



Construction

in 21 jurisdictions worldwide

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Joint ventures

- 1 Must foreign contractors enter into a joint venture with a local contractor in order to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

Under Turkish law, foreign construction companies may tender for construction works without local contractors and receive remuneration in consideration of their work. It is not necessary, but advisable, to form a joint venture with a local contractor. However, foreign engineers and architects who wish to work on a construction project in Turkey may need to obtain a work permit, comply with the rules of architects' and engineers' associations in Turkey and be temporarily registered with such associations.

In public tenders, the authority may require that the foreign contractor form a joint venture with a local partner to participate in the public tender. If not otherwise required by the authority, the foreign contractor may control the joint venture company in such cases.

To operate in the construction sector, foreign contractors may also incorporate or acquire a corporation in Turkey. Such a company, even if it is wholly owned by a foreign investor, will be treated like a Turkish company and enjoy the same rights as other Turkish companies under the Foreign Direct Investments Law.

Foreign pursuit of the local market

- 2 If a foreign contractor wanted to set up an operation to pursue the local market, what are the key concerns you would counsel them to consider before they took such a step?

It would be advisable for a foreign contractor to become acquainted with Turkish tax legislation, corporate governance rules, the labour market, and the requirements for operational licences in the relevant sector. Especially in the construction sector, the contractor would need to establish relations with local contractors before entering the Turkish market. Acquiring an existing corporation or establishing a joint venture with a reputable and institutionalised

local contractor may give newcomers a considerable advantage.

Turkey has adopted a liberal foreign investment system, and procedures for establishing companies, branches, or liaison offices are rather simple.

Licensing procedures

- 3 Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

In principle, foreign contractors are not required to hold a special licence to engage in the construction business. In public tenders, however, the relevant authority may request that the bidder company have certain qualifications. Construction companies would need to comply with general licensing requirements and hold certain licences to open and operate a workplace.

Foreign architects or engineers who wish to work in Turkey should hold diplomas from accredited universities, obtain academic equivalence certificates and should not be disqualified from working in their field. Nevertheless, key foreign personnel for public projects may be exempted from certain requirements, or foreign professionals may work on projects by engaging a Turkish correspondent.

Labour requirements

- 4 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project? At the end of a project will there be termination payments assessed against a foreign contractor?

Foreign and Turkish contractors are subject to the same mandatory rules of the Turkish labour legislation when operating in Turkey. There are no statutory regulations that specify the minimum number of local employees to be employed on a particular construction project. However, in practice, employment of blue-collar foreign workers would not be permitted.

Labour contracts for employees who have been working for more than six months under an indefi-

nite-term contract can be terminated by the employer by complying with notice periods, which vary from two to eight weeks. Employees with definite-term contracts may not be entitled to notice pay, but may be awarded compensation if they are laid off before the expiry of their contract term.

Furthermore, an employee with more than one year of service may be entitled to receive severance pay. However, payment of severance pay is subject to a ceiling amount.

Lastly, employees should also be paid for any unused annual leave and unpaid overtime payments upon termination of their contracts.

Local labour law

5 Are there any labour laws applicable to construction and infrastructure projects?

The gross monthly minimum wage determined by the Ministry of Labour and Social Security is applicable to construction and infrastructure projects.

Under Turkish law, working hours including overtime cannot exceed 11 hours a day. Employees working more than 45 hours per week are entitled to an overtime payment, which is calculated as 50 per cent over the usual hourly wage.

However, according to the Turkish labour legislation, construction workers in certain industries with dangerous labour conditions should not work more than 7.5 hours per working day, and women and persons under 18 cannot be employed in construction.

Health and safety regulation

6 Are there any specific health and safety rules regulating the construction industry?

Construction work is classified as fifth degree dangerous work and is, therefore, heavily regulated by the health and safety rules issued by the Ministry of Labour and Social Security. Rules may vary depending on the nature of the project and the industry involved.

Generally, contractors and subcontractors are obliged to ensure that health and safety rules are complied with, and to train the employees of any possible risks, necessary precautions, and legal rights and liabilities.

Furthermore, a coordinator should be appointed to prepare a health and security plan adequate for the needs of the construction project.

Close of operations

7 If a foreign contractor, who has been legally working, decided to close its operations, what are the legal obstacles to closing up and leaving?

In principle, there are no legal obstacles to foreign

contractors closing their operations in Turkey. The procedures for closing vary for companies, liaison offices and branches. The liquidation procedure for companies owned by foreign investors is almost the same as for local establishments, and it may take up to one year.

However, contractors that wish to close their business would need to settle their accounts with their subcontractors, customers, etc, and comply with notification requirements under labour, union, and social security legislation, as well as tax laws.

Furthermore, contractors that are party to a shareholders' or joint venture agreement may need to obtain their partners' approval and comply with procedures foreseen in the agreements or laws to close their operations in Turkey.

Standard forms of construction contracts

8 What standard-contract forms that apply to multinational construction projects are used?

Although Turkish construction contracts are not standardised, tender specifications used for public works are frequently taken into consideration in local private sector projects.

During the last decade, the influence of foreign financiers and the contractors has led to the adoption of the standard form contracts of the International Federation of Consulting Engineers (FIDIC) in some multinational projects after amendments required by Turkish laws have been made. The most frequently used FIDIC contract is the Condition of Contract for Construction, which is also known as the 'Red Book'. Additionally, the standard contracts of the Institute of Civil Engineers of England are also used in Turkey.

For public construction projects, two standard form contracts are used as per the Public Procurement Contracts Act (PPCA): the turnkey lump-sum price contract, and the unit price basis contract. However, PPCA contracts are not applicable for public projects that are financed by international institutions or foreign governments.

Allocation of construction risks

9 In typical construction contracts, who assumes the risk of material price escalation and shortages?

In principle, the risk is borne by the contractor if the project is a turnkey project. However, the contractor may request an increase of the project price or termination of the contract if an unforeseeable increase in material prices prevents the contractor from completing the project. For example, an increase of 80 per cent is found to be unpredictable by scholars.

Contractors are required to act as prudent businesspeople and assess risks before entering into contracts. Therefore, in the absence of contractual

provisions, price escalations are generally borne by contractors unless the project owner agrees to supply materials.

Competition

10 Do local laws provide any advantage to local contractors in competition with international contractors?

The Public Procurement Law (PPL) and the PPCA adopted in 2002 were enacted in line with the EC Treaty principles of free competition and transparency. Public tenders are open to all domestic and foreign bidders; however, projects with an estimated value below the thresholds stipulated in the laws (which is approximately €10 million at present) are subject to a national price preference up to 15 per cent. Accordingly, local contractors may enjoy an advantage in such tenders.

This being the case, a number of sector-specific laws also lay down procurement regimes deriving from the PPL, notably for the restoration of cultural heritage, consultancy services in privatisation, and emergency interventions related to sea pollution by petroleum. Furthermore, foreign contractors that provide international finance for public projects are not subject to the PPL and enjoy an advantage over local contractors.

PPPs and PFIs

11 In certain forms of construction such as PPP and PFI, where the contractor has a private obligation to long-term quality control and maintenance, how is the risk of additional future costs for quality control and maintenance considered and mitigated?

In public contracts subject to the PPL, contractors are required to provide a warranty for 15 years after the completion of work. Quality control and maintenance obligations in internationally financed public projects differ based on the contract. However, in general, a warranty period of five years would be applicable.

Contractors may charge for maintenance services provided after the completion of projects, subject to the terms of their contracts.

Payment of fees

12 How may a contractor secure payment of its fees by an owner? May the contractor place liens on the land or the property itself?

Contractors are empowered to create mortgages on land or on properties, pursuant to the Turkish Civil Code to secure the payment of fees. Contractors who have completed construction may request the registration of mortgages within three months following the completion of the required work if the project owner and the landowner are the same.

If the contract price is to be paid upon completion of the work, contractors may also establish temporary mortgages on properties.

Also, depending on the project and the contractors' negotiating skills, project owners may be persuaded to provide contractors with security, eg, a bank letter of guarantee, to secure payment.

Tort claims and indemnity

13 Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even if the general contractor is negligent?

Under Turkish law, general contractors will be liable for the misconduct of, and damages caused by, subcontractors and subworkers employed by them.

The general contractor may ask for reimbursement of its losses from the subcontractor if losses were caused due to the subcontractor's or its employees' fault. The reimbursement of losses may be limited if the general contractor is found to be negligent as well. In any event, waivers from possible compensation and indemnification requests for gross negligence, wilful misconduct or unlawful acts are not enforceable under Turkish law.

Insurance

14 Do local laws require the maintenance of any specific type of insurance on construction projects?

In public construction contracts, there are two types of mandatory insurance to be maintained by the contractors: all-risk construction insurance and third-party liability insurance.

All-risk insurance should cover the contractor's liabilities from the commencement of construction until completion. The insurance amount will be based on the project price. The insurance amount for third-party liability insurance will be determined by insurance companies on a project-by-project basis.

Moreover, the draft Zoning Law and the draft Building Inspection Law require two types of mandatory insurance. If these laws are enacted, architects, engineers, and other professionals working for a construction project will need to hold professional liability insurance, and the material providers will need to hold product liability insurance.

Lastly, upon completion of the construction, owners must obtain earthquake insurance for their buildings.

Insolvency and bankruptcy

15 If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor instated to prevent delay on the project?

In principle, a contractor's bankruptcy is not stipu-

lated as a reason for the automatic termination of a contract under the law, but it is possible to state otherwise in the contract.

However, if the contract was executed relying on the contractor's personal qualifications, then the contract may be terminated upon the contractor's insolvency. In such a case, if a portion of the construction was completed, the contractor may receive payment for the completed work, provided the insolvency was not the contractor's own fault. Otherwise, the contractor may be required to compensate the project owner for its losses and also be liable for any contractual penalty contained in the contract.

In public projects, the project owner may terminate the contract, and, in addition to its compensation rights, may cash in the performance bond provided by the contractor.

Contracting with government entities

16 Have government agencies that deal with contractors ever sought refuge under sovereign immunity and avoided paying a contractor disputed amounts on that basis? If so, is there recourse in the local courts?

Government agencies and private companies are treated alike if the dispute arises from a commercial contract. Therefore, government agencies that deal with contractors may not seek refuge under sovereign immunity and refrain from paying a contractor's unpaid fees.

An agreement between a government agency and a contractor is subject to the provisions of private law. This means that in case of any dispute, the contractor may initiate an action in a civil court. If the contract contains an arbitration clause, the parties may apply for arbitration.

Bribery

17 If it is proved that a contractor has delivered something of value or bribes to facilitate the award of a construction contract to that company, will the contract be enforceable under local law? Will that contractor suffer any other adverse consequences?

If a contractor is convicted on charges of bribery in a public tender after execution of a public contract, the contract is terminated and the performance bonds provided by the contractor would be cashed in. However, if 80 per cent of the work was completed by the contractor and completion of the remaining work cannot be undertaken by another contractor, the government agency may request the completion of the project in the public interest or under certain other conditions.

Persons convicted on charges of bribery in public tenders face a prison term of five to 12 years and are banned from public tenders.

Arbitration

18 Can a government agency commit to arbitrate disputes privately or must matters go to court?

Government agencies are not obliged to go to court for disputes arising from construction contracts. They may also apply for arbitration to settle disputes arising from a contract if the contract contains an arbitration clause.

Foreign corruption

19 What are the prohibited acts that your laws limit? What may your jurisdiction's contractors do locally and abroad, and what is prohibited?

Turkey is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the United Nations Convention against Corruption, and the Council of Europe Criminal Law Convention on Corruption. Under Turkish law, it is an offence to provide, offer to provide, or arrange for a benefit to be offered to a person if the benefit is not legitimately due to that person and the offer is made to influence a foreign public official to obtain or retain business or grant to the bribe-giver a business advantage. Convicted persons may face a maximum prison term of 12 years.

Force majeure and acts of God

20 Under local law, are contractors excused from the obligations of the contract if they cannot work because of events beyond its control?

The concepts of force majeure and acts of God are not defined under Turkish laws. However, under Turkish laws, in case an unpredictable event occurs beyond the control of the debtor and causes impossibility of performance, debtors would be excused from their obligations under the contract, in the absence of any fault attributable to them.

If debtors are in a position to continue to perform their duties after cessation of the event beyond their control, they would be entitled to an extension of time, but obliged to fulfil their obligations.

In construction projects where a lump-sum price is agreed to, the courts may grant the contractors the right to terminate the contracts if a force majeure event causes impossibility of performance. If the construction is totally destroyed as a result of a force majeure event prior to delivery, the contractors cannot request remuneration for their works or expenses, save where the owner defaults on taking over the construction.

Accordingly, in the absence of contractual provisions, the courts or arbitrators would decide whether there exists an event beyond the parties' control excusing them from fulfilling their obligations or not. Therefore, it is highly advisable to include provisions

in the construction contract defining force majeure events and their consequences.

Dispute resolution mechanisms

21 Other than contractual international arbitration, what dispute resolution procedures are used successfully to solve construction disputes?

For local construction projects, the jurisdiction of the Turkish courts is commonly accepted. Alternative dispute resolution procedures are not generally preferred in construction projects, except for multinational projects, which usually contain international arbitration clauses.

Courts and tribunals

22 Are there any specialised courts or other tribunals that resolve construction disputes?

There are no special courts or other tribunals to resolve construction matters in Turkey.

Dispute review boards

23 Have dispute review boards been used with success or failure?

Although there are certain boards assigned to resolve price disputes between the contractor and the public agency in public procurement contracts, dispute review boards are not commonly used in Turkey. Nevertheless, the increase in foreign contractors and institutionalisation of the construction sector in Turkey may trigger the implementation of the dispute review boards system in Turkey.

Mediation

24 How is mediation defined and is it commonly used to resolve project disputes?

Mediation may be defined as a non-binding dispute resolution process in which a neutral person helps the parties try to reach a negotiated settlement based on equity principles. Although mediation is not commonly used in Turkey, this may change as a result of the draft Mediation Bill recently prepared by the Turkish Ministry of Justice.

Confidentiality in mediation

25 If a party participates in mediation, will the statements made therein be absolutely confidential or are the parties at risk that their statements can be used against them?

Under the draft Mediation Bill, the statements made and documents exchanged in mediation should be kept confidential and not used in an arbitration or judicial proceedings. Nevertheless, it is advisable to enter into a written mediation agreement that clarifies the confidentiality of the process.

Arbitral award

26 Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Turkey has been a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958, since 1992. Turkey ratified the New York Convention with the reservation that it would be applicable only to the recognition and enforcement of arbitral awards that are made in the territory of a contracting state and that arise from commercial disputes.

Previously, Turkish courts were reluctant to enforce foreign arbitral awards, using public order as a ground. Now, the Turkish courts are guided by the recent liberalisation trend favouring arbitration and enforcement of arbitral awards.

Governing law and arbitration provider

27 If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Especially in multinational construction projects, parties prefer to settle their disputes pursuant to the rules of the international arbitration institutions. The rules of arbitration of the ICC, the ICSID, and the UNCITRAL are preferred in practice.

Other than that, Swiss jurisdiction including Swiss law, as choice of law, and Switzerland, as an arbitration venue, are very commonly preferred by Turkish contractors dealing with foreign investors in multinational construction projects, because of the historical background of the Turkish Civil Code, which was adopted from Swiss law.

International environmental law

28 Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and its wildlife while advancing infrastructure and building projects?

Turkey is a party to the Stockholm Declaration of 1972 and a number of international treaties for the protection of the environment.

In light of Turkey's efforts to integrate EU directives, detailed legislation has been issued for the protection of the environment and sustainable development.

Turkish legislation provides detailed requirements and rules for air, water, and soil contamination, as well as waste, radiation, noise control, etc. Preparation of an environmental assessment report is also required for certain industries.

Update and trends

The stabilisation of the political environment and the economy in Turkey triggered the revival of the construction and real estate sectors. This also allowed the introduction of the long-awaited housing finance system in March 2007.

As a result of the foregoing developments, the number of foreign investments is substantially increasing. The experience of Turkish contractors and ability to provide time- and cost-efficient services creates the opportunity for higher profit

margins compared to developed countries.

In the last decades, PPPs have become established as a proven procurement method for financing and delivering public infrastructure projects in Turkey.

Due to unplanned urbanisation and the earthquake risk in Turkey, 'urban renewal' has entered onto the agendas of governmental authorities, opening the door for great opportunities.

Other international legal considerations

29 Are there any other legal considerations that will present a difficulty or obstacle for a foreign contractor attempting to do business?

As a result of Turkey's need for international finance, foreign investments in the construction industry are highly welcomed.

Being a contractor in Turkey requires knowledge of the local market and suppliers, an understanding of the legal requirements and sensitivity to cultural differences. In practice, foreign investors mostly tend to get local assistance with respect to regulatory requirements such as obtaining construction and utilisation permits.

International treaties

30 Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Turkey has executed bilateral treaties for the promotion and protection of investments with more than 30 countries. These treaties aim to improve bilateral commercial and investment relations and establish a favourable atmosphere for investors of the contracting countries. Turkey is also a party to certain legal support treaties enabling the enforcement of arbitral awards with various countries which are neither

signatory to New York Convention or to the ICSID treaty.

Apart from bilateral treaties for the protection of investments, Turkey is also a signatory to the Multilateral Investment Guarantee Agency Agreement.

Tax treaties

31 Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

There are more than 60 agreements between Turkey and other countries for the prevention of double taxation. These agreements aim to prevent double taxation on income gained by nationals of the contracting states.

Currency controls

32 Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

There are no general currency controls in effect that make it difficult or impossible to convert funds from one currency to another.

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Removal of profits and investment

33 Are there any controls or laws that restrict removing profits and investments from your jurisdiction?

Foreign investors can transfer their profits as well as dividends, sale and liquidation proceeds arising from transactions and activities conducted in Turkey by complying with tax regulations.

Although exchange controls have been considerably relaxed, the regulations must be carefully followed. Commercial banks are responsible for implementation of the exchange control regulations, and this becomes critical for foreign investors when repatriating profits.

Contractual matrix of international projects

34 What is the typical contractual matrix for a major international project in your jurisdiction in terms of the contractual relationships among various parties?

In Turkish practice, the owner usually contracts directly with the contractors. The contractors, at their sole discretion, then enter into subcontracts with companies, architects, engineers, etc. Local subcontractors are generally preferred since they are able to provide cost-effective services. Private tenders are commonly used when determining subcontractors.

This structure may vary from one project to another in accordance with the project's needs.

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