

Client Alert: Egypt's New Law on Agreements Concluded by Public Entities

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On 3 October 2018, Law No. 182 of 2018 on Agreements Concluded by Public Entities (the "Law") was published in the Official Gazette, with its effective date set for one month from publication. The Law's Executive Regulations (the "ER") were promulgated on 31 October 2019 by the Ministry of Finance Decree No. 692 of 2019, which entered into force on the following day.

The Law's Scope of Application

According to Article 1 of the Law's Promulgating Articles and Article 1 of the Law, the latter applies to all bodies covered by the State's budget, as well as the State's administrative bodies ("**Administration**"). These entities include:

- Ministries;
- Authorities and entities of a special budget;
- Municipalities;
- General service and economic authorities, and all said entities' affiliated units of a special character; and
- Private funds, with the exception of social welfare funds established therein, which rely mainly on the financial contributions of their members and projects financed from private accounts.

The provisions of the constitutional laws/decrees of any such public entities, to the extent regulating procurement differently, shall prevail over the Law.

The Law repeals the Tenders and Auctions Law, No. 89 of 1998, commonly referred to as the "Public Procurement Law" (the "**PPL**"). As an exception, the PPL will still apply to all transactions for which an invitation to bid was extended or which were concluded prior to the Law's effective date. This exception remains valid until the respective transaction has been executed.

Important Changes Included in the Law

The provisions pertaining to direct contracting, framework agreements, agreements with special character (such as BOO/BOOT/EPC + Finance), and unsolicited offers are perhaps the most important changes under the Law.

Taken together, the changes promulgated by the Law appear to be designed to provide the State with a much more practicable framework and to avoid the constraints that existed under

the PPL. These constraints often crippled its capacity to act swiftly when needed, which possibly impeded the State's ability to promote foreign investment efficiently.

The Law's Application to Direct Contracting

Under the PPL, direct contracting generated major controversy and was a catalyst for some of the most prominent public interest litigation in the recent history of Egyptian jurisprudence. The wording of the PPL was rather ambiguous. In turn, this led to conflicting interpretations as to the relevant public entity's actual ability to resort to direct contracting and the legality and validity of the ensuing agreement.

The Law seems to support a more robust framework in that it provides for more detailed conditions for direct contracting, especially for specific cases, such as:

- (1) Emergency cases resulting from sudden circumstances that cannot be predicted or foreseen, and where it is impractical to observe standard tendering procedures;
- (2) Where only one source who has the technical capacity and ability to satisfy the contracting requirements, or has exclusive or monopoly rights in relation to the subject matter of the agreement;
- (3) The completion of existing projects, for which there is only one source;
- (4) Where the agreement's subject matter was not included in an existing contract, and there is a technical necessity that it is executed by the same source;
- (5) Urgent cases where the contracting time period does not allow for tendering, and the purpose is to ensure the safety and efficiency of works at administrative entities, provided that the urgency is not a result of a miscalculation or delay in undertaking standard tendering procedures;
- (6) To standardise existing projects; and
- (7) To foster the State's social or economic policies.

According to the ER, the conditions and restrictions that apply to direct contracting include, *inter alia*, that it must be the best available contracting method, it may not be part of a framework agreement, it must be considerate of time efficiency and within the market price ranges and technical requirements, and it may not violate competitiveness. A permanent committee, to be incorporated by a resolution of the respective competent authority, will authorise direct contracting situations.

That said, and despite apparent efforts to break down the concept of 'direct contracting' to more palpable components, it appears from the above list of conditions that some remain, to a large extent, quite unclear and may leave room for extensive argumentation.

Also noteworthy is that the Law has moved the express exclusion of the Ministry of Defense and the Ministry of Military Production and their respective entities to a separate section, which is clearly titled as "contracts relating to national security.", as opposed to the PPL, which had provided for this exception under the provisions pertaining to direct contracting.

The Law Introduces Framework Agreements

This newly introduced concept appears to grant the Administration more flexibility in managing its contractual relationships with private contracting parties. The Administration may invite a bid in relation to and/or conclude framework agreements on the basis of a tendering process, or direct contracting, to satisfy its own needs or the needs of another public entity. Framework agreements apply to the following cases:

- (1) The need for frequently contracted items, works, services, or consultancy studies that are characterised by generality or common use.
- (2) The Administration's anticipation, in light of the nature of the items, works, services or consultancy studies required, that an urgent need will arise in the future, without knowing the exact timing of the required supply, implementation or quantities.
- (3) Other cases in which the Administration deems it appropriate to follow this type of contracting, including targeting development of some industries, the characterisation of the Administration's needs, and other similar cases.

The aforementioned list supports a wide application of framework agreements, in particular cases (2) and (3).

That said, framework agreements cannot be indefinite in term. According to the ER, a framework agreement's duration shall not be less than two years and is extendable for up to four years, subject to the competent authority's approval.

Unsolicited Offers Under the Law

Another unique feature of the Law is that the Cabinet may authorise any specific Administration to conclude agreements with natural or judicial Egyptian or foreign parties on a direct contracting basis, if such project achieves the Administration's and the State's 'economic and development objectives'. Foreign parties must also submit an investment project, including financing. Authorisation is at the Cabinet's discretion and is based on the competent minister's proposal.

Unless offered project involves certain exclusive IP rights to the benefit of offering party, the Administration reserves the right, in its absolute discretion, to solicit other competing bids, if it deems necessary.

We understand from the above that the State's objective is to encourage investors to contribute toward the State's development goals by offering a more streamlined tendering process to interested parties.

Transaction Contracts and Projects of Complex, Interrelated and Multilateral Nature

As an exception to the Law's provisions, the Administration may conclude contracts of a complex, interrelated or multilateral nature, or contracts that require a financing structure, such as BOOT, BOO or EPC + Finance, *etc.*, if such contracts would satisfy the Administration's urgent economic and development objectives, or if the economic or social circumstances require the rapid completion of the contract within a certain timeframe.

According to the ER, these contracts shall be awarded by a public call for bids, by calling for a shortlist of nominated investors to submit their offers, or by direct agreement in specific cases set forth in the ER. Such agreements will be concluded in accordance with the frameworks, procedures and conditions published in the Cabinet-approved procedural manual. Additionally, the competent minister for each Administration shall set specific regulations for each project, in coordination with the Minister of Finance and Planning, which will be endorsed by the Cabinet.

Other New Provisions and Changes to the PPL

The Law contains other new and changed provisions, including contracting procedures to be concluded electronically, and new definitions for what constitutes “construction works,” “services,” “consultancy studies,” and “artistic works” to help clarify previously grey areas, in particular in relation to the distinction between “construction works” and “services.” Also, it seems that the points system for awarding bids will now be mandatory.

Subcontracting is, now, expressly allowed under the Law, provided that the subcontractors’ details are mentioned in the bid and that they are not changed without the Administration’s consent. In all cases, the contractor remains solely liable to the Administration for the contract’s execution.

The Administration has the option to request information from the public, as well as to request expressions of interest in preparation for its invitation to bid, and as well as a request for a preliminary qualification screening to verify the bidder’s technical, financial, administrative, human and other capacities, as per the criteria set forth in the request. The performance bond shall be 5% for the purchase or lease of movables, construction works, receipt of services, artistic works, and consultancy studies; 3% for the purchase of real estate; 30% for the sale of movables; and 10% for the sale of real estate and projects.

The Law requires that the Administration allocate at least 20% of the value of their requirements to contracts with SMEs. It also allows for the prioritization of SMEs for local tenders when the value does not exceed EGP two million.

The Administration may order a variation of up to 25% of the respective items’ quantity in construction works contracts and up to 15% of the respective items’ quantity in other types of contracts, subject to certain approval requirements and restrictions set forth in the ER. The Law expressly foresees a pro-rata schedule adjustment.

In the case of the contractor’s delay in contract execution, a “delay consideration” not exceeding 10% of the total value of the contract for construction works (3% for other contracts) applies, if the delay does not exceed 10% of the delivery period, and 15% (5% for non-construction works contracts), if such delay period is exceeded, in addition to the Administration’s right to claim full compensation for its actual damages.

If you would like more information about this topic, please contact us.

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