

Legal Alert

Public Procurement Law amended to protect subcontractors

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An amendment to the Public Procurement Law of 29 January 2004 went into force on 24 December 2013. This is one of several amendments to the Public Procurement Law in recent months, this time addressing subcontracting in performance of public contracts. The main purpose of the changes is to strengthen the right of subcontractors to obtain proper and timely payment of their fees.

The amendment introduces a legal definition of a subcontracting agreement in the Public Procurement Law, meaning an agreement made in writing, for consideration, involving services, supplies or construction work constituting part of a public contract, concluded between the contractor selected by the contracting authority and another entity (the subcontractor), and in the case of public contracts for construction work, also an agreement between a subcontractor and sub-subcontractors or among sub-subcontractors.

New obligations on both sides

The new regulations impose on the contracting authority a duty to set forth in the terms of reference for the procurement the requirements that must be met by a subcontracting agreement for construction work. If the contractor fails to comply with such requirements, the contracting authority may assert its reservations or objections. The amendment imposes on contractors an obligation to submit to the contracting authority any subcontracting agreements concluded for performance of contracts for construction work.

Contractor's fee

In the case of contracts providing for performance of construction work over a period exceeding 12 months, the contracting authority will pay the contractor its fee in instalments, upon presentation by the contractor of proof of payment of the fees due and payable to subcontractors and sub-subcontractors.

However, if the contract provides for payment of the contractor's fee as a whole, then the contracting authority will apportion the advances in accordance with the presentation of proof of settlement with subcontractors and sub-subcontractors. Lack of proof of payment of fees owed to subcontractors will result in withholding of the fee payable to the contractor.

If the contractor fails to pay the subcontractors, they will have the right to seek payment directly from the contracting authority. This will result in setoff against the contractor's fee accordingly. If the situation is repeated, it may provide grounds for the contracting authority to renounce the contract with the contractor.

Personal performance by the contractor

Another important regulation is the possibility for the contracting authority to require that the contractor personally perform key portions of a procurement for construction work or services or for work connected with arrangement and installation.

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