



**SIGMA**

**Support for Improvement in Governance and Management**

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**TURKEY**

**PUBLIC PROCUREMENT**

**ASSESSMENT MAY 2009**

## 1. Summary

### 1.1 Main Developments since last year

There has been no progress towards adopting either the Public-Private Partnership (PPP) law, concessions law, or law on utilities procurement. The drafts of these acts (mentioned in the 2008 Sigma assessment report) are still being discussed and have not yet been approved.

Since the last Sigma assessment report, the current Public Procurement Law (PPL) has been changed five times, but most of these amendments were only minor. An extensive amendment to the PPL (which modified almost half of the law's articles) was adopted in December 2008 (Law No. 5812). The main objective of this amendment was to align the Turkish public procurement legislation with the *acquis communautaire*. This objective has been partially achieved and in many crucial aspects the PPL has been harmonised with the EC Directives, but the transposition is not full and some of the new provisions are in manifest contradiction with the EU legislation.

Law No. 5812 has introduced several instruments modelled on the EC Directives:

- A new type of notice — prior notice — modeled on the EC's prior indicative notices, has been introduced. However, unlike the EC provisions, it is only compulsory to conduct the procurement using open or restricted procedure after the prior notice has been published. The contract notice can only be published 40 days after publishing the prior notice. The Turkish provisions on prior notice are more rigid than the EC equivalents and may unnecessarily restrict the discretion and flexibility of contracting authorities.
- Framework agreements are now available for all contracting authorities. Previously, they were only available in the health sector. The regulation of framework agreements is largely based on the EC Directives.
- The standstill period (mandatory waiting period between contract award decision and conclusions of a contract) has been introduced in the PPL.
- Several elements of e-procurement based on EC Directive provisions are now included: electronic auctions, electronic publication of procurement notices, procedures conducted fully electronically on the Electronic Public Procurement Platform (to be established by the Public Procurement Authority), and a dynamic purchasing system.
- Simplified procedures include shorter time limits and reduced administrative burden for candidates and tenderers in submitting documents.
- Review procedures have been tightened up: the main objective was to limit the possibility of abusing review mechanisms by submitting unfounded appeals in order to prolong the procedure. The fee for lodging an appeal has been significantly increased. Time limits for the review of cases by the Public Procurement Authority (PPA) have been shortened.

It remains to be seen how the new provisions will be implemented in practice. Furthermore, not all of the necessary changes have yet been made. For example, not all of the new instruments under EC Directives 2004/17 and 2004/18 have been incorporated — such as competitive dialogue, social and ecological considerations, and functional technical specifications — or those under EC Directive 2007/66 (such as ineffectiveness and alternative penalties). Some of the new provisions are not fully in line with EU public procurement law, such as the new exemptions (article 3) and new conditions for applying the direct procurement procedure (article 22).

Following the recommendations of the Sigma Peer Review delivered in October 2008, some institutional changes are also underway. The Public Procurement Authority (PPA) has changed its internal organisation to clearly separate its advisory and review functions so as to minimise the risk of conflict of interest.

The Ministry of Finance's co-ordinating role for public procurement and concessions will be formalised with the adoption of amendments to *Decree Law No. 178 on the Duties and Organisation of the Ministry of Finance* (at the time of writing, these amendments were still in draft form).

### **1.2 Main Characteristics (strengths and weaknesses)**

Turkey's public procurement system has significantly improved since the adoption of the PPL in 2002. Generally, the systems of public procurement and concessions/PPPs in place are of a high standard. This can largely be explained by Turkey's history of practicing market-based and competition-based techniques for contracting the supply of goods, works and public service delivery, either in the form of traditional public procurement or in the form of concessions/PPPs.

However, the Turkish Government still faces a number of important challenges in the areas of public procurement and concessions/PPPs:

1. The need for a number of significant changes to the legal framework: The most important is to transpose fully the new EC Directives into national law. The introduction of a set of new procedures and instruments, such as e-procurement, framework agreements, centralised purchasing and competitive dialogue, will require a significant effort and an increase in the PPA's capacity and knowledge.
2. The need to find an efficient solution to the current problems in the complaints review and remedies system: The review system is resource-demanding and does not fully comply with EU remedies requirements; it generally has potential for improvement.
3. The need to enhance the professionalism of contracting entities' procurement functions: by strengthening organisational and staff capacity, streamlining decision-making structures, relying more on line organisations rather than on tender committees to achieve professionalism and accountability, and eliminating the formal approach that governs the management of procurement processes today.

As a basic precondition for improving procurement practices, the legal framework will need to provide for a higher degree of flexibility. Market functionality and competitiveness seem basically to be satisfactory in most sectors, judging by the participation rates of tenderers in tender proceedings.

### **1.3 Recommendations for Reform**

Since there has been little progress in drafting new legislation on PPPs, concessions and utilities procurement, and as not all institutional changes have been accomplished, many recommendations made in the Sigma 2008 assessment report remain valid.

#### **A. Short-term priorities (to be started over the next 12 months):**

- Consider consolidating the various drafts and introducing a single, comprehensive revision of public procurement legislation. Failing that, consider incorporating immediately into the framework of the current PPL the competitive dialogue procedure and the provisions allowing for the use of functional technical requirements. This would enable the PPP/concessions law to progress without compromising the integrity of the overall regulatory framework;
- Ensure that the PPL coverage is in accordance with the coverage of the EC Directives; this would also mean removing current exemptions that do not comply with EU law;
- Start to increase PPA competence so as to enable it to respond to all of the new challenges facing the public procurement system; Promote the implementation of the amended PPL, especially the new techniques (electronic procurement, framework agreements).

***B. Medium-term priorities (to be started over the next two years):***

- Adopt new legislation that complies with EU requirements and prepare a comprehensive strategy for developing the system of public procurement and concessions/PPPs;
- Adjust and develop the PPA and expand its functions to transform it into a centre of excellence in public procurement; provide operational support and capacity-building to promote professionalism and efficient procurement within contracting entities;
- Further strengthen and professionalise procurement implementation by institutionalising training and education in public procurement and by introducing new ways of organising and managing procurement processes;
- Adopt a coherent concessions/PPP law covering all types of concessions; the award of concessions and PPP contracts should be made in accordance with the provisions of the PPL, including for review and remedies.

## 2. Assessment of the Public Procurement/Concessions System

### 2.1 Legislative Framework

Public procurement in Turkey is currently governed by the Public Procurement Law (PPL, Law 4734) and the Public Procurement Contract Law (Law 4735), both of which were adopted in 2002. The current PPL is generally well-structured, with a natural division between the various phases in the procurement process.

The PPL has been amended several times every year since 2004<sup>1</sup>. While this may not be unusual, some of these amendments were introduced on an *ad hoc* basis by individual ministries and parliamentarians, rather than as part of an overall government strategy. These amendments have introduced exemptions that are not envisaged under the *acquis communautaire*. It has also been a common practice in Turkey that “big ticket” procurement for (politically) important international events (*e.g.* cultural or sporting events) is exempt from the PPL.

In addition to the PPL, several pieces of secondary and tertiary legislation have been issued by the Public Procurement Authority – PPA (most recently in March 2009, after the adoption of the amendments to the PPL by Law 5812). These regulations contain detailed instructions for the conduct of procedures, together with standard tender and contract documents (the use of standard tender and contract documents is mandatory). The PPA also issues circulars and interpretative decisions. However, the standard contracts provide for the possible application of a price advantage in favour of domestic candidates, while the standard administration specifications for goods procurement leave it to the contracting authority to decide whether or not to open up competition to foreign tenderers under the thresholds.

#### 2.1.1 Coverage of the legislation

The public procurement regime covers budget institutions, entities of special provincial administrations and local municipalities, state economic enterprises, social security funds, public institutions assigned with public duties, etc., but does not use the same definitions as the EC Directives. In particular, the PPL contains no definition equivalent to the EC definition of “bodies governed by public law”.

The current PPL does not explicitly deal with entities operating in the utilities sector, nor does it contain any reference to the award of works concessions. While utilities are not specifically mentioned, publicly-owned utilities operating in the water, energy, transport and telecommunications sectors are included as state or municipality economic enterprises. The result is that private sector utilities are not covered by the PPL; this is precisely the situation that the EC sought to avoid in adopting its own original Utilities Directive.

Since 2007 the PPA has been working on a draft law for utilities procurement, but the draft has not yet been adopted by the government. Also for the last two years a proposed law on concessions and PPPs has been developed by the State Planning Organisation (SPO) but is still not finished.

The PPL applies to contracts for goods, services and works, although the definitions are not identical with those of the EC Directives. It also provides a separate definition of consultancy services, which are subject to a special procedure contained in section 5 of the law. This special procedure does not appear to affect the overall application of the common procedures of the PPL, but sets out a two-envelope system of tender submission that applies in this context only, allowing the technical evaluation to take place independently of the financial evaluation.

The PPL applies to procurement by contracting authorities for contracts well below the EC threshold levels, although there is no great distinction made between the procedures that apply for both high-value and low-value contracts. The only, but significant, differences are that the publication rules are

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<sup>1</sup> By-laws nos. 4761, 4964, 5020, 5148, 5226, 5255, 5312, 5436, 5583, 5615, 5625, 5680, 5726, 5737, 5763, 5784 and 5812

less onerous and the time limits are shorter for low-value contracts, which simplify the procedure in practice. The PPL prohibits the practice of splitting contracts to avoid the application of the PPL.

### 2.1.2 Exemptions

There are a (growing) number of exceptions to the PPL, including exemptions for agricultural and livestock products, procurement conducted in foreign countries by entities covered by the PPL and in cases similar to those covered by the EC's "reserved" contracts, certain medical services, and cultural heritage projects (art. 3). New exemptions have been introduced recently by Law 5812. In addition to exemptions stipulated by the PPL, several other laws introduce more exemptions, either for individual institutions<sup>2</sup> or for specific types of contracts, or even for individual projects (e.g. construction work on the old parliament building, Law 4969).

### 2.1.3 Compatibility with EU legislation

Under the PPL, the open procedure is the basic procedure; other procedures (apparently including the restricted procedure<sup>3</sup>) may only be applied when special conditions for their use have been fulfilled. In fact, the restricted procedure rarely occurs (0.61% of all procedures published in the *Public Procurement Bulletin* in 2008). The PPL also contains a specific "direct procurement" procedure (art. 22), which can be used for: low-value procurement; situations that would come under the EC's negotiated procedure, i.e. when there is only one supplier (e.g. based on the existence of exclusive rights); the lease or purchase of immovable property; certain urgent medical supplies; and the legal services of Turkish or foreign advocates for arbitration. The most recent amendment to the PPL (Law 5812) added to the list some types of contracts that would not directly qualify for exceptional procedures under the EC rules (purchase of some medicines, vaccinations and medical materials, and procurement related to national and local elections).

The conditions for the use of the negotiated procedure largely reflect those of the EC Directives.

The PPL's qualification criteria largely reflect those of the EC Directives, including the more recent mandatory exclusion provisions. The PPL also specifically prohibits bribery and collusion. The PPL sets out appropriately the content of tender documents and tender notices. However, the requirement that only those tenderers who have purchased the documents (at the cost of reproduction) can participate in the proceedings may unnecessarily restrict participation. The publication of procurement notices (contract notices and contract award notices) is mandatory above certain thresholds. Prior indicative notices (PINs) have been introduced by recent amendments.

The PPL permits domestic preferences; there is a price advantage of up to 15% for domestic contractors offering domestic products. In procedures for contracts below the thresholds, contracting authorities may restrict participation to Turkish companies.

As the current PPL was closely modelled on the former EU public procurement legislation, there are many significant similarities. However, concerns remain about the compatibility of the PPL with the current EU legislation, notably:

- the absence so far of the new procedures and techniques introduced in the most recent EC Directives (competitive dialogue, social and environmental considerations, functional technical specifications);
- the manner in which the PPL defines the scope of application;
- the extensive exemptions;
- the apparent need to justify the use of the restricted procedure;

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<sup>2</sup> For example, the Turkish Investment Support Agency (Law No. 5523), and the Istanbul 2010 Cultural Capital Agency (Law No 5706).

<sup>3</sup> This is unclear: article 5 appears to place the open and restricted procedures on an equal footing, although article 20 implies that the restricted procedure may only be used in the case of complex procurement or where it involves high technology.

- the greater tolerance of direct procurement;
- technical specifications and standards;
- the criteria for contract award; and
- the existence of national preferences and restrictions on participation by foreign companies.

Other concerns with the PPL, but not specifically addressed by the Directives, include the automatic cancellation of tender proceedings in certain cases if fewer than three tenders have been received (even though competition is guaranteed by ensuring that a competitive process has been employed); and the mandatory requirement for tender and performance securities in all contracts regardless of value or risk.

#### **2.1.4 Legislation for concessions/PPPs**

The structure of the legal framework governing concessions/PPPs will need to be amended to ensure legal clarity and certainty for all operators (whether public or private). Sector-specific laws governing the use of PPPs should be repealed, as well as laws allowing for the use of particular PPP models only [e.g. the build-operate-transfer (BOT) law and the build-operate (BO) law]. These laws should be replaced by a single PPP law for all relevant economic sectors that deals with the pertinent issues, such as eligibility of projects, internal authorisation procedures, granting of state guarantees, and monitoring. It needs to be made clear that the award of PPP contracts must follow the procurement rules if the contract is to qualify as a public contract or public works concession. The PPP law does not need to contain detailed procurement rules; instead it should refer to the PPL.

The scope of the PPL, on the other hand, should be extended to cover public works concessions. The specific provisions of Directive 2004/18/EC — on awarding these works concessions and obliging concessionaires to respect procurement rules under specific circumstances — will also have to be adopted. The PPL could also cover the award of service concessions (in the sense of EU procurement law), although this is not necessary from a legal point of view. If service concessions are left outside the PPL's scope, then the fundamental principles of the EU Treaty must remain applicable in the award of these concessions.

#### **Summary**

*The government has taken a number of positive legislative steps to make the public procurement legislation comply with EU law. Public procurement legislation is modeled on the EC Public Procurement Directives and is in line with these directives in several key aspects. The most recent amendment to the PPL (introduced by Law 5812) includes a number of new instruments based on the new EC Directives. However, not all of the new EU procurement procedures and techniques have been fully incorporated. Thus in many crucial aspects the Turkish PPL is not harmonised with EU public procurement legislation. The growing number of exceptions, far beyond EU standards, means that many contracts that would normally be covered by the EU procurement rules remain outside the scope of the Turkish PPL. The existence of domestic preferences and restrictions on the participation of foreign companies create a barrier to free trade.*

*A cohesive legislative process needs to be accelerated — new draft laws on PPP, concessions and utilities procurement have been discussed since 2007 but have still not been adopted by the government. There is also a plan to fully revise the current PPL later in 2009-2010 in order to completely incorporate the EC Directives.*

#### **2.2 Central Public Procurement Institutions**

The main actors in public procurement are the Ministry of Finance (MoF), which has primary responsibility for the co-ordination and submission of draft legislation, and the Public Procurement Authority (PPA). The Ministry of Finance's co-ordinating role for public procurement and concessions will be formalised with the adoption of amendments to *Decree Law No. 178 on the*

*Duties and Organisation of the Ministry of Finance* (at the time of writing, the amendments were still in draft form).

The PPA was established under the Public Procurement Law (PPL). Its mandate is to ensure the proper implementation of the PPL, to support participants in the procurement process, and to provide legal resolution of disputes over public procurement. Under the administrative hierarchy, the PPA is related to the Ministry of Finance but is organisationally independent of the ministry. It enjoys full independence in its actions and decisions and is financially autonomous.

The PPA consists of the Public Procurement Board (PPB), the president, three deputy presidents and the service units. The PPB has 10 members (including the chairperson). They are appointed by the Council of Ministers on the recommendation of various government authorities — ministries, the Court of Accounts, the Turkish Union of Chambers and Stock Markets, and the Turkish Employers Union Confederation. PPB candidates must have higher education qualifications, no fewer than 12 years of experience in public institutions, and knowledge and experience of national and international public procurement procedures. Candidates may not be actively engaged in the activities of a political party. Members of the PPB are nominated for a five-year term and cannot be re-elected. Membership cannot be revoked before the expiry of the term, other than in the event of serious illness or of a final court ruling and with the approval of the Prime Minister. The Council of Ministers selects the chairperson of the Public Procurement Board from among its members, while the deputy chairperson is appointed by the board. The chairperson is also the president of the PPA.

The PPA's professional staff must also fulfil certain requirements and pass special examinations to be promoted to the position of public procurement expert or assistant expert. PPA staff are subject to the *Civil Service Act*. At the end of 2008 the PPA had 232 staff (compared to 213 at the end of 2007), including 69 public procurement experts and 28 assistant public procurement experts.

The PPL provides for a special procedure for financing the PPA. The PPA is not financed from the state budget, but through various direct payments: from contracting authorities (a fee of 0.05% of the value of the public contract is levied on contracts above a certain threshold value, and fees are charged for the publication of procurement notices); from tenderers (fees for the submission of complaints); and other revenue resulting from fees charged for its activities (training, publications, etc.). This unusual way of financing the PPA's operations places a burden on participants in the procurement system, both contracting entities and economic operators. However, it does ensure a high level of independence for the PPA in its decision-making and in its activities.

The PPA's tasks include, among others:

- deciding on complaints filed by dissatisfied tenderers;
- providing help-desk functions;
- developing guidelines for implementing public procurement legislation;
- issuing secondary legislation, circulars and interpretative decisions;
- providing training on public procurement;
- regulating the tender notices to be published in the *Public Procurement Bulletin*, as well as publishing the *Bulletin*;
- establishing and operating an electronic procurement platform,
- maintaining a list of companies excluded from participating in public procurement procedures;
- maintaining international relations;
- keeping records on public procurement and collecting statistical and other information on public procurement.

The PPA is also involved in the legislative process for primary law: the initial draft public procurement primary law is usually prepared by the PPA, whose staff have the necessary national and international background and knowledge to participate in this process. The PPA is also a member of the working group established by the Ministry of Finance for co-ordinating the drafting activity in public procurement.

### *Summary*

*The PPA has become a stable and strong institution. It has already largely helped to establish a modern public procurement system and, in general, has the capacity to implement procurement legislation effectively. However, a reorganisation of the PPA is needed in order to improve its functionality and resolve some of the key problems identified in its service delivery. Specifically, there is a need for increased specialisation of functions and staff competencies, combined with a more natural division of these functions in organisational terms. The recommendation to reorganise the PPA should be considered further in the light of all of the new challenges facing the PPA in implementing the new EC Directives.*

## **2.3 Procurement Operations and Practices**

### **2.3.1 Statistics**

The number of contracting entities covered by the PPL is about 10,500 (not counting utilities entities). According to PPA statistics (see Annex), in 2008 there were 116,612 public procurement procedures, and the total value of public contracts (not including direct procurement) exceeded 30 billion EUR. The publication of procurement notices in the *Public Procurement Bulletin* has reached a significant number (notices for contracts above certain thresholds have to be published). The *Bulletin* appears to be rather successful in disseminating information on public procurement opportunities, reflected by a fairly high participation rate. Thus, information on public tenders is widely available. The general interest in tendering among economic operators appears to be good in most areas. The figures for the rate of participation suggest that the number of tenders submitted in procurement procedures is generally satisfactory. In the construction sector, in particular, there appears to be significant competition. Foreign tenderers are also present, indicating a healthy market. They will often form joint ventures or consortia with Turkish tenderers, especially in the construction sector.

### **2.3.2 Views on the amendments**

Contracting entities expressed appreciation of the amendments introduced by Law 5812 and indicated that they had been consulted on the changes. They were in favour of the ability to use negative references and of the changes to the complaints procedures. There was strong interest in the use of framework agreements. However, as the accompanying by-laws were only introduced in March 2009, contracting entities have not had much experience in using all of the new approaches. The increase in the number of exemptions was also welcomed; however, this could present a future problem when they are removed to align the PPL with the EC Directives.

### **2.3.3 Procurement practices**

At the central level and in the main municipalities around Ankara, it appears that procurement is well organised. Procurement is conducted by tender committees appointed in accordance with the PPL, and no procurement is commenced until a budget is provided. The budgeting and internal financial controllers are involved from the outset and, where possible, technical specialists are used from the contracting entity to prepare the technical specifications. The higher-spending authorities also have specialised public procurement units comprised of members with the relevant technical expertise. These authorities are therefore able to create tender commissions for each procurement procedure.

As already mentioned, the procedures adopted tend to be the open procedure (73% of all procedures published in the *Bulletin*), with very few restricted procedures being employed (see Annex). It will be interesting to see whether this will change under the new law. There appears, nevertheless, to be a residual reliance on direct contracting by citing lengthy PPL time limits or an emergency. In most

cases, the recourse to direct procurement is in reality a question of poor procurement planning and budgeting, rather than a question of genuine urgency. This suggests that broader competence training might be desirable. Statistics on the use of the direct procurement procedure are not available.

Tender documents are largely based on the PPA's standard tender documents. The only clear problem seems to be the contracting authorities' practice of requesting original copies of all documents related to the qualification criteria in the PPL, regardless of need. This system inflexibility is also carried over to tender securities and performance bonds, which are required in almost all cases, again regardless of whether or not they are needed and irrespective of the contract value.

#### **2.3.4 Training**

Training has so far concentrated on compliance training, but should include more competence and practice-oriented training. It will be essential to offer training in the new approaches provided for under Law 5812 if their benefits are to be realised. Training should also address the needs of tenderers, who will be expected to respond to contracting authorities using the new methods and techniques. Priorities for improving the public procurement system include further professionalism of the procurement function within contracting authorities and enhancing managerial accountability and clarity in decision-making processes. Most of the training is conducted by the PPA itself, which already has difficulty in meeting the training demands of the whole country, despite the reorganisation of its training function. Specialised training institutions, both public and private, should be used to deliver training on a much larger scale.

#### **Summary**

*The level of transparency in procurement opportunities is high and the resulting participation by economic operators appears to be good in most areas. Contracting entities are appreciative of the amendments to the PPL, which was helped by prior consultation. Their liking for the extensive exemptions, however, indicates a tendency to avoid the application of the PPL where possible. A greater use of the new approaches under the amended PPL would improve this situation; it is therefore important to prioritise training in these new approaches.*

### **2.4 Control, Review and Integrity**

#### **2.4.1 Complaints review**

The PPL establishes a three-tier system for reviewing complaints lodged by disappointed suppliers: (1) in the first stage, a complaint is submitted and reviewed by the contracting entity itself; (2) a complainant who is dissatisfied with the decision of the contracting authority may, as a second step, appeal this decision to the PPA, and the decision on this appeal is made by the Public Procurement Board (PPB); (3) the final decision on the appeal made by the PPB is then subject to the jurisdiction of the regular courts.

Amendments under Law 5812 to the complaints procedure are aimed at improving and streamlining the system. The main changes have been to shorten the process and to increase the fees paid for lodging complaints (from 500 to 2000 EUR).

The review procedure is launched with the lodging of a complaint. The complaint may be submitted by any contractor, supplier or service provider who claims to have suffered damage or a loss of rights, or who is likely in the future to suffer loss or damage resulting from an alleged breach. The law, however, provides a definition of "potential tenderer", which sets two additional conditions: (1) the complainant must provide services in the area of the procurement; and (2) the complainant must have purchased the tender documents before being permitted to submit a complaint. This limits the number of economic operators who might complain and is more restrictive than the EU approach. Therefore the Turkish system does not guarantee the same level of protection of legitimate interests of potential suppliers.

According to Law 5812, the time limit for lodging complaints is 10 days for most procurement, but this can be shortened to five days in case of emergency or in the areas of defence and security. The

complaint is made directly to the contracting entity, and the contracting entity is required to respond to the complaint within 10 days, compared to 30 days previously. The complainant then has 10 days in which to appeal to the Public Procurement Authority against an adverse decision by the contracting authority. The appeal must be lodged before the contract is signed. The appeal is then reviewed by the PPB, and this review can involve oral proceedings. The PPB must reach its decision within 20 days. The PPB can then:

- determine the corrective action;
- annul the procedure; or
- state that the appeal is invalid (reject the complaint).

The PPL therefore does not provide for compensation for damages. The lodging of an appeal does not automatically result in the suspension of the procurement procedure; the PPB must decide separately on such suspension. The procedure is suspended only in specific circumstances, *i.e.* where the complaint is well-founded or where the damage or loss could be irreparable. However, suspension is extremely rare in practice.

PPB decisions on appeals are subject to judicial supervision by the courts. Any dispute that arises after the conclusion of the contract must be brought directly before a court.

Prior to the adoption of the amendments introduced by Law 5812, the number of complaints lodged by dissatisfied tenderers had grown significantly over the years, from some 900 in 2003 to more than 3,600 in 2008. This is a significant number of cases, even if it represents only about 3% of all contract award procedures. The early indications are that the effect of the amendments will be to reduce the number of complaints by about 30%, which should allow a more expeditious consideration of complaints. Whereas previously the review procedures were not handled independently from the other functions of the Deputy Presidency for Regulation, this issue has been addressed by a re-organisation within the Public Procurement Authority.

From 2003 until May 2009, 1585 decisions of the PPB were brought to the courts. Court cases are lengthy and appeals are only completed by the court within two and a half or three years, on average. Of the court cases opened against the decisions of the PPA, 198 have been finalised, of which 138 were concluded in favour of the PPA and 60 in favour of the complainant.

#### **2.4.2 External audit**

The Turkish Court of Accounts (TCA) is responsible for external audit. The legal framework governing its operations is based essentially on Law 832 on the Court of Accounts, enacted in 1967 (as amended). Law 5018 on Public Financial Management and Control (PFMC), in force since December 2005 (as amended), also governs some of the TCA's general responsibilities.

The TCA is responsible for the audit of:

- government offices funded by the general budget and by the annexed budget (Law 832/28);
- institutions and enterprises established as fixed or revolving capital establishments, or funds of which half or more of the capital is invested by the government offices mentioned above (Law 832/28);
- municipalities and local provincial administrations;
- institutions that by law are subject to TCA audit.

The TCA has the authority to audit all public and statutory funds and resources, with some of the major exemptions being:

- TRT (Television/Radio);
- Toki Collective Housing;
- Central Bank and other state banks;

- municipal enterprises;
- state economic enterprises (now performed by the Prime Ministry High Auditing Board).

In addition, some other restrictions also mean that, for example, the TCA can only audit the Ministry of Defence in part. Only very analytical work can be done through the analysis of transactions, although for the procurement of military goods “on the spot” audits are not within the competence of the TCA. This means that the TCA is not entitled to carry out physical property audits. The Inspection Service within the Ministry of Defence may look into the documents. However, the Inspection Service only reports to the minister to which it belongs.

The TCA conducts audits in two phases. The first phase is the audit of accounts, while the second phase is the trial of these audited accounts. The end product is a legal document called a *writ*, which either acquits officials or holds them responsible for their financial management. The judicial assessment is to establish “public loss” resulting from the misuse of resources as an individual responsibility of the accountant.

Prior to the adoption of PFMC Law 5018, the TCA was responsible for the *ex ante* control of all public procurement, which meant that its prior approval was needed for each and every public procurement activity above a certain threshold. Today the TCA performs *ex post* audits of the accounts within its remit, currently amounting to approximately 6,900 accounts. Approximately 85% of the central government accounts are audited annually. The PFMC Law covers 176 central government administrations, two social security institutions, and around 2,000 local administrations. However, regulatory and supervisory agencies, including the Public Procurement Authority (PPA), are excluded from the requirement to produce an “accountability report”<sup>4</sup> (PFMC Law, article 41) and from the whole of Part Five of the PFMC Law covering internal control requirements for the PPA’s own activities.

The TCA tends to audit contracting entities that are established in Ankara and the municipalities. Audits are not carried out comprehensively or on a sample basis.

The TCA audit is comprised of a compliance audit based on a transactions and balance accounts document. There are currently 700 auditors in the TCA. These auditors have received regular training in procurement auditing (carried out in-house).

The TCA does not prepare a specific (thematic) report on its findings concerning public procurement. Nevertheless, the TCA considers public procurement to be a high-risk area, with the main problems arising from:

- payments that do not comply with the contract (*e.g.* purchasing additional, unforeseen items from the contractor);
- extensive use of the negotiated procedure (not only for exceptional cases);
- use of the direct procurement method for procurement exceeding the relevant thresholds;
- abnormally low tenders;
- lack of PPL knowledge by the smaller contracting entities.

### 2.4.3 Integrity of procurement operations

The PPL contains significant provisions on probity and anti-corruption. It already contains the “mandatory exclusion” requirements of the latest EC Directives on selection, and also defines and prohibits other forms of bribery and corruption in a separate article. The PPL also provides for sanctions and penalties in the event of discovery, which applies to both individuals and companies

<sup>4</sup> Accountability reports should include general information on the administration, activities, and performance as per the strategic plans and the performance programme, resources used, and reasons for any deviation from appropriations compared to the approved budget.

and can lead to temporary or permanent disbarment, depending on the severity or frequency of the crimes. In the event of criminal activity, the PPL provides for action by the public prosecutor and the criminal authorities.

The Competition Authority has handled 34 cases of alleged bid-rigging since 1999, 17 of which led to administrative fines. There are probably more cases that have not been reported to the Competition Authority, because contracting authorities have taken their own action, such as cancelling the contract and starting again when they suspect collusion. The Competition Authority has started to work with the PPA to develop a system for detecting contracts that have involved bid-rigging.

### **Summary**

*In its amended form the PPL is not fully aligned with the EC Directives. It does not introduce all of the provisions of Remedies Directive 2007/66/EC, such as ineffectiveness and alternative penalties. The provision whereby only those who have bought tender documents can complain (unlike in the EU legislation) also reduces the number of potential complaints.*

*The TCA plays a key role in auditing compliance with the PPL and budgetary rules. A synthesis of the results of its audits in the area of public procurement would be helpful.*

*The PPL contains significant provisions for probity and anti-corruption. The proposed work of the PPA and the Competition Authority on a system for detecting potential bid-rigging cases is welcome, but this will also require the commitment of contracting entities.*

### **3. Reform Dynamics**

Overall stewardship of the public procurement system is in the hands of the Ministry of Finance, with the assistance of the PPA. However, we question whether there is an overall clear strategy for procurement other than ultimate alignment with the *acquis communautaire*. It appears that legislation is adopted in a somewhat piecemeal fashion, without taking all aspects into account in a direct way. Although the PPL has been amended many times and continues to be amended, these amendments are rarely comprehensive. The latest amendment takes on board some, but not all, of the provisions of the latest EC Directives. It does not take into account the new Remedies Directive (2007/66/EC). Despite the apparent intention of replacing the existing amended PPL with a new EU-compatible law, new amendments continue to be proposed. This approach provides neither legal stability nor certainty. Similarly, the degree to which utilities are covered is unclear, and the likely staggered adoption of the proposed amendment to the PPL and of the new utilities law will leave some entities in a vacuum. Furthermore, the lack of reference to works concessions in the PPL leaves their coverage in doubt and causes difficulties at a time when a draft law on concessions/PPPs is being considered by the State Planning Organisation (SPO).

A clear and comprehensive strategy is needed to ensure alignment of both the PPL and the draft utilities law with the *acquis*. This strategy should deal with concessions, introduce the new procedures in the latest EC Directives, and reconsider the remedies provisions.

In addition, training has so far been conducted primarily by the PPA itself and is largely confined to compliance training. Given the size of the country and the number of people in need of training, it is unlikely that the PPA will ever have the resources to serve as the exclusive source of training. It is also doubtful whether it will have the capacity to carry out the necessary competence training. Future procurement training should therefore involve a wide spectrum of public and private institutions.

### **4. Recommendations for Assistance**

Assistance to Turkish public procurement/concessions reform should focus on the following issues:

- Preparing a strategy for developing Turkey's public procurement and concessions system;
- Providing legislative support to:

- comprehensively review the PPL to make it fully compliant with the EC Public Procurement Directives;
  - make concessions/PPP in primary legislation compliant with EU requirements;
  - identify appropriate solutions to the problems with the review and remedies system;
  - review the draft law on utilities procurement.
- Establishing appropriate institutional solutions for policy-making, advice and co-ordination in concessions and PPPs;
  - Building the capacity of central institutions (Ministry of Finance and PPA);
  - Providing training for the public procurement community (especially in the new procurement techniques).

## 1 Annex

### PROCUREMENT/CONCESSIONS STATISTICS for 2008<sup>5</sup>

<b>A. Number of contracting entities</b>		
Central government	6 597	
Regional and local authorities	2 868	
Other (bodies governed by public law)	1 052	
Utilities	N/A	
Total number of contracting entities	<b>10 517</b>	
<b>B1. Awarded public contracts/contracting entities</b>	<b>Total (estimated) value, EUR millions</b>	<b>Total number</b>
Central government	12 112	70 705
Regional and local authorities	11 650	33 496
Other (bodies governed by public law)	6 724	12 411
Utilities	N/A	N/A
<b>Total public contracts awarded</b>	<b>30 486</b>	<b>116 612</b>
<b>B2. Awarded concessions/contracting entities</b>		
Central government	1 340	2 638
Regional and local authorities	629	4.331
Other (bodies governed by public law)	2 836	26 206
Utilities	N/A	N/A
<b>Total concessions awarded</b>	<b>4 805</b>	<b>33 175</b>
<b>C1. Awarded public contracts above the EU thresholds</b>		
Works	7 303	321
Services	8 459	6 462
Goods	8 042	5 943
Mixed contracts	N/A	N/A

<sup>5</sup> Based on data supplied by the Public Procurement Authority.

<b>Total public contracts above the EU thresholds</b>	<b>23 804</b>	<b>12 726</b>
<b>C2. Awarded concessions above the EU thresholds</b>		
Works	199	4
Services	892	1.114
Other	3 150	1 646
<b>Total concessions above the EU thresholds</b>	<b>4 241</b>	<b>2 764</b>
<b>D. Procurement methods used (for contracts above the national thresholds)</b>		
Open procedure	19 043	5 864
Restricted procedure	550	49
Negotiated procedure with prior publication of a notice	2 287	781
Negotiated procedure without prior publication of a notice	N/A	N/A
Other procedures (competitive dialogue, etc.)	3 934	1 344
<b>D1. Low-value procurement (estimated)</b>	<b>9 478</b>	<b>141 749</b>
<b>E. Participation rate (average number of submitted tenders)</b>		
Works	40 193	
Services	23 057	
Goods	53 766	

#### F. The 10 largest procuring entities

	NAME OF THE PROCURING ENTITIES	Annual procurement budget	Total value of contracts awarded in 2008
1.	ISTANBUL METROPOLITAN MUNICIPALITY	N/A	167 716
2.	REPUBLIC OF TURKEY PRIME MINISTRY HOUSING DEVELOPMENT ADMINISTRATION OF TURKEY	N/A	151 228
3.	DIRECTORATE GENERAL OF WATER AND CANALIZATION ADMINISTRATION OF ISTANBUL	N/A	50 710
4.	TÜDEMSAŞ TURKISH RAILWAY MACHINES INDUSTRY CORPORATION	N/A	46 062
5.	TURKISH ELECTRICITY TRANSMISSION COMPANY	N/A	38 996
6.	ISTANBUL DIRECTORATE GENERAL OF ELECTRICAL TRAM AND TROLLEY ENTERPRISES	N/A	31 881
7.	MINISTRY OF NATIONAL DEFENCE INTERNAL SUPPLY OF IZMIR REGION HEADSHIP	N/A	29 917
8.	TURKISH STATE RAILWAYS	N/A	16 381
9.	ANKARA METROPOLITAN MUNICIPALITY	N/A	15 801
10.	REPUBLIC OF TURKEY MINISTRY OF ENVIRONMENT AND FORESTRY	N/A	15 766

**G. The 10 largest public contracts/concessions awarded and/or advertised in 2009**

	SUBJECT OF THE CONTRACT	NAME OF THE CONTRACTING AUTHORITY	CONTRACTOR	PROCUREMENT PROCEDURE	VALUE OF THE CONTRACT (EUR MILLIONS)
1	Steel construction components	(TÜDEMSAŞ) TURKISH RAILWAY MACHINES INDUSTRY CORPORATION	HALİL BAKIR	Exception (3G)	430
2	Infrastructure construction of Ankara-Sivas Railway Project	TURKISH STATE RAILWAYS	CHINA MAJOR BRIDGE ENGINEERING CO.	Open procedure	375
3	Supply construction of subway of Kadıkoy-Kartal and supply of electro-mechanic systems	ISTANBUL METROPOLİTAN MUNICIPALITY	MAK-YOL İNŞAAT SANAYİ TURİZM VE TİCARET A.Ş	Open procedure	336
4	Removal of stretch of asphalt	ISTANBUL METROPOLİTAN MUNICIPALITY	İSTANBUL ASFALT FABRİKALARI SANAYİ VE TİCARET A.Ş.	Open procedure	196
5	Supply of electro-mechanic systems for subway of Ankara	ANKARA METROPOLİTAN MUNICIPALITY	ANSALDO SEGNALAMENTO FERREVIÁRIO S.P.A	Open procedure	158
6	Construction of Turkey-Georgia railway (Turkish Part)	TURKISH STATE RAILWAYS	ÇELİKLER TAAH İNŞVE SAN AŞ	Open procedure	130
7	Construction of Harbiye Convention Centre	ISTANBUL METROPOLİTAN MUNICIPALITY	SEMBOL ULUSLAR.YAT.TAR.PEY.İNŞ .TURZ.SAN.VE TİC.	MD21B Negotiated procedure	93
8	Overlaying of asphalt of various main streets and boulevards in Ankara	ANKARA METROPOLİTAN MUNICIPALITY	SÖĞÜT İNŞAAT TAAHHÜTMADEN.GIDA NAK.İÇ VE DIŞ TİC.LTD	Open procedure	73
9	Construction of highway tunnel between FULYA-LEVAZIM	ISTANBUL METROPOLİTAN MUNICIPALITY	KİSKA OĞUZ GÜRSEL VE ORTAĞI	Restricted procedure	71
10	Construction of Eskişehir Gar transition infrastructure	TURKISH STATE RAILWAYS	NET YAPI VE TİCARET.LTD.ŞTİ	Open procedure	57