

The Impact of Kuwait's New Tender Law

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Kuwait's aspirations to attract foreign investors commenced with the establishment of the Kuwait Direct Investment Promotion Authority ("KDIPA"), which allows for the issuance of an investment license permitting the establishment of a 'wholly foreign-owned' Kuwait entity.

This progressive trend has been sustained with the introduction of Law No. 49 of 2016 (the "New Tenders Law") which superseded Law No. 37 of 1964. The modernization of Kuwait's laws and regulations, together with increasing flexibility in welcoming foreign investors is facilitating the ease of doing business in Kuwait and has been a part of His Highness the Emir's vision to develop Kuwait into a financial and commercial hub by the year 2040.

Priority of the National Industry and Local Contractors

Increasing foreign investment is not the sole concern for Kuwait, as this objective must be achieved also in coherence with the aim to progressing Kuwait both economically and technologically. The New Tenders Law, alongside Law No. 116 of 2013 (the "Direct Investment Law"), which focused on educating the local population and advancing the local economy, was introduced with this purpose in mind.

For example; Article 87 of the New Tenders Law provides that a foreign contractor is now obliged to purchase no less than 30% of its contractual requirements from the local market or from local suppliers registered in the 'suppliers' classification' lists at the Public Tenders Central Bureau (the "Bureau"), formerly known as the Central Tenders Committee (the "CTC"). Moreover, it shall also manage compliance of foreign contractors by awarding not less than 30% of the contracting works awarded to local contractors registered in the contractors' classification lists at the Bureau. These steps enhance the general position of the local market its local contractors.

Bidding by a Foreign Entity

Article 31 of the New Tenders Law states that the party submitting a bid for a public or limited tender or in the events of enquiries and direct contracting, must comply with the following requirements as set forth in Article 31 of the New Tenders Law:

"First: To be a Kuwaiti, individual or company, registered in the commercial register.

Second: to be registered in the suppliers or contractors register, or as per the nature of the tender, enquiry or direct contract."

On the other hand, Article 31 of the New Tenders Law simulatenously provides for an exemption which changes the landscape of public tenders. According to Article 31 of the New Tenders Law, this article permits a foreigner to be a potential bidder. At present, Decree Law No.68 of 1980 (the "Commercial Law") requires that a Kuwaiti partner or local agent facilitate such bids; in light of this, it remains yet to be seen, how this will fit in with the New Tenders Law which suggests the contrary. It is unclear how this new provision will be implemented and forthcoming issuance of the Executive Regulations pertaining to the New Tenders Law are awaited in anticipation of how any such conflicting provisions shall work in a practical context. It is worth noting that despite not needing an agent to bid, the foreign bidder is still in need of a local agent or partner for the execution phase of the project in order to sponsor the employees.

It should also be noted that the aforementioned Article 31 is subject to the offering being limited to Kuwaiti companies in the event of standard works or for which sufficient specializations are available in the local market. On the other hand, the offering may be confined to foreign companies if the concerned entity requests such and upon the need for executing specified works requiring technical specializations that are unavailable in sufficient numbers locally.

Furthermore, under the previous Tenders Law, delays occurred due to complications arising from appointing an agent and registering such agencies in order to enable a foreign entity to tender for works. In the past, a foreign entity was required to have an agent (i) that was registered in the Commercial Register and with the Chamber of Commerce and Industry (the "MOCI"); (ii) that was registered with the CTC by an official notarized document; and (iii) that had completed the pre-qualification process for the tender in question. Pre-qualification was achieved by submitting documents to the CTC establishing the applicant company as being able to perform the contract. Whilst a prequalification procedure still takes place under the New Tenders Law, the New Tenders Law along with the Direct Investment Law seeks to increase flexibility within the tendering process.

Exemptions

Public entities that are subject to the provisions of the New Tenders Law may contract for any of the purposes set forth under this law without permission from the Public Tenders Central Bureau (the "Bureau"), as long as the contract value does not exceed KD 75,000 (Seventy Five Thousand Kuwaiti Dinar). The contract value of this exemption dramatically increased from KD 5,000 being the cap set out in the previous tenders law.

Public Tenders Central Bureau Dynamics

This Bureau is responsible for undertaking the procedures concerned with the public procurement process, starting with its planning up to the completion of the contract all in accordance with the New Tenders Law.

The Bureau will consist of seven members, from whom the chairman and his deputy will be elected.

Bidder Grievances

Pursuant to the New Tenders Law, any bidder who sustains loss or damage as a result of a breach by any tenderer or the entity managing the procurement process, may submit a complaint to the entity managing the procurement process at any stage, requesting that it reconsider the procedure causing the damage or that remedial action be taken.

Criteria for Public Tenders

With the establishment of the New Tenders Law, Kuwait has established an organised criteria for potential bidders to follow. However, any company which appears to have issues with completing existing projects will not be awarded new projects until such issues are resolved and the project as a whole is completed.

In addition, the previous tenders law did not recognize or regulate the technical evaluation of the various project tenders. Now, under the New Tenders Law, a 'points system' is now used by the Bureau in allocating project work of a technical nature to a selected bidder based upon successful attainment against a specified 'points based' criterion.

Conclusion

The New Tenders Law illustrates Kuwait's ambitions to expand within the international commercial market by allowing more opportunity for foreign investors while simultaneously providing a dependable market for the local population to cultivate growth potential. Kuwait eagerly awaits issuance of the Executive Regulations that shall further elucidate how these goals shall be met in a more practical context.