

## **THE NEW TURKISH PUBLIC TENDER LAW**

The Turkish Parliament has enacted the new Public Tender Law No. 4734 (“Law No. 4734”)<sup>1</sup> on 4 January 2002, which entered into force on 1 January 2003. Effective as of that date, the provisions of the State Tender Law No. 2886 (“Law No. 2886”)<sup>2</sup> are not applicable in the public tenders which are within the scope of Law No. 4734. This study evaluates the differences between the provisions of Law No. 2886 and Law No. 4734, and sets forth the basic features of Law No. 4734.

### **I. INTRODUCTION**

Law No. 4734, which has been enacted as a part of the approximation efforts of Turkish legislation to European Union Law, mainly establishes the principles and procedures to be applied in tenders held by all public entities and institutions governed by public law or under public control or using public funds. Law No. 4734 mainly aims to provide for transparency, competition and fairness at public tenders.

One of the most important features of Law No. 4734 is the establishment of the Public Tender Authority (“Authority”) with public legal entity, which is administratively and financially autonomous. The Authority is assigned and authorized for the effective execution of Law No. 4734 and for the accurate application of the principles, procedures and transactions specified therein. The Authority is independent in its actions relating to the fulfillment of its duties, and no organ, office, entity or person can issue orders or instructions for the purpose of influencing the decisions of the Authority. The most important powers and duties of the Authority are to evaluate and conclude any complaints claiming that the transactions carried out by the contracting entity are in violation of Law No. 4734 and the related legislative provisions; and to prepare, develop and guide the implementation of all the legislation concerning Law No. 4734 and the standard tender documents.

### **II. COMPARISON**

There are a number of differences between the provisions of Law No. 2886 and Law No. 4734. Firstly, Law No. 4734 is extremely wide in scope. In addition to the scope of Law No. 2886, Law No. 4734 covers different administrations which have to act in conformity with this Law, for instance, the Public Economical Enterprises (*Kamu İktisadi Tesebbüsleri*), social security establishments (*sosyal güvenlik kuruluslari*), independent public agencies (*bagimsiz bütçeli kuruluslar*), legal persons which are empowered to carry out public duty and established by private laws are within the scope of Law No. 4734.

However, certain tenders have been excluded from the scope of Law No. 4734. For instance, the tender of tools, arms, military materials, equipments and systems for national defense, security and intelligence, and tender of goods, services or works, which are to be

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<sup>1</sup> Published in the Official Gazette No. 24648 dated 22 January 2002.

<sup>2</sup> Published in the Official Gazette No. 18413 dated 27 May 1984.

realized with foreign financing pursuant to international agreements, are not subject to the provisions of Law No. 4734.

Pursuant to Law No. 2886, “*unless definitely needed otherwise, tenders are to be organized in seasons when the most reasonable prices can be achieved.*” However, Law No. 4734 makes it more difficult for government agencies to issue tenders. Under Article 5 of Law No. 4734, for instance, the government agencies shall not be able to issue tenders unless adequate funds are allocated and the Environmental Impact Assessment report is prepared before commencing the tender process.

Law No. 4734 also brings certain threshold values, which have been increased by Communiqué No. 2003/1<sup>3</sup>: (i) 350.031.000.000 Turkish Liras (approximately 240.000 USD as of the date hereof) for the tender of goods and services by contracting entities included in the department of general budget and of annexed budget, (ii) 583.385.000.000 Turkish Liras (approximately 400.000 USD as of the date hereof) for the tender of goods and services by other contracting entities included within the scope of this Law, and (iii) 12.834.470.000.000 Turkish Liras (approximately 8.850.000 USD as of the date hereof) for the tender of works by any of the contracting entities included within the scope of this Law. These thresholds are used in the determinations to be made under Articles 13 and 63 of Law No. 4734.

Under Article 13 of Law No. 4734, tenders with approximate costs equal to or exceeding the thresholds stated above shall be published in the Official Gazette at least 25 days prior to the tender date. Article 63 of Law No. 4734 provides for some advantages to domestic contractors compared to the foreign investors: in tenders held under Law No. 4734, the contracting entities can bring provisions to the tender documents regarding the restriction of participation to only domestic bidders in case the tender is below the thresholds determined above. Further, in case the tender is above such thresholds, in tendering such services and works, a price advantage up to 15% for all domestic bidders shall be granted. However, this provision shall not be applicable for the domestic bidders who participate in the tender proceedings by forming joint ventures with foreign bidders.

Another difference between Law No. 2886 and Law No. 4734 relates to the tender methods. Law No. 2886 provided for the closed method (*kapali teklif usulü*), restricted method (*belli istekliler arasinda kapali teklif usulü*), open method (*açık teklif usulü*), concurrence method (*yarisma usulü*) and negotiated method (*pazarlik usulü*). However, Law No. 4734 removed the closed and restricted methods and brought a new procedure, namely the direct method (*dogrudan temin*), which may only be applied under certain conditions and without any public announcements. The most important difference in terms of tender methods between the two laws refers to the removal of the closed method by Law No. 4734. Because, pursuant Law No 2886, the closed method was determined as the essential method to be applied in tenders. The purpose of that method was to ensure the confidentiality of the bids, and thereby, to provide for free competition conditions.

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<sup>3</sup> Published in the Official Gazette No. 25000 dated 21 January 2003.

However, Law No. 4734 does not foresee the closed method, and identifies the open method as the essential tender method. In contrast, the open tender method for the purpose of Law No. 2886 was only applied in the tenders of which estimated value does not exceed a certain amount. The other three methods set forth under Law No 4734, namely the restricted, negotiated and direct methods, are regulated as secondary methods, and may only be applied under certain conditions. For example, under Article 20 of Law No. 4734, tenders regarding the goods, services or works for which open procedure is not applicable due to the complexity of the nature of the work and/or the requirement for high technology, can be conducted by restricted procedure. Moreover, by virtue of Article 21 of Law No. 4734, one of the cases in which the negotiated method may be applied is where no tender is submitted at the end of open or restricted procedures. In addition, Law No. 4734 limits the application of the restricted method by providing that *“in tenders conducted by restricted procedure, the notice of pre-qualification shall be published not less than twenty-five days in advance, in order to allow candidates to prepare their applications.”*

Another difference in the tender methods between Law No. 2886 and Law No. 4734 relates to the “Cost Plus Fixed System” (*Emanet Usulü*) which was among the most used systems in practice, although it was not regulated as a tender method under Law No. 2886. The Cost Plus Fixed System, which was provided in Article 81 of Law No. 2886 which states that certain works may be tendered for contract in Cost Plus Fixed System by the committees consisting of the officials of the administration who shall be responsible for giving payment orders, and other managerial staff. However, the Cost Plus Fixed System has been removed by Law No 4734.

There are also a number of terminological differences between Law No 2886 and Law No. 4734 which may have important consequences. For example, whereas Law No. 2886 uses the term of *“best price”* for the highest bid offered, Law No 4734 uses the term of *“economically most advantageous bid”*. The purpose of such terminological difference is to ensure that the economically most advantageous bid does not only refer to the highest price, but it also considers certain other criteria to determine the successful bidder. Another terminological difference of Law No. 4734 is that the term of *“estimated price”* has been replaced by the *“approximate cost”*. The main difference between the estimated price and approximate cost is that the latter is kept confidential until the tender is completed.

### **III. DRAFT LAW AMENDING CERTAIN PROVISIONS OF LAW NO. 4734 (“DRAFT LAW”)**

Law No. 4734 has been enacted by the previous Government. After the general election, the new Turkish Government has proposed a Draft Law to the Parliament on 25 December 2002, which is presently discussed in the relevant Committee. The Draft Law mostly limits the application of Law No. 4734 contrary to the original purpose and mainly provides for the following amendments:

(a) The purchase of goods and services to be made by the entities enumerated in Articles 2(b) and 2(d) of Law No. 4734, such as the public economic enterprises carrying out activities in energy, water, transportation and telecommunication sectors, will be outside the scope of Law No. 4734.

(b) Under Law No. 4734, the blood relatives up to third degree of the persons authorized for the tenders in the administration, and of those who have the duty to prepare, carry out, conclude and approve any and all kinds of matters with respect to the tender of the

administration, cannot participate in a tender directly or indirectly or as a subcontractor. However, the Draft Law only prohibits the participation in tenders of the relatives of the persons stated above up to second degree.

(c) The Draft Law provides for the “Cost Plus Fixed System” explained above, which was regulated under Law No. 2886, but was removed by Law No 4734. Under Law No. 4734, there is no any provision prohibiting the Municipal Economic Enterprises (“MEEs”) to participate in tenders issued by the Municipalities with which they are associated. However, under Article 54 of the Public Tender Regulation<sup>4</sup>, any entities such as foundation, association, or union which are associated with the administration issuing the tender, are prohibited to participate in those tenders.

(d) The Draft Law removes this prohibition of the Public Tender Regulation issued under Law No. 4734, and makes it possible for the MEEs to participate in tenders to be issued by the municipalities that they are associated with.

(e) Further, under Article 62(a) of Law No. 4734, in order for the investment projects which require more than 1 year to be tendered, the allocation for each year of such projects must already be included in the budgets of the relevant years, and the allocation of the first year shall not be less than 10% of the project cost. However, the Draft Law provides that the provisions of Article 62(a) stated above will not apply in the year of 2003.

#### IV. CONCLUSION

Law No. 4734 entered into effect on 1 January 2003, and effective as of that date the provisions of Law No. 2886 will not be applicable in the tenders which are within the scope of Law No. 4734. Law No. 4734 mainly aims to ensure that the public tender legislation of Turkey reaches the international standards, and in particular, the EU standards. For this purpose, an important number of differences exist between the provisions of Law No. 2886 and Law No. 4734. All these provisions, which have been explained above, are envisaged to ensure the transparency and competition during the public tenders. As stated in the press declaration dated 9 December 2002 of the Authority, the Turkish public tender legislation has fully been harmonized with the international and European Union standards. However, the new Government has proposed the Draft Law explained above to the Parliament on 25 December 2002, which seems to deviate Law No. 4734 from its original mission to a certain extent.

Law No. 4734 is mostly criticized for making discrimination between domestic and foreign bidders. As explained above, Law No. 4734 provides certain advantages to domestic contractors compared to the foreign investors. Furthermore, the domestic bidders who participate in the tender proceedings by forming joint ventures with foreign bidders cannot benefit from such advantages. Such discrimination between domestic and foreign bidders is in contradiction with the general objective of the Turkish Government of attracting foreign capital to Turkey. ⊕

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<sup>4</sup> Published in the Official Gazette No. 24821 dated 20 July 2002.

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