

Recent Amendments to the Procedures and Principles on Tenders to be Undertaken by the Undersecretariat of Defense Industries

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The Council of Ministers' decision on the Procedures and Principles Relating to Tenders to be Undertaken by the Undersecretariat of Defense Industries (the "**Administration**") Within the Scope of Article 3(b) of the Public Procurement Law No. 4734¹ (the "**New Procedures**") was published in the Official Gazette No. 30368, dated 22 March 2018, and repealed the previous Procedures and Principles² (the "**Repealed Procedures**"). This client alert summarizes the material novelties introduced by the New Procedures.

A. Changes to the Scope and Purpose

One of the major changes introduced by the New Procedures is the widening of the scope of parties eligible to conduct such public tenders that are exempt from the Public Procurement Law. Now, along with the Administration³, any establishment, organization, association, undertaking, or company of which at least half of its capital directly or indirectly belongs to the Administration, can conduct such tenders. Nonetheless, the Administration will decide which tenders of the above-mentioned sub-administrations will be subject to the New Procedures. Once the Administration has made its decision, the relevant decision-making authority of those entities will have the power to carry out necessary tenders. In such a case, Articles 7, 10, and 14 of the New Procedures, which regulate certain authorities of the Administration and the Defense Industry Executive Committee ("**DIEC**", *Savunma Sanayi İcra Komitesi*) as well as the use of the Defense Industry Support Fund to finance the project, will not be applicable.

In addition, the definition of the requesting entity who makes the demand (*ihitiyaç makamı*) has been broadened. Accordingly, along with the Administration now the President's office, the Prime Ministry, the Turkish General Staff and its affiliates, the Ministers and their affiliates, the Ministry of Defense acting for the Commanders-in-Chief of the Armed Forces, the Security General Directorate, the Ministry of Interior acting for the General Commandership of the Gendarmerie and the Coast Guard, the National Intelligence Agency, and other state institutions and organizations are entitled to request tenders. Previously this was limited to the Office of Commander in Chief, the Commanders-in-Chief of the Armed

¹ Published in the Official Gazette No. 24648, dated 22 January 2002.

² Published in the Official Gazette No. 27282, dated 8 July 2009.

³ Please note, throughout this client alert the Undersecretariat of Defense Industries refers to the administrative body and the Undersecretary of Defense Industries refers to the head of the administration.

Forces, the General Commandership of the Gendarmerie, the Coast Guard and the Ministry of National Defense.

The Repealed Procedures applied only to tenders for the purchasing of property and services. The New Procedures, however, also apply to tenders for construction, research & development (“R&D”) projects, feasibility surveys, and consultation services. In order to start a tender, the approval of the Undersecretary of Defense Industries, as opposed to the DIEC, will be necessary.

B. Changes to the Tendering Methods

Under the Repealed Procedures, the Administration was entitled to determine the ‘appropriate procedure’ or follow ‘single source supply’ subject to the approval of the DIEC to conduct tenders.

The New Procedures limit the tendering methods with three options, namely:

1. Single source supply procedure: the Administration sources the supply from a bidder directly. This method may be used only if at least one of the following circumstances exists: national interest; secrecy; technological advancements to be concentrated in a specific area; or to establish standardization.
2. Tender by way of taking proposals: the Administration discusses the technical aspects and proposal fees with applicants it deems suitable.
3. Tender by way of competition: this method is used for supplying the necessities of projects that aim to showcase technological products/prototypes in which two or more undertakers’ capabilities are compared with one another within the same tender or contract. For tenders that take place according to this method, the Undersecretariat of Defense will choose the bidders it considers suitable.

C. Changes to the Start of the Project and the Publication of the Invitation to Bid Folder

The Repealed Procedures included procedures on how the project was to start. Once the need was known by the Administration, a ‘project group’ was to be formed which would prepare all the necessary documents and the invitation to bid folder for the tender. Furthermore, the minimum requirements that had to be found in the folder were also stated, which included the main criteria to be adhered to when assessing the bids, the conditions of industrial participation, offset commitment conditions, etc. Among those criteria was the required use of the Turkish language, which has now been lifted. Thus, it can now be interpreted that when at least one of the parties is foreign, the prevailing language may be freely determined.

Under the New Procedures, the Administration will determine the minimum requirements to be included within the invitation to bid folder, including the price benefits for domestic goods/domestic bidders. Furthermore, the Administration will approve the decision to start the project rather than the previously competent authority, the DIEC.

According to the New Procedures, the invitation to bid folders must be obtained by the interested parties, while in the past, they were sent to the relevant firms.

Under the Repealed Procedures, once the invitation to bid folder had been published, the Administration’s ability to make changes to it was limited to factual and technical errors. Now, however, until the bids are received by the Administration, the Administration has the right to make any changes it considers suitable in the folder, *ex officio* or upon the request of a bidder.

D. Changes to the Taking of Bids and Their Evaluation

The New Procedures introduce the principle of calculating an approximate cost for the project. This is subject to the technicality and complexity of the project, which may preclude the Administration from making such cost and fee estimate.

The New Procedures state that bids will be evaluated by the bid evaluation committee which is to be formed by the Undersecretary of Defense Industries or those to whom he delegates such authority, in accordance with the procedures and principles to be determined by the Administration.

According to the New Procedures, the existence of public welfare or necessity and the approval of the Undersecretary of Defense Industries are no longer required for the Administration to request revised bids from the bidders.

E. Changes to the Contractor Selection

The DIEC is still the authority that selects the contractor with which to enter into a contract. However, according to the New Procedures, the DIEC, by prescribing the limits of the scope of such delegation, can delegate this authority to the members of the DIEC or the Undersecretary of Defense Industries in instances it considers appropriate. In instances when the predetermined resource ceiling limit is exceeded, the relevant administration who was initially empowered to decide on requests will be entitled to re-evaluate the resource ceiling limit. This will be either the DIEC, members of the DIEC, or the Undersecretariat of Defense Industries, due to the new mechanism that allows delegation of authority.

Furthermore, the New Procedures provide that the tender results of urgent procurement projects, R&D projects, feasibility surveys, and consultancy services are sent to the Undersecretary of Defense Industries for approval, instead of to the DIEC.

F. Changes to the Implementation of the Contract

The Repealed Procedures included a mandatory minimum content requirement for any contract to be signed with a contractor, such as the terms relating to payment, how disputes were to be resolved, the procedure to be followed if assignment was possible, the price, the period of the contract, intellectual property rights, force majeure, and termination. The New Procedures do not include any mandatory minimum content requirement for contracts, except for the inclusion of provisions in R&D contracts to determine whether any penalty will be imposed. Instead, the New Procedures provide some suggestions for the scope of the draft contracts, such as force majeure events, termination procedures, escalation formula (if any), etc.

Furthermore, it is now possible that if a need arises during the scope of the project and provided that competition is maintained, more than one contractor may be chosen for the same subject or work.

The Administration is now required to ensure that no change to a signed contract results in any material deviation from the relevant tender conditions or exceeds the resource ceiling amount.

The New Procedures provide that in lieu of penalty payments to be made to the Administration as per the contract, additional services and property may be procured. Regarding the property or services that would not necessarily be considered of a fair quality, provided that the Undersecretary of Defense Industries considers that appropriate, they may be accepted by the requesting entity by making a fair reduction on the price.

G. Securities and Project Resources

The Repealed Procedures contained a provision stating that the form, amount and principles of securities would be one of the required clauses to be found within the invitation to bid folder. However, the New Procedures set out detailed provisions regarding the amount of the securities and applicable exemptions.

Some notable provisions include:

- A bid bond in an amount to be determined by the Administration will be sought from the bidders unless there is a provision in the invitation to bid folder that no bid bond will be required.
- Prior to the signing of the contract, a performance bond in the amount of 6% of the total contract price must be provided by the bidder. However, under special circumstances and subject to the

approval of the Undersecretary of Defense Industries, no performance bond may be required. In such case, however, 6% of each payment to the contractor will be withheld as security.

- An advance payment can be made only in return for an advance payment bond in the same amount.
- In regard to the bidders who cannot provide securities by law, no bond will be required provided that they justify their situation in writing.

H. Effective Date of the New Procedures and Status of the Current Tenders

The New Procedures entered into force upon their publication on 22 March 2018. Tenders that were notified or announced in writing on or prior to 22 March 2018 and contracts signed under such tenders will remain subject to the Repealed Procedures.

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