

TURKISH PUBLIC PROCUREMENT LAW

Basic Concepts and Principles

This document provides information on significant aspects of Turkish Public Procurement Law.

TURKISH PUBLIC PROCUREMENT LAW

Basic Principles and Concepts

Content

I. LEGISLATION UNTIL THE SIGNATURE OF THE PUBLIC PROCUREMENT CONTRACT (ADMINISTRATIVE COURTS (İDARİ YARGI) /DANIŞTAY “COUNCIL OF STATE” STAGE)-LAW N° 4734	1
II. LEGISLATION AFTER THE SIGNATURE OF THE PUBLIC PROCUREMENT CONTRACT (JUDICIARY COURTS (ADLİ YARGI) / YARGITAY “SUPREME COURT” STAGE)-LAW N° 4735	10
III. SOME IMPORTANT SUBJECTS REGARDING TURKISH PUBLIC PROCUREMENT LAW	12
IV. Tenderers and Application of the Price Advantage.....	15
V. STRICT FORMALISM IN PUBLIC PROCUREMENT DOCUMENTS IN TURKEY	20

I. LEGISLATION UNTIL THE SIGNATURE OF THE PUBLIC PROCUREMENT CONTRACT (ADMINISTRATIVE COURTS (İDARİ YARGI) /DANIŞTAY “COUNCIL OF STATE” STAGE)-LAW N° 4734

1

WHAT ARE THE TYPES OF TENDER PROCEDURE AS PER TURKISH PUBLIC PROCUREMENT LAW?

Under Turkish Law, three type of tender procedure is regulated as per the Law no. 4734.

These are;

- a. Open procedure
- b. Restricted procedure
- c. Negotiated procedure

- **OPEN PROCEDURE (Art. 19 of Law no. 4734):**

Open procedure is used where all tenderers may submit their tenders without any limitation. Both qualification and financial offer is submitted in open procedure.

- **RESTRICTED PROCEDURE (Art. 20 of Law no. 4734):**

Restricted procedure is the procedure in which tenderers, who are invited following pre-qualification by the contracting authority, can submit their

tenders. Procurement of goods, services or works may be conducted by restricted procedure **where open procedure is not applicable as the nature of the subject necessitates specialty and/or high technology and in procurement of works where estimated costs exceed the half of threshold value.**

Pre-qualification evaluation shall be carried out in accordance with the qualification criteria, which are established pursuant to Article 10 and specified in the pre-qualification documents and in the pre-qualification notices. Those who fail to meet the minimum requirements specified in these documents shall not be accepted as qualified. Provided that it is stated in prequalification notice and document, all or a certain number of the tenderers who have been considered as qualified from those who have been listed by ranking according to specified criteria set forth in the document may be invited to submit their tenders.

The candidates who have not been invited to submit tenders shall be informed in writing about the reasons. The procurement shall be concluded after the evaluation of the tenders in accordance with the evaluation criteria that are designed in accordance with Article 40 in a way to avoid any impediment to competition depending on the nature of the work and that are specified in the tender documents and in the letter of invitation. In case the number of tenderers that can be invited to submit tenders is less than five or the number of tenderers that submit tenders is less than three, the procurement shall be cancelled.

2

In case of the cancellation of procurement due to the number of tenderers being less than three, the procurement proceedings may be concluded by reviewing the tender documents and eliminating the deficiencies and errors, if any; and by re-inviting all pre-qualified tenderers.

• **NEGOTIATED PROCEDURE (Art. 21 of Law no. 4734):**

Negotiated procedure may be applied, where;

- a) no tender is submitted in open or restricted procedures,
- b) it is inevitable to conduct the tender procedures immediately, due to unexpected and unforeseen events such as natural disasters, epidemics, risk of losing lives or properties or events that could not be predicted by the contracting authority,
- c) it is inevitable to conduct the tender procedures immediately, due to occurrence of specific events relating to defense and security,
- d) the procurement is of a character requiring a research and development process, and not subject to mass production,

e) due to specific and complex characteristics of the works, goods or services to be procured, it is impossible to define the technical and financial aspects clearly,

f) product good, material and services procurements by contracting authorities with estimated costs of up to **fifty billion Turkish Liras (hundred and twenty-seven thousand one hundred and fifty-four Turkish Liras)**.¹

Publication of a notice is not compulsory in cases set forth in subparagraphs (b), (c) and (f). Where a notice is not published, at least three tenderers shall be invited to submit their qualification documents and price offers together.

In procurements to be conducted in accordance with subparagraphs (a), (d) and (e), first of all, the tenderers who are accepted as qualified according to evaluation criteria in tender documents shall submit their initial proposals, which do not include prices, on aspects such as technical details and realization methods of the contract that is subject matter of the tender. The tender commission shall interview with each tenderer on the best methods and solutions to meet the needs of the contracting authority. After the clarification of the conditions as a result of the technical interviews, the tenderers who have demonstrated their capacity and capability to meet all these conditions shall be asked to submit their offers including the tender price based on a reviewed and clarified technical specifications.

In procurements to be conducted under this provision, the procurement proceedings shall be concluded after receiving the tenderers' final offers in writing which may not exceed their initial price.

In procurements of goods to be conducted under the scope of paragraphs (b), (c) and (f), signing of contract and receiving the performance security are not obligatory, provided that the goods are delivered within the time limit of contract signing and upon the approval of the contracting authority.

- Tenders are announced to the public either with announcement or by invitation. Giving all tenderers sufficient time to prepare their tenders;

Procurement with estimated costs equal to or exceeding the threshold values stated in Article 8, shall be advertised by publishing in the Public Procurement Bulletin, at least once, provided that;

Notices of procurements to be conducted by open procedure shall be published not less than forty days prior to deadline for the submission of tenders, pre-qualification notices of procurements to be conducted by restricted procedure shall be published not less than fourteen days in advance of the deadline for the application, notices inviting candidates to a

¹ Please refer to the General Communiqué on Public Procurement for the application of afterwards period starting from December 2016.

negotiated procedure shall be published not less than twenty-five days prior to the deadline for the submission of tenders.

- There is no requirement of tender announcement, which is conducted as per Article 21/ (b), (c) and (f) of the Law no. 4734, however participation to these tenders are provided by invitation. For the participation to the tender, at least three invitation letters to tender must be sent. However, even one tenderer (bidder) is enough for validity of the tender.

HOW THE TENDERS ARE EVALUATED?

- In evaluating the tenders, first of all, the tenders of the tenderers whose documents are established to be incomplete or whose tender letters and tender securities are established to be not in compliance with the requirements as a result of the first session in accordance with Article 36 shall be excluded from the evaluation proceedings (Art. 37 of Law no. 4734).
- However, in case of missing information in the documents provided that absence of those do not alter the substance of the tender; the contracting authority shall request the tenderer in writing to furnish these missing information in a given time period. The tenderers who do not furnish this missing information in a given time shall be excluded from the evaluation and their tender securities shall be registered as revenue.
- Following this first-evaluation and proceedings, the tenders of tenderers with complete and appropriate documents and appropriate tender letters and preliminary guarantees shall be held subject to a detailed evaluation. At this stage, the tenders shall be examined for their conformity with the qualification criteria determining the capacity of the tenderers to perform the contract, as well as with the conditions set forth in the tender documents and whether an arithmetical error exists in unit price charts. The tenders that are found ineligible and the tenders with arithmetic errors in unit price charts shall be disqualified.

WHAT IS THE LEGAL REQUIREMENTS FOR JOINT VENTURES IN TENDER PROCESS? (Art. 14 of Law no. 4734)

- Joint ventures may be established by more than one natural or legal person either in the form of a business partnership or as a consortium. Members of a business partnership carry out the whole business jointly having equal rights and responsibilities while members of consortium carry out the business separating their rights

and responsibilities according to their expertise field for the purpose of performing relevant parts of the business. Business partnerships may participate in any kind of tender. However, in cases where different expertise is needed, the contracting authorities shall indicate in tender documents whether the consortium are allowed or not to submit tenders. At the tender stage, the joint venture shall be asked to submit an agreement indicating the mutual agreement of the parties to form a business partnership or a consortium. The pilot partner and the coordinator partner shall be specified in business partnership agreements and in consortium agreements respectively. In case the contract is awarded to the business partnership or consortium, a notary-certified business partnership or consortium contract shall be submitted prior to signing of the contract. In both business partnership agreement and contract, it has to be stated that the natural or legal persons setting the business partnership are jointly and severally liable in the fulfillment of the commitment, whereas in consortium agreement and contract it has to be clarified which part of the business has been committed by natural or legal persons setting the consortium and they would ensure the coordination among them through coordinator partner in fulfilling the commitment.

HOW THE CONTRACT IS AWARDED?

5

- Following the evaluation performed in accordance with Article 37 and 38, the contract shall be awarded to the tenderer who submitted the economically most advantageous tender shall be awarded with the contract.
- The economically most advantageous tender is determined solely on the basis of price or together with the price by taking into account the non-price factors such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit. In tender proceedings where the economically most advantageous tenders shall be determined by taking into account the non-price factors in addition to the price, these factors must be expressed in monetary values or relative weights in tender documents.
- In tender proceedings where it is stated in the tender documents that there is a price advantage for domestic tenderers in accordance with Article 63 of this Law, the tender proceedings shall be concluded by also taking into account the price advantage to determine the economically most advantageous tender.
- In tender proceedings where the lowest price offer is evaluated as the economically most advantageous tender, in case there are more than one offers with the same tender prices and these are established to be

the economically most advantageous tender, the tender proceedings shall be concluded by determining the economically most advantageous tender taking into account the factors other than price as stated in the second paragraph.

- The tender commission shall reach a justified decision, and submit the decision for the approval of the contracting officer. The decisions shall include the names or commercial titles of the tenderers, the offered prices, the tender opening date and the award of contract and grounds thereof, and in case the contract was not awarded, the related reasons thereof.
- Within maximum five days following the date of the decision, the contracting officer shall approve or cancel the tender decision, indicating clearly the grounds for cancellation.
- The tender commission's decision shall be deemed valid if the decision is approved, and null if it is cancelled.
- Prior to approval of the tender decision by the contracting officer, the contracting authority must check whether the successful tenderer and the owner of the second most economically advantageous tender are prohibited from participation in tenders and shall attach the related document to the tender decision. If it is detected that both tenderers are prohibited, the procurement shall be cancelled.

HOW THE SUCCESSFUL TENDERER IS ANNOUNCED?

- The tender result shall be acknowledged to all tenderers who have submitted an offer, including the tenderer to whom the contract is awarded, within maximum three days following the day of approval by the contracting officer. While doing this, the reasons for excluding the tender from the evaluation or not finding the tender eligible, shall also be included.
- In cases where the tender decision is cancelled by the contracting officer, the tenderers shall be notified together with the reasons thereof.
- The contract shall not be signed unless five days have passed in procurements held pursuant to subparagraphs (b) and (c) of Article 21 and ten days in procurements held in other cases, following the notification of all the tenderers about the tender result.

HOW THE DISPUTES ARISING FROM TENDER PROCEDURE IS RESOLVED?

- The disputes regarding tender process are evaluated under Law no. 4734.
- **Candidates, tenderers or potential tenderers²** who claim that they have suffered a loss of right or damage or likely to suffer a loss of right or damage due to unlawful procedures or actions within the process of the tender may file **a complaint (“şikayet”)³** and **appeal (“itirazen şikayet”)** in line with the procedures and the principles of this law (Art. 54 of Law No. 4734).
- The complaint and appeal applications are the mandatory administrative application paths to be exhausted before filing a lawsuit.

WHAT IS THE COMPLAINT (ŞİKAYET) AT THE TENDER STAGE? (Art. 55 of Law no. 4734)

The complaint shall be made to the contracting authority within the application period which is five days regarding the procurements held according to subparagraphs (b) and (c) of the article 21 and ten days for other cases from the date which the proceeding or action, which is subject matter of the complaint, have been realized or should be realized, and before contract signing. The period for complaint applications concerning the issues covered in the procurement notice shall start from the date on which the notice is first published, while the period for applications regarding the other provisions of prequalification or tender documents which are not reflected in the procurement notice shall start from the purchasing date of the related document.

- The complaints regarding the procurement notice, prequalification or tender documents shall be submitted at the latest until three working days before the tender or application deadline provided that time limits do not exceed the time limits stated in the first paragraph. It is compulsory for the contracting authorities to conclude such complaint applications before the procurement date or deadline for the

² **Candidate** means natural or legal persons, or joint ventures formed by those persons applying for pre-qualification.

Tenderer means the supplier, service provider or works contractor submitting tender to procurement of goods, services or works.

Potential tenderer means natural or legal persons, or joint ventures formed by those persons, operating in the field of the subject matter of contract, and have purchased the tender or pre-qualification documents.

³ “Complaint” is made towards “Contracting Authority”, i.e. procuring authorities and institutions covered by Law, e.g. DSI and “Appeal” applications shall be submitted to the Authority (KİK) through signed petitions.

application. In case material defect or technical defect or deficiencies which could affect tender preparation or fulfillment of the work during the review following the complaint are detected and the contracting authority considers a correction on the tender documentation, application deadline or tender date can be postponed for once, according to procedure in article 29 after the necessary correction. However, if the detected material or technical defect or deficiencies have also taken place in tender notice it shall be proceeded according to Article 26.

- The contracting authority makes the necessary review on the complaint application and takes a reasoned decision within ten days following the complaint application. The decision shall be notified to the complainant and the other candidates, tenderers or potential tenderers within three days after the date of the decision. Potential tenderers are not notified about the decisions other than those against the tender notice, tender or pre-qualification documents.
- In case a decision is not taken in the specified period the complainant may submit an appeal application within ten days following the expiring of decision period; and in case the decision is not deemed appropriate, the candidates, tenderers or potential tenderers including the complainant may submit an appeal application to the Authority within ten days following the notification of the decision by the contracting authority.
- The contract may not be signed unless ten days have passed either from the final notification date of the decision upon application where an application to the contracting authority exists, or from the expiration date for taking a decision where no decision is taken and unless it has been enquired whether there has been no appeal application or, unless the Authority has given a final decision where there has been an appeal application.

WHAT IS THE APPEAL (İTİRAZEN ŞİKAYET) (Art. 56 of Law no. 4734)?

The candidates, the tenderers or potential tenderers who have submitted a complaint application to the contracting authority or those who have found the decision of the contracting authority inappropriate may file an appeal to the Authority before the signing of the contract under the conditions and within the period stipulated by the fourth paragraph of Article 55.

- Among the proceedings and decisions related to the cancellation of a tender only those taken upon complaints and appeals can be subject matter of an appeal and this appeal application is submitted directly to the Authority within five days.

- When reviewing the appeals, the Authority shall look for whether there has been an infringement of equal treatment principle in the framework of claims of applicant and by considering the aspects established in the contracting authority's decision taken upon a complaint and objections raised against proceedings. The appeals to be submitted against an action taken by the contracting authority to cancel the tender upon a complaint or appeal, on the other hand, shall be reviewed limited with the justifications of the contracting authority for such cancellation.
- Having been signed of the contract without complying with the specified periods and procedures in the Law or having been resigned from the appeal application shall not constitute an obstacle for reviewing appeal application and taking one of the decisions stated in Article 54.
- The Board, when deemed necessary, may decide to hear the parties and the relevant persons. In this case, the parties and the relevant persons shall be heard on a date to be identified by the Board.
- The Authority is obliged to make the final decision on the appeal application within twenty days following the date on which the documents, information and the tender proceeding files of the tender under review are recorded in the Authority. This period shall apply as ten working days for the appeals against tenders that are conducted pursuant to subparagraphs (b) and (c) of the Article 21 and against actions taken by the contracting authority to cancel the tender upon a complaint or appeal.
- All decisions taken by the Board shall be notified to the parties within five working days following the decision date and is published in the website of the Authority within five days following the notification. No fee may be collected for the access to the decisions.
- Contracting authorities must immediately execute the necessary transactions resulting from Board decisions, which would create changes in the legal status.

Appeal Subject	Application Term
Applications against the cancellation of the tender	5 days
For other applications	10 days

WHAT IS THE PROCEDURE FOR ANY COURT CASE?

As stated above, the complaint and appeal applications are the mandatory administrative application paths to be exhausted before filing a lawsuit.

- In case that bidders would like to bring a case against the tender process, defendant of the case must be shown as “Public Procurement Authority-Kamu İhale Kurumu “**KİK**”). The case is heard before administrative courts of Turkey.
- Danıştay (“*Council of State*”) 13th Division is the assigned Division to examine court case appeal applications for the files related with the Law no. 4734.

With the Law Amendment held on 18/6/2014 in Administrative Procedure Law, the cases in relation to the public procurement excluding “*decisions regarding ban from public procurements*” are tied to urgent proceeding procedure (*please refer to Art. 20/A of Law no. 2577*).

The mandatory term for bringing a lawsuit against the decision of KİK is thirty days following from the notification of KİK decision.

Following this amendment, the cases must be finalized within one month after the case has reached before Danıştay and final decisions must be notified to Parties at most within one month.

WHAT IS THE NUMBER FOR MINIMUM NUMBER OF TENDERERS (BIDDER) FOR A VALID TENDER?

- Regarding Open Procedure: There is not a lower limit of number of tenderers (*However, in tenders to be conducted in accordance with Law no. 4734, the contracting authorities are liable for ensuring transparency, **competition**, equal treatment, reliability, confidentiality, public supervision, and fulfillment of needs appropriately, promptly, and efficient use of resources. Therefore, mostly evaluated as the violation of competition conditions throughout the tender*).
- Regarding Restricted Procedure: Number of tenderers cannot be less than three (Art. 20 of Law No. 4734).
- Regarding Negotiated Procedure: For the participation to the tender, at least three invitation letter to tender must be sent. However, even one tenderer (bidder) is enough for validity of the tender.

10

II. LEGISLATION AFTER THE SIGNATURE OF THE PUBLIC PROCUREMENT CONTRACT (JUDICIARY COURTS (ADLİ YARGI) /YARGITAY “SUPREME COURT” STAGE)-LAW N^o 4735

The procedure after signature of the Public Procurement Contract is mainly regulated by the Law No. 4735. Accordingly, any legal dispute between the successful tenderer and the administration after this stage shall be subject to judiciary proceedings. When there is no provision to apply in Law No. 4735,

the general provisions of Turkish Law, mainly Law No. 6098 (*Turkish Code of Obligations*) shall apply to the dispute.

HOW DECISIONS TAKEN AT THE END OF THE COURT CASES AFFECT THE CONTRACT?

As per Article 28 of the Turkish Administrative Procedure Law numbered 2577, “*The administration must implement the acts and take actions required by the judgments and stay of execution orders given by the Council of State, regional administrative courts, administrative and tax courts without delay. This period, under no circumstances, can exceed thirty days from the notification of the decision to the administration*”.

IF THE PUBLIC PROCUREMENT CONTRACT IS CANCELLED AS A RESULT OF THE COURT DECISION AND DECISION OF KİK, WHAT WILL BE THE FOLLOWING PROCEDURE?

The possibility of cancellation of the procurement contract after signature of the Public Procurement Contract between the successful tenderer and administrative authority has not been clearly and specifically ruled under legislation. Such a cancellation is different from the termination of the contract grounds regulated within Law No. 4735. After cancellation of the tender with a court judgment, since the administrative authorities are bound with the decision of judicial authorities, they must initiate process to fulfill the directions stated within the court order. Under these circumstances, the Procurement Contract shall be terminated as per provisions of Law No. 4735 and general provisions of Law.

Following cancellation decision of the court, first of all, administrative authority (KİK and the administration) takes a decision on the cancellation of the procurement contract and contractor must be notified about it (within 5 days following administrative authority decision, Parties must be notified (Article 56 of Law No. 4734).

Starting from the cancellation notice, a termination committee is formed and in the presence of the contractor the already completed services are calculated till termination notice. Termination date is deemed to be the provisional acceptance. The provisions within the Procurement Contract regarding provisional acceptance, terms of guarantee, maintenance liability, final acceptance and return of the guarantee letter shall be applied as if they are applied in normal circumstances and in completed works.

A termination protocol is signed between the contractor and administrative authority.

A committee assigned by the administrative authority shall determine the defects of the work that may arise within the definite guarantee period and afterwards process. If the work needs to be brought up to a certain level for the benefit of the public welfare and administration after the termination of

the Contract, then it must be stated within termination provisional acceptance protocol. In circumstances where contractor has given an order to third parties in terms of goods and services, administrative authorities mostly consider it carefully and request to carry out work for a definite period to mitigate possible losses of the contractor and to prevent compensation may be claimed from administrative authority itself.

In brief;

- As first step, as it is also stated above, a termination committee shall be set up to determine exact amount of the completed works.
- Progress billing (hak ediş) that contractor is entitled shall be calculated and advance payments and penalties will be deducted from this amount.
- Administration may propose to purchase the equipment, machines and facility of the project from the contractor.
- Administration may propose contractor to continue to the work up to a certain level due to technical requirements or to secure completed works. This determination must be reflected to the liquidation provisional acceptance protocol.
- Contract performance guarantee will be returned back to the contractor.

III. SOME IMPORTANT SUBJECTS REGARDING TURKISH PUBLIC PROCUREMENT LAW

WHY CLARIFICATION REQUEST AND ADDENDUM (ZEYİLNAME) AT TENDER STAGE IS IMPORTANT?

The clarification request and addendum at the tender stage is explained under Article 29 of the Law No. 4734.

*“In principle, **no amendment** should be made in the tender documents after the advertisement of the procurement notices. If an amendment is deemed as necessary, the necessities and reasons thereof shall be certified with a minute, and the previous notices shall be deemed invalid, and the procurement notice shall be advertised again, likewise.*

*However, after the advertisement of tender notices, **if material or technical errors or deficiencies that may affect the preparation of tenders or realization of the work are detected by the contracting authority or notified by the tenderers with a written notice, the tender documents can be amended. The addendum relating to such amendments, and constituting a binding part of the tender documents shall be provided to all tenderers who have purchased the tender documents, in a way to ensure that they are informed ten days prior to the deadline for submission of tenders. In case an extension of the time period is needed in order to prepare the tenders due to the amendments made with addendum,***

the date of tendering may be postponed for maximum twenty days, but for once only. In case of an addendum, the tenderers who have already submitted their tenders prior to such arrangement shall be allowed to withdraw their tenders and submit new tender.

Moreover, the tenderers may request explanations in writing relating to aspects in the tender documents, which they may need when preparing their offers, twenty days prior to the deadline for submission of tenders. In case such request is found appropriate by the contracting authority, the required explanations shall be provided in writing, in a way to ensure that all the tenderers who are already provided with the tender documents until that date are informed of such explanations ten days in advance of the deadline for submission of tenders, without disclosing the tenderer making the request."

It is important make clear the liabilities of the tenderers at the tender stage and if any liability regulated for the contractor is not clear, it should be let to be amended by the contracting authority. As the tender specifications are part of the Public Procurement Contract, in order to prevent any cancellation due to nonfillment of obligations, it is required to clarify all the ambiguous points beforehand.

WHAT HAPPENS IF THE DELIVERY TERM IS REGULATED IN A DIFFERENT MANNER FOR DOMESTIC AND FOREIGN TENDERERS?

It is considered as the violation of Article 5 of the Law No. 4734 which regulates the transparency, fair competition and equality. Therefore, if such a tender is announced, then it will be a ground for the cancellation of the tender (17.02.2004/UK.Z-174 R.G. 24.03.2004-25412)

WHAT HAPPENS IF TURKISH TREASURY IS SUBJECT TO ANY LOSS DUE TO THE FAULT OF MEMBERS OF THE TENDER COMMITTEE?

If the tender is not announced in time as in direction regulated within the law and if Turkish treasury has any loss due to this failure, the loss will be compensated by the relevant members of the tender committee (Yargıtay 4th Civil Division, 05.04.1964, 2446/1847).

MAY THE OPENING OF THE TENDER OFFERS AS WELL AS THE ANNOUNCEMENT OF THEM MAY BE POSTPONED BY THE TENDER COMMITTEE?

Although the tender documents are received by the administration, if the opening of the tender documents as well as the announcement of them is postponed by the tender committee, it will certainly injure the principles regulated with the public procurement law and the tender needs to be cancelled (7.08.2007-2007/UH.Z-2838).

WHAT HAPPENS IF THE ITEMS WITHIN THE OFFER OF THE TENDERER IS SAME WITH THE APPROXIMATE COST (YAKLAŞIK MALİYET)?

The confidentiality principle for the approximate cost applied during tender phase. Therefore, if any clue is found that it is impossible for the tenderer make such kind of offer without knowing the approximate cost, therefore it is very clear that approximate cost is revealed, then the tender will be cancelled (19.10.2006/UY.Z-2518) (R.G. 18.12.2006-26380).

IF THE TENDERER HAS TAX DEBTS, WILL HIS GUARANTEE BE RECORDED AS REVENUE?

“It is seen from the records that the lead partner of the joint venture has tax debts in the amount of TRY 19,262.71 at the tender date which is 20.07.2012. Since this debt exceed the barrier stated within Article 17.4. of General Communique of the Public Procurement as TRY 5,000, the offer is left out of assessment and his guarantee must be recorded as revenue to Turkish Treasury” (17.10.2012; 2012/UH.1-3999).

WHAT HAPPENS IF THE UNAUTHORIZED PERSON SUBMITS THE OFFER ON BEHALF OF THE COMPANY?

In a sample decision it is seen that the authorized representatives announced in Trade Registry Gazettes has no authority to delegate or cancel the delegation, the person that is appointed via Public Notary is not authorized to submit the tender on behalf of the company. Therefore, the offer of the company must be left out of assessment (25.12.2006-2006/UY.Z-3290).

HOW THE PAYMENT IS MADE TO JOINT VENTURES?

Joint ventures should take atax number from tax office and the invoice should be issued by the joint venture directly. In return of the invoice, payment will be made.

IS IT POSSIBLE ADMINISTRATIVE AUTHORITY MAKES THE PAYMENT WITHOUT THE RECEIPT OF AN INVOICE OR TO ANOTHER COMPANY OF THE TENDERER?

Payment may only be made in return of an invoice and administrative authority has the authority to check the authenticity and reliability of the invoice. As another important point, the payment may only be conducted to the authorized person/entity by the accounting officer of the administrative authority and accounting officers would act cautious in this subject, because as per Article 61 of the Law on Public Finance Management and Control Law, if he acts to the contrary, it will create financial liability of the officer.

MAY THE SIGNATURE BE COMPLETED AFTER THE OFFER IS SUBMITTED?

Only the signature that needs to be on the offer envelope may be completed within the attendance of all the tenderers when offers are being submitted to the administrative authority, since at that stage, it is not known yet who will be the successful tenderer (14.08.2003-R.G. 25.8.2003-25210).

MAY A COMPANY BRING A COMPLAINT AGAINST THE TENDER SPECIFICATIONS AFTER SUBMITTING HIS OFFER?

KİK rules that after submitting the offer, the tender specifications cannot be discussed by the company before complaint or appeal stage. However, courts state that a company may bring this issue before the administrative authorities and courts, even if they have submitted their offer for the tender (05.08.2013-2013/UY.IV-3231; Ankara 10th Administrative Court, 2013).

MAY AN ATTORNEY MAKE THE COMPLAINT AND APPEAL APPLICATION WITH A GENERAL ADVOCACY POWER OF ATTORNEY?

Attorney needs to have a special competence to apply for complaint and appeal within his Power of Attorney, otherwise application may be rejected (12.09.2011-2011/UY.III-3013).

SHOULD THE ORIGINAL OF THE POWER OF ATTORNEY OR SIGNATURE CIRCULAR BE SUBMITTED WITH THE COMPLAINT OR APPEAL APPLICATION OR THE PHOTOCOPY WOULD BE ENOUGH?

The original or notary approved versions of the Power of Attorney or Signature Circular should be submitted, otherwise application may be rejected (19.08.2013-2013/UY.I-3308; 22.10.2012-2012/UH.III-2602).

IV. TENDERERS AND APPLICATION OF THE PRICE ADVANTAGE

1. Definitions

- A. **Goods** mean any kind of purchased necessities, and movables and immovables, together with the rights thereof.
- B. **Services** means such services as maintenance and repair, transportation, communication, insurance, research and development, accounting, market surveys and polls, consultancy, promoting, broadcasting and publication, cleaning, catering, meeting, organisation, exhibition, guarding and security, vocational training, photography, film, intellectual and fine arts, computer systems and software services, lease of movable and immovable properties and the rights thereof and other similar services.
- C. **Works** means construction of buildings, roads, railways, highways, airports, docks, harbours, shipyards, bridges,

tunnels, subways, viaducts, sports facilities, infrastructure, pipelines, communication and energy transmission lines, dams, power plants, refineries, irrigation facilities, soil reclamation, flood-prevention and pickling; and installation, manufacture, preparation of site materials, transportation, completion, large scale-repair, restoration, landscaping, drilling, demolition, reinforcing and assembly related with the works stated above and similar construction works.

- D. **Tenderer** means the supplier, service provider or works contractor submitting tender to procurement of goods, services or works.
- E. **Potential tenderer** means natural or legal persons, or joint ventures formed by those persons, operating in the field of the subject matter of contract, and have purchased the tender or pre-qualification documents.
- F. **Domestic Tenderer** means natural persons who are the citizens of Republic of Turkey and legal persons established in accordance with the Laws of Republic of Turkey. *For joint ventures to be considered as domestic tenderers, all of the partners should satisfy the criterion of domestic tenderers.*
- G. **Domestic Products**

- i. *Industrial products*

- 1. The industrial products should be within the scope of the production subject of the industrial enterprise.
 - 2. The industrial products should be manufactured entirely in Turkey or the important phases of manufacturing should take place in Turkey.
 - 3. Domestic participation rate should at least 51%.

- ii. *Nutrient and Animal Product*

- 1. Mentioned products should be produced by an approved enterprise
 - 2. The mentioned products should be manufactured entirely in Turkey or the important phases of manufacturing should take place in Turkey.
 - 3. Agricultural products should be produced by enterprises with registration document from the Ministry of Food, Agriculture and Livestock

Herbal products, livestock born or elevated in Turkey, Fisheries elevated or hunted in Turkey are considered as domestic products.

Other products will be considered as domestic products where they are entirely produced in Turkey or the important phases of manufacturing should take place in Turkey.

Certification of the Domestic Products:

Domestic Product Certificate is issued by the Chamber or Commodity Exchange where the producer is registered. The certificate includes details on producers, products, validity period.

2. Price Advantage in favour of Tenderers

A. Scope of Application of Price Advantage

As per Article 63 of the Public Procurement Law, the price advantage will be applied as follows:

- i. For service procurement tenders and construction work tenders:
 - Only for domestic tenderers
 - Possible application of price advantage up to 15%
- ii. For product purchase tenders:
 - For tenderers offering domestic productss
 - Price advantage up to 15%

*For tenders of the medium and high technology industrial products indicated in the list of Ministry of Science, Industry and Technology, it is **obligatory** to apply the price advantage up to 15%.*

- For tenders open to only domestic tenderers offering domestic productss
 - Price advantage up to 15%
- B. Regulation of Price Advantage
- Amount of price advantage should be indicated in the tender documents.
 - For tenders with more than one property item which is subject to price advantage for tenderers offering domestic productss:
 - Tenders should be open to partial bid
 - Each part subject to price advantage should consist of only one property item.

C. Calculation of the Price Advantage

- i. For tenderers offering domestic productss
 1. Bids of the tenderers not offering domestic productss are multiplied by the price advantage percentage
 2. All of the bids are put in order from lowest to highest
 3. Lowest bid is considered as the most appropriate bid in financial means.

Example:

Company A, Company B and Company C participate to a tender. The companies offer 250.000, 210.000 and 195.000 consecutively. Companies A and B offer domestic products.

Price advantage is determined as 9% in the tender documents.

Company C's offer thus becomes: $195.000 \times (109 \div 100) = 212.550 \text{ TL}$

When the offers are put in order: 210.000 (B) < 212.550 (C) < 250.000 (A)

→ Company B wins the tender.

However, for the tenders where the most appropriate bid in financial means is determined by considering other factors; first the order of the offers is determined by considering the "other factors" and then the price advantage is multiplied with the newly calculated offers of the tenderers not offering domestic products.

3. Domestic Tenderers

A. Definition of the Domestic Tenderer

i. Within the scope of the Public Procurement Law

Domestic Tenderer means natural persons who are the citizens of Republic of Turkey and legal persons established in accordance with the Laws of Republic of Turkey. *For joint ventures to be considered as domestic tenderers, all of the partners should satisfy the criterion of domestic tenderers.*

ii. Within the scope of Relevant By-Laws

(By-Law on Application of the Product Purchase Tenders, By-Law on Application of the Service Procurement Tenders, By-Law on Application of the Construction Works Tenders)

In addition to the definition provided in the Public Procurement Law, the By-Laws provide that:

In order to understand whether a tenderer is a domestic tenderer the procedure is as follows:

- For real persons: from the Identity Number mentioned in the application documents or letter of proposal.
- For legal persons: from the submitted documents for the tender. No additional document required for the assessment of being a domestic tenderer.

iii. Within the scope of Public Procurement General Communique

For the tenders where being a domestic tenderer is significant, tender specifications provide that if there is any

suspicion of whether the tenderer is domestic or not, additional documents may be demanded in an effort to complete the missing information.

iv. Decisions of the Public Procurement Authority (PPA)

Submission of the Trade Registry Gazette is sufficient as a proof of being a domestic tenderer. (PPA, 20.05.2008)

Copy of the identity document is sufficient as a proof of being a domestic tenderer. (PPA, 29.01.2007)

B. Tenders open to Domestic Tenderers Exclusively

As per Article 63 of the Public Procurement Law, it is possible for contracting authorities to insert provisions to the tenders documents indicating that the tender is exclusively open to domestic tenderers if the estimated cost is below the threshold values.

i. Threshold Value

In order to harmonize Turkish legislation with the European Union acquis, threshold values were introduced to the Turkish Public Procurement Law. Several monetary thresholds are provided varying due to the type of work and type of the authority.

Threshold values are updated every year at the end of January with a Communique of the PPA. For the year 2017 the threshold values are not announced, however, it is possible to provide the numbers for 2016 as an example:

- for procurement of products and services by the contracting authorities operating under the general or the annexed budget: 976.465,-TL
- for procurement of goods and services by other contracting authorities within the scope of the PPL: 1.627.445,-TL
- for the works contracts by any of contacting authorities covered by this Law: 35.804.003,-TL

Under extraordinary circumstances threshold values could be updated during any time of year with the proposal of the PPA and decision of the Council of Ministers.

ii. Estimated Cost

- Determined by the contracting authority
- Prior to the procurement proceedings of goods, services or works
- VAT is excluded and shall be indicated on a priced bill of quantities with its justifications.

- Estimated cost shall not be stated in tender or pre-qualification advertisements, and shall not be explained to tenderers or to the others who do not have any formal relationship with the tender proceeding.

4. Currency of the Payment

Due to the amendment of the legislation (*specifically in By-Law on Application of the Product Purchase Tenders, By-Law on Application of the Service Procurement Tenders, By-Law on Application of the Construction Works Tenders, By-Law on Application of the Frame Agreement Tenders, By-Law on Application Electronic Bidding and By-Law on Application of Consulting Service Procurement Tenders*) on 29 November 2016, several articles of the tender specifications are changed.

In the light of the amendments mentioned above:

- Tenderers shall make their offers in Turkish Liras
- Tenderers shall use Turkish Liras for their payments
- Currency of the payments is Turkish Liras exclusively.

V. STRICT FORMALISM IN PUBLIC PROCUREMENT DOCUMENTS IN TURKEY

20

Turkish public procurement legislation has some strict rules in order to keep the tender process safe. One of those rules is the presentation type of the documents which are prepared and provided from the foreign countries. The main reason for this formality is the lack of confidence to the documents from abroad. Public procurements' main aim is to provide public benefit and in this respect to keep the benefit at the highest level. But it cannot certainly be said that this formalism is the right instrument to keep this public benefit at the aimed level. Because, in some tenders important bidders are disqualified because of their documents and thus the work subjecting to tender cannot be done by competent bidders.

There are basically four different ways to present documents from foreign countries to public procurements; Apostil ratification, Bilateral Agreement Ratification, Turkish Consulate Ratification and Foreign Country Turkish Consulate Ratification.

Apostil ratification; official documents prepared in the countries which are parties to Convention on Abolishing the Requirement for Legalization for Foreign Public Documents (Lahey or Apostile Convention 5 October 1961), are exempted from Turkish Consulate or Turkish Ministry of Foreign Affairs ratification as long as there is an apostille annotation on the documents.

Bilateral Agreement Ratification; if there is an agreement between Turkish Republic and other states including clauses about the signature, stamp on the documents or clauses directly about the ratification type of the documents, ratification of the documents from these states will be done according to this agreement.

Turkish Consulate Ratification; If there is no apostille ratification and there is no bilateral agreement between Turkey and other state, the documents must be ratified by Turkish Consulate in that state. If there is not a Turkish Consulate in the country document is prepared, the document in an order must be ratified by, Ministry of Foreign Affairs of the Country document prepared, Turkish Consulate responsible from the relations with this country OR Turkish Legation of The Country and finally Turkish Ministry of Foreign Affairs.

Foreign Country Turkish Consulate Ratification; If there is no apostille ratification and there is no bilateral agreement between Turkey and other state, another way is to have the documents ratified by The Turkish Consulate of foreign country in which document prepared and Turkish Ministry of Foreign Affairs.

Documents directly prepared by the Turkish Consulate of any Foreign Country have to be ratified by Turkish Ministry of Foreign Affairs before used in Turkey.

APOSTILLE RATIFICATION

Both apostilles and certifications are used by foreign governments to assess the authenticity of an official signature on a document; the capacity in which the person signing the document acted; and the identity of any stamp or seal affixed to the document.

Under the Hague Convention, signatory countries have agreed to recognize public documents issued by other signatory countries if those public documents are authenticated by the attachment of an internationally recognized form of authentication known as an "apostille." The apostille ensures that public documents issued in one signatory country will be recognized as valid in another signatory country. Apostilles require no further diplomatic or consular legalization.

For documents intended for use in countries which are not signatories to the Hague Convention, the Department of State attaches a certification. Note that unlike apostilles, which require no further legalization, certificates of authentication may require further diplomatic or consular legalization before being sent overseas. The apostilles and certifications issued are attached to the dossier document exclusively by means of a staple.

List of The Countries Party to Apostille Convention

Albania, Andorra, Antigua and Barbuda, Argentina , Armenia, Australia, Austria, Azerbaijan, The Bahamas, Bahrain, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burundi, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Grenada, Honduras, Hong Kong, Hungary, Iceland, India, Republic of Ireland, Israel, Italy, Japan, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macau, Republic of Macedonia, Malawi, Malta, Marshall Islands, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Namibia, Kingdom of the Netherlands, New Zealand, Nicaragua, Niue, Norway, Oman, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, São Tomé and Príncipe, Serbia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Suriname, Swaziland, Sweden, Switzerland, Tonga, Trinidad and Tobago, **TURKEY**, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela.

Documents Those Can Be Apostilled

- Documents prepared by an official or an authority of Judicial Organ or Court.
- Administrative Documents
- Notarial Deed
- Official Declarations of Notaries or Official Authorities which proves, the record, date or signature and stamp of a document prepared for special purposes.

Documents Those Cannot Be Apostilled

- Documents prepare by consulate or diplomacy officials
- Documents directly related with trade and customs.

Competent Authority to Make Apostilles in Turkey

According to Article 6 of the Apostille Convention, every signatory state has to identify authorities those can make apostilles and if any of these authorities change that state must acknowledge Ministry of Foreign Affairs of Holland.

Competent Authorities in Turkey to make apostilles are as follows;

- Administrative Documents
 - i. In cities, Governor, Deputy Governor, Director of Legal Affairs

- ii.** In districts, District Governor
- Judicial Documents
 - i.** Presidency of Judicial Commission

Form of The Apostille

According to Article 4 of the apostille convention, there must be 10 different information on the apostille document;

- Name of the country document is prepared
- Name of the official signed the document
- Title of the signatory person
- Name of the Authority to which the stamp belongs
- Ratification place
- Ratification Date
- Apostille Authority
- Apostille Number
- Apostille Authorities stamp or seal
- Signature of the official who prepared the apostille

BILATERAL AGREEMENT RATIFICATION

As also stated above, if there is an agreement between Turkish Republic and other states including clauses about the signature, stamp on the documents or clauses directly about the ratification type of the documents, ratification of the documents prepared in these states will be done according to this agreement. This means; no further ratification will be needed as long as there is a bilateral agreement between Turkey and another state.

In this respect, the documents prepared, sealed or stamped, ratified by the competent authorities of the following countries can directly be used in Turkey. No extra ratification, including apostille, is needed; Albania, Austria, Georgia, Croatia, Kuwait, Lithuania, Hungary, Macedonia, Uzbekistan, Poland, Russia, Tajikistan, Ukraine.

Documents prepared, sealed or stamped and ratified by Kazakhstan in order to be used before Turkish Courts are exempted from extra ratifications.

Documents prepared, sealed or stamped and ratified by Azerbaijan in order to be used before Turkish Judicial Authorities are exempted from extra ratifications.

CONSULATE RATIFICATION

If the document is provided from a country which is not party to the Apostille Convention or there is not any bilateral agreement between that country and Turkey, the only way to use these documents is to have them ratified by Consulates. These documents can be ratified by both Turkish Consulate abroad and the Consulate of that country in Turkey. For each way there are special provisions.

If a document is going to be ratified by The Turkish Consulate in a foreign country, to use that document in Turkey official translation and ratification of Turkish Notary is strictly needed. After the translation of an official translation office and ratification of the Turkish Notary, the document can be used officially in Turkey.

If a document is going to be ratified by The Consulate of that foreign country in Turkey, a final ratification of Turkish Ministry of Foreign Affairs will be necessary. For the probability there might not be a Turkish Consulate in the country the document is prepared or provided, the ratification can be done in an order with the ratifications of Ministry of Foreign Affairs of the Country document prepared, Turkish Consulate responsible from the relations with this country OR Turkish Legation of The Country and finally Turkish Ministry of Foreign Affairs.

PROBLEMS FACED IN TURKISH PUBLIC PROCUREMENT SYSTEM

Due to the lack of confidence to documents which are provided from abroad, Turkish public authorities, especially Public Procurement Authority (PPA or KİK) are very strict with the ratification of the documents. This is because both Apostille authorities and The Consulates only ratify the signatures or stamps on the document not the content of the text on the document. So, because the content of the document is not ratified, KİK keeps the process strict in order not to ratify documents which are not real.

This situation sometimes causes the elimination of some competent companies from the tender process. Main issue KİK and other authorities are emphasizing is the direct ratification of the documents. This means that, no matter by whom it is prepared, the document must be ratified directly by the Ratification Authority after it is prepared and no other official authority can intervene. For example if the document is a business experience certificate, directly who prepared this document should bring it before The Consulate or The Apostille Authority to be ratified. An extra ratification, for example by Ministry of Foreign Affairs or by Chamber of Commerce will violate the ratification process according to KİK. Even the document is prepared by an official authority, for example chamber of commerce, no other official ratification is needed, besides this ratification will violate the ratification chain according to Turkish Public Procurement Authority (KİK).

According to us this ratification chain KİK looks for is impossible to be implemented in most of the countries in the world. Because every country has its own ratification system and despite this reality; to ask for such kind of ratification is actually asking for the impossible.

Another problematic issue with the documents provided from abroad is the ratification way of the documents. In Apostille Convention, in Turkish legislation and in ratification systems of any countries around the world, the ratification means; approval of authenticity of the signature, title of the signatory, and if exists exactness of the stamp or seal with the original on the document. Many companies in Turkey are facing this problem and they are having the documents only ratified. As explained, the ratification must include; authenticity of the signature, title of the signatory, and if exists exactness of the stamp or seal with the original. Some of very important documents of Big Companies are disqualified for only this reason.

CONCLUSION

Turkish Public Procurement System is very strict about the ratification of the documents provided from abroad. Main reason for that is the lack of confidence to these documents because the ratification authorities are not actually ratifying the content of the document. They only ratify signature or stamp or seal on the document. It is very common for foreign companies to be disqualified from public tenders just because their documents are not presented properly. Even they are very competent and they are the ones which can carry on the business very successfully, they cannot win the tender and stay out of the process which is also a detrimental situation to Turkey's public profit.

To avoid this situation, foreign companies must certainly have legal assistance before attending the public tenders in Turkey. Because considering Public Tenders, the judicial process is also very different from other legal issues. Before Courts, there are administrative application ways and these ways are obligatory to be applied and once the document is disqualified it becomes very difficult and more expensive for foreign companies to solve the problems. Best way to avoid this situation is to have legal assistance before attending public tenders.

Should you have any queries, please feel free to contact us.

Kind Regards,

Sarıbrahimoğlu Law Office

©Sarıbrahimoglu Law Office

This publication does not necessarily deal with every important topic nor cover every aspects of the topics with which it deals. It is not designed to provide legal or other advice.

Sarıbrahimoglu Law Office is a freelance attorney firm registered under Ankara Bar Association and Sarıbrahimoglu Legal Consultancy Firm is a limited liability company registered under Istanbul Trade Registry.

Registered Offices:

1. Ankara Office

Kızkulesi Sokak No. 14/1
06700 GOP/ANKARATURKEY

2. Istanbul Office

Merkez Mahallesi Gönen Sok No. 9/6
Sisli/ ISTANBUL-TURKEY