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Editors

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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**Editors**

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

# SAUDI ARABIA

*Nick Simpson, John Balouziyeh and Bshayer Binyamin<sup>1</sup>*

## I INTRODUCTION

Saudi Arabia regularly features near the top of country rankings for ease of doing business, freedom of contract and economic opportunity. As at 2021, Saudi Arabia was ranked the 18th largest economy in the world by gross domestic product, and the largest economy in the Middle East. The country's public spending in defence, healthcare, education, infrastructure, transport, and other government-driven sectors is the highest in the Middle East and North Africa. Saudi Arabia ranks fifth globally for defence spending alone, with an annual defence budget hovering at approximately US\$50 billion over the past three years. The size of the Saudi economy, the range of its trading relationships and the importance of Saudi Arabia for stability in the Middle East make Saudi Arabia a strategic partner for many western governments and a key destination for foreign investment for companies seeking to do business in, and with the government of, Saudi Arabia.

In line with Saudi Arabia's ambition to attract goods and services from the world's leading multinational companies, simplify government procurement procedures, enhance transparency, strengthen integrity and ensure fair treatment of bidders, Saudi Arabia enacted the amended Government Tenders and Procurement Law, issued by Royal Decree No. M/128 (the amended Procurement Law or amended PL),<sup>2</sup> which amends the Saudi Government Tenders and Procurement Law, enacted by Royal Decree No. M/58 (the 2006 Procurement Law or 2006 PL).<sup>3</sup> The amended Procurement Law, which entered into force on 1 December 2019 G, is accompanied by its Implementing Regulations, enacted by Ministry of Finance Resolution 1242 (the 2019 Regulations).<sup>4</sup> The 2006 Procurement Law was accompanied by implementing regulations enacted by Ministry of Finance Decision 362 (the 2007 Regulations).<sup>5</sup> This chapter will discuss the reforms introduced by the amended Procurement Law and its 2019 Regulations in the areas of bidding procedures, awards and dispute resolution.

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1 Nick Simpson, is the managing partner, John Balouziyeh is a senior legal consultant and Bshayer Binyamin is a trainee associate at the Law Firm of Wael A Alissa in association with Dentons & Co.

2 Dated 13/11/1440 H., corresponding to 16/7/2019 G.

3 Dated 4/9/1427 H., corresponding to 27/9/2006 G.

4 Dated 21/3/1441 H., corresponding to 18/11/2019 G.

5 Dated 20/2/1428 H., corresponding to 10/3/2007 G.

## **II YEAR IN REVIEW**

The amended Procurement Law represents a major overhaul of the 2006 Procurement Law, with most of the provisions of the 2006 Law having been substantively modified or abrogated in their entirety. Together with the 2019 Regulations, the amended Procurement Law sets out to regulate procurement procedures, prevent abuse of authority, protect public funds, attain maximum value of public funds, strengthen transparency and integrity, ensure fair treatment of bidders and enhance economic development.<sup>6</sup>

The reforms introduced by the amended Procurement Law are significant. One key development is the adoption of a unified e-portal supervised by the Ministry of Finance through which all government tenders and procurements must be announced. The e-portal broadens the scope of potential tenderers globally and drives price elasticity, resulting in better value outcomes for the Saudi government and an enhancement in the quality of participants through competition. In addition, the electronic reverse tender regime established by Article 34 of the amended Procurement Law enhances value for money. Bidders have the chance to submit successively lower bids during a specified bid period. Direct purchase tender process waivers and performance bond exemptions for low value contracts also drive efficiency in the market, with the speedier procurement process in this sector likely to result in the expedited roll-out of smaller projects and procurement attentions diverted to larger, more complex undertakings.

The reforms found in the amended Procurement Law in the areas of dispute resolution should also increase foreign investor confidence. The historic dispute resolution procedures of the 2006 Procurement Law left many government contractors with a sense of unease. Article 78 of the 2006 Procurement Law entitled the contractor to register complaints with a Violations Committee consisting of members from the Ministry of Finance and other Saudi Arabian government authorities. The independence and neutrality of a committee consisting wholly of government officials called to review claims from private contractors could be called into question. While the 2006 Procurement Law provided for a means of appealing the decisions of the Violations Committee, such appeals needed to be filed with the Board of Grievances' commercial courts. This, in turn, gave rise to unease among government contractors, given delays and uncertainty in the adjudication of cases lodged with the Board of Grievances.

The amended Procurement Law addresses these concerns. It grants the Administrative Courts jurisdiction to resolve disputes and allows parties to government contracts to submit their disputes to arbitration. Article 92 of the amended Procurement Law provides that contractors may resort to the Administrative Courts to claim compensation in cases of breach of contract. In addition, the government agency may, subject to prior approval of the Minister of Finance, agree upon arbitration, as stipulated in the 2019 Regulations. Article 154 of the 2019 Regulations sets out the conditions required for the government agency to enter into an arbitration agreement. The conditions require that the value of the underlying contract in dispute exceed 100 million Saudi riyals, that the arbitral tribunal apply the laws of Saudi Arabia and that the contract documents establish the terms of the arbitration. In line with

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<sup>6</sup> Art. 2 amended PL.

these reforms, the Saudi Centre for Commercial Arbitration intends to be at the forefront of procurement evolution in Saudi Arabia, providing technical expertise to assist in the resolution of disputes in multiple specialised technical areas.

### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

As stated above, the amended Procurement Law, along with the 2019 Regulations, regulates long- and short-term commercial agreements between private bodies and government entities. The Procurement Law applies to all government entities, including ministries, agencies, public organisations and independent public entities that have a separate legal personality.<sup>7</sup> The language of Article 4 of the amended Procurement Law indicates that the law applies to private persons wishing to engage in commercial dealings with government entities. While neither the amended Procurement Law nor the 2019 Regulations provides a definition for ‘private persons’, it is generally understood that the term refers to both natural and juridical persons (in various forms).

#### ii Regulated contracts

It is fair to state that the amended Procurement Law governs all types of commercial dealings entered into by government entities and private persons, regardless of the amount involved. A contract amount, among other factors, would determine the appropriate method to award a contract. For example:

- a* a government entity may award a contract via limited tender if the estimated value of the works and purchases does not exceed 500,000 riyals;<sup>8</sup>
- b* a government entity may resort to direct procurement, if the overall value does not exceed 100,000 riyals;<sup>9</sup> and
- c* a government entity may apply reverse auctioning to purchase goods available to more than one supplier, contractor or service provider if the cost does not exceed 5 million riyals.<sup>10</sup>

As an exception to the above rule, the amended Procurement Law and the 2019 Regulations allow an exemption<sup>11</sup> from the tendering procedures outlined under the this legislation in cases of emergency.<sup>12</sup> Pursuant to Article 46 of the 2019 Regulations, a case of emergency shall require the following:

- a* the occurrence of any of the following events:
  - a serious and unexpected threat to public safety, health or security;
  - a grave event that portends loss of life or property; or
  - the use of public or limited tender procedures shall cause serious harm because of the length of the proceedings;

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<sup>7</sup> Art. 10 and Art. 1 amended PL.

<sup>8</sup> Art. 30.2 amended PL.

<sup>9</sup> Art. 32.3 amended PL.

<sup>10</sup> Art. 54.2 Regulations of 2019.

<sup>11</sup> Art. 1, definition of the case of emergency, amended PL.

<sup>12</sup> A case where there is a serious and unexpected threat to public safety, security or health, or there is a breach resulting in loss of life or property and that cannot be dealt with through ordinary tender procedures.

- b* the required works and procurements are not contemplated by the framework agreement or cannot be performed;
- c* the approval of the government entity's head shall be obtained; and
- d* the General Auditing Bureau shall be provided with all agreements, contracts and exchange documents relating to these works and procurements.

The contracting private person contractor may not assign an awarded contract or any part thereof to any other contractor, entrepreneur or supplier unless and until prior written approval is obtained from both the relevant government entity and the Ministry of Finance.<sup>13</sup> Article 117 of the 2019 Regulations stipulates the following conditions:

- a* such an assignment, whether full or partial, shall be reflected in an assignment agreement concluded between the parties of the assignor and assignee and attested by the relevant Chamber of Commerce. The assignment agreement should specify the obligations of the parties towards the project and the government entity, and should be approved by the latter; and
- b* the assignee contractor shall meet the relevant requirements and conditions for undertaking the assigned works and shall pass all the requirements for technical evaluation (and qualification, if so required). The assignment shall not result in damage to the assigned works or a breach of their use.

#### **IV SPECIAL CONTRACTUAL FORMS**

##### **i Framework agreements and central purchasing**

The amended Procurement Law provides a basic framework for government tenders and procurement in Saudi Arabia. However, the Law must be viewed simply as a framework, and one that must be read within the context of sector-specific circulars, resolutions and regulations, which may in some cases alter the substantive provisions of the Law. To illustrate this point, we can examine the general rule requiring the government to purchase supplies through public tender and the modifications of this rule by regulations specific to the health and defence sectors.

As a general rule, all works and purchases must be put out to public tender. Public tenders are announced on a unified web portal of government procurement that is under the supervision of the Ministry of Finance.<sup>14</sup> However, the amended Procurement Law provides for certain exceptions.<sup>15</sup>

Article 47(a) of the 2006 Procurement Law specifically excluded the purchase of weapons, military equipment and their spare parts from the requirements for public tenders. It subjected the purchase of such equipment to the purview of a ministerial committee formed by a royal decree and consisting of a chairman and at least three other members for the purpose of selecting the best offer serving the public interest. The committee was required to bring its recommendations before the President of the Council of Ministers for approval.

Article 32 of the amended Procurement Law has abolished the Ministerial Committee, and the procurement of arms, other military equipment and their spare parts is now subject to

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13 Art. 70 amended PL.

14 Art. 29 amended PL; see also Art. 1 amended PL.

15 Art. 28 amended PL.

direct purchase through the General Authority for Military Industries (GAMI),<sup>16</sup> superseding the former ministerial committee. Today, the procurement of military equipment and their spare parts purchased by GAMI is subject to direct procurement and is exempt from the rules of public tender established by Article 29 of the amended Procurement Law.

In addition, direct procurement is permitted in the following cases:<sup>17</sup>

- a* if the work and items are exclusively available from a sole supplier, entrepreneur or contractor, with no acceptable substitute, provided that the contract is concluded as stipulated by the 2019 Regulations;
- b* if the estimated cost of work and purchases does not exceed 100,000 riyals provided domestic small and medium-sized enterprises (SMEs) are given priority in the invitation to tender;
- c* if the use of such direct procurement is deemed a prerequisite for safeguarding national security and prevents the use of public or limited tender, the government entity shall, after the contract is concluded, draw up a report setting out the reasons that prompted the use of direct procurement and provide the General Auditing Bureau with a copy of the report;
- d* if the work and purchases are available from a sole non-governmental institution or a non-profit organisation, provided that the institution or organisation performs the contractual obligations itself; and
- e* in cases of emergency.

However, some sectors further restrict the ability of their agencies to procure goods by direct purchase. For example, the Ministry of Health has issued internal declarations that restrict the ability of public healthcare agencies (including public hospitals) to procure goods by direct purchase according to the following guidelines:

- a* the health affairs manager in towns such as Al Kharj has the authority to execute direct purchases for amounts up to 300,000 riyals;
- b* the health affairs manager in cities such as Riyadh has the authority to execute direct purchase for amounts up to 400,000 riyals; and
- c* hospitals have restrictions based on their size (hospital bed capacity): (1) for hospitals with capacity of 500 beds and more, managers have the authority to execute direct purchases for amounts up to 100,000 riyals; (2) for hospitals with capacity of 200 to 499 beds, managers have the authority to execute direct purchases for amounts up to 50,000 riyals; and (3) for hospitals with capacity of 199 and fewer beds, managers have the authority to execute direct purchases for amounts up to 30,000 riyals.

If a purchase falls below the above thresholds and falls into one of the exemptions established by the amended Procurement Law, public health agencies may purchase goods directly, without needing to issue a public tender.

## **ii Joint ventures**

The National Center for Privatization and PPP (NCP) was established in 2017 to enable privatisation and public–private partnerships (PPPs) under Saudi Vision 2030 by: (1) formulating regulations; (2) creating privatisation frameworks; (3) preparing government

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<sup>16</sup> Art. 32.1 amended PL.

<sup>17</sup> Art. 32.2–32.6 amended PL.

assets and services identified for privatisation; and (4) developing an efficient privatisation process that targeted sectors will follow to solicit and engage private sector participation, as well as promoting opportunities domestically and internationally.

The board of directors of the NCP issued Decision 2/5/2018,<sup>18</sup> which consists of the Privatization Projects Manual, which seeks to expand the user base of the privatisation model by applying rules and procedures that would help relevant stakeholders in the public and private sectors to better understand how to participate in projects.

Four months later, in July 2018, the NCP published the Draft Private Sector Participation Law (PSPL), which seeks to attract foreign investors to partner in the launch of infrastructure projects worth billions of dollars. Seeking to facilitate PPPs, the PSPL creates a series of exemptions for projects and companies falling within the scope of its application. For example:

- a* Under Article 47, the Procurement Law shall not apply to PPPs and sale of asset (SOA) projects and contracts that are subject to the provisions of the PSPL and the regulations issued thereunder. However, governmental entities and private parties may voluntarily agree to subject PPPs or SOA projects and contracts to the Procurement Law.
- b* Under Article 49, as an exception to the Law of Real Estate Ownership and Investment by Non-Saudis and any other regulations that restrict foreign ownership of real estate, if approval is granted by the Council of Ministers, in private sector participation projects:
  - non-Saudis may own real estate in whole or in part, except for properties located within the boundaries of the cities of Mecca and Medina; and
  - real estate may be leased to a private party within the boundaries of the cities of Mecca and Medina for a period equal to the term of any PPP contract for the purpose of implementing the PPP contract for real estate that is the subject of the PPP contract.
- c* Under Article 50, the NCP may coordinate with the Ministry of Human Resources and Social Development to determine the need for exemptions from the Labour Law and the Nitaqat Guide in relation to employment in any PPP.
- d* Under Article 51, a private party is exempted from the application of Articles 150 and 181 of the Companies Act, which require shareholders of joint-stock companies (JSCs) or limited liability companies whose capital loss reaches 50 per cent of the company's paid-up capital to dissolve the company, increase the share capital or risk having the JSC deemed dissolved by operation of law.
- e* Under Article 52, the Competition Law does not apply to the actions of any private party insofar as those actions are directly related to a PPP contract or PPP project.

Royal Decree No. M/101<sup>19</sup> exempts 'privatisation projects' from the Procurement Law. Some commentators interpret the term used in the original Arabic to refer to 'privatisation projects' to apply not only to privatisation projects, but also to PPPs. The official text of Royal Decree No. M/101, published in Umm Al-Qura, the official Saudi gazette,<sup>20</sup> does not define the term used in the original Arabic, but 'privatisation operations' is a valid translation. However, it is not outside the realm of possibility that, for a broader scope of application, the government intended to include all PPPs when employing the term. However, this

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18 Dated 3/8/1439 H., corresponding to 19/4/2018 G.

19 Dated 20/10/1439 H., corresponding to 4/7/2018 G.

20 Available at <<https://www.uqn.gov.sa/articles/1532032275843847900>>.



interpretation is not persuasive because when the Saudi government refers to the term PPPs in Arabic it generally uses a different term.<sup>21</sup> Because nothing in the plain text of Royal Decree No. M/101 explicitly states that PPPs fall within its intended scope, we can conclude that PPPs are not exempted from the amended Procurement Law.

## **V THE BIDDING PROCESS**

### **i Notice**

As a general rule, all works and purchases must be put out to public tender and are announced on a unified web portal of government procurement under the supervision of the Ministry of Finance.<sup>22</sup> However, the amended Procurement Law provides for certain exceptions to public tender,<sup>23</sup> as discussed below.

### **ii Procedures**

Limited tender contracts, which fall outside public tender requirements, are permitted in the following cases:<sup>24</sup>

- a* if the works and purchases are only available from a limited number of contractors or suppliers;
- b* if the estimated value of the works and purchases does not exceed 500,000 riyals, by inviting the greatest possible number of bidders, provided that they are not fewer than five;<sup>25</sup>
- c* urgent cases;
- d* if the works and purchases are available from civil society associations or organisations or from non-profit entities, provided that they execute the contracts concluded on their own; and
- e* consulting services.

Limited tenders are subject to more relaxed rules than those applicable to public tenders. The rules for limited tenders are set out in Section III of Chapter II of the 2019 Regulations.

The procurement of arms, other military equipment and their spare parts is now subject to direct purchase through GAMI<sup>26</sup> and is exempt from public tender (see Section IV.i).

In addition, Article 32 of the amended Procurement Law permits direct procurement in certain exceptional cases, such as when services are exclusively available from a sole supplier or the estimated value of the contract does not exceed 100,000 riyals.

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21 For example, the Arabic term used in Article 47 of the Private Sector Participation Law is different from the term used in Royal Decree No. M/101 to refer to PPPs.

22 Art. 29 amended PL; see also Art. 1 amended PL.

23 Art. 28 amended PL.

24 Art. 30 amended PL.

25 Under the 2006 Procurement Law, this threshold was set to 1,000,000 riyals (Art. 44 PL). The decrease to 500,000 riyals represents a policy by the Saudi government to subject a greater number of government contracts to public tender.

26 Art. 32.1 amended PL.

### iii Amending bids

The amended Procurement Law permits amendments of the prices of contracts or framework agreements only in the following cases, as further specified by the 2019 Regulations:<sup>27</sup>

- a* if there is a change in the prices of materials or services covered by the tender and specified by the 2019 Regulations;
- b* if changes to customs tariffs, duties or taxes are introduced; or
- c* if, during the implementation of a contract, unforeseeable material difficulties arise.

Moreover, the contracting government entity may issue variation orders involving increases in contracts by not more than 10 per cent of their value or reductions by not more than 20 per cent of their value, as further stipulated by the 2019 Regulations.<sup>28</sup>

## VI ELIGIBILITY

### i Qualification to bid

Article 18 of the amended Procurement Law requires those with whom government entities are working to meet a set of requirements laid out in the 2019 Regulations.<sup>29</sup> As such, failure to meet these requirements disqualifies bidders. Note also that the requirements are listed by way of being the bare minimum. As the case may be, a government entity has the right to impose any additional requirements it deems necessary for a particular work stream to be deliverable.<sup>30</sup>

To submit a bid pursuant to Article 13 of the 2019 Regulations, a bidder would need to hold the following set of valid, up-to-date regulatory registrations:

- a* a commercial registration certificate issued by the Ministry of Commerce or, when a commercial registration certificate is not required under the relevant laws, the necessary permits or licences for providing the intended services or carrying out the work;
- b* a certificate confirming regular payment of tax or *zakat*, issued by the General Authority of Zakat and Tax (whenever payment is required);
- c* a certification declaring the registration and regular payment of contributions, issued by the General Organisation for Social Insurance;
- d* a certification declaring membership of the bidder's relevant chamber of commerce (whenever payment is required);
- e* a certificate of classification in the field of works that is the subject of the application, if the works are required to be classified;
- f* proof that an establishment is a local SME if it falls in this category, as determined by the General Authority for Small and Medium Enterprises;
- g* a certificate of achievement of the required percentage for Saudisation of jobs, issued by the Ministry of Human Resources and Social Development;
- h* a certificate of registration from the competent authority proving that an entity is a non-profit institution, non-governmental organisation or similar.

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27 Art. 68 amended PL.

28 Art. 69 amended PL.

29 Art. 18 amended PL.

30 Art. 13.J 2019 Regulations.

Pursuant to Article 77 of the 2019 Regulations, a bidder is given a grace period of no longer than 10 business days to submit any of the documents listed above that are missing or to resubmit any renewed licences or permits.

Article 14 of the 2019 Regulations then lists the following persons that government entities and their contractors are prohibited from dealing with:

- a* state officials (except for those licensed to undertake non-commercial activities, including the purchase of state officials' intellectual property rights directly or through a publisher, those assigned to carry out technical works and those participating in public auctions unless the purchased goods are intended for personal use);
- b* persons with whom dealing is generally prohibited, including those prohibited by a court order or a decision issued by an authorised body, until the order or decision expires;
- c* companies that have been dissolved or liquidated;
- d* persons who are under the age of 18; and
- e* incompetent persons.

## **ii Conflicts of interest**

Pursuant to Article 96.1 of the amended Procurement Law, conflicts of interest are regulated under a set of separate regulations issued by the Ministry of Finance, namely the By-laws for Regulating Conflicts of Interest in the Implementation of the Government Tenders and Procurement Law and its Implementing Regulations, enacted by the resolution of the Board of Ministries No. 537 (the Conflicts of Interest Regulations or the CoIRs).<sup>31</sup> The CoIRs apply to any employee related, directly or indirectly, to government tenders and procurement and private persons that are dealing with a government entity, along with their employees.<sup>32</sup>

Moreover, where a conflict arises between their personal interests and those of a government entity, the following persons are required to disclose such conflicts:

- a* the head of the government entity or its delegates;
- b* the director in the government entity's board of directors;
- c* those participating in the preparation or drafting of the tender documents, regardless of the nature of their participation;
- d* members of the committee opening envelopes and examining bids, and any other related technical or financial committees; and
- e* experts who undertake any tasks related to procurement and tenders in favour of a government entity.

The CoIRs provide general high-level guidance on how a conflict of interest should be regulated. The CoIRs require every government entity, in collaboration with and under the supervision of the Ministry of Finance, to issue a dedicated policy on conflicts of interest. The policy should at least indicate the procedures adopted by the government entity to minimise conflicts of interest and to disclose conflicts, and the appropriate procedures to be taken when conflicts arise. The policy should also include a list of illustrative scenarios of conflicts of interest.<sup>33</sup>

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31 Dated 21/8/1441 H., corresponding to 24/4/2020 G.

32 Art. 3 CoIR.

33 Art. 8 CoIR.

### iii Foreign suppliers

One of the long-standing objectives of the amended Procurement Law is to prompt local businesses to engage in dealings with government entities. This is supported by the issuance of supplementary sets of regulations, pursuant to the amended Procurement Law and 2019 Regulations, such as the Regulation for Preferring Local Content, SMEs and Listed Companies, and the Terms, Conditions and Mechanisms for Preferring National Products and Local Content.

Echoing that mindset, Article 3.2 of the amended Procurement Law allows government entities to engage in dealings with foreign persons (those not already licensed by the Ministry of Investment as foreign investors) only if the government entity has ensured that no more than one local person with the necessary expertise can undertake the relevant scope of work. Article 4 of the 2019 Regulations further requires the following:

- a the relevant scope of work shall be posted on the procurement portal to ensure that there is no more than one local person qualified to carry out the work;
- b the Ministry of Investment (the key regulator of foreign investment) approves the arrangement; and
- c any qualification assessment, bid and procurement bond shall be conducted in accordance with the amended Procurement Law and the 2019 Regulations.

## VII AWARD

### i Evaluating tenders

Bids to Saudi government ministries, agencies and instrumentalities are to be submitted in an encrypted form through the unified portal, as stipulated by the 2019 Regulations. The government entity announces the names of persons who have submitted bids through the unified portal.<sup>34</sup> Bidders must submit, along with their bids, a bid guarantee (the bid bond) ranging from 1 per cent to 2 per cent of the bid value. A bid not accompanied by a bid bond is disqualified.<sup>35</sup> As an exception, a bid bond is not required for direct procurement, competition, contracts of government entities between themselves, contracts signed with non-governmental institutions, societies or non-profit organisations and contracts signed with domestic SMEs.<sup>36</sup>

Within limited exceptions laid out in Article 61.3 of the amended Procurement Law, a successful contractor must provide a performance guarantee (the performance bond or performance bank guarantee) equal to 5 per cent of the contract's value in favour of the government within 15 business days of the date of being notified of the award. The government entity may extend this time limit for a similar period. If the successful bidder is late in providing the performance bond within this time frame, the bid bond will not be returned to the bidder, and negotiations shall be conducted with the next bidder.<sup>37</sup>

The performance bond will be retained by the government until the contractor has fulfilled all its obligations and the project is handed over, in accordance with the terms and

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34 Art. 37 amended PL.

35 Art. 41 amended PL; see also Art. 11 PL of 2006.

36 Art. 42 amended PL.

37 Art. 61 amended PL.

conditions of the contract.<sup>38</sup> Certain tenders will also include an advance payment requirement on behalf of the government. If an advance payment is made, an advance payment guarantee, or payment bond, must also be provided.

The government entity may pay to the contractor an advance payment against a bank guarantee equal to the value of the advance payment, as stipulated by the 2019 Regulations.<sup>39</sup> The contractor can be held accountable for the advance payment in the event that the government contract is terminated.<sup>40</sup>

Under Article 48 of the amended Procurement Law (see also Article 22 of the 2006 Procurement Law), no bid may be disqualified on account of its low price, unless it is at least 25 per cent less than the estimated cost and prevailing market prices (35 per cent was set as the threshold under the 2006 Procurement Law) and provided that the Bid Evaluation Committee has reviewed the estimated prices, has held a discussion with the lowest bidder and asked the latter in writing to provide a detailed breakdown of the items that make up its bid and explain the reasons for its low price. If, however, the Committee is not convinced of the bidder's ability to perform the Contract properly, it may recommend that the bid be disqualified. The purpose of this provision is to combat the potential for fraud, corruption or price control by dominant establishments.

## **ii National interest and public policy considerations**

The purpose of the amended Procurement Law is to promote the public interest, among other national objectives aimed at serving the Saudi citizens and the security of the Saudi state. Prior to the issuance of the amended Procurement Law in 2019, the Ministry of Finance issued a draft Government Tenders and Procurement Law in 2017, which sought to ensure wider participation, transparency, best practices, promotion of the public interest and value in the expenditure of public funds. Moreover, the Law sought to implement government contracts at fair and competitive prices to ensure the optimum use of public funds, while promoting integrity and eliminating the potential for personal interests to play a part in the awarding of government contracts. Like the amended Procurement Law that was ultimately issued in 2019, the draft Law sought to guarantee the fair treatment of bidders and promote equal opportunity and economic development.

The amended Procurement Law of 2019 represents a major overhaul of the 2006 Procurement Law, but it maintains the aim of the 2006 Procurement Law to protect the public interest. Together with the 2019 Regulations, the amended Procurement Law sets out to promote the public interest by regulating procurement procedures; preventing abuses of authority; protecting public funds; attaining maximum value from public funds; strengthening integrity; ensuring fair treatment of bidders and transparency; and enhancing economic development.<sup>41</sup>

The amended Procurement Law allows for its provisions to be waived or relaxed when doing so would promote the public interest. For example, Article 77 of the amended Procurement Law grants the government wide discretion to terminate contracts if the public interest so requires, subject to the approval of the Ministry of Finance. Provisions of the 2006 Procurement Law similarly safeguarded the public interest by offering government

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38 Art. 61.4 amended PL.

39 Art 66 amended PL.

40 Art. 155 Regulations of 2019.

41 Art. 2 amended PL.

authorities discretion to waive or relax its rules; for example, the Article 47(a) exclusion of the purchase of weapons and military equipment from the requirement for public tenders (see Section IV.i). In addition, the 2006 Procurement Law required contractors and government authorities to execute their contracts in good faith according to the contractual terms in the service of the public interest.<sup>42</sup>

Laws safeguarding the public interest within the ambit of government tenders and procurement are not limited to the amended Procurement Law and its 2006 predecessor. A host of anti-corruption and bribery laws and institutions were established with the public interest in mind. These laws and institutions include the National Anti-Corruption Commission, also known as the Oversight and Anti-Corruption Authority, or Nazaha, the Anti-Corruption Committee and the Saudi Combating Bribery Law (CBL), enacted by Royal Decree No. M/36,<sup>43</sup> as amended by Royal Decree No. M/4.<sup>44</sup> They work together with the anti-corruption provisions of the amended Procurement Law to safeguard the public interest and public funds. For example, Article 51.3 of the amended Procurement Law allows the government to cancel a tender if there are indicators of fraud, corruption or collusion among bidders or among parties relating to the tender and Article 7.1(a) requires government entities to cancel a contract if it is established that the contractor has attempted, either itself or through third parties, directly or indirectly, to bribe any of the employees of the entity subject to the provisions of the amended Procurement Law. Once a contract has been terminated, the CBL can be used to prosecute the public official who solicited or accepted a bribe.

The risks of bribery increase exponentially when intermediaries are used in the government procurement process. With this in mind, the amended Procurement Law, along with its 2006 predecessor, provides special rules with respect to the use of agents when contracting with government agencies and instrumentalities. Under Article 90 of the amended Procurement Law, contracts must be directly signed with those authorised to perform the contracted work. No mediation is permitted in this respect. The Law clarifies that this prohibition on 'mediation' is not intended to prohibit the use of a distributor or the agent of the product being sold. It does, however, prohibit an agent or 'intermediary' from signing a government contract on behalf of the party that is contracting with the Saudi government.

Article 71 of the 2006 Procurement Law had a similar rule in place. It required contracts with the Saudi Arabian government to be directly concluded with the companies and persons licensed to carry out the work set out in the contract. Like the amended Procurement Law, the 2006 Procurement Law prohibited the use of intermediaries when concluding contracts.

However, while both the 2006 Procurement Law and the amended Procurement Law are clear in their prohibition of the use of intermediaries in concluding contracts, they state nothing about the use of intermediaries in helping to bid on tenders, navigate the Saudi market or win government contracts. While the term 'intermediary' is never defined in either Law, we can draw certain conclusions from the original Arabic that is used in the text of Article 90 of the amended Procurement Law and of Article 71 of the Procurement Law. Both texts use the same term in the Arabic clause that prohibits the use of 'mediation' with respect to the signing of contracts. That term, '*wasata*', roughly means 'mediation' or 'brokerage', and based on this and the normal context in which it is used in the Arabic language, we

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42 Art. 77 PL of 2006.

43 Dated 29/12/1412 H., corresponding to 1/7/1992 G.

44 Dated 2/1/1440 H., corresponding to 13/9/2018 G.

can conclude that the aim of the rule is not to prohibit the use of agents from assisting in the procurement of government contracts, but rather to prohibit the signing and execution of contracts with the Saudi Arabian government by any party other than the party that will carry out the contract. The purpose of this restriction is to keep the government contractor fully liable for the performance of the duties set out in the contract, including the duty not to engage in acts of bribery. It is the contractor, not the contractor's agent or distributor, who commits to the obligations set out in the government contract by signing the contractor's name on the contract. In this framework, agents and even distributors may assist in procuring contracts, but they may not sign on behalf of their principals.

As with almost all areas of government contracting, the defence sector has its own special rules, regulations and exceptions. While agents and intermediaries may be used for market research and intelligence, and in bidding on government contracts, they may not be paid commissions for contracts for the supply of armaments or military equipment under Council of Ministers Resolution No. 1275.<sup>45</sup>

With respect to local content, the amended Procurement Law makes various references to local content and domestic companies, particularly SMEs, which are given preference in government tenders and procurements. For example, direct procurement rather than public tender is permitted if the estimated cost of work and purchases does not exceed 100,000 riyals, provided domestic SMEs are given priority in the invitation to tender.<sup>46</sup> Similarly, a bid bond is not required for contracts signed with domestic SMEs.<sup>47</sup>

Council of Ministers Resolution No. 124,<sup>48</sup> which has come to be known as the '30 per cent Rule', requires a certain percentage of government contracts to be performed locally. Resolution No. 124 provides in part that '[a]ll non-Saudi Arabian contractors are obligated to assign Saudi Arabian contractors at least 30 per cent of the works of any government contracts which the non-Saudi Arabian contractor obtains. This applies to public works, i.e., implementation projects.' This provision, which applies to subcontracting, has been interpreted to mean that only pure supply contracts are excluded from the scope of the 30 per cent Rule. Other contracts are required to show 30 per cent local content to qualify for government contracts.

## **VIII INFORMATION FLOW**

Government agencies are required to perform advance planning for their projects and purchases in coordination with the Ministry of Finance. At the beginning of each fiscal year, they must publish plans commensurate with their budgets, disclosing their intended purchases throughout the year, except where withholding this information is required for national security.<sup>49</sup> When processing tenders, the unified portal must provide the highest levels of privacy, confidentiality, security and transparency.<sup>50</sup> Pursuant to Article 9 of the 2019 Regulations, data submitted by bidders on the portal is subject to strict confidentiality.

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45 Dated 12/9/1395 H., corresponding to 18/9/1975 G.

46 Art. 32 amended PL.

47 Art. 42 amended PL.

48 Dated 29/5/1403 H., corresponding to 13/3/1983 G.

49 Art. 12 amended PL.

50 Art. 17 amended PL.

However, data is anonymised, collated and published at the end of each financial year on the portal as a list of direct purchases. The types of works and procurements and their total value are disclosed in the annual publication.<sup>51</sup>

## IX CHALLENGING AWARDS

### i Procedures

Bidders may file a grievance against any decision taken by the government entity before the award decision is issued, within five working days of the date of issue of the decision. A bidder may also file a grievance with the government entity against the award decision, within the standstill period. The relevant government entity must decide upon any grievance filed within 15 business days. If this time frame expires without the issue of any decision on a grievance, this will indirectly mean that the grievance has been rejected.<sup>52</sup> A bidder may then, within three business days of the date of being notified of the decision (or from the expiry date of the time frame stated earlier), file a grievance with a dedicated government tenders and procurement judicial committee, as discussed below.<sup>53</sup>

A government tenders and procurement judicial committee is dedicated to adjudicating complaints and grievances filed by bidders. The committee is comprised of five members, to be appointed by virtue of a resolution of the minister of the Ministry of Finance and reappointed every three years. The committee reviews and adjudicates complaints and grievances submitted and notifies claimants of its decision within no more than 15 working days of the date of receipt of the grievance. In any case, the committee may, at its ultimate discretion, extend this duration for another 15 working days if necessary. It is also important to mention that when submitting a complaint to the committee, a bidder should provide a guarantee equal to half of the bid bond's value, which shall be refunded if the grievance is proven valid.<sup>54</sup>

### ii Grounds for challenge

The amended Procurement Law does not outline particular grounds upon which a challenge may be brought, but rather Article 87.1 of the amended Procurement Law explains that a bidder may file any grievance with the government entity (and the grievance may be raised to the level of the judicial committee).

In this context, it may be relevant to observe the powers and authorities granted to the judicial committee, which shall:

- a* review the bidders' grievances against the award decision or any other decision or action taken by the government entity prior to the award decision;
- b* review the contracting parties' grievances against the performance evaluation decisions; and
- c* review the price adjustment requests under the provisions of Article 87.2 of the amended Procurement Law.<sup>55</sup>

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51 Art. 48 2019 Regulations.

52 Art. 87.1-2 amended PL.

53 Art. 87.2 amended PL.

54 Art. 86.4 and Art. 87.3-4 amended PL.

55 Art. 68 of the 2006 Procurement Law.



### **iii Remedies**

Article 87.5(b) of the amended Procurement Law indicates that, where a grievance is found valid, the action in violation of the provisions of the amended Procurement Law will be rectified, if possible. Otherwise, the offered tender shall be cancelled. If a government entity (upon its own decision, following a bidder's grievance, or that of the judicial committee) rectifies an act and the rectification results in awarding the tender to a different bidder, the disqualified bidder shall be granted an opportunity to file another grievance arising from the government entity's award of the tender to a different bidder.

## **X OUTLOOK**

The amended Procurement Law, together with announced reforms in the areas of arbitration and dispute resolution, is expected to increase foreign investor confidence in Saudi Arabia, draw the world's leading multinational companies to partner with the Saudi government and help modernise and transform Saudi Arabia. The impact of the amended Procurement Law will, in our view, be a positive one for the Saudi economy. It will encourage foreign investment in the health, education, infrastructure, military, recreation and tourism sectors, while facilitating employment in, and the transfer of knowledge to, local Saudi businesses and individuals. All this is, of course, in line with Vision 2030, the plan first announced by Crown Prince Mohammad bin Salman on 25 April 2016.

We expect that the adoption of a unified e-portal, supervised by the Ministry of Finance and through which all government tenders and procurements must be announced, will broaden the scope of potential tenderers globally and drive price elasticity. Value for money will also be enhanced by the electronic reverse tender regime. Bidders will have the chance to submit successively lower bids during a specified bid period. Direct purchase tender process waivers and performance bond exemptions for low-value contracts will also drive efficiency in the market, with the speedier procurement process in this sector likely to result in the expedited roll-out of smaller projects and procurement attentions diverted to larger, more complex undertakings.

The not insignificant reforms found in the amended Procurement Law in the areas of dispute resolution should also increase foreign investor confidence in Saudi Arabia. The Saudi Center for Commercial Arbitration intends to be at the forefront of procurement evolution in Saudi Arabia, providing technical expertise to assist in the resolution of disputes in 15 specialised technical areas. No doubt this will be welcomed by international bidders.

Further efficiencies generated by framework agreements are expected to be developed by the Unified Procurement Competent Entity. The adoption by public entities of these framework agreements should reduce cost, maintain uniformity and deter duplication.

In summary, the amended Procurement Law is a welcome addition to the Saudi regulatory regime, centralising government procurement and providing a transparent and value-driven platform that will lead, from the government's perspective, to greater competition, speedier procurement processes and, ultimately, better value for money for the people of Saudi Arabia.

# ABOUT THE AUTHORS

## NICK SIMPSON

*The Law Firm of Wael A Alissa in association with Dentons & Co*

Nick Simpson is the head of Dentons' Saudi Arabia practice and is based in Riyadh. Formerly the managing partner of the firm's Muscat, Oman office, he has over 20 years of experience advising clients across a variety of sectors on the full range of their corporate and commercial requirements. This includes company establishment, mergers and acquisitions, joint ventures, company flotations and offerings.

As a trusted adviser to local companies, funds, conglomerates and major international corporates, Nick was recognised in the market as a 'leading individual' in *The Legal 500* 2018 guide. He also received accolades in the *Chambers Global* 2019 guide, which noted that clients are impressed by his 'excellent knowledge, patience and communication skills'. Under his leadership, the Band 1 ranked corporate team was regarded as 'highly sought after for its multi-jurisdictional capabilities' and described as a 'leader in Oman' and as being 'well equipped to advise both domestic and international clients'.

Nick was admitted to practise in England and Wales in 1999 and New South Wales, Australia in 2004. Nick worked for Dentons in London and then for a leading international firm in Australia prior to joining the Dentons Middle East offices.

## JOHN BALOUZIYEH

*The Law Firm of Wael A Alissa in association with Dentons & Co*

John Balouziyeh advises companies, NGOs, contractors, and individuals on international law, rule of law, transitional justice and foreign investment matters. He has advised clients on investing in the Middle East, public-private partnerships, joint ventures, legal and legislative reform, treaty law, customary international law, and government contracts and procurement. He has represented multinational healthcare, defence, education, and energy companies in government contracts with the Saudi Ministry of Health, the Ministry of Defense, the General Authority for Military Industries, the Ministry of Education and Saudi Aramco.

An active member of the Middle East CSR committee, John leads Dentons' award-winning pro bono partnership with the Norwegian Refugee Council (NRC), which advises Syrian refugees on the laws of Lebanon, Jordan, Turkey and Iraq. John serves as an officer in the Judge Advocate General's Corps of the US Army Reserve (JAG), where he has held a number of billets, including legal adviser, prosecutor and defence counsel.

**BSHAYER BINYAMIN**

*The Law Firm of Wael A Alissa in association with Dentons & Co*

Bshayer Binyamin is a trainee lawyer at Dentons, based in Jeddah, Saudi Arabia. Her work focuses primarily on assisting multinational and local companies on various corporate matters, incorporating foreign investments, and advising on ADR options.

Before joining Dentons in January 2020, Bshayer worked for a leading regional law firm and a US international law firm, where she advised on international commercial arbitration, litigation, foreign investment and capital market matters in Saudi Arabia.

Bshayer studied at Dar Al-Hekma University (LLB, law, first class honours) and Harvard Law School (LLM, exp.). She is fluent in Arabic and English.

**THE LAW FIRM OF WAEL A ALISSA IN ASSOCIATION WITH DENTONS & CO**

Al Murjana Tower, Level 7  
Corner of Prince Sultan St. and Alkayyal St.  
PO Box 48271  
Jeddah, 23423  
Saudi Arabia  
Tel: +966 12 601 7731  
Fax: +966 11 200 8679  
bshayer.binyamin@dentons.com

Tatweer Towers, Tower 1  
Level 8, King Fahad Road  
PO Box 59490  
Riyadh, 11525  
Saudi Arabia  
nick.simpson@dentons.com  
john.balouziyeh@dentons.com  
Tel: +966 11 200 8678 ext. 202/220  
Fax: +966 11 200 8679

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