

Chambers



GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top ranked lawyers

Public Procurement & Government Contracts

Afghanistan
Kakar Advocates LLC

chambersandpartners.com

2019

AFGHANISTAN

LAW AND PRACTICE:

p.3

Contributed by Kakar Advocates LLC

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Kakar Advocates LLC

CONTENTS

1. General	p.4	4. Review Procedures	p.7
1.1 Basic Statutes Governing Public Procurement	p.4	4.1 Resolving Disagreements Between the Government and a Contractor	p.7
1.2 Regulations Governing Cost Reimbursement and Pricing Issues	p.4	4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes	p.7
1.3 Public Sector Procurement Procedures	p.4		
1.4 Common Types of Procurement Procedures	p.5	5. Miscellaneous	p.7
1.5 Eligibility to Bid for Public Sector Opportunities	p.5	5.1 Other Unique Aspects	p.7
1.6 Compliance and Ethics Rules	p.5		
1.7 Disappointed Bidders	p.5		
1.8 Handling Disputes	p.5		
2. Contract Award Process	p.5		
2.1 Tender Procedures for Soliciting Offers	p.5		
2.2 Negotiating Tenders	p.6		
2.3 Accounting Standards	p.6		
2.4 Verification of Tenders	p.6		
2.5 Accounting and/or Estimating Systems Subject to Prescribed Standards/Requirements	p.6		
2.6 Accounting and/or Estimating Systems Subject to Audit or Inspection Requirements	p.6		
3. Post-Award	p.6		
3.1 General Process and Terms and Conditions for Payment to the Contractor	p.6		
3.2 Government Pay Relative to Actual Costs	p.6		
3.3 Rules Governing How Contractors Must Accumulate, Record and Report Costs	p.6		
3.4 Purchasing Goods or Services from a Foreign Contractor	p.6		
3.5 Rules That Apply to a Foreign Subcontractor's Accounting and Pricing	p.7		
3.6 Access to a Contractor's Records	p.7		
3.7 Audit Rights	p.7		
3.8 Recovering Costs	p.7		

AFGHANISTAN LAW AND PRACTICE

Contributed by *Kakar Advocates LLC* **Authors:** Kawun Kakar, Thomas Kraemer, Abdul Wahid Rizwanzai

Kakar Advocates LLC is a full-service law firm based in Kabul, Afghanistan, with US and Afghan licensed attorneys from an extensive range of backgrounds and experiences. Kakar Advocates provides services to prominent national and international clients in both the private and public sec-

tors, including legal services, tax and financial advice, and development and strategic consultancy services. Kakar Advocates has extensive experience working with Afghanistan's public procurement laws on behalf of both public and private clients.

Authors



Kawun Kakar is managing partner at the firm. He has extensive experience as attorney, private sector executive and senior government official.



Abdul Wahid Rizwanzai is an associate attorney specialising in public procurement, commercial contracts and general business matters



Thomas Kraemer is senior counsel. His practice covers public procurement, energy, mining and commercial contracts.

1. General

1.1 Basic Statutes Governing Public Procurement

Public procurement in Afghanistan is generally controlled by the Procurement Law, which was passed in 2016. The Procurement Law sets broad guidelines for procurement of goods and services by governmental bodies. It is intended to provide effective control over public funds, ensure transparency of the bidding process, and provide equal opportunity to all qualified bidders.

1.2 Regulations Governing Cost Reimbursement and Pricing Issues

The Procurement Law is supplemented by the Procurement Procedure, promulgated by the National Procurement Authority in 2016. The Procurement Procedure fills in many gaps and adds significant detail to the requirements for public procurement in Afghanistan. The Procurement Procedure covers the entire procurement process, from procurement planning and required documents through the competitive bidding process, to contract award, contract management and dispute resolution.

Additional regulations and procedures to further clarify the legal framework are in the drafting process and may be enacted in 2018 or 2019. The National Procurement Authority

also has a number of internal procedures, which are available on its website.

1.3 Public Sector Procurement Procedures

Under the Procurement Law and Procurement Procedure, the government entity seeking the procurement must prepare a procurement plan that takes into account the entity's needs, the estimated cost of the goods or services to be acquired, and the nature and quality of the procurement. The procurement plan should also state the type of procurement method to be used. The entity must present the procurement plan to the National Procurement Authority for review and approval.

The Procurement Law authorises four types of procurement methods: (1) request for quotation; (2) open bidding; (3) restricted bidding; and (4) single-source procurement. The request for quotation method is used on smaller procurements and utilises a set of standard bid documents prepared by the National Procurement Authority (also available on the NPA website). Larger procurements must be approved by the National Procurement Commission and utilise one of the other three procurement methods.

Open bidding, where the bidding is open to all eligible bidders, should be used whenever possible in order to promote

the broadest possible competition. If the procuring entity prefers to employ the restricted bidding or single-source procurement, then the entity must provide a written justification for its decision.

The restricted tendering method is permissible only where the procuring entity has determined that the procurement is available only from a limited number of sources (maximum of five sources). Unlike the request for quotation method, which requires a general announcement of the procurement, the notice of restricted bidding may be sent directly to the qualified bidders. A minimum of three eligible bidders must be shortlisted for further consideration.

Single-source procurement is appropriate only where (1) the procurement is available only from a single provider, such as where the provider holds exclusive invention or production rights; or (2) other tendering methods would be impractical because of imminent threat to public health, welfare or safety, or an imminent threat of damage to property.

1.4 Common Types of Procurement Procedures

The Procurement Law and Procurement Procedure allow for various types of contracts and payment methods. The permissible contract types are: lump sum contract; unit price contract; framework contract; percentage-based contract; contract for design, supply and erection; turnkey contract for industrial plant; design and build contract; and repayable costs and specific price contract.

The request for proposal procurement method is used for smaller procurements. For larger projects, the open bidding method is preferred as it promotes greater competition. According to National Procurement Authority statistics, on larger contracts the open bidding process is used more than 85% of the time.

1.5 Eligibility to Bid for Public Sector Opportunities

The threshold for eligible bidders is relatively low in order to maximise competition. Generally, an eligible bidder is one who has the legal capacity to enter contracts, is not insolvent, has no conflict of interest, is not debarred from participating in public procurements, has not been convicted of a business crime within the past two years, and possesses the professional and technical qualifications and financial resources necessary to perform the procurement. Bidder eligibility is confirmed by the procuring entity and, on larger contracts, double-checked by the NPA.

1.6 Compliance and Ethics Rules

Afghanistan's procurement process is designed to promote openness and transparency. Bidders are prohibited from conduct that contravenes these principles, including: providing false information; fabricating documents; directly

or indirectly offering a benefit in order to obtain a contract award; colluding with other bidders or procurement staff; engaging in violence, intimidation, or similar behaviour to influence the procurement; making defamatory statements or false accusations; revealing another bidder's confidential information; or otherwise undermining the transparency of the process.

1.7 Disappointed Bidders

Disappointed bidders may request a debriefing from the procuring entity after being notified of non-selection. However, there is no further action until the procuring entity announces its intent to award the contract to another bidder.

Following the announcement of the contract award, a disappointed bidder may submit a protest to the procuring entity. If there is no response, or the response is unsatisfactory, the protester may appeal to the Administrative Review Committee.

The Administrative Review Committee is an independent, ad hoc committee established for the purpose of hearing the appeal. The decision of the Administrative Review Committee is the final step in the administrative process. Unsatisfied bidders may further challenge the contract award through the court system.

1.8 Handling Disputes

There is no dispute resolution procedure specified in the Procurement Law or Procurement Procedure. However, every procurement contract is required to include a dispute resolution clause.

2. Contract Award Process

2.1 Tender Procedures for Soliciting Offers

Under the Procurement Law and Procurement Procedure, the government entity seeking the procurement must prepare a procurement plan that takes into account the entity's needs, the estimated cost of the goods or services to be acquired, and the nature and quality of the procurement. The procurement plan should also state the type of procurement method to be used. The entity must present the procurement plan to the National Procurement Authority for review and approval.

The Procurement Law authorises four types of procurement methods: (1) request for quotation; (2) open bidding; (3) restricted bidding; and (4) single-source procurement. The request for quotation method is used on smaller procurements and utilises a set of standard bid documents prepared by the National Procurement Authority. Larger procurements must be approved by the National Procurement Commission and utilise one of the other three procurement methods.

Open bidding, where the bidding is open to all eligible bidders, should be used whenever possible in order to promote the broadest possible competition. If the procuring entity prefers to employ the restricted bidding or single-source procurement, then the entity must provide a written justification for its decision.

The restricted tendering method is permissible only where the procuring entity has determined that the procurement is available only from a limited number of sources (maximum of five sources). Unlike the request for quotation method, which requires a general announcement of the procurement, the notice of restricted bidding may be sent directly to the qualified bidders. A minimum of three eligible bidders must be shortlisted for further consideration.

Single-source procurement is appropriate only where (1) the procurement is available only from a single provider, such as where the provider holds exclusive invention or production rights; or (2) other tendering methods would be impractical because of imminent threat to public health, welfare or safety, or an imminent threat of damage to property.

2.2 Negotiating Tenders

Bids are evaluated by a bid evaluation committee composed of qualified persons selected by the procuring entity. The bid evaluation committee first conducts an initial assessment to determine that all bids were submitted by eligible bidders. Then financial and technical assessments are carried out, followed by a detailed assessment. During these stages, the bid evaluation committee ensures that the proposals meet the specifications of the tender, and may ask for clarification from the bidder. The committee will also inquire into any financial proposal that appears to be unrealistic.

The procuring entity will engage in negotiations with bidders. The negotiations may be on either financial or technical aspects of the proposal.

2.3 Accounting Standards

There are no particular accounting standards specified in the Procurement Law or Procurement Procedure. Particular standards may be specified in the tender documents.

2.4 Verification of Tenders

There is no requirement in Afghan law for bidders to supply certifications in support of the prices offered.

2.5 Accounting and/or Estimating Systems Subject to Prescribed Standards/Requirements

There is nothing in Afghan law on this point during the pre-award period.

2.6 Accounting and/or Estimating Systems Subject to Audit or Inspection Requirements

There is nothing in Afghan law on this point during the pre-award period.

3. Post-Award

3.1 General Process and Terms and Conditions for Payment to the Contractor

The Procurement Law and Procurement Procedure allow for various types of contracts and payment methods. The permissible contract types are: lump sum contract; unit price contract; framework contract; percentage-based contract; contract for design, supply and erection; turnkey contract for industrial plant; design and build contract; and repayable costs and specific price contract.

The procuring entity is required to specify the timing and method of payment, as well as other details such as currency and exchange rate, in the procurement contract. The procurement contract may specify a single lump sum or a series of payments. In the latter case, the contract must provide with specificity the criteria for each payment due, whether percentage of work completed, defined milestone, or other factor.

The procurement contract may allow for up to 30% of the total contract price to be paid as an advance payment. The contractor must provide payment security in the amount of the advance payment.

3.2 Government Pay Relative to Actual Costs

Cost reimbursement is not directly addressed in the Procurement Law and Procurement Procedure. Appropriate details regarding cost reimbursement should be set forth in the procurement contract.

3.3 Rules Governing How Contractors Must Accumulate, Record and Report Costs

As a general rule, the procuring entity is responsible for project oversight, and will designate a Project Manager for this purpose. The Procurement Law and Procurement Procedure have some specific provisions allowing the entity to physically inspect the project site, but provide little guidance regarding accounting, record keeping and cost verification. Additional requirements may be set forth in the procurement contract.

3.4 Purchasing Goods or Services from a Foreign Contractor

Procurement from international sources is permissible where the procurement is not available from three or more sources within Afghanistan. International tenders follow the same rules and procedures as domestic tenders. There

are no separate accounting or pricing rules for international contractors.

3.5 Rules That Apply to a Foreign Subcontractor's Accounting and Pricing

Under the Procurement Procedure, a contractor may transfer up to 20% of the total contract price to a subcontractor with the written consent of the procuring entity. Transfer of more than 20% of the contract price is grounds for termination of the contract. There are no different pricing or accounting rules for subcontractors.

3.6 Access to a Contractor's Records

There is no general right for the procuring entity to access a contractor's records. The Afghanistan Revenue Department has broad audit rights for purposes of ensuring compliance with tax laws.

3.7 Audit Rights

The Procurement Law and Procurement Procedure do not provide audit rights. Some rights may be provided in the procurement contract. In addition, the contractor's invoices will be reviewed by specialists in the Ministry of Finance who are familiar with typical project costs.

3.8 Recovering Costs

In the event that the contractor is discovered to be submitting improper costs for reimbursement, the procuring entity has the option to terminate the contract, and may refer the contractor to the National Procurement Authority's Debarment Committee. Debarment may be for a period of 2 to 5 years. The contractor's performance guarantee may be forfeited, and the procuring entity may refer the matter to the Attorney General's Office for prosecution.

4. Review Procedures

4.1 Resolving Disagreements Between the Government and a Contractor

The dispute resolution mechanism is to be specified in the procurement contract, as are the applicable damages. Government contracting uses a variety of dispute resolution procedures, from domestic courts to international arbitration. There is no requirement that Afghan law apply and government contracts often specify the laws of other countries.

4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes

The Procurement Law and Procurement Procedure give the contracting parties broad discretion to choose the means for resolving disputes. The NPA encourages mediation through the Afghanistan Center for Dispute Resolution. Mediation or arbitration through other organization, both inside or outside of Afghanistan is permitted, and it is common for contracts to provide for arbitration through a recognized organization such as the International Chamber of Commerce, the Singapore International Arbitration Centre, or others. Disputes may also be heard by the Commercial Court in Afghanistan, or by a foreign court designated in the procurement contract.

5. Miscellaneous

5.1 Other Unique Aspects

Public procurement in Afghanistan is governed by a modern legal framework that continues to evolve. The system is designed to encourage open competition while also imposing a high degree of transparency and fairness. The procurement process is overseen by the National Procurement Authority, an independent entity that reports directly to the President of Afghanistan.

Kakar Advocates LLC

House #177, Lane 3, Street 4
Shahr-e-Naw
Kabul
Afghanistan



Tel: +93 (0) 783 300 400
Email: Office@KakarAdvocates.com
Web: www.kakaradvocates.com