



## SIGMA

### Support for Improvement in Governance and Management

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## TURKEY

### PUBLIC PROCUREMENT

#### ASSESSMENT MAY 2008

#### 1. Summary

This assessment report is based on a Sigma peer review of the public procurement system and the system for concessions and public-private partnerships (PPP), which took place in the autumn of 2007 and the spring of 2008. The draft peer report has been submitted to the Government of Turkey and to the European Commission.

Public procurement is currently governed by the Public Procurement Law (PPL) (Law no. 4734), adopted in 2002. The PPL has been amended several times every year since 2004<sup>1</sup>. Whilst this may not be unusual, some of these amendments were introduced on an *ad hoc* basis by individual ministries and Parliamentarians rather than as part of an overall government strategy. These amendments have introduced exemptions that had not been envisaged under the *acquis communautaire*. It has also been a common practice in Turkey that 'big ticket' procurement related to (politically) important international (cultural or sporting) events are exempt from the scope of the PPL.

The Public Procurement Authority (PPA) has prepared a proposed amendment to the current PPL which essentially aims to introduce electronic means of procurement as well as some of the new procedures (framework agreements, dynamic purchasing system) and to reform, to a limited extent, the rules on remedies. In addition, it has also initiated the preparation of a second draft law which would, if adopted, completely replace the current PPL. Neither draft has been adopted yet, and only the former is in the public domain.

The current PPL does not explicitly deal with entities operating in the utilities sector nor does it contain any reference to the award of works concessions. The PPA is also currently working on a draft law for utilities procurement, which is in the public domain. A proposed Law on Concessions and PPPs is currently being elaborated by the State Planning Organisation (SPO), but there is nothing in the proposed amendment to the PPL that would enact the appropriate award procedures in line with the *acquis*. The proposed PPL amendment, whilst including some provisions in relation to remedies, does not address all of the requirements of the new Remedies Directive (Directive 2007/66/EC).

This updated assessment of public procurement in Turkey will partially take into account the drafts (proposed amendment to the PPL and draft Utilities Law) already in the public domain.

In the area of concessions/PPPs, serious fragmentation exists in the legislative as well as the institutional framework. There is a need to prepare a coherent and EC-compliant legal framework and to create a single and coordinating PPP unit to support the implementation of PPP projects and of a future concessions law.

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

## 2. Legislative Framework

In addition to the PPL, several pieces of secondary and tertiary legislation have been issued by the PPA. These regulations contain detailed instructions for the conduct of procedures, together with standard tender and contract documents (the use of standard tender and contract documents is mandatory). The PPA also issues circulars and interpretative decisions. The standard contracts provide for the possible application of a price advantage in favour of domestic candidates and the Standard Administration Specifications for goods procurement leave it to the contracting authority to decide whether or not to open up competition to foreign tenderers under the thresholds.

The current PPL is generally well structured, with a natural division between the various phases in the procurement process.

The public procurement regime covers budget institutions, entities of special provincial administrations and local municipalities, state economic enterprises, social security funds, public institutions assigned with public duties, etc., but without using the definitions included in the EC Directives. In particular, there is no definition equivalent to that of 'bodies governed by public law'. Utilities are not specifically covered but privately owned utilities operating in the utilities sectors of water, energy, transport and telecommunications were specifically excluded by a 2003 amendment. The result is that private sector utilities are not covered by the PPL but government-owned entities operating in these sectors are covered; this is precisely the situation that the EC sought to avoid in adopting its own original Utilities Directive. The definitions contained in the draft Utilities Law are much closer to those of the Utilities Directive.

There are a number of exceptions to the PPL which extend beyond, for example, exemptions for military-use products and services. Thus, in addition to a broad exemption for military procurement, there are also exemptions, for example, for the following: agricultural and livestock products; procurement conducted by covered entities in foreign countries and in cases similar to those covered by the EC's 'reserved' contracts; certain medical services; and cultural heritage projects.

The PPL applies to contracts for goods, services and works, although the definitions are not co-extensive with those of the Directives. It also provides a separate definition of consultancy services, which are subject to a special procedure contained in section 5. This does not appear to affect the overall application of the common procedures of the PPL but sets out a two-envelope system of tender submission that applies in this context only, allowing the technical evaluation to take place independently of the financial evaluation. The PPL does not mention or apply to the award of either works or services concession contracts. The proposed amendment to the PPL does not, at this stage, change this position, despite the fact that the SPO is working on a draft concessions/PPP law. The draft Utilities Law does contain a definition of works concessions but does not, of course, include them within its coverage (this is because the draft Utilities Law is much more closely modelled on the equivalent EC legislation).

The PPL applies to procurement by contracting authorities well below the EC threshold levels, although there is no great distinction made between the procedures that apply. The only, but significant, difference is that the publication rules and time limits to be applied are less onerous (shorter). In other respects, it is the same procedures that apply, but the differences do ensure that a simpler procedure applies in practice. The PPL contains provisions regarding the unlawful splitting of contracts aimed at avoiding the application of the PPL.

Under the PPL, the open procedure is the basic procedure and all other procedures may be applied (apparently including the restricted procedure<sup>2</sup>) only when special conditions for their use have been fulfilled. In terms of practical implementation, the restricted procedure is virtually absent. When used, selection will be made on the basis of pass/fail criteria which constitute, potentially, an incompatibility with the Directives (this would be replaced by a 'ranking' procedure in the proposed amendment and is therefore more likely to make it compatible). The PPL also contains a specific 'direct procurement' procedure, which can be used for the following: low-value procurement; situations falling within the EC's negotiated procedure, implying the existence of only one supplier (e.g. based on the existence of exclusive rights); the lease or purchase of immovable property; certain urgent medical supplies; and the legal services of Turkish *or* foreign advocates in respect of arbitration. The conditions for the use of the negotiated procedure largely reflect those of the Directives.

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<sup>2</sup> This is unclear: Article 5 appears to place the open and restricted procedures on an equal footing, although Article 20 implies that the restricted procedures may only be used in the case of complex procurement or where it involves high technology.

The qualification criteria of the PPL largely reflect those of the Directives, including the more recent mandatory exclusion provisions. It also contains specific prohibitions on bribery and collusion. The PPL sets out appropriately the content of tender documents and tender notices, although there is a requirement that only those who have purchased the documents (at the cost of reproduction) can participate in the proceedings, which may be an unnecessary restriction on participation. The publication of procurement notices (contract notices and contract award notices) is mandatory above certain thresholds, but there are no prior indicative notices (PINs), which represents an incompatibility with the EC Directives. The draft Law on the Amendment of the PPL would introduce PINs, but some of the proposed provisions currently appear incompatible with the Directives.

Although stated to be based on the most economically advantageous tender, the award criteria included in the PPL do not fully comply with the Directives, since a more restrictive approach has been adopted with regard to the possibility for contracting entities to use criteria other than lowest price or to require only the factors that can be quantified in monetary terms. For this reason (at least in respect of the former requirement) and in nearly all cases, only the lowest price criterion is applied.

Domestic preferences are permitted and provide for a price advantage of up to 15% for domestic contractors offering domestic products.

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

- the absence so far of the new procedures introduced in the most recent Directives (competitive dialogue, framework agreements, electronic auctions, dynamic purchasing systems, social and environmental considerations, functional technical specifications); these may be partially introduced by way of the proposed amendment but the draft does not fully reflect the provisions of the Directives;
- the manner in which the PPL defines the scope of application;
- the extensive exemptions;
- the apparent need to justify the use of the restricted procedure;
- the more extensive tolerance of negotiated procedures and direct procurement;
- technical specifications and standards;
- the criteria for contract award; and
- the existence of national preferences and the restriction of participation of foreign companies.

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

Of equal concern is the tendency to apply all of the provisions of the PPL rather inflexibly by requiring all qualification criteria to be met in all cases, together with the extensive need to provide original documents in each case. This formalistic approach becomes even more apparent in the case of the draft Utilities Law, which appears to replicate the PPL in this regard rather than providing increased flexibility, as is the case of the *acquis communautaire*, when dealing with more commercially sensitive procurement.

In the area of concessions/PPPs, it will be necessary to amend and structure the legal framework in such a way that legal clarity and certainty for all operators (whether public or private) are achieved. Sector-specific laws governing the use of PPPs (in some specific form) should be repealed as well as laws allowing for the use of particular PPP models only (e.g. the Build-Operate-Transfer (BOT) law and Build-Operate (BO) law). These laws should be replaced by a single PPP law relating to all relevant economic sectors and dealing with the pertinent issues, such as eligibility of projects, internal authorisation procedures, granting of state guarantees, and monitoring. It needs to be made clear that the award of PPP contracts must follow the procurement rules when a given PPP contract qualifies as a public contract or public works concession. The PPP law does not need to contain detailed procurement rules as such. It would be preferable if the PPP law referred to the PPL instead. The scope of the PPL, on the other hand, should be extended to cover public works concessions; the specific provisions of Directive 2004/18/EC relating to the award of such works concessions and the obligations on the concessionaire itself to respect procurement rules under specific

circumstances will have to be transposed as well. The PPL could also cover the award of service concessions (in the sense of the EU procurement law); this is, however, not necessary from a legal point of view. If service concessions are left outside the PPL's scope, then it needs to be made sure that the fundamental principles of the EC Treaty remain applicable for the award of such concessions.

*The government has initiated a number of positive legislative measures in order to bring the public procurement legislation into compliance with EC law. The PPA has prepared a draft law on utilities with the aim of transposing the EC Directives 2004/17 as well as prepared amendments to the existing PPL in order to introduce a number of the new instruments and methods provided by the EC Directive 2004/18, such as electronic procurement and framework agreements. There is also a plan to make a full revision of the current PPL later in 2008 in order to ensure a full transposition of the PPL. Similarly, a draft law on PPPs that has been prepared by the SPO will replace the existing sectoral laws. Still, to ensure that the legal framework outside the detailed provisions of the EC Directives will be seriously considered, it will also be important to introduce less complex procedures and more flexibility for contracting authorities. As indicated in the peer report, the coordination in terms of adoption and date of effectiveness of these various legal acts is of utmost importance.*

### **3. Central Public Procurement Organisation**

In the area of public procurement, the main actors are the Ministry of Finance (MoF), which has primary responsibility for coordination and submission of draft legislation, and the Public Procurement Authority (PPA). The PPA was established under the PPL in order to ensure the proper implementation of the PPL, to support the participants in the procurement process, and to provide legal remedies in the case of disputes related to public procurement. Under the administrative hierarchy, the PPA falls under the Ministry of Finance but is organisationally independent of the ministry. It enjoys full independence in its actions and decisions and is financially autonomous.

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

The professional staff of the PPA must also fulfil certain requirements and pass special examinations to be promoted to the position of public procurement expert or assistant expert. PPA staff are subject to the Civil Service Act. At the beginning of 2007, the PPA had 198 staff (of which 68 were public procurement experts and 23 assistant public procurement experts). The number of personnel grew by the end of 2007 to 213 (of which the number of public procurement experts was 64, while the number of assistant public procurement experts was 24), and strengthening of institutional capacity is continuing in 2008.

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

The PPA's tasks include, among others:

- deciding on complaints filed by dissatisfied tenderers;
- providing help-desk functions;
- elaborating guidelines for the implementation of public procurement legislation;

- issuing secondary legislation, circulars and interpretative decisions;
- providing training on public procurement;
- regulating the tender notices to be published in the *Public Procurement Bulletin*, as well as the publication of the *Bulletin*;
- maintaining a list of companies excluded from participation in public procurement procedures;
- maintaining international relations;
- keeping records on public procurement and collection of statistical and other information related to public procurement.

The PPA is involved in the legislation process regarding primary law as well: the initial draft public procurement primary law is usually prepared by the PPA, whose staff have the necessary – national and international – background and knowledge to participate in this process. The PPA is also a member of the working group established by the Ministry of Finance for the coordination of the drafting activity in the area of public procurement.

*The PPA is a stable and strong institution. It has already largely contributed to the establishment of a modern public procurement system and, in general, has the capacity to implement procurement legislation effectively. However, a reorganisation of the PPA is needed in order to improve its functionality and resolve some of the key problems identified in its service delivery (refer to the peer review report for details). Specifically, there is a need for increased specialisation of functions and staff competencies combined with a more natural division of these functions in organisational terms. The recommendation for a reorganisation of the PPA should further be considered in the light of all of the new challenges that the PPA will meet with the implementation of the new EC Directives.*

#### **4. Procurement Operations and Practices**

The number of contracting entities covered by the PPL amounts to about 35,000 in Turkey. According to the statistics of the PPA, in 2007 the number of public procurement procedures was 148,969 and the total value of public contracts (including those awarded by direct procurement) was 57,825,026,000 YTL. Procurement notices which, above certain thresholds, are to be published in the *Public Procurement Bulletin*, have reached a significant number. The *Bulletin* appears to be rather successful in disseminating information on public procurement opportunities, as further reflected by a fairly high participation rate, indicating that information on public tenders is widely available. The general interest among economic operators for participation in tendering appears to be good in most areas. The figures for the rate of participation suggest that the number of tenders submitted in procurement procedures is generally satisfactory and, based on the experiences of the contracting entities, the number of tenderers/candidates is usually sufficient. In the construction sector, in particular, there appears to be significant competition. Foreign tenderers are also present, indicating a healthy market and, especially in the construction sector, they will often form joint ventures or consortia with Turkish tenderers.

Assessment has only been made of contracting entities located in and around Ankara. These are mainly contracting entities with large budgets and several procurements, and they appear to demonstrate rather good procurement practices. Anecdotal evidence suggests that this is not representative of all procurement in Turkey and that at local level, particularly in rural areas, there is less competence. This may be a significant problem in practice since the vast majority of contracting authorities are found at local level and in rural areas. For example, the number of municipalities in Turkey is in the order of 3,200. Despite the huge training effort of the PPA, even they are aware that much more is needed to strengthen and build procurement capacity at this level.

At central level at least and in the main municipalities around Ankara, it appears that the procurement function is well organised. Procurement is conducted by tender committees appointed in accordance with the PPL and no procurement is commenced until a budget has been made available. The budgeting and internal financial controllers are implicated at the outset and, where possible, technical specialists are retained from the contracting entity to prepare the technical specifications. The larger spending authorities also have specialised public procurement units and are able to create tender commissions for each procurement, comprised of members with the relevant technical expertise.

The procedures adopted tend to be the open procedure, with few restricted procedures being employed. There appears, nevertheless, to be a residual reliance on direct contracting based on the claim that the time

limits of the PPL are too long or that there is an emergency. In most cases, it transpired that the events relied upon to justify the use of direct procurement were really a question of poor procurement planning and budgeting rather than a question of genuine urgency, which suggests that broader competence training might be desirable.

Tender documents are largely prepared on the basis of the standard tender documents of the PPA. The only clear problems seem to arise from the formalism of the procedures, which encourages the practice of requesting the original copies of all of the documents related to the qualification criteria referred to in the PPL, regardless of need. The inflexibility of the system is also carried over to tender securities and performance bonds which are required in almost all cases, again regardless of whether or not they are needed and irrespective of contract value. To that extent, the process appears to be carried out mechanically. Despite the availability of 'value for money' award criteria in the PPL, the tendency continues to be to prefer the lowest priced tender. Many cited the fear of auditors and, in some cases, the PPA if anything other than the lowest priced tender was chosen.

The absence from the PPL of the tools contained in the latest Directives, such as the use of framework agreements, electronic means of communication or electronic tools for procurement, means that contracting entities have not been able to adopt them. In the case of frameworks, for example, many entities expressed their desire to make use of them, if only to overcome their warehousing problems and to avoid the repeated need to consider the same tenderers and documents for repeat business. Those involved in health procurement overcame the problem by requesting an amendment to the PPL, allowing the use of frameworks in the health sector only. It would appear, therefore, that it is important to introduce into the PPL and implement as soon as possible the latest techniques and tools of the EU Directives, and this is also the intention of the government (these techniques and tools are contained, at least in part, in the proposed amendment to the PPL and in the draft Utilities Law).

Capacity at central level appears to be satisfactory. Most procurement departments and officers are familiar with the PPL, aware of its shortcomings, and familiar with the practical issues of procurement. The introduction of new techniques and procedures compatible with the EC Directives will imply further capacity development in those areas. The situation in the regions is less clear and it may be assumed that there is a continuing need for capacity-building throughout the country. Training has so far been concentrated on compliance training, but this would need to be rolled out to include more competence and practice-oriented training. Most training is conducted by the PPA itself, which has (and will continue to have) difficulty in meeting the training demands of the whole country. Specialised training institutions, public as well as private, should be utilised in the delivery of training on a much larger scale.

Many of the potential shortcomings in procurement operations and practices might be addressed through legislative development. For example, a simplification is needed to introduce a less formalistic approach and to allow contracting authorities to adapt to the situation on the ground. Further capacity-building would be necessary, even at central level, following the introduction of new procurement techniques, but such capacity-building should also include practical competence training and not only compliance training based on the PPL and its amendments. Training should also address the needs of tenderers, who will be expected to respond to contracting authorities employing new methods and techniques. Further professionalisation of the procurement function within contracting authorities, together with enhancement of managerial accountability and clarity in decision-making processes, belong to the priority actions for improvement of the public procurement system. The "professionalisation factor" will become further accentuated with the introduction of all of the new instruments and methods, such as e-procurement, framework agreement and centralised and coordinated purchasing.

## **5. Control, Review and Integrity**

### **5.1 Complaints Review**

The PPL establishes a three-tier system for reviewing complaints lodged by disappointed suppliers: (i) in the first stage, a complaint is submitted to and then reviewed by the contracting entity itself<sup>3</sup>; (ii) a complainant who is dissatisfied with the decision of the contracting authority may, as a second step, appeal this decision

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<sup>3</sup> This review of the complaint by the contracting entity is mandatory and if it has not been carried out the PPB must subsequently refuse the complaint.

to the PPA and the decision on this appeal is made by the Public Procurement Board (PPB); (iii) the final decision on the appeal made by the PPB is then subject to the jurisdiction of the regular courts.

The review procedure is launched with the lodging of a complaint. The complaint may be submitted by any contractor, supplier or service provider who claims to have suffered damage or a loss of rights, or who is likely in the future to suffer loss or damage resulting from an alleged breach. In the Regulation on Complaints on Procurements, however, a definition of 'potential tenderer' is introduced, which sets two additional conditions: the complainant must provide services in the field of the procurement and must have purchased the tender documents before being permitted to submit a complaint, reinforcing the purchasing obligation referred to above (this definition is replicated in the proposed amendment to the PPL).

The complaint must be submitted directly to a contracting entity in writing. The complaint can be lodged at any time during the procurement procedure before the contract is signed, but it must be lodged within 15 days of the date on which the complainant became aware of the circumstances raised in the complaint (or when the complainant should have become aware of those circumstances).

Once the complaint has been submitted, the contracting entity cannot conclude the contract unless the contracting officer certifies that urgency and public interest considerations require the continuation of tender proceedings. Such a certification must be delivered to the complainant seven days before the signature of the contested contract. The contracting entity must reach a decision on the complaint within 30 days and its decision must be notified to all tenderers within seven days.

In the event that there is no decision regarding a complaint within the 30-day deadline or that the decision is considered by them to be unsatisfactory, the candidates or tenderers may appeal to the PPA within 15 days (the exact content of the appeal is set by the PPL) and pay a 170 EUR fee for filing the complaint. The PPL does not provide any list of decisions that may be contested in the complaint or any limitations regarding the complaint. It is therefore understood that – without any exceptions – all decisions of the contracting entity that are alleged to be unlawful may be the subject of a complaint (although the contract notice and/or the tender/pre-qualification document can be contested only before the tenderer/candidate has submitted a tender/application).

The appeal must be lodged before the contract is signed. The appeal is then reviewed by the PPB, which must reach its decision within 45 days. The PPB can:

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

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

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

The number of complaints lodged by dissatisfied tenderers has grown significantly over the years, from some 900 in 2003 to over 4,000 in 2007. This is a significant number of cases, even if it represents only about 3% of all contract award procedures. There is some question as to how effectively and how quickly the existing complaints mechanism deals with complaints. In particular, much concern has been voiced with respect to the length of the review procedure and the ensuing delays. There are no statistics concerning the effectiveness of the first phase of the process (review by the contracting entity itself), but it appears that this first-stage review hardly ever resolves the dispute between the contracting entity and the tenderer, even though it delays the public procurement procedure for almost two months. It seems that the PPB is also rarely in a position to provide its decision within the 45 days stated in the PPL, although this may be a statement of perception as much as reality. Nevertheless, the PPA is also itself concerned with the workload represented by the number of complaints, which suggests that it may well have difficulty in meeting the 45-day deadline. The current proposed amendment seeks to reduce the deadlines for both stages. However, if as is commonly claimed, the PPB cannot meet even the present deadlines, shortening them will not improve the situation. It appears that the problem is more fundamental and is linked rather to the current institutional arrangements of the PPA, where review procedures are not handled independently from the other functions of the deputy presidency for regulation (reference is made to the peer report).

The number of court cases brought against the decisions of the PPB concerning disputes in 2008 constitutes a modest 9.4% of the total number of Board decisions. Court cases are lengthy and appeals are completed by the court, on average, only within two and a half or three years. Of the court cases opened against the decisions of the PPA, 73 were concluded in favour of the PPA and 37 in favour of the appellant.

***The PPL is not fully aligned with the EC Directives, and the proposed amendment to the PPL does not succeed in completing this alignment. In particular, the proposed provisions seeking to introduce a standstill, as required by the acquis, remain imperfect. One of the main problems with the current system is that the institutional arrangements are inefficient and place an excessive workload and responsibility on the PPA. The increasing number of complaints (which remains modest in percentage terms) means that the system is unable to cope. A new review mechanism within the structure of the PPA should be elaborated.***

## 5.2 External Audit

The legal framework governing the operations of the Turkish Court of Accounts (TCA), responsible for external audit, is based essentially on Law no. 832 on the Court of Accounts enacted 1967 (as amended). Law no. 5018 on Public Financial Management and Control, in force since December 2005 (as amended), also provides some general responsibilities of the TCA.

The TCA is responsible for the audit of:

- government offices funded by the general budget and by the annexed budget (Law no. 832/28);
- institutions and enterprises established as fixed or revolving capital establishments, or funds of which half or more of the capital is invested by the government offices mentioned above (Law no. 832/28);
- municipalities and local provincial administrations;
- institutions that by law are subject to the audit of the TCA.

The major exemptions from the TCA audit are the following institutions:

- TRT (Television/Radio);
- Toki Collective Housing;
- Central Bank and other state banks;
- Municipal enterprises;
- State economic enterprises (where audits are performed by the Prime Ministry High Auditing Board).

In addition, the audit of the Ministry of Defence is also circumscribed by some restrictions.

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

Prior to the adoption of the PFMC Law 5018, the TCA was responsible for the *ex ante* control of all public procurement which meant that, above a certain threshold, the prior approval of TCA was needed for each and every public procurement activity. Today the TCA performs *ex post* audits of the accounts within its remit, currently amounting to approximately 6900 accounts. Approximately 85% of the accounts are audited annually, comprised mainly of central government institutions and large accounts. The PFMC Law covers 176 central government administrations, two social security institutions, and around 2000 local administrations. However, regulatory and supervisory agencies, including the Public Procurement Authority (PPA), are excluded from the requirement of producing an “accountability report” (PFMC Law, article 41) and from the whole of Part Five of the PFMC Law covering internal control requirements for the PPA’s own activities. The “accountability reports” should include general information of the administration, information on activities, and performance information as per the strategic plans and the performance programme, resources used, and reasons for any deviation from appropriations compared to the realisation of the approved budget.

The TCA tends to audit contracting entities established in Ankara and municipalities. Audits are not carried out comprehensively or on a sample basis. However, the Audit Law has indirectly offered the TCA the possibility of avoiding the problem, as the TCA is not required to publicly show the accounts that have not been covered by annual compliance audit reports.

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

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

- payments not in compliance with the contract (purchasing additional, unforeseen items from the contractor);
- extensive use of the negotiated procedure (not only for exceptional cases);
- use of the direct procurement method also for procurement exceeding the relevant thresholds.

### **5.3 Integrity of Procurement Operations**

The PPL contains significant provisions relating to probity and anti-corruption. It already contains the 'mandatory exclusion' requirements of the latest Directives with respect to selection and also defines and prohibits other forms of bribery and corruption in a separate article. The PPL also provides for sanctions and penalties in the event of discovery, which will apply to both individuals and companies and can lead to temporary or permanent disbarment, depending on the severity or frequency of the crimes. In the event of criminal activity, the PPL provides for action by the public prosecutor and the criminal authorities. It should be mentioned that the peer review report has not studied this topic specifically. For further information on integrity, reference is made to Sigma's assessment report on the public integrity system in Turkey.

## **6. Capacity to Further Develop the Public Procurement System**

Whilst overall stewardship of the public procurement system is in the hands of the Ministry of Finance with the assistance of the PPA, there is room to question whether there is an overall and clear strategy with respect to procurement other than ultimate alignment with the *acquis communautaire*. It appears that legislation is adopted in a somewhat piecemeal fashion, without taking all aspects into account in a direct way. Thus, the PPL has been amended many times and continues to be amended, but these amendments are rarely comprehensive. The latest proposed amendment takes on board some of the provisions of the latest EC Directives, but not all of them. It does not take account of the new Remedies Directive. Despite the apparent intention of replacing the existing PPL, as amended, by a new EC-compatible law, new amendments continue to be proposed, which does not provide legal stability or certainty. Similarly, the position of the utilities coverage is unclear and the likely staggered adoption of the proposed amendment to the PPL and of the new Utilities Law will leave some entities in a vacuum. Furthermore, the lack of reference to works concessions in the PPL leaves the question of their coverage open and causes difficulties at a time when a draft law on concessions/PPPs is being considered by the SPO.

It would thus seem advisable, in order to bring some certainty to the process of alignment, to set out a clear and comprehensive strategy, with a view to ensuring alignment of both the PPL and the draft Utilities Law with the *acquis*, notably by dealing with concessions, introducing the new procedures of the latest Directives, and reconsidering the remedies provisions.

At an institutional level, it would appear that the complaints review mechanism of the PPL is being undermined by the apparent inefficiencies of the PPA and the PPB. Time and resource constraints have negatively affected the perceived quality of the complaints mechanism, which in itself is a cause for popular complaint. Further rationalisation of the internal structures of the PPA and the PPB, with a clearer separation of functions and responsibilities, may well improve the current inefficiencies.

In addition, training has so far been conducted primarily by the PPA itself and is largely confined to compliance training. Given the size of the country and the number of people in need of training, it is questionable whether the PPA will ever have the resources required to be the exclusive source of training. It is also doubtful whether it would itself have the capacity to carry out the competence training that appears to

be necessary. Procurement training would in the future involve a wide spectrum of public and private institutions in order to satisfy the training needs.

Turkey has benefited from one successful twinning arrangement with Italy, but it would surely benefit from more assistance, notably in addressing the institutional changes that may be beneficial and in designing a more appropriate system for capacity-building delivery throughout the country that seeks to improve procurement competence rather than just knowledge of the rules.

## **7. Summary and Next Steps**

The public procurement system of Turkey has undergone a number of impressive improvements since the implementation of a new public procurement law (PPL) in 2003. However, the Turkish Government faces a number of important challenges in the areas of public procurement and concessions/PPPs. A first main challenge is derived from a need for a number of significant changes in the legal framework, of which the most important relate to the need for transposing the new EC Directives into national law. The introduction of a set of new procedures and instruments, such as e-procurement, framework agreements, centralised purchasing and competitive dialogue, will require a significant effort and an increase in the capacity and knowledge of the PPA. A second main challenge will be to find an efficient solution to the current problems in the system for complaints review and remedies. The review system is resource-demanding and does not comply with EC remedies requirements; generally it has a potential for improvement. A third main challenge identified relates to the organisation and working practices of the PPA (besides the review system). Another important finding relates to the operational side of public procurement. There is generally a need for enhanced professionalisation of the procurement function within contracting entities in terms of capacity-strengthening of the procurement organisation and staff, streamlining of decision-making structures, greater reliance on the line organisation rather than on tender committees (professionalisation and accountability) and, not least, elimination of the formalistic approach that today governs the management of procurement processes. As a basic condition for the improvement of procurement practices, the legal framework will need to provide for a higher degree of flexibility. Market functionality and competitiveness seem basically to be satisfactory in most sectors, judging from the participation rates of tenderers in tender proceedings.

Importantly, the ongoing efforts to reform the legal framework for public procurement are highly appreciated, with the objective of transposing the new EC Directives 2004/17 and 18 and otherwise improving the framework in areas not directly covered by the detailed provisions of the Directives. The legislative reform process includes the drafting of a law covering utilities (EC Directive 2004/17), amendments to the current PPL covering a number (but not all) of the new procedures and instruments in EC Directive 2004/18, and elaboration of the plan to fully revise the existing PPL at the end of 2008. However, there is concern about the timing for the adoption and implementation of these new pieces of legislation. The legislative situation is becoming further complicated by the likely need for coordination between the PPL and the law on concessions and PPPs that is currently being drafted by the SPO.

Priority should be given to the following actions:

### **A. *Should be applied (or started) in the short term (or next 12 months):***

- Consideration should be given to consolidating the various drafts and introducing a single but comprehensive revision of public procurement legislation. Failing that, thought should be given to introducing immediately the competitive dialogue procedure and the provisions allowing the use of functional technical requirements in the framework of the current amendment of the PPL in order to allow the progression of the PPP/concessions law without compromising the integrity of the overall regulatory framework.
- It would be necessary to ensure a correct coverage of the PPL in accordance with the EC Directives concerning coverage, which would also mean removing current exemptions that are not in compliance with the *acquis*.
- It would also be critical to commence the increase in competences of the PPA in order to be in a position to respond to all of the new challenges that are to be introduced into the public procurement system. It will be necessary to promote the implementation of the amended PPL (in the event that this will be the decision), especially in terms of the new techniques to be introduced (electronic procurement, framework agreements and competitive dialogue).

**B. *Should be applied (or started) in the medium term (or next two years”):***

- The adoption of the new legislation compliant with EC requirements and the preparation of the comprehensive strategy for public procurement and concessions/PPPs are needed. Part of this strategy should include a rethinking of the organisation of the PPA, with a view to providing greater efficiency with respect to the implementation of the law. This strategy should include revision of the review procedures in order to allow the currently increasing number of cases to be heard effectively and rapidly, in accordance with EU requirements, and to provide greater objectivity and independence in the review system.
- Organisational adjustment and development of the PPA will derive from a need to build a centre of excellence in public procurement and thereby to expand its range of functions or services compared with the current situation. Operational support and capacity-building to promote professionalisation and efficient procurement at the level of contracting entities will become critical challenges.
- Further strengthening and professionalisation of the procurement function at operational level should be ensured by institutionalising training and education in public procurement and by introducing new ways of organising and managing procurement processes.
- A coherent concessions/ PPP law covering all types of concessions needs to be adopted. The award of concessions and PPP contracts should be made in accordance with the provisions of the PPL, including its review and remedies provisions.