 days from the date of the grievance submission, otherwise the grievance will not be admissible.

On another note, it should be noted that when contracts are awarded, arbitration can be used as a means of dispute resolution. This, however, requires the consent of the Minister of Finance and other requirements:

- estimated value of the contract exceeds SAR100 million;
- applicable rules to the arbitration process shall be those of Saudi Arabia; and
- the contract expressly provides for arbitration.

Otherwise, administrative courts will have jurisdiction to hear cases with regard to such contracts.

## 4.2 Remedies Available for Breach of Procurement Legislation

Another committee shall be formed by the Minister of Finance to ensure the proper application of the GTPL and the terms and conditions set forth in the awarded contract, and examines any violations in relation thereto. The committee may issue a decision against the violators to prevent them from dealing with any Governmental Entity for a period not exceeding five years and/or reduce their classification, if any. The committee may, instead of applying the above prevention penalty, impose a fine on the violators, not exceeding 10% of the value of their offer. The decision of the committee shall be effective from the date of its issuance, unless an administrative court order is issued to suspend its implementation. Furthermore, the committee's decisions may be appealed before the administrative court, within 60 days from the date of the decision's knowledge.

## 4.3 Interim Measures

Under the GTPL, interim measures are available. For instance, Governmental Entities are obligated to suspend the contract award procedure until the standstill period ends, if there were no grievances filed.

## 4.4 Challenging Awarding Authority's Decisions

Every competitor has the right to file a grievance before the Governmental Entity against any decision it made, before the award decision, within five working days from the date of the decision. Also, every competitor has the right to file a grievance before the Governmental Entity over the award decision during the standstill period (see 3.4 Requirement for Standstill Period).

The Governmental Entity must decide on the grievance within 15 working days from the date the grievance is submitted. If such period has passed without any decision, then the grievance is deemed to be rejected. The competitor may, within three days from the date he was notified of the rejection or after the above period has passed, file another grievance to the committee referred to in 4.1 Responsibility for Review of Awarding Authority's Decisions, that must look into such grievance within 15 working days from the day of receipt.

## 4.5 Time Limits for Challenging Decisions

Please refer to 4.4 Challenging Awarding Authority's Decisions.

## 4.6 Length of Proceedings

The length of a court proceeding related to a procurement claim shall vary depending on the circumstances and complexity of

the claim. However, generally, the court process is very lengthy, and claims are heard over a course of hearings, which may be scheduled one to two months apart. The judge has the sole discretion to manage the procedure and timetable of the claim before the court. It is worth noting that issuing a final judgment may take up to two years.

## 4.7 Annual Number of Procurement Claims

There are no statistics published specific to the annual number of procurement claims before courts. However, every three years, the Ministry of Justice issues a booklet with all the judgments issued. The booklet specified that, in 2016, the administrative court issued around 29 judgments related to procurement claims, which may be considered low compared to the total number of government tenders and procurements.

According to the Portal, in 2019, the total number of government tenders and procurements was 40,415, with a total value exceeding SAR87 billion.

(Please note that the firm is not responsible for the inaccuracy of the numbers provided.)

## 4.8 Costs Involved in Challenging Decisions

There are no governmental costs or expenses for submitting claims before courts in Saudi Arabia. However, the court may decide, when necessary, to appoint one or more experts to provide their technical expertise on the dispute. In such case, the litigants must cover the expenses and fees pertaining to the appointment of the experts, which shall be determined based on a tender.

## 5. Miscellaneous

### 5.1 Modification of Contracts Post-award

The GTPL allows the modification of the prices of the contracts in certain situations, as follows:

- if there were changes in the prices of the raw materials or services included in the tender documents;
- if there were amendments to the customs tariffs, fees or taxes; and
- if, during the execution of the contract, the contractor is facing unexpected financial difficulties.

Moreover, the Governmental Entity may, within the limit of its actual needs, issue variation orders to increase the contract price by no more than 10% or decrease the contract value by no more than 20%.

## **5.2 Direct Contract Awards**

As indicated above, the GTPL allows the Governmental Entity to award a contract through the Direct Purchase contracting procedure, in one of the following situations.

- Securing purchases of weapons, military equipment and spare parts, through the General Authority for Military Industries.
- If the business and purchases are available exclusively with a single contractor.
- If the anticipated tender value does not exceed the amount of SAR100,000. In this case, the priority is to extend the invitation to local small and medium enterprises.
- If the use of this method is necessary to protect the interests of national security, and public or limited competition cannot be used for it. In this case, the Governmental Entity must, after concluding the contract, prepare a report that includes the reasons for using this method and provide a copy of it to the General Supervision Bureau.
- If the works and procurements are only available with one non-profit organisation or community or one of the non-profit entities, if it undertakes to do what it has been contracted for by itself.
- In a state of emergency.

## **5.3 Recent Important Court Decisions**

Court decisions are not published in Saudi Arabia.

## **5.4 Legislative Amendments Under Consideration**

As stipulated above, the new and updated GTPL has been recently published and come into force. Therefore, it is unlikely legislative amendments are to be considered any time soon.

**EKP Legal Counsel** has offices in Beirut, Dubai and Riyadh, and has been serving the Middle East for more than 15 years, combining best practice knowledge with deep expertise in local Middle Eastern markets. EKP advises government procuring entities and project sponsors on limited or non-recourse financing projects and is the go-to firm for PPP projects. The team can provide support throughout a project's life cycle, from the initial bid to award, operation and handover. EKP provides advice covering the legal feasibility of the project, its contractual structure, the preparation of the RFP package and project

documents, financing agreements and relevant security package, risk allocation, bankability, EPC, O&M and FM contracts for a whole suite of models, such as DBFOT, DBO, BOOT and BOO. EKP's expertise in executed projects spreads across various sectors, including city development, social infrastructure, healthcare, water and power, transportation, waste-to-energy, ports, labour housing and ICT.

The firm would like to thank Hessa Al-Aqeel and Reina El Ali for their contribution to the guide.

## Author



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