

Evaluation And Situation of Direct Procurements in Procurement System in Public Sector

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Abstract

This study focuses on the problems resulting from the legislation on direct procurements and the ways they are practiced. Direct procurement is not accepted as a procurement procedure in Public Procurement Law numbered 4734, though the term public procurement is mentioned in the law, which also explains how to practice it. The main principles watched in public procurements in Europe Union (EU) countries are competition, transparency, non-discrimination and equal treatment, and the concerned EU Directive covers all sensitivities about procurement. Although these principles are attached importance to also in Turkey, there are lacunas in the legislation on competition as well as arbitrary operations, which contributes to the perception that administrations offer benefits to companies bringing about an ineffective use of public resources.

Keywords: Public Procurements, Direct Procurement, Procurement System

Kamu Kesiminde Doğrudan Temin ile Yapılan Alımların İhale Sistemi İçindeki Yeri ve Değerlendirilmesi

Özet

4734 sayılı Kamu İhale Kanununda ihale usulü olarak kabul edilmese de adı ve nasıl uygulanacağı belirtilen doğrudan temin işlemleriyle ilgili mevzuat ve uygulamaya dayalı ortaya çıkan sorunlar bu çalışmanın konusunu oluşturmaktadır. Avrupa Birliği ülkelerinde de uygulanan bu alım işlemlerinde önem verilen ilkeler; rekabet, şeffaflık, ayırıcılık yapmama, tarafsızlık, eşit muamele olarak belirtilmiş ve her türlü alım konusundaki hassasiyetler direktiflerde yer almıştır. Türkiye’de de bu ilkelere önem verilmesine rağmen özellikle rekabetin sağlanması konusunda mevzuattaki eksiklikler ve uygulamada yapılan keyfi işlemler idarelerin

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firmalara menfaat sağladıkları algısını arttırmakla birlikte aynı zamanda kamu kaynağının verimsiz harcanması sonucunu da doğurmaktadır.
Anahtar Kelimeler: Kamu Alımları, Doğrudan Alım, İhale Sistemi

1. INTRODUCTION

Undertaking the mission of meeting public needs within social needs, public economy fulfils its duty through the expenditures made by public administrations. Known as public spending, such expenditures are indicated as a “tool” which is simply defined as the “use of public revenues to meet public needs”¹. The use of public spending as a tool becomes more of an issue when it comes to the realization of the objectives of public finance policy. This tool has improved as the organisation called state has existed, and it has always been important. Public finance specialists holding a classical point of view support that the natural order must be protected within the economy and that the state should not intervene in the economy through public spending but make less expenditure. It is not this opinion which brought about this tool, but the global economic crisis of 1929 required the state to intervene in the economy, which as a result caused the need for public spending. The opinion that the state could overcome the crisis by increasing public spending gained importance in the years following 1929. This opinion, which was welcome by modern public finance specialists under the name of Keynesian philosophy and applied by states, is based on the idea that the state should intervene in the economy. According to this opinion, crises result from the incomplete use of resources, and the resources cannot be used properly due to insufficient demand. Keynesianists think that public expenditures should be used as a tool to compensate the insufficiency in demand². In this context, public spending appears as a tool which is used for the procurements (goods, services and manufacturing) in the general economy ruled by free market economy. Given that the procurements targeting to meet public needs are partially provided from the market economy, how these procurements will be carried out becomes an important issue. The answer to this question can be through the establishment of a system where the companies to participate in the procurement can be made subject to a competition. Right at this point stands the procurement system as a tool of the multi-benefit that is an aspiration to

1 Nihat Edizdoğan, Özhan Çetinkaya ve Erhan Gümüş, Kamu Maliyesi, (Bursa: Ekin Kitabevi, 2010), s. 39.

2 Halil Nadaroğlu, Kamu Maliyesi Teorisi, (Ankara, Beta Yayınları,11.Baskı), s. 139.

be realized through public spending. With the purpose of rendering public services, the state carried out procurements through various procurement laws within the market economy between 1920s and 2000s. The laws that made the procurements in this period possible are “*The Law on Auction and Import dated 1925 and numbered 661 (auction and procurement)*”, “*The Law on Auction and Procurement dated 1934 and numbered 2490*” and “*The State Procurement Law dated 1983 and numbered 2886*”. Since the law numbered 2886 had deficiencies and gaps and the questions about EU integration were put on the agenda, the new Procurement Law numbered 4734 was accepted in 2002. Yet, the new procurement law contained only expenditures, and some of the provisions of the Law numbered 2886 on income-generating operations have remained valid to date.

The Public Procurement Law (PPL) numbered 4734 and accepted in 2002 aims at transparency, equal treatment, reliability, confidentiality and public audit in procurements, proper and timely fulfilment of needs and efficient use of resources. The law has been in force for eleven years. However, more than twenty amendments have been made in the law since its enforcement. Among these amendments, two come to the forefront. One is that the number of exceptions that fall into the scope of the law has remarkably increased. The second is that although procurement procedures are categorized in four groups, which are open procedure, restricted procedure, negotiated procedure and direct procurement, direct procurement is no longer accepted as a procurement procedure with an amendment made one year after the enforcement of the law.

As the number of direct procurements, which are no longer accepted among procurement procedures, has substantially increased, the principles such as transparency, equal treatment and reliability have been pushed into the background no matter how much they were initially highlighted in the law. Not being listed among procurement procedures, direct procurement now stands as an exceptional procurement procedure that can be applied in special conditions. However, as mentioned in this study, direct procurements have strikingly increased in number. In this study, we examined the situation of procurements carried out under the name of direct procurement within Public Procurement Law, their place in European Union procurement system and evaluated the deficiencies in the legislation as well as the practices resulting from the practice and procurement operations considering the essence of the Law.

2. DIRECT PROCUREMENT PRACTICES WITHIN THE CONCEPT OF PROCUREMENT AND LAW NUMBERED 4734

It is possible to say that there is a trilateral relationship between the administration, contractor (private person/company) and the public within the procurement system. While public institutions are rendering the public services to the public via contractors, they are also acting as intermediaries between the public and contractor companies. In classical public spending, the state used to render the services to the public directly and make the expenditures directly by itself, whereas in modern public spending, public administrations act as an intermediary between the private sector and public due to procurement practices. In other words, public administrations supply the goods, services and construction works to be offered to the public from private companies.

In this study, we firstly focused on the concept and system of procurement because they are both important for the target to be achieved in this study.

2.1. The Concept and System of Procurement

The updated General Turkish Dictionary of Turkish Language Association defines the concept of procurement as follows “*giving works, goods and etc. to those who agree to receive them in the most suitable conditions among several buyers through public sale*”³. The definition in the Dictionary of Economics Terms is as follows “*giving works, goods and services to candidates with the most suitable tenders through public sale*”. In this regard, it is possible to say that in general terms procurement is a process and operation aiming to find the most economical tender.

When we take a look at the relevant legislation to understand the concept of procurement, we see two definitions in the laws numbered 4734 and 2886. Under Article 4 titled “Definitions” of the State Procurement Law numbered 2886, procurement is defined as follows “*Pre-contract operations which show that the job is to be assigned to one of the candidates to be selected and which are completed under the principles and procedures mentioned in this law with the approval of authorities*”. Under Article 4 titled “Definitions” of the Public Procurement Law numbered 4734, procurement is defined as follows “*Operations which show that goods and service purchases as well as*

3 <http://tdk.gov.tr>, (22.05.2013).

construction works are assigned to one of the candidates to be selected and which are completed under the principles and procedures mentioned in this law as the contract is signed upon the approval of procurement official". When we examine the above-mentioned definitions, we understand that the definitions in the Turkish dictionary and the Law numbered 2886 cover both income-generating operations and expenses, while the definition in the Law numbered 4734 includes only expenditures. We can explain this as follows: The Law numbered 2886 and the dictionary qualify the purchases needed by the public and the operations of the places to be rented as a "work".

As of today, when the public sector purchases goods and services by making expenditures, the Public Procurement Law dated 2002 and numbered 4734 is applicable. However, when there is an income-generating operation like renting, selling and etc, the State Procurement Law dated 1983 and numbered 2886 is applicable. It should be noted that this dualism is inconvenient not only from legal perspective but also in practice, and the same problem exists with definitions and concept in addition to other operations⁴. Public institutions are having trouble in that they are subject to the law numbered 2886 when it comes to income generating operations, but they are subject to the law numbered 4734 for goods purchase and construction works.

In practice, the procurements carried out under the law numbered 4734 are more in the forefront compared to the procurements carried out under the law numbered 2886. We can see this clearly when we look at the data of the institutions that are subject to Public Procurement Law⁵. According to the data, the operations carried out under the law numbered 4734 are much bigger in number. The law numbered 2886 enables the state to generate income through its assets without affecting people's financial situation, whereas the law numbered 4734 makes it possible to spend the tax income collected from people. Thus, we can say that Public Procurement Law is more important considering the public's sensitivity about possible corruption issues associated with the spending of money owned by the public.

4 Aydın Akgül, "Devlet İhale Kanunu'ndan Kamu İhale Kanunu'na", *Danıştay Dergisi*, Sayı.111, Yıl.2006, s. 12.

5 While the amount of public procurements carried out by the institutions that are subject to Public Procurement Law is approximately 100 billion TL, the amount of income-generating procurements is far below this number. See: for procurement numbers, Public Procurements Monitoring Report - 2012, for income figures, see: www.bumko.gov.tr.

The law numbered 4734 regulates how to spend the public's money. It systematically defines the procurement process and stipulates its application in a systematic way. In this scope, the procurement process starts as the need arises and the purchase order is given. In the procurement system, one of the important points is the efficient and effective use of resources. Hence, there is a principle that no procurement can be carried out for works without subsidy. Another important issue is that the fulfilment of the need in question must be beneficial to the public and fall in to the scope of the related administration's duties. One of the priorities in the procurement process is that the approximate cost is determined after the project and the technical specifications, which provide detailed definitions on the goods, services or construction works needed by the administration, are prepared. Procurement documents are prepared in line with the procurement process that has been set, and the procurement approval is taken. Following this, the procurement commission is created and announcement is published. Once the procurement documents are submitted to the possible candidates, the tenders that are submitted by the candidates are collected until the day and hour of the procurement. Tenders are evaluated and the procurement decision is made. Then the results of the procurement are communicated. As the contract is signed, the procurement process comes to an end. The operations following this step are carried on under the Public Procurement Law⁶. In the direct procurements, which we examine in this study but which are not listed among procurement procedures, purchases are made without realizing most of the steps (creating a procurement commission, setting a procurement date, signing a contract) mentioned above. Such procurements disburden the administrations on the one hand. On the other hand, they degrade and give harm to the procurement system.

2.2. The Practice of Direct Procurement and Its Place in Public Procurement System

Direct procurement is a type of procurement which was listed among the procurement procedures in the law accepted in 2002 and numbered 4734. Its definition in the law was as follows "*A procurement procedure where needs can be met by negotiating the technical specifications and price with the candidates*

6 H.Gürhan."Kamu İhale Kanunu ve Getirdikleri", İç Anadolu Belediyeler Birliği Yayını, Birlik, Sayı.10, Yıl.2008, s. 23, http://www.iabb.gov.tr/resimler/ekler/2522a2b2726fb0a_ek.pdf?dergi=1, (25.06.2013).

invited by the administration in the mentioned conditions". However, with the amendment made in the Law 4734 on 30.07.2003, direct procurement is no longer accepted as a procurement procedure.

Direct procurement is not accepted as a procurement procedure in the Public Procurement Law. In the preamble of the draft law, we read the following expression *"the law has been made considering the situations in which it is inevitable to meet the need from a certain candidate without making any announcement due to the nature of job"*. In article 22/d, it is stated as follows *"to facilitate trivial maintenance and repair works by meeting the small-scale and daily needs such as paper, stationery, electrical materials up to the mentioned amount"*.

Direct procurement is organized in order to meet the needs directly without making an announcement or taking collaterals, but by respecting the conditions stated in the law. In direct procurement, there is no obligation to create a procurement commission, and the proficiency rules mentioned in Article 10 of the law numbered 4734 are not necessarily sought. In such procurements, a person or people to be assigned by the procurement official can conduct a market research and meet the needs. Thus, unlike other procurement procedures, direct procurement prevents competitions as it disregards the tenders of other possible candidates. In direct procurement, it is thought that the administration is going to meet the need in the most economical way possible via its officials.

Table 1 below shows the distribution of procurement procedures within public spending system and the position of direct procurement in this distribution;

Table 1: Public Procurements carried out within the Law Numbered 4734

	Public Procurement in Quantity (in Numbers)		Public Procurement Amount (1000 TL)	
	2009	%	2009	%
Public Procurement Scope	2009	%	2009	%
With the Procurement Procedures mentioned in the Law numbered 4734	98.142	75,02	53.462.792	80,73
With Direct Procurement	-	-	4.086.070	7,26
Within Exceptions	32.686	24,98	7.955.974	12,01
TOTAL	130.828	100,00	66.224.836	100
Public Procurement Scope	2010	%	2010	%
With the Procurement Procedures mentioned in the Law numbered 4734	87.976	73,04	54.291.186	78,11
With Direct Procurement	-	-	5.866.929	8,44
Within Exceptions	32.475	26,96	9.352.169	13,45
TOTAL	120.451	100,00	69.510.284	100
Public Procurement Scope	2011	%	2011	%
With the Procurement Procedures mentioned in the Law numbered 4734	100.246	73,21	62.958.815	68,60
With Direct Procurement	-	-	16.912.958	18,43
Within Exceptions	36.585	26,72	11.870.195	12,93
Out of Scope	95	0,07	29.438	0,03
TOTAL	136.926	100,00	91.771.406	100
Public Procurement Scope	2012	%	2012	%
With the Procurement Procedures mentioned in the Law numbered 4734	94.173	73,74	76.634.709	81,18
With Direct Procurement	-	-	10.554.256	11,18
Within Exceptions	33.440	26,19	7.121.725	7,54
Out of Scope	88	0,07	88.033	0,09
TOTAL	127.701	100,00	94.398.722	100,00

Source: Public Procurement Authority, Public Procurements Monitoring Report 2009, Public Procurement Authority, Public Procurements Monitoring Report 2010, Public Procurement Authority, Public Procurements Monitoring Report 2011, Public Procurement Authority, Public Procurements Monitoring Report 2012.

Prepared in line with the data of Public Procurement Authority, Table 1 shows that the majority of the procurements have been carried out with the procurement procedures, but the other procurements (direct procure-

ments and exceptions) have also reached a significant size. Among all procurements, the share of public procurements that are out of the procurement procedures was 20% in 2009 (approximately 12 billion TL), 22% in 2010 (approximately 15 billion TL), 31% in 2011 (approximately 29 billion TL). Though the increase stopped in 2012, the share was 19 % (approximately 18 billion TL).

Among the procurements that are out of the procurement procedures, direct procurements look as follows: The share of the direct procurements in all of the procurements in 2009 was %7.26. In 2010, there was an increase and their share reached 8.44%. In 2011, there was a remarkable increase in the share of direct procurements and this ratio passed 18%. In 2012, however, the ratio decreased to 11%. Nevertheless, we can still say that this ratio is critical and given the way direct procurement is carried out, a significant amount of public money (10.554.256 TL in 2012) has been used in a way not open to competition, with little transparency paving the way for corruption. This situation can be observed more clearly in Table 2, which directly shows a monetary comparison of direct procurements and all of the procurements.

Table 2: Distribution of Direct Procurements within All Procurements

	Direct Procurements (1000 TL)	All of the procurements (1000 TL)	Direct Procurements Within All Procurements (%)
2009	4.086.070	66.224.836	7,26
2010	5.866.929	69.510.284	8,44
2011	16.912.958	91.771.406	18,43
2012	10.554.256	94.398.722	11,18

Source: Prepared based on Table 1.

Table 2 also shows that all other procurements and direct procurements both increase on annual basis, but the increase in direct procurements is much more than the increase in other procurements. For example, in 2010 direct procurements increased by 43% compared to 2009, whereas all of the procurements increased by 5%. In 2011, direct procurements increased by 188%, whereas all procurements increased by 32%. In 2012, however, direct procurements dropped by 37%, while all procurements increased by 3%. We need to point out that it is important to analyse the reasons why

direct procurements are preferred in the public sector as such an analysis will help to use public resources effectively and efficiently.

Table 3: The Distribution of Direct Procurements as per the Procurement Procedure and the Related Law

		Direct Procurements		Share in Total Public Procurements (%)
Clauses of Article 22	Type of Procurement	Purchase Amount (1.000 TL)	Share in Direct Procurements %	%
22/a	Purchase of Goods	570.019	5	1
	Purchase of Services	199.587		
	TOTAL	769.606		
22/b	Purchase of Goods	140.000	1	0,2637
	Purchase of Services	101.953		
	Construction Work	14		
	TOTAL	241.967		
22/c	Purchase of Goods	257.915	2	0,3682
	Purchase of Services	79.961		
	TOTAL	337.876		
22/d (Within Monetary Limits)	Purchase of Goods	9.661.519	69	13
	Purchase of Services	1.674.007		
	Construction Work	360.681		
	TOTAL	11.696.207		
22/d (Within Representative Entertainment Activities)	Purchase of Goods	2.634.023	17	3
	Purchase of Services	206.261		
	Construction Work	54		
	TOPLAM	2.840.338		
22/e	Purchase of Goods	16.214	1	0,1455
	Purchase of Services	27.341		
	TOTAL	133.555		
22/f	Purchase of Goods	821.455	5	1
	Purchase of Services	2.387		
	TOTAL	823.842		
22/g	Purchase of Goods	64	0,001	0,0002
	Purchase of Services	124		
	TOTAL	187		
22/h	Purchase of Goods	382	0,004	0,0008
	Purchase of Services	259		
	Construction Work	59		
	TOTAL	700		
22/i	Purchase of Goods	3.133	0,391	0,072
	Purchase of Services	62.986		
	Construction Work			
	TOTAL	66.120		
22/i	Purchase of Goods	45	0.015	0,0028
	Purchase of Services	2.515		
	Construction Work			
	TOTAL	2.560		
TOTAL	Purchase of Goods	14.194.768	84	18
	Purchase of Services	2.357.382	14	
	Construction Work	360.818	2	
	TOTAL	16.912.958	100	

Source: Public Procurement Authority, Public Procurements Monitoring Report, 2011.

The most common type of direct procurements can be observed within the metropolitan municipalities and other municipalities: *As of 2013*, the administrations within the metropolitan municipalities met their needs not exceeding 44.287 TL (*approximately EUR⁷15.500*) and other administrations met their needs not exceeding 14.755 TL (*approximately EUR 5.800*) through direct procurement. They also carried out direct procurements for their accommodation, travel and catering needs within entertainment activities (PPL, Article:22) The procurements that were carried out in accordance with the related clauses of article twenty-two of the Law are shown in Table 3.

As it can be seen in the table, a great majority of the direct procurements fall into the scope of clause (d) of the article. In 2011, direct procurements amounted to 16, 9 billion TL, and the direct procurements based on monetary limits (22/d) amounted to 11, 7 billion TL. All in all, direct procurements constitute 13% of all public procurements, which shows the severity of the situation in terms of transparency, competition, efficiency and effectiveness.

2.3. European Union Procurement System and Direct Procurement Method

Although public procurements⁸ have a very important role in European Union (EU) budget, they are not handled under a separate title in European Union treaties⁹. However, the articles on the free circulation of labour force, services and capital as well as the article on the freedom of establishment in "*Treaty on the Functioning of the European Union*" show that legally there is sufficient justification to harmonise the legislation in this field¹⁰. When we take a look at the EU legislation within this framework, we see that EU directives cover the regulations and fundamental principles on public

7 EUR value is based on the foreign exchange rates on 4.7.2013 (1 EUR = 2.52 TL). The numbers vary from 3.000 EUR (Lithuania) to EUR70.000 (Czech Republic) in EU countries. This subject is handled under "European Union Procurement System".

8 Public procurement contracts constitute 16% of the GDP in EU economy. http://www.publicprocurementnetwork.org/index.php?option=com_content&view=article&id=59&Itemid=54

9 TC. Başbakanlık Avrupa Birliği Genel Sekreterliği, Avrupa Birliği Antlaşması ve Avrupa Birliği'nin İşleyişi Hakkında Antlaşma, Ankara, 2011.

10 Nisa Ünay, "Türk Kamu İhaleleri Sisteminin Avrupa Birliği Kamu İhaleleri Sistemi İle Uyumlaştırılması", Rekabet Bülteni, Sayı.11, 2004, s.1, <http://www.escrc.com/article/1449/turk-kamu-ihaleleri-sisteminin-avrupa-birligi-kamu-ihaleleri-sistemi-ile-uyumlastirilmasi>, (22.03.2013).

procurements. In EU directives the principles are listed as follows; effective competition, transparency, equal treatment, non-discrimination, objectivity and proportionality¹¹. The European Union Council particularly attaches importance to core principles which are competition, transparency, equal treatment and non-discrimination¹². It is essential for the member states to pay attention to such principles so that there occur no troubles between the member states and candidates.

EU directives and regulations numbered 2004/17/EC and 2004/18/AT cover procurement procedures, goods and services purchases as well as construction works. In the directive that is numbered 2004/12 of the European Parliament and Council and was published in the EU Official Gazette dated 30.4.2004¹³, the procurement procedures to be used in public procurements are listed as open procedure, restricted procedure, negotiated procedure and competitive dialogue. Besides, it is stated that procurements can be carried out by making framework contracts. The above-mentioned procedures can be briefly explained as follows;

(1) Open procedure is a procurement procedure where all candidates can submit a tender and competition is at its peak. It is carried out in line with the minimum criteria to be set by the administration and upon the procurement announcement to be published in the European Official Gazette.

(2) Restricted procedure is a procurement procedure where certain candidates are invited giving particular importance to the principles mentioned in the directives.

(3) Negotiated procedure is based on negotiation with candidates. It can be carried out whether an announcement is made or not. It is possible to finalize the procurement by negotiating with one or more candidates based on the reason for choosing negotiating procedure. This procedure can be applied when there is no candidate and the procurement is complicated by nature.

(4) Competitive dialogue can be applied when there is no candidate among open or restricted candidates and when procurements are com-

11 Cemil Akçay ve Erol Manisalı, "4734 Sayılı Kamu İhale Kanunu ve 4735 sayılı Kamu İhale Sözleşmeleri Kanunu'nun, AB Uygulamaları Çerçevesinde Uygulamada Karşılaşılan Sorunlar Açısından İncelenmesi", <http://www.e-kutuphane.imo.org.tr/pdf/1544.pdf>, (20.03.2013).

12 OECD, Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, Brief 1, January, 2011, s. 4.

13 <http://www.publicprocurementnetwork.org>.

plicated¹⁴. However, it is essential that the administrations treat all candidates equally so that the competition terms are protected. Any explanation, regulation, adjustment or additional information regarding this procedure cannot change the fundamentals of the tender or call for tender in a way to prevent competition or cause discrimination¹⁵.

Looking into procurement procedures, we understand that the procurement procedure which is referred to as direct procurement is not mentioned in the directives. Such procurements are not in the scope of the procurement procedures detailed in the EU directives but are mildly carried out. They are, in fact, stated in the member states' own regulations. Such procurements are below either the threshold value or a certain value¹⁶. Generally named as direct procurements, the amounts and forms of these procurements change from one country to another¹⁷. Member states published regulations on direct procurements at different times and in different periods. For instance, Sweden enforced its direct procurement threshold values in 2010¹⁸. The amounts below the threshold values are as follows in member states; EUR 15.000 and below in Bulgaria, Cyprus, Finland, France, Latvia, Poland, Romania and Slovenia, EUR 20.000 or EUR 30.000 in Italy, Hungary, Lithuania and Slovak Republic, EUR 40.000 in Austria and Estonia, EUR 55.000 in Luxembourg, EUR 67.000 in Germany, EUR 70.000 in Czech Republic¹⁹. When there is a procurement to be carried out within the determined limits, it is possible to see sufficient announcements in the central procurement authorities or on their websites (ensuring competition)²⁰.

14 Directive 2004/18/EC of The European Parliament and of The Council of 31 March 2004, Article.29

15 Ayhan Kortunay ve Yasin Sezer. (2007). Kamu İhale Kanununun 63. Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi, Ankara Üniversitesi Hukuk Fakültesi Dergisi, C.56, Sayı.3, 2007, s.151 (26.05.2013). <http://libris.bahcesehir.edu.tr/yordam.htm?ac=arama&cAlanlar=y%FDId%FDIay>.

16 London Economics and Ecorys, Public Procurement in Europe (Cost and Effectiveness), PricewaterhouseCoopers International Limited, 2011, s.5. http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf (Erişim: 30.06.2013)

17 Tiziana Bianchi, Valentina Guidi, The Comparative Survey on The National Public Procurement Systems Across The PPN, Roma, December, 2010, s.1-227

18 OECD, "Public Procurement in EU Member States The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives", *Sigma Papers*, No. 45, OECD Publishing, 2010, p.28. <http://dx.doi.org/10.1787/5km91p7s1mxv-en>

19 OECD, 2010, p.4

20 Bianchi & Guidi, 2010, p. XVII

When we take a look at the share of direct procurements in all procurements in European Union countries, we can say that the distribution is not clearly shown in statistical data²¹. The reason for this is that procurement procedures are applied in a mild way. In the period of 2006-2010, open procedures constituted 75%, negotiated procedures constituted 10%, restricted procedures constituted 10% and competitive dialogues constituted 5% of all procurement procedures. In some situations such as emergencies or priorities, direct procurement method is used for purchases made through restricted procedure or negotiated procedure. Therefore, there are different applications of negotiated procedure such as competitive negotiated procedure, accelerated negotiated procedure or negotiated procedure without announcement under certain conditions²². Such practices can be observed also in restricted procedures. Thus, direct procurements appear in restricted procedures and negotiated procedures. Such practices may change from one country to another. Among these procurements, the share of procurements without announcement is 5%²³. It is the same in the restricted procedures with a ratio of 5%.

3. EVALUATION OF DIRECT PROCUREMENT METHODS IN TURKEY

Not being referred to in EU directives but indirectly mentioned in the legislations of member countries, direct procurements exist in Turkish Public Procurement Law, though not listed as a procurement procedure. Direct procurements have had a considerable share in public procurements in recent years. Thus, it is inevitable to ensure that direct procurement practices in Turkey are in compliance with competitive, transparent and non-discriminatory practices just as in EU member states. It should be noted that the environment, where direct procurements are carried out without respecting transparency and competition and where direct procurements have reached a remarkable size, has come into being as a result of the legislation and practices. Within this framework, it is crucial that direct procurements be evaluated considering the legislation and practices and this procurement procedure be used to ensure more transparent and competitive conditions.

21 London Economics and Ecorys, 2011, p.16

22 London Economics and Ecorys, 2011, p.36

23 London Economics and Ecorys, 2011, p.16

3.1. Evaluation of the Legislation and Suggestions

In the provisions related to direct procurements within the Turkish procurement legislation, it is stated that a person or people to be assigned by the procurement official shall conduct a market research and carry out the procurement without the obligation to make an announcement²⁴. According to the expression “without obligation to make an announcement” in this provision, administrations can have the freedom to receive tenders from any company they like. This situation naturally causes administrations and companies to develop bilateral relations enabling the officials to take advantage of the relations and thus, paving the way for abuses. As administrations have preferred to receive tenders without making an announcement and in the way they like in order to handle their operations rapidly and easily, this procurement procedure has become more popular compared to the others. This detection can clearly be seen in the figures presented in this study. It is observed that recently direct procurement figures have been on the rise, whereas other procurement procedures have remained below them (Table 2). When administrations carry out direct procurements although they are required to prefer other procurement procedures, they divide their works with a high amount as if they were different works staying within the monetary limits²⁵ and realize several procurements instead of one (Table 1). The issue of dividing the works within monetary limits is handled under the title of “Evaluation of the Practice”, so we are contended with mentioning it under this title. Although administrations can act more rapidly by applying direct procurement, this situation may cause the infringement of fundamental principles of the system such as transparency and competition and ultimately bring about corruption.

As mentioned in detail in the previous parts of this study, administrations have increasingly tended to carry out direct procurements over the years. In 2011, the total direct procurement amount reached *16.912.958.000 TL* (approximately 16 billion 900 million TL) constituting 18,43% of all public procurements. The fact that even the direct procurements carried out within monetary limits in 2011 corresponded to 13% shows the severity of the situation. The figures reveal that direct procurement is not applied as an exception, on the contrary it is abused so as not to obey the general provisions of the Public Procurement Law.

24 Public Procurement Law (PPL), Article: 22.

25 PPL, Article: 22/d.

The law numbered 4734 was issued with the aim of ensuring competition, transparency, efficiency, effectiveness and accountability, and to reach this goal it even foresaw the audit mechanism dealing with complaints and objections. However, its field of application is gradually narrowed through excessive bureaucracy, unwieldiness and waste of time. Ten different topics were excluded from the procurement procedures in article twenty-two of the Law regulating direct procurement. However, the scope of the law numbered 4734 should not be narrowed with such practices, but on the contrary it should be enlarged as much as possible so that the law can be respected and public resources can be used effectively. In fact, the enlargement of the law in this direction is of importance considering the compliance with EU procurement system.

Mentioned as a fundamental principle in EU directives, competition is not only indispensable for the market but also essential for the economic efforts to be continued effectively and efficiently. Competitive power represents an ideal environment where economic activities carried out by a person or an enterprise are not restricted by others and economic activities are effectively conducted. International organizations do research into competitive power. Turkey ranked 43rd among 144 countries in the 2012-2013 competition index published by World Economic Forum²⁶. As the public procurement system has taken a place in this competition, procurement now stands as an area where competition is experienced in the most effective and efficient way. It is, thus, important to have a better ranking in the list above.

The most important point in ensuring competition is the announcement. Announcements should be made timely and in the correct media. As a matter of fact, it is through the announcements that market players can be informed about the tender and create the desired competition environment. Yet, there being no legal obligation to make an announcement for direct procurements and the officials of the administration accepting tenders from any candidate they like both ruin the fundamental principles and spirit of Public Procurement Law.

The place of direct procurements in statistics proves that direct procurements are no longer applied as an exception. It is thought that some changes need to be made so that the principles of transparency, competition, equal treatment, public opinion audit and effective use of sources

26 www.rekabet.gov.tr, (2.07.2013).

are effectively implemented. In this technological era, it is a big deficiency that web sites, EKAP (Electronic Public Procurement Platform) and similar systems are either not used or used insufficiently.

Mandatory announcement should be discussed for the principle of competition to be enforced in a direct procurement. In today's world, almost all public institutions own a web site. Besides, it is known that Public Procurement Authority has established an effective announcement mechanism for open and restricted procedure candidates through EKAP²⁷. If it becomes obligatory to make an announcement for direct procurements by keeping the terms and conditions simpler on the website of the Public Procurement Authority as well as the websites of the public administrations, it will be a quite important regulation for competition. Another regulation should be made about the application of monetary limits mentioned in article 22/d of the Law. Public institutions, which want to accelerate their works by using the monetary limits, end up dividing their works. Restrictive provisions should be introduced to this article for the works not to be divided but carried out within competitive tender practices.

3.2. Evaluation of the Practices and Suggestions

The employees in the production and presentation of public goods and services may sometimes have to act quickly. The reason for this may be that the public may demand services instantly, and the officials in charge of the services have a busy schedule. Thus, the people in charge of the services and the officials who carry out the operations may tend to interpret the public procurement legislation by thinking of themselves. Since their objective is to carry out the procurement as soon as possible, they may tend to receive tenders from the already available companies by dividing their work based on monetary limits, although they are supposed to carry out open procedure. The officials interpreting the legislation as they like prefer to receive tenders from the companies that work fast or the companies recommended to them. This situation ultimately causes people to think that there is an interest relationship between the officials and the companies in question (Table 4).

The main reasons why administrations opt for direct procurement can be listed as follows: allowances being paid in small amounts and tranches,

27 www.ihale.gov.tr, (2.07.2013).

small and individual allowances (provision of allowance in a sympathetic way), provincial administrations having few allowances allocated to their cleaning, stationery and spare part (products for maintenance and repair) needs, the need for buying materials in the desired model or brand, the desire to finish the work at the earliest opportunity²⁸. Given the way direct procurements are applied, it is possible to see that the principles such as competition, transparency and public audit are ignored. Public officials are thought to exert a direct effect on this.

Public officials are not independent of the society. Given their authorities and positions, they have the public power to accelerate the improvements or deteriorations in the society. The impressions that public officials leave on the public relatively shape the public's point of view about the institutions. For example, if all the officials, from A to Z, in the procurement operations are sensitive about the competition in meeting the needs, the public will have a positive approach to the public officials and administration concerned. Regarding this, TESEV (Turkish Economic and Social Studies Foundation) conducted a survey on the employees of the market and asked them to what extent they think public administrations treat the candidates equally. The participants were asked to grade their answers from 1 to 10. The result can be seen in the table below;

Table 4: Survey on the People's Perception of Public Institutions' Equal Treatment in Tenders

	Does not treat equally (0-4)	Mediocre (5)	Treats equally (6-10)
Municipalities	75%	14%	11%
Central Administration	79%	15%	6%

Source: Fikret Adaman, Ali Çarukoğlu, Burhan Şenatalar, İş Dünyası Gözünden Türkiye'de Yolsuzluğun Nedenleri ve Önlenmesine İlişkin Öneriler, (TESEV Yayınları, 2003), s. 54.

As the results of the survey show, many people hold the opinion and have the perception that there is no equal treatment in tenders. The opin-

28 Yasin Atılbaz, 4734 Sayılı Kamu İhale Kanunu Kapsamında Doğrudan Temin İle Yapılacak Alımlardaki Uygulamaların Analizi, Yayınlanmamış Yüksek Lisans Tezi., 2009, s. 34. [http://libris.bahcesehir.edu.tr/yordam.htm?-ac=arama&cAlanlar=y%FDld%FDray,\(25.06.2012\).](http://libris.bahcesehir.edu.tr/yordam.htm?-ac=arama&cAlanlar=y%FDld%FDray,(25.06.2012).)

ion that the unethical behaviours of public officials employed in the direct procurement have an effect on this situation is coming to the forefront. It is possible to say that direct procurement practices (considering their content) have a share in this negative perception. Direct purchases referred to as direct procurements in Turkey are indispensable also in European Union countries. Yet, the important thing is to ensure competition and protect transparency. In European Union, this type of procurement is envisaged in urgent, prioritized and special works, and in direct procurements companies are informed so that a competitive environment can be created. The countries where the competition is strong are Germany, Spain and Denmark. The countries where the competition is weak are Slovakia, Estonia and Poland²⁹. The ethical behaviours of the public officials as seen in the European Union are critical and contribute to competition.

The employees of the public administrations may sometimes face the urgent demands of their managers in meeting the public's needs. They may sometimes remain helpless in their workload as a result of the spontaneous actions of their employees. Thus, when employees are to fulfil their tasks rapidly, they prefer to carry out direct procurement which does not necessitate any announcement or preparation. Through this method, they can spread and divide the high value purchases over time. In this way, they not only make high-value procurements but also exclude competition. This may be an example for the perception that when public administrations and officials rule out competition, they pave the way for corruption. The best examples, however, can be seen in municipalities. In a municipality that has been scrutinized³⁰, direct procurement method was separately applied for each district for a construction work to be carried out under the name of "public toilet". Yet, the project should have been designed and calculated as a whole, direct procurement method should have been chosen and competitive conditions should have been created. In this example, what contributed to the perception of corruption was that the work was divided into several parts by remaining within the direct procurement limits and certain people in the market were assigned the task causing the parties involved to take advantage of the situation. The people who caused this situation are all public officials employed in the procurement process. To prevent such things, first of all, measures should

29 London Economics and Ecorys, 2011, p. 96.

30 Özhan Çetinkaya, one of the authors of this study came across this example as he was examining one of the procurement files of a municipality in his capacity as an expert witness.

be taken so that senior managers and public officials can be sensitive about this issue and then measures should be taken to prevent the employees who are actively involved in the process from misusing their authorities. If measures targeting to encourage senior managers and procurement officials to behave ethically are taken³¹, the employees at lower levels will broadly be discouraged from disobeying the legislation.

In addition to the problem of dividing the works within monetary limits in direct procurements, there is another important problem. Since monetary lines are used up, the public's money is wasted and high-value procurements are carried out. Moreover, according to the last paragraph of article twenty-two of the Law, procurement officials are allowed to do price research in the market, which makes it possible to set the prices depending on the officials. As the officials become more dominant in setting the prices, the relationship between the official and the company concerned also gets better. In other words, if the officials tend to make their purchases from the companies which with they have already established a contact, they may prevent competition. When they make purchases always from the same companies, they risk being charged higher amounts although tenders may be submitted by other companies. If the functioning of administrations is revised in order to weaken the link between the officials and companies and if the employees are trained in this direction and if technology is used, competition and transparency will increase.

4. CONCLUSION

Direct procurement method is applied in European countries, too. However, in Turkey the number of direct procurements has significantly increased causing a situation contradicting the essence of procurement system. The reasons for this may be the lacunas in Turkish legislation, the personnel assigned the task of carrying out the procurement, the attitude of the senior managers and public officials overlooking the operations and assuming the responsibility. Though direct procurement is not mentioned in EU directives, there are significant regulations to ensure competition in the procurement method which is seen as direct procurement in EU countries' own legislation. In Turkey, on the other hand, direct procurement is

31 Unless senior managers are prevented from transgressing the legislation through moral and material sanctions by keeping in mind the saying that "Corruption starts at the top", none of the employees at lower levels will respect the legislation or ethics while carrying out their work.

preferred as a method facilitating the works of administrations shunning competitive conditions.

The place of direct procurements in statistics shows that direct procurement is no longer applied as an exception. It is seen that there is a need to make changes in direct procurement practices to guarantee the principles such as transparency, equal treatment, public audit and efficient use of resources. It is a big deficiency that in today's world, where we are living in the era of technology, websites or systems like EKAP are not used in direct procurements because the legislation does not require it or because administrations are not so sensitive about the issue of competition. Given today's economy and social relations, it is now inevitable to inform companies of procurements through announcements so that competition conditions can be created.

Considering that the share of direct procurements has greatly increased in the public procurement system, it is obvious that administrations must undertake the responsibility for ensuring transparency, competition, equal treatment, reliability, confidentiality, public audit, timely and proper fulfilment of needs and efficient use of resources³².

Ineffective practices weakening the competitive environment such as direct procurement in the procurement system prevents all persons and companies to bid in the public procurement from offering bids on equal terms. In parallel with this, the operations that are carried out by companies taking advantage of the situation and that are called corruption bring about several costs, notably "high amounts of taxes". Those that are not involved in this process are also adversely affected: they have to face an additional financing for the services they do not benefit from and they ultimately get poorer and poorer³³.

*Corruption = Monopolist structure + Decision making at its sole discretion - Accountability*³⁴. This formula does not suffice to explain the issue as a whole, but based on it, it can be said that an effective way to combat corruption is to break the monopolist structure particularly for direct procurements and to ensure transparency. In this regard, for the public

32 PPL, Article.5

33 Mehmet Şahin, "Küreselleşme Kaynaklı Yoksulluk ve Yolsuzluk", Muhasebe ve Finans Dergisi, Sayı.25, 2005, s. 131.

34 M. Hakan Özbaran, "Şeffaflık ve Hesap Verme Sorumluluğu Bağlamında Yolsuzlukla Mücadelede Sayıştayların Rolü", Sayıştay Dergisi, Sayı.43, 2001, s. 4, <http://www.sayis-tay.gov.tr/yayin/dergi/icerik/der43m1.pdf>, (16.03.2013).

procurement system to be fostered, the lacunas in the legislation should be filled and the misdoings in practice should be eradicated in the way mentioned under the evaluation and suggestions title. In other words, as it has previously been mentioned in the study, it is of importance that direct procurement operations, the significance of which has been proven in numbers, be freed from monopolist and non-transparent understanding. To do this, administrations should develop their announcement applications and introduce legal regulations to prevent procurements without any announcement being made in advance.

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