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The Procurement Law in the Middle East

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Abstract

This article aims to compare the different facets that emerged from an analysis of the Codes of Public Contracts present and effective in the Middle East. Specifically, the article below analyzes the proper meaning of the Public Procurement Code and its use, as well as the innovations introduced in recent years, especially in light of the public tenders called in some countries of the Middle East. In addition to a temporal *excursus* on the legal changes introduced in this public sphere, the document analyzes some of the fundamental Procurement Law of the Middle East starting from the one structured in the United Arab Emirates (UAE) to then arrive at the latest and more modern New Government Tender and Procurement Law (GTPL) in Saudi Arabia, which has currently attracted the attention of many legal analysts.

Keywords: UAE, Middle-East, Procurement-law, KSA, Contract, GTPL, Civil-law, Tender, Public, Subcontracting, Commercial, Liability.

1. INTRODUCTION

1.1 The Public Procurement into the different economic eras

Since 2008 and the outbreak of the economic crisis, the main threats to conventional supranational and international institutions, standards, values and norms have come from the intensification of previously marginal nationalist and protectionist movements. This is a search for nationalization which has intensified further with the Covid-19 health emergency, which has led various states of the world, mainly Western, to tighten and close international relations based on exports and imports with different levels of explicitness, aimed at rest of the world.

In this sphere of international relations, the problem has arisen of the effective management of public and state interests, which if previously it was also extended abroad, in order to break every economic and social barrier, in recent years has undergone the exacerbation of above, guaranteeing access, for example, to public tenders, only in the state/territorial context (*Anderson N., Robert D., Arrowsmith, Sue*).

Public procurement, in particular, has become a public policy and, as such, a key tool for the development of companies in different forms which require, in the design of procurement criteria, the respect of wider interests that go beyond those of end-users of the service provided, and like all public interests they have suffered their own territorial restriction and classified between West and East.

1.2 The Meaning of Public interest

Throughout the World, and mostly in countries that have a set of laws and codes that dictate the life of the individual and the community, we speak of interests with particular reference to the public interest and legitimate interest.

This indication of interest does not see the individual as an autonomous subject but instead as a member of a community of people and recalls the need for the rights of each one to be balanced with the interests of an entire community. The theories that define what these interests are are different, and the way in which they are found in every single and different country in the world is different.

The economy (in the guise of micro and macro) offers substantial help in accurately understanding the collective goods subject to protection even if the notion of interest cannot be provided unequivocally.

It is not possible to indicate unequivocally and definitively what the public interest is. The reason for

this affirmation lies in a series of factors, such as for example the historical evolution of a company, the needs of a company itself and the powers attributed by law to the public administrations responsible for pursuing a general interest.

The needs of a community vary according to the historical period and are influenced by external cultural influences.

This means that the public interest is nothing more than a value belonging to a community of people and therefore worthy of protection.

In order for a public interest to really be invalidated, it is essential that there is a legislative intervention which crystallises in a rule the type of value common to all and that there is an office that ensures that there is respect for this protection.

1.3 The GPA for the Public Procurement

The GPA is the main international binding document on the regulation of public procurement. Its main objective is to guarantee the international opening of public markets and, therefore, proclaims a principle of non-discrimination. It effectively requires the prohibition of discrimination based on the reason or origin of the enterprise (foreign affiliation or ownership) and based on the origin of goods and services and also establishes and strengthens aspects of good governance, due process and integrity in procurement procedure.

However, it can be argued that the practical effects of the GPA have been somewhat limited as the scope, applicability and intensity of enforcement are based on criteria such as the type of contract, its amount, the contracting entity, etc., and these criteria in turn vary from country to country. To this end, every two years, the members of the GPA provide the list of subjects covered by the annexes of the GPA, with possible partial revocation or modification of the coverage of the provisions of the GPA on the basis of reciprocity between States.

Therefore, there is ample flexibility for the parties to the GPA with regard to the commitments to access the design market even within the GPA, and the principle of non-discrimination becomes conditional. In this context, the principle of non-discrimination can take many forms, and the coordination of this principle to be established in practice requires effective control over the content (*Anderson N., Robert D.*)

1.4 The Procurement Law in Middle East

In the European Union, public procurement represents 14% of the gross domestic product while for Middle East and North Africa (MENA) region countries, this share is around 18%.

Many MENA countries have recently undertaken to improve their public procurement systems, including by modernizing their procurement policies and institutional frameworks, developing guidelines and building professional procurement capacity.

The Deauville Partnership initiative aims to assist Arab countries transition to develop strong governance structures through the domestic production of reforms aimed at supporting targeted actions to create effective reforms and effective transparent national governance systems. The MENA-OECD Public Procurement Network was established in September 2012 to achieve the objectives of the Deauville Partnership Initiative regarding the appropriate use of public procurement.

The MENA-OECD meeting on public procurement, held on 8 and 9 October 2013 in Rabat, Morocco, focused on developing an inventory of procurement systems in the six MENA countries of Deauville *(Syed Akhtar M., Meriem Ait Ali S.*).

The information obtained aims to provide a baseline useful for verifying aspects of national systems against the OECD by identifying current procurement reforms in MENA countries and identifying areas of common interest on which to direct the activities of the MENA-OECD Network on public procurement.

Only Morocco, Tunisia, Egypt and Oman have a regulatory body or authority overseeing public procurement. There is no public procurement authority in Algeria.

In Egypt and Oman, the authorities have their own budgets. Lebanon, Jordan and Kuwait do not have a regulatory body or authority to oversee public procurement. It should also be underlined that Lebanon is in the process of restoring a high bid committee while in Jordan, the procurement activity is largely carried out by three bodies: the Ministry of Labor Directorate General for Contracts (for building contracts), Ministry of General Procurement Department of Finance (for the purchase of goods) and the Joint Procurement Directorate attached to the Prime Minister's Office *(for the purchase of medicines).*

In terms of opportunities, with the exception of Lebanon, MENA countries, by law, prefer the participation of national companies in public tenders. In Tunisia, for example, offers submitted by Tunisian companies are privileged (even in public works contracts) to offers from foreign companies and products of any origin other than Tunisian, and this whenever these services and products are equal quality and as long as the price of Tunisian products does not exceed 10 percent of the amount offered by foreign companies and the prices of foreign companies. In Algeria, however, a share of the contracts must be awarded to national

companies. A margin of 25% is granted to Algerian products or companies owned mainly by Algerian citizens. Furthermore, if a need or service can be satisfied by a micro-enterprise, the contracting services are required to procure these products/services from a micro-enterprise. In Egypt the margin is 15% of the price.

In Kuwait, Egypt, Jordan and Lebanon (*where SOEs do not bid for tenders*) the public procurement framework does not favor SOEs, while in Algeria, Tunisia, Morocco and

Oman does. This raises competition concerns and limits the ability of the private sector to benefit from public procurement opportunities.

All countries have a regulatory framework that requires sourcing opportunities (*other than exclusive source or price quotes*) to be public and advertised in a national gazette or a widely circulated newspaper. And also the case of advertising on a central web portal with varying degrees of accessibility to relevant information

2. MATERIALS AND METHODS

2.1 The use of the Procurement Code around the World

Barriers to public procurement go far beyond traditional tariff barriers. By making an excursus on the different uses of the procurement code in the world, we can find, for example, the case of Argentina which applies price preferences for national goods in public procurement, or Australia which has not adopted non-discrimination as a key principle and maintains discriminatory measures, or again Brazil, where foreign companies must be legally established in Brazil to participate in national tenders and a preference for domestic goods and services of up to 25% or China, where there is an aggressive buy-Chinese policy which, in principle, only allows Chinese companies to participate in public tenders. All these examples impose some national preferences or quotas which explicitly limit the access of foreign companies to public procurement. These are examples, so to speak, of regulatory or de jure barriers.

But possible barriers could be less visible and indirect measures, such as bureaucratic requirements. In Chile, for example, the procedure for enrollment in the public contracts register is excessively bureaucratic. Obstacles include obtaining recognition of workers' academic qualifications, the need to produce numerous notarized documents (for example, certificates of good behavior of workers, certification of previous projects), and obtaining a local tax identification number. In Israel, English notices of international tenders are only published in print format in Israeli English newspapers and are not available online (*Auby, Jean-Bernard*).

3. RESULTS AND DISCUSSION

3.1 The Globalization progress

There is currently no effective transatlantic enforcement system capable of addressing administrative (non-regulatory) decisions not expressly directed but implicitly biased towards favoring domestic bidders. As per common imagination, the creation of permanent courts would imply a step forward that would require not only the momentary or punctual acceptance by the States of some terms and conditions, but the long-term tolerance of a particular level of obedience towards "superior" bodies" which could lead to future sovereignty restrictions. In the current situation, this appears somewhat problematic, and it cannot be ignored that, even if the concept has evolved, the primary legitimacy is still mainly based on the nineteenth-century idea of nation and sovereign state.

On the other hand, the supervisory bodies, judicial activism and judicial dialogue have proved to be one of the key elements for the creation of a certain degree of solidarity – an embryonic datum – on which other elements of harmonization can be taken up. However, the initiatives of this process must not obviate restrictive elements such as the prevalence of national identities at the origin. Judicial oversight could eventually replace other dispute resolution mechanisms internationally, such as diplomatic or even arbitrary, but the process must avoid missteps.

That said, and according to what has been explained above, in the globalization progress a great and important role is expressed by the GPA that has some characteristics that make it a particularly broad and permanent instrument compared to other international economic standards. The use and acceptance of this norm seems to offer such flexibility and vocation for permanence that it can be considered something more than a treaty. As some scholars argued, the GPA relies on participating countries accepting the fundamental legitimacy of all of its parts, rather than willingly opting out of particular arrangements or provisions deemed disadvantageous at a particular time.

3.2 UAE Procurement Law

The UAE Procurement Law, governed by Cabinet Decision No. 4 of 2019 (UAE Procurement Law) applies to procurement, supply contracts, works and the provision of services performed by the government, ministries or government-affiliated federal entities (*Farazi, Subika, Erik Feyen, and Roberto Rocha*).

It should be noted that Article 2 of the UAE Procurement Law excludes from its scope of application a particular number of activities which by their nature cannot be managed except internally. These are mostly areas related to procurement for military and pharmaceutical use, everything concerning the Ministry of Defense and Department of State Security, federal entities engaged in international agreements / obligations

relating to procurement performed by these entities, still certain fixed assets of the balance sheet related to ongoing construction, and to conclude partnership contracts with the private sector classified as partnership projects.

Locally, several Emirates have enacted autonomous procurement laws applicable to the Emirate concerned, however providing that any federal entity can be excluded from the provisions of the UAE Procurement Law by the Council of Ministers (*OECD*). For example, Dubai Law No. 12 of 2020 establishes the framework that regulates the procurement procedure for government entities in Dubai.

An article of profound importance is also the article 25 of the UAE Procurement Law, which recognizes different procurement methods, including tenders, direct solicitations, mumarasa (negotiation), competitive dialogue and competition, etc. and sets out the procedure to be followed for undertaking procurement by each of these methods.

Of no less interest, it should be noted that as an alternative to public procurement, in the UAE it is a common and very attractive practice to resort to public-private partnerships or PPPs, i.e. contracts between a government body and a private body for the implementation of a project public through service contracts, management contracts, financial leasing contracts, concession contracts, BOT contracts and so on (*Litan, Robert E., Michael Pomerleano, and Vasudevan Sundararajan*).

Such an alternative reflects the UAE's willingness to attract foreign investment and promote the country's economic growth, so much so that the UAE government issued Cabinet Decision No. 2/2017 which defines a high-level framework of guidelines and procedures for partnership with the private sector.

3.3 New Government Tender and Procurement Law (GTPL) in Saudi Arabia

The Kingdom of Saudi Arabia (KSA) is the largest economy in the Middle East and North Africa (MENA) region. It is good to point out that in recent years the economy of the Kingdom has grown to become the final destination for many investors from all over the world, thanks also to the very recent innovations not only in economic terms but also in terms of transparency.

To this end, a reform of public procurement has been devised which aims to underline the Kingdom's interest in the international economy accompanied by marketing and transparency safeguards (*Ivaldi, Marc, Frédéric Jenny, and Aleksandra Khimich*).

In fact, one can easily guess that the public procurement reform will stimulate the development of the non-oil sector of the Saudi Arabian economy, in line with Vision 2030. In this context, Saudi Arabia has introduced a new law on procurement and on Public Procurement (GTPL). The GTPL aims to protect public funds and stimulate economic expansion, as well as encourage investment by supporting equality and emphasizing integrity, fair competition and transparency.

The GTPL has introduced extensive reforms, adjustments and updates to the procurement process that are easily found in the principles of contracting and in its contractual procedures, as well as in the Etimad Portal, thus elaborating areas of specific interest which, following the reform, will make the system more fluid and efficient public.

The GTPL also introduces tougher penalties in case of delay in the execution of the contract and the possibility to resort to arbitration subject to approval by the Minister of Finance.

In addition, as far as subcontracting is concerned, similarly to the previous law, it is foreseen that in order to award or enter into a subcontract it is necessary to obtain the written consent of the government body and the Ministry of Finance (MoF). The Government Body, according to the new GTPL, will now be able to pay the subcontractor directly, and this precisely with a view to safeguarding work and the economy, as well as all economic operators.

The reform also requires the Ministry of Finance to draft a regulation governing the priority of local small and medium-sized enterprises (SMEs) and companies listed on Saudi financial markets, also adding that contracts must be paid in Saudi Riyals (*Hadi Melki, Sahar Saad*).

For the purposes of a slight foreign opening, however, it is envisaged that the Government Body, subject to the approval of the MoF, can accept another currency.

In any case, from what has been specified above, the Council of Ministers of Saudi Arabia has been keen to consolidate and underline the importance of giving priority, in the execution of works and contracts, to local SMEs and companies listed on the financial markets. For example, local SMEs are granted a 10% (10%) discount for submitting bids. In addition, the Local Content and Public Procurement Authority (LCGPA) must set up an exclusive portal for local SMEs and companies listed on financial markets, as well as other incentives for these local institutions.

A further significant addition and novelty dictated by the GTPL is the unified web-based portal. The e-Procurement System – Etimad Portal (Portal) is one of the pillars of the e-government of the Kingdom. The procedures relating to all the tenders and contracts

of Public Administration Bodies will be published on the Portal. It works to consolidate the tendering and public procurement process for all government sectors, improving transparency between government sectors on the one hand and between competing entities on the other. The portal allows the largest segment of competitors to access offers, strengthening competitiveness and improving the quality of government projects undertaken.

To summarize, the new GTPL represents a significant step towards development for the Kingdom of Saudi Arabia. While the GTPL provides for a centralized approach to public procurement, it enhances the Kingdom's position in the international market. Efficiency, transparency and equality generally attract international bidders and investors. With a view to even greater transparency, the Authority for Public Expenditure and Project Efficiency (EXPRO) has issued regulatory controls for the evaluation of offers.

4. CONCLUSION

To conclude, it should be noted that, from an international point of view of analysis of global procurement law, over the years we have witnessed a first opening, aimed at the creation of a single and universal market that saw a transition from nineteenth-century nationalism to utopian over nationalism sought by many States.

On the other hand, however, we have witnessed a clear distinction maintained between Western and Eastern countries, or rather between Europe, America, the East and the Middle East. In fact, there is a clear need to unify some states while leaving out others still with possible economic sanctions or even with barriers that in fact prevent the free movement of companies in the execution of national works and works.

There is currently no effective transatlantic enforcement system capable of addressing administrative (non-regulatory) decisions not expressly directed but implicitly biased towards favoring domestic bidders. But as we pointed out earlier, an artificial construction of institutional and legal enforcement, if it were not grounded in an abstract and, to some extent, irrational sense of community, would likely face a legitimacy crisis (*Goldman David*). The creation of permanent courts would imply a step forward which would require not only the momentary or timely acceptance by states of certain terms and conditions, but the long-term tolerance of a particular level of obedience to "superior" bodies which could lead to future sovereignty restrictions (*Hamada Koichi*).

On the other hand, the fact that the development of many states cannot be linked to such possible changes in globalization cannot be underestimated. A case of no less interest is in fact the most recently analyzed modification to public procurement dictated by the Kingdom of Saudi Arabia which, precisely in the vision of a national increase, has set limits in this area.

In fact, in a recent development, the Council of Ministers issued Resolution no. 377 of 03/06/1444H. approve the rules for public bodies that contract with companies that have no regional headquarters in the Kingdom (the "Rules"). Under the Rules, government entities are not permitted to contract with foreign companies that do not have a regional office located in the Kingdom, except as provided in the Rules. Works and purchases with estimated costs not exceeding SAR /1,000,000/one million or which are carried out outside the Kingdom are excluded from the scope of the Rules. The Regulation will enter into force on 19/06/1445H. corresponding to 01/01/2024G.

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