

LEGAL FRAMEWORK COMPARISON OF PUBLIC PROCUREMENT LAW  
WITH STATE PROCUREMENT LAW

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## ABSTRACT

### LEGAL FRAMEWORK COMPARISON OF PUBLIC PROCUREMENT LAW WITH STATE PROCUREMENT LAW

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This thesis makes the comparison of legal frameworks of the two Procurement Laws, the New Public Procurement Law (4734) and the Ex-State Procurement Law (2886) respectively. As a result of this comparison, it is seen that a lot of provisions starting from tender notice time limits to the awarding of contracts, have been changed substantially by the introduction of Turkish Public Procurement Law. Besides this comparison, the related procurement directive on construction works in European Community, namely EEC 93/37 is analyzed through the topics pertinent to the New Public Procurement Law, from which it is observed that there are both similar and different application regarding tender process in this directive when compared with the provisions of Turkish Public Procurement Law on construction works. This thesis study also aims to put forward the conception of Turkish contractors about the New Public Procurement Law by means of a questionnaire containing 15 questions. From the results of questionnaire, it is seen that majority of the contracting companies have a positive attitude towards the New Public Procurement Law although some provisions of the Law do not meet the expectations of the companies.

Key Words: New Public Procurement Law, Ex-State Procurement Law, European Community.

## ÖZ

### YASAL İÇERİK YÖNÜNDEN KAMU İHALE KANUNU'NUN DEVLET İHALE KANUNU İLE KARŞILAŞTIRILMASI

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Bu tez çalışması, iki ihale kanununun, sırasıyla Yeni Kamu İhale Kanunu (4734) ve Eski Devlet İhale Kanunu (2886), yasal içeriklerinin karşılaştırmasını yapmıştır. Bu karşılaştırma sonucunda, ihale ilan sürelerinden sözleşme aşamasına kadar bir çok hükmün, Türk Kamu İhale Kanununun yürürlüğe girmesi ile büyük değişikliğe uğradığı görülmüştür. Bu karşılaştırmanın yanında, Avrupa birliği'nde geçerli olan (EEC 93/37) ihale direktifinin içeriği Yeni Türk İhale Kanunu'na uygun bazı başlıklar doğrultusunda analiz edilmiştir. Türk Kamu İhale Kanununun yapım işleri ile ilgili hükümleri söz konusu direktif ile karşılaştırılınca, bu direktifin ihale süreci ilgili hem benzer hem de farklı uygulamaları içerdiği görülmüştür. Ayrıca, bu tez çalışması Türk müteahhitlerinin Yeni Kamu İhale Kanunu (4734) hakkında görüşlerini, 15 soruluk bir anket yardımı ile almayı amaç edinmiştir. Anketin sonuçlarından, Kanunun bazı hükümlerinin inşaat firmalarının beklentilerini karşılamamasına rağmen, firmaların çoğunluğunun Yeni Kamu İhale Kanunu hakkında olumlu düşüncelere sahip oldukları görülmüştür.

Anahtar Kelimeler: Yeni Kamu İhale Kanunu, Eski Devlet İhale Kanunu, Avrupa Topluluğu.

To My Family

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## **LIST OF ABBREVIATIONS**

EC:	European Community
ECU:	European Currency Unit (currency of EC)
EIA:	Environmental Impact Assessment Report
EU:	European Union
EFTA:	European Free Trade Association
GATT:	General Agreement on Tariffs and Trade
GDP:	Gross Domestic Product
GPA:	WTO - Government Procurement Act
PIN:	Prior Publication of Contract Notice (of the EC)
PPA:	Public Procurement Authority
PPB:	Public Procurement Board
TEC:	Treaty of the European Community
TISK:	Turkish Employers Union Confederation
TL:	Turkish Lira
TOBB:	Turkish Union of Chambers and Stock Markets
VAT:	Value Added Tax
WTO:	World Trade Organization
4734:	Turkish Public Procurement Law
4735:	Public Procurement Contract Law
2886:	Turkish State Procurement Law

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Public Procurement**

##### **1.1.1 What Is Public Procurement?**

There may be lots of answers to this question ‘What is Public Procurement?’ Nevertheless, public procurement simply refers to the contracts awarded (for pecuniary interest) by a public purchaser (‘contracting authority’) or a ‘utility’ (entities operating in the water, energy, transport and telecommunications sectors) in order to meet their requirements like works, supplies or services to a contractor, supplier, or service provider respectively.

Public procurement may be further defined as the purchase of goods, services, works and supplies by public authorities and enterprises, constitutes one of the traditional instruments employed by governments of any description to sustain their own operations and to provide various public utilities [10].

The process subject to the law that governs budgeting by which the state, or any other agency that is in a qualified proximity to the state, procures or accepts the promise of products, buildings, or services, or to which it transfers a duty of the state, in order to perform a task in the public interest or to arrange for its performance is an other, but sophisticated, definition for public procurement.

##### **1.1.2 Economical Importance Of Public Procurement**

Nowadays, it is estimated that within the territory of the EU, public authorities and enterprises yearly spend approximately 720'000'000'000 (720 billions) Euros for the purchase of goods and services; the amount of money comprises approximately 14% of the European Union’s GDP [10].

As regards Turkey, within the period of twelve months between 01.01.2003 and 01.01.2004, an amount of 5600 thousand billion TL (approximately 3,2 billion Euros) were spent on public procurement including procurement of goods, services and works [8].

### **1.1.3 Process Of Public Procurement**

The process of public procurement can basically be divided into three steps. First, it starts with a planned decision to make the purchase, which involves determining whether there is a need for the particular goods, works or services and whether the purchaser has the legal powers to undertake the transaction.

Procurement of services, supplies and works is a major part of any project. Since it invariably requires the exchange of money, procurement is generally subject to a variety of controls, including internal standing orders, external audit, review by funding partners and statutory regulations. Consequently, the procurement process takes time and must be planned firstly as an integral part of the whole project planning process, and secondly to ensure regulations and obligations are met and sufficient time is allowed for them to be properly completed.

The second phase is then to choose which firm is to be the provider of the goods, works or services required. Finally, the third phase starts with the conclusion a contract with that party. Once the contract is made, there follows the process often referred to as contract administration. This includes supervising performance to ensure that the promised goods, works and services are properly delivered, accepting performance, arranging for payment of the contractor, and various other contractual matters. The focus of this thesis, however, is on procurement in a narrower sense, covering only the second of the three phases, which is the process of selecting the contractor.

### **1.1.4 Public Procurement Policy**

Generally speaking, the public procurement regime should establish specific procedures to guarantee that procurement contracts are awarded in a competitive, transparent and non-discriminatory manner. Some other features that should be

satisfied for a proper public procurement and preventing corruption are the followings.

Procurement should be economical. It should result in the best quality of goods and services for the price paid, or the lowest price for the acceptable quality of goods and services; not necessarily the lowest priced goods available; and, not necessarily the absolutely best quality available, but the best combination to meet the particular needs.

“Price” is usually “evaluated price” - meaning that additional factors such as operating costs, availability of spares, servicing facilities are taken into account.

Contract award decisions should be fair and impartial. Public funds should not be used to provide favors; standards and specifications must be non-discriminatory; suppliers and contractors should be selected on the basis of their qualifications and the merit of their offers; there should be equal treatment of all in terms of deadlines, confidentiality, and so on.

The process should be transparent. Procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.

The procurement process should be efficient. The procurement rules should reflect the value and complexity of the items to be procured. Procedures for small value purchases should be simple and fast, but as purchase values and complexity increase, more time and more complex rules will be required to ensure that principles are observed. “Decision making” for larger contracts may require committee and review processes, however bureaucratic interventions should be kept to a minimum.

Accountability is essential. Procedures should be systematic and dependable, and records explaining and justifying all decisions and actions, should be kept and maintained.

Finally, competence and integrity in procurement encourages suppliers and contractors to make their best offers and this in turn leads to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor partners with which to do business.

## 1.2 Aim Of The Thesis

The aim of this thesis is threefold. In chapter 2, the legal framework comparison of the New Turkish Public Procurement law (4734) with the ex-procurement law (2886) through some important headings is tried to be made. Not surprisingly, during the comparison, most of the time, the focus is on public works procurement, and hence, service and supply concepts are often withdrawn. Moreover, some of the parts of 2886 related with public sector procurement contracts, which are now included in 4735 (Law on Public Procurement Contracts) and not contained in the new Public Procurement Law anymore, are not discussed in this study.

In chapter 3, the related procurement law in European Community (EEC 93/37) is discussed so as to observe the different applications in a more general respect. As in the second chapter, mostly, the focus will be on public works procurement.

Due to the given space and time frame, delimitations become a necessity, above all in such a wide area like public procurement.

While investigating the EC public procurement system, only the EEC 93/37 (the European Community Directives For Construction, Contracting Procurement) will take the main attention among others (EC 93/36 'the European Community Directives For Good Procurement', EC 92/50 'the European Community Directives For Service Procurement', EC 93/38 'the European Community Directives For Procurement Performed By The Utility Sector.')

The legal situation and the precise implementation of the EC-directives in the different Member States are hardly analyzed. Furthermore, relation between the public procurement directives and the primary legislation is not investigated yet.

Apart from that, as a very important introductory remark, only contracts above the threshold value are taken into consideration. The proceedings for tender invitations and awards below the threshold value are different.

For the sake of clarity and in order to avoid impreciseness and unnecessary repetitions, there will be some specific remarks concerning more detailed

delimitations within the text itself. On the other hand, there will be some recapitulations to facilitate the understanding.

Last but not least, it has to be pointed out that this thesis focuses on a description of the public procurement regimes at stake. In addition, it does aim at bringing forward suggestions how the current systems could be improved, or how it should be further developed, despite the fact that in order to fulfill those tasks properly, much more time and space would have been an indispensable prerequisite.

In chapter 4, the results of the survey conducted for determination of perception of Turkish Construction Sector about the new Turkish Procurement Law (4734) will be given. The positive and negative critics derived from the survey will be revealed.

The comparison of those topics mentioned above seems to be very rewarding. First, public procurement issues are economically extremely important, due to a huge amount of public money spent through this instrument. Moreover, public procurement is, at least up to now, rarely given the legal attention it deserves. The underlying reason may lie in the long-lasting underestimation of its importance, and, deriving from that, the surprisingly tardy start of its legal development, oriented around the key-issues of transparency, nondiscrimination and legal protection [10].

### **1.3 Method**

The following thesis is based on an examination of the relevant legal sources applied under European and Turkish Law. The sources of the legal orders include legislation, judgments and academic writing. The European and Turkish legal provisions are interpreted generally by means of a comparative and systematic approach.

For the interpretation of European law, the English version of the texts will form the basis of the analysis, as this is the stipulated working language.

### **1.4 Historical Enhancement In Turkey And In the World**

During the last decade, an enormous increase in legal activity in the field of public procurement could be observed in the world. It commenced with the

implementation of EC-directives. The underlying reason for the regulation of public procurement throughout the EC is the expectation to eliminate non-tariff barriers arising from discriminatory and preferential purchase patterns, through creating rights for suppliers against unwelcome practices of purchases. It is estimated that substantially yearly savings of 20.000.000.000 (20 billions) Euros are possible.

The TEC (Treaty of European Community) does not contain explicit provisions on public procurement. However, there is no doubt that the provisions on non-discrimination, the prohibition to barriers to intra-community trade, freedom to provide services, the right of establishment, public undertakings and undertakings to which special or exclusive rights by the Member States are granted, state monopolies providing services of general economic interest, and state aids, are applicable in order to regulate government purchasing and combat discriminatory procurement practices in the Member States [10]. Currently, the EC's public procurement law is codified in six directives.

- The works directive, Council Directive 93/37/EEC of 14<sup>th</sup> June 1993 coordinating the procurement procedures for the award of public works contracts.
- The service directive, Council Directive 92/50/EEC of 18<sup>th</sup> June 1992 relating to the coordination of procedures for the award of public service contracts.
- The supply directive, Council Directive 93/36/EEC of 14<sup>th</sup> June 1993 coordinating procedures for the award of public supply contracts.
- The procedures directive, Council Directive 89/665/EEC of 21<sup>st</sup> Dec. 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.
- The utilities directive, Council Directive 93/38/EEC of 14<sup>th</sup> June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
- The utilizes procedures directive, Council Directive 92/13/Eec of 25<sup>th</sup> Feb. 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

They embrace every Member State and its organs, which are interpreted in functional terms. They include all levels of state. It seems to be the fastest to always keep both sets of rules, the primary legislation and the second legislation, in mind when assessing a case which falls within the field of a public procurement directive.

The European Council Directives were followed by an international agreement, the Government Procurement Act (GPA), based on the regime of the World Trade Union (WTO) and was subsequently ratified by the EC. Hence, European Community had to amend some of the provisions of its directives accordingly. The GPA, which is a plurilateral agreement, was enacted during Uruguay Round of Multilateral Trade Negotiations on 15 April 1994 as a substitution for the precedent, GATT 1947 (General Agreement on Tariffs and Trade). Some of the Signing states are: EC, EFTA (European Free Trade Association), USA, Canada, Japan, South Korea. GPA entered into force on 1 January 1996.

The World Trade Organization promotes free trade at global level. WTO works within areas such as technical barriers to trade, subsidies, anti-dumping and customs tariffs. The works of WTO, which is an international cooperation agency, is not international, but intra-national [10]. Consequently, cooperation is based on consensus between WTO's members in accordance with these members' undertakings stated in the various agreements concluded within the WTO framework. Their Agreement on Plurilateral Government Procurement – GPA contains regulations covering transparency and non-discrimination. Although it is, to a large extent, inspired by the EC's procurement directives, this agreement establishes the framework of both EU's, and a number of other important trade partners' regulations in this field.

As regards the history of procurement in Turkey, the first Procurement Law of Turkey number 2490, which was enacted in 1934 by the publication of Official Gazette. It was for the requirements of a young republic, Turkey, striving for improvement and reforms. Through the years, lots of amendments, additions and repeals were conducted according to the needs of government, as the economical, social and technological circumstances changed. Some of them were law number: 2838 in 1935, law number: 2902 in 1936, law number: 3559 in 1939, law number:

4547 in 1944, law number: 5405 in 1949, law number: 6246 in 1954, law number: 6150 in 1973 and in 1979.

After that, Procurement Law (2886) in 1983 was enacted and the provisions of the first Turkish Procurement Law (2490) was repealed. This new procurement law also experienced amendments. Some of them are law number: 2944 in 1983, law number: 2990 in 1984, law number: 4628 in 2001 and law number: 4646 in 2001.

Finally, the new Public Procurement Law (4734) and the Law on Public Sector Procurement Contracts (4735) was enacted on 4 January 2002 and 5 January 2002 respectively. As for the other procurement laws mentioned above, this new law have been exposed to amendments, such as law number: 4761 on 12 June 2002, law number: 4964 on 30 July 2003 and law number: 5148 on 27.04.2004 which gave the today last shape of the procurement law 4734.

In the content of 4761, there were some eleven adds and amendments to Law No:4734. They were mainly about

- the scope of the Law in article 2,
- the exceptions of the Law in article 3,
- the updating of the threshold values in article 8,
- the work experience certificates for qualification in article 10,
- the procurement announcement rules and time limits in article 13,
- the duty period of the Committee members of PPA and the circumstances where the deposition from their works is prospective in article 53,
- the educational and professional properties required for the appointment of public procurement expert assistants and public procurement experts in article 53,
- the future of Committee Chairman and Committee Members after leaving their duties in article 53,
- the portion of income from the conclusion of contracts over a value of 144.999.000.000 TL, amounting to %0,05 of the contract value in article 53,
- the complaint process and time limits of the decision announcement of the PPA in article 56,

- the necessity of completing property, nationalization of building site and the necessity of preparing application projects to bid through receiving turnkey lump sum price proposal in article 62.

As for 4964, it put forward much more comprehensive amendments to 4734 when compared to 4761. Some of the main adds and amendments are about

- the enlargement of the scope of the Law in article 2,
- the total change of the exceptions of the Law in article 3,
- the inclusion of new definitions such as service, joint-venture, domestic tenderer, restitution project in article 4,
- Environmental Impact Assessment Report (EIA) in article 5,
- tender commission where the procuring entity does not have enough qualified staff to conduct the tender in article 6,
- the estimated cost in article 9,
- the professional and technical qualifications regarding work experience certificates for monitored and managed works in article 10,
- ineligibility to participation in article 11,
- the procurement announcement rules and time limits in article 13,
- the participation of consortiums in article 14,
- the exclusion of direct procurement from procurement procedures in article 18,
- the announcement time limits of restricted procedure in article 20,
- the addition of new circumstances to apply negotiated procedure, being free to make announcement of negotiated procedure in some circumstances and in procurement of goods it is not mandatory to make contracts and require permanent security in article 21,
- in what circumstances direct procurement is possible without requiring announcement and security in article 22,
- the amount of temporary security required by the contracting entity in article 24 and 33,
- the adoption of the letters of guarantee that may be arranged by foreign banks permitted to operate in Turkey and private financial establishments in article 34,

- the time interval for the contracting officer to approve or cancel the tender decision in article 40,
- the announcement of the decision approved by the contracting officer and the notification date of the mailed decision letter in article 41,
- the invitation to sign the contract in cases where the winner is a foreign tenderer in article 42,
- the conclusion of the contract for which, unless otherwise stated in the tender document, certifying the contract by a notary public is not mandatory in article 46,
- the scope of procurement of the consulting services in article 48,
- the time limit for the invitation to tender in the procurement of consulting services in article 50,
- the process of review conducted by the procuring entity in article 55,
- the process of review conducted by the Authority in article 56,
- the prohibition from participation to tenders in article 58,
- the penal liability of officers in article 60,
- the prohibition of the reveal of confidential information in article 61,
- the other rules for contracting entities in the planning stage of tenders such as the time periods when the contracting entities can open tenders, the exceptional work procurements for which the rule of completing property, nationalization and preparation of application projects are not obligatory, the money limits in the budget for both negotiated and direct procurement procedures in article 62,
- the substitution of Public Procurement Bulletin for the Official Journal and the Public Housing Estate in article 68.

Finally, by Law Number: 5148, exceptions of the Law in article 3, was partially amended again.

## **CHAPTER 2**

### **LEGAL FRAMEWORK COMPARISON OF ACT 2886 AND ACT 4734 THROUGH SOME HEADINGS**

#### **2.1 General Provisions**

##### **2.1.1 Application Principles**

Under this topic, the differences and similarities of the ex-procurement law (2886) and the new procurement law (4734) are tried to be discussed through some fundamental concepts such as objectives, scopes, exceptions and definitions. Moreover, basic principles and tender commission are also scrutinized in a comparative manner.

##### **2.1.1.1 Objective**

As regards objectives, it can be seen that both procurement laws have the same objective, which is to establish the principles and procedures to be carried out in procurements held by all public entities and institutions governed by public law or under public control or using public funds.

##### **2.1.1.2 Scope**

When the scope of both laws are examined, it is seen that 4734 is more extensive than 2886. While 2886 covers procurement of goods, services and works, the cost of which is paid by any kind of resources that are at the disposal of the contracting entities such as the departments included in the general budget, annexed budget, special provincial administrations and municipalities and it gives the right to Ministry of Finance and Council of Ministers to decide how the procurement is

executed for the revolving funds organizations, funds that are established in accordance with special laws unions, legal entities.

On the other hand, 4734, in addition to the scope of 2886, covers any procurement of goods, services and works of the contracting entities such as the revolving funds organizations of entities mentioned above, unions, legal entities, all state economic enterprises, consisting of public corporations and economic state establishments; social security establishments, funds, entities of legal personalities that are established in accordance with special laws and that are assigned with public duties (except for professional organizations and foundation institutions of higher education) and establishments with independent budgets, any institutions, organizations, associations, enterprises and corporations of the contracting entities mentioned above which directly or indirectly, together or separately have more than half of the capitals and finally, the construction tenders of banks within Law No: 4603.

However, Saving Deposit Insurance Fund and banks whose shares are partially or fully owned by this Fund and banks covered by Law No: 4603 (excluding the construction tenders of banks within Law No:4603) and establishments including those who carry out activities in the energy, water, transportation and telecommunication sectors, are out of the scope of 4734.

### **2.1.1.3 Exceptions**

According to 2886, with the permission of Minister of Finance in some cases;

- a) where requirements can directly be supplied by another public entity or revolving funds organizations of contracting entity,
- b) where requirements can directly be supplied by revolving funds organizations of contracting entity, special provincial administrations, entities of legal personalities that are established in accordance with special laws and that are assigned with public duties,
- c) the sale of buildings, registered to the Treasury, to the associations working for the benefit of public,

- d) the leasing of buildings with the permission of Ministry of Culture and Tourism and through the provisions of regulations enacted by Ministry of Finance,
- e) where the situation is the occupation of buildings, registered to the Treasury, by real or legal persons, these occupied buildings shall be sold,
- f) the purchase of medical requirements and drugs from drugs store, through the regulations, by the Ministry of Finance,
- g) purchase of medical requirements and drugs from Kızılay Association,
- h) purchase of goods or services and construction works of organizations of contracting entities abroad,
- i) the works to be carried out by the method of force account,
- j) purchase of goods, services and works , realized through international agreements,
- k) with regard to defense, security procurement of tools, military materials, equipments and systems procurement of their research, development, modernization, procurement of services, tools and equipment within the state intelligence security, Law shall not be applied.

On the other hand, in 4734, the articles h, j, k are covered as exceptions, moreover the followings are added as some other conditions where the law may be disregarded,

- a) Procurement of products relating to agriculture and livestock, by entities included within the scope of this Law, directly from the producer or its partners in order to process, utilize, improve and purchase directly from villagers according to Law No:6831,
- b) The purchases of the institutions that are in the scope of law will be carried out as follows; the goods and services which are produced by punishment execution institutions, the institutions of jails work-home attached to the Ministry of Justice, orphanages attached to the Social Service and Child Care Institution, productions of schools and centers attached to the Ministry of Education and institutes and breeding stations attached to the Ministry of Agriculture on their own, will be purchased directly from the related institutions. The goods and equipments, which are in the principal status of State Supply Office, will be purchased from the General Directorate of State Supply Office,

- c) Necessary purchases of goods and services for research and development projects executed and supported by national research and development institutions,
- d) Procurements of goods, services or works, which are to be realized with foreign financing pursuant to international agreements, and in the financing agreement of which is stated that different tender procedures and principles will be applied; all kinds of consultancy and loan graduating services with regard to borrowings from international capital markets; procurement of goods and services to be made by Republic of Turkish Central Bank relating to production and printing of banknotes and valuable documents; any kind of procurement for consultancy services in privatization implementations pursuant to Law no: 4046, dated 24.11.1994; procurements of goods and services related to commercial activities by enterprises, undertakings and companies operate in the field of air transport,
- e) Goods and service procurements of the institutions such as state economic enterprises, consisting of public corporations and state economic establishments, any institutions, organizations, associations, enterprises and corporations which more than half of their capitals, directly or indirectly, together or separately are owned by state economic enterprises, consisting of public corporations and state economic establishments to be made in order to cover the needs relating to direct producing of goods and services or principal activities, within their commercial and industrial activities, the estimated costs and contract prices of which do not exceed 3.335.007.000.000 Turkish Liras excepting those financed by treasury guarantee or by means of transferring directly from the transfer order of budget,
- f) Service procurements by contracting entities that are under the scope of this Law with a view to providing diagnosis and cure for the persons entitled pursuant to their special legislation and purchasing of drugs and medical supplies with prescription during outpatient treatment by persons whose treatments are carried out by the entities.

The enterprises, institutions and corporations which carry out activities in energy, water, transportation and telecommunication sectors shall be subject to subparagraph (e) until their special laws enter into force and shall be subject to other

provisions of this Law for procurements of goods, services and works which are not within the scope of sub-paragraph (e).

#### **2.1.1.4 Definitions**

As far as the definitions of concepts concerned, some of them, in 2886, are removed from 4734, and some new definitions of terms are included. For example, the terms purchase, sale, hiring, barter, transport were removed from the law. Some of the definitions included in 4734, are as follows,

Consultant: Service providers, who uses his knowledge and experience for the benefit of the contracting entity, who have no organic link with the contractors whom they provide consultancy services for, who do not gain anything other than the due consultancy fee from the contracting entity, and who provide the consultancy services.

Joint Venture: A partnership or a consortium established by mutual agreement of more than one natural or legal person in order to participate in a tender.

Domestic Tenderer: Real persons who are the citizens of Republic of Turkey and legal entities founded according to the laws of Republic of Turkey.

Preliminary Design: In accordance with the final necessity program of a certain structure, the design consisting of one or more solutions without necessary land and ground researches where the information is obtained from the existing maps and the plans, dimensions, outlook and profiles are prepared on the basis of the available data including environmental impact assessment and feasibility reports.

Final Design: In accordance with the approved preliminary design of a certain construction, the design with possible land and ground researches have been undertaken, where the construction elements have been measured and dimensioned and construction system and equipment and technical specifications have been indicated.

Implementation Design: In accordance with approved final design of a certain construction , design indicating any kind of detail of the construction.

Open Procedure: A procedure where all tenderers are allowed to submit their tenders.

Restricted Procedure: A procedure, where following a prequalification process, only

the tenderers who are invited by the contracting entity can submit their tenders.

Negotiated Procedure: A procedure which can be employed under the conditions set forth in this Law, in which the procurement process is conducted in two stages, and the contracting entity negotiates with the tenderers, the technical details of the procurement with the contractual terms and in some cases the contract price.

Authority: Public Procurement Authority (PPA)

Board: Public Procurement Board (PPB)

#### **2.1.1.5 Basic principles**

It is seen that both 2886 and 4734 state that in tenders to be conducted in accordance with the Law, the contracting entities are liable for ensuring transparency, competition, equality of treatment, reliability, accountability, confidentiality, public supervision, and procurement of needs under appropriate conditions and in a timely manner, and for the efficient use of resources. Purchase of goods, services and works cannot be consolidated in the same procurement, unless there is a natural and justifiable connection between them. In addition to this, the procurement proceedings shall not be initiated unless there is a sufficient budget allocation.

According to 2886, goods, services or works to be procured cannot be divided into lots with the intention of avoiding the provisions of law, whereas in 4734 the sentence ‘avoiding the provisions of law’ is replaced by the sentence ‘avoiding the threshold values’.

Moreover in 4734, for the procurements to be held in accordance with the Law, the principal procurement methods are the open and restricted procedures. The other methods may be used only under the special conditions set out in the Law.

Finally, a new concept ‘Environmental Impact Assessment Report (EIA)’ is introduced with 4734. According to this, the works requiring an Environmental Impact Assessment Report (EIA), a document indicating positive comments on EIA must be obtained before the initiation of procurement proceedings. However, in emergency situations due to natural disasters, EIA report shall not be required for the procurement of construction works.

#### **2.1.1.6 Tender commission**

According to 4734, the procuring entity shall assign a tender commission, which consists of at least five members and in odd numbers, including one chairperson, at least four personnel of the related contracting entity provided that two of them are experts on the subject matter of the tender, a financial officer in cases of general budget and annexed budget entities, and in case of other entities a personnel responsible for accounting and finance, together with its substitute members. In order to allow for the required examinations, each member of the commission shall be provided with a copy of the records of procurement proceedings, within three days following the invitation or announcement.

The common rules for the study of commissions for both laws are that the tender commission shall convene with no absentees. The commission decisions shall be taken by majority voting. Abstention is not possible in decisions. The chairman and members of the commission are responsible from their votes and decisions. The members using dissential vote have to write down their justifications in the records of commission minute and sign it. The decisions taken by the tender commission and the minutes kept shall be signed by the chairperson and members of the commission, indicating the names, surnames and titles. Finally, if there are not enough staff which are qualified enough to conduct the duty of tender commission in contracting entity, staff working in entities covered by this law, can be hired.

#### **2.1.1.7 Record of procurement proceedings**

Both laws contain such similar provision for the record of procurement proceedings. Accordingly, a record of procurement proceedings shall be prepared for all procurements that will be conducted. This record of procurement proceedings shall include the certificate of approval, which is taken from tender officer and contains information about the characteristics, project number, amount of advance payment and appropriation, priced bill of quantities relating to the estimate cost, the tender documents, the advertisement texts, the tenders or the applications and other documents submitted by candidates or tenderers, and all documents relating to the procurement process such as minutes and decisions of the tender commission.

## **2.1.2 Rules on Participation**

Threshold values, estimated cost, rules on qualification, ineligibility, technical specifications, procurement announcement rules and time limits, joint ventures, sub-contractors are some topics that are reviewed for the comparison of two procurement law under Rules on Participation part.

### **2.1.2.1 Threshold values**

Threshold value is a new concept introduced by the new procurement law 4734. In 2886, this concept was not mentioned at all directly, instead, the amount determined by the Law of General Budget was used. Generally, threshold value is the monetary limits established in 4734 in order to be used in the implementation of provisions relating to advertisements and to providing price advantages in favor of domestic tenderers.

According to 4734, by taking into consideration the estimated cost, the threshold values that shall be applicable are as follows:

- a) 398 billion 685 million Turkish Liras for procurement of goods and services by the contracting entities operating under the general or the annexed budget,
- b) 664 billion 475 million Turkish Liras for procurement of goods and services by the other contracting entities within the scope of the Law,
- c) 14 trillion 618 billion 461 million Turkish liras for the works contracts by any of contacting entities covered by the Law.

Threshold values are updated by the Public Procurement Authority in view of the Index of Wholesale Prices of the previous year and are published in the Official Gazette on February which will be effective as of February 1 of each year. Moreover, the threshold values and monetary limits indicated in this Law may further be updated upon the proposal of the Authority with the decision of the Council of Ministers in cases of emergency.

### **2.1.2.2 Estimated cost**

Both 4734 and 2886 have the same content for the estimated cost subject. They both foresee that prior to the procurement proceedings of goods, services or works,

the contracting entity shall conduct all necessary price surveys and shall determine an estimated cost excluding the value added tax (VAT) in consideration of the nature of the work, by means of adding 25% for profit and general expenses. The approximate cost must be determined in a realistic manner through detailed quantity and price research. The contracting entity may demand help from municipalities, the chamber of trade and industry, professional competent advisors. These shall be mentioned in an account statement.

Especially, the approximate cost pertaining to the construction work must be determined by the Contracting Entities by making use of one or several of the following items together, and conducting other required price research;

- a) Approximate costs, current prices, and unit prices of construction conforming to the nature of the work as determined by public administrations,
- b) Prices determined by related professional chambers, universities, or similar organizations,
- c) Cost values to be obtained from experienced entities and organizations operating as contractors or sub-contractors.

However, provided that it is confirmed by the tender officer that, due to the nature of the work, they cannot be prepared by the Contracting Entities, consulting services may be provided through procurement for the preparation of the technical specifications in accordance with the provisions of the Public Procurement Law no. 4734.

Finally, the only but the most important difference is that in 4734, unlike 2886, the estimated cost are not written down in the tender and pre-qualification documents, and it is not released to tenderers and person that are not related to the tender process officially.

### **2.1.2.3 Rules on qualification**

In 2886, it is stated that for qualification, tenderers are required to have a real address and to submit the determined security. In addition to this, some documents and information such as document proving that the tenderer is registered to the related chamber, for joint ventures, related documents, declaration of signature etc.

for the assessment of technical and financial qualifications shall be demanded from the tenderers. But, for the detailed information, specifications were referred.

On the other hand, in 4734, these relevant documents for the evaluation of economic, financial, professional and technical qualifications are mentioned with sufficient detail. Some of them are as follows:

a) For evaluation of the economic and financial standing;

1) Bank statements relating to the financial standing of the tenderer, showing an unused cash credit or unused letter of security belonging to the tenderer at the banks with a ratio range to be established by the Contracting Entity according to the nature of the work, provided that it is not less than 10% of the price to be proposed by the tenderer.

2) The whole or required sections of the balance-sheet or equivalent documents of the tenderer, belonging to the last year preceding the year of tender.

3) A statement of the tenderer's overall turnover, belonging to the last three years preceding the year of tender and indicating his work volume, or documents indicating the volume of the work relating to the subject matter of the procurement proceedings.

b) For the evaluation of professional and technical qualifications;

1) Documents proving that the tenderer is registered to the related chamber in accordance with the relevant legislation, and is legally eligible to submit tenders.

2) Documents (work experience certificates) demonstrating the experience of the tenderer in relation to the subject of the procurement in the public or private sector, within the last five years in case of procurement of goods and services, and within the last fifteen years in case of procurement of works in the amount equaling to 70% of the contract value realized and %50 of the contract value monitored or managed, accepted as free from fault by the contracting entity proving its experience on similar works. For joint venture tenderers in construction works' tenders, the lead partner must meet the whole of the

minimum work experience amount, and the other partners must each meet at least 10% of this amount.

3) Documents relating to the production and/or manufacturing capacity, research-development activities and quality assurance practices of the tenderer.

4) Information and/or documents relating to the organizational structure of the tenderer, proving that he employs or will employ adequate number of staff in order to fulfill the subject matter of the procurement.

5) In cases of procurement of services or works, the documents demonstrating the educational and professional qualities of the executives and the technical staff of the tenderer.

6) Documents relating to plants, machinery, devices and other equipment those are required for the fulfillment of the work that is the subject of the procurement proceedings.

7) Documents relating to the technical staff or technical institutions responsible for quality control, whether they are directly attached to the tenderer or not.

8) Certificates granted by internationally recognized quality control institutions accredited in accordance with the rules, certifying the conformity of the work in question with the relevant specifications and standards.

9) In case requested by the contracting entity, samples, catalogues and/or photographs of the goods to be supplied for the confirmation of their accuracy.

Among the documents demonstrating the experience of tenderers, the ones for construction or construction related service duties, the real person should be either an architect or an engineer among the staff who are employed to carry out auditing or management duties. The documents, which will be obtained through completion of work, management and auditing, can not be used by persons apart from the individuals and institutions who are the owners of the documents and can not be transferred, rented and sold. In order to participate in a tender, legal entities, which are established or participated in by the owners of this document, should have more than half of the shares of the legal entity. It is obligatory to request this share requirement in every tender and to maintain the share during the guarantee period.

According to 4734, any tenderer shall be excluded from the procurement proceedings who;

- a) is bankrupt or is being wound-up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities,
- b) is the subject of proceedings for a declaration of bankruptcy, for an order of compulsory winding up, or administration of court due to his debts,
- c) has not carried out obligations concerned with payment of finalized social security contributions,
- d) has not carried out obligations concerned with the payment of finalized taxes,
- e) has been convicted of an offence concerning his professional conduct by a judgment of a competent court within the five years preceding the date of the procurement proceedings,
- f) are established by appropriate means of proof by the contracting entity that the tenderer has been involved in misconducts that are against the work ethics or professional ethics during a work he carried out for the contracting entity, within the five years preceding the date of the tender,
- g) has been banned from professional activity by the chamber,
- h) fails to submit the information and documents specified or it is established that he/she has submitted misleading information and/or false documents,
- i) participates in procurement proceedings even though prohibited,
- j) are established to be involved in prohibited acts and conducts.

#### **2.1.2.4 Ineligibility**

Although both laws almost have the same provisions about this subject, some minor changes and additions can be seen in 4734. In either law, the following persons or entities cannot participate in any procurement, directly or indirectly or as a sub-contractor, either on their own account or on behalf of others:

- a) those who are temporarily or permanently prohibited from participating in public procurements in accordance with this Law and the provisions of other laws and

convicted due to crimes and organized crimes mentioned in Anti-Terror Law No: 3713,

b) the contracting officers of the contracting entity carrying out the procurement proceedings, and the persons assigned in boards having the same authority,

c) Those who are assigned to prepare, execute, complete and approve all procurement proceedings relating to the subject matter of the procurement held by the contracting entity,

d) The spouses, relatives up to third degree and marital relatives up to second degree, and foster children and adopters of those specified under paragraph (b) and (c),

e) The partners and companies of those specified under paragraph (b), (c) and (d) (except for joint stock companies where they are not a member of the board of directors or do not hold more than 10 % of the capital).

Moreover, in 4734, the contractors, convicted of fraudulent bankruptcy by the relevant authorities, providing consultancy services for the subject matter of the procurement also cannot participate in the procurement of such work. Similarly, the contractors of the subject matter of the procurement cannot participate in procurements held for the consultancy services of such work. These prohibitions are also applicable for their companies with which they have a partnership and management relation for joint stock companies where they own more than half of the capital, and for the companies where more than half of the capital is owned by above-mentioned companies.

Finally, the foundations, associations, unions and other entities included within the body of the contracting entity carrying out the procurement, or related with the contracting entity and the partners of mentioned entities, cannot participate in the procurement held by these contracting entities.

#### **2.1.2.5 Technical specifications**

According to both 4734 and 2886, the administrative and technical specifications specifying all characteristics of the goods, services and works that constitute the subject matter of the procurement shall be prepared by the contracting entities.

However, if the preparation of the specifications due to the characteristics of the goods, services or works is not possible, the technical specifications may be outsourced by the approval of the contracting officer.

The technical criteria for the goods, services and works to be procured shall be specified in the technical specifications, which constitute an integral part of the tender documents. The specified technical criteria shall aim efficiency and functionality, shall not consist of elements impeding competition and shall ensure non-discrimination.

Technical specifications may, where possible, include arrangements to ensure conformity with national and/or international technical standards. No specific brand, model, patent, origin, source or product can be specified. However, in case where no national and/or international standards exist or where it is not possible to establish technical characteristics; brand or model can be specified provided that “or equivalent” phrase is stated.

#### **2.1.2.6 Procurement announcement rules and time limits**

In spite of the fact that, when examined, both laws aim to give all tenderers sufficient time to prepare their tenders properly, it can be seen that the provisions of 4734 about procurement announcement and time limits, are much more favorable than the ones in 2886 from tenderers’ point of view.

According to the provisions of 2886, there were five ways of advertising procurement notices for different circumstances. The first one is the advertisement of notice in the locality where procurement is to be held in case there are local newspapers. The notice shall be at least advertised twice in this case. The first advertisement shall be published at least ten days prior to deadline of submission of tenders. Moreover, the second advertisement shall be published at least five days prior to deadline of submission of tenders. Where there is no gazette publication, the notices shall be advertised on the notice boards of the related contracting entities, government and municipality buildings, which shall be certified with a minute.

The second one is the advertisement of notices at cities, in cases the estimated cost of procurement exceeds the amount determined by the General Budget Law

every year. In this case, advertisements shall be published in the newspapers at least ten days prior to the deadline for submission of tenders.

The third one is the advertisement of notices in the Official Gazette, in case the estimated cost of the procurement is three times more than the amount determined by the General Budget Law. It is again compulsory to publish the notices at least ten days prior to the submission of tenders.

In cases, where the subject matter of procurement is very important and the amount is considerable and moreover, it requires professional handling, contracting entities may advertise the procurement notices abroad.

Finally, for the negotiated procurement procedure, contracting entity has the freedom to decide whether they are going to advertise notices or not.

On the other hand, in 4734, procurement announcement time limits are arranged according to the threshold values and subject matter of procurement like goods, services and construction works. They are as follows,

a) Procurement with estimated costs equal to or exceeding the threshold values, shall be advertised by publishing in the Public Procurement Bulletin, at least once, provided that;

- 1) Notices of procurements conducted by open procedure shall be published not less than forty days prior to deadline for the submission of tenders,
- 2) Pre-qualification notices of procurements conducted by restricted procedure shall be published not less than fourteen days in advance of the deadline for the application to prequalification,
- 3) Notices inviting candidates in a negotiated procedure shall be published not less than twenty-five days prior to the deadline for the submission of tenders.

In procurements conducted by restricted procedure, it is compulsory to provide letter of invitation to tender to the tenderers that are qualified as a result of the pre-qualification proceedings, not less than forty days in advance of the deadline for the submission of tenders.

TABLE 1: Procurement Announcement Time Limits Above Threshold Values

Procurement Procedure	Open Procedure		Restricted Procedure				Negotiated Procedure	
			For Prequalification		For Tender			
Announcement Place	In Turkey	Abroad	In Turkey	Abroad	In Turkey	Abroad	In Turkey	Abroad
Time Limits (in days)	40	52	15	27	40	52	25	37

b) For the procurements with estimated costs below the threshold values,

1) The notices of procurements conducted for the procurement of goods or services with an estimated cost of up to 43.499.000.000 Turkish Liras and for the procurement of works with an estimated cost of up to 86.999.000.000 Turkish Liras shall be published in at least two local newspapers where the procurement is to be held, at least seven days in advance of the deadline for the submission of tenders.

2) The notices of procurements conducted for the procurement of goods or services with an estimated cost between 43.499.000.000 Turkish Liras and 86.999.000.000 Turkish Liras and for the procurement of works with an estimated cost between 86.999.000.000 Turkish Liras and 725.000.000.000 Turkish Liras shall be published in the Public Procurement Bulletin, at least once and in a local newspaper, and not less than fourteen days in advance of the deadline for the submission of tenders.

3) The notices of procurements conducted for the procurement of goods or services with an estimated cost above 86.999.000.000 Turkish Liras and below the threshold value, and for the procurement of works with an estimated cost above 725.000.000.000 Turkish Liras and below the threshold value shall be published in the Public Procurement Bulletin, at least once and in a local newspaper, and not less than “twenty-one days” days in advance of the deadline for the submission of tenders.

TABLE 2: Procurement Announcement Time Limits Below Threshold Values

Monetary Interval	For Goods and Service Procurement	For Works Procurement	For Prequalification of Restricted Procedure
Up to 43.499.000.000 TL	7 days	-	7 days
Up to 86.999.000.000 TL	-	7 days	7 days
43.499.000.000 TL – 86.999.000.000 TL	14 days	-	7 days
86.999.000.000 TL – 725.000.000.000 TL	-	14 days	7 days
86.999.000.000 TL – threshold value	21 days	-	7 days
725.000.000.000 TL – threshold value	-	21 days	7 days

For the procurements conducted by restricted procedure with estimated costs below the threshold values, the notices of pre-qualification proceedings shall be announced not less than seven days prior to the deadline for submission of pre-qualification documents.

Like the provisions in 2886, in case there are no local newspapers in the locality where the procurement is to be held, the notices shall be advertised on the notice boards of the related contracting entity, government and municipality buildings and announced by using municipal facilities, within the same time limits.

Apart from the above-mentioned compulsory announcement of notices, the contracting entities may also advertise the procurement notices by means of other newspapers or publications having national and international circulation, data processing networks or electronic media (internet), depending on the significance and characteristics of the procurement. However, where international announcement of notices is required, the above minimum time limits shall be increased by 12 days.

### **2.1.2.7 Joint ventures**

There are no direct provisions in 2886 for the concept of joint ventures and consortiums. However, in 4734, joint ventures can be established by more than one natural or legal persons in two ways as work partnership and consortium. While the members of work partnership form partnership to carry out work as a whole, the members of consortiums form partnership, by separating their rights and responsibilities, to carry out the parts of the work related to their own profession. Work partnership can bid for all tenders. However, in cases where different expertise is needed, the contracting entities shall indicate in tender documents whether the consortium are allowed or not to submit tenders. At the tender stage, the joint venture shall be asked to submit an agreement indicating the mutual agreement of the parties to form a work partnership or consortium. The pilot partner for the work partnership agreements, the coordinator for the consortium agreements shall be stated. In case the contract is awarded to the joint venture, a notary-certified work partnership or consortium contract shall be submitted prior to signing of the contract. In both partnership agreement and partnership contract, it has to be stated that the natural or legal persons setting the work partnership are jointly and severally liable in the fulfillment of the commitment. On the other hand, in consortium agreements and contracts, it has to be stated that the natural or legal persons setting the consortium undertake which part of the work and cooperate with the coordinator during this period.

### **2.1.2.8 Subcontractors**

Another concept, which is not directly mentioned in 2886, is the subcontractors. According to 4734, where it deemed necessary because of the characteristics of the subject matter of the procurement, during the tender proceedings, the tenderers may be asked to specify the portions of the contract that they plan to assign to sub-contractors, and submit the list of the sub contractors for the approval of the contracting entity prior to the signing of the contract. However, in such a case, the liabilities of the sub-contractors with regard to the portion of the contract assigned to them shall not release the contractor from its own liabilities.

### **2.1.2.9 Cancellation of procurement prior to the deadline of the receipt of tenders**

According to both laws, the procurement proceedings may be cancelled at any time prior to the deadline for the submission of tenders, in cases where considered necessary by the contracting entity or where it is established that the documents included in tender documents contain items preventing the performance of the tender, which are impossible to correct.

In such a case, the tenderers shall be promptly notified of the cancellation, together with the reasons thereof and all submitted tenders shall be deemed rejected, and shall be returned unopened to the tenderers. The tenderers cannot make any claims against the contracting entity because of the cancellation of the tender proceedings.

### **2.1.2.10 Prohibited acts and conducts**

Very similar statements exist in both laws regarding the subject of prohibited acts and conducts. Consequently, both 2886 and 4734 prohibit tenderers from

- a) conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, corruption, bribery or other actions,
- b) causing confusion among tenderers, to prevent participation, offering agreement to tenderers or encouraging tenderers to accept such offers, conducting actions which may influence competition or tender decision,
- c) forging documents or securities, using forged documents or securities or attempting these.

In addition to those mentioned above, 4734 also prohibits the submission of more than one tender by a tenderer on his own account or on behalf of others where the submission of alternative tenders are not accepted. Furthermore, participation of persons or firms, which are within the coverage of the subject of ineligibility, are also banned.

## **2.2 Procurement Process**

### **2.2.1 Procurement Procedures and Application**

Under this topic, the applicable procurement procedures, which are open procedure, restricted procedure, negotiated procedure, direct procurement and design contest procedure are scrutinized. The procedures, which were in the scope of 2886, but not covered by 4734, will not be mentioned in detail.

#### **2.2.1.1 Applicable procurement procedures**

According to 4734, there are three main procedures applied for procurement proceedings. They are open procedure, restricted procedure and negotiated procedure. In addition to this, in some special condition, other methods such as design contest procedure and direct procurement, may be applied for this purpose. However, 4734 repealed the procedure (named as open tender method) which were conducted according to 2886 in such a way that the bidding process was executed orally among the tender commission and tenderers.

#### **2.2.1.2 Open procedure**

Open procedure which resembles to the closed procedure covered by 2886 generally, is a procedure where all tenderes can submit their tenders.

#### **2.2.1.3 Restricted procedure**

According to 4734, restricted procedure is a procedure in which tenderers who are invited following pre-qualification by the contracting entity, can submit their tenders. It is conducted in cases where open procedure is not applicable due to the complexity of the nature of the subject or the requirement for high technology.

According to this procedure, unlike the one in 2886, publication of pre-qualification notice is mandatory and the pre-qualification notice shall be published not less than fourteen days in advance. After the pre-qualification assessment process according to the criteria, stated in related documents before, a letter of invitation to

tender shall be sent to pre-qualified tenderers, provided that the tenderers are given at least forty days to prepare their tenders.

Unlike 2886, in case the number of tenderers that can be invited to submit tenders is less than five or the number of tenderers that submit tenders is less than three, the procurement shall be cancelled.

#### **2.2.1.4 Negotiated procedure**

According to 2886, negotiated procedures was not conducted in a common way. Contracting entities were given the freedom to decide how the procurement was held.

On the other hand, the situations where this procurement procedures can be applied are almost the same for both laws. For example, negotiated procedure may be applied in cases where no tender is submitted at the end of open or restricted procedure, where it is compulsory to conduct the tender procedures immediately, due to unexpected and unforeseen events such as the force majeure events or due to occurrence of specific events relating to defense and security.

In addition to these circumstances mentioned above, it may further be applied according to 4734 in cases where

- the procurement is of a character requiring a research and development processes, and not subject to mass production,
- due to specific and complex characteristics of the works, goods or services to be procured, it is impossible to define objectively the technical and financial aspects,
- The procurement of goods and services amounting up to the value of 72.499.000.000 Turkish Liras.

As regards advertisement of notices, 2886 did not have provisions requiring the advertisement of notices. On the contrary, according to the provisions of 4734, except for the emergent situations due to unforeseen force majeure events and due to defense and security requirements, and the procurement of goods and services amounting up to the value of 72.499.000.000 Turkish Liras, the advertisement of notices is a must for tender proceedings. Nevertheless, in cases where advertisement is not mandatory, at least three tenderers must be invited to the tender.

As regards realization of procurements conducted by negotiated procedure due to the cases where no tender is submitted in open or restricted procedures, where the procurement is of a character requiring a research and development process, and where it is impossible to define the technical and financial aspects clearly due to specific and complex characteristics of the works, goods or services, according to 4734, first, the tenderers shall submit their initial proposals, which do not include prices, for aspects such as technical details and realization methods of the contract that is the subject of the tender. The tender commission shall consult to and negotiate with each tenderer on the best methods and solutions for the procurement of the needs of the contracting entity. After the clarification of the conditions as a result of the technical consultations, the tenderers that have demonstrated their capacity and capability to meet all these conditions shall be asked to submit their final offers including the tender price based on a revised and agreed technical specification.

In some cases where no tender is submitted at the end of open or restricted procedure, where it is compulsory to conduct the tender immediately due to unexpected and unforeseen events such as force majeure events and due to occurrence of specific events relating to defense and security, procurement proceedings shall be concluded after a price negotiation based on the final offers.

#### **2.2.1.5 Direct procurement**

In some cases, procurement may be held by the contracting entity without publishing procurement notice and requiring tender security. The followings are some examples of this kind of applications.

This method may be applied

- a) if it is established that the needs can be supplied by only one natural or legal person,
- b) in case only one single natural or legal person has exclusive rights with regard to the need in question,
- c) for procurements not exceeding 21.749.000.000 Turkish Liras for needs of contracting entities within the boundaries of metropolitan municipalities and for procurements not exceeding 7.249.000.000 Turkish Liras for needs of other

contracting entities, and purchases with regard to accommodation, trip and victualing within the scope of representation expenses,

d) for purchase or lease of immovable property in accordance with the need of the contracting entity,

e) for procurements of medicines, medical consuming materials, test and control consuming materials which are to be used in urgent cases and are impossible to be stocked for their natures.

Finally, the needs shall be supplied through price research in the market by individuals assigned by the contracting officer without establishing a tender commission and obtaining guarantee.

#### **2.2.1.6 Design contests**

In both law the same provisions exist for the procurement of requirements by means of design contest applications, which may be conducted to acquire the required plans and projects relating to architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts. The contracting entities may conduct contests, with or without prize, in which the winner is selected via assessment of a jury. As for all procedures, advertisement of such contests shall be published in a way to ensure a competitive environment.

#### **2.2.2 Advertisement of procurement and pre-qualification, Issuance of Tender Documents**

Mainly, contents of procurement advertisement, pre-qualification advertisement, tender documents and administrative specifications are going to be studied, and the differences between the provisions of 2886 and 4734 are going to be stated in a comparative manner.

##### **2.2.2.1 Contents of procurement advertisements**

Generally, both laws state that advertisements shall not include anything that is not specified in tender documents and they both specify such similar information that

should be included in advertisements except for that 4734 forbids the reveal of the estimated cost prior to tender. Some of them are,

- a) The name, address, telephone and fax number of the contracting entity,
- b) the procurement procedure to be applied, rules of participation and the required documents and certificates,
- c) Where the tender documents can be seen, and the price to obtain tender documents,
- d) The place, date and hour of the tender, and procurement procedure to be applied,
- e) The address where the tenders are to be submitted until the hour specified for opening the tenders,

In addition to those mentioned above, the followings are also covered by 4734. They are,

- a) in case of procurement of goods, the place of delivery, and in case of services and works, the place where such task is to be realized,
- b) the commencement and completion dates for the subject of the procurement
- c) the criteria to be used in the qualification assessment,
- d) indication of whether the tender is limited only to domestic tenderers, and whether there is a price advantage for domestic tenderers,
- e) the type of tender and contract,
- f) the amount of tender security determined by the tenderer provided that it is at least 3 % of the tender price,
- g) the validity period of the tenders,
- h) whether or not the consortiums are able to bid for tender.

#### **2.2.2.2 Contents of pre-qualification notices/advertisement**

Unlike 2886, pre-qualification process for restricted procedure is defined sufficiently and the contents of pre-qualification advertisement are determined in 4734. Accordingly, the following information is mandatory in pre-qualification notices:

- a) the name, address, telephone and fax number of the contracting entity,

- b) the name, characteristics, type and quantity of the procurement,
- c) in case of procurement of goods, the place of delivery, and in case of services and works, the place where such task is to be realized,
- d) the commencement and completion dates for the procurement,
- e) rules of participation to pre-qualify and the required documents,
- f) the criteria to be used in pre-qualification assessments,
- g) indication of whether the procurement is limited only to domestic tenderers, and whether there is a price advantage for domestic tenderers,
- h) where the pre-qualification documents can be seen, and the price to obtain pre-qualification documents,
- i) the place, date and hour for the submission of the application to pre-qualify,
- j) whether or not the consortiums are able to bid for tender.

#### **2.2.2.3 Correction of procurement notices**

According to both 2886 and 4734, procurement notices that are not in compliance with the provisions shall not be valid. In such cases, procurement proceedings can not be carried out unless they are renewed to ensure conformity.

However, according to 4734, in case of errors other than time limits ,tender proceedings may be conducted provided that a correction notice is advertised in order to correct erroneous matters within ten days following the advertisement of tender or pre-qualification notices.

#### **2.2.2.4 Contents of the tender documents and administrative specifications**

According to 4734, the tender documents shall include the administrative specifications that also incorporate the instructions to tenderers, the technical specifications that also cover the design of the work, the draft contract and other required documents and information.

As regards administrative specification, both laws mostly contain the same information in specifications. Some of them are,

- a) the name, characteristics, type and quantity of the work, and in case of services the work description,
- b) the name, address, telephone and fax number of the contracting entity,
- c) the procurement procedure, date and hour of the tender and place of tender submission,
- d) instructions to tenderers,
- e) rules of participation for tenderers, the required documents and qualification criteria,
- f) the validity period of the tenders,
- g) an indication of whether the procurement is limited to domestic tenderers and whether there is a price advantage for domestic tenderers,
- h) type of tender and contract,
- i) the amount and terms of tender security and performance bond,
- j) conditions relating to supervision, inspection and acceptance,
- k) procedure for settlement of disputes.

Apart from the ones mentioned, 4734 requires the inclusion of the followings in administrative specifications

- a) methods for request for clarification of the tender documents and the realization of such request,
- b) an indication of whether it is possible to submit tenders for the whole or a portion of the subject matter of the procurement, whether an alternative tender can be proposed in procurement of goods,
- c) information on whether the transportation fees, insurance costs, taxes, duties or charges are to be included in the tender price,
- d) the procedures and principles set forth in this Law and which shall be applied during the receipt, opening and evaluation of the tenders,
- e) the procedures and principles set forth in this Law, which are required to be applied beginning with the decision of procurement and until the signing of the contract,

- f) an indication that the contracting entity is free to cancel the tender proceedings before the date of tender,
- g) an indication that the contracting entity is free to reject all the tenders and cancel the procurement proceedings,
- h) the commencement and completion dates for the subject matter of the contract, the place it will be carried out, the terms of delivery and the penalties to be paid in case of delays,
- i) the place and terms of payment; whether an advance payment will be made or not, if so, the amount and terms of such payment; for work that constitute the subject matter of the contract the terms of payment for price adjustments, if payable,
- j) circumstances and conditions for time extension,
- k) who will pay the taxes, duties, charges and other expenses relating to the contract,
- l) terms relating to insurance of the work and the workplace, together with the liability and supervision of construction.

As regards providing of tender and pre-qualification documents, the tender and pre-qualification documents can be seen at the place of contracting entity, free of charge. However, it is compulsory to buy this document for tenderers willing to participate in the pre-qualification or tender proceedings. The price of the document shall be determined by the contracting entities by considering that the price is not exceeding its publication costs and not impeding competition.

#### **2.2.2.5 Clarifications or amendments to the tender documents**

Both 4734 and 2886 contain similar provisions for the subject of clarifications or amendments to the tender documents. Accordingly, in principle, no amendments should be made in the tender documents after the advertisement of the procurement notices. If an amendment deemed necessary, the necessities and reasons thereof shall be certified with a minute, and the previous notices shall be deemed invalid, and the procurement notice shall be advertised again, on the same principles.

Procurement notice need not be advertised again if the addendum relating to such amendments, and constituting a binding part of the tender documents shall be provided to all tenderers that were given the tender documents, in a way to ensure

that the tenderers are informed ten days prior to the deadline for submission of tenders. In case an extension of the time period is required in order to prepare the offers due to the amendments made with the addendum, the date of tendering may be postponed for maximum twenty days, but for once only. In case of an addendum, the tenderers who have already submitted their tenders prior to such arrangement shall be allowed to withdraw their tenders and submit new tender.

### **2.2.3 Submission of Tenders and Applications**

Under this topic, preparation and submission of tenders and applications, period of validity of tenders, tender security, values accepted as tender security and letter of guarantee issues are going to be examined by explaining similar and different applications of aforementioned procurement laws.

There are similarities as regards preparation and submission of tenders. Both laws state that all documents and certificates required under the rules of participation to the tender including the bids, which shall be submitted both in writing and numeral, and the tender security shall be placed in an envelope. The name, surname or commercial title and notification address of the tenderer, the subject of the procurement and the full notification address of the contracting entity carrying out the procurement proceedings shall be written on the envelope. The seal of the envelope shall be signed and stamped by the tenderer.

The same process shall be proceeded for the cases where the tenderers may give alternative bids for the procurement of goods, which is a new application introduced by 4734.

The tenders are submitted to the contracting entity no later than the date and hour specified in the tender documents, in return of a receipt indicating the queue number. The tenders submitted after the hour specified as deadline shall not be accepted and shall be returned unopened.

The submitted tenders cannot be withdrawn or changed for any reason whatsoever, except in case of an addendum.

As regards, the period of validity for tenders, unlike 2886, 4734 contains such provisions that these periods specified in the tender documents. In case contracting

entity requires, this period may be extended maximum as long as the validity period of the tender specified in the tender document with the consent of the tenderer, provided that no amendments are made in the conditions of tender and contract.

Another subject that should be mentioned, is the tender security, which is set at least 3% of the offered price and estimated price respectively by 4734 and 2886. As for consultancy services procurements in 4734, if it is not mentioned in tender documents, tender security may not be taken.

Similar provisions exist in 2886 and 4734 regarding the subject of the accepted values as tender security. According to them, the current Turkish Lira, letters of guarantee from banks and Borrowing Bills issued by the Under secretariat of Treasury are accepted as tender security. In addition to them, the letters of guarantee that may be arranged by foreign banks permitted to operate in Turkey and private financing institutions shall be accepted as tender securities according to 4734.

Securities other than letters of guarantee cannot be received by tender commissions. Such securities must be deposited to accounting offices or departments. Securities may be exchanged with other values accepted as tender security. Under any circumstances, the tender securities received by the contracting entity can not be attached or held subject to precautionary measures.

Furthermore, according to 4734, the letters of guarantee belonging to successful tenderer who is awarded the contract and to the tenderer submitting the second best offer shall be submitted to accounting offices or departments following the procurement proceedings, which is a new application, not seen in related provisions of 2886. The tender securities of other participants who are not awarded the contract shall be promptly returned. In case a contract is signed with the successful tenderer, the guarantee belonging to the tenderer with the second best offer shall be returned immediately after the signing of the contract.

The last sub-topic, which is the letters of guarantee, was accepted, if they are given for an indefinite period of time only by the banks pre-determined by the Ministry of Finance according to 2886. On the other hand, as for 4734, it is enough for tenderers to state the period in preliminary letters of guarantee and it should be at least 30 days more than the validity periods set for tenders . In case of extension of

the validity period of the tender, the period of preliminary letters of guarantee shall be extended accordingly.

#### **2.2.4 Evaluation of the Tenders**

Under this topic, in order for comparison of 2886 and 4734, the following sub-topics will be scrutinized. They are receipt and opening of tenders, evaluation of tenders, cancellation of tender proceedings, conclusion and approval of tender proceedings, notification of finalized tender decision, invitation to sign the contract, and the obligations and liabilities of both tenderer and contracting entity. Moreover, it will be examined what is to be done in cases where abnormally low tenders exist and the concept of performance bond. Finally, the provisions of notification of the result of tenders are studied.

To start with the receipt and opening of tenders, according to both 4734 and 2886, the tenders shall be submitted to the contracting entity until the hour of tender stated in the tender documents. Envelopes that are not in compliance with the requirements set forth before in the tender documents, shall be recorded in the minutes and shall not be included in the evaluation stage. The envelopes shall be opened in front of the tenderers who are present, in the order of submission.

Tenderers with incomplete documents or improper tenders (bid form) and tender securities shall be recorded in the minutes. The tenderers and their tender prices shall be announced. At this stage, no decision shall be made with regard to rejection or acceptance of any of the tenders, the document consisting of the bid shall not be corrected or completed.

During the evaluation stage, as for 4734, the tender commission may ask the tenderers for clarification of their tenders in writing on the unclear aspects of the tender, in order to use in the examination, evaluation and comparison of tenders. However, no change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

In evaluating the tenders, first of all, the tenders of the tenderers, whose documents are established to be incomplete or whose tenders or tender securities are

established to be not in compliance with the requirements as a result of the first session shall be excluded from the evaluation stage. However, in case of omission of documents or omission of unimportant information in the documents provided that absence of which do not alter the substance of the tender; the contracting entity shall request the tenderer in writing to furnish these missing document or information in a given time period. Following this pre-evaluation, the tenders shall be examined for their conformity with the qualification criteria determining the capacity of the tenderers to perform the contract, which is the subject of the tender proceeding, as well as with the conditions set forth in the tender documents. The tenderers that are found in unconformity shall be disqualified.

At the final stage, the price charts annexed to the tender shall be checked for any arithmetic errors. In case of any arithmetic errors in the multiplications or additions in the annexed chart of the tender, these arithmetic errors shall be corrected by the tender commission ex officio, on the basis of the unit prices offered by the tenderers. The corrected tender price shall be accepted as the actual offer of the tenderer and the tenderer shall be promptly notified in writing of such an event. The tenderer shall notify in writing whether he accepts or rejects the corrected tender within five days after the written notification to him. In case the tenderer does not accept the corrected tender or fails to respond within this period, the tender in question shall be disqualified and the tender security shall be registered as revenue.

In the evaluation stage, there is not a provision stating what to do in cases where abnormally low tenders are taken from tenderers in 2886, whereas according to 4734, there are provisions stating that the tender commission determine those that are abnormally low compared to the other tenders or the estimated cost determined by the contracting entity. Before rejecting these tenders, the commission shall request from the tenderers, the details relating to components of the tender such as the economic nature of the manufacturing process, the service provided and the method of works, the selected technical solutions and / or the advantageous conditions to be utilized by the tenderer in supply of the goods and services or fulfillment of the works and lastly, the originality of the goods, services or works proposed. The explanatory statements to the questions are required in writing and within a specified

period. As a result of this evaluation, the tenders of the tenderers whose explanatory statements are found insufficient shall be rejected.

Another new provision introduced by 4734 in the evaluation stage is the arrangements regarding domestic tenderers. Accordingly, in tenders held under 4734, the contracting entities can bring provisions to the tender documents regarding the restriction of participation to only domestic tenderers in case the tender is below the threshold values, and in case the tender is above the threshold values, in procurement of service and works, up to 15% price advantage for all domestic tenderers and in procurement of goods, up to 15% price advantage for domestic tenderers who are determined that the products offered by them considered as domestic product by the Authority with the opinion of Ministry of Industry and Trade and other relevant organizations and institutions shall be granted. However, this provision is not applicable for the domestic tenderers who participate in the tender proceedings by forming joint ventures with foreign tenderers.

Both laws have such similar provisions for the rejection of all tenders and cancellation of tender proceedings. In case the tender proceedings are cancelled, this event shall be notified promptly to all the tenderers. The contracting entity shall incur no liability for rejecting all the tenders. However, in case requested by any of the tenderers, the contracting entity shall notify only the tenderers, requesting explanation for cancellation, of the reasons for the cancellation of the tender proceedings.

Following the evaluation stage, according to 2886, the tender whose contract value is less than the estimated cost, determined before by the contracting entity, and which is preferable shall be awarded with contract. This application essentially creates confusion, although it is stated that for the determination of the best tender, some criteria like quality and quantity of procurement, unit price and technical and financial standing of the tenderer shall be considered.

On the other hand, according to 4734, the tenderer with the economically most advantageous tender shall be awarded with the contract. In cases where it is not possible to determine the economically most advantageous tender on the basis of the lowest price only, the economically most advantageous tender shall be determined by

taking into account the factors other than price such as operation and maintenance costs, cost-effectiveness, productivity, quality and technical merit, which must be stated in the tender documents and where possible, must be expressed in monetary values. Relative weights shall be determined in tender documents for the factors, which cannot be expressed in monetary values.

There is a different application between 4734 and 2886, in tender proceedings where the lowest price offer is evaluated as the economically most advantageous tender, in case there are more than one offers with the same tender prices and these are established to be the economically most advantageous tender. In such cases, according to 4734, the tender proceedings shall be concluded by determining the economically most advantageous tender provided that the factors other than price, mentioned above, are taken into account. On the other hand, as for 2886, in case there are more than one offers with the same tender prices and these are established to be the economically most advantageous tender, if both tenderers are present, the contracting entity requests their second proposals. After that the tenderer with the lowest bid, is awarded to contract. If the second proposals are again the same, the one who is awarded with the contract is selected by drawing of lots.

After the conclusion of tender, the tender commission shall make its justified decision, specifying the grounds thereof, and submit the decision for the approval of the contracting officer. The decisions shall include the names or commercial titles of the tenderers, the offered prices, the tender date and the award of contract. Within maximum five days following the date of the decision, the contracting officer shall approve or cancel the tender decision, indicating the grounds for cancellation.

After that, the tender decisions approved by the contracting officer shall be announced to all tenderers who have submitted an offer, including the successful tenderer, by means of registered mail sent to the notification addresses of all tenderers within maximum three days following the day of approval. The seventh day following the mailing of the letter shall be deemed the notification date of the decision to the tenderers. In the case that the tenderers participating in the tender whose tender has not been evaluated or found non-responsive, make a written request within five days following the notification date; the contracting entity must notify the

tenderer in writing of the reasons for rejection within five days following the date of the request.

Following the notification of finalized tender decision, the stage of invitation to sign the contract commences. Within three days following the time limits specified in the previous paragraph in cases necessitating the visa of Ministry of Finance, in three days following the notification on realization of this visa, an announcement shall be made to the successful tenderer, via registered mail to his notification address, to sign the contract by issuing a performance bond within ten days following the date of notification. The seventh day following the mailing of the letter shall be deemed the notification date of the decision to the tenderer. However, this notification can be made directly to the tenderer at the office of the contracting entity, in return for his signature. For the foreign tenderers, this time is extended by twelve days.

As far as performance bond concerned, the same provisions and values are valid for both laws. Accordingly, in order to ensure that the commitment is carried out in accordance with the provisions of the contract and specifications, a performance bond calculated as 6% of the contract value shall be taken from the successful tenderer prior to the signing of the contract. However, in the case of procurements related to consultancy services, introduced by 4734, provided that it is specified in the tender documents, the performance bond may not be taken before the signing of the contract. In such a case, a deduction of 6% from each progress payment shall be retained as guarantee.

Finally, if the obligation and liabilities of the tenderer and contracting entity in the conclusion of the contract are examined in both laws, it is seen that very similar provisions are applied. For example, according to both 4734 and 2886, the successful tenderer is obliged to sign the contract after submitting the performance bond after which the tender security shall be returned immediately. In case these obligations are not fulfilled, the tender security of the successful tenderer shall be registered as revenue without taking any further legal action. In such cases, there is no further provisions in 2886. On the other hand, a new application is introduced by 4734. Accordingly, the contracting entity sign a contract with the tenderer submitting the

second best offer in accordance with the principles and procedures provided that the contracting officer approves doing so. However, in order to sign a contract with the tenderer offering the second best price, the tenderer in question shall be notified of such event within three days following the termination of the ten-day period specified for the purpose of signing contract and issuing the performance bond. In case the tenderer with the second best offer also rejects signing the contract, the tender security of this tenderer shall be registered as revenue too and the tender proceedings shall be cancelled.

As regards the obligations and liabilities of the contracting entity in the signing of the contract, the contracting entity is obliged to carry out its duties regarding the conclusion of the contract within the period set forth above. In case the contracting entity fails to fulfill this obligation, the tenderer can renounce his commitments within maximum five days following the end of the period, on condition that he makes an announcement through a notary-public approved notification with a period of ten days. In this case, the tender security is returned and the tenderer gains the right to demand the recorded expenses he has incurred in the issuing of the guarantee. Those who have caused the loss shall compensate for it.

To say a few words about the stage of signing of the contract, all tenders that are realized shall be concluded with a contract. The contracts shall be signed by the contracting officer and contractor. In the case the contractor is a joint venture, the contract shall be signed by all the partners of the joint venture. Unless otherwise stated in the tender document, certifying the contract by a notary public is not mandatory, which is a new provision introduced by 4734. And finally, contracts shall not be inconsistent with the specifications set out in the tender documents.

Notification of the result of tender is an other obligation of the contracting entity according to 4734. The tender results of those tenders whose contract value exceeds 1.450.003.000.000 TL for procurement of goods or services and 2.900.007.000.000 TL for works, shall be published in the Public Procurement Bulletin within maximum fifteen days following the date on which the registration of the contract with Court of Accounts is notified to the contracting entity if necessary. In cases where such a notification is not necessary, the date of awarding the contract

shall be taken into account. The contracting entities may also announce the results of the tender according to the significance and characteristics of the work which is the subject of the tender via other newspapers published in the country or abroad, or via broadcasting instruments, data processing networks or through electronic communication (internet). In all cases, tender results shall at least contain the contracting entity who conducted the tender, the date of the tender, the procedure of the tender, the name, characteristics, type, amount and place of the work that is the subject of the tender, the number of tenderers participating in the tender, the name or commercial title of the successful tenderer, the contract value and the commencing and termination dates of the work.

### **2.2.5 Special Rules on Procurement of Consulting Services**

Procurement of consulting services is one of the new concepts introduced by 4734. At least, it is not wrong to say that this concept was not covered by 2886 on its own text. By the way, procurement of consulting services are examined in such a way parallel to the one used so far for the procurement of goods, services and construction works that under this topic, consulting services, pre-qualification and preparation of a short list, invitation to tender, preparation and submission of tenders and finally evaluation and conclusion of tenders are scrutinized generally.

#### **2.2.5.1 Consulting services**

Consulting services in technical, financial, legal or similar fields which are comprehensive and complex in nature and which require special expertise and experience, such as preparation of Environmental Impact Assessment Reports, plan, software, implementation, design, preparation of technical specifications or supervision can be procured from service providers. Subject to the provisions contained in this section, only the restricted procedure shall be applied to tenders regarding consultancy services.

### **2.2.5.2 Pre-qualification and preparation of a short List**

The pre-qualification announcements shall be made within the period and principles specified for the procurement of goods, services and works mentioned before. The pre-qualification notices announced in accordance with the provisions of 4734 shall include information relating to the pre-qualification criteria to be used in the evaluation of the general competency, financial capacity and technical skills of the candidates. These notices shall also include the number or range of candidates that will be invited for inclusion in the short list and for submitting tenders. Minimum three and maximum ten candidates shall be selected among those that qualify in the pre-qualification evaluations carried out.

### **2.2.5.3 Invitation to tender**

A period of minimum forty days shall be given in order for the candidates included in the short list to prepare their technical and financial proposals, and an invitation to tender shall be sent along with the tender documents. In case the number of tenderers, which are eligible to be invited to the tender, is less than three, the invitations shall not be sent and the tender shall be cancelled.

When preparing their tenders, the tenderers can make a request for written explanations until twenty days prior to the final submission date of tenders, on matters, which need explanation in the tender documents. In case an explanation is made by the contracting entity, this explanation shall be sent in writing to all the tenderers on the short list, so that they are informed ten days prior to the final submission date of tenders.

After the invitation is sent, changes can be made in the tender documents where the contracting entity finds or when the tenderers notify in writing material or technical mistakes. An addendum containing the changes, which is a binding part of the tender documents, shall be sent at least ten days prior to the final submission date of the tenders to all the tenderers who are included in the short list, to ensure that they are informed. In case additional time is required to prepare the tenders, due to the changes made with the addendum, the date of the tender can be postponed for a maximum of twenty days, for once only. In circumstances where an addendum is

arranged, tenderers who have submitted their tenders prior to the arrangement shall be given the opportunity to withdraw their tenders and submit new ones.

#### **2.2.5.4 Preparation and submission of tenders**

The letter of tender containing the price offered for the consultancy services and tender security shall constitute the financial offer of the tenderer. These shall be put in an envelope with the statement that it is the financial offer. All other documents required for the technical evaluation shall constitute the technical proposal. This proposal shall be put in a separate envelope marked as technical proposal.

The envelopes containing the financial and technical proposals shall be placed together in a separate envelope or package which bears the name, surname or commercial title and open notification address of the tenderer, the job to which the tender is related to, and the open address of the contracting entity, and submitted.

#### **2.2.5.5 Evaluation and conclusion of tenders**

Envelopes containing the technical proposals shall be opened in the order they were received in the presence of the tenderers who are present, a control shall be made to ensure that all of the required documents are submitted and the result is recorded in the minutes. The envelopes containing the financial proposals shall be recorded in the minutes without being opened, packed all together, sealed, and signed by the tender commission to be held in protection. No decision can be made at this stage as regards the rejection or acceptance of any tender. The submitted tenders cannot be withdrawn or changed for any reason whatsoever, except in case of an addendum.

The tenders submitted for consultancy services shall be evaluated in two stages, namely technical and financial evaluation. The technical proposal shall be evaluated at the first stage and the financial proposal at the second stage; the points shall be given separately for each stage. The overall score shall be calculated taken into account the weighted coefficients determined for the technical and financial points. The weighted coefficients for technical and financial points can differ

depending on the characteristics and the authenticity of the service, provided that the weight of the technical point is higher.

In these tenders, the technical evaluation criteria shall be specified in the tender documents and in the invitation to tender as the experience in fulfilling contracts of similar characteristics and scale, the method proposed for the job, the organizational structure, the educational and professional qualifications of the executives and the technical staff to be assigned for the execution of the job.

In the evaluation of the tenders submitted for consultancy services, tenders, which have missing documents, or which do not comply with the required conditions shall be rejected and disqualified. However, in case of omission of documents or omission of unimportant information in the documents provided that absence of which do not alter the substance of the tender; the contracting entity shall request the tenderer in writing to furnish these missing document or information in a given time period.

The tender commission shall make an evaluation according to the technical evaluation criteria and points specified in the tender documents. Tenders, which receive points below the minimum technical point specified in the tender documents, shall be excluded from the evaluation. As a result, the financial proposals are returned to their owners unopened. Meanwhile, tenderers whose technical proposals exceed the minimum technical points set out in the tender documents shall be notified in writing of the date and hour when the financial proposals will be opened.

On the date and hour notified by the tender commission; first of all, the results of technical evaluation and the technical points shall be announced. The envelopes containing the financial proposals, which have been collectively kept under protection by the tender commission shall be opened. The financial points given to tenderers with eligible financial proposals and tender securities shall be determined.

The technical and financial points belonging to these tenderers shall be multiplied by the weighted coefficients specified in the tender documents and thus the total points shall be determined. The tenderer scoring the highest total point shall be invited to discuss the job description, contractual terms, personnel and financial proposal. However, this meeting shall not cause any significant change in the terms

and conditions set out in the tender documents. In case the parties clarify the contractual terms and come to an agreement after the meeting, the tenderer in question shall be awarded the contract. After that, the decision made by the tender commission shall be submitted to approval of the contracting officer.

In case the tenderer awarded with the contract fails to fulfill his liability to sign the contract, despite of the agreement made in the meeting, the contracting entity shall register the tender security as revenue. In this case, a contract may be signed with the tenderer scoring the second highest points by negotiating in accordance with the principles and procedures set forth in the previous paragraph, and provided that the tender price is approved to be appropriate by the contracting officer. If the second tenderer does not realize the signing obligation, its tender security shall be recorded as revenue by the contracting entity, too.

Finally, the tender proceedings shall be cancelled in case there are less than three candidates or tenderers after the pre-qualification or technical or financial evaluation.

## **2.3 Public Procurement Authority**

Another new concept, introduced by 4734, is the Public Procurement Authority. There was not provisions relating to such an establishment in 2886. The Public Procurement Authority with public legal entity which is administratively and financially autonomous is established in order to carry out the duties assigned with 4734. The Public Procurement Authority is assigned and authorized for the effective execution of this law and for the accurate application of the principles, procedures and transactions specified in 4734.

### **2.3.1 Public Procurement Authority**

The Authority shall be independent in its actions relating to the fulfillment of its duties. Therefore, no organ, office, entity or person can issue orders or instructions for the purpose of influencing the decisions of the Authority.

The Authority, whose center is in Beşevler, Ankara, is related to the Ministry of Finance. There are mainly three units comprising, they are the Public Procurement Board, Presidency, and the service units.

As regards its duties with respect to the tender procedures carried out in accordance with 4734, some of the major ones are,

- a) to evaluate and conclude any complaints within the period from the commencement of the tender proceedings until the signing of the contract,
- b) to prepare, develop and guide the implementation of all the legislation concerning 4734 and Public Procurement Contracts Law (4735) and the standard tender documents,
- c) to provide training on procurement legislation, to provide national and international coordination,
- d) to gather information, to compile and publish statistics relating to quantity, price and other issues,
- e) to keep the records of those who are banned from participating in tenders,
- f) to carry out research and development activities,
- g) to publish Public Procurement Bulletin in printed or electronic media.

The Authority may, if deems necessary, review and bring to conclusion any claims of violation of 4734 and the related legislative provisions.

The Authority may request documents, information and comments from all private and official institutions, establishments or persons, when fulfilling its duties. The requested documents, information or comments must be provided within the given time limits.

The decision organ of the Authority shall be the Public Procurement Board, consisting of ten members including one chairperson, and one secondary chairperson. The members of the Board shall be appointed by the Council of Ministers as follows: 2 candidates proposed by the Ministry of Finance, 3 candidates proposed by the Ministry of Public Works and Settlement, and one each candidate proposed by the Presidency of Court of Accounts , Council of State and the Ministry in charge of Under secretariat of Treasury, and one each candidate proposed among professional groups relating to public procurements by Turkish

Union of Chambers and Stock Markets (TOBB) and Turkish Employers Union Confederation (TISK). The Council of Ministers shall appoint one of the members as the Chairperson. The Chairperson of the Board shall also be the President of the Authority. One of the members shall be selected by the Board as the Secondary Chairperson. The members of the Board shall be very qualified in their fields of occupation.

According to the provisions concerning The Public Procurement Authority, the duty period of the Committee members is five years. A member can not be elected more than once. Committee members can not be discharged before the duty period is over in cases other than their incapability due to the physical disabilities or illness. In case of sentenced with misconduct or defamatory offense, they are deposed from their duties by the approval of Prime Minister. Committee memberships, which become vacant due to deposition or before the due date, are filled within one month.

The Board members cannot start working until they take an oath in witness of the First Bureau of Assembly of the High Court of Appeal, that they will fulfill their duties in an honest and impartial manner, that they will not violate and let others violate the provisions of 4734 and the related legislation throughout their memberships.

Moreover, the members of the Board, unless based on a specific Law, can not be involved in any official or private jobs, trade or freelance activities, can not participate in conferences or instruct courses against payment, and can not be a shareholder or manager in any kind of partnerships based on commercial purposes.

When executing their duties, the Board members and the staff of the Authority cannot disclose any confidential information or document concerning the related officials or third parties to any entity except for those authorized by law for such disclosures, and cannot use them for the benefit of their own or third parties. This liability of confidentiality shall also continue after they leave their offices.

The Board members are obliged to submit a declaration of property, within one-month following the date of commencement and expiry of office, and every year during their service period.

The Board shall meet upon the call of the chairperson or, in case of his/her absence, the second chairperson, with no absentees, and shall take decisions by rule of majority. In case of equal votes, the party supported by the Chairperson shall be accepted as constituting the majority. There can be no abstentions while taking decisions. The board members shall be responsible for their votes and decisions. In cases of permit-leaves, sick-leaves, assignments or failure to make new appointments to the offices that become vacant, seven members are necessary for convening. The members who fail to participate in five meetings within a calendar year for reasons other than stated in this Law shall be deemed to have resigned from membership.

The service units of the Authority; shall consist of main service units, consultancy units and auxiliary service units, organized in adequate number of departments as required in line with the duties and authorities of the Authority.

The fundamental and permanent duties required for the services of the Authority shall be executed by the professional staff consisting of the Public Procurement Experts and Assistant Experts, together with the other staff.

The revenues of the Authority are gained from different sources. Some of them are as follows,

- a) for the agreements amounting more than 144.999.000.000 Turkish Liras in the scope of 4734, five of the per ten thousand of the agreement value which will be collected from the contractor. (It is a must for administrations and notaries to require that the contractor deposits this amount to Institution's accounts.),
- b) 216.000.000 Turkish Liras collected from the tenderers who make complaints,
- c) incomes from activities such as training programs, courses, seminars and meetings,
- d) incomes from all printed documents, forms, certificates and publications,
- e) supports from the general budget, when necessary.

Finally, transactions and works relating to the annual accounts, revenues and expenses of the Authority shall be audited by the Court of Accounts. The properties and assets of the Authority shall be deemed belonging to the State, and therefore cannot be attached or pledged.

### **2.3.2 Demand for Review and Review of the Complaints**

Although 2886 does not have provisions, specific enough, regarding demand for review of complaints and dispute settlement from the complainant point of view, according to the provisions of 4734, any contractor, supplier or service provider who claims that he has suffered a loss of rights or suffered or is likely to suffer loss or damage resulting from an alleged breach of such duty can demand review in accordance with the phases specified below, with a written complaint. After that, the review of the complaints, which is comprised of three step, commences. These steps are the administrative review, the review by The Public Procurement Authority and judicial review.

In order to have the administrative review started, the contractor, supplier or service provider shall first of all submit a written complaint to the contracting entity. The complaint shall be heard by the contracting entity only where no procurement contract has been signed and the complaint is submitted within fifteen days following the date upon which the contractor, supplier or service provider submitting the complaint became aware of the circumstances giving rise to the complaint or the date upon which the contractor, supplier or service provider should have become aware of those circumstances.

Following the submission of the complaint, the contracting entity shall, within thirty days issue a written justifiable decision. If the complaint is upheld in whole or in part, the decision shall also indicate the corrective measures to be taken. The decision shall be notified to all tenderers within seven days following the date of the decision. In cases where no decision can be made within a given period or the decision taken is found unacceptable by the tenderer; the contractor, supplier or service provider can request the Authority to review the case at the end of decision period or fifteen days after the decision date.

Following the submission of a complaint, the contracting entity shall be prevented from signing a contract unless the contracting officer certifies that urgency and public interest considerations require the tender proceedings to continue. This certification, which is the justifiable approval of the continuation of the tender proceedings, shall be notified within a period that will ensure that the complainant

receives such notice not less than seven days in advance of the signing of the contract.

If the contracting entity notifies the contractor, supplier and service provider that the tender proceedings may continue and the contract may be signed, then the contractor, supplier and service provider may request a review to be undertaken by the Authority, within at least three days following the date of the aforementioned notification.

Subsequent to administrative review conducted by the contracting entity, by means of submission of a complaint to the Authority prior to the signing of the contract, administrative review by the Public Procurement Board begins, provided that the contracting entity has been notified by the contractor, supplier or service provider of all alleged breaches with regard to the tender proceeding that are requested to be remedied, together with an indication that the right to refer to legal action is reserved.

Provided that it specifies the reasons and grounds relating to the complaints submitted to the Authority, the Board can order in three different ways.

It may determine the corrective operation in cases where no suspension of the tender proceeding is necessary and remedies by the contracting entity would be sufficient. The second alternative is that it may order the termination of the procurement proceedings in case of non-compliance with this Law and the related legislation, which would constitute an obstacle for the continuation of the proceeding and which cannot be removed by taking corrective measures, or lastly, it may decide that complaint is irrelevant.

The Board orders the suspension of the procurement proceedings until the final decision, in case the subject of the appeal is obviously contrary to the Law and the related legislation or in case damage or loss which would be irreparable in the absence of a suspension is likely to be inflicted upon the contractor, supplier, service provider, public, the contacting entity or other tenderers.

Complaint is an obligatory application way, which should be used prior to sue. Upon complaints, Institution takes the final decision within 45 days at the latest. In cases where the contracting entity decides to continue the procurement proceedings,

institution make the decision of suspension or continuation of the bidding procedure within 5 days, in other cases, the time period is 15 days.

Finally, all decisions of the Public Procurement Board shall be notified to the parties within five days following such decisions. These decisions shall also be published by the Authority in the Official Gazette.

The third and the last review stage is the judicial review according to 4734. In cases where the complaints made after the signing of the contract, which shall not be assessed by the Board or where the complainant is not satisfied with the decision of The Public Procurement Authority, he can initiate the judicial review process knowing that the final decisions made by the Public Procurement Authority with regard to the complaints shall be under the jurisdiction of the Turkish courts and such cases shall have priority.

## **2.4 Prohibition and Criminal Liability**

Both 4734 and 2886 have similar provisions concerning prohibition and criminal liabilities in cases where the prohibited acts and conducts exist. Under this topic, the subjects, prohibition from participation, and penal liabilities of both tenderers and officers, are scrutinized.

### **2.4.1 Prohibition from participation to tenders**

According to provisions of both laws, those who are established to be involved in prohibited acts and conducts set forth before, shall be prohibited from participation to any tender carried out by public institutions and entities included within the scope of Procurement Law for some period of time, which is stated as up to one year in 2886. On the other hand, this period of time is at least one year and up to two years with the decision of the ministry carrying out the tender proceedings or the related or relevant ministry according to 4734. Furthermore, the prohibition covers the procurements conducted by the entities out of the scope of 4734.

In addition, those who do not conclude a contract in accordance with the procedures although the tender has been awarded except for force majeure shall be prohibited from participation to any tender carried out by public institutions and

entities included within the scope of Law for at least six months and up to one year. Prohibition decisions shall be taken by the Ministry implementing the contract or by the Ministry which the contracting entity is subordinate to or associated with, by contracting officers of Contracting Entities which are not considered as subordinate to or associated with any Ministry, and by the Ministry of Internal Affairs in special provincial administrations and in municipalities and in their affiliated associations, institutions and undertakings.

The prohibition decisions shall apply to all of the partners in case of sole proprietorships, and for partners that are real or legal persons who own more than half of the capital in case of companies with shared capital. Those who are established to be involved in these acts and conducts during or after the tender proceedings shall not be allowed by the contracting entity to participate in the current tender as well as the other tenders to be carried out by the contracting entity until the effective date of the prohibition decision.

The prohibition decisions shall be made within at most forty five days following the establishment of conducts or acts requiring prohibition. The prohibition decision shall be sent for publication in the Official Gazette within at most fifteen days, and shall become effective on the date of its publication. The decisions shall be followed up by the Public Procurement Authority and those who are prohibited from participation to public procurements shall be recorded.

#### **2.4.2 Penal Liability of Tenderers**

Even if it is established after the completion and acceptance of the contract, the real or legal persons involved in prohibited acts or conducts that are specified before, constituting a crime under the Criminal Code, and their partners or proxies relating to the work in question, shall be held subject to criminal prosecution in accordance with provisions of the Criminal Code. In addition to the punishment rendered by the court, these persons shall be prohibited from participation to tender proceedings of all public institutions and entities, starting from the ending date of the prohibition decision made by the contracting entity for a period of at least one year

and up to 3 years, together with the circumstances stipulated under the topic of prohibition from participation to tender.

Those for whom a decision to file a public lawsuit is made following the criminal prosecution held, can not participate in the tenders held by public institutions and entities included within the scope of Law, until the end of the judgment proceedings. Moreover, they are informed to the Public Procurement Authority by The Prosecutor's Office for registration.

In cases of repetition of prohibited acts and conducts set forth above, these persons and the companies with shared capital in which these persons own more than half of the capital, or the sole proprietorships to which these persons are partner, are permanently prohibited from participation in public procurements, by decision of the court.

In accordance with the provisions of 4734, the tenderers, who are prohibited by decision of court, and those who are convicted, shall be notified by the Public Prosecutors to the Public Procurement Authority in order to be entered in their records by the Public Prosecutors, and to the relevant professional chambers in order to be entered in their professional records. And finally, the court decisions pertaining to those who are permanently prohibited from participation in public procurements are announced by publication in the Official Gazette within fifteen days following the notification by the Public Procurement Authority.

### **2.4.3 Penal Liability of Officers**

In case it is established that the contracting officer, the chairperson and the members of the tender commission, the supervisors and all other related persons, assigned at any stage of the procurement proceedings starting from the tender proceedings until the completion of the commitment, have committed prohibited acts or conducts specified before; have failed to fulfill their duties in accordance with the legal requirements or failed to act impartially; or are involved in defaults or negligent acts which inflict loss upon one of the parties, these persons shall be given a disciplinary punishment in accordance with the related legislation. Criminal prosecution shall also apply for these persons depending on the nature of their acts or

conducts, and in addition to the punishment rendered by the court, these persons shall compensate for all the loss and damage inflicted upon the parties in accordance with the general provisions. The persons who have been sentenced due to the prohibited acts and conducts, are not assigned with duties within the scope of this Law.

Moreover, the personnel of the contracting entity who have been held subject to criminal prosecution due to acts and conducts included within the scope of this Law, are not appointed to any assigned or authorized positions related with the implementation of the Law or other related regulations.

Another liability of officers is not to violate the principle of confidentiality covering not disclosing and using for the benefit of their own or of third persons, any of the confidential information such as the estimated cost or documents relating to all proceedings about the tender process; works, transactions as well as technical and financial structures of the tenderers. The principle of confidentiality is also valid for those who provide consultancy services.

The sanctions mentioned above shall also apply to those who violate the principle of confidentiality with regard to estimated cost and the basic principles such as transparency, competition, equality of treatment, reliability, accountability, confidentiality, public supervision, and procurement of needs under appropriate conditions and in a timely manner, and for the efficient use of resources in accordance with the provisions of 4734.

#### **2.4.4 Other Rules for Contracting Entities in the Planning Stage of Tenders**

It is mandatory for contracting entities to comply with the principles set below within the scope of Law no. 4734, before opening a tender for goods, services or works.

a) With the aim of completing investment projects in the planned time period and presenting them to the service of the economy, in order for a tender to be opened for works that cover a period exceeding one year, a program must be established to ensure that there is an appropriation in the budget on a yearly basis distributed according to the time period of the work. The appropriation contemplated for the first year shall not be less than 10% of the cost of the project, and the appropriation

portions which are initially put in the program for the coming years cannot be decreased in the years to follow.

b) In consideration of the time period in which the planned appropriations shall be used, as regards works that cover a period of more than one year and have the nature of investments (excluding those works that must be carried out due to natural disasters), it is mandatory that the contracting entities open tenders in time and that the tender be finalized in the first nine months of the year. However, in cases where the procurement of goods, services and works, which are continuous and will be conducted in the next fiscal year, the contracting entities can open tenders before the end of the previous fiscal year.

c) For construction works except for the projects of dam, irrigation with big capacity, and petroleum and natural gas pipeline, without obtaining building site, without completing property, nationalization and if required development works and without establishing application projects, it is not allowed to open a tender. In construction works that have the application project, it is obligatory to bid through receiving turnkey lump sum price proposal. However, for construction works, which have insufficient time to establish an application project due to the natural disasters, it is allowed to open a tender with preliminary or final projects. For the parts of these works, which the application project is implemented, it is allowed to bid through receiving turn-key job-lot price proposal, and for the parts, which the application project is not implemented, it is allowed to bid through receiving unit price proposal for each piece of work. Moreover, for repair works of historical building whose primary, restoration and restitution projects are implemented, it is allowed to bid through receiving unit price proposal for each piece of work.

d) In the programming of the budget by the contracting entities, the determined estimated cost to be used in comparing the proposals submitted by tenderers participating in the tender shall not be disclosed to tenderers.

e) In cases where the staff employed by contracting entities in accordance with the laws, decrees and regulations have not sufficient qualifications and are not sufficient in number, a tender can be opened for the services specified in this Law.

- f) In the case that the date determined for the tender falls on a holiday, deadline for the submission of tender shall be extended to the first working day following the holiday at the same place and time with no further requirement of a notice, and those tenders which have been submitted until this time shall be accepted.
- g) For the engineers or architects not participating in management and control tasks in construction works, their each year after graduation shall be taken into account as 87.000.000.000 Turkish Liras so that they can participate in construction tenders.
- h) The annual total of the expenses to be used up within the monetary limits specified in both negotiated procedure and direct procurement method, can not exceed 10 % of the appropriations to be allocated in contracting entities' budgets for this purpose, unless otherwise it is approved by Public Procurement Authority.
- i) No advertisement shall be published before the preparation of the tender documents. In the calculation of the notice periods, the day of the publication of the notice shall be taken as basis and the date of tender shall not be taken into account.
- j) The sanctions mentioned above under the topic of penal liabilities of officers shall also apply to those who violate the Rules for Contracting Entities in the Planning Stage of Tenders according to the provisions of 4734.

## **CHAPTER 3**

### **LEGAL FRAMEWORK OF THE RELATED PROCUREMENT LAW IN EUROPEAN COMMUNITY (EEC 93/37)**

This directive (93/37/EEC) was adopted by having regard to the Treaty establishing the European Economic Community, the proposal from the Commission and the opinion of the Economic and Social Committee in cooperation with the European Parliament for the public procurements concerning the coordination of procedures for the award of public works contracts by the Council of The European Communities at the date of 14 June 1993.

#### **3.1 The Reasons For The Adoption of 93/37/ EEC**

There are lots of reasons for the adoption of this law, which may be numbered as the following,

- a) The Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts has been amended substantially and on a number of occasions; whereas, for reasons of clarity and better understanding, the said Directive should be consolidated;
- b) The simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contracts;
- c) Such coordination should take into account as far as possible the procedures and administrative practices in force in each Member State;

- d) The works contracts of less than ECU 5.000.000 may be exempted from competition as provided for under this Directive and it is appropriate to provide for their exemption from coordination measures;
- e) Provision must be made for exceptional cases where measures concerning the coordination of procedures need not be applied, but such cases must be expressly limited;
- f) It is necessary to provide common rules in the technical field which take account of the Community policy on standards and specifications;
- g) In order to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community; whereas the information contained in these notices must enable contractors established in the Community to determine whether the proposed contracts are of interest to them; for this purpose, it is appropriate to give them adequate information on the works undertaken and the conditions attached thereto;
- h) It is necessary to provide common rules for participation to public works contracts, including both qualitative selection criteria and criteria for the award of the contract;
- i) Additional information concerning contracts must, as is customary in Member States, be given in the contract documents for each contract or else in an equivalent document;
- j) It would be appropriate to enable certain technical conditions concerning notices and statistical reports required by this Directive to be adapted in the light of changing technical requirements.

### **3.2 General Provisions**

Under this topic, some of the definitions in this law, the coverage and exceptions of the law are scrutinized. In addition, the provisions concerning the awarding procedures, threshold values negotiated procedure and conclusion of tender proceedings are studied.

### 3.2.1 Definitions

For the purpose of this Directive:

public works contracts, are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority which have as their object either the execution, or both the execution and design, of works or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

contracting authorities, shall be the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law;

A body governed by public law, means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and having legal personality, and financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law;

a work, means the outcome of building or civil engineering, works taken as a whole that is sufficient of itself to fulfill an economic and technical function;

open procedures, are those national procedures whereby all interested contractors may submit tenders;

restricted procedures, are those national procedures whereby only those contractors invited by the contracting authority may submit tenders;

negotiated procedures, are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

a contractor, who submits a tender shall be designated by the term tenderer, and one who has sought an invitation to take part in a restricted or negotiated procedure by the term candidate.

### **3.2.2 Exceptions**

As regards exceptions to this law, this directive shall not apply to works contracts which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the Member State's security so requires. Furthermore, this directive shall not apply to public contracts governed by different procedural rules and awarded;

- a) in pursuance of an international agreement, concluded in conformity with the Treaty, between a Member State and one or more non member countries and covering works intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission,
- b) to undertakings in a Member State or a non member country in pursuance of an international agreement relating to the stationing of troops,
- c) pursuant to the particular procedure of an international organization.

### **3.2.3 Threshold values**

As regards threshold values, the provisions of this Directive shall apply to public works contracts whose estimated value net of VAT is not less than ECU 5.000.000. The value of the threshold in national currencies shall normally be revised every two years. The calculation of this value shall be based on the average daily values of these currencies expressed in ecus over the 24 months terminating on the last day of August immediately preceding the 1 January revision. The exchange values shall be published in the Official Journal of the European Communities at the beginning of November.

In cases where a work is subdivided into several lots, the value of each lot must be taken into account for the purpose of calculating the amounts above. Where the aggregate value of the lots is not less than the amount ECU 5.000.000, the provisions shall apply to all lots. Contracting authorities shall be permitted to depart from this provision for lots whose estimated value net of VAT is less than ECU 1.000.000, provided that the total estimated value of all the lots exempted does not, in

consequence, exceed 20 % of the total estimated value of all lots. Another provision relating to threshold value is that no work or contract may be split up with the intention of avoiding the application of this Directive.

In awarding public works contracts the contracting authorities shall apply the procedures that is, open, restricted and negotiated procedures. There are two ways of awarding contracts through negotiated procedure, which is the most complex procedure.

### **3.2.4 Negotiated procedure**

According to the Law, the contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice (PIN) and after having selected the candidates according to publicly known qualitative criteria in the following cases;

- a) in the event of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions, insofar as the original terms of the contract are not substantially altered,
- b) when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs,
- c) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.

On the other hand, the contracting authorities may award their public works contracts by negotiated procedure without prior publication of a contract notice (PIN) in the following cases;

- a) in the absence of tenders or of appropriate tenders in response to an open or restricted procedure insofar as the original terms of the contract are not substantially altered and provided that a report is communicated to the Commission at its request,
- b) when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the works may only be carried out by a particular contractor,
- c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseen by the contracting authorities in question, the time limit

laid down for the open, restricted or negotiated procedures cannot be kept. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authorities,

d) for additional works not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the carrying out of the work described therein, on condition that the award is made to the contractor carrying out such work;

- i. when such works cannot be technically or economically separated from the main contract without great inconvenience to the contracting authorities, or
- ii. when such works, although separable from the execution of the original contract, are strictly necessary to its later stages,

However, the aggregate amount of contracts awarded for additional works may not exceed 50 % of the amount of the main contract;

e) for new works consisting of the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded. As soon as the first project is put up for tender, notice must be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting authorities. This procedure may only be adopted during the three years following the conclusion of the original contract.

Finally, in all other cases, the contracting authorities shall award their public works contracts by the open procedure or by the restricted procedure.

### **3.2.5 Conclusion of tender proceedings**

After the conclusion of tender proceedings, the contracting authority shall, within 15 days of the date on which the request is received, inform any eliminated candidate or tenderer who so requests of the reasons for rejection of his application or his tender, and, in the case of a tender, the name of the successful tenderer.

Moreover, it shall also inform the Office for Official Publications of the European Communities of that decision. For each contract awarded, the contracting

authorities shall draw up a written report which shall be communicated to the Commission and include at least the following:

- a) the name and address of the contracting authority, the subject and value of the contract,
- b) the names of the candidates or tenderers admitted and the reasons for their selection,
- c) the names of the candidates or tenderers rejected and the reasons for their rejection,
- d) the name of the successful tenderer and the reasons for his tender having been selected and, if known, any share of the contract the successful tenderer may intend to subcontract to a third party,
- e) for negotiated procedures, the circumstances which justify the use of these procedures.

### **3.3 Common Rules in the Technical Field**

Generally, technical specifications is referred as the technical field in 93/37/EC. The provisions of the Law about the technical specification can be enumerated as the following:

- a) Technical specifications, which are the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a work, material, product or supply, which permits a work, a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. These technical prescriptions shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or to the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labeling. They shall also include rules relating to design and costing, the test, inspection and acceptances for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

- b) The technical specifications, mentioned above, shall be given in the general or contractual documents relating to each contract.
- c) Without prejudice to the legally binding national technical rules and insofar as these are compatible with Community law, the technical specifications shall be defined by the contracting authorities by reference to national standards implementing European standards, or by reference to European technical approvals or by reference to common technical specifications.
- d) A contracting authority may depart from the provisions above in cases where,
- i. the standards, which is a technical specification approved by a recognized standardizing body for repeated and continuous application, compliance with which is in principle not compulsory,  
European technical approvals, which is a favorable technical assessment of the fitness for use of a product, based on fulfillment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use,  
common technical specifications, which is a technical specification laid down in accordance with a procedure recognized by the Member States to ensure uniform application in all Member States which has been published in the Official Journal of the European Communities,  
do not include any provision for establishing conformity, or, if technical means do not exist for establishing satisfactorily the conformity of a product to these standards, European technical approvals or common technical specifications;
  - ii. use of these standards, European technical approvals or common technical specifications would oblige the contracting authority to acquire products or materials incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties;
  - iii. the project concerned is of a genuinely innovative nature for which use of existing European standards, European technical approvals or common technical specifications would not be appropriate.

e) Contracting authorities invoking (iii) shall record, wherever possible, the reasons for doing so in the tender notice published in the Official Journal of the European Communities or in the contract documents and in all cases shall record these reasons in their internal documentation and shall supply such information on request to Member States and to the Commission.

f) In the absence of European standards or European technical approvals or common technical specifications, the technical specifications;

i. shall be defined by reference to the national technical specifications recognized as complying with the basic requirements in order to achieve technical harmonization,

ii. may be defined by reference to national technical specifications relating to design and method of calculation and execution of works and use of materials,

iii. may be defined by reference to other documents. In this case, it is appropriate to make reference in order of preference to national standards implementing international standards accepted by the country of the contracting authority,

iv. other national standards and national technical approvals of the country of the contracting authority.

g) Unless such specifications are justified by the subject of the contract, Member States shall prohibit the introduction into the contractual clauses relating to a given contract of technical specifications which mention products of a specific make or source or of a particular process and which therefore favor or eliminate certain undertakings. In particular, the indication of trade marks, patents, types, or of a specific origin or production shall be prohibited. However, if such indication is accompanied by the words “or equivalent”, it shall be authorized in cases where the contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties concerned.

### **3.4 Common Advertising Rules**

According to the provisions of the Law, contracting authorities shall make known, by means of an indicative notice, the essential characteristics of the works contracts which they intend to award and the estimated value of which is not less than the threshold 5.000.000 ECU. Contracting authorities who wish to award a public works contract by open, restricted or negotiated procedure, shall also make known their intentions by means of a notice in which they inform the potential tenderers mainly about which procedure will be used and which information concerning the economic and technical standing of tenderers will be required to participate in tender.

In addition to the notices prior to awarding of contract, contracting authorities who have awarded a contract shall make known the result by means of a notice. However, certain information on the contract award may, in certain cases, not be published where release of such information would impede law enforcement or otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of particular enterprises, public or private, or might prejudice fair competition between contractors.

After the formation stage of notices, the contracting authorities shall send the notices, which are prepared according to the samples given in the annexes of directive, as rapidly as possible and by the most appropriate channels to the Office for Official Publications of the European Communities.

The notice for the finalized decision of procurement proceeding shall be sent at the latest 48 days after the award of the contract.

After the arrival of the notices to the Office for Official Publications of the European Communities They shall be published in full in the Official Journal of the European Communities and in the data bank in the official languages of the Communities, the original text alone being authentic.

The Office for Official Publications of the European Communities shall publish the notices not later than 12 days after their dispatch. In the case of the accelerated procedure, which will be explained, this period shall be reduced to five days.

The cost of publication of the notices in the Official Journal of the European Communities shall be borne by the Communities. The length of the notice shall not be greater than one page of the Journal, or approximately 650 words.

As far as time limits for notice concerned, in accordance with the provisions of the Law, time limits change as the procurement procedure change. Some of the related provisions for open procedure are;

- a) the time limit for the receipt of tenders, fixed by the contracting authorities shall be not less than 52 days from the date of dispatch of the notice;
- b) the time limit 52 days for the receipt of tenders may be reduced to 36 days where the contracting authorities have published the indicative notice (PIN), mentioned before;
- c) provided they have been requested in good time, the contract documents and supporting documents must be sent to the contractors by the contracting authorities or competent departments within six days of receiving their application;
- d) provided it has been requested in good time, additional information relating to the contract documents shall be supplied by the contracting authorities not later than six days before the final date fixed for receipt of tenders;
- e) where the contract documents, supporting documents or additional information are too bulky to be supplied within the time or where tenders can only be made after a visit to the site, time limits shall be extended accordingly.

As for restricted and negotiated procedure,

- a) the time limit for receipt of requests to participate fixed by the contracting authorities shall be not less than 37 days from the date dispatch of the notice.
- b) The contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders. The letter of invitation shall be accompanied by the contract documents and supporting documents. It shall include at least the following information:
  - i. where appropriate, the address of the service from which the contract documents and supporting documents can be requested and the final date for making such a request; also the amount and terms of any sum to be paid for such documents,

- ii. the final date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up,
  - iii. a reference to the contract notice published,
  - iv. an indication of any documents to be annexed, to support the verifiable statements furnished by the candidate,
  - v. the criteria for the award of the contract if these are not given in the notice.
- c) In restricted procedures, the time limit for receipt of tenders fixed by the contracting authorities may not be less than 40 days from the date of dispatch of the written invitation. The time limit for the receipt of tenders may be reduced to 26 days where the contracting authorities have published the indicative notice.
- d) Requests to participate in procedures for the award of contracts may be made by letter, by telegram, telex, telefax or by telephone. If by one of the last four, they must be confirmed by letter dispatched before the end of the period.
- e) Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than six days before the final date fixed for the receipt of tenders.
- f) Where tenders can be made only after a visit to the site or after on the spot inspection of the documents supporting the contract documents, the time limit shall be extended as in the case of open procedure accordingly.

Moreover, 93/37/ECC has provisions defining the time limits in cases of urgency, which is named as accelerated procedure,

According to this procedure, in cases where urgency renders impracticable the time limits laid down above, the contracting authorities may fix the following time limits:

- a) a time limit for receipt of requests to participate which shall be not less than 15 days from the date of dispatch of the notice;
- b) a time limit for the receipt of tenders which shall be not less than 10 days from the date of the invitation to tender.

Provided it has been requested in good time, additional information relating to the contract documents must be supplied by the contracting authorities not later than 4 days before the final date fixed for the receipt of tenders.

### **3.5 Common Rules on Participation**

Under this topic, there are ten important sub-topics, which are going to be scrutinized. They are orderly, variants, existence of sub-contractors and joint ventures, invitation to tender, employment protection and working conditions provisions, ineligibility for participation, enrolment in the professional or trade register, financial and economic requirements, technical capability requirements, official list of recognized contractors, awarding criteria and finally abnormally low tenders.

#### **3.5.1 Variants**

Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may take account of variants which are submitted by a tenderer and meet the minimum specifications required by the contracting authorities.

The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in their tender notice if variants are not permitted.

#### **3.5.2 Subcontractors**

According to 93/37/ECC, in the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties. This indication shall be without prejudice to the question of the principal contractor's liability.

#### **3.5.3 Joint ventures**

As regards joint ventures, it is briefly stated that tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.

#### **3.5.4 Invitation to tender**

There are also some provisions concerning the stage of invitation to tender in the Law. Accordingly, in restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the contractor's personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required, those whom they will invite to submit a tender or to negotiate.

Moreover, there are some minimum and maximum limits for the number of undertakings to be invited. Where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite, will fall. In this case the range shall be indicated in the contract notice. The range, which shall be determined in the light of the nature of the work to be carried out, must number at least 5 undertakings and may be up to 20. In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition. However, in cases where the contracting authorities award a contract by negotiated procedure, the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

And finally, as a last but the most important statement about the stage of invitation tender, each Member State shall ensure that contracting authorities issue invitations without discriminations to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.

#### **3.5.5 Employment protection and working conditions**

There are also provisions about the subject of the employment protection and the working conditions in the Law. Accordingly, the contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working

conditions which are in force in the Member State, region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract. Moreover, the contracting authority which supplies the information mentioned above, shall request the tenderers or those participating in the contract procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the work is to be carried out.

### **3.5.6 Ineligibility**

There are very likely provisions about the ineligibility properties of a candidate to participate tenders in 93/37/ECC, when compared to the Turkish Procurement Law (4734). Accordingly, any contractor may be excluded from participation in the contract who:

- a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar proceedings under national laws and regulations;
- b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;
- c) has been convicted of an offence concerning his professional conduct by a judgment;
- d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;
- e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;
- f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;

g) is guilty of serious misrepresentation in supplying the information required.

Where the contracting authority requires of the contractor proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:

- i. for points (a), (b) or (c), the production of an extract from the judicial record, or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or in the country where that person comes showing that these requirements have been met,
- ii. for points (e) or (f), a certificate issued by the competent authority in the member state concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country where that person comes.

### **3.5.7 Enrolment**

Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Member State in which he is established.

Some examples are,

in Germany, the Handelsregister, and the Handwerksrolle

in France, the Registre du Commerce and the Répertoire des métiers

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato

in the United Kingdom and Ireland, the contractor may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, if this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name.

### **3.5.8 Financial and economic standing**

Contractors are supposed to supply the required information and documents demonstrating his financial and economic standing for assessment purpose to the contracting entity. Evidence of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

- a) appropriate statements from bankers;
- b) the presentation of the firm's balance sheets or extracts from the balance sheets, where publication of the balance sheet is required under the law of the country in which the contractor is established;
- c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

The contracting authorities shall specify in the notice or in the invitation to tender which reference or references they have chosen and what references other than those mentioned above in points (a), (b) and (c) are to be produced.

### **3.5.9 Technical capability**

Another important criteria for evaluation of candidates is the evidence of the contractor's technical capability, which may be furnished by:

- a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;
- b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority directly;
- c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;
- d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

### **3.5.10 Official list of contractors**

In order to prevent the contractors from providing the documents mentioned above for the assessment stage of each tenders in Member States, the official lists of recognized contractors is introduced for simplicity. The contractors included in this list are assumed to satisfy the provisions stated above for participation to tenders. These lists are prepared by the related administrative units of each Member States. According to the Law, contractors registered in the official lists may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority. This certificate shall state the reference which enabled them to be registered in the list and the classification given in this list. Certified registration in the official lists by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability for works corresponding to the contractor's classification

However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.

### **3.5.11 Criteria for the award of contracts**

As regards the criteria for the award of contracts, it is seen that very similar provisions exist in both 93/37/ECC and the Turkish Procurement Law. Accordingly, the criteria on which the contracting authorities shall base the award of contracts shall be:

- a) either the lowest price only;
- b) or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit, all of which shall be stated in the contract documents or in the contract notice by the contracting entity intending to apply to the award, where possible in descending order of importance.

### **3.5.12 Abnormally low tenders**

If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favorable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer. If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it consider to be too low.

Finally, as an obligation to Member States, they are obliged to forward to the Commission, every year, a report describing the practical application of the directive. The reports shall be submitted to the Advisory Committee for Public Contracts. The statistical reports shall detail at least the number and value of contracts awarded by each contracting authority or category of contracting authority above the threshold, subdivided as far as possible by procedure, category of work and the nationality of the contractor to whom the contract has been awarded, and in the case of negotiated procedures, the reasons for the selection of this procedure, listing the number and value of the contracts awarded to each Member State and to third countries.

## CHAPTER 4

### THE SURVEY CONDUCTED FOR DETERMINATION OF PERCEPTION OF TURKISH CONSTRUCTION SECTOR ABOUT NEW PROCUREMENT LAW

#### 4.1 Methodology

While conducting the survey, a questionnaire comprised of 15 questions, was used as the main tool. First seven questions were asked to determine the characteristics of the contracting companies. The remaining questions are all pertinent to the subject matter of thesis study. Especially, question 10 was asked to determine the attitudes of contracting companies towards the change in the Law.

45 contracting companies out of 105 companies responded to the study. Their participation took place via both mail and electronic mail. Out of 45 companies, 10 companies participated via e-mail, others did so via mail.

#### 4.2 Results of the Questionnaire

All of the questions were analyzed one by one and according to the relations between them. The analysis of each question will be presented in this section.

**Question 1:** How many years has your company been in construction sector?

The aim of this question is to examine the experiences of contracting companies in the construction sector.

Out of 45 companies, only 2 companies have an experience of 6-10 years, 7 companies have a 11-20 year experience and the remaining majority, 36 companies have been in the sector for more than 20 years.

From these results, it can obviously be inferred that majority of the companies responding to the questionnaire is quite experienced in Turkish construction sector.

TABLE 3: Age of contracting companies

<u>Alternatives</u>	<u>Frequency</u>	<u>Percent (%)</u>
1-5 years	0	0
6-10 years	2	4,4
11-20 years	7	15,6
More than 20 years	36	80
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 2:** What is the total number of technical staff in your company?

This question was asked to assess technical staff size and technical capacity of the companies responding to the questionnaire.

According to the results, out of 45 companies, 11 companies employ 5-15 technical staff, 18 companies employ 15-50 technical personnel and the remaining 16 companies employ more than 50 technical personnel.

From these results, it can easily be concluded that most of the companies responding to the survey, are really great in scale from the number of employed staff point of view.

TABLE 4: Number of technical staff in the companies

<u>Alternatives</u>	<u>Frequency</u>	<u>Percent (%)</u>
Less than 5 personnel	0	0
5-15 personnel	11	24,4
15-50 personnel	18	40,0
More than 50 personnel	16	35,6
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 3:** What kind of a commercial partnership is yours?

The aim of this question is to examine the institutional structure of the companies. Out of 45 companies, 18 companies are limited companies and the remaining 27 companies are all incorporated companies.

TABLE 5: Type of commercial partnership of the companies

<u>Alternatives</u>	<u>Frequency</u>	<u>Percent (%)</u>
Ordinary partnership	0	0
Collective partnership	0	0
Limited company	18	40
Incorporated company	27	60
Consortium	0	0
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 4:** Which one/ones of the below is/are within your company's activity area?

By asking this question, the determination of working areas of companies are intended.

From the results, it can be inferred that majority of them are dealing with construction works like construction of factories and industrial buildings, dam construction for irrigation purpose, construction of water purification, store and transmission establishments, construction of public housing scheme and service buildings, and road, motorway, tunnel and viaduct constructions.

TABLE 6: Activity areas of the companies

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Construction of power plants and transmission lines	15	33,3
Factories and industrial buildings	24	53,3
Construction of natural gas, petroleum and telephone lines	16	35,6
Port and quay construction	13	28,9
Dam construction for irrigation purpose, construction of water purification, store and transmission establishments	35	77,8
Construction of public housing scheme and service buildings	27	60,0
Road, motorway, tunnel and viaduct constructions	28	62,2
Airport, subway construction	14	31,1
Consultancy service	0	0
Space frame system steel constructions	1	2,22
Rehabilitation of buildings	1	2,22

**Question 5:** What is the yearly average amount of your company's turnover?

The aim of this question is to determine the amount of monetary revenues of companies from construction activities and in the same way their economic scale and financial power. By examining the results, it can be seen that the average turnover of companies is approximately 20-25 million dollars, which is really a huge amount.

TABLE 7: Annual turnover of the companies

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Less than 1 million dollars	0	0
1-5 million dollars	9	20
5-20 million dollars	12	26,7
20-50 million dollars	14	31,1
50-100 million dollars	4	8,9
More than 100 million dollars	6	13,3
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 6:** Do you participate in tenders pertinent to construction works?

As it can be seen from the answers, all of the companies participate in tenders as tenderers related to construction works, which shows that the questionnaire was forwarded to companies relevant to the thesis subject.

TABLE 8: Number of firms participating in construction works tenders

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Yes	45	100
No	0	0
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 7:** Is there a tender preparation department working on specifically tenders in your company? If so, how many persons constitute this department?

The aim of this question is to determine whether the companies deal with the tenders and their proceedings consciously, seriously or not.

From the results, 35 companies have an organized group for this purpose, which is really pleasing. However, it can be seen that these groups are comprised of 3-4 persons, which is, I think, not enough for tender process.

TABLE 9: Number of firms having a tender preparation department

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Yes	35	77,8
No	10	22,2
<b>Total</b>	<b>45</b>	<b>100</b>

TABLE 10: Number of persons constituting the departments

<u>No of persons in the group</u>	<u>Frequency</u>	<u>Percent (%)</u>
1	1	2,9
2	9	25,7
3	7	20,0
4	8	22,9
5	5	14,3
6	2	5,7
8	1	2,9
10	2	5,7
<b>Total</b>	<b>35</b>	<b>100</b>

**Question 8:** Did you have a chance of studying the latest shape of the New Procurement Law (4734)?

From the results, it is understood that construction companies are all aware of the change in Procurement Law, which is pleasing.

TABLE 11: Number of firms studying the New Procurement Law

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Yes	45	100
No	0	0
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 9:** If your answer to the question 8 is yes, what is your general opinion about the New Procurement Law?

The purpose of this question is to find out the general attitude of the companies to the New Procurement Law.

As it can be seen from the result, the majority of them have an affirmative attitude towards the New Procurement Law when compared to the Ex-procurement Law.

TABLE 12: General opinion of firms about the New Procurement Law

<u>Alternative</u>	<u>Frequency</u>	<u>Percent(%)</u>
Positive	7	15,6
When compared with the Ex-procurement Law, positive	25	55,6
Negative, I prefer the Ex-procurement Law	0	0
If insufficient parts of the Ex-procurement Law was corrected, it would be better	13	28,8
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 10:** According to their importance, enumerate some applications and changes which are enacted with the New Procurement Law and are given below. Moreover, please state your opinion about them as positive or negative.

i) Determination of threshold values in the 8<sup>th</sup> article of the New Procurement Law.

As it can be seen from the table, almost all of the firms perceive this provision as positive and 32 of them think that it is an important provision.

TABLE 13: Attitude of firms towards threshold values

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	42	93,3	Important	32	71,1
Negative	3	6,7	Medium	11	24,4
			Unimportant	2	4,5
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

ii) Keeping secret the estimated cost of the work to be awarded.

From the results shown in the table, it is seen 28 of the firms have a positive attitude towards the provision about keeping secret the estimated cost of the work to be awarded and 33 of them view this change as an important issue.

TABLE 14: Attitude of firms towards the secrecy of the estimated cost

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	28	62,2	Important	33	73,3
Negative	17	37,8	Medium	4	8,9
			Unimportant	8	17,8
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

iii) After the conclusion of procurement proceedings, except for some cases, making turnkey lump-sum price contract is mandatory. However, in cases when application projects can not be prepared, unit-price basis contracts can be made with the preliminary or final projects.

From the results, 34 of the contracting companies both perceive this change as positive and think that it is an important change.

TABLE 15: Attitude of firms towards the provision relating the types of contracts

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	34	75,6	Important	34	75,6
Negative	11	24,4	Medium	11	24,4
			Unimportant	0	0
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

iv) Lengthening of tender notice period when compared to Law no. 2886.

Not surprisingly, majority of contracting companies have a positive conception about lengthening of tender notice period and 20 of them view this change as an important provision of the Law.

TABLE 16: Attitude of firms towards the provision relating lengthening of tender notice period

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	20	44,4
Negative	4	8,9	Medium	19	42,2
			Unimportant	6	13,4
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

v) The repeal of receiving bids with the open offer method.

38 of the companies think that the repeal of receiving bids with the open offer method is a favorable change in the Law and more than half of them view it as an important provision.

TABLE 17: Attitude of firms towards the repeal of receiving bids with the open offer method

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	38	84,4	Important	25	55,6
Negative	7	15,6	Medium	13	28,8
			Unimportant	7	15,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

vi) Admission of the security letters of private finance institutions.

Attitude of 31 firms about this newness is positive and 23 of them think that it is an important provision introduced by the Law.

TABLE 18: Attitude of firms towards the admission of the security letters of private finance institutions

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	31	68,9	Important	23	51,1
Negative	14	31,1	Medium	15	33,3
			Unimportant	7	15,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

vii) In cases where the owner of economically the most advantageous bid would not sign the contract, being possible of awarding the contract to the tenderer giving the second economically most advantageous bid providing the acceptance of tender officer.

39 of contracting companies perceive this provision as positive and 26 of them view it as an important change.

TABLE 19: Attitude of firms towards the signing of contracts

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	39	86,7	Important	26	57,8
Negative	6	13,3	Medium	16	35,6
			Unimportant	3	6,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

viii) In tender process, the use of typical standard forms and administrative specification prepared by the Public Procurement Authority.

Almost all of the firms responding have a positive attitude towards this application and 26 of them think that it is an important provision introduced by the Law.

TABLE 20: Attitude of firms towards the use of typical standard forms and administrative specification prepared by the Public Procurement Authority

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	43	95,6	Important	26	57,8
Negative	2	4,4	Medium	13	28,9
			Unimportant	6	13,3
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

ix) For the tenders having an estimated costs more than threshold values, possibility of application of price advantage up to 15% in favor of domestic tenderers by contracting entities.

Again, nearly all of the companies perceive this arrangement as positive and 31 of them think that is an important provision.

TABLE 21: Attitude of firms towards the application of price advantage

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	44	97,8	Important	31	68,9
Negative	1	2,2	Medium	10	22,2
			Unimportant	4	8,9
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

x) Giving place to consultancy service procurement in Law no: 4734.

Out of 45 companies, 44 of them have a positive conception about this provision and almost half of them view this change as an important change.

TABLE 22: Attitude of firms towards the inclusion of consultancy service procurement

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	44	97,8	Important	22	48,9
Negative	1	2,2	Medium	20	44,4
			Unimportant	3	6,7
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xi) The foundation of Public Procurement Authority which has an autonomous statue and is responsible for the regulation of tender process, answering complaints and settling the disputes relating to tender process.

As it can be seen from the table, majority of the companies have a positive attitude towards the foundation of Public Procurement Authority and 30 of them attach importance to this provision.

TABLE 23: Attitude of firms towards the Public Procurement Authority

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	30	66,7
Negative	4	8,9	Medium	10	22,2
			Unimportant	5	11,1
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xii)** Limitation of work increases (Turnkey lump-sum basis contracts = 10%, Unit price basis contracts = 20%).

More than half of participant companies perceive the limitation of work increases as favorable and 80% of them think that it is an important provision of the Law.

TABLE 24: Attitude of firms towards the limitation of work increases

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	29	64,4	Important	36	80,0
Negative	16	35,6	Medium	6	13,3
			Unimportant	3	6,7
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xiii)** The repeal of force account method tender procedure.

75% of the contracting companies have a positive attitude towards the repeal of force account method tender procedure, which is moreover viewed as an important change in the Law by 25 participant companies.

TABLE 25: Attitude of firms towards the repeal of force account tender procedure

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	34	75,6	Important	25	55,6
Negative	11	24,4	Medium	15	33,3
			Unimportant	5	11,1
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xiv) Having the chance of participation to tenders by forming not only work partnership but also consortium for tenderers.

About 87% of firms perceive it as positive and 24 of them attach importance to this provision introduced by the Law.

TABLE 26: Attitude of firms towards consortiums

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	39	86,7	Important	24	53,3
Negative	6	13,3	Medium	16	35,6
			Unimportant	5	11,1
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xv) In order to be able to open a tender, it is mandatory that the appropriation and its programming be completed.

As it is shown in the table, out of 45 companies, 43 of them perceive this obligation of the Law as both favorable and important.

TABLE 27: Attitude of firms towards the provision regarding the programming of appropriation

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	43	95,6	Important	43	95,6
Negative	2	4,4	Medium	1	2,2
			Unimportant	1	2,2
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xvi) It is mandatory that at least 10% of the appropriation mentioned above be ready for the first year.

According to the results, 40 firms have a positive conception about this obligation introduced by the Law and 80% of them think that it is an important provision.

TABLE 28: Attitude of firms towards the adjustment of appropriation

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	40	88,9	Important	36	80,0
Negative	5	11,1	Medium	6	13,3
			Unimportant	3	6,7
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xvii) In order to be able to open a tender, it is mandatory that the completion of ownership, expropriation and if required the development transactions of the land be done.

Again, almost all of the companies perceive this obligation of the Law as positive and important.

TABLE 29: Attitude of firms towards applications to be completed in order to open a tender

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	42	93,3	Important	42	93,3
Negative	3	6,7	Medium	2	4,5
			Unimportant	1	2,2
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xviii)** The repeal of contractorship licenses and the use of work experience certificates which are not used by anybody except for the owner of it, not hired to anybody else, not sold and transferred for the evaluation of prequalification.

As regards the repeal of contractorship licenses and the use of work experience certificates, it is seen from the results that 41 contracting companies have a positive attitude to this change and about 85% of them view it as an important provision.

TABLE 30: Attitude of firms towards the repeal of contractorship license and the use of work experience certificates

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	38	84,5
Negative	4	8,9	Medium	6	13,3
			Unimportant	1	2,2
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xix)** The request of key technical staff criteria among the prequalification documents in the New Procurement Law.

As it can be seen from the table, 39 contracting companies perceive the request of key technical staff criteria as positive and 60% of the participants think that it is an important provision of the Law.

TABLE 31: Attitude of firms towards key technical staff criteria

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	39	86,7	Important	27	60,0
Negative	6	13,3	Medium	11	24,4
			Unimportant	7	15,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xx) The increase of responsibility period of contractors in continuous succession from 5 to 15 years starting from the date of final acceptance.

More than half of the companies responding to questionnaire have a negative conception about this provision and 33 of them viewed it as an important provision.

TABLE 32: Attitude of firms towards the increase in responsibility period of contractors

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	21	46,7	Important	33	73,3
Negative	24	53,3	Medium	8	17,8
			Unimportant	4	8,9
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xxi) The publication of tender notices in Public Procurement Bulletin instead of the Official Gazette.

Out of 45 companies, 41 of them have a positive attitude towards the publication of tender notices in Public Procurement Bulletin instead of the Official Gazette and nearly half of them think that it is an important issue.

TABLE 33: Attitude of firms towards the publication of tender notices in Public Procurement Bulletin instead of the Official Gazette

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	22	48,9
Negative	4	8,9	Medium	11	24,4
			Unimportant	12	26,7
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxii)** The formation of tender commission with odd number and at least 5 members and not being permitted that the tender officer be a member of tender commission.

Almost all of the participant companies view this provision as favorable and about half of them attach importance to it.

TABLE 34: Attitude of firms towards the formation of tender commission

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	44	97,8	Important	23	51,1
Negative	1	2,2	Medium	13	28,9
			Unimportant	9	20
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxiii)** The use of wholesale property price index published by the Institution of State Statistics for updating the monetary value of work experience certificates and the calculation of price differences of monthly payments instead of license coefficients.

According to the table showing the results, 37 contracting companies perceive this new application as positive and 65% of them think that it is important.

TABLE 35: Attitude of firms towards the use of wholesale property price index

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	37	82,2	Important	29	64,4
Negative	8	17,8	Medium	9	20,0
			Unimportant	7	15,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxiv)** Giving place to the contract process and related rules for contracts in another law named as The Law on Public Procurement Contracts other than Procurement Law (4734), which was a part of The Ex-procurement Law (2886).

Out of 45 companies, 41 of them have a positive conception about this newness and more than half of them think that it is not very important.

TABLE 36: Attitude of firms towards The Law on Public Procurement Contracts

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	21	46,7
Negative	4	8,9	Medium	18	40,0
			Unimportant	6	13,3
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxv)** In the New Procurement Law for some exceptional cases, procurement being possible without advertising, requiring tender performance bonds and establishing a tender commission by means of direct procurement method.

According to the table, more than half of the companies responding to the questionnaire perceive direct procurement method as negative and 73% of them state that it is important.

TABLE 37: Attitude of firms towards the direct procurement method

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	21	46,7	Important	33	73,3
Negative	24	53,3	Medium	5	11,1
			Unimportant	7	15,6
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xxvi) Preparation of two general specifications for each of construction works and service works, and the repeal of the General Specifications for Public Works.

Out of 45 contracting companies, 43 of them have a positive attitude towards this change and about half of them view it as an important change introduced.

TABLE 38: Attitude of firms towards the repeal of the General Specifications for Public Works

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	43	95,6	Important	24	53,3
Negative	2	4,4	Medium	15	33,3
			Unimportant	6	13,4
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xxvii) For the architects and engineers which are real persons and have not participated in management and control tasks in construction works before, 87 billion Turkish Liras for each year passing after their graduation is taken into account as work experience in the assessment of the professional and technical qualification.

Nearly all of the companies participating in survey perceive this new application as positive and 73% of them think that it is an important application.

TABLE 39: Attitude of firms towards the evaluation of professional experience for qualification

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	42	46,7	Important	33	73,3
Negative	3	53,3	Medium	8	17,8
			Unimportant	4	8,9
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxviii)** The work monitoring and work management certificates being possible to be given to only architects and engineers working on the related tasks conforming to their educations.

According to the table, 41 firms have a positive conception about this new provision and approximately 87% of them view it as an important provision of the Law.

TABLE 40: Attitude of firms towards the work monitoring and work management certificates

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	39	86,7
Negative	4	8,9	Medium	5	11,1
			Unimportant	1	2,2
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxix)** The contracting entities being free of canceling tenders.

From the table, it is seen that about 69% of the participant companies perceive the freedom of contracting entities to cancel tenders and out of 45 companies, 29 of them think that it is important.

TABLE 41: Attitude of firms towards the canceling of tenders by contracting entities

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	14	31,1	Important	29	64,5
Negative	31	68,9	Medium	10	22,2
			Unimportant	6	13,3
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xxx) The examination of abnormally low tenders by the contracting entities and after this examination, the refusal of abnormally low tenders unless the explanations of tenderers about their bids satisfy the tender commission.

In accordance with the table, attitude of 41 firms about the examination of abnormally low tenders is positive and again 91% of the firms attach importance to this new application of the Law.

TABLE 42: Attitude of firms towards the examination of abnormally low tenders

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	41	91,1	Important	41	91,1
Negative	4	8,9	Medium	4	8,9
			Unimportant	0	0
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

xxxi) In tender process, possibility of furnishing missing information in the documents which do not change the essence of bid and are not related with tenders and tender securities, by the contracting entities.

According to the results, conception of 37 firms about furnishing missing information in tender documents is positive and 78% of them view it as an important application.

TABLE 43: Attitude of firms towards furnishing missing information in tender documents

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	37	82,2	Important	35	77,8
Negative	8	17,8	Medium	9	20,0
			Unimportant	1	2,2
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**xxxii)** In 4734, making clear the judgment of prohibition from participation to tenders and the period of prohibition by determining prohibited acts and conducts.

All of the companies responding perceive this provision as positive and about 85% of them think that it is an important provision introduced by the Law.

TABLE 44: Attitude of firms towards the provision regarding prohibition from participation to tenders

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>	<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Positive	45	100	Important	38	84,5
Negative	0	0	Medium	5	11,1
			Unimportant	2	4,4
<b>Total</b>	<b>45</b>	<b>100</b>	<b>Total</b>	<b>45</b>	<b>100</b>

**Question 11:** Have you ever carried out construction works in the countries which are members of European Union?

As it can be seen from the results, only 5 companies have carried out construction works in EU members and others have not.

The conclusion derived, suggests that, Turkish contracting companies are in great difficulties regarding EU operations, business engagement and entering construction market.

TABLE 45: Number of firms having carried out construction works in EU

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Yes	5	11,1
No	40	88,9
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 12:** If your answer to question 11 is yes, which countries?

From the results, it can be concluded that, majority of companies carried out construction works in Germany. Ireland and Portugal pursue Germany in this respect.

TABLE 46: EU members where Turkish contractors performed construction works

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Austria	0	0
Belgium	0	0
Denmark	0	0
Finland	0	0
France	0	0
Germany	3	50
Ireland	2	33,3
England	0	0
Italy	0	0
Portugal	1	16,7
Spain	0	0
Sweden	0	0
Norway	0	0
<b>Total</b>	<b>6</b>	<b>100</b>

**Question 13:** Have you ever entered public procurement tenders in the members of EU?

Out of 45 companies, only 8 companies entered tenders in the member countries of EU, the remaining 37 companies did not.

It can be concluded from this result that Turkish contracting companies confronted with many difficulties in entering EU construction market.

TABLE 47: Number of firms having entered public procurement tenders in EU

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
Yes	8	17,8
No	37	82,2
<b>Total</b>	<b>45</b>	<b>100</b>

**Question 14:** If your answer to question 13 is yes, what is your opinion about the related law EC93/37 and the New Turkish Public Procurement Law (4734)?

From the answers to the question, it is understood that majority of the companies think that when Turkish Procurement Law is compared with the related law in EU, there are both similar and different application regarding tender process and its proceedings.

TABLE 48: Opinion of firms about EC93/37 and the Law number: 4734

<u>Alternative</u>	<u>Frequency</u>	<u>Percent (%)</u>
There are many similarities between them	1	12,5
It is very different from Turkish Procurement Law	2	25
There are both similar and different application	5	62,5
<b>Total</b>	<b>8</b>	<b>100</b>

**Question 15:** From your point of view, if there are some subjects which should be added, repealed or changed in the New Turkish Procurement Law, please state briefly?

There are lots of different criticism to the New Procurement Law. Some of them are given below.

a) Most of the companies do not believe that the examination of abnormally low tenders can be done properly and frankly due to one of the basic principles of the Law “Economically the most advantageous bid is the lowest bid”. Moreover, they think that contracting entities can not venture to put the abnormally low bids out of assessment for the fear that they would cause the loss of public benefit.

Some of them argue that although the owners of abnormally low tenders are required to explain their tenders, if they are not pleased with the bids they have given, they do not respond the explanation request of contracting entity and slip out without losing their tender securities.

Moreover, for the determination abnormally low tenders, a fix ratio should be determined. For example the bids lower than 30% of the estimated cost should be put out of evaluation.

b) They think that contracting entities lack in well educated and informed staff for tender process.

c) Some of them think that 100% of the work monitoring certificates should be evaluated as work experience in the qualification stage instead of 20% of them.

d) Most of the companies think that the limitation of work increases and the repeal of contractorship licenses are very affirmative changes in the Law.

e) Direct procurement method is thought to be susceptible to misuse and distortion.

f) Some of them think that a grading system, which includes not only the monetary proposal but also work experience, technical and economical capacity of tenderers, should be formed and used in the qualification stage like in 2886 to determine the most advantageous bid.

g) The amount of estimated cost which should be kept secret, can be learnt by the contractors having proximity to contracting entities, which cause unfair competition.

h) Some of them complaint that the contracting entities include all typical standard forms in tender documents although some of them need not be included due to irrelevancy to the tender procedure, which causes confusion and misunderstanding.

i) Some of them argue that forming consortiums and entering tenders as consortiums are not possible in that almost in all tender notices there is an article saying that “Consortiums can not bid for this construction work.”.

- j) As regards key technical personnel, some companies have, the start of Social Security Premiums of key technical personnel, done a week even a day before the date of tender, which is contrary to the fundamental aim of the Law. A period like at least 4-6 months should be required for the start of payment of Social Security Premium before the date of tender. Furthermore, How many key personnel will be required should be determined by the related regulations not by the contracting entities.
- k) Some of the companies responding to survey are against the article of the Law about the furnishing of missing documents and information in tender file. Because they think that a bid is prepared once and it should be complete and free from faults. If there is incompleteness, it is the mistake of the one who has prepared the bid.
- l) During the calculation of estimated cost, they think that it would be more suitable to use price values obtained from market researches instead of the unit prices published by some public institutions.
- m) Some of them claim that the estimated cost should not be kept secret.
- n) Some of them complaint that the projects relevant to the works to be awarded are not ready in spite of the publication of tender notice.
- o) As regards returning of tender securities, they think that the securities should be released at most for 15 days beginning from the date of tender due to the costs paid especially for the security letter to the banks. Moreover they complain about the tender validity period and think that it should be determined by the Law, not by the contracting entities for the same reason mentioned above.
- p) Some of them think that the New Procurement Law attaches importance to only economy of the works by ignoring the importance of quality, speed and technology using in construction sector.
- q) Some of them argue that the appropriation of the works for the first year should be greater than 10% of the total estimated cost.
- r) Some of them criticize the Public Procurement Authority due to its stringent auditing on the procurement proceedings. Some propose that the PPA should be more autonomous by implying the political effect on it.

- s) Some of them complain about the exclusion of some public association working on water, energy and telecommunication fields from the scope of the New Procurement Law, which is very disturbing and dangerous for the competitive environment.
- t) As regards the work experience certificates, some of them think that the 15-year period mentioned in the Law for the validity of work experience certificates should be increased to at least 25 years.
- u) The definition of similar works should be made in a more extensive way, because at this moment, a company, having constructed a dam before, can not participate in the tender of an irrigation canal construction work due to the narrow definition of similar work.

### **4.3 General Findings**

As far as construction sector is concerned, the subjects numbered below are the main parts that the Public Procurement Law particularly deficiencies according to the results of the survey. They are respectively;

- evaluation of abnormally low tenders,
- missing documents that can be completed during the evaluation of tenders,
- arrangements related to similar work experience certificates,
- evaluation of work experience certificates in the case of joint ventures,
- documents related to the organizational structure and technical staff of tenderers,
- responsibility period of contractors and sub-contractors.

#### **4.3.1 Evaluation of abnormally tenders**

For the evaluation of abnormally low tenders, the criteria which is the assessment of the estimated cost with the tenders given by the tenderers should be realized. In other words, estimated cost should be compared with the tenders for the assessment of abnormally low tenders. However, there are some factors that cause errors in this assessment way. According to the related regulation for the work's tenders, the estimated cost can be calculated by using;

- building approximate costs suitable for the characteristic of the work, current values and unit prices, which are determined by Public Administrations,
- prices determined by professional organizations, universities or similar establishments,
- building costs obtained from experienced persons and establishments working as contractors and sub-contractors,
- price establishing shored to the market research of administrations.

At first, it is obviously seen that estimated cost which is calculated by market research is very different from the one calculated by using the unit prices determined by some public institutions every year [7].

Secondly, if the subject is examined from the tenderers' point of view, there are project deficiencies that prevent tenderers from determining a right bid value for turn key lump-sum price tenders [7].

Consequently, since it is a reality that both the estimated cost and the tender are risky and far away from real prices, administrations run into problems in the assessment of abnormally low tenders.

From the light of these arguments above, assumptions for the limit of abnormally low tender should begin from the point of tenders without profit. For the solution, price analysis of tenderers should be required as annexes to their tenders by the administrations [7]. The utility of price analysis can be summarized in such a way that;

- the list of current prices of workmanship and material should firstly be determined. The current price of workmanship can not be below minimum wages,
- current price of material can not be below the current prices of producer establishments.

For example tenderers can not write down a bid less than 555.000.000 TL/m<sup>3</sup> for the first class pine timber suitable for TS 1264 and TS1265. Otherwise, it is obvious that instead of the first class pine timber, the second or third class material will be used. This situation is also valid for the materials like cement and iron bars.

It is certain that tenderers who do not comply with the ones mentioned above and put current price less than the known current prices, are not sincere.

For unit price basis works, tender interrogation should be conducted for both total price and each of the unit prices constituting total price by examining the price analysis. For lump-sum basis works, tender interrogation should be realized for each work group constituting the whole [7].

Finally, tenderers who are determined as the owner of tender which are insincere and irresponsible by the end of the tender interrogation, cause misguiding of administration and disorder by false or wrong declaration. Consequently, these tenderers should be out of evaluation and punished according to the pertinent rules.

#### **4.3.2 Missing documents that can be furnished during the evaluation of tenders**

The distress resulting from the subject about the missing documents that can be furnished is known by everybody dealing with the procurement process regardless of whether they are tenderers or officers of contracting entity.

All tenderers should be prompt enough when preparing their bids and the related documents required by administrations for qualification process. Moreover, prompt tenderers should be protected from the unfair competition of tenderers desiring to take advantage of sincere provision of the Law about the furnishing of missing documents [9].

To achieve this, the expressions used for defining the documents that can be furnished in the Law, such as “not being the characteristic of changing the essence of tender” and “unimportant information absence” should be interpreted in a narrow manner [7]. Furthermore, these documents that can be furnished should be defined in a concrete way, which supplies application easiness for administrations.

#### **4.3.3 Arrangements related to similar work experience certificates**

The Public Procurement Law (4734) includes very determining arrangements about criteria required from tenderers. The basic criterion used for the determination of professional and technical qualification is the similar work experience certificate, which shows the work capacity and capability of tenderers in similar works.

The key word that should be focused on is the “similar”, to which the Law make an explanation as: the works which show similarities with the subject matter of work or parts of the work regarding quality and size, which require the same or similar construction technique or method and which have similar properties as regards foundation, machinery and equipment with economical power, education and organizational necessities.

It must not be forgotten that both monetary size and physical size should be taken into account while defining the similar works. Because, monetary criterions do not always reflect work experience exactly and sometimes, technical and physical criterions may outstrip monetary criterions [7].

The definition of similar work causes very serious problems for both administrations and tenderers. Sometimes, contrary to the explanation of it in the Law, wrong definitions of similar work that prevent competition, are encountered in lots of tender notices [9].

The problem can only be solved by doing the detailed classification of similar works. The last thing that should be stated about this subject is the importance of the detailed determination of the construction work done during the preparation of work experience certificates, as it is known that construction works can include a lot of different categories of expertise in it [7]. The detailing convenient for the classification of works will benefit the accession of real experience information.

#### **4.3.4 Evaluation of work experience certificates in the case of work partnerships**

According to the New Procurement Law, for work partnerships, while pilot partner should supply the whole of the minimum work experience amount by himself, each of other partners should provide 10% of the minimum work experience amount.

As it is seen, this provision creates injustice from work partnership’s point of view. Due to the fact that pilot partner is obliged to provide the whole of the required work experience, this kind of work partnerships can barely be formed.

If it is calculated, the work partnerships’ total work experience is clearly greater that the minimum work experience amount required from individual

tenderers by administrations. For example, for a work partnership having four partners, the pilot partner has to supply at least the whole (100%), the other three partners have to supply at least 10% each, summing up to 130% of what is required from individual tenderers for qualification.

In our country, there are lots of contractors the number of which is more than the total number of contractors in USA and EU, which is one of the main problem in Turkish construction sector [7]. In order to solve this problem, what should be done is to form strong construction sector establishments together with economical and technological power in Turkey and abroad by means of work partnerships [7].

Therefore, in order to encourage the formation of work partnerships, the Procurement Law or its secondary legislation should be amended in such a way that pilot partner is obliged to supply 70% of minimum work experience required and the remaining part should be met by the other partners [7].

#### **4.3.5 Documents related to the organizational structure and qualification of technical staff of tenderers**

The New Procurement Law and its secondary legislation give opportunity and warrant to administrations to require documents related to the organizational structure and qualification of technical staff of tenderers.

Unfortunately, it has been heard recently that different uses of this warrant result in problems. For example, for a construction work tender whose estimated cost is 6 trillion Turkish Liras, the qualification criterion for technical staff is to employ a civil engineer, a mechanical engineer, an electrical engineer and an architecture, whereas for an other construction work tender whose estimated cost is 48 trillion Turkish Liras, only an oath for technical staff can be seen satisfactory.

Therefore, the Public Procurement Authority should guide the contracting entities by determining the general principles when requiring the documents related to the organizational structure and qualification of technical staff of tenderers and should limit the number of staff which are already working, to a number something reasonable with estimated cost, physical size and importance of construction work [7].

#### **4.3.6 Responsibility period of contractors and subcontractors**

Contractors and sub-contractors are responsible for the damage and loss because of the fact that construction work has not been done by complying with rules of art and science not only, from the date of commencement of construction to the date of final acceptance, but also for a period of fifteen years counting from the date of final acceptance successively (severally) according to the New Procurement Law and its secondary legislations. No sub-contractor takes on such a big responsibility period. Because it is not fair that a sub-contractor be responsible for the whole of the construction for 15 years with contractor.

A 15 year period is really such a long duration for responsibility that in our country, the period for saving documents is not more than 10 years practically. Thus, it will be impossible for the assertion, proving and defense of demands in the future [7]. The reasonable responsibility period should generally be 5 years, as in the case of the Law of Debts, and for the cases where contractor does not carry out what he has promised to do deliberately and with great fault, this responsibility period can be increased to 10 years at most.

## **CHAPTER 5**

### **CONCLUSION**

Public Procurement is a very important instrument through which governments meet their requirements so as to sustain their own operations and to supply various public facilities by awarding contracts in accordance with a predetermined set of rules defining qualification, evaluation and conclusion criteria, within a time schedule.

As regards economical importance, it comprises one of the biggest part of governments' expenses in the budget. Since it necessitates the exchange of money obtained from the taxes, procurement process is, in general, subject of controls carried out by statutory bodies and rules.

Moreover, any change in the legal framework of public procurement affects every person related with this instrument, such as suppliers, service providers, contracting companies and administrative entities.

The New Public Procurement Law together with its secondary legislation have substantially changed the legal framework of procurement regime and affected those related with this instrument. This change in the Law was explained in the chapter 2 in detail by making a comparison between the State Procurement Law and the Public Procurement Law. From this comparison, it is seen that by the introduction of the Public Procurement Law, the provisions of the State Procurement Law related with

- application principles in which scope and exceptions of the Law were redefined,
- rules on participation in which threshold values, procurement announcement rules and time limits were redefined, and some applications related with estimated cost, rules on qualification and documents required for qualification were changed,

- procurement procedures and applications in which applicable procurement procedures and methods were defined again, and some procedures like open tender procedure and force account procedure which had been in force were repealed,
- submission of tenders in which the topics like addendum, tender security and letter of guarantee were dealt with,
- evaluation of tenders in which time schedule and rules starting from the opening of the tenders to awarding of the contract were redefined, and the evaluation of abnormally low tenders was introduced,
- prohibition and criminal liability in which prohibition from participation to tenders, penal liabilities of tenderers and officers were redefined,

Furthermore,

- rules on procurement of consulting services was included,
- the establishment of Public Procurement Authority was introduced,
- the stage of demand for review and review of complaints were included, by the Public Procurement Law brought into force in January 2003.

The most remarkable characteristic of this new Procurement Law is that it mainly attaches importance to the stage of preparation for tenders and makes the contracting companies study the tender documents and projects of the work to be awarded very promptly. Moreover, it systematically adjusts the tender process by means of a lot of minutes and standard evaluation forms to be filled by tender commissions within predetermined time limits.

The second part of this thesis study focused on the legal framework of the council directive on the procurements of construction works, the main intention of which is to eliminate non-tariff barriers arising from discriminatory and preferential purchase patterns. The directive primarily contain the following:

- EC-wide advertising of public contracts above threshold values determined;
- prohibition of technical specifications capable of discriminating against potential bidders;
- and the application of objective criteria of participation in tendering procedures together with an unbiased awarding criteria.

It can simply inferred that the council directive on the procurements of

construction works have both similar and different provisions when compared with Turkish Public Procurement Law. The similar provisions of it can be enumerated as;

- the applicable procurement procedures, open, restricted and negotiated procedures,
- the definition of threshold values,
- the conclusion of tender proceedings,
- the determination of technical specifications,
- the common rules on participation to tenders,
- the documents required from tenderers for qualification,
- and the evaluation of abnormally low tenders.

Finally, Within the thesis study, a survey was conducted to determine the conception of Turkish construction sector about the introduction of the Public Procurement Law by means of a questionnaire. From the results obtained, it can simply be inferred that majority of the contracting companies have a positive attitude towards the Public Procurement Law although some provisions such as;

- evaluation of abnormally low tenders,
- missing documents that can be completed during the evaluation of tenders,
- arrangements related to similar work experience certificates,
- evaluation of work experience certificates in the case of joint ventures,
- documents related to the organizational structure and technical staff of tenderers,
- responsibility period of contractors and sub-contractors,

do not satisfy their expectations.

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## APPENDICES

### APPENDIX A

#### SAMPLE QUESTIONNAIRE (IN ENGLISH)

(While answering the questions from (1) to (9), please circle the alternative which fits you best.)

1. How many years has your company been in construction sector?
  - a) 1-5 years
  - b) 6-10 years
  - c) 11-20 years
  - d) More than 20 years
  
2. What is the total number of the technical staff in your company?
  - a) Less than 5
  - b) Between 5 and 15
  - c) Between 15 and 50
  - d) More than 50
  
3. What kind of a commercial partnership is yours?
  - a) Ordinary partnership
  - b) Collective partnership
  - c) Limited company
  - d) Incorporated company
  - e) Consortium
  
4. Which one/ones of the below is/are within your company's activity area?
  - a) Construction of power plants and transmission lines
  - b) Factories and industrial buildings
  - c) Construction of natural gas, petroleum and telephone lines
  - d) Construction of port, quay
  - e) Dam construction for irrigation purpose, construction of water purification, store and transmission establishments
  - f) Construction of public housing scheme and service buildings
  - g) Road , motorway, tunnel and viaduct constructions
  - h) Airport, subway constructions

- i) Consultancy service
- j) Others .....

5. What is the yearly average amount of your company's turnover?

- a) Less than 1 million dollars
- b) 1-5 million dollars
- c) 5-20 million dollars
- d) 20-50 million dollars
- e) 50-100 million dollars
- f) More than 100 million dollars

6. Do you participate in tenders pertinent to construction works?

- a) Yes      b) No

7. Is there a tender preparation department working on specifically tenders in your company? If so, how many persons constitute this department?

- a) Yes .....person      b) No

8. Did you have a chance of studying the latest shape of the New PPL (4734)?

- a) Yes      b) No

9. If your answer to the question 8 is yes, what is your general opinion about the New Procurement Law?

- a) Positive.
- b) When compared with the Ex-procurement Law, positive.
- c) Negative, I prefer the Ex-procurement Law.
- d) If insufficient parts of the Ex-procurement Law was corrected, it would be better.

10. Please, according to their importance, enumerate some applications and changes which were enacted with the New Procurement Law and are given below. Moreover, please state your opinion about them as positive or negative.

	Positive/Negative	Important	_____→ Unimportant		
i. Determination of threshold values in the 8 <sup>th</sup> article of the New Procurement Law	*    *	1	2	3	
ii. Keeping secret the estimated cost of the work to be awarded	*    *	1	2	3	

	Positive/Negative		Important	Unimportant	
	*	*	1	2	3
iii. After the conclusion of procurement proceedings, except for some cases, making turnkey lump-sum price contract is mandatory. However, in cases when application projects can not be prepared, unit-price basis contracts can be made with the preliminary or final projects	*	*	1	2	3
iv. Lengthening of tender notice period when compared to the Ex-procurement Law	*	*	1	2	3
v. The repeal of receiving bids with the open offer method	*	*	1	2	3
vi. Admission of security letters of private finance institutions	*	*	1	2	3
vii. In cases where the owner of economically the most advantageous bid would not sign the contract, being possible of awarding the contract to the tenderer giving the second economically most advantageous bid providing the acceptance of tender officer.	*	*	1	2	3
viii. In tender process, the use of typical standard forms and administrative specifications prepared by the Public Procurement Authority	*	*	1	2	3
ix. For the tenders having an estimated costs more than threshold values, possibility of application of price advantage up to 15% to the domestic tenderers by the contracting entities	*	*	1	2	3
x. Giving place to consultancy service procurement in the New Procurement Law	*	*	1	2	3

	Positive/Negative		Important	Unimportant	
	*	*	1	2	3
xi. The foundation of Public Procurement Authority which has an autonomous statue and is responsible for the regulation of tender process, answering complaints and settling the disputes relating to tender process	*	*	1	2	3
xii. Limitation of work increases (Turnkey lump-sum basis contracts=10%, Unit price basis contracts= 20%)	*	*	1	2	3
xiii. The repeal of force account method tender procedure	*	*	1	2	3
xiv. Having the chance of participation to tenders by forming not only work partnership but also consortium for tenderers	*	*	1	2	3
xv. In order to be able to open a tender, it is mandatory that the appropriation and its programming be completed	*	*	1	2	3
xvi. It is mandatory that at least 10% of the appropriation mentioned above be ready for the first year	*	*	1	2	3
xvii. In order to be able to open a tender, it is mandatory that the completion of ownership, expropriation and if required the development transactions of the land be done	*	*	1	2	3
xviii. The repeal of contractorship licences and the use of work experience certificates which are not used by anybody except for the owner of it, not hired to anybody else, not sold and transferred, for the evaluation of prequalification	*	*	1	2	3

	Positive/Negative	Important	Unimportant		
			1	2	3
xix. The request of key technical staff criteria among the prequalification documents in the New Procurement Law.	*	*	1	2	3
xx. The increase of responsibility period of contractors in continuous succession from 5 to 15 years starting from the date of acceptance	*	*	1	2	3
xxi. The publication of tender notices in Public Procurement Bulletin instead of the Official Gazette	*	*	1	2	3
xxii. The formation of tender commission with odd number and at least 5 members and being not permitted that the tender officer be a member of tender commission	*	*	1	2	3
xxiii. The use of the wholesale property price index published by the State Statistics Institution for updating the monetary value of work experience certificates and the calculation of price differences of monthly payments instead of license coefficients	*	*	1	2	3
xxiv. Giving place to the contract process and related rules for contracts in another law named as The Law on Public Procurement Contracts other than Procurement Law (4734), which was a part of The Ex-procurement Law (2886)	*	*	1	2	3
xxv. In the New Procurement Law for some exceptional cases, procurement being possible without advertising, requiring tender performance bonds and establishing a tender commission by means of direct procurement method.	*	*	1	2	3

	Positive/Negative	Important	Unimportant		
			1	2	3
xxvi. Preparation of two general specifications for each of construction works and service works and the repeal of the General Specifications for Public Works.	*	*	1	2	3
xxvii. For the architects and engineers which are real persons and have not participated in management and control tasks in construction works before, an amount of 87 billion Turkish Liras for each year passing after their graduation is taken into account as work experience in the assessment of the professional and technical qualification	*	*	1	2	3
xxviii. The work monitoring and work management certificates being possible to be given to only architects and engineers working on the related tasks conforming to their educations	*	*	1	2	3
xxix. The contracting entities being free of canceling tenders	*	*	1	2	3
xxx. The examination of abnormally low tenders by the contracting entities and after this examination, the refusal of abnormally low tenders unless the explanations of tenderers about their bids satisfy the tender commission	*	*	1	2	3
xxxi. In tender process, possibility of furnishing missing information in the documents which do not change the essence of bid and are not related with tenders and tender securities by the contracting entities	*	*	1	2	3
xxxii. In 4734, making clear the judgment of prohibition from participation to tenders and the period of this prohibition by determining the prohibited acts and conducts	*	*	1	2	3

(While answering the questions from (11) to (14), please circle the alternative which fits you best)

11. Have you ever carried out construction works in countries which are members of European Union?

- a) Yes      b) No

12. If your answer to question (11) is yes, which countries?

- a) Austria      b) Belgium      c) Denmark      d) Finland      e) France
- f) Germany      g) Ireland      h) England      i) Italy      i) Portugal
- k) Spain      l) Sweden      m) Norway

13. Have you ever participated public procurement tenders in the members of European Union?

- a) Yes
- b) No

14. If your answer to question (13) is yes, what is your opinion about the related law EC93/37 and the New Turkish Public Procurement Law (4734)?

- a) There are many similarities between them
- b) It is very different from Turkish Procurement Law
- c) There are both similar and different application

15. From your point of view, if there are some subjects which should be added, repealed or changed in Turkish Procurement Law, please state briefly? (Write down briefly the subjects you want to state to the place given below.)

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## APPENDIX B

### SAMPLE QUESTIONNAIRE (IN TURKISH)

(1-9 numaralı soruları cevaplariken size uygun olan seçeneği daire içine alınız.)

1. Şirketiniz kaç yıldır inşaat sektöründe faaliyet göstermektedir?
  - a) 1-5 yıl
  - b) 6-10 yıl
  - c) 11-20 yıl
  - d) 20 yıldan fazla
2. Şirketinizde çalışan toplam teknik personel sayısı nedir?
  - a) 5'den az
  - b) 5-15 arası
  - c) 15-50 arası
  - d) 50'den fazla
3. Ticari ortaklığın türü nedir?
  - a) Adi ortaklık
  - b) Kolektif ortaklık
  - c) Limited şirket
  - d) Anonim şirket
  - e) Konsorsiyum
4. Aşağıdakilerden hangisi/hangileri firmanızın faaliyet alanına girmektedir?
  - a) Enerji santralleri ve iletim hatları yapımı
  - b) Fabrika ve endüstriyel yapılar
  - c) Doğalgaz, petrol boru hatları ve telefon hatları yapımı
  - d) Liman, rıhtım yapımı
  - e) Sulama amaçlı baraj, su arıtma, depolama ve iletim tesisleri yapımı
  - f) Toplu konut ve hizmet binaları yapımı
  - g) Karayolu, otoyol, tünel, viyadük yapımı,
  - h) Metro, havaalanı yapımı
  - i) Danışmanlık hizmetleri
  - j) Diğer .....

5. Firmanızın gerçekleştirdiği yıllık ortalama ciro miktarı nedir?

- a) 1 milyon dolardan az
- b) 1-5 milyon dolar arası
- c) 5-20 milyon dolar arası
- d) 20-50 milyon dolar arası
- e) 50-100 milyon dolar arası
- f) 100 milyon dolardan fazla

6. İnşaat işleriyle ilgili kamu ihalelerine katılıyor musunuz?

- a) Evet
- b) Hayır

7. Firmanızda özellikle kamu ihaleleri üzerine çalışan ayrı bir grup var mı? Eğer varsa kaç kişiden oluşmaktadır?

- a) Evet .....kişi
- b) Hayır

8. Yeni ihale kanununun (4734) son halini inceleme şansınız oldu mu?

- a) Evet
- b) Hayır

9. Eğer 8. soruya cevabınız evet ise, genel olarak yeni ihale kanunu ile ilgili düşünceniz nedir?

- a) Olumlu.
- b) Eski ihale kanunuyla karşılaştırınca olumlu.
- c) Olumsuz, eski ihale kanununu tercih ederim.
- d) Eski kanunun yetersiz kısımları düzeltilip revize edilse daha iyi olurdu.

10. Yeni ihale kanunu ile yürürlüğe giren aşağıdaki bazı yeni uygulama ve değişiklikleri önem derecelerine göre sıralayınız. Ayrıca lütfen hakkındaki düşüncenizi (olumlu veya olumsuz) belirtiniz.

	Olumlu/Olumsuz	Önemli	→	Önemsiz
i. Yeni ihale kanununun 8. maddesi ile Eşik Değerlerin belirlenmesi	* *	1	2	3
ii. İhale edilecek işin yaklaşık maliyetinin gizli tutulması	* *	1	2	3

	Olumlu/Olumsuz		Önemli → Önemsiz		
iii. İhalelerin sonucunda anahtar teslimi götürü bedel sözleşmenin bazı istisnalar dışında esas olması, ancak uygulama projesinin hazırlanmadığı durumda ön veya kesin proje üzerinden teklif birim fiyata esas sözleşme yapılması	*	*	1	2	3
iv. İhale ilanlarının sürelerinin eski uygulamaya göre uzatılması	*	*	1	2	3
v. İhalelerde açık teklif usulü ile teklif alınmasının kaldırılması	*	*	1	2	3
vi. Teminat olarak özel finans kuruluşlarının teminat mektuplarının da kabul edilmesi	*	*	1	2	3
vii. İhalelerde ekonomik açıdan en avantajlı teklif sahibinin sözleşmeyi imzalamadığı durumlarda ihalenin ekonomik açıdan en avantajlı ikinci teklif veren istekliye ihale yetkilisinin onayı ile yapılması	*	*	1	2	3
viii. İhale sürecinde Kamu İhale Kurumunun hazırladığı standart formların ve tip idari şartnamelerin kullanılması	*	*	1	2	3
ix. Eşik değerlerin üzerindeki ihalelerde yerli katılımcılara idare tarafından %15'e kadar fiyat avantajının sağlanabilmesi	*	*	1	2	3
x. Danışmanlık hizmet alımı ihalelerine 4734 sayılı kanunda ayrı bir yer verilmesi	*	*	1	2	3
xi. İhale sürecini düzenlemesi itirazın şikayetlerin iletilmesi ve çözülmesi için özerk bir statüye sahip olan Kamu İhale Kurumunun kurulması	*	*	1	2	3

	Olumlu/Olumsuz		Önemli → Önemsiz		
xii. Keşif artışlarının sınırlandırılması (Anah. Tes. Götürü bed. Söz..=%10)(Birim fiyat Söz..=%20)	*	*	1	2	3
xiii. Emanet usulü ihale şeklinin kaldırılması	*	*	1	2	3
xiv. İhalelere isteklilerin ortak girişim oluşturarak girebilecekleri gibi konsorsiyum oluşturarak katılabilmesi	*	*	1	2	3
xv. İhalelere çıkılabilmesi için söz konusu işin ödeneğinin çıkması ve yıllara göre programlanmasının zorunlu olması	*	*	1	2	3
xvi. Yukarıda söz edilen ödeneğin ilk yıl için harcanacak kısmının en az toplam ödeneğin %10'u olması zorunluluğu	*	*	1	2	3
xvii. İhaleye çıkılabilmesi için söz konusu işe ait mülkiyet, kamulaştırılma ve gerekli hallerde imar işlerinin tamamlamanın zorunlu olması	*	*	1	2	3
xviii. Müteahhitlik karnelerinin kaldırılması ve belge sahibi kişi veya tüzel kişilik dışında kullanılamayan, kiralanamayan satılamayan ve devredilemeyen iş deneyim belgelerinin yeterlilik değerlendirmesinde kullanılması	*	*	1	2	3
xix. Yeni ihale mevzuatında anahtar teknik personel kriterinin yeterlilik belgeleri arasında istenmesi	*	*	1	2	3
xx. Müteahhitlerin kesin kabul tarihinden sonra müteselsilen olan sorumluluğunun 5 yıldan 15 yıla çıkması	*	*	1	2	3

	Olumlu/Olumsuz		Önemli	→	Önemsiz
xxi. İhale ilanlarının Resmi Gazete yerine Kamu İhale Bülteninde yayınlanması	*	*	1		2 3
xxii. İhale komisyonlarının tek sayı ve en az 5 üyeden oluşması; ve ihaleyi yapan kurum veya kuruluşun en üst ita amirinin (ihale yetkilisinin) komisyonlara girememesi	*	*	1		2 3
xxiii. Yıllara sari işlerdeki fiyat farkı hesaplamalarında ve iş deneyim belgelerinin güncellenmesinde karne katsayılarının yerine TEFE'nin kullanılması	*	*	1		2 3
xxiv. İhale sonrası sözleşme süreci ile ilgili kısmın eski mevzuatta (2886) yer almasına karşın, yeni mevzuatta sözleşme süreci ile ilgili kısmın ayrı bir kanun (4735) Kamu İhale Sözleşmeleri Kanunu içinde yer alması	*	*	1		2 3
xxv. Yeni ihale kanunu ile bazı istisnai durumlarda ilan yapılmaksızın, teminat alınmaksızın ve ihale komisyonu kurulmaksızın Doğrudan Temin usulü ile ihtiyaçların temin edilebilmesi	*	*	1		2 3
xxvi. Yapım işleri ve hizmet işleri için ayrı iki genel şartnamenin hazırlanması, ve Bayındırlık İşleri Genel şartnamesinin yürürlükten kaldırılması	*	*	1		2 3
xxvii. Denetim ve yönetim görevinde bulunmayan mimar ve mühendis gerçek kişilerin ihalelere girebilmeleri için iş deneyimini tevsik amacıyla mezuniyet yılından itibaren her yıl için 87 milyarlık miktarın iş deneyim belgesi hükmünde mesleki ve teknik yeterlik değerlendirmesinde göz önüne alınması	*	*	1		2 3

	Olumlu/Olumsuz	Önemli →	Önemsiz
xxviii. İş deneyim belgelerinden olan iş denetim ve yönetim belgelerinin sadece mimar veya mühendis olan gerçek kişilere verilebilmesi	*	*	1 2 3
xxix. İdarelerin ihaleleri iptal etmekte serbest olması	*	*	1 2 3
xxx. Aşırı düşük tekliflerin teklif değerlendirme sürecinde idare tarafından sorgulanması ve idarenin yapılan sorgulama sonucunda istekli tarafından yapılan açıklamaları tatmin edici bulmadığı durumlarda bu tekliflerin değerlendirme dışı bırakılması	*	*	1 2 3
xxxi. İhalelerde teklifin esasını değiştirmeyecek (teklif mektubu ve geçici teminat hariç) bazı belgelerdeki bilgi eksikliklerinin idare tarafından tamamlattırılması	*	*	1 2 3
xxxii. 4734 sayılı kanunda yasak fiil ve davranışların belirtilerek buna bağlı olarak ihalelerden yasaklama kararlarının ve sürelerinin netleştirilmesi	*	*	1 2 3

(11-14 numaralı soruları cevaplarırken size uygun olan seçeneği daire içine alınız.)

11. Avrupa Birliği'ne üye ülkelerde inşaat işleri gerçekleştirdiniz mi?

a) Evet b) Hayır

12. Eğer 11. soruya cevabınız evet ise, hangi ülkelerde?

a) Avusturya b) Belçika c) Danimarka d) Finlandiya e) Fransa  
f) Almanya g) İrlanda h) İngiltere i) İtalya  
k) İspanya l) İsveç m) Norveç

13. Avrupa Birliği ülkelerinde daha önce hiç kamu ihalelerine katıldınız mı?

a) Evet  
b) Hayır

14. Eđer 13. soruya yanıtınız evet ise, ilgili ihale mevzuatı olan EC93/37 ile yeni Türk İhale Kanunu (4734) hakkındaki düşünceiniz nedir?

- a) Türk ihale kanunuyla bir çok yönden benzerlikleri var
- b) Türk ihale kanunundan çok farklı
- c) Benzer uygulamalarının yanında çok farklı uygulamalar da var.

15. 4734 sayılı yeni Kamu İhale Kanunu'nda sizce ilave edilmesi, çıkarılması veya değiştirilmesi gereken hususlar varsa, kısaca belirtebilir misiniz? (Boş bırakılan alana kısaca belirtmek istediğiniz hususları yazınız.)

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