

Commissions Disclosure Requirement - Foreign Companies Beware

Asad Ahmad - Associate - Corporate / Mergers and Acquisitions
- Kuwait City

A new wave of concerns and queries has risen regarding Kuwait Law No. 25 of 1996 (the “**Commissions Law**”). Foreign companies doing business with Kuwait are typically unaware of the Commissions Law until it is too late. Usually Kuwait public tender projects are awarded to foreign companies. These foreign companies have more than likely utilized the services of an intermediary local agent to procure the government project. This scenario sets the stage for a Commissions Law violation. The proverbial net has been cast wide and far with an unclear broad scope and no known avenue for correction available to any violator.

In the year of its enactment, the Commissions Law was extensively debated in the Kuwait National Assembly. The debate included the draft legislation related to the Kuwaiti Ministry of Defense procurement and alleged irregularities, which included excessive commission payments to brokers and middlemen. Against this backdrop, the policy reasoning behind the Commissions Law becomes clear, there must be full transparency and accountability in connection with government contracts. The Kuwait government should be applauded for taking this step as an attempt to identify and expel any internal corruption. Yet it seems this deterrence mechanism has been underutilized by the Kuwait judiciary,

Briefly summarized, the Commissions Law places an obligation on both a foreign principal and a local Kuwaiti agent, whom are involved in the execution of a Kuwait government contract, to disclose their commercial arrangement to the relevant government entity. This disclosure must include specific details enumerated under the Commissions Law, and must be done in a certain timeframe. Furthermore, the disclosure requirement is not limited to commission payments. If any party involved in the execution of a Kuwait government contract derives any type of benefit as a result of the execution of the same, they would be obligated to disclose. It is important to note that the Commissions Law was not intended and does not prohibit the payment of commissions to local Kuwaiti agents for services they provide. On the contrary, an agreement to pay a commission fee as the basis for remuneration in an agency agreement would be considered a common practice in Kuwait. Please see below for more details.

Main Principals and Requirements of the Commissions Law

The Commissions Law is drafted in broad and ambiguous terms, meaning that administrative and judicial interpretations and practices will be important in determining the precise application of the Law. The main principals and requirements of the Commissions Law are as follows:

- According to Article 1, the Commissions Law applies to agreements concluded with Kuwaiti governmental entities, companies owned entirely by Kuwait or ministries, and companies with at least 50% Kuwaiti government ownership, (presumably including Kuwaiti Airways).
- Article 2 of the Law states that any contract whose value is not less than Kuwaiti Dinars 100,000 and which is concluded by any such Kuwaiti government entity shall include a clear provision as to whether or not the other party has paid or will pay any commission or benefit of any kind to an intermediary. The Commissions Law explicitly applies to “military transactions and military equipment” procurement transactions of all types.

- In those cases, where the contractor has and intends to pay an intermediary, Article 2 requires that the intermediary be the authorized agent for the contractor, and resident in Kuwait. In addition, Article 2 requires that the above-mentioned contractual clause disclose the intermediary's full name, capacity, profession or position, residency, place of work, and in particular, describe the value of the commission or its rate, the person to whom it was paid or will be paid, and the place of payment.
- Article 3 broadens the disclosure requirement by obligating every person (i) who pays or offers; as well as (ii) any person who receives in any capacity:
 - a commission, gift, grant, donation or similar benefit, regardless of nomenclature, even when it is auxiliary, such as consultancy fee, administrative costs, or any kind of service yielding a material or ethical benefit, or who promises or receives a promise for any such benefit
 - on the occasion of the execution of a contract, which is provided for in Article 2, or during the execution thereof, shall within 30 days following the payment, receipt, or promise, transmit to the authority [other contractual government party] with which he concluded a contract a detailed acknowledgment in writing stating:
 - the amount of the commission;
 - the type of currency; and
 - place and instrument of payment,
 - Such [government] party shall in turn notify the State Audit Bureau accordingly, immediately by passing along the declaration with a copy thereof.
 - The provisions of the preceding paragraph shall also apply to contracts concluded prior to the effective date of this Law, [provided such contract] is still in effect, whether or not performance thereunder has begun.
- Article 4 of the Law states that any party failing to submit the declaration mentioned in Article 3 within the specified time shall be fined the equivalent of the relevant commission or benefit, in addition to being obliged to reimburse a similar amount to the Kuwaiti government. Article 5 states that any party submitting inaccurate information, or hiding a fact pertaining to the rules in the above-quoted Article 3, shall be jailed for not more than three years and fined the equivalent of the relevant commission or benefit, or either of these two punishments, in addition to being obliged to reimburse a similar amount to the Kuwaiti government.
- In the event of the failure to disclose, the Commissions Law does not provide for a cure period and does not otherwise address the issue of curing any deficiencies. As such we are currently unaware of any repair measures for a failure to abide by the requirement under the Commission Law, as the penalties are applicable upon failure to notify within the designated time period.

Analysis Under the Commissions Law

As stated above, it is important to note that the language of the Commissions Law is somewhat convoluted (in both English and Arabic) and, in our experience, has given rise to some debate amongst legal practitioners in Kuwait. Having said that, we have found that the conclusion of the analysis under the Commissions Law is heavily based on the relevant facts of the matter in question. The vagueness of the language under the Law creates an opportunity for arguments to be made, based on the facts, that the Commissions Law elements are not fulfilled. Minimal changes to the facts seem to have a substantial impact on the analysis. This is of course subject to future judicial interpretation and application.

As of today, no Kuwait court has taken up a claim for a violation of the Commissions Law, however, with Kuwait's attempt to crackdown on inter-governmental fraud, it's only a matter of time before this occurs.

For further information, please contact [Asad Ahmad \(Af.ahmad@tamimi.com\)](mailto:Af.ahmad@tamimi.com).