

## Evaluation of Public Procurement System Considering the Principles of Competition, Transparency and Equal Treatment

Özhan Çetinkaya<sup>a</sup>

**Abstract:** *Public procurement system is constituted by the procurements needed by the State as well as the operations carried out to bring its property to the use of private sector. Different laws are applicable to these two types of operations. Public Procurement Law numbered 4734 is applicable to spending, and State Procurement Law dated 2886 is applicable to income-generating operations. Recent studies have revealed that the principles of competition, transparency and equal treatment, which are said to be the core of procurement system, have been ruined due to the content of certain provisions of the related laws and problems in practice. It will be possible to talk about the existence of a healthier procurement system and public gains as long as the problems are identified and solutions are put into practice.*

**Keywords:** Public procurement system, transparency, competition, equal treatment.

**JEL Classification:** H50, H57, D41, D73

### 1. Introduction

During the first years of the Republic, the State and other administrations largely assumed the responsibility of producing or presenting goods, services and construction works to meet the social needs of the public through their internal organisations (Adal, 1968:12-15). Accordingly, they had service production and constructions works done by public employees and bought goods mostly from public enterprises (and sometimes private enterprises) they had already established (Sayar, 1964:1). When the State started to do business with private enterprises, the following question was raised: "How should the State make purchases and from which enterprises?" When private enterprises came into play to meet public needs, it became necessary to ensure that the State is fair with enterprises while making purchases. This required the creation of legal grounds. The first legal regulation which is accepted to be first procurement law is "The Law on Auction and Import dated 1925 and numbered 661 (auction and import)." The second regulation is "The Law on Auction and Procurement dated 1934 and numbered 2490." After this law, which remained valid for about fifty years, "The State Procurement Law dated 1983 and numbered 2886" was put into force. These laws made up for the deficiencies in the previous laws and were aimed at fairer and more transparent and economical procurements in parallel with economic developments. Following the decisions dated January 24, 1980, the target was to enable private enterprises to take place in economy more. Thus, the public sector gradually withdrew from the production of goods and services and its productions in several fields were privatized. As a

<sup>a</sup> Assoc. Prof., Uludag University, Faculty of Economics and Administrative Sciences, Public Finance, Bursa, Turkiye, ozhanc@uludag.edu.tr

result, the State increasingly started to make its procurements from private enterprises. The State Procurement Law numbered 2886 being put into force, administrations began to buy goods and services from private enterprises and have their construction works done by private companies. They also started to carry out income-generating operations (rent, build-operate, build-operate-transfer). Yet, some problems occurred and it became mandatory to improve public procurements according to the European Union Acquis. Therefore, the need to review the public procurement law was felt, and the Public Procurement Law dated 2002 and numbered 4734 was enforced. The new procurement law regulates only the operations related to spending. Some articles of the law numbered 2886 have remained applicable to income-generating operations. Today, public procurement regulations are carried out according to the law numbered 4734 on the side of spending and the law numbered 2886 is applicable to income-generating operations. In spite of the improvements in public procurement legislations and legal infrastructure, there are still problems resulting from the regulations and practices. Administrations fail to carry out procurement operations properly and enterprises act in such a way that they ruin competition. The principles of competition, transparency and equality are thus violated. As a result, procurements are made at high costs, public resources are used more than required or sometimes procurements fail and services are interrupted.

The objectives of this study are to show that public administrations fail to prevent excessive or irrational use of public resources in procurements, identify important problems in legislations and practices so that public procurements can be carried out in a healthier way and with a special attention to transparency and competition and provide solutions. Accordingly, this study first covers the problems identified in the laws numbered 2886 and 4734, and then offers suggestions for a healthier procurement system. While the problems in procurement system were being identified, former studies on the problems in procurement system, the public procurement reports issued by Public Procurement Authority and procurement files<sup>1</sup> were consulted.

## **2. Findings about Public Procurement Operations within the Scope of State Procurement Law Numbered 2886**

There are some practices that fall into the scope of State Procurement Law but ruin the principles of transparency and equal treatment in the sales and rent of properties by public administrations and establishment of corporeal rights on property. Such practices also aim at political gains. These practices are detailed below;

a- Beyond the evaluation of the State Procurement Law considering the principles of competition and equal treatment, an important point about this law is that it was passed in 1983 in order to carry out both spending and income related operations and its provisions were applicable to both. However, a closer look into the law would reveal that spending come to the forefront. When spending operations were excluded from the State Procurement Law with the Public Procurement Law numbered 4734, the law numbered 2886 made no sense for income related operations. The law numbered 2886 and the law numbered 4734 are both related to procurements, which causes confusion on the side of officials enforcing these laws. As the officials involved in public procurement practices generally look into spending, they may get confused when they are to deal with income-generating operations and make mistakes in writing the right law or article number. Besides, the term procurement law is still ambiguous because which law is being referred to is unclear for some.

b- Article 35 of the State Procurement Law covers different procurement procedures. In Article 36, it is stated that the main procurement procedure is closed bidding. The law states which procurement procedures are to be applied under which conditions, but some provisions of the law are too general and abstract making the law easy to be interpreted from an excessively broad perspective. Due to the lacuna in law, it can be possible to prefer negotiated procedure to closed bidding. For example, the following expression in Article 51/g on the negotiated procedure is open to discussion: *“when closed or open bidding are not found to be convenient because of the features and use.”* This expression prevents close bidding from being the main procedure. We see this provision being applied mostly in renting operations. Public administrations rely on the expression *“because of the features and use”* and invite the bidders they want through negotiation. Thus, the principle of equal treatment to candidates is violated, competition is ruined, public resources are prevented from increasing and the likelihood of corruption gets stronger (Sezer, 2002:68-69).

c- The law stipulates that an estimated cost be calculated before the tender in income-generating operations like renting, sales and establishment of corporeal rights on property. It is stated in Article 9 of the Law that *“Either administrations shall come up with an estimated cost or they have it calculated...”* Accordingly, public administrations are required to calculate an estimated cost on their own or with the help of institutions such as municipalities, chambers of trade and chambers of industry. However, what happens in practice is that administrations calculate an estimated cost without considering any criteria (particularly municipalities) and they go out to tender with this cost. Such practices along with the one stated under the previous bullet above make it possible for administrations to go out to tender with whichever ever candidate they want and at the cost desired. This not only brings about the violation of equal treatment principle but also ruins competition and prevents a possible increase in public resources.

d- Another practice which has caused the violation of equal treatment and competition principles is the Law dated 12/11/2012 and numbered 6360, which casts off the Law numbered 2886. The following is stated in Article 10 of the Law dated 12/11/2012: *“The metropolitan municipality can run the excavation sites in its own ownership and at its disposal as well as public transport services, social facilities, kiosks, parking lots and cafés; or transfer the operation of such places to enterprises where they or their subsidiaries hold more than 50% of the shares according to the provisions of the State Procurement Law dated 8/9/1983 and numbered 2886. The cost and duration is to be determined by municipal councils. However, the transfer of such places to third parties by municipal enterprises is subject to the Law numbered 2886.”* This article allows municipal administrations to go out to the tender with the candidates they want. Here the municipal council fixes a price for an asset. The asset is given to the municipal corporation at the cost determined by the council. All this process is subject to the Law numbered 2886, but there is a risk that relying on the expression *“because of features and use”*, municipalities can go out to the tender through negotiation procedure with this cost and candidates they want. In such an operation, the municipal council grants the necessary permission to the municipal corporation, but the administration can use its own corporations (as a camouflage) and carry out the tender with the candidate it wants. In such operations not only are the principles of competition and equal treatment violated but also the municipal council is excluded.

e- Regarding the announcement period of big income-generating tenders such as the establishment of restricted real rights on immovable like land, plot and buildings, it is stated

in Article 17 of the Law that “... *The period between the first newspaper announcement and tender cannot be less than 10 days, and the period between the last announcement and tender cannot be less than 5 days...*” It should be noted that 10-day and 5-day periods are too short for a healthy tender process. When a tender is initiated for the establishment of restricted real rights on valuable immovable, a 10-day period would not be long enough for candidates, except certain ones, to make preparations and calculations (state of the land, calculation of the cost of the building which is to be constructed on the land, profitability, etc.,...). Such a situation would stifle competition and equal opportunities.

f- According to law numbered 2886, agreements are made for income-generating operations such as sales and renting. The winner of the tender is normally expected to comply with the provisions in the agreement. However, in practice agreement may be violated in different ways such as improper use of location or straying from the point of tender. Such situations which involve the use of fraud or trickery in tender undoubtedly cause the breach of public rights. Hence, the public administration concerned is required to monitor the operations and actions of the enterprise and check whether it complies with the agreement or not. It is unfortunately observed that some public administrations fail to carry out the above-mentioned monitoring and control activities and they sometimes ignore actions which are incompatible with the law. This leads to the violation of the principle of equal treatment by administrations.

### **3. Findings about Tender Operations Falling into the Scope of State Procurement Law Numbered 4734**

In the general preamble of the Public Procurement Law numbered 4734, which was put into force upon its publication in the Official Gazette dated 22.01.2002, it is indicated that State Procurement Law numbered 2886 fails to meet the requirements of the era and it caused confusion as the spending and income operations are carried out based on the same law. The most important reasons for making a new Law were to ensure transparency, competition, equal treatment and public opinion audit and to make sure that needs are met in a proper and timely manner and resources are used effectively. When we compare the first version of the law as it was passed by the Grand National Assemble and the last version today, we realize above all that many amendments were made between 2002 and 2013. To be more specific, one hundred and sixty-two amendments were made with twenty-six laws from the date law was first accepted to July, 2013<sup>2</sup>. Amendments took the form of additional articles, change in articles or annulled articles. Given the number and content of amendments, it is possible to say that the initial spirit of the law has been damaged. Considering the law numbered 4734, the most important points which can be regarded as a problem about the failure to ensure transparency, competition, equal treatment and public opinion audit are detailed below;

a- There are too many procurements that fall into the scope of exceptions according to Public Procurement Law; it is seen that as of 2013, there are nineteen exceptional situations that fall into the scope of Article 3, which is about exceptions. The 2010 Progress Report of European Commission covers a due diligence about exceptions. It is mentioned in the report that the number of exceptions has been rapidly increasing since the day the law was passed (Günel, 2011:108). In 2002, when the Law was first accepted, the number of exceptions was only six. However, as the years passed, that number has increased showing that regarding the proper use of public resources, fundamental principles such as competition, transparency and reliability have been damaged over the years.

**Table 1.** Size of Exceptional Public Procurements (2012)

Scope	Public procurement (in number)		Public procurement amount (1000 TL)	
	2012	%	2012	%
In the scope of tender procedures mentioned in the law numbered 4734	94.173	73,74	76.634.709	81,18
Direct Procurement	-	-	10.554.256	11,18
<b>Exception</b>	<b>33.440</b>	<b>26,19</b>	<b>7.121.725</b>	<b>7,54</b>
Out of scope	88	0,07	88.033	0,09
Grand Total	127.701	100,00	94.398.722	100,00

**Source;** Public Procurement Authority, Public Procurements Monitoring Report-2012, Ankara, 2013, p.2

As it can be seen in Table 1, the number of exceptions constituted 26.19% of all operations and their amount corresponded to 7.54% of the total amount in 2012. These rates suggest that the situation is beyond the famous saying in Turkish "*Exceptions do not break the rule*". In other words, the numbers show that exceptions have replaced the rule so far. A good example to this would be the categorisation of goods and service purchases up to 6.629.154,-TL as an exception by State Economic Enterprises (SEE) and Municipal Economic Enterprises (MEE) in 2013. According to the figures published in 2012, SEEs hold a very high share, which is 34%, in all the exceptional procurements (2012 Public Procurements Monitoring Report 2013:12). As the Law allowed such exceptions, the amount allocated to such exceptional procurements was kept high. However, this clearly shows us that regarding the use of public resources, fundamental principles such as competition and equal treatment are transgressed.

b- Regarding the widespread use of negotiated procedure and direct procurement instead of open procedure, which is the main procedure type; the following is stated in Article 5 on fundamental principles of the Public Procurement Law: "*Open procedure and restricted procedure are the main procedures in the tenders to be carried out in line with this Law. Other procurement procedures may be used in the special situations mentioned in the Law.*" According to this statement, administrations are required to use open and restricted procedures above all. Although the data in Table 2 show that administrations use open procedure, it is also understood that purchases that fall into the scope of negotiated procedure, direct procedure and exceptions have reached a significant amount. The clearest example about this is State Economic Enterprises. According to a study published in 2009 (Koçberber,2009:151-176), SEEs fall far behind the reference values in the indicators when it comes to preferring open procedure, asking for confirmation before the agreement and inviting sufficient number of candidates to the tender. The same study has also revealed that there were many complaints about some of the tenders carried out by SEEs, as a result of which several tenders had to be cancelled. The study, thus, shows that SEEs have a performance far below the target when it comes to carrying out tenders in compliance with the related legislation.

Table 2 shows that the purchases made with negotiated and direct procedures constitute 18.50% of the entire sales, and their amount corresponds to 17, 5 billion TL. The numbers prove that a significant amount of public resources are used without respecting the principle of "competition", which is one of the fundamental principles of the Law.

**Table 2.** Distribution of Public Procurements within the Law (2012)

Scope	Public procurement (in number)		Public procurement amount (1000 TL)	
	2012	%	2012	%
Open	71.414	55,93	61.977.853	65,66
Restricted	624	0,48	7.749.420	8,21
<b>Negotiated</b>	<b>22.135</b>	<b>17,33</b>	<b>6.907.437</b>	<b>7,32</b>
<b>Direct Procurement</b>	-	-	<b>10.554.256</b>	<b>11,18</b>
Exception	33.440	26,19	7.121.725	7,54
Out of scope	88	0,07	88.033	0,09
Grand Total	127.701	100,00	94.398.722	100,00

**Source;** Public Procurement Authority, Public Procurements Monitoring Report-2013, Ankara, 2013, p.2-4.

The Law numbered 4734 indicates that negotiated procedure can be applied in certain situations. These situations are detailed in six clauses covering miscellaneous issues. However, administrations may tend to apply procedures in their favour. For example, according to Article 21/b of the Law on negotiated procedure *“Tenders must be carried out urgently if any unpredictable or unexpected thing, which cannot be envisaged by the administration, such as natural disasters, epidemics, danger of loss of property or life happens.”* Relying on this statement, administrations may apply this procedure, which is fast, and simply get rid of the challenging and complicated open procedure process. Administrations may take advantage of the phrase *“which cannot be envisaged by the administration”* and go out to tender with the candidate they want applying the negotiated procedure. What happens in reality is that administrations qualify something as unpredicted though they themselves fail in planning and carry out the tender in the way they like exploiting the above-mentioned statement. For example, an administration can organise a tender towards the end of the year and complaints are submitted causing the tender to be cancelled. Upon the complaints, that administration can qualify this situation as an *“unpredictable event”* and opt for negotiated procedure on the grounds that they have no time to organize a new tender. In this way, the administration can give the job to the candidate it wants. In fact, what is called to be unpredictable here is not about a situation but about the administration itself.

It is possible to say that applying negotiated procedure or direct procurement in a tender where open procedure should be applied shows that the administration concerned goes out to the tender with the candidate it wants and helps the enterprise from which purchases are made profit from the situation. As a result, principles of equal treatment and competition are both breached.

c- In open and restricted procedures, the tender period is long and it takes a lot of time to initiate the tender not to mention the long preparation period and complaints about the tender(Olgun,2006:48-49). Therefore, seeking to finalize the tender and get the job done as quickly as possible, administrations have some concerns about open and restricted procedures. As a consequence, they opt for negotiated procedure or direct procurement where things are done more quickly compared to open or restricted procedures. In Article 62/b of the Law, it is stated that *“Given the period when the envisaged subsidies are to be used, it is essential that administrations carry out the tenders on time and conclude the tenders within the first nine months of the year for the projects that cover more than one year and are of investment quality (except for the projects that need to be finalised due to natural*

*disasters*)...” Yet, administrations do not always comply with the time constraint and go out to the tender towards the end of the year failing to finalize the tenders on time. Then they call this situation unpredictable and use negotiated procedure as last resort. Direct procurement is another way administrations may have recourse to in order to get rid of long tender periods. Administrations may divide their works under different projects and choose direct procurement for the purchase of goods or construction works. In fact, particularly in construction works, there should be no division and the integrity of the project should not be damaged. That construction works are handled under more than one tender is a violation of fundamental principles. If works can be planned, then they should not be divided into pieces (Gök, 2010:21). For example, take a municipality which is supposed to combine different public toilet constructions carried out in various districts under one tender and in a file starts the construction work in each district using the direct procurement method and assigns the candidates it wants to each construction work right before the local elections. If the municipality had given the construction work to only one candidate through open procedure, the cost of the total project would have been lower. However, the municipality got the works done faster and had political gains before the elections, although it meant a higher cost. It is possible to consider this situation as undeserved gain, unfair competition and unequal treatment.

d- Administrations being subject to loss due to unrealistic calculation of approximate prime cost or approximate prime cost being kept confidential; Administrations determine approximate costs based on the type of tender by doing a market research and checking the market values and unit prices (construction work and service work) published by the State. However, there is an interesting point about approximate costs: There is a difference of 10 to 35% between the approximate costs and the contractual costs stated in the contract signed by the winner. The figures in Table 3 explain this situation.

**Table 3:** Comparison of Contractual Cost- Approximate Cost (2012)

Procedure	Type of Procurement	Contractual Cost/Approximate Cost
Open	Purchase of Goods	79%
	Purchase of Services	87%
	Construction Work	67%
Restricted	Purchase of Goods	71%
	Purchase of Services	7%
	Construction Work	70%
Negotiated	Purchase of Goods	88%
	Purchase of Services	90%
	Construction Work	88%

**Source;** Public Procurement Authority, Public Procurements Monitoring Report-2012, Ankara, 2013, p.8

Approximate costs are calculated according to market conditions. As it can be seen in table above, the works are being done with an offer 33% less than the prime cost in construction projects where open procedure is used. This shows that there is a problem about approximate costs. Another point about approximate costs is that they have to be kept confidential according to Law numbered 4734. That approximate costs are being kept confidential is not beneficial to the administration. On the contrary, it is against the administration. In such a situation, either the bidders are subject to extremely low values or administrations are forced to make purchases at high costs (Serdar, 2010:38). Being faced with extremely low bids puts both the administration and bidders in a difficult situation. Low

bids constitute an important problem particularly in construction works (Eren, 2010:72-73). Besides, enterprises may learn about approximate costs in different ways. While administrations are carrying out preliminary surveys about approximate costs with enterprises, the latter can have an idea. During this process, the representative of enterprises may establish close contacts with the officials of the administration and get the information they want. The way that an enterprise gets information about approximate costs can be observed in the procurement procedure. For instance, in some tenders the bids of some candidates may be too close to each other<sup>3</sup>. This shows that several enterprises have learnt the approximate cost. Or in some tenders, most candidates offer a value far below the approximate cost. In such a situation, they are eliminated. Yet, there is still a winner, which implies that the winner might have learnt the cost in advance. This scenario may also show that the approximate cost was calculated wrongly. Calculating the approximate cost wrongly or breaking its confidentiality came up as the most important result of the surveys conducted on the employees of administrations (Kömürçü, 2006:93-94). If approximate costs are learnt or such an impression is left, everybody concerned becomes suspicious (Serdar, 2010:34). Thus, the problems about approximate cost turn out to be violating the principles of competition and equal treatment.

e- Shaping the tenders in municipalities in order to have political gains and benefits; Regarding this issue, we see that particularly municipalities, which use a significant amount of public resources, may seek to have political gains in their spending or income-generating operations (CHP, 2010:41-43). According to Law numbered 4734, municipal enterprises can participate in the tenders initiated by municipalities and get their projects. However, in recent years, it is observed that more and more municipal enterprises participate in the tenders initiated by municipalities. They win the tenders every year. Municipal enterprises apply different methods to get the works of municipalities (Meşe, 2011:209-212). For instance, municipalities choose negotiated procedure “on the grounds that the tender should be initiated immediately” and give the job to the municipal enterprises. If open procedure is to be carried out, it is announced in advance that the municipal enterprise will get the job and in this way other enterprises are prevented from getting the job. Sometimes, they may add such provisions to the specifications that enterprises other than the targeted one cannot get the job. They may also create a set-up where some companies already doing business with the municipality appear to be offering bids in the tender. If external companies get the job, then they may create problems about the progress payments or something else so that the external companies are discouraged from participating in the next tender (Meşe, 2010:211). There is no doubt that in such situations competitive conditions are removed. However, there is a more important point here: Municipal enterprises have other companies in the market do the job which they have taken from the municipality. Doing this, they apply exceptions or direct procurement. In other words, municipal enterprises outsource the job they have taken from the municipality (Meşe, 2010:211). Regarding the jobs with big amounts in particular, municipal enterprises can spend the purchases up to 6.629.154,-TL in 2013 without being subject to Law. Doing this, they rely on Article 3/g of the Law, which is about exceptions. Such a functioning is against the municipality but for the municipal enterprises and their outsource companies. Giving the job to its own enterprise, the municipality is hindering competition. In other words, it does not apply open procedure or do business with the companies in the market and as a result, it gets the job done at an inappropriate cost. As the job is given to a municipal enterprise, it is the municipal enterprise which earns money. In addition, as the municipality outsources its job to other companies in the market, it is in fact favouring them. Also, as open procedure is not chosen, they save time



and get the work done faster and more smoothly. Making the procurements in the way it likes or dividing the projects, a municipal enterprise prevents competition by favouring certain companies in the market, violates the Law numbered 4734 and makes purchases at high amounts causing loss of public resources.

f- Fraud and trickery in tender; Tender process starts with the announcement and contract being signed and ends with the job being completed. The situations that do not comply with the legislation are charged with fraud and trickery in tender (Turkish Penal Code, Art: 235). In this framework, competitive conditions must be created in goods and service purchases as well as construction works, tenders must be carried out transparently and after the contract is signed, the parties involved must fulfil their obligations in line with the contract. If a tender is not carried out in a health way, it is thought that there is bid-rigging. This can occur in any purchase. However, we see it happening more in works like cleaning, garbage collection and meter reading. As to construction works, it is observed that the contractual obligations are violated, or for example, although the contract forbids the use of outsource companies, the job is done with third parties. In service procurements, the deficiencies in the qualities and number of the employees to be hired may bring about serious gains to the winner of the tender. Regarding this, some problems about controlling the administration may occur. The representatives of the enterprise and administration may agree on their benefits. The employees may be shown to have worked although they did not. The jobs may not be completed fully and payments may be made more than required. In construction works, the materials which must not be according to the contract may be used or although third party employees must not be made to work, they work. As a result, the quality of the job decreases. All in all, not only public officials but also the representatives of companies can be blamed for such improper functioning, but it is always the public that is at a loss (Sarıtaş, 2009:60).

Such operations in tender process cause certain companies to be favoured damaging the principles of equal treatment and competition.

g- Deficiencies about the employment of staff during tender process; The number of employees dealing with the tender preparations may not always be sufficient. Unqualified staff may be employed. There may be some deficiencies in the organisation of tender unit. Employees may be too close with companies. Given the length of tender process (preparation of files, announcement, complaints and etc.), an insufficient number of employees or their lacking the desired qualities would increase mistakes and cause the tender preparations to take longer. In such a situation, administrations may tend to avoid procurement procedures and choose negotiated procedure or direct procurement, which are easier to apply. A procurement system which does not function well puts employees in a difficult situation and causes them to work in hesitation (Çiçek, 2009:74). This also leads to constant complaints. The number of complaints submitted to the Public Procurement Authority may help us learn whether or not the tenders are healthy. In 2010, the number of complaints submitted to the Authority was 4.281, and this number increased to 4.670 in 2011 (PPA;2011;2). Given the rise in complaints, it is possible to say that the way tenders are carried out by administrations has now become open to discussion. Besides, when we take a look at the working environment of tender units, we see that the location and environment they work in may constitute another reason for the problems mentioned above. Administrations use a significant amount of public resources and their working environment should be designed in a way to reflect the significance of their job.

h- Insufficient sanctions on transgressions (fraud or trickery in tenders); Legal rules are important regulations keeping the order in social life. Individuals must respect the rules and keep the order. Such obligations are based on laws. Regarding tenders, there is also a tender legislation which concerns both candidates and administrations. Sometimes candidates may tend to profit from tenders as the sanctions against unfair competition and unequal treatment are not strong enough and Criminal Procedures Act does not offer severe punishments against fraud, trickery and bid rigging in tenders. Article 59 of Public Procurement Law regulates the criminal liability of candidates, and Article 60 regulates the criminal liability of officials. If officials are definitely charged with an offense, they are not given duties anymore. If they are charged with misconduct in office, they are envisaged to be punished to six-month to two-year in prison. Yet, considering the extenuating circumstances, such offenders are not arrested. On the side of candidates, even if candidates establish a company and that company is banned from carrying out its operations, they can still establish another company and participate in tenders as long as they hold half of the new company's shares at the most. In this way, they can solve this problem. According to Turkish Penal Code, if there is bid rigging but no consequent public loss, one to three-year imprisonment is envisaged (TPC,Art:235). Yet, considering the extenuating circumstances, offenders are not punished with imprisonment. That being the case about penalties, not only the officials but also candidates involved in the tender process act too courageously and some do not hesitate to violate the principles of competition and equal treatment.

i- The same winners in tenders; An examination of tender files has revealed that whether open or negotiated procedure is applied, administrations make purchases from the same person or enterprises. Both administrations and enterprises cause this situation. The officials and employees of administrations have this understanding that they should continue to work with the same enterprises in order to get their jobs done more quickly (to keep their positions at work, to be elected again) and in the way they like. As time passed, the enterprises concerned learned how to keep on the right side of the administrations and get a slice of the cake. Some problems may occur among the enterprises due to the new ones that have just penetrated the market. However, such companies are absorbed by the system. Enterprises can prevent competition by placing bids alternately, offering complementary bids or limiting bids (Eftekin, 2010:90).

#### **4. Suggestions for a Healthy Tender System and Conclusion**

Turkey can manage to have a healthy tender system by fully complying with the principles of competition, transparency and equal treatment, which are directly mentioned in Public Procurement Law numbered 4734, though not in the State Procurement Law numbered 2886. In fact, regarding this issue, it is possible to state that both law-makers require competition, transparency and equal treatment through the two procurement laws (particularly Law numbered 4734) and indicate that these points should be taken seriously for the tender system to function in a healthy way. However, our study reveals the fundamental principles are not applied due to certain provisions in the laws and practices of the parties involved, which prevents the healthy-functioning of the system. As this study shows, tenders are not carried out in a healthy way, and this is associated with the annulment decisions made as a result of the complaints – particularly about the SEEs- submitted to Public Procurement Authority (Koçberber, 2009:151-176). Another datum supporting this is the increasingly growing number of complaints in the statistics of Public Procurement Authority (PPA, 2012:37-40). Both the annulment decisions made by Public Procurement Authority and

rise in the number of complaints show that there are problems about tenders and those who carry out the tenders fail to conduct operations in a healthy way. Considering the findings in this study and the results of various researches in this field, the solutions to the problems in the tender system and suggestions for a healthier functioning can be listed as follows:

a- Above all, the competitiveness of the system should be strengthened. To ensure this, first of all the number of candidates in a tender should be increased no matter which law is being taken as basis. This is of importance also for the country's full membership to the European Union. The European Council attaches great importance to core principles, which are competition, transparency, equal treatment and non-discrimination (OECD, 2011:4). It is essential that member states pay attention to these principles so that there occurs no problem between the members and candidates. Therefore, the provisions which allow administrations to interpret the law for their own sakes should be removed. The principles of competition, transparency and equal treatment should be better applied so that administrations are not involved in anything related to political gains or corruption and they do not tend to share tenders. This will not only help the private sector develop but also contribute to public gains, which will both pave the way for economic growth. The most important suggestion for a more competitive environment would be to ensure high participation and make as many enterprises as possible join the tender. To do this, additional provisions can be added to the specifications.

b- Second, it should be noted that the Law numbered 2886 is unnecessary. This law should be abrogated and a new law, which would give an end to breakdowns in the system, should be put into force. Regarding the rent and sales of public property, the name of the new law should not include the word "procurement". Such a new law should not cover any provisions which can be interpreted by administrations for their own sakes, which is currently the case in negotiated procedure (Article 51/g). The new law should also cover clear rules about how to calculate the estimated cost. Feasible deadlines to announce and apply for tenders should be set. The new law should also cover serious provisions to make administrations fulfil their duties, including controls to ensure that the place which is given out by contract is properly used.

c- The third suggestion, which is more comprehensive, can be handled in two parts: suggestions about the problematic provisions in the Public Procurement Law numbered 4734 and suggestions about the problems in the tenders carried out by administrations.

Suggestions about the problematic provisions in the Public Procurement Law numbered 4734; firstly, there are too many exceptions in Article 3 of the Law numbered 4734. Such exceptions cause problems. As mentioned earlier in this study, the number of exceptions and the amount that yearly exceptional procurements have reached raise concern around the implementation of the principles of competition and equal treatment. When the law was first passed, only the purchases in defence, security, intelligence, agriculture and animal husbandry were classified under exceptions in the preamble of the law (PPL Preamble, A:3). Thus, to ensure competition and equal treatment, the scope of exceptions should be narrowed down and the number of exceptions should be decreased, as it was the case in the first years after the law was passed. This issue has been handled in other studies and concrete solutions have been offered so far (Ertaş, 2010:145).

Second, the principles of competition and equal treatment are largely violated in direct procurement and negotiated procedure. In such tenders, the candidates are limited to the

ones who are called for tender rather than the ones who would like to apply for it. As this study reveals, these procedures are widely applied. There are various reasons why administrations prefer direct procurement or negotiated procedure. The most important reason is that in open procedure, it takes a long time to make preparations and the announcement period is so long. A solution to this problem would be to shorten the announcement period so that administrations do not violate the regulations. The public is concerned about competition in open procedure and direct procurement. Administrations should be prevented from carrying out tenders without making any announcements. They call certain candidates for tender, which should also be ended. Administrations can start with making announcements on their websites. If the necessary infrastructure is provided, the announcements can also be shared on the webpage of Public Procurement Authority. For example, Public Procurement Authority successfully carries out open procedures on Electronic Public Procurement System (EKAP). This system decreases labour and time cost preventing any wrong interpretation of the law (Koçberber, 2009:132). As long as the website on which the announcement is to be published is made clear and the type and amount of procurement is determined in a direct procurement, competition will be increased, too. After the announcement is shared online in a direct procurement or negotiated procedure, it should be ensured that the bids are placed online, too. In this way, no personal contact will be established with enterprises, facilitating competition, transparency and equal treatment. In this way, the public and enterprises will be assured that tenders are not carried out with certain candidates. Also, public administrations will have significant gains.

Suggestions about the problems in the tenders carried out by administrations; It is known that administrations carry out tenders with open procedure towards the end of the year. When there is a complaint, they prevent the tender from being finalized and apply negotiated procedure. In such a situation, the administration and enterprises concerned are thought to have established a relationship based on their mutual interests and benefits. To solve this problem, Public Procurement Authority should strictly follow administrations to make sure that the latter properly carry out tenders considering the tender period. There is an obvious increase in the annulment decisions in the last months of the year. Regulations should be reviewed to prevent such annulments and serious sanctions should be introduced against administrations breaking the law.

Second, there is a problem about approximate prime costs as mentioned earlier. There is generally no big difference between the bid of the tender's winner and approximate cost or enterprises come up with a too low bid. Such situations raise concerns that the approximate costs are learnt in advance. To solve this problem, different suggestions are made: Either the approximate cost can be shared with all candidates (Serdar, 2010:38) or administrations should be encouraged to carry out more research and studies on the correct calculation of approximate costs (Doğanyığıt, 2010:95-99, Eren, 2010:73). In the preamble of the law, there is no clear explanation as to why the approximate cost is kept confidential. Given the problems in practice and lacuna in the law, there is no meaning in keeping the approximate cost confidential anymore. In today's conditions, prices are published on companies' websites. Thus, administrations and enterprises can learn them. In addition, the prices in previous tenders are shared with enterprises. Therefore, both parties already have an idea about costs. To avoid problems about approximate costs, the officials of administrations should realistically estimate the approximate costs, the managers and tendering officials should place emphasis on the importance of the issue and the definite costs should be shared with the candidates. In this way, officials would no longer be suspected and public administrations would make purchases at real costs.

Third, as mentioned above, municipalities tend to give tenders to their own enterprises and block competition. To avoid this, either new regulations forbidding municipalities to participate in tenders should be made or a new regulation should be introduced to enable municipalities to get municipal services rendered by municipal enterprises without being subject to the tender laws. It is observed that municipal enterprises do not participate in tenders in the same way as other companies in the market do, which means they have an organic connection with the administration of the municipality. Therefore, unless a definite decision is made as to whether or not municipal enterprises should join tenders, municipalities will keep on ignoring competition and equal treatment and continue to go out to tenders with their own companies. There is a more important point: Municipal enterprises outsource the projects they have taken from municipalities. To prevent this, a new regulation banning municipal enterprises from outsourcing the projects they have taken from municipalities can be introduced. For example, a municipality gives its printing and publication job to its own enterprise, which then outsources the job to a third party company in the market. If a municipality gives its job to a municipal enterprise which technically cannot do it and thus prefers to outsource it, then it means that the municipality is indirectly providing improper benefits to the third party company. In fact, if the municipality went out to the tender with open procedure, it would still get its job done by a company in the market, but there would be a risk that the winner of the tender would not be the chosen third company.

Fourth suggest about tenders is related to staff. However, considering the human factor, problems around staff are not easy to solve. In today's world, it is difficult for the public sector to find sufficient and qualified employees. Yet, it is of great importance to have sufficient and qualified employees for proper use of public resources. Those who are to be employed in the department dealing with tenders should receive training on tender legislation and personal development. The physical conditions and working conditions should be at optimum level in the tender units. For example, entrance to the spaces where tender studies are being carried out should be limited to prevent a possible close relationship between the representatives of enterprises and officials. Given the moral and material responsibilities of the officials carrying out tender operations, they should get an extra payment like hazard pay or attendance fee (Karatoprak, 2011:422). This suggestion is also important to find members for commissions. Most people think that working on a tender is an extra burden; however, if they were rewarded with such payments, they would be more willing to work on tenders.

Fifth suggest in tenders is about bid-rigging, fraud and trickery. The preparations of tender officials as well as their controls during and after the tender are crucial. If the officials, who are to spend public money, do not fulfil their duties and if they fail to check whether or not the tender complies with the legislation or if always the same enterprises get the tenders, the risk of bid-rigging and trickery in tender increases. To avoid this, some measures can be taken and also the punishments can be made more severe. That the punishments are not strict enough causes administrations and their officials to underestimate tenders. If punishments were deterrent and strict enough, administrations and their officials would care about working with different and several enterprises to ensure competition and check the compliance of the tender with regulations.

The problems of public procurement system resulting from the law and practices and suggestions to these problems are listed above. If these suggestions are implemented, they would bring the following public benefits:

- Public resources will be consumed more reasonably and the surplus will be used to render other public services. If the cost is low in public procurements and the prices are high in rental and sales of public property, there will be more public resource paving the way for other services.
- Administrations will gain trust. The public will be assured that administrations are using public resources properly. Particularly, municipalities are the most important administrations that meet the public's daily needs. The public can directly evaluate the private companies rendering the services and witness what is being done. If administrations continue to work with the same enterprises despite the public's discontent with the services, administrations will lose trust. If tender operations are carried out in compliance with the regulations, the public will place more trust in municipalities.
- Candidates will be treated fairly. If the regulations are fully respected, competition will be possible and administrations will make purchases at low prices. As competition is ensured and candidate profile is diversified, the market will be improved. In fact, tender system will contribute to the development of the market.
- A healthy tender process will decrease the work burden on the audit and judicial system. When regulations are violated, the State is forced to carry out more audits and controls. It can be said that the increase in the number of complaints about tenders makes us question whether or not administrations carry out tenders in a healthy way. Public Procurement Authority, General Directorate of Security Affairs and the Ministry of Justice, which are in charge of the audits and controls, all work so hard. If tender operations are carried out under just, transparent and competitive conditions, there will be less work load on the general services (audit, judicial system) and the costs will decrease.

## End Notes

1. *The tender files were examined and evaluated by me within the scope of expertise. The outcomes of the files were used to put forth the findings in the study.*
2. *An examination of the latest version of the law shows that amendments were made with the laws numbered 5680, 4964, 6111, 5812, 5148, 5226, 5312, 573, 5784, 5917, 5020, 6461, 6353, 5680, 5436, 5583, 6288, 6353, 4761, 5615, 5763, 5625, 5255, 6287 and statutory decrees numbered 661 638.*
3. *With a decision made by Public Procurement Authority, given the nature of things, it is found to be unlikely that two candidates offer the same bid and that another candidate offers nearly the same bid with a slight difference and it was decided to annul the tender.*

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