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What Do The Amendments in Public Procurement Law Mean?

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A. General Introduction

Legal texts regulating public Procurements along with public sector expenditure law budget texts are most important legal documents about the public sector. While the Budget Law text and other related fiscal legislation (tax laws, budget implementation directions etc.) define main principles about the collection of revenues and making expenditures as well as details of these principles, Procurements law defines the principles, which will be the basis for the purchase of goods and services as well as for the performance of building and construction works (predominantly capital expenditures) necessary for the provision of public services, and defines the relevant rules to be applied with this respect.

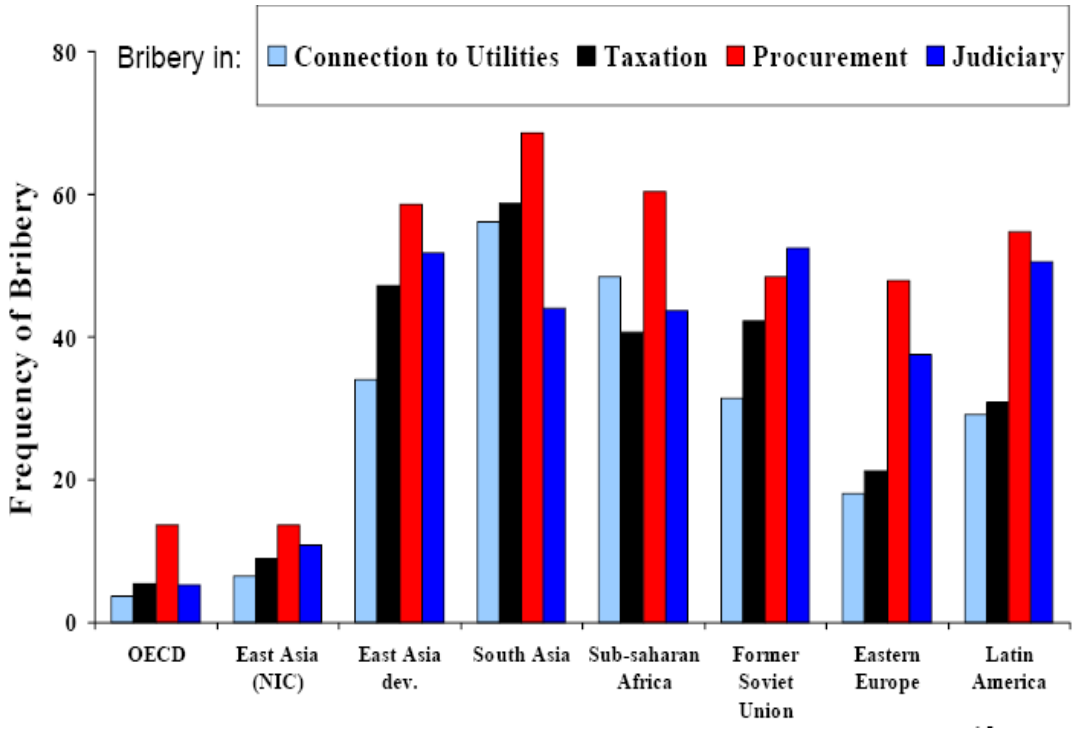
Public Procurements can be considered among activities that have critical importance for governments for several aspects. In other words, procurements have some qualifications pertaining to both the economy and governance:

- According to OECD estimations, market volume subjected to procurements in average accounts for 15 % of countries'. With this respect, significant amount of public resources is allocated for procurements.
- Allocation of such an important proportion of public resources for purchases has global importance in terms of goods and services trade throughout the world.
- Procurements constitute the most important transaction which engages the public sector and private sector. And this, in turn, might lead to the use of public funds by both public officials and the private sector for their own interest.

Therefore, procurements that are located in a frame involving a big piece from the public revenue cake as well as personal interests constitute a serious risk sphere for

governments. As also evident from the graph below, among other public functions, procurements are the field of function where bribery and corruption is the highest.

Graph 15. Corruption Perception in Different Regions



Source: Kaufmann, World Bank (2006), based on " Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries". The question asked to the participants is "For which of the items (connection to utilities – electricity, water, etc., tax, procurements and judiciary) you have to make non-invoiced payments more?"

In this context, some points that should be paid regard to as regards procurements must be emphasized:

- Besides all, procurements must ensure competition and the transparency that will enable competition. This means, clear and explicit rules covering Procurement participants shall be defined. If it is necessary to set exemptions, rules and practices with this respect shall also be clear.
- Though transparency is the necessary condition to ensure competition in procurements, it is not enough alone. The studies carried out on this subject reveal that the resources used for procurements shall be properly administered and thus the institutional constructs and public officials dealing with procurements must be professionally competent. In this context, procurement works must be considered as a strategic function of the public authority rather than a basic administrative function.

B. Situation in Turkey

It is estimated that the ratio of potential procurements market to the GDP is below OECD average, around 8.6 %. [1](Table 12*). **However, it shall be underlined that the estimated figure represents the minimum level**.* Because, the table below does not include statistics on housing and other construction Procurements of Mass Housing Administration (TOKİ), which we believe that has an important position in the Procurements system. TOKİ, which was initially included in the No II Chart of the No 5018 Law as a special budgeted public administration, was then removed from this chart. Since, therefore the administration was no longer a special budgeted public administration; it lost the status of being subjected to No 5018 Law. On the other hand, although being considered under the scope of the Procurements law, TOKi was to a high extent exempted from the provisions of Procurements Law as regards mass housing projects, as per No 68/c article of the given law. TOKİ web site does not include detailed data on an annual basis and having the qualifications to be represented in our table. However, based on the data included in the web site of the institution, total amount of project Procurements (housing practices of the administration, housing + social appurtenances, squatter transformation, natural disaster housing, agriculture villages, resource development, Emlak Real Estate Investment Partnership, Restoration, Infrastructure social appurtenances, consultancy services) is estimated to be around 19.4 billion USD as per the end of 2008.

[1] In this calculation, items that are included in goods and services procurement but which are not subjected to Procurement-procurement by public administrations, such as electricity, water, telecommunication expenditures, travel allowances, duty expenses have been excluded.

Table 12. Procurements under the Scope of No 4734 Law (Million YTL and Million USD)

	2007			2008		
	Procurement of goods and services	Capital	Total	Procurement of goods and services	Capital	Total
Central Government Budget	11.192	13.003	24.195	12.276	18.441	30.717
Local Administrations	7.973	15.771	23.744	9.709	17.773	27.482
Social Security Institution	35	47	82	39	188	227
Circulating Funds	2.700	583	3.283	3.017	700	3.717
Provincial Bank		495	495		520	520
Public Economic Enterprises	16.390	3.913	20.303	18.375	4.879	23.254
Total Expenditure Subject to Procurement (TL) **	38.290	33.812	72.102	43.415	42.501	85.916
Total Expenditure Subject to Procurement (USD)	29.454	26.009	55.463	33.396	32.693	66.089
Total General Admin. Exp (excluding interest) (TL)			235.157			273.823
Total General Admin. Expenditure (USD)			180.890			210.633
GDP (TL)			853.636			994.315
GDP (USD)			656.886			801.867
Total Expenditure Subjected to Procurement/GDP (%)	4,49	3,96	8,45	4,37	4,27	8,64
Total Expenditure Subjected to Procurement (excluding KİTs) / total general admin (%)	9,31	12,71	22,03	9,14	13,74	22,88
Exemptions + direct procurement / Total Expenditure Subjected to Procurement (%) ***			19,9			21,7

Source: Our own calculations from State Planning Organization Annual Targets and Public Investment (2009), Public Procurement Law 2007-2008 reports
* Turned into annual data benefiting from 2008 Local Administrations data on first nine months
** Procurements subjected to Procurement refers to public procurements carried out under procedures including exemption and direct procurement under the scope of No 4734 Law
*** Given rate for 2008 reflects the results for first nine years (KİK Report)

As the table above indicates, the share of the expenditures that can be subjected to Procurement (excluding Public Economic Enterprises (KİTs)) in total administrative expenditures excluding total interest expenditures is 22-23 % in annual. This rate corresponds to 48 billion USD for 2008. And this means that, when KİTs are also included, the potential volume of this market for 2008 is around 66 billion USD. Another striking point in the Table is that the share of procurements, like direct procurement or exemptions which are made in violation to the general rules stipulated by the related Law accounts for around 20 % of total public procurements (corresponding to around 14 billion USD). Exemption practices are addressed below in detail. Another point to note is that approximately 70 % of procurements are carried out by central and local administrations. And this implies that more than half of procurements (roughly 9 billion dollars) subject to exemptions are done by central and local administrations.

Thus; it shall not be surprising that such a big market will be open to serious discussions as regards governance and transparency as mentioned in the introduction part. This openness to discussions makes the quality of the legislation regulating this area as a prior agenda item.

The first legal text of Turkey regulating procurements is the No 661 Public Auction, Dispute and Export Law enacted in Republican period on 22.04.1925. Then, No 2490 Law was enacted and stayed in effect for almost 50 years from 1934 to 1983. Due to its strict provisions of the said Law, exemption claims rose in time and the law was replaced with No 2886 Law in 1983. Through some flexibilities to eliminate certain complaints about procurements were introduced in the new Law, the prevalence of complaints about this Law also increased in time. At the beginning of 2003, in parallel to the EU harmonization requirements No 4734 Law put into effect and procurements underwent a new structural change both in institutional and regulatory terms.[2]

The drawbacks or the risk elements that were present until the enactment of No 4734 Law concentrated on the following areas:[3]

- All of the public administrations are not covered under a single Procurement law and that these individual administrations developed their specific Procurement legislations in time,
- It is not obligatory for all Procurement methods to announce the Procurement, and that even to announce the Procurement is obligatory, competitive participation is hindered due to short announcement periods,
- The selection and evaluation criteria are not announced in advance and are not objective,
- The bidders that did not win the Procurement are not informed of the decision of the public authority that opened the Procurement,

No 4734 Law was enacted in 2002 in line with the recommendations of the EU principally to eliminate the mentioned drawbacks. However, the results for Turkey in the survey including comparisons between countries and forming the basis of an OECD report in November 2006 indicate the despite the four years that have passed, similar drawbacks in some areas are still valid.[4]

According to the results, Turkish Procurement system still has the following problems:

- Public authorities initiate the Procurements without making sufficient preparations and planning,
- The rules related to participating to and winning the Procurement are not clear,

[2] Kamil Mutluer, Erdoğan Öner, Ahmet Kesik (2005), Bütçe Hukuku, s.300-301
[3] OECD; a.g.e s.30-31
[4] OECD; a.g.e s.10-11

- Selection criteria are not announced before application deadlines,
- Bidders are not provided with enough time enabling preparations ensuring equal participation to the Procurement,
- Procurement invitation announcements are not sufficient,
- Access to Procurement decision documents is limited.[5]

In this report, on the basis of the information we have gathered, we tried to evaluate to what extent the aforesaid problems are eliminated and whether the legislation is harmonized with the EU legislation or not.

These developments in any case indicate that despite the No 4734 Law, which was enacted in 2002 and is considered to be based on more transparent and egalitarian principles, there are still some problematic aspect of the Turkish Procurement system. This situation, on the other hand, concentrates the attention the modifications in the Procurement system that have been initiated right after the enactment of the Law and continued until present. It should be noted that, though a Procurement law was put in force just two years after the establishment of the Turkish Republic, the modifications and amendments realized during the last decade is quite different from the previous experiences both in quantitative and qualitative terms.

C. The Meaning of the Amendments in the Procurement Legislation

Inventory of the Amendments and Amendments Aiming at Harmonization with the EU Norms

We believe that before taking the inventory of the amendments in the law, it will be useful to evaluate to what extent the amendments are within the context of EU harmonization. The ground for a part of the modifications introduced after the enactment of the law was stated to be improving the compliance of the system to the EU norms. Though the high number and complexity of modifications hinder the ability to conduct a complete numerical analysis, the amendments introduced can be grouped and evaluated roughly under two categories namely modifications aimed at complying with the EU norms and modifications out of the scope of complying with the EU standards:

[5] It is known that a part of these problems is tried to be solved as in the newly enacted No 5812 law.

Modifications aiming at complying with the EU norms: Important amendments aiming at reflecting the EU norms to the modifications can be summarized as follows:

- Threshold values set forth in the No 4734 Law were harmonized with the European Union and World Trade Organization regulations (4761, 2002).[6]

- In case that situations that the administration cannot foresee occurs during the implementation of the work after the Procurement process, in order to implement and complete the work and thus eliminate the requirement to go to a Procurement again, under the condition that it will be possible to implement the work up to a certain proportional amount over a certain amount above the contract amount parallelism with the ratios observed in the European Union countries was ensured (4761, 2002).

- Regulations pertaining to submission of balance sheets were harmonized with the EU rules (4964, 2003).

- The institutions operating in the energy, water provision, transportation, and communication sectors in compliance with the European Union directives are promulgated to be removed off the scope of no 4734 Law (4964, 2003).

- The exemptions as regards the procurements pertaining to defense, security, and intelligence shall are modified in compliance with the European Union norms (4964, 2003).

- Transactions related to the issuance, sale, purchase and transfer of securities and other financial instruments as well as transactions by the Central Bank were left out of the scope in the European Union directives pertaining to procurement of services (4964, 2003).

- Procurement of advocacy services pertaining to the representation and defense of public administrations in disputes that have to be solved based on the rules of international arbitration as per European Union norms was allowed to be done directly without being subjected to Procurement procedures (4964, 2003).

- Communicating the grounds for Procurement cancellation to bidders that submitted a written request rather than all bidders (4964, 2003).

[6] In spite of this modification, the EU argues in the Progress Reports as well as at the negotiations that the threshold values are high than necessary.

- Alternative procurement methods for Procurement systems (such as electronic Procurement, dynamic procurement) (5680, 2007; 5812, 2008)

b. **Modifications that are not in compliance with the EU norms**: Some important modifications that are not thought to be in compliance with the EU acquis communitaire and the standards applied in the EU countries can be listed as follows;

- The scope article was narrowed in a way not in compliance with the EU standards (4964, 2003). Systematic modifications included in the EU norms as a framework were not yet introduced with respect to some institutional constructs that are left out of the scope.

- Third article of No 4734 law, which regulates exemptions, have been expanded via regulations introduced in different time periods (such as 4761, 2002; 4964, 2003; 5812, 2008). Evaluation on this issue which is continuously subjected to criticisms in EU expansion reports is addressed with examples in the following sections.

- Due to the unexpected increase in prices of materials used in the production of work items or work groups in the construction works the Procurements pertaining to which were carried out as per No 4734 Law before the date 31/5/2008, the Council of Ministers was authorized to set the price variance for the production works carried out or to be carried out after 1/1/2008 (5794, 2008)

- The determination of proficiency criteria for participating in Procurements were modified in a way to result in outcomes that might prevent competition

- The areas where direct procurement was allowed were expanded (5812, 2007).

- The amendment introduced by the No 5625 Law considerably increased the exemptions from application project preparation criteria (5625, 2007).

- The authority of the Public Procurement Authority (KİK) to examine the claims that took place in the media was removed (5812, 2008).

- The fee amount that shall be paid for complaint applications to KİK was increased significantly (5812, 2008).

To give a clarifying example, it will be wise to touch upon the extent to which some modifications introduced in the No 4734 Law by the No 5812, as last amended the aforesaid law, comply to the EU norms. (Box 1)

Box 1: To What Extent the EU Norms are Complied With? 5812 Case

Among the major grounds for the amendment of No 5812 is to make positive contribution to the EU harmonization process. In fact, some articles of the said law are amended significantly in compliance with the commitments of the harmonization process. On the other hand, some articles, which were included in No 4734 during the initial preparation process and were in harmony with the EU legislation were abolished, and there exist some certain areas that were not amended though the Progress Reports recommended amendment.

As the assessment we carried out suggests, the issue of harmonization in the case of No 5812 Law can be categorized under three groups.

1. *Articles introducing modifications in compliance with the EU legislation;*

Allowing pre-announcements is a modification that contributes to transparency and that is covered in the EU directives.

Shortening complaint periods is in general a positive development. This way, preventing unnecessary bureaucratic procedures and paper works were aimed to be prevented.

Establishment of electronic procurements platform as well as methods like dynamic procurement system and electronic deduction are elements that are involved in the EU Public Procurements Directive and added in the national legislation as per No 5812. These methods will improve the pace of operation of the system.

2. *Modifications that are not in harmony with the EU legislation*;

Through each Progress Report states that there are too many exemptions, the said Law, rather than cutting the number of existing exemptions, has introduced more exemptions.

The scope of the procedure for Procurements among some bidders was expanded not in proportion to the EU legislation. This expansion is in contradiction with the competition and equal treatment principles.

The scope of direct procurement was expanded and was modified in contradiction to the definition of the said term in the EU terminology.

The scope of framework agreements is highly different than the context defined in EU directives. If no limitation is introduced in the secondary legislation, this situation might lead to more serious problems.

3. *Items that are covered by the Progress Reports but not addressed in the Law amendment;*

The definition of "administration" in the Turkish legislation has always been criticized due to its scope. However, unlike these criticisms, various administrations were left out of the scope.

Privileges and utilities elements were not dealt with.

Criticisms arguing that announcement periods are short were not taken into consideration.

Following parts of the report employs a more comprehensive evaluation. Besides the continuous modification of articles on scope and exemptions, issues such as the lack of framework regulations to which the institutions excluded of the scope of the law in parallel with the EU standards will be subjected to proves that there turn back from the Public Procurement Law in particular as the experience of local administrations are considered.

Now, let us take a closer look to the amendments in the Public Procurement Law in the light of these explanations. In fact, the amendments in the No 4734 Public Procurement Law are often too complex and too many to follow up. Nevertheless, it is possible to categorize the legislative aspect of the amendments in the said Law into two groups.

1. Laws Amending No 4734 Law

These are laws that directly amend various provisions of No 4734 Law, in particular the 3rd article pertaining to exemptions. Among the fundamental objectives of No

4734 Law is to include procurements by all institutions using public funds in the scope. In particular the reactions against the different public procurement regulations valid for specific public agencies and institutions as authorized under No 2886 Law were the major reason behind the inclusion of all public institutions under the scope of a single public procurement law. As the Law took effect, in particular due to detailed regulations pertaining to the announcement periods and placing of bids by the bidders, claims for the exclusion of various public institutions, in particular KİTs that are operating under market competition were voiced. With this respect, 2nd article of the No 4734 Law regulating the scope of the law was subjected to claims for exclusion out of the scope. The most important article that was widely the subject of amendment claims was the 3rd Article of the No 4734 Law which provides for the exemption of the certain activities of public institutions and agencies which are included in the scope of the Law. The context of the mentioned amendments is examined in more detail below.

The laws amending No 4734 Law started to be introduced in various times as of January 2002, the date the said Law was put into effect. The first of these regulations is the No 4761 Law that was put in force in June 2002. The last law amending the No 4734 Law is No 5812 Law put into effect on 20 November 2008. No 4734 Public Procurement Law was amended by 17 laws in total.

Table 13. Amendments in Public Procurement Law

Law No	Date of Publication on Official Gazette	Articles intervened In	Total # of intervened articles

4761	22.06.2002	2/1, 3, 8/1, 10/2, 13/1, 53, 56/5, 62, 4, 6th provisional article	10
4964	15.08.2003	281, 3, 4, 5/6, 6/2, 9, 10/1, 11/3, 13, 14, 16, 18, 20, 21, 22, 24/1, 25, 27/2, 28, 33, 34, 35, 36, 39, 40, 41, 42, 46/1, 47/1, 48/1, 50/1, 53, 55, 56, 58, 60, 61, 62, 68, 4th provisional article, 3rd provisional article, 3/g	42
5020	26.12.2003	22	1
5148	07.05.2004	3	1
5226	27.07.2004	3, 62, 4	3
5255	11.03.2005	7th provisional article	1
5312	24.12.2005	3/ annex, 4/annex	2
5436	24.12.2005	6/1, 4	2
5583	28.02.2007	3/ annex	1
5615	04.04.2007	10/ annex	1
5625	26.04.2007	62/1	1
5680	07.06.2007	2/1 , 2nd annexed article	2
5726	05.01.2008	3/ annexed, 4/ annexed	2
5737	27.02.2008	3/ annexed, 4/ annexed	2
5763	26.05.2008	22/ annexed, 3rd annexed article	2
5784	26.07.2008	3/ annexed	1
5812	05.12.2008	3, 4,10, 11/1, 13, 20, 21, 22, 26/2, 36/1, 37, 38, 40, 41, 42/1, 43/1, 47, 48, 52, 53, 54, 55, 56, 62, 65, annexed article 1, annexed article 2, provisional article 4, provisional article 8, provisional article 9	31
Total number of interventions			105

As also seen at the Table, around 100 new regulations intervening in the Law via addition of provisions or modifications were introduced.[7] No 4964 Law made 42 interventions, ranking the first with this respect and was followed by No 5812 and No 4761 Laws making 32 and 10 interventions respectively.

As also stated above, the 3rd Article of the Law regulating the exemptions (10 interventions overall) and the 2nd Article regulating the scope received more interventions. The other articles that were intervened in particularly are the 13th Article regulating Procurement periods, 20th Article regulating the Procurements carried out among certain bidders, the 21st Article regulating the negotiation procedure and the 22nd Article regulating direct provision.

2. Exemptions from No 4734 Law introduced by different laws

[7] In calculating this number, number of articles subjected to additions or amendments were taken into account. Therefore, articles that were amended more than once were also taken into consideration. Amendments in individual clauses of a single article were not taken into account. If the amendments in clauses are also considered, the number might increase further.

Public Procurement Law as intervened in solely by the mentioned 17 laws. Apart from this, via the laws of several agencies and institutions and some other amending laws, provisions ensuring exemption from No 4734 Law were introduced. However, to prevent the modification of scope through individual regulations, the 66th Article of the Law stipulated that the Law can be amended solely by adding the related provision to the Law itself.[8] It is found out that the number of the mentioned individual legal regulations is 37. Some prominent regulations are listed below:

- Expert evaluations to be made during the sale of immovable properties belonging to the Treasury,
- Construction to be carried on old lodging buildings for the parliament (No 4969 Law),
- Activities of the oil sector enterprises as included in the privatization portfolio (No 5015 Oil Law),
- Consulting and Controlling Operations for North Ankara Urban Transformation Project of Ankara Metropolitan Municipality (No 5104 Law),
- Activities to be held out of the funds from agricultural insurance pool (No 5363 Law),
- Election process pertaining to the establishment of nuclear power plant (No 4710 Law),
- Activities to be assigned by the local administration unions (No 5355 Law),
- Organization expenses for the World Bank and IMF meetings to be held in Istanbul in 2009,
- Procurement procedures for the privatization of sports competitions mutual betting games (No 5738 Law),
- Procurements of service like consultancy service by the General Directorate of Foundations under the Law of Foundations (No 5737 Law),
- Spending to be made out of the special account to be set by the Directorate General of Youth and Sports (No 5764 Law),
- Exemption of the Turkish Investment Support Agency from the said Law (No 5523 Law),
- Exemption of Istanbul 2010 Cultural Capital Agency from the said Law (No 5706 Law),
- Exemption of TÜRKSAT A.Ş from the said Law (No 5189 Law),

[8] In other words, it is obvious that during the 6 years that the Law was in effect, this provision was not complied with.

- Building health facilities in exchange of leases (No 5396 Law).

In conclusion, we think that around 140 change in forms of additions, modifications and exemptions were introduced in the Public Procurement Act under total 54 legal regulations composed of 17 direct amendments and 37 indirect amendments (through other laws). It is ironic that the Public Procurement Law, though introduced in 2002 and stayed into effect for a short period as 6 years was subjected to such a high number of interventions is evaluated as follows: *"… it will be appropriate to rewrite the Public Procurement Law the systematic of which is disrupted… and revise the said Law by also examining the secondary legislation".*[9]

D. Evaluation of Amendments and Regulations

Public procurements, as also stated at the beginning, include a significant governance risk. We believe that we have to assess this risk in a systematic way and that in this context we have to address three concepts and their relations with each other. These concepts are **political rent-seeking, populist rent-seeking and bureaucratic rent-seeking**. Political rent-seeking, in short, is the transfer of funds by the groups having the political power to the groups supporting them as well as to their own accounts using the political power they have. Populist rent-seeking refers to transfer of funds to a wider mass (voters) under the condition to take over and maintain administration. Bureaucratic rent-seeking refers to use of the bureaucratic authorities in one's own interest to maintain or improve his/her condition and thus receive material and non-material gains. Though it might appear that these three rank-seeking categories conflict with each other in certain cases, they generally prefer settings that are prone to collaboration. While political rent often interlocks with populist rent, the maximization of the former depends on the relationship with the bureaucratic rent holders. The closer the bureaucracy to the political power, the more both the political and bureaucratic rants can be optimized and the more the voters receive "some things".

Procurement legislation is the area where these rent-seeking groups, in particular the political rent seekers and bureaucratic rent seekers are the most prominent. Because, for a politician, Procurement is an important tool enabling capital accumulation in hands of "supporters" and thus the strengthening of the foundations of political power. The interventions in the Procurement legislation attract more attention and become among the prior items in the public agenda with this respect. However, it should also be noted that each amendment in the Procurement legislation cannot be

[9] The underlined evaluation is based on the article by Mr. Bahattin Işıklı Public Procurement Authority Vic President (afterwards, Board Member) titled "Problems of Public Procurement System and Regulatory Efforts" as published in the Union of Constructors of Turkey Magazine, April 2008 issue page 28-31.

evaluated on the axis of rent seeking. In some cases, amendments required by the conjuncture or external conditions are introduced without depending on the rent seeking motivation.

In this context, the amendments made in the Turkish Procurement legislation during the previous five years can be categorized as follows.[10]

1. Regulations posing risk of political rent

By risk of political rent, we refer to risk that might be related with Procurements that are carried out benefiting from provisions on exemptions without being subject to the general and limiting provisions of the legislation and/or that are carried out, out of the scope of the Procurement legislation. In particular the institutional exemptions (leaving out of scope) introduced in the 2nd Article of No 4734 Law regulating the scope and part of the additions and modifications in the 3rd Article that regulates the exemptions granted to the in-the-scope institutions can be evaluated in this context. Furthermore, a part exemptions introduced with 37 other laws are also involved in this risk space. In addition to these articles, 22nd Article of the Law that regulates the direct procurement procedure and has exemption-related aspects and the 21st Article that sets the negotiation procedure can be evaluated in this context; because, these procurements are also not subjected to any regulations. Some of these regulations are elaborated on in more detail below.

The most striking amendment in 2nd article of Procurement Law related to scope is the amendment made in the second clause as per No 4964 Law. The said law stipulates that enterprises and businesses operating in the energy, water, transportation and telecommunication sectors that are included under the context of utilities will not be subjected to the No 4734 Law. Such activities shall be founded on a separate legal framework in parallel to the EU regulations. ***However, though a law draft on this issue was prepared, it did not become a law yet and thus there occurred a significant legislative gap in this area.*** This situation implies that a serious political rent risk might be created through the municipal economic enterprises (BİTs), affiliated institutions of municipalities (road and water supply institutions etc.) and public economic enterprises (KİTs), in particular through those operating in the mentioned areas. Since, in Turkey, the majority of the legal duties of municipalities are carried out through affiliated economic enterprises as well as KİTs, the procurements that will be left out of the scope of the laws might reach to significantly high levels.

[10] This section was prepared with the efforts and recommendations of a number of people. We would like to thank them all.

Other public authorities and institutions that are left out of the scope under the context of the second article and the related secondary legislations are public foundations (except for the Procurements carried out by the public authority they are affiliated to), units carrying services to rural areas, procurements to be made with the funds transferred from Promotion Fund to an institution that is not covered by the law and the procurements institutions will make through the circulating fund enterprises. Here, it should be noted that, since 2005, a lot of public works including KÖYDES (Project for Supporting Infrastructure in Rural Areas) have been carried out through the units carrying services to rural areas.

A striking practice in this context is the procurements realized directly through the State Supplies Office (DMO). Exclusion of the procurement of goods and services directly produced by the departments of correction and prisons affiliated to Ministry of Justice; business dormitory enterprises; nursing homes and orphanages affiliated to Social Services and Child Protection Agency; schools and centers affiliated to the Ministry of Education and carrying out production; institutes and production stations affiliated to the Ministry of Agriculture and Rural Affairs; and goods and services directly produced by the Prime Ministry Printing House Enterprise from the said authorities and enterprises, procurement of goods and services that are included in the State Supplies Office Main Status from the Directorate General of State Supplies Office, procurement of loading, transportation and harbor services from Directorate General for State Railways of Republic of Turkey, and procurement of fuels and vehicles from Directorate General for Liquidation Works Circulating Fund Enterprises led to extremely important results. **The administrations begun to give orders for their needs that are to be attained under the scope of the law from the DMO and since the DMO made the procurements under the scope of exemptions, a number of administrations were indirectly become not subjected to the Procurement regime.**

The significant exemptions introduced under the ***third article are***;

- The number of the clauses in the exemptions article, which was 5 when the law was first introduced, reached 13 clauses as per the last amendment made. This development was subjected to criticisms in the EU progress reports.

- An issue in particular important with respect to municipalities is the provision of the 3/a article of the law exempting the procurements to be made by the institutions the founding purpose of which are "processing, improving and evaluating". Here, the issue that should be discussed is the activities covered by the concept "improving". **It is a possibility that a forestation project of a municipality can be considered as an "improving" operation and included under the scope of exemptions.**

- Clause 3/b of the mentioned article is on the exemption of confidential transactions such as procurements for defense, security and intelligence.[11]

- Clause 3/c allows the exemption of an administration provided that the said administration carries out air transportation activities.

- Clause 3/g is an important area of exemption. This clause introduces some exemptions with respect to procurement of goods and services by commercial and industrial establishments. A certain proportion of procurements of goods and services by KİTs and BİTs directly to be used in production were exempted from the Procurement Law. However, it is an important risk that the procurements that exceed the exemption threshold level are divided into groups to benefit from the exemption provisions.[12] **It is known that, the majority of local administration companies that are making exempted procurements in particular under the scope of clause 3/g do not set the principles and procedure with respect to procurements. The Procurements are in general carried out through negotiation often without announcement rather than being based on administrative specifications.**

- As per clause 3/h, procurements of diagnosis and treatment services, medicine and medical equipments for the employees of public administrations covered by the Procurement Law as well as for their family members are included in the scope of exemptions. With respect to the mentioned procurements, another regulation has been introduced based on the opinions of the Ministry of Finance and Ministry of Health. **This exemption provision, which is put in force by regulation and thus which is aimed at the health sector open to political concerns, is assessed to be a serious risk area.**

  Another clause that has high risk of political rent is the criteria in the 10th Article of the law on proficiency criteria for participation. In some cases, the determination of the mentioned proficiency criteria is manipulated so that only the firms preferred by the political rule can participate in the Procurement. **This practice takes the following form in case of local administrations: The administration sets the proficiency**

[11] Procurement principles for these items are regulated separately.
[12] 5 Article of the Law promulgates that such a practice cannot be carried out as a founding principle.

criteria in a way that only its own BİT can meet and the BİT winning the Procurement divides the procurement amount to pieces below the threshold level determined by the 3/g clause and distributes the individual amounts to any company it decides.[13]

There exists another important amendment in this context. As regards professional proficiency (work experience in particular), while first version of the Law prioritizes the completion of and approval of the work, in time (in particular after the introduction of No 5812 Law), **engineers and architects without any work experience were allowed to enter Procurements by only showing their diplomas.**

It is observed that, in case exempted procurements are regulated under different regulations, announcement periods are shortened, the number of procurements upon negotiation and direct procurement is increased and no arrangements with respect to the criticisms to be conveyed by the bidders, in general.

Modifications in the Procurement legislation involving political rent-seeking risk are not only observed in form of leaving out of the scope and increasing the scope of exemption provisions. For instance, No 4734 Law involves some mechanisms that do not allow the bidder with the lowest offer to win the Procurement under certain conditions and thus that ensure that the Procurement is undertaken by firms carrying out more professional and high-quality production activities. However, since the secondary legislation setting the details and putting into effect the mechanisms is not yet put into force despite the fact that the necessary authorization is granted (here, lack of expert personnel is also a point of issue), the Procurements can be won by the lowest bidders because of "comptroller fear". **It must be noted that this situation, which does not seem connected with political rent at a first glance, might be used by the firms supporting the ruling party as a weapon in the implementation phase.**

The scope of this method was enlarged as the construction works was subjected to the framework agreement practice. Framework agreement is a procurement system facilitating periodical procurements (cleaning, consumables, repair and maintenance) by appointing 2 to 4 firms for a period of 3 years. However, the method has been expanded for construction works besides routine procurements and the boundaries of the method have not been clearly defined. **Therefore, there is a prevalent concern that the construction works will be assigned to firms supporting the ruling**

[13] The practice of setting the Procurement criteria in a way indicating the firm referred to is also called "Procurement only missing photographs".

parties for longer terms and that the practice includes elements significantly open to misuse.

The scope of the definition of services in the Law was enlarged and via the amendment made in 2003, the services concerning repair and maintenance, transportation, communication, insurance, research and development, market research and surveys, consultancy, architecture and engineering, promotion, publishing and publication, professional training, photography, film, intellectual and fine arts and computer systems were allowed to be procured through opening Procurements. Here, the 'computer systems' concept is important, as this way data entry, automation and control works of several administrations is assigned to natural persons. However, the lawfulness of this practice is debatable. In law suit, which is currently seen before the Council of State, a court of first instance decided that the mentioned computer services can only be provided by the state as per the No 128 article of the Constitution.

Through the No 4964 Law, direct procurement is excluded of the scope of Procurement procedures. Therefore, making announcement and implementing contract provisions become nonobligatory in case of direct procurement, paving the way for procurements from banned people. **Furthermore, in 2008, under No 5812 Law, the number of areas where direct procurement is lawful was increased.**

No 4964 Law also enlarged the number of areas where negotiation procedure will be applied, and by means of a clause added to the 21st article of the Law enabled the employment of negotiation procedure for procurement of goods, materials and services the average cost of which is around 50 billion YTL.

In time, the setting of the procedure for Procurements among certain bidders. While No 4964 Law shortened the time periods, thanks to No 5812 Law, the procedure which used to be applied in cases where the work required special expertise and/or high technology is now allowed to be used unconditionally in the Procurements approximate cost of which exceeds threshold value. **This is an amendment that can give way to misuses which were also seen when No 2886 Law was in force.**

An important change introduced by No 4734 Law is that, as a rule for construction works, firms to go out to the Procurement by offering a bid for the realization of implementation project and turn-key lump sum cost. This way, administrations will also be able to make payment plans and the cost of project for the public will become clear. This provision in the (c) clause of No 62 article has gone under various changes in time. **The last amendment introduced by No 5625 Law has significantly**

increased the number of exemptions of the implementation project preparation conditions.

By means of the turn-key principle introduced in the public Procurements through No 4734 and 4735 Laws, paying unnecessary price differentials was tried to be prevented. nonetheless, in 2008, with introduction of No 5794 Law an article was added to No 4735 Law regulating public procurement contracts and the Council of Ministers, upon the motion of the Public Procurement Authority, was authorized to set the principles of and procedures for determining price variance for production works carried out or to be carried out after 1/1/2008 regardless of whether, for the construction works the Procurements for which were carried out before 31/05/2008 under No 4734 Law, there exists a provision pertaining to setting a price difference in the Procurement document due to unexpected increase in prices of materials used in the production of work items or work groups in the construction works or whether the Procurement was contracted in foreign exchange terms. **This was highly abused in the period where No 2886 Law was in force. Increasing the price to be paid during the implementation process pertaining to the contract regardless of the approximate cost of the Procurement as well as allowance planning has destroyed an important feature of the new Procurement system.**

A part of the criticized amendments in the Procurement legislation can also be evaluated under the category of political rent-seeking risk. The most important issue with this respect is the modifications pertaining to some authorities and responsibilities of the Public Procurement Authority concerning the supervision of the Procurement process and modifications in the complaint mechanisms:

- **The authority of the Public Procurement Authority (KİK) to examine the claims that took place in the media was removed via No 5812 Law. Therefore, criticisms arguing that the function of the said Authority pertaining to public supervision has been disrupted have risen.** In its first version, 53rd Article of No 4734 Law grants the Authority the right and authority to examine and finalize incompliance claims against the Procurement legislation. However, as also stated before, this clause was annulled with No 5812 Law. Therefore, supervision by the Authority was limited with complaint applications. However, there are several Procurements that contain concrete and serious aspects not in compliance with the legislation and did not undergo hierarchical supervision, though there is no complaint filed against it. **Removing the power of the said Authority to examine claims will lead to inaction against the incompliance claims that took place in the media.**

- No 5812 Law has considerably raised the fee for submitting a complaint application to the Public Procurement Authority (10 times in average). **This constitutes a significant barrier beyond the liberty of people to claim their rights**.

2. Regulations posing risk of bureaucratic rent

Bureaucratic rent in public Procurements is fundamentally an important issue that might be associated with the bureaucrats involved in the Procurement process. During the process of drafting No 4734 Law, removing the system known as "report system" which enables bureaucrats in the Ministry of Public Works to be issued "constructor authorization certificate" in connection with the Procurements carried out and when they retire or quit public service, use this document or let construction firms to use it for pecuniary advantages. However, the resistance of the bureaucracy in this field was not unzipped; and the "report system" was rearranged under the scope of the 10th Article of the Law which regulates the proficiency criteria for Procurement participation as "documents to be granted for supervisory activities". Under the new regulation, the circle of bureaucratic actors that have supervisory powers have been enlarged considerably. Bureaucracy of the Ministry of Public Works, State Hydraulic Works, Directorate General for Highways, Mass Housing Authority, bureaucratic actors in municipals and in other public authorities related to construction works (undersecretaries, general managers, Procurement commission member) were granted the right to get the mentioned document. While the rate of the supervisory proficiency certificate was set at a certain proportion of the value of the work carried out by the constructor undertaking the works under the supervised Procurements, as per the last amendment (by No 5812 Law), this rate was increased to 1/ 1 In this case, a bureaucrat participating in the decision making and supervision process of any Procurement will have a supervisory proficiency certificate equal to the value of the work undertaken, i.e. at the same value with the constructor. Nonetheless, it should be noted that the Law tries to lower this rate for the first five years and introduce similar limitations.

Nevertheless, it should also be kept in mind that, this kind of certificates have a significant market value like taxi license plates allowing the bureaucracy attaining bureaucratic rents closely integrate into the political rent seeking activity and that the limitations introduced might be easily broken in practice. The probability that the firms that are closed to the political rule and that does not have real work experience gain advantage in front of more experienced and long-established firms by using the documents obtained under the aforesaid method in the invitation based Procurement which actually have to be carried out with firms that

have similar work experience and equivalent work finalizing certificates can be considered as an example for this situation. Therefore, even use of such documents are somehow limited, the probability that the limitations can be broken in practice should also be kept in mind.

E. Conclusion

No 4734 Law regulating public procurements have been subjected to serious amendments during last six years. As stated above, though a part of these amendments were based on grounds of EU harmonization and/or introducing some flexibilities in practice, a significant number of the amendments involve elements posing political rent-seeking risk.

Even though this risk manifests itself in form of the tightening of the article on scope and expansion of the article on exemptions, articles apart from these also imply that the Procurement law has turned into a tool to establish a capital accumulation model with close connections with political authorities. It is apparent that local administrations and other public administrations an authorities participating in construction works assume roles in the implementation pillar of the model.

Furthermore, it is obvious that weakening of the public supervision and weakening the role of the perceptions of clarity and quality-competition which constitute the founding philosophy of the Law in the Procurement processes will lead to significant challenges against the rational use of public funds in line with public interests.

As a result, when the support to the political rent by the bureaucratic rent and the content of the amendments made are considered, it will not be wrong to claim that the Procurement system will become subjected to higher risk of corruption and irregularity.