

Turkey

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OVERVIEW OF THE CONSTRUCTION AND PROJECTS SECTOR

1. What are the main trends in the local construction and projects market? What are the most significant deals?

Main trends

As power and infrastructure projects are emerging all over the country, construction is now considered to be the leading economic sector in Turkey. Legal instruments are being enacted by the government to promote independent investment in the power and infrastructure sectors.

Due to the young population and demographic structure of Turkey, shopping mall construction is another emerging sector. The government has also focused on urban planning and urban housing projects in the last five years. Public-private partnerships (PPPs) are used, in light of recent legislation, especially in the healthcare sector. Different construction project models are also starting to be developed under PPPs.

Major projects

The Marmaray Rail Tube Tunnel and Commuter Rail Mass Transit System (Marmaray Project) is one of the largest transport infrastructure projects in the world. Railway tracks on both sides of the Istanbul Strait will be connected to each other through a railway tunnel under the Istanbul Strait. Construction began in 2004. The new and upgraded railway system will be about 76 kilometres long (for more information see, www.marmaray.com). The total cost of the project is about US\$3 billion (as at 1 April 2012, US\$1 was about EURO.7).

The Gebze-Izmir Highway Project is another major construction project in Turkey which started in 2011 and is scheduled to be completed in seven years. The project is based on the Build-Operate-Transfer model. The project has been awarded to a consortium composed of NuroI-Özaltın-Makyol-Astaldi-Yüksel-Göçay by the Turkish Highways General Directorate. The consortium has established the project company called Otoyol Yatırım ve İşletme A.S. The design of the project includes a chain bridge, which is planned to be the second longest in the world, to be constructed by the Japanese companies IHI-ITOCHU (subcontracted by the project company). The total cost of the project is about US\$6 billion.

MAIN PARTIES

2. Who are the main parties involved in a project?

The following are the main parties involved in a project:

- The owner (employer), who contracts design, engineering, procurement, permitting, construction, installation and related services.
- The contractor, who provides these necessary services.
- The engineer, who often acts as the supervisory and reporting authority, and sometimes resolves conflicts between the owner and the contractor.

During implementation of major projects, the lenders and lenders' engineers also supervise due implementation of the contract documents.

Subcontracting is allowed under Turkish law, especially in large scale construction works. The appointed subcontractors are often set out in the contract documents. If they are not, the contractor can subcontract part or all of the works, unless this is clearly prohibited by the terms of the contract.

PROCUREMENT ARRANGEMENTS

3. Which are the most common procurement arrangements if the main parties are local? Are these arrangements different if some or all of the main parties are international contractors or consultants?

Procurement arrangements can differ depending on the nature of the project. Power and infrastructure projects are often based on Engineering Procurement and Construction (EPC) contracts with a lump sum price. A payment mechanism based on unit prices is also often used.

Private companies prefer to appoint contractors for the procurement, construction and design of the project. On the other hand, government authorities often prepare the design work in advance and request contractors to implement the designs during construction.

Under Turkish law, there is no legal requirement for private companies to conduct a tender before awarding a contract to the contractors. However, government authorities must conduct a tender before awarding a project, unless they are clearly exempted by Public Procurement Law No. 4734 or other legislation.

For private projects, there is no major difference in procurement arrangements if some or all of the main parties are international contractors or consultants. In a government project, foreign companies can sometimes be excluded from bidding. However, the authors have not experienced this in practice, especially in large scale power and infrastructure projects.

TRANSACTION STRUCTURES

4. What transaction structures and corporate vehicles are most commonly used in both local and international projects?

Local projects

For private projects, the owners often wish to nominate one of their affiliates as the main subcontractor (for example, the EPC contractor) provided that the arm's-length principle is duly followed.

For government projects, a special purpose vehicle (SPV) may be required by the tender documents. In practice, contractors may also engage in government projects without an SPV, to the extent that the tender documents allow.

Joint ventures are most commonly used in Turkey, particularly for major infrastructure projects. Joint ventures can be established by more than one natural or legal person, either in the form of a business partnership or as a consortium (*Article 14, Public Procurement Law No. 4734*).

International projects

The structures are the same for local and international projects. However, for international projects tendered by government authorities, foreign investors are sometimes asked to establish a Turkish company resident in Turkey, under the Foreign Direct Investments Law No. 4875.

FINANCE

5. How are projects financed? How do arrangements differ for major international projects?

Project finance is preferred in power and infrastructure projects involving international market players. In these projects, project finance is structured so that income from the goods or services to be produced is transferred to the lenders, until the principal and interest amount under the loan facility is repaid by the borrower (the owner of the project). Projects can also be financed through equity and debt financing.

For government projects developed by local authorities such as municipalities, the Bank of Provinces (that is, a state-owned financial institution) can provide loan facilities to local authorities. In addition, the Export Credit Bank of Turkey provides Turkish companies with short-term credits and letters of guarantee, to increase their share of the international market. Certain Islamic finance instruments are also available, and are particularly used in major public housing and shopping mall projects.

SECURITY AND CONTRACTUAL PROTECTIONS

6. What forms of security and contractual protections do funders typically require to protect their investments?

Security

The main security available for lenders relates to the SPV's contracts, licences or ownership rights to resources (*see below, Contractual*). This is because SPV assets are likely to be worth much less than the debt if they are sold after a default on repayment. Security can be taken over tangible and intangible assets. The most common forms of security typically required by lenders are:

- Charges over sponsors' assets, which can be done by a fixed charge/mortgage or a floating charge over the project assets.
- Restrictions on share transfers or a pledge of sponsors' shares.
- Completion guarantees.
- Contractor bonds.
- Back-to-back guarantees given by central government, for government projects. However, central government guarantees are rarely enforced in practice.

The approach does not differ for international projects.

Contractual

The contractual protections funders typically require to protect their investments are:

- Escrow accounts.
- Step-in rights.
- Assignment of implementation agreements and other benefits including insurance premiums.
- Cash deficiency agreements, through which sponsors undertake that the company will satisfy certain predetermined financial ratios.

The approach does not differ for international projects.

STANDARD FORMS OF CONTRACTS

7. What standard forms of contracts are used for both local and international projects? Which organisations publish them?

Local projects

For private projects, the parties usually develop and negotiate their own contracts (*Article 19, of the Code of Obligations No. 818 dated 1926 and Article 26, of the new Code Obligations No. 6098, which will enter into force as of 1 July 2012*). The FIDIC standard forms of contracts, or hybrid contracts based on FIDIC standard contracts, are used.

The Public Procurement Authority issues standard form tender documents and contracts for the procurement of goods, services and construction works, for tender projects within the scope of Public



Procurement Law No. 4734. These standard form contracts cannot be negotiated. However, Article 20 of the Code of Obligations, which will enter into force as of 1 July 2012, clearly cites the *contra proferentem* rule, which provides that an ambiguous term will be construed against the party that imposed it in the contract.

For projects excluded from Public Procurement Law No. 4734, the relevant government entity prepares the tender documents, including the contract between the contractors and the relevant government authority. In this case, the government authorities do not use standard form contracts but the general terms of the contracts therefore tend to differ slightly according to the previous experience of the governmental authorities.

International projects

Standard forms are generally the same for local and international projects.

CONTRACTUAL ISSUES

Contractors' risks

8. What risks are typically allocated to the contractor? How are these risks offset or managed?

The contractor often undertakes to do the following, among others (subject to any mitigation agreed by the parties in the relevant contracts):

- Perform all work and services and geotechnical investigations and provide all materials, equipment, machinery, and so on, that are necessary or appropriate to carry out and complete the works.
- Obtain, pay for, maintain (and bear the risk of failure to obtain and maintain) all applicable permits required to perform the works. The owner is only required to assist the contractor during the preparation required to obtain permits.
- Perform any detail of the works that is not clearly specified in the design documents that is necessary for the facility, provided the failure to specify this detail is not due to the owner's technical requirements.
- Indemnify the owner for any actions, claims, damages or losses arising from the contractor's acts or omissions.
- Procure in its own name, pay for, receive, transport to the workplace and store all materials, equipment, supplies, machinery and tools (for procurements in Turkey or procurement requiring importation into Turkey) especially in the EPC contracts.
- Administer and pay relevant income tax, social security payments and any custom and import duties and additional taxes imposed on it or on any of its subcontractors.

The contractor must perform the works in accordance with the project schedule. If the contractor fails to meet the critical deadlines, the contractor must pay contractual fines. To mitigate this risk, a recovery schedule can be requested from the contractor. The recovery schedule must be approved by the engineer and/or the owner as certain deadlines are generally changed by it.

In contracts based on a lump sum contract price, the contractor is not allowed to claim for its extra costs. However, if the contractor faces severe conditions which have not been anticipated at the signing date, the contractor can claim for its additional costs. Similarly, if the owner changes the design of any part of the works therefore creating additional liability for the contractor, the contractor can also claim for these costs.

There are no key variations between local and international projects apart from where they are agreed between the parties.

Excluding liability

9. How can liability be excluded or restricted under local law?

Under Turkish law, the contractor can exclude or restrict liability for the following (whether based on contract, warranty, tort, strict liability or otherwise):

- Loss of profit.
- Loss of use.
- Loss of production.
- Loss of opportunity.
- Any consequential, incidental, indirect, special or punitive damages arising out of, in connection with or resulting from the contract signed with the owner. However, liability arising from gross negligence is reserved.

Caps on liability

10. Do the parties usually agree a cap on liability? If yes, how is this usually fixed? What liabilities, if any, are typically not capped?

Parties usually agree a cap on liability. For instance, in the power and infrastructure sector, the contractor's overall liability is often limited to 100% of the total contract price, excluding any insurance proceeds covering the contractor's liability.

In other sectors, caps on liability are solely based on the mutual agreement of the parties. Generally, owners request that the contractor's liability is not capped in relation to:

- The contractor's indemnification obligations under the contract.
- Cases of fraud, gross negligence or wilful misconduct.
- Third party injury and property damage caused by acts or omissions of the contractor.
- Claims arising out of intellectual property rights.

There is no difference between local and international projects, unless agreed in the contracts.

Force majeure

11. Are force majeure exclusions available and enforceable?

Force majeure exclusions are available and enforceable under Turkish law and are often included in the contracts. Force majeure

under Turkish law is similar to European law practice. Force majeure events must:

- Be beyond the reasonable control of and without the fault of the affected party.
- Cause the affected party to be unable to perform its obligations and cannot be avoided by the affected party, despite the exercise of due foresight and diligence.

Consequently, force majeure assists the contractor if and to the extent that the contractor claiming a force majeure event proves the actual consequences of it. If the contractor proves the force majeure and the consequences, it will be excused from the performance affected, to the extent it is affected. The same principle applies to the owner in the same way.

Material delays

12. What contractual provisions are typically negotiated to cover material delays to the project?

At the beginning of a project, there can be delays if the work site is not fully delivered to the contractor. To address this issue, notice to proceed is generally given by the owner to the contractor following delivery of the work site clear from any obstacles. In addition, all expropriation works and material permits must be completed before construction starts.

During performance of the works, if the contractor faces problems which may result in material delay, the project schedule might be changed with the approval of the owner. However, if the contractor fails to achieve the agreed completion date, the contractor must pay fines as provided in the contract.

There are no key variations between local and international projects.

Material variations

13. How are material variations to the works usually dealt with in the contract?

The owner can, by issuing a written order, instruct the contractor to make certain changes to the works, including any addition, deletion, suspension or other modification to the quality, function or purpose of the works. Such variations must be agreed with the contractor and the impacts of the variation must be clearly identified.

In practice, a variation made necessary due to an act, omission or default by the contractor does not result in any payment to the contractor or any extension of the project schedule.

There are no key variations between local and international projects.

Other provisions

14. What other main contractual provisions are usually heavily negotiated by the parties?

Contractor's warranties, acceptance tests and termination clauses are also usually heavily negotiated by the parties.

There are no key variations between local and international projects.

APPOINTING CONSTRUCTION PROFESSIONALS

15. How are construction professionals usually selected? Following selection, how are they then formally appointed? How are their liabilities dealt with in the contract?

Selection

For government projects, the engineer and/or the consultant engineer and other construction professionals where necessary are selected by tender process.

For private projects, owners receive proposals from firms without making an official tender, and select professionals accordingly.

Appointment and liability provisions

Professionals are generally appointed by contract, rather than engagement letters.

The liability of professionals for fraud and gross negligence is usually governed by and limited to the related provisions in the Code of Obligations and the relevant regulatory requirements issued by the professional organisations.

There are no key variations between local and international projects.

PAYMENT FOR CONSTRUCTION WORK

16. What are the usual methods of payment for construction work? Are there ways for the contractor and consultants to secure payment or mitigate risks of non-payment under local law?

Methods of payment

The method of payment is purely based on contract. In practice, an advance payment of between 10% and 20% of the total contract price is paid to the contractor following the submission of the advance payment bond by the contractor. The contractor must provide a performance bond amounting to 10% to 20% of the total contract price, depending on the contract.

During the progress of the works, milestone payments are determined by the parties. The contractor has to issue invoices on receipt of these payments. It is uncommon for the owner to provide bonds to the contractor to secure his own payment obligations but it is legally possible. A letter of credit is commonly used in construction projects. Turkish banks often issue letters of credit and frequently follow the standard forms of the International Chamber of Commerce.

Securing payment

Under Turkish law, the contractor can claim a lien or attachment over the works, or over property of the owner in the contractor's possession or at the work site, unless it is clearly excluded in the contract. However, in practice this is not common. Instead, the contractor uses other available contractual protections like a payment bond or parent guarantee.

SUBCONTRACTORS

17. How do the parties typically manage their relationships with subcontractors?

Owner

Unless otherwise agreed, the owner does not have any contractual obligation to, or relationship with, any subcontractor. The contractor generally includes a clause to this effect in each subcontract with subcontractors.

If any subcontractor or the contractor fails to pay social security payments for the employees, the Social Security Institution can claim the amount directly from the owner under the Social Security Act. If the owner pays these amounts, he can claim them back from the contractor, under the contract between the owner and the contractor.

Contractor

Subcontractors are not third party beneficiaries of the contract between the owner and the contractor. It is typically agreed that the contractor will be solely responsible for paying each subcontractor for services, equipment and material. The contractor must execute an appropriate written subcontract with each subcontractor, consistent with the terms and conditions of the main contract. In practice, the contractor undertakes to notify the owner of any dispute with a subcontractor that could have a material effect on the progress of the works.

Under Turkish law, a subcontractor can indemnify a contractor and this indemnification is valid and binding.

LICENSING

18. What licences and other consents must contractors and construction professionals have to carry out local construction work? Are there any specific licensing requirements for international contractors and construction professionals?

Contractors must obtain a certificate from the Ministry of Environment and Urbanism authorising them to engage in construction activities (see box, *Main construction organisations*). Architects, designers, engineers and consultant engineers must be registered with a professional body or union to carry out their professional services. Additionally, government construction inspection companies must obtain and maintain an authorisation certificate from the Ministry of Environment and Urbanism (*Law No. 4708 on the Supervision of Construction Works*).

There are no specific additional licensing requirements for international contractors and construction professionals provided that they prove their accreditation in Turkey.

19. What licences and other consents must a project obtain?

There are number of environmental and administrative licences and consents which must be obtained. However, the material ones are referred to below.

Before

Zoning consents. The owner must apply to the relevant municipality to change the zoning plan, for use of the construction facility. The municipality obtains opinions from the relevant authorities before approving the revised zoning plan (*Master Plan Regulation*).

Buildings and structures must be shown in the master plan prepared for the related sites. This master plan (including the project area) must be approved by the municipality or governorship (*Construction Law*). When the project master plan is approved, a local master plan based on the project master plan is prepared and approved.

The municipality or governorship decides whether to approve the plot plan after the master and local master plans are approved and the provincial construction department of the municipality or governorship has issued an opinion on the project (*Construction Law*). Approval usually takes two to three months following the application to the municipality or governorship.

Construction consents. A contractor must obtain a construction licence from the relevant municipality or provincial administration (*Construction Law*). A construction licence is valid for five years. Construction must start within two years of when the licence is issued. If the construction is not completed within this five-year term, the licence can be extended for additional five-year terms. A change or extension to an existing building is subject to approval and the issue of a new construction licence.

If construction occurs without a licence the construction will be suspended. Within a month of the suspension, the owner must apply to the municipality or provincial administration to continue construction (*Construction Law*). If a building is not altered in accordance with the relevant rules and regulations, or the owner does not obtain a construction permit, it can be demolished and the construction owner can be subject to monetary penalties. Individuals who construct buildings without a construction permit, or in breach of the construction permit and plan, can be punished by imprisonment of between one and five years (*Criminal Code*).

An owner must execute an agreement with a construction inspection company certified by the governmental authorities to ensure that the construction and the materials used will comply with the required technical standards, specifications and relevant legislation (*Construction Supervision Law*). This agreement must be in force until the date the building use permit is issued (see below, *On completion*). A building use permit cannot be issued without a works completion report issued by a construction inspection company.

Other consents. The location of private and public projects within Turkey must be approved by the General Staff, before the design is approved or construction begins, regardless of whether or not there is a military forbidden zone near to the project area (*Military Zones Regulation*).

A decision under the Environmental Impact Assessment (EIA) Regulation is required in certain circumstances (see *Question 25, Environmental impact assessments (EIAs)*).

All public and private buildings to be constructed, renovated or expanded in earthquake zones must comply with technical specifications required in the Earthquake Regulation.

During

Regulation of workplaces. The Regulation of Workplace Opening and Operation Permits (Regulation) regulates the supervision, licensing and inspection of workplaces, to eliminate or minimise their adverse impacts on the environment and public health, and to protect natural resources.

A workplace cannot be opened or operated without obtaining a workplace opening and operation permit (*Regulation*). The Regulation classifies workplaces and the related permits required for them as:

- Hygienic (that is, administrative offices).
- First class non-hygienic (such as, for example, nuclear power plants and thermal power plants with power over 20MW).
- Second class non-hygienic (mostly related to explosive materials or activities, such as petroleum and gas).
- Third class non-hygienic (including construction materials and supplies).

A single permit can be issued for workplaces that have the same address and operator.

The relevant municipality or provincial administration is authorised to supervise workplaces, and take necessary measures if workplaces are dangerous for public health and the environment. The municipality or provincial administration can temporarily or permanently suspend operation of a workplace if it deems necessary, and can impose administrative fines.

Generally, first class non-hygienic workplaces and certain second class non-hygienic permits must establish a health protection zone around the workplace (*Regulation*).

First class non-hygienic establishments must obtain a site selection and establishment permit (*Regulation*). However, certain first class non-hygienic establishments subject to the EIA Regulation (see *Question 25, Environmental impact assessments (EIAs)*) are exempt from this requirement.

On completion

Building use permit. A building use permit must be obtained immediately after completion of the construction. A building use permit certifies that the building has been constructed according to the licence and approved plans. An application for a building use permit must be decided by the relevant municipality within 30 days of the application. Facilities that do not require a construction licence also do not require a building use permit.

If no building use permit has been obtained the relevant structure cannot use the municipality's utility services.

Operation certificate. Workplaces with more than 50 employees must obtain an operation certificate issued by the Ministry of Labour and Social Security. The Labour Law No. 4857 of 22 April 2003 (Labour Law) and the Operation Certificate Regulation provide guidance on the application process. It is issued to workplaces which have taken all necessary health and safety measures and does not have an expiration date. An establishment permit is a condition for the issue of an operation certificate (*Establishment Permit and Certificate for Operation Regulation*).

An operation certificate must be obtained before the start of operations. Failure to obtain the operation certificate can lead to partial or total suspension of operations, if the health and safety requirements in that workplace are not met. If all requirements are met, operations will not be suspended and only an administrative penalty will be imposed.

PROJECTS INSURANCE

20. What types of insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Compulsory insurance

Earthquake insurance must be maintained immediately after the completion of a construction project (*Bye-law No. 587*).

Social security registrations of the workers must also be duly made.

Non-compulsory insurance

The following is not required by law but is typically taken out under the contract:

- Professional liability insurance.
- Risk insurance including damage to third parties.
- Property damage insurance.

There are no key differences between local and international contracts.

LABOUR LAWS

21. Are there any labour law requirements for hiring (local and foreign) workers?

Local workers

Local employees are employed under the Labour Law. There are no special requirements or restrictions for hiring local employees, except for some types of work such as that which is heavy and dangerous. For example, people under 16 years of age cannot be employed for heavy and dangerous works in Turkey. For workers doing heavy and dangerous work, a health report supporting the status of the candidate must be obtained.

Foreign workers

Foreign employees must obtain a work permit to work in Turkey:

- At least five Turkish citizens must be employed at a workplace for which a foreign work permit is requested.
- A further five Turkish citizens must be employed for each additional foreign work permit that is requested for that workplace.

To obtain a foreign work permit, the entity owning or operating the workplace must satisfy one of the following thresholds:

- Paid-in capital of at least TRY100,000 (as at 1 April 2012, US\$1 was about TRY1.8).
- Gross sales of at least TRY800,000.
- An export amount in the previous year of at least TRY250,000.



The employee's salary must be at a level that is consistent with his position and competence.

22. Which labour laws are relevant to projects?

The Labour Law is the main legislation relating to projects. It regulates the working conditions and work-related rights and obligations of employers and employees working under an employment contract.

A minimum wage is determined at least every two years by the Ministry of Labour and Social Security, through the Minimum Wage Fixing Board. This board has set the minimum wage at TRY701.14 per month for 2012.

The maximum working time is 45 hours per week and 11 hours per day. The parties can agree to vary working time according to the days of the week worked, provided both:

- The daily working time must not exceed 11 hours.
- The average weekly working time over a two-month period must not exceed 45 hours.

23. Must an employer pay statutory redundancy or other payments at the end of a project? Are all employees eligible?

An employer must pay statutory redundancy at the end of the project if and to the extent that the employee worked more than one year on the project. The redundancy payment is calculated by multiplying the monthly salary of the employee by the number of years worked.

All social security premiums must be paid by the employer if the contractor fails to pay such amounts.

HEALTH AND SAFETY

24. Which health and safety laws apply to projects?

The main items of health and safety legislation are:

- The Labour Law.
- Bye-law No. 7/7583 dated 4 December 1973 Regarding the Health of Employees.
- Regulation Concerning the Health and Safety of the Workplace, published in the *Official Gazette No. 25311 dated 9 December 2003*.
- The regulation concerning the protection of workers from the danger of explosive materials, published in the *Official Gazette No. 25328 dated 26 December 2003*.

Under Turkish law, the owner is legally responsible for health and safety in the workplace, under the health and safety legislation. However in practice, the owner obtains contractual undertakings from the contractor to comply with the owner's obligations under the health and safety legislation. Therefore, the owner and the contractor jointly initiate, maintain and supervise all reasonable

safety precautions and programmes in connection with the performance of the work, according to safety manuals that must be prepared under the applicable law.

In particular:

- The owner, through the contractor, must report within two calendar days any safety or security incidents that occur at the workplace, or at any other place where the work is carried out, to the relevant regional directorate of the Ministry of Labour and Social Security.
- The contractor must suspend the work where any machinery creates a risk for the health and safety of employees.
- If the contractor employs more than 50 workers at the workplace, the contractor must establish a committee responsible for health and safety.

In case of breach of health and safety rules, certain financial administrative penalties may be applied by the regional labour departments, the amount of which depends on the seriousness of the breach. Breach of health and safety rules may result in imprisonment of up to one year in the event that safety is endangered due to fire, explosion, collapse or a similar event (*Article 170 and 171 of the Criminal Code*).

ENVIRONMENTAL ISSUES

25. Which local laws regulate projects' effects on the environment?

Air

The following laws regulate projects' effects on air:

- The Industrial Air Pollution Control Regulation, which states that certain construction projects (including coal fired power plants) must have an air emissions permit.
- The Air Quality Control Regulation and the Industrial Air Pollution Control Regulation set out emission limits for industrial facilities. The Industrial Air Pollution Control Regulation also provides that facilities, which are not subject to the emission permit, must minimise the adverse impacts of their activities on the environment by using high-tech methods and disposing of waste in accordance with the legislation.

In case of failure to comply with the Industrial Air Pollution Control Regulation, the Ministry of Environment and Urbanism can require compliance within one year. If an emission permit is not obtained, the operation can be partially or wholly suspended and administrative fines can be imposed on the project owner.

Water

The Water Pollution Regulation imposes limits for domestic and/or industrial wastewater and the principles for discharging wastewater. At the operation stage, the project company must either obtain a wastewater discharge permit (if it will discharge wastewater into the surrounding environment) or a connection certificate to connect to the existing sewage system, if any. Wastewater generated during the construction stage must be managed in accordance with the Water Pollution Regulation.

A discharge permit holder must meet the wastewater standards set out in the Water Pollution Regulation.

If there is any domestic wastewater arising during the construction stage, the contractor must also obtain a wastewater discharge permit for the construction stage.

If the requirements of the Water Pollution Regulation are not fulfilled, the Ministry of Environment and Urbanism can require compliance within one year. If a wastewater discharge permit is not obtained, the operations of the facility can be partly or totally suspended, and an administrative fine can be imposed.

Exploration and use of underground water are subject to the permission of the General Directorate of State Hydraulic Works (DSI) under the Underground Water Law. If underground water is used without the necessary permission a fine will be imposed. If the violation is repeated, in addition to a fine, the wells will be closed at the owner's cost.

If the owner of the facility needs to use spring, stream, river, lake or sea water, an agreement must be concluded with the Ministry of Finance for the use of that water. If water is used without the necessary permission, the Ministry of Finance can ask for payment of fees retroactively, calculated according to the quantity of water used.

Waste

The main legislation regulating waste management are:

- **The Excavation Soil Regulation.** Companies that generate excavation soil and waste soil of up to two tonnes must arrange for the relevant municipality or an authorised company to collect and transport the waste. If the amount is more than two tonnes, the company must obtain special permission from the municipality and/or the highest authority in the region (or an authorised company) for excavation, and obtain containers to store the waste temporarily before starting the excavation.
- **The Solid Waste Regulation.** This regulates the storage and disposal of "solid waste" (that is, domestic and industrial waste).
- **The Package Waste Regulation.** This regulates the production, collection, temporary storage, transport, recycling and disposal of package waste.
- **The Hazardous Waste Regulation.** This regulates the production, collection, temporary storage, transport, export, recycling and disposal of hazardous wastes. It provides design criteria and standards for building hazardous waste handling, storage and treatment facilities. A licence must be obtained from the Ministry of Environment and Urbanism for the storage, disposal and transport of hazardous waste. Facility operators must submit hazardous waste declaration forms to the relevant provincial governorate each year, indicating the amount of hazardous waste produced at the site.
- **The Waste Oil Regulation.** This sets standards for the storage, transport and disposal of waste oil, and to prevent its discharge into the environment. Only facilities licensed by the Ministry of Environment and Urbanism can collect, dispose of or sell waste oil for commercial purposes.

Waste management by the licence holder, or the operator under the Operation and Maintenance Agreement if any, should be conducted during the operation stage.

Facilities listed in the appendices to the Environmental Permit and Licence Regulation must obtain an environmental permit and licence certificate. This certificate covers air emissions, wastewater discharge, noise control and disposal of dangerous waste. Operators who obtain this certificate do not need to obtain separate permits for wastewater discharge, noise control, air emission and disposal of dangerous waste.

The new Criminal Code, which was enacted in 2004, introduced imprisonment and/or fines for pollution of the environment. A person who discharges waste into the surrounding area in breach of the technical requirements and intentionally or negligently causes pollution of soil, water or air, can be imprisoned and/or fined.

Environmental impact assessments (EIAs)

Larger projects that may have a substantial impact on the environment, such as power stations, require EIAs. Additionally, there is a very detailed list attached to the EIA Regulation which enumerates the specific projects that need an EIA.

If a project is within the scope of the EIA Regulation, the owner must, at the latest by the start of construction, either:

- Prepare an EIA report and obtain approval of it by the Ministry of Environment and Urbanism.
- Obtain a decision from the Ministry of Environment and Urbanism that an EIA is not required.

Otherwise, the relevant activity can be suspended permanently or temporarily, and an administrative fine of 2% of the project investment cost can be imposed.

The EIA Regulation regulates:

- The types of EIA reports (full EIA report or EIA preliminary report/project description report) and the content of these studies.
- The administrative and technical principles and procedures applicable during the EIA process.
- Pre-operational, operational and post-operational monitoring and auditing of projects within the scope of the EIA Regulation.

For example, a decision to approve an EIA or confirm that an EIA is not required must be obtained before the issue of an electricity generation licence for a power station project by the regulatory body.

For a modification or capacity increase to an existing power station operation, the site owner must prepare and submit a project description report to the Ministry of Environment and Urbanism, for a decision on whether an EIA report is required (*EIA Regulation*).

All undertakings and statements given in an EIA report are binding. The Ministry of Environment Urbanism requires the project owner to sign an undertaking, when the EIA report is approved, that he will comply with the EIA report and the relevant legislation.

Sustainable development

The construction facilities must be fit for purpose and must be consistent with modern technological requirements. Governmental authorities can make inspections on the facilities to determine whether the construction works are in line with good engineering practices. Additionally, for power plants, the government must issue an acceptance certificate which certifies that the facility satisfies the regulatory requirements. However, sustainable construction is often a contractual issue between the parties. That is to say, if the owner requires specific things for sustainable practice, the contractor should comply with these requirements.

26. Do new buildings need to meet carbon emissions or climate change targets?

Turkey signed the Kyoto Protocol to the UN Framework on Climate Change (Kyoto Protocol) in 2009. Turkey is not obliged to reduce its greenhouse emissions under the Kyoto Protocol until 2012. After 2012, if the Kyoto Protocol remains in effect, the cost of compliance is expected to have a significant impact on the costs of operators, both in the public and private sector, especially in the lignite and fuel oil powered electricity generation business.

New legislation is expected in the near future providing for, among other things, quantitative emission targets to apply the International Climate Protection Regime after 2012.

The Environmental Law, which is based on the polluter pays principle, and the Air Quality Protection Regulation, that limits the concentration of pollutants in flue gas, are important guides in this area. However, they do not include commitments to reduce greenhouse gas emissions from buildings.

CORRUPT PRACTICES

27. Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Rules

The new Criminal Law No. 5237 (New Criminal Law), which entered into force on 1 June 2005, defines bribery as providing a benefit to a public official for the performance or omission of an action, contrary to the requisites of the duties of the official.

Government officials must declare their assets, to monitor any increase in their assets (*Law No. 3628 Concerning the Declaration of Assets and Combating Bribery and Corruption, which entered into force on 4 May 1990*).

A government official who receives gifts from foreign countries or any foreign individuals or legal entities, with a value exceeding ten months' worth of his minimum salary, must deliver the gift to the public entity he works for (*Regulation No. 90/748 10 August 1990, implementing Law No. 3628*).

MAIN CONSTRUCTION ORGANISATIONS

Union of Chambers of Turkish Engineers and Architects

Main activities. The Union of Turkish Engineers and Architects is responsible for protecting the rights of its members and issuing regulatory texts. All engineers and architects in Turkey must be registered with the local chambers of engineers and architects which are the members of this union.

W www.tmmmb.org.tr

Union of Turkish Contractors

Main activities. The Union of Turkish Contractors is responsible for protecting the rights of its members. Most major contractors are members of this organisation.

W www.tmb.org.tr

Ministry of Environment and Urbanism

Main activities. The Ministry is responsible for issuing the regulation concerning zoning, housing and environment, supervision of the construction practices and preparation of the professional codes.

W www.csb.gov.tr

Turkey has also ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (*Law No. 4518 1 February 2000*).

Penalties

The New Criminal Law imposes imprisonment of between four and 12 years for bribing Turkish government officials. Non-nationals who commit this crime are subject to this penalty, regardless of whether the crime is committed in Turkey or abroad. Government officials who receive a bribe are also subject to the same penalty.

For this penalty to apply a bribery agreement is sufficient, and the actual transfer of money or other type of benefit is not required. If a governmental official who receives a bribe is a judge, a notary public or a sworn financial consultant, the imprisonment penalty is increased by between one third and one half.

If bribery creates an unlawful benefit to a legal entity, the legal entity is subject to the following measures under the New Criminal Law (criminal liability of legal entities is a new concept under Turkish law):

- Invalidation of a licence issued by a public entity.
- Seizure of goods used in a crime committed by representatives of a legal entity, or which result from the crime.
- Seizure of monetary benefits resulting in, or provided for, the committing of a crime.

If the person who gives a bribe informs the investigating authorities about the bribery before the investigation starts, he will not be punished for bribery.

BANKRUPTCY/INSOLVENCY

28. What rights do the client and funder have on the contractor's bankruptcy or insolvency?

The parties usually agree that the owner can terminate the contract if the contractor becomes bankrupt, insolvent or goes into liquidation. Termination of the contract for this reason will not prejudice the rights of the contractor under the contract or applicable legislation. The owner can appoint a third party to complete the remaining works.

PPPS

29. Are public private partnerships (PPPs) common in local construction projects? If so, which sectors commonly use PPPs?

PPPs have been used regularly in Turkey since the 1980s. They were first implemented for private investors and companies to participate in the construction and operation of power plants. They were first structured on conventional models such as the government concession model, and later on new models including the Build-Operate-Transfer and Build-Operate models. Major highway and airport projects have also been developed under these models.

There are an increasing number of health projects based on the PPP model defined in Fundamental Law No. 3359 Concerning Healthcare Services.

30. What local laws apply to PPPs?

To support PPP models, specific laws have been enacted, such as:

- Law No. 3096 of 4 December 1984 Concerning the Authorisation of Legal Entities other than the Turkish Electricity Authority for the Generation, Transmission, Distribution and Trade of Electricity.
- Law No. 3996 of 8 June 1994 Concerning the Realisation of Certain Investments and Services through the Build-Operate-Transfer model.
- Law No. 3465 Concerning the Authorisation of Legal Entities other than the General Directorate of Highways for the Construction, Operation and Maintenance of Highways.
- Law No. 4283 dated 16 July 1997 Concerning Development and Operation of Electricity Facilities based on the Build-Operate Model.
- The Council of Ministers Decree No. 97/9853 of 1 August 1997 Regarding the Implementation of Law No. 4283.
- Fundamental Law No. 3359 Concerning Healthcare Services.
- Regulation No. 2006/10655 of 3 July 2006 Regarding the Construction of Health Facilities Through Renting and Refurbishment of Health Facilities.

A draft PPP law is being debated to consolidate and simplify different models.

31. What is the typical procurement/tender process in a PPP transaction? Does the government or another body publish standard forms of PPP project agreement and related contracts?

An open tender process is generally implemented by the government authorities. The relevant government authority can also limit the bidders by applying pre-selection criteria. The tender documents are typically composed of the administrative and technical specifications, instructions to bidders and the draft contract to be signed between the investors. Standard form documents are prepared by the tendering authority unilaterally and cannot be negotiated.

The main principle is that the procurement process must be transparent and fair and must take into consideration the principle of accountability. All decisions of the tendering authority are subject to judicial review.

DISPUTE RESOLUTION

32. Which are the most common formal dispute resolution methods used? Which courts and arbitration organisations deal with construction disputes?

Formal dispute resolution methods

Disputes arising from construction contracts can be resolved through domestic arbitration, provided that the place of arbitration is Turkey (*Articles 407 to 444, Civil Procedural Law No. 6100*).

If the contract includes a foreign element, the International Arbitration Law No. 4686 can be applied, which is similar in its text and reasoning to the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law). The arbitration rules of the Civil Procedural Law and International Arbitration Law No. 4686 are ad hoc. The International Chamber of Commerce (ICC) arbitration rules are still the most common dispute resolution mechanism preferred by contracting parties in practice. If parties do not agree on arbitration, disputes will be settled by the state courts.

Courts and arbitration organisations

The Istanbul Chamber of Commerce has its own arbitration rules and can manage the whole arbitration. It also actively promotes its own rules. However, the Istanbul Chamber of Commerce is not widely used in Turkey, due to the dominant use of ICC International Arbitration Rules. There are no dedicated arbitration institutions in Turkey. However, the Turkish Union of Chambers and Stock Exchanges promotes the use of ICC Rules.

The state courts (for example, commercial courts) of Turkey are, of course competent to resolve disputes between parties.



33. What are the most commonly used alternative dispute resolution (ADR) methods?

Adjudication and dispute review boards are the most commonly used ADR methods. Dispute resolution methods are generally specified in the arbitration clause in the contract, and the parties must usually use these methods first before resorting to ADR.

A draft law concerning ADR methods in civil law disputes is being debated, and it is expected to enter into force soon.

TAX

34. What are the main tax issues arising on projects?

Value added tax (VAT), stamp duty and withholding tax are the basic taxes arising on projects. Social security payments for workers are an additional financial liability.

Turkey does not require payment of tax to reflect an increase in land value following completion of the project. However, if the project company or the contractor uses state owned lands, a rental fee must be paid to the government accordingly.

35. Are any methods commonly used to mitigate tax liability on projects? Are there any tax incentives to carry out regeneration projects?

Under the Turkish tax-incentive regime, certain goods and services, especially imported goods, can be exempt from VAT, which is charged at 18% for many goods and services. To benefit from this incentive, an investment incentive certificate must be obtained from the Ministry of Economics.

In addition, there:

- Is a stamp duty exemption for electricity generation facilities' contracts, provided they achieve commercial operation before 31 December 2012.
- Are certain purchase guarantees for certain renewable energy projects.
- Are certain purchase guarantees and additional contributions, to the extent that the equipment of a renewable energy facility is manufactured in Turkey.

OTHER REQUIREMENTS FOR INTERNATIONAL CONTRACTORS

36. Are there any specific requirements that international contractors or construction professionals must comply with?

There are no other specific requirements for international contractors or professionals.

REFORM AND TRENDS

37. Are there any proposals to reform construction and projects law? Are there any new legal or regulatory trends affecting projects?

Reform proposals

Based on publicly available sources, there are certain proposals to increase the role of the Public Housing Authority, which assigns contractors for the major urban planning projects. The legislative framework of this initiative is likely to be finalised soon. The Turkish incentive regime will change in the first quarter of 2012, which may bring favourable opportunities for contractors and investors. For instance, it is possible that a VAT refund will be given for building and construction expenses over a certain threshold.

The government is also considering allocating public land for infrastructure projects. However, the most important legislative change will be the new PPP law, which is being debated and is expected to be enacted in 2012.

Trends

There are proposals to amend the Electricity Market Law, the Natural Gas Market Law and the Petroleum Market Law to:

- Increase the number of independent private investors.
- Reach a strongly liberalised and competitive market.
- Add value to domestic natural resources.

Since these markets have a very close relationship with the construction sector, we believe these legal changes will help to revive the Turkish construction sector. In addition, the Turkish Parliament enacted the Law No. 6302 which regulates the sale of land to foreigners. There is also a new law concerning the sale of land which has lost its forestry nature (that is, land that is no longer considered forestry land for specific natural and legal reasons).

These legal and regulatory changes may have positive effects on the development of construction projects.

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