

HOW CAN THE FOREIGN BIDDERS PARTICIPATE IN TENDERS IN TURKEY?

1. Can Foreign Bidders Participate in Public Tenders in Turkey ?

The law governing the procurement legislation in Turkey is the Public Procurement Law no. 4734. It is possible for foreign bidders to participate in tenders through certain regulations in article 63 of this Law. In tenders below the "threshold value" which is the monetary limit specified annually in Turkey (*as of 2013 it is 811,897.00 TL for the purchase of goods and services and it is 29,769,751.00. TL for construction*) the contracting entity announcing the tender is free to determine whether the tender is open to foreign bidders or not. All tenders above this monetary value, ie, the "threshold value" are open to foreign bidders. Furthermore, in both cases, the contracting entity may apply price advantage up to a rate of 15 % in favor of domestic bidders¹.

However, it must be noted that in purchases requiring advanced technology, the contracting entities are generally not applying price advantage in favor of domestic bidders in order to ensure competition.

2. Aren't Enough Number of Foreign Bidders Participating in Public Tenders in Turkey ?

Upon evaluating the public procurements realized in 2012 in terms of value, 64.2 % of the tenders were open to foreign bidders. Out of these tenders amounting to 49.330.467.000 TL (approximately 21.5 m Euros) price advantage has been applied in tenders amounting to 20.057.000.000 TL in favor of domestic bidders and in 58,3 % of them the foreign bidders have participated in tenders on equal terms with domestic bidders.

However, upon examining the results of the public tenders and the amount of the contract amounts it is noticed that the participation of the foreign bidders is insufficient. Out of the total public procurements amounting to 83,844,466,000 TL in 2012 only 2,78 % (2.330.397.000 TL.) has been undertaken by foreign contractors. 45 % of this amount (1.051.825.000 TL.) has been undertaken by 265 contractors from European Union Countries. 55 % of it has been undertaken by 176 contractors from other countries. 56 % of the amount undertaken by European Union contractors is related to procurement of goods.

The reasons for European Union countries to have a high rate of participation compared to the other countries can be listed as the geographical proximity, presence of the Customs Union and a common long - standing history in the economic field, etc. However, in the tenders open to foreign bidders, although it is possible to participate only by placing the required documents and price offer letter in an envelope as the tender bid, lack of interest may be considered as bureaucratic drawback. Upon ignoring a number of bureaucratic obstacles (when we list them below, it shall be understood that they may not even be regarded as obstacles), it is a fact that participating in public tenders poses much less risk compared to other investments, Likewise, during the European Union accession process, the Turkish Public Procurement Legislation has been directly prepared in compliance with the laws of the European Union.

3. What are the conditions for Foreign Bidders to Participate in Tenders in Turkey ?

All tenders in Turkey are made through announcements. The public tenders must be announced in the web site of Turkish Public Procurement Authority (<https://ekap.kik.gov.tr/EKAP/Ilan/BultenIndirme.aspx>) before 7, 14, 21 or 40 days depending on the approximate cost of the work to be procured (according to the estimated cost of the tendered work). The conditions for participating in the tender can easily be seen through the mentioned announcements. The announcements include information about qualifications for participating in the tender, specifications, information about the public administrations organizing the tender and information about the work to be procured. We must indicate that the tenders to which foreign bidders are allowed to participate are generally made after 40 days of announcement.

The following issues must be taken into consideration while participating in the tenders;

3.1. In order to be able to participate in the tender, a copy of the tender document with each page approved must be purchased from the contracting entity or it must be downloaded via EKAP by using e - signature.

3.2. First of all, the specifications covering the features of the work to be procured shall be inspected.

3.3. If it is decided that there is no problem with the professional and technical necessities of the work subject to the tender, the conditions for participating in the tender, the qualification criteria, the administrative specification explaining the tender process and the draft contract covering the duration of the work shall be inspected.

3.4. The documents related to economic and financial qualifications required in the administrative specification for participating in the tender and the documents required for evaluation of professional and technical qualification are as follows;

3.4.1. The documents showing that the bidder is an “alive” and active entity and is authorized to submit an offer,

3.4.2. Work experience certificate (document proving that the bidder has previously performed similar works).

3.4.3. Documents related to economic and financial qualifications,

3.4.4. If the documents showing the work experience are requested during procurements of goods requiring a special manufacturing process, the “Production Capacity Report” shall also be required together with the documents showing the work experience.

3.4.5. During procurements of goods requiring a special manufacturing process, the documents related to the machinery and equipment and the capacity report, Quality Management System Certificate, Environmental Management System Certificate, Manufacturing Sufficiency Certificate and Service Competence Certificate issued by the relevant chambers of profession may be required. All of the above mentioned documents, with the exception of the documents related to machinery, tools and equipment may be requested if it is determined that they are issued for the good or work subject to the tender.

3.4.6. Documents showing that the candidate or the bidder is authorized to offer the good, which is the subject of the procurement.

3.4.7. Permits or similar documents for the market supply of the good subject to procurement may be requested as a document of qualification for participating into tender.

3.4.8. Depending on the nature of the procurement, arrangement can be made in the technical specification or the draft contract regarding the number and qualification of the personnel stipulated to be employed by the contractor.

3.5. Certification procedures of the documents issued in foreign countries and issued by the representative offices of foreign countries in Turkey with the exception of the documents issued by the representative offices of the Republic of Turkey located in foreign countries shall be made as follows:

3.5.1. Certification procedure means confirmation of the truth of the signature on the document, title and capacity of the person who has signed the document and that the seal and stamp on the document, if any, is same as the original.

3.5.2. Official documents issued by the countries that are party to the “Convention on Abolishing the Obligation to Certify Foreign Official Documents” and included within the scope of Article 1 of this convention shall be exempted from the approval of the Consulate of the Republic of Turkey in the country where it is issued or the Turkish Ministry of Foreign Affairs provided that they bear the “Apostille” seal.

3.5.3. If there is an agreement or convention between the Republic of Turkey and any other state or states containing provisions that require certain proceedings in respect of certifying the signature, seal or stamp on the documents, the certification procedures of the documents issued by these countries may be carried out in accordance with the provisions of this agreement or convention.

3.5.4. The signature, seal or stamp on documents issued in foreign countries, which do not bear an “Apostille seal” must be certified by the Consulate of the Republic of Turkey in the country where it is issued, or respectively by the representative office of the issuing country in Turkey and the Ministry of Foreign Affairs of the Republic of Turkey. The documents issued in countries where Consulate of the Republic of Turkey is not present, must be certified respectively by the Ministry of Foreign Affairs of the issuing country, the Consulate of the Republic of Turkey responsible from relations with that country or by the representative office of the issuing country in Turkey and the Ministry of Foreign Affairs of the Republic of Turkey.

3.5.5. The documents issued by the representative office of the foreign country in Turkey must be certified by the Ministry of Foreign Affairs of the Republic of Turkey.

3.5.6. Procedures may not be carried out on the basis of the documents issued by the Honorary Consulates.

3.5.7. The unofficial documents exempted from certification shall be indicated by the contracting entity in prequalification specification or in administrative specification.

3.6. Translations of documents to be submitted within the scope of application or offer and certification procedure of these translations shall be made as follows:

3.6.1. The documents issued in a foreign language and submitted by native bidders and real persons who are Turkish citizens and / or by joint ventures or consortiums which have real entity partners established under the laws of the Republic of Turkey must be translated by sworn translators in Turkey and certified by the public notary. These translations are exempt from certification by the Ministry of Foreign affairs of the Republic of Turkey.

3.6.2. Translation of the documents issued in a foreign language and submitted by the foreign bidders and certification of these translations shall be made as follows:

3.6.2.1. Certification of the translations means confirming that the signature of the sworn translator who has made the translation and the seal or stamp on the document, if any, are same as the original.

3.6.2.2. If the documents are translated by the sworn translators in the country where they are issued and if they bear an “Apostille seal” then these translations shall not be subject to any further certification. If these translations do not bear an “Apostille seal” the signature on the translations and the seal or stamp, if any, must be certified by the relevant Consulate of the Republic of Turkey in that country, or respectively by the representative office of the issuing country in Turkey and the Ministry of Foreign Affairs of the Republic of Turkey.

3.6.2.3. If there is an agreement or convention between the Republic of Turkey and any other state or states containing provisions that require certain proceedings in

respect of certifying the signature, seal or stamp on the documents, the certification procedures of translations of the documents may be carried out in accordance with the provisions of such agreement or convention.

3.6.2.4. If the documents issued in countries where Consulate of the Republic of Turkey is not present, are translated by a sworn translator in the issuing country and if the translation does not bear an “Apostille seal”, the signature and the seal or stamp, if any, on the translation must be certified respectively by the Ministry of Foreign Affairs of the issuing country, the Consulate of the Republic of Turkey responsible from relations with that country or by the representative office of the issuing country in Turkey and the Ministry of Foreign Affairs of the Republic of Turkey.

3.6.2.5. If the documents issued in a foreign language are translated by the sworn translators in Turkey and certified by the public notary, such translations shall not be subject to a further certification.

3.7. Certification procedure of the documents related to Quality and Standard shall be made as follows:

3.7.1. The documents issued in foreign countries by the certification bodies accredited by the national accreditation bodies included in the “International Accreditation Forum for Mutual Recognition Agreement” or by the accreditation bodies included in the “International Laboratory Accreditation Cooperation for Mutual Recognition Agreement” shall be exempted from certification provided that they are submitted together with a confirmation letter obtained from the Turkish Accreditation Authority. Such documents issued in a foreign language must be translated by sworn translators in Turkey and certified by the public notary. These translations are exempt from certification by the Ministry of Foreign affairs of the Republic of Turkey.

3.7.2. The certification procedure and translation of quality and standard related documents, which are issued in foreign countries and which may be submitted without obtaining a confirmation letter from the Turkish Accreditation Authority is subject to the principles indicated in fourth and fifth paragraphs.

4. Who May and Who May not Participate in Public Procurements in Turkey ?

The following persons are not definitely allowed to participate in public procurements in Turkey:

4.1. Those who are temporarily or permanently prohibited from participating in public procurements pursuant to provisions of the Law or other laws; and those who have been convicted of the crimes under the scope of terror or of organized crimes, or of crime of bribing public officials in their own country or in a foreign country.

4.2. Those decided to be involved in fraudulent bankruptcy by the relevant authorities.

4.3. The contracting officers of the contracting entity carrying out the procurement proceedings, and the persons assigned in boards having the same authority.

4.4. Those who are assigned to prepare, execute, finalize and approve all tender proceedings of the Contracting Entity related to work, which is the subject of the tender.

4.5. Spouses, blood relatives up to the third degree, relatives of kinship by marriage up to the second degree, as well as adopted children and adopted parents of the persons mentioned above.

4.6. The partners and the companies of the persons mentioned in the above paragraphs. (Except for joint stock companies where they are not a member of the board of directors or do not hold more than 10 % of the capital).

4.7. Bidders of the foreign countries mentioned in the resolutions of the Council of Ministers.

Bidders who take part in the tender despite these restrictions shall be excluded from the tender and their bid bond shall be registered as revenue. Furthermore, if the tender is awarded to one of these bidders due to the fact that it is not detected at the stage of evaluation of the bids, their guarantee shall be registered as revenue and the tender shall be cancelled.

5. How to Apply to the Tenders in Turkey and How to submit Offers ?

5.1. The offer letters shall be submitted in writing and shall be signed. It must be stated in the offer letter that the tender document is fully read and accepted, the offer price must be written clearly and be consistent with each other in figures and in words, it must not contain any scraping, erasure and correction and the offer letter must be signed by the authorized persons by indicating their names, surnames or trade titles. The offer letters shall be prepared on the basis of the standard forms annexed to the tender document.

In tenders, the bidders shall provide bid bonds in an amount to be determined by them, which shall not be less than 3 % of the offered price. The following may be submitted as bid bond;

- Turkish Lira at circulation,
- Letters of Guarantee issued by banks and by private finance institutions.
- Domestic Borrowing Bills issued by the Undersecretariat of Treasury and certificates issued in lieu of these bills.

All documents including the offer letter and bid bond required as a condition for participation to the tender shall be placed in an envelope. Name, surname or trade title of the bidder, full address for notification, the name of the work related to the offer and full address of the contracting entity holding the tender shall be written on this envelope. The sealed part of the envelope shall be signed and sealed by the bidder. The offers shall be submitted to the Contracting entity in return for receipts with sequence numbers until the time of the tender stipulated in the tender document. The offers submitted after this time shall not be accepted and returned to the bidder without opening. The offers may also be sent via registered mail. The offers sent by mail must be received by the contracting entity until the hour specified as deadline in the tender documents. The date and hour of the receipt of the offers that will not be included in the procurement proceedings due to postal delays shall be determined through an official report. The offers submitted may not be returned and replaced for any reason except in cases where an addendum is issued.

5.2. The receipt, opening and evaluation of the offers shall be carried out in line with the following principles:

5.2.1. The Tender commission shall examine the offer envelopes in their order of receipt. The envelopes that do not meet the above requirements shall be determined through an official report, and shall not be accepted for evaluation. The envelopes shall be opened in the presence of the participants and bidders in the order of reception.

5.2.2. It shall be checked whether the documents of the bidders are complete, and their offer letters and the bid bonds are in compliance with the described procedure. The bidders whose documents are deficient or whose offer letters and bid bonds are not in compliance with the described procedure shall be determined through an official report. The bidders and their offer prices and the amount of estimated cost shall be announced. The official report related to these proceedings shall be signed by the tender commission. At this step, no decision shall be made with regard to rejection or acceptance of any of the offers. Also, the documents presented as the tender offer may not be corrected or completed by the bidders. The session shall be closed for immediate evaluation of the offers.

5.2.3. Upon request of tender commission, the contracting entity may ask the bidders to clarify their offers in writing on the unclear aspects of the offer for using them during examination, evaluation and comparison of the offers. However, this clarification shall not be required and made with the intention of changing the tender price, or converting any ineligible offer according the conditions in the tender documents to an eligible one.

5.2.4. At evaluation step of the offers, first of all, decision shall be taken for exclusion from evaluation of the offers of the bidders, whose documents are determined to be incomplete or whose offer letters and bid bonds are determined to be non - compliant with the requirements. However, in case if there is missing information in the documents, provided that this missing information does not affect the gist of the offer; the contracting entity shall request the bidder in writing to furnish these missing information in a given period of time. The bidders who fail to complete such missing information within the allowed period of time shall be excluded from the evaluation and their bid bonds shall be registered as revenue. Following this first - evaluation and proceedings, the offers of bidders with complete and appropriate documents and appropriate offer letters and bid bonds shall be evaluated in details. At this step, the offers shall be examined for their conformity with the qualification criteria determining the capacity of the bidders to perform the contract, as well as with the conditions set forth in the tender documents and whether an arithmetical error exists in unit price offer tables. The offers that are found ineligible and the offers with arithmetic errors in unit price offer tables shall be excluded from the evaluation.

5.2.5. The “economically most advantageous” offer is determined either solely on the basis of price or together with the price by taking into account the non - price factors together with the price. Upon considering the feature of the commodity which is the subject of the tender, factors such as operation and maintenance costs, cost - effectiveness, productivity, quality and technical merit may be determined as non - price factors. The method of calculation with the monetary values or relative weights of the non - price factors and the documents and/or sample to be submitted for being able to make the evaluation related to these factors shall be clearly indicated in the administrative specification. Economic and financial qualification criteria and work experience certificates may not be stipulated as a non - price factor. The non - price factors may not be determined in a manner that shall restrict the competition by indicating a brand or model as basis. A descriptive document with justifications shall be prepared by the unit or the officials introducing the regulations related to the non - price factors, the monetary values or relative weights of these factors and the calculation method and this document shall be annexed to the tender approval document.

5.2.6. An arrangement can be made stating that only domestic bidders may participate in procurement of commodities, where the approximate value is below the threshold value. Furthermore in tenders open to domestic bidders only, up to 15 % price advantage may be applied in favor of the domestic bidders offering domestic goods. In procurement of goods, an arrangement can be made stating that all bidders may participate without taking the approximate cost into consideration and in these tenders price advantage up to 15 % may be applied in favor of the bidders offering domestic goods. The percentage of the price advantage to be applied in favor of those offering domestic goods shall be announced in tender or prequalification invitation or in the administrative specification.

5.2.7. As a result of the evaluation, the contract shall be awarded to the bidder who submits the “economically most advantageous” offer. Within maximum five working days following the date of the decision, the contracting officer shall approve or cancel the “tender decision”, indicating clearly the grounds for cancellation. With the exception of the bid bond, the offer and application documents submitted by the bidders shall not be returned after finalization of the tender. “The finalized tender decision” shall be notified to all bidders

who have submitted an offer, including the bidder to whom the contract is awarded, within maximum three days as of the date of its approval by the contracting officer.

5.2.8. The contract shall not be signed unless ten days have passed following the notification of the tender result to all bidders. , the successful bidder shall be notified to sign the contract by issuing a performance bond at a rate of 6 % within ten days following the date of notification. In case of foreign bidders twelve days shall be added to this period.

5.2.9. The successful bidder is obliged to fulfill its legal obligations and to sign the contract. If this obligation is not fulfilled, the bid bond of the successful bidder shall be registered as revenue and prohibition action shall be started against him.

5.2.10. If the bidder that is awarded the contract fails to submit the documents required in the tender document until the deadline for application and / or the tender date or fails to submit the performance bond or does not sign the contract, then the contract may be concluded with the second economically most advantageous bidder if it is found suitable by the contracting officer. Other than the performance bond, the legal taxes (Decision stamp duty 0,569 %, contract stamp duty 0,948 % and other current taxes, if any) shall also be collected from the bidder, to whom the contract is awarded

5.2.11. After signing of the contract, the result of the tender shall be published in the official website of the Public Procurement Authority.

6. What are the Conditions for Excluding the Foreign Bidders from Evaluation in Tenders ?

The foreign bidders shall be excluded from the tender proceedings if it is determined that they are in the following situations:

6.1. Those who are bankrupt or being liquidated, whose affairs are being administered by the court, who have announced an arrangement with creditors, who have suspended business activities or who are in a similar situation under legislative provisions applicable in their own countries,

6.2. Those whose bankruptcy is declared, who are the subject of an order of compulsory liquidation, or are under court administration due to debts to creditors or who are in similar situations as per the legislative provisions applicable in their own countries,

6.3. Those who have finalized social security premium debts as per the legislative provisions applicable in their own countries,

6.4. Those who finalized tax debts as per the legislative provisions applicable in their own countries,

6.5. Those who have been convicted by a court in connection with their professional activities during a period of five years prior to the date of the tender,

6.6. Those who have been proven by the Contracting Entity to have performed activities in violation of business or professional ethics in works realized for the Contracting Entity during a period of five years prior to the date of the Tender,

6.7. Those that have been prohibited as of the date of the Tender from professional activities by the chamber in which they are registered in accordance with the provisions of the relevant legislation,

6.8. Those who fail to submit the information and documents mentioned by the contracting entity or those who have been determined to have submitted misleading information and / or fake documents.

7. How Does the Contract Performing Process of the Successful Bidder and the Public Organization Work ?

As a result of the tender processes carried out, a lump - sum contract over the total price proposed by the bidder shall be concluded for the entire work, the detailed specifications and quantities of which are determined by the contracting entity.

The contract may not be amended.

It shall be possible to assign the Contract upon written consent of the Contracting Officer under compulsory circumstances. However, the transferees must meet the requirements of the initial tender. Furthermore, with the exception of the assignments made due to the change of the name and status, no other contract may be assigned or taken over by the same contractor for a period of three years as of the date of assignment of a contract.

If, after signing the contract, the contractor notifies in writing, with the justifications that he is unable to perform his obligations due to insolvency, for reasons other than force majeure, the performance bond and the additional performance bonds, if any, shall be registered as revenue, the contract shall be terminated and its account shall be liquidated according to the general provisions without any need for serving a further protest.

The cases that can be accepted as force majeure are; natural disasters, legal strikes, general epidemic diseases, announcement for partial or general mobilization and other cases to be determined by Public Procurement Authority, if necessary. For the contracting entity to be able to accept any of the circumstances stated above as force majeure, including cases of granting term extension and contract termination; such cases must not be caused due to any fault attributable to the Contractor, must have the nature to hinder the performance of the contract, the contractor must not have sufficient power to eliminate this hindrance, the contractor must notify the Contracting entity in writing within twenty days following the date of occurrence of the force majeure event and it must be documented by the competent authorities.

However, if there is a relevant provision in the contract; the relevant contracting entity may perform inspections at certain steps and intervals on works requiring production or manufacturing processes, for purposes of determining whether such processes are being carried out in compliance with the quality and specifications set forth in tender documents, provided that such inspections shall not revoke the powers and responsibilities of inspection and acceptance commissions.

Inspection and acceptance commissions consisting of at least three persons to be formed by the contracting entities shall perform inspection and acceptance procedures on delivered goods, services or works or on completed work. Inspection and acceptance procedures shall not be performed unless the goods or any work done has been delivered to the contracting entity by the contractor.

Once it has been determined that the contractual obligations have been fulfilled in accordance with provisions of contract and tender documents and that the contractor is not involved in any debt to the contracting entity in connection with the concerned contract, the performance bond and the supplementary performance bond, if any, shall be returned gradually.

In construction contracts, half of the performance bond shall be returned following elimination of the deficiencies and errors, if any, and the approval of the provisional acceptance protocol, and the other half shall be returned upon after submitting a certificate of clearance from Social Security Institution and after approval of the final acceptance protocol .

In contracts other than construction contracts, after determining that the certificate of clearance has been brought from the Social Security Institution; if there is a warranty period for the goods received or the work performed, half of the performance bond shall be returned and the other half shall be returned after expiry of the warranty period, and if there is no warranty period the total amount of the performance bond shall be returned.

The performance bonds, which are not requested by the contractor despite written warning of the contracting entity and thus not returned within two years as of the date of final calculation and approval of the final acceptance protocol in construction contracts and after expiry of the warranty period, if any, in other contracts, shall become null and void and shall be returned to the issuing bank. Securities other than the performance bond shall be entered as revenue to the Treasury.

The information summarized above is generally related to open tender procedure as the tender procedure and procurement of goods as the subject of procurement but it can be easily stated that it is very similar to the other tender procedures (restricted tender procedure and commission bargaining tender procedure and to the other subjects of procurement (services and works contracts) It is a fact that the tenders held in Turkey are realized in utmost transparent manner due to EKAP system. (www.kik.gov.tr) It is possible to follow - up the existing tenders through internet and to send the offers through mail.

8. What kind of Organization must be Established in Turkey for being Able to participate in Tenders ?

There are two important factors of following up the tender process and legislation by foreign bidders and for preparation of offers for these tenders. These are;

- Legal and financial factors,
- Foreign Language and Technical Factors.

For the foreign bidders planning to participate in the tender, it is possible to get a share from a market of 70 - 80 billion lira in each year, by managing these factors in good manner.

The following staff is needed in offices to be established for participation in tenders in Turkey:

- Employees speaking a foreign language, who has very good knowledge on the goods, constructions, or services produced by the company or supplied to Turkey;
- Financial consultants,
- Legal consultants with expertise on the subject of tenders