

Chapter 4

REFORMING PUBLIC PROCUREMENT SECTOR IN TURKEY

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ABSTRACT. Turkey underwent a major public procurement reform two years ago. Given the fact that, government spends around U.S.\$ 25 billion to purchase goods, services and construction works every year in Turkey, it can be easily understand how vital is to have a transparent and competitive public procurement system for the country. This essay presents both a comparison of the public procurement legislation before and after the reform and a comparison of some aspects of the newly introduced system with some developed countries' public procurement systems. The aim of this essay is to provide basic information about the public procurement reform in Turkey and to evaluate the results of it for the last two years. The comparative methodology is used in this essay.

INTRODUCTION

In Turkey, the state has always had an important role in the economy. According to the latest statistics, the government spends around 12-15% of GDP to buy goods, services and construction works. Thus regulating public procurement is an important function of public administration. First legislation in the public procurement field is nearly as old as Turkish Republic itself. In the past two years time following the establishment of the Turkish Republic, a law to regulate buying and selling activities performed by government departments, namely "Law on the Buying and Selling Activities Made on Behalf of the Government" was enacted in 1921. During the past 83 years, four responding laws to regulate the sector were issued.

Recently, Turkey has made a great reform in the public procurement field and has enacted two new framework laws to regulate the public procurements. By-laws and other secondary legislations which were necessary for the implementation of these laws were also prepared with a reformist approach. Along with this reform in the legal framework, the institutional framework of the public procurement sector has also been changed significantly. A financially and administratively autonomous

regulatory body, namely the Public Procurement Authority, to regulate and to monitor the public procurement field had been established. Establishment of this new agency was not only a reform in the public procurement sector but also in the Turkish Administrative system as well. Because it is one of the latest examples of regulating and monitoring some sectors through Independent Regulatory bodies. These functions were traditionally performed by central government units.

After a brief summary of history of public procurement legislations, the paper will summarize the reform efforts from the beginning of year 2000 and what has been done to bring the new perspectives and principals to the public procurement sector in Turkey. Then, a brief evaluation of the first two years of the implementation of the new legislative system is going to be made.

REASONS FOR PUBLIC PROCUREMENT REFORMS

Historical Background

The first law regulating public procurements in the Turkish Republic was the “Law on the Buying and Selling Activities Made on Behalf of the Government” (Law No. 661), enacted in 1925. With a few amendments, this law was in effect until 1934. In 1934 a new law, namely “Law of Auctions, Reverse Auctions and Tendering” (Law No. 2940) was issued. This was the longest lasting implemented law in the public procurement sector in Turkey.

It stayed in force for nearly fifty years until 1983. During this period it was amended 13 times to adapt it to the changing needs of the sector. The system introduced by this law had very modern aspects even compared to the current law, namely Public Procurement Law (No. 4734). For instance, Article 14 of Law No. 2940 stated that in the case of termination of a contract award, the procedure would compensate the real losses of the tenderers by the Government. This is still a highly debated issue in even developed countries, especially in the Europe. In Turkey, the latest law still has not got compensation clause for such cases. Another example is the Article 5 of Law No. 2940. In this article it was stated that tender documents should be provided to the interested parties free of charge unless the documents had many attachments, drawings, etc. Furthermore, the law introduced an upper limit for the charges for the documents. In general, the law was providing a transparent environment for public purchases. Its purpose was mainly focused on preventing waste in public spending.

Prior the latest reforms, the “State Tender Law” (Law No. 2886), which was enacted on September 8, 1983, regulated the public procurements

during the last two decades.. All three laws, Laws No. 661, No. 2940 and No. 2886, had one important feature in common: They were regulating not only purchases made by the public agencies but also buying, selling, leasing and swapping activities performed by government agencies all together.

Another important characteristic of this period is that the Ministry of Finance and Ministry of Public Works and Settlements were the two main actors regulating the sector. These two along with the Court of Accounts and Administrative Courts were also monitoring the implementation of the public procurement legislations. After this chronological summary, the needs for reform can be better understood with a review Law No. 2886.

Two Decades with Law No. 2886

The State Bidding Law (Law No. 2886) regulated two government functions: procurements and selling of some productions of goods and services as well as selling and renting government properties by government agencies. As procurement is related to public spending selling of some productions of goods and services as well as selling and renting government properties by government agencies create income for the public, combining these two different functions of the government agencies into one law had created problems.

Another main feature of Law No. 2886 was that it mainly focused on regulating the construction works of the public agencies. The law had some articles to regulate the purchases of goods but had hardly any articles on procurement of services by the public agencies. Given the fact that contracting out most of the classical functions of the public administration was not popular at the time of enactment of Law No. 2886, this approach can be justified. But in the beginning of 2000s, this was a real shortcoming for a contemporary law.

Moreover, most of the public agencies' procurements were not covered by the law. The law stated that agencies which were not covered by the law could issue their own regulations on procurements with the approval of the Cabinet. As a result of this provision there were dozens of regulations covering procurements of different public agencies. Thus, as economic operators were unable to understand the practices and requirements of various public agencies, the law has reduced significantly bid competition.

Another crucial shortcoming of the law was the provision about "appropriate value." According to the law, tenders would be evaluated on the basis of cost reductions made from the value of contract calculated by contracting entities, and the appropriate value would be chosen by a tender

commission. Either the estimated cost or the “appropriate value” was not determined on the basis of pre-determined and objective criteria. Thus, the tender evaluation phase allowed too much discretion by the public officers involved in the tender evaluation phase. Consequently, favoritism and corrupt practices were persistent.

The most notorious and the most criticized practice developed in the framework of Law No. 2886 was a carnet system. The system can be summarized as a record of past performance kept by the Ministry of Public Works and Settlements. The negative aspect of it was that, in practice, one could buy or hire someone else’s carnet for a specific construction works. This caused a lot of problems and increased corruption. So, a result of this practice, public buildings were built by economic operators who had no real experience related to building projects.

Public procurements in Turkey were, and still are, decentralized. Before the reform, there was not a central agency responsible for the regulation and monitoring of the sector. The Ministry of Finance, which is responsible for budget control, and the Ministry of Public Works and Settlements, which is in charge of construction works, were involved in regulations. The Ministry of Finance was also responsible for the ex-ante control of some procurements, the Court of Account conducted the ex-post control of procurement, and Administrative Courts were mandated to solve contract disputes. This institutional framework hindered the effective implementation of the existing legislation.

There are also some other shortcomings of the previous system, established by Law No. 2886. The most notables of them are as follows:

- Publication of notices was not required for all procurement methods and even when it was obligatory, announcement periods were too short to inform interested economic operators. This means a lack of transparency and competition.
- Contract award decisions were also not announced. As a result, transparency for economic operators and for the wider public was lacking.
- Economic operators who were eliminated during the transactions or lost the contract were also not informed about the decisions of the contracting entity. Economic operators were not given a clearly structured format to complain about the contract award process as well.

- Qualification criteria and tender evaluation criteria were not objectively determined and pre-announced. This created a basis for corrupt practices.
- The Public procurement system established by Law No. 2886 was not in parallel with the international contemporary standards and practices.

REFORMING THE LEGAL AND INSTITUTIONAL FRAMEWORK

With the beginning of 21st century, apart from the technical difficulties and problems listed above, there occurred some other national and international developments requiring a reform in the public procurement system of Turkey. First of all, due to Turkey's candidanship to the European Union (EU) membership, alignment of Turkish public procurement legislation with EU Acquis was announced as a medium term priority (Secretariat General for EU Affairs of Turkey, 2001).

Moreover, following the economic crisis which occurred at the beginning of 2001, Turkey concluded some agreements with the World Bank (WB) and the International Monetary Fund (IMF) in which a stated precondition was its reforming public procurement system.. Legislative changes alone were not considered enough and establishment of an independent regulatory body to take care of Turkish Public Procurement system was also required by the international organizations. Some similar recommendations can be seen in the World Bank's (2001) *Country Procurement Assessment Report*.

All these developments added speed to the reform efforts started at the beginning of 2000. An inter-ministerial committee, with the support and assistance from EU and WB prepared a draft public procurement law taking the UNCITRAL Model Law and EU Directives on public procurement as a basis. After discussions with other stakeholders and debates in the Turkish Parliament, two new laws to regulate the public procurement sector were approved by the parliament in January 22, 2002. The twin laws -- Public Procurement Law (PPL) No. 4734 and Public Procurement Contract Law (PPCL) No. 4735 -- were published in the *Official Gazette*. Some specific articles of these laws came into force following the announcement in the Official Gazette but the implementation of the laws started by the January 1, 2003. These article, which immediately came into force, were related to the establishment of the Public Procurement Authority and the issuance of the secondary legislation to prepare the contracting entities for the implementation of the law. Finally a new framework for public procurements in Turkey was created.

PPL is the more popular and dominant of these two laws. It sets the new rules for most of the practices. PPCL regulates the period following the signature of the contract and focuses on contract management issues. The PPL has a relatively important place in the sector, some even argue that regulating the details about public procurement practices and process through a separate law is unnecessary; and that these details should be regulated through secondary legislation or regulations.

PPL aims to cover all public agencies spending public money and to regulate the public procurement sector through the uniform rules and principles. It brings the principles of transparency, competition, equal treatment, accountability, efficiency and effectiveness in public spending, as well as reliability and confidentiality. These principles are the goals of the new public procurement system of Turkey and the contracting entities are asked to achieve all these objectives in their procurements covered by the law.

One of the newly introduced concepts by the PPL is “estimated cost” which determined following detailed market research and must not be disclosed prior the signing of the contract. PPL also encourages the contracting authorities to seek realistic bids and question the bids which seem abnormally low. Objective qualification and evaluation criteria are also brought about by the law. There are some other contemporary measures to improve transparency and to foster the competition introduced by the PPL. Among them are:

- Coverage of the PPL is broadened in view of aligning Turkish legislation with EU directives. However, procurement of State Economic Enterprises (SEEs) is also covered by the law. This seems a reaction to economic crisis which was fueled, inter alia, by budgetary deficits of SEEs and deficits of social security institutions.
- The new law regulates only the procurements of goods and services and construction works by the covered contracting entities. Selling, hiring and swapping activities of the public agencies are still regulated by Law No. 2886.
- As a reaction to wasting public resources through spending without proper planning, and needs assessment; and initiating projects without allocating enough resources, necessary allocations have to be made before initiating any procurement process. For construction works, an Environmental Impact Assessment report is also required before necessary funds are appropriated and a tendering process is started.

- The carnet system is abolished. Objective qualification criteria are introduced and past experience or performance is assessed through systems in line with international best practices.
- Time limits for publication of the tender notices and submission of the tenders are aligned with the time –limits introduced by the related EU Directives.
- Procurement methods are re-defined and four new procurement methods, as recommended in international documents, are introduced. These are open, restricted, negotiated and direct procurement methods. Moreover, instead of “appropriate value” practice, “economically most advantageous tender” criteria is introduced to evaluate the tenders.
- The PPL also introduced the notion of abnormally low tenders. Thus contracting entities now have a chance to question tenders which seem abnormally low. This is both to align legislation with international practices as well as to prevent bids which are too low to perform the contract to receive the contract award.
- As a transparency increasing measure, publishing the information about the result of a contract award procedure is required. This requirement is for contracts above thresholds stated in the law.
- Rules and procedures for debarment and exclusion are also clearly stated in the law. All natural and legal entities having a legal relation with the contacting entity are excluded from the participation to contracts awarded by that entity.
- Longer time periods are given to the economic operators to prepare responding bids.

Public Procurement Authority (PPA)

The most significant institutional innovation introduced by the PPL is the establishment of the Public Procurement Authority. This is a central autonomous regulatory body responsible for keeping an eye on the public procurement system. In the World Bank’s CPAR of Turkey, experts recommended establishing a proper complaint review mechanism for disappointed bidders (World Bank, 2001; CPAR, 2001). Similarly in a report prepared by the EU Commission of Turkey it was suggested that establishment of an autonomous body to regulate the sector, guide the implementations and review the complaint was necessary (Representation of EC to Turkey, 2000, p. 8).

Article 53 of the PPL provided the bases for establishment of such an autonomous regulatory body and in compliance with this provision; an administratively and financially autonomous Public Procurement Authority was established. The duties of this Authority can be summarized as:

- To publish the *Public Procurement Bulletin*;
- To resolve any complaints claiming that the proceedings that are carried out by the contracting entity from the commencement of the tender proceedings until the signing of the contract , are in violation of this law;
- In cases where it is established that domestic tenderers are prevented from participating in tender proceedings taking place in foreign countries, because relevant measures are taken to ensure that the tenderers of those countries are prevented from participating in the tenders held under the scope of this Law, and to furnish proposals to the Council of Ministers in order to ensure that the necessary arrangements are made;
- To prepare, develop and guide the implementation of the legislation;
- To provide training for public and private sector; and
- To compile and publish statistics relating to the quantity, price and other issues; and to keep the records of those who are prohibited from participating in tenders.

EVALUATION OF THE FIRST TWO YEARS OF THE REFORM

The Public Procurement Authority was established by April 16, 2002, followed by the appointment of the Board and shortly by its structural institution. Subsequently, the Authority recruited staff from various agencies. In order to implement the law, tender regulations (secondary legislation) and standard tender documents were prepared. It took four months for preparation of the standard tender documents and regulations, which are necessary for the implementation of the law and which are published in the *Official Gazette* on November 25, 2002. During the preparation of the secondary legislation the PPA has received technical support from EU and grants from the World Bank to receive assistance from national and international experts.

The Law has been amended three times in two years to further align it with EU Directives: June 2002, August 2003, April 2004. Implementing regulations has also been amended three times due to the amendments of the law and problems during implementation.

As training is one of the most important responsibilities of the PPA after the secondary legislation was adopted, training programmes were launched. As of December 20, 2003; 6,812 staff from 218 public institutions and entities had been trained for a total of 1,519 hours.

Currently, the training programmes for 300 staff from 33 different entities and institutions have still been carrying on since January 2004. Besides, as mentioned above, with a grant provided by the World Bank, an interactive learning programme was prepared in a CD form and 5,000 copies have been distributed to public and private entities.

PPA has regularly followed up the EU, the World Trade Organization (WTO), the Organisation for Economic and Co-operation Development (OECD), and UNCITRAL activities. Additional study visits have been organized to EU Member Countries such as Poland, Slovakia, and Estonia, which had taken similar steps prior to Turkey. Procurement experiences of Denmark, Austria and Italy have also been examined on site.

Reviewing complaints is also a crucial activity of the Authority. It is the main innovation of the new law; therefore it deserves a bit more detailed explanation.

The complaint review system introduced by the law has three phases. Dissatisfied bidders or candidates can protest against the transactions and decisions of the contracting entities related to contract award procedure. During the first phase, they are required to submit their protests to the contracting entity in question. If they are not satisfied with the entity's response, or if they receive no reply in 30 days from the entity, they file their complaint with the Public Procurement Authority.

The Authority handles this task through its Board. Upon a complaint reached to the Authority in line with the procedures laid down by the Law, the Board reviews the complaint and takes one of the decisions outlined below, provided that it specifies the reasons and grounds relating to the appeals to the Authority:

- Determines the corrective operation in cases where no suspension of the tender proceeding is necessary and remedies by the contracting entity would be sufficient;
- Orders the termination of the procurement proceedings in case of non-compliance with this law and the related legislation, where taking corrective measures by the contracting entity is deemed insufficient and non-compliance in question would constitute an obstacle for the continuation of the tender proceeding;

- Decides that the appeal is irrelevant.

After an appeal is made, the Authority shall take a decision relating to continuity of the tender proceedings within five days in cases where the contracting entity has taken the decision of continuation of tender proceeding. In the case of not proceeding with the correction of tender proceedings, the decision shall be made within fifteen days. The Authority shall take the final decision within thirty days following the request date. Therefore, this function of the Board is obviously a quick administrative way to solve problems. Nevertheless, there is the third phase for the still dissatisfied complainant. Tenderers can take the decision of the Authority to a relevant administrative court.

The Turkish complaint system functions in the sequence described above. One needs an Authority decision to knock on an administrative court door and a response from the contracting entity to knock on the Authority's door.

To make a comparison, the U.S. protest system is comprised of 'three doors,' namely the Government Accountability Office (GAO), the United States Court of Federal Claims and the contracting entity itself (Lees, 2002). In the U.S. system, bidders are free to choose among these, according to their needs and circumstances. Although the Turkish protest system is comprised of 'three doors,' the protestors in Turkey are required to follow a protest sequence. Indeed, in the Turkish system the PPA may hold a hearing; similar to the U.S. system in which the GAO may hold a hearing if it considers it necessary. However, when it comes to contract disputes, in the Turkish system, PPA does not have the authority to decide. This issue is left to civil courts.

This newly introduced complaint review system has been functioning for nearly two years. It has been welcomed especially by the private sector as there has never been such a system giving them the opportunity to challenge decisions of the procuring entities through a fast and effective way.

For the year 2003, (January 1, 2003 – December 31, 2003) 897 complaints have received by the Authority. The breakdown of 897 complaints is as follows: 401 (45%) services procurement, 368 (41%) goods procurement, 128 (14%) public works procurement (see Figure 1). In the first quarter of 2004, 354 complaints have received and 172 (49%) of them were about services procurement, 121 (34%) goods procurement, 61 (17%) works procurement (see Figure 2). As a result of these complaints, 117 procurements were cancelled, 48 required corrective operation and 105 appeals were resent to the related entity since the procedures for the appeal

had not been completed by the complainant in first half of 2004 (see Figure 3).

So far, the Authority has declared 2005 final decisions on complaints. Only 85 of these decisions have been taken to the administrative courts. The courts have rejected four of those applications and in two of the cases they have decided to suspend the execution of the decisions of the Authority. Remaining 81 applications are still pending.

FIGURE 1
Distribution of the Complaints Made in 2003 on the Basis of Subject Matter of the Procurements

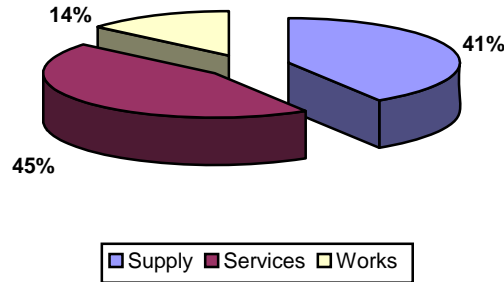


FIGURE 2
Distribution of The Complaints Made in 2004 (First Quarter) on the Basis of Subject Matter of the Procurements

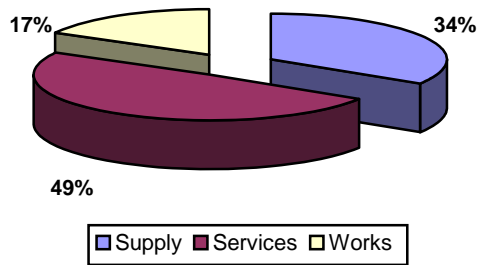
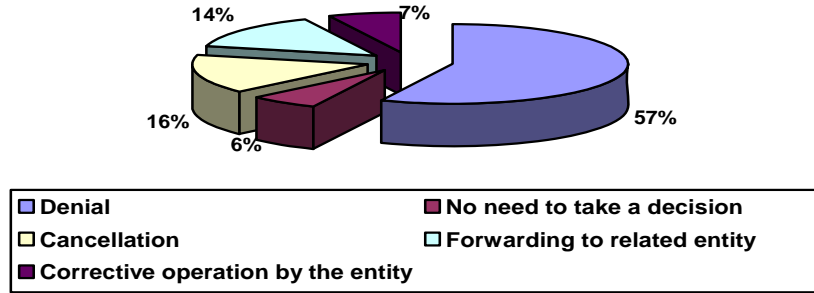


FIGURE 3
Complaints Concluded by the Public Procurement Board in First Half of 2004



During the last two years, PPA has followed up with the developments in the public procurement sector and proceeded with guiding and informing the entities. In fact, a strategy settlement programme has been phased in. In accordance with the importance given by the government to *the e-government project*, activating the e-procurement *initiatives* was determined as a priority target by the PPA.

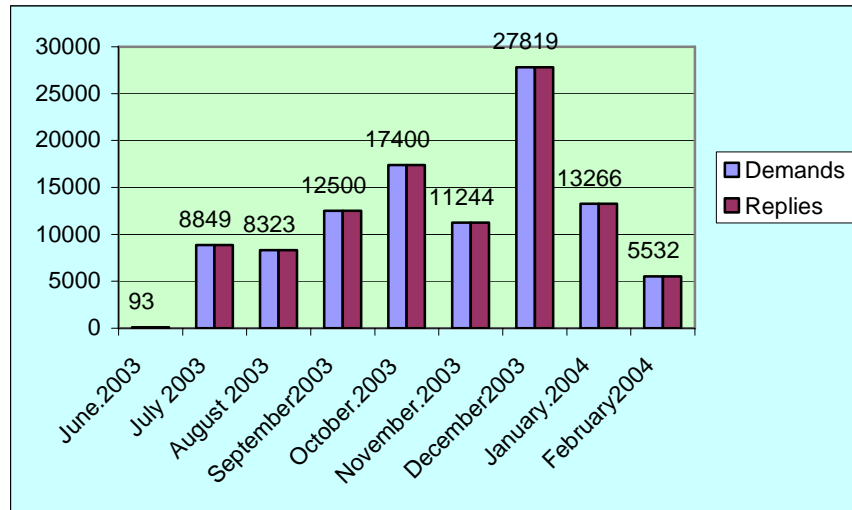
As a first step of e-procurement practices, contracting entities within the scope of this law are assigned a procurement registration number (PRN) and all procedures can be followed up and examined by this number. Since Article 40 of the Public Procurement Law (No. 4734) obliges the contracting entities to confirm whether the successful tenderer is prohibited from participation in tenders or not, the PPA established a system which allows the contracting entities to check on tenderers. . The PPA keeps a list of ‘prohibited contractors’ in which there are 1,544 records of contractors currently prohibited from participating in public procurements. In accordance with the provisions of the law, to prevent those prohibited contractors from participating in contract award procedures, contracting entities ask for confirmation from the PPA whether the best bidder for their contract is included in the list or not. An e-mail message affiliated with the PRN allows completion of the process.. The entity may receive a reply via e-mail in the same day, approximately in two hours. After that, a confirmation approval certificate may be collected from website with a password. The numbers of confirmation demands and replies are shown in Figure 4.

By amendment in August 2003 the publication of procurement notices in the Public Procurement Bulletin prepared by the Authority became a requirement for procurement conducted in accordance with the provisions of PPL. Since January 1, 2004 all the procurement advertisements are being published in *Public Procurement Bulletin*. Even procurements not covered

by the PPL may benefit from the *Bulletin* as a means of announcement. *Public Procurement Bulletin* is published both in printed and electronic media and made available for all stakeholders and interested parties.

As it can be seen above, the Public Procurement Authority has managed to achieve great success in a two-years period; specifically in handling complaints. Since it was introduced, there have been an enormous number of complaints for this period. The majority of the public officials conduct public procurement as a part of their jobs, besides other duties. Thus, for many cases of complaints their lack of expertise could be blamed. Public procurement experts are to be trained and procurement shall be done by

FIGURE 4
Number of Confirmation Demands and Replies



these experts as a profession. Thus the staff working on procurement issues should get a salary in accordance with their duties and responsibilities.

CONCLUSION

The reform process that accelerated in the beginning of the millennium has come to a new stage with the changes in the legal and institutional areas. But of course, the reform is a continuing process, and there is still a lot to

do. . There are a lot of competing objectives for countries procurement system. As Schooner (2002) underlines, these objectives will be subject to change overtime. “ Determining which goals are most important is a daunting, ever-evolving challenge”(Schooner, 2002, p. 110) Turkey’s EU membership candidacy is still on the table, and therefore alignment with the EU directives is still at the top of our priority list. E-procurement that will bring more efficiency and productivity to both buyers and suppliers is also a challenge for the authority in short term.

Also there are a lot of things that can be done with the countries of the region. Hopefully, Turkey can provide good examples in the region in the field of the public procurement by harmonizing its strong tradition of public administration and modern developments.

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