

Can Gender-Responsive Public Procurement Approach be Incorporated into Public Procurement Law?

Kamu İhale Kanunu'na Cinsiyete Duyarlı Kamu Alımları Yaklaşımını Entegre Etmek Mümkün mü?

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Abstract

The basic function of public procurement is to supply the requirements of public institutions on the market. However, the social state idea and sustainable approach bring innovative opinion of public procurement. Considering gender-responsive needs in purchasing processes, creating equal conditions between women and men, assuming a supportive role in reducing existing economic inequalities methods are among the important steps taken at this point. Considering the Turkish public procurement legislation, it can be seen that no concrete steps have been taken on the issues. The aim of this article is to analyse the applicability of the gender-responsive public procurement approach within the framework of Turkish public procurement legislation. In this context, evaluations have been made to bring an innovative perspective to the legislation, based on the principle of equality in the Constitution and the practices considered exceptions to the principle of equality in the Public Procurement Law.

Keywords: Fiscal Law, Public Procurement, Public Procurement Law, Public Tender, Societal Gender Equality.

Öz

Kamu alımlarının klasik fonksiyonu, kamu kurumlarının ihtiyaçlarının piyasadan temin edilmesidir. Ancak sosyal devlet anlayışı ve sürdürülebilirlik yaklaşımları, kamu alımlarına yenilikçi bakış açıları kazandırmıştır. Satın alma süreçlerinde cinsiyete duyarlı ihtiyaçların göz önünde bulundurulması, kadın ve erkekler arasında eşit koşulların oluşturulması, mevcut ekonomik eşitsizliklerin azaltılmasına yönelik destekleyici rol üstlenilmesi ve sosyal açıdan sorumlu alım yöntemlerinin benimsenmesi bu noktada atılan önemli adımlar arasında yer almaktadır. Türk kamu alımları mevzuatına bakıldığında henüz bu konularla ilgili somut bir adımın atılmadığı görülmektedir. Bu çalışmanın amacı, Türk kamu alımları mevzuatı çerçevesinde cinsiyete duyarlı kamu alımları yaklaşımının uygulanabilirliğinin incelenmesidir. Bu kapsamda Anayasada yer alan eşitlik ilkesi ve Kamu İhale Kanunu içerisinde eşitlik ilkesinin istisnaları olarak değerlendirilen uygulamalardan hareketle mevzuata yenilikçi bir bakış açısı kazandırılmasına yönelik değerlendirmelerde bulunulmuştur.

Anahtar kelimeler: Kamu Alımları, Kamu İhale Kanunu, Kamu İhalesi, Mali Hukuk, Toplumsal Cinsiyet Eşitliği.

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Extended Abstract

Public procurement, which constitutes a significant share of public expenditures, is conceptualized as the procurement of goods, services, and works by public administrations from the market. The classical aim of the public procurement is to finalize the procurement process in the most cost-effective manner. The main factors considered in this context are price and quality. However, since the early 2000s, it has been seen that the functions assigned to public procurement have expanded. The reason behind this change is the sustainability approach, which is influential in many other disciplines. The sustainable public procurement approach is an innovative approach that takes a long-term perspective on the impacts of public procurement and integrates environmental and social factors into public procurement.

The concept of sustainability is generally known as one associated with the environment. However, the sustainability approach has a wide dimension, including economic and social dimensions. The fact that the concept was first used by environmental scientists and has been widely adopted by both the private and public sectors is among the main reasons why the connotation is centred on the environment. There is a similar situation in the reflection of sustainability approaches in public procurement. In this context, when it comes to sustainable public procurement, the first thing that comes to mind is public procurement that covers environmental sustainability. It is possible to clearly observe the importance attributed to environmentally sustainable public procurement in international directives, national procurement legislation, and the literature on the subject. However, recently, it has been observed that important steps have been taken to integrate social sustainability, one of the main pillars of the sustainability approach, into public procurement.

Socially sustainable public procurement refers to a public procurement process that aims to ensure the general welfare and equality of society in addition to price and quality. In this context, it includes an approach based on the inclusion of ethical concerns such as fundamental human rights, employment and labour conditions, local development, and fair competition in the public procurement process. One of the sub-components of socially responsible public procurement is gender-responsive public procurement. Gender equality means gender is not a determining factor in participation in social life, and equal rights apply to women and men. Although great progress has been made in this regard, it is still possible to see gender-based inequalities in many areas of life. Participation in economic activities is one of these areas.

The literature on the disadvantageous position of women is wide. Traces of gender inequality can also be seen in terms of participation in public procurement. The support mechanisms offered by governments at this point offer important opportunities to consider the needs of women in public procurement, to reduce inequalities in participation and competitiveness in public procurement, and to empower women suppliers. In providing these opportunities, not only a single support mechanism can be utilized but also a combination of different mechanisms linked to various stages of the procurement process can be preferred. Such support mechanisms may include the use of exemption procedures for gender-related procurement, the inclusion of issues related to gender inequalities in cases of exclusion, the request for documents demonstrating that gender equality has been achieved, the rewarding of parties that comply or commit to comply with gender equality, the monitoring of commitments to equality, and the imposition of sanctions in the event of a contrary situation. As these approaches to find a concrete response, a legal and regulatory framework needs to be established. Especially in the last two decades, it has been observed that many countries have included regulations to ensure gender equality in their national procurement legislation.

The primary source for public procurement in Türkiye is Public Procurement Law No. 4734. There is no mechanism to support gender-responsive procurement within the relevant law. Therefore, the current Law No. 4734 does not provide opportunities to integrate gender equality in public procurement. At this point, the aim of this study is to make suggestions for an innovative approach to Law No. 4734 from a gender equality perspective.

One of the most important obstacles to gender-responsive public procurement, including positive discrimination for women, is the hesitation about equality and competition. To remove this obstacle, it is necessary to make legal arrangements that will constitute an exception to these two principles (strengthened on social grounds). In this context, Article 5 of Law No. 4734 entitled “Basic Principles”, which expresses the principles to be followed in the tender process and serves as a guideline for objections regarding the process, needs to be re-evaluated. The principles directly related to the subject matter in the content of the relevant article are the principles of equal treatment and competition. Compliance with these two principals has great importance for the successful conclusion of the tender process. However, it is known that there are deviations from these two principles in various articles of the law for several socio-economic reasons. For example, it is possible to consider tender procedures that restrict participation and unannounced procurements as deviations from the principle of competition.

Other relevant examples are the price advantage applied to domestic goods and domestic bidders under Article 63 of this Law and public procurement for regional development and technological development regulated under Additional Article 9. Both regulations constitute exceptions to the principle of equal treatment and related competition. Therefore, it is possible to extend these exceptions, which are presented on socio-economic grounds, to gender-responsive procurement through additions and amendments in the law. Moreover, Article 10 of the Constitution of the Republic of Türkiye on equality before the law states that “women and men have equal rights. The state is obliged to ensure that this equality is realized. Measures to be taken for this purpose shall not be interpreted as contrary to the principle of equality.” This provision offers important opportunities in terms of forming the basic basis of this regulation to be made in the law. In addition, the definition of “women-owned enterprise” should be added under the heading of definitions in Article 4 of the relevant Law to reveal who can benefit from the existence of a support mechanism for women/women-owned enterprises. The existence of these regulations will remove the obstacles to the inclusion of gender-sensitive mechanisms in the content of the Act of Law No. 4734 on exceptions, qualification rules, those who cannot participate in tenders, prohibited acts and behaviours, procurement procedures, and evaluation of bids. The arrangements that will be made in the relevant articles should also be explained and supported by secondary legislation.

Keywords: Fiscal Law, Public Procurement, Public Procurement Law, Public Tender, Societal Gender Equality.

Introduction

The principle of equality is one of the fundamental principles that must be adhered to in the field of procurement law, as in all other disciplines of law. The principle of equality in terms of public procurement law refers to the requirement of treating all parties equally during the procurement process, avoiding practices that restrict competition, ensuring transparency and accountability, and refraining from exercising discretionary powers. In public procurement law, exceptions to the principle of general equality can be observed due to technical, economic, social, and cultural reasons. One of the exceptions to the principle of equality is gender-responsive public procurement, which is one of the sub-components of socially-oriented public procurement.

Discussions about gender inequality are known to have a long history. One of the main focal points of these debates in many areas of social life is economic inequality. Although recent studies indicate a reduction in economic disparities between women and men, there is still a significant imbalance, with women continuing to face disadvantages. Public procurements are one of the areas where women are disadvantaged, which is aligned with economic inequalities. In addition, the extensive implementation of social and sustainable public procurement practices presents opportunities to address the disadvantaged environment by integrating qualitative selection criteria into the procurement process.

Some of the actions taken include: Considering the needs of women in the public procurement process; addressing gender inequalities as a reason for excluding bidders; supporting the participation of female entrepreneurs in public tenders through positive discrimination mechanisms; monitoring performance criteria to reduce gender disparities, and enforcing legal penalties for violations of gender equality in the procurement process.

The study seeks to assess the practicality of incorporating gender-responsive approaches into the existing Turkish public procurement legislation. In this context, primarily the study has examined the conceptual framework for public procurement that are socially responsible, and gender-responsive public procurement, which is one

of its sub-components. Subsequently, the topic was elaborated upon, discussing broad approaches for gender-responsive public procurement. In the concluding section, with reference to the obstacles before this approach which is not included in the current Turkish public procurement legislation, assessments were made to provide the legislation with a fresh and forward-thinking outlook. The significance of this study is highlighted by the absence of any research in the literature in Türkiye on gender-responsive public procurement, with the exception of reports from civil society organizations. Within this particular framework, the anticipated outcome is to make a valuable contribution to the field of literature by increasing awareness of the topic.

An Innovative Approach in Public Procurement: Socially Responsible Public Procurement

Public procurement is the process by which goods, services, and construction are supplied from the market for a certain price (Akdoğan, 2014).¹ States, being one of the major consumer actors in the economy, engage in public procurement that accounts for a substantial portion of public expenditure. By 2021, in OECD countries, public procurement accounts for 28% of total public expenditure and 13% of GDP (OECD, 2023). This volume represents a substantial proportion of national economies and demonstrates that public administrations are influential and active participants in the market by means of public procurement (Gyori, 2022).

During the pre-globalization era, public procurement was conducted with an understanding based on local and domestic conservation. Subsequently, starting from the 1980s, coinciding with the widespread adoption of the principle of free trade, a phase of global competition characterized by the lowest prices emerged (Hamilton, 2022). This period, referred to as the economic approach process in public procurement, has prioritized large enterprises, while small, disadvantaged, and social-purpose enterprises

¹ Public tenders, where the procurement process is conducted under the principle of competition between more than one candidate, are one of the most important methods of public procurement. In this context, public procurement is a top concept that includes public tenders (Akdoğan, 2014).

have been left behind in the process (Aykaç et al., 2021). The notion of sustainability, initially introduced in *The Brundtland Report of 1987* and subsequently adopted as a motto in following international summits and conferences, has resulted in the development of new approaches for public procurement (Günel, 2023). The concept of sustainability, which emphasizes the importance of meeting needs without neglecting future generations, has become widely accepted in the field of public administration, as well as in many other disciplines (Şen et al. 2018; Günel, 2023). The World Summit on Sustainable Development, convened in Johannesburg in 2002, signified a pivotal moment in the implementation of the sustainability approach to public procurement. The summit clearly urged governments to take economic, social and environmental implications into account in their procurement practices (Bamfo et al. 2019). Environmental criteria have also been added to the bidding process with the World Trade Organization Public Procurement Agreement, which entered into force in 2014. Later, social and sustainable criteria have been incorporated into the work of international organizations, including the UN (Call for Action on Sustainable Development Goals), the OECD and the EU, and, later, into national public procurement legislation (Hamilton, 2022).

Sustainable public procurement promotes three fundamental aspects: economic, environmental, and social. The economically sustainable public procurement approach entails considering the overall impact of the procurement process and maximizing the efficient use of public resources. The public procurement strategy for environmental sustainability, also referred to as green public procurement, aims to mitigate the adverse environmental effects of the purchasing process (Günel, 2023). Socially responsible public procurement, one of the foundations of sustainable public procurement, is an innovative process in which economic criteria, as well as ethical and social concerns, dominate the acquisition of goods and services, and where public acquisitions are used as a social-impact public policy instrument rather than a mere economic trade (Aykaç et al., 2021). Under this approach, public procurement aims to promote social benefits such as establishing human-friendly living and working conditions, providing support for disadvantaged and marginalized groups and

equality, and on the other hand, it seeks to avoid social harms that are the opposite of those above, namely low living and working standards, social exclusion, and inequality (Semple, 2017). Social procurement practices are entrusted with various functions, including promoting diversity and inclusion in employment, enhancing the competitiveness of small and social enterprises in the market, supporting domestic production, establishing ethical rules in trade, improving the quality of life in society, promoting sustainable development goals, and leading change in the private sector (Ambe, 2019; Aykaç et al., 2021; OECD, 2021; Gyori, 2022). Therefore, social procurement practices represent a process focused on creating social added value, taking into account the narrowly defined low-price-high-quality-money-compensation criteria in traditional public procurement, as well as the impact of the purchasing process on society (EC, 2021; OECD, 2022). This approach expands the benefits of public procurement beyond the mere acquisition of products, jobs, and services. It positions public procurement as a policy tool for achieving social goals, which are also referred to as horizontal goals (Kristensen, 2021).

Socially responsible public procurement has a number of challenges, despite the advantages outlined above. Among the difficulties for public administrations in carrying social purchasing implementations into action from theory stage, the following can be listed: the lack of awareness of social procurement criteria; the lack of knowledge of staff at the point where social criteria can be incorporated into the procurement process; difficulties in measuring the benefits of social procurement; lack of communication between the stakeholders in the process of procurement; and insufficient knowledge and capacity of small and social enterprises (Aykaç et al., 2021). Procurement authorities need to pursue an active policy to minimize these challenges and increase the spread of socially responsible procurement. In this context, public procurement authorities can support socially responsible purchases by assuming one or a combination of regulatory, supportive, guiding, and encouraging roles. It can fulfil its regulatory role by defining minimum performance standards for socially responsible procurement within the legal framework for public procurements; its supporting role by carrying

out activities aimed at raising the awareness of the private sector about and supporting its progress in this area; its guiding role by establishing public-private partnerships; and its encouraging role by supporting with reward mechanisms the steps the market has taken or will take in the area of social responsibility (Choi, 2010).

Gender-responsive Public Procurement

Gender equality has been a central focus of the global political agenda for the past four decades (Squires, 2007). This concept, which is highly complex and cannot be fully explained from a single perspective, can be broadly understood as the principle that women and men possess equal rights, irrespective of their biological distinctions (Ecevit, 2021). Currently, despite notable progress made in addressing gender-based inequalities, there are still indications of gender inequality in many different areas (OECD, 2021). From an economic perspective, several issues arise: Women face underrepresentation in economic activities compared to men; they tend to be concentrated in undervalued sectors; women's entrepreneurship is smaller and is more vulnerable to impunity; women-led enterprises have less experience in terms of work and management compared to other enterprises; and women receive lower pay in certain sectors despite performing the same job and having the same job description (OECD, 2021; UN-WOMEN, 2021; UN-SDG, 2021). The problems expressed here are difficult to change by solely individuals. Therefore, a strong public strategy needs to be created in order to ensure that the functioning mechanism of the market is carried out within the framework of the principle of gender equality. (Doorgapersad & Kinoti, 2015). Key strategies to address the problem include establishing a legal and regulatory framework to eliminate the disadvantage of women in economic activities; designing educational opportunities to support women's participation in economic activity; enhancing funding and grants opportunities for women entrepreneurs; and providing support to women and women-owned enterprises through tax and other incentive-based programs (UN-WOMEN, 2023). In addition, gender-responsive public procurement, which is the subject of the study, is one of the policy proposals to promote gender equality economically.

Gender-responsive public procurement (UN-WOMEN, 2021), which proposes a solution to gender equality in society from the perspective of public expenditure policies, refers to the process by which gender requirements and aspects are integrated into public procurement policies and implementations (OECD, 2021). More explicitly, gender-responsive public procurement is a supply method in which buyers and suppliers take into account the needs of women and men in the public procurement process, where purchasing contracts are designed to address gender disadvantages, and where measures are taken to implement criteria to promote competition and equality by the end of the delivery process (EIGE, 2021). The primary objective of this approach is to achieve a socio-economic transformation with the aim of diminishing economic gender inequalities (Sarter, 2020). The broad-scale objectives of gender-responsive public procurement include aligning with the United Nations sustainable development goals, enhancing competitiveness, promoting equitable distribution of economic resources, reducing poverty, increasing the capacity and inclusivity of employment, fostering economic growth, and improving efficiency in public spending. (Arnaiz, 2010; Kirton, 2013; Nyeck, 2015; Sarter, 2020; EIGE, 2021).

It is difficult to say that gender-responsive public procurement has sufficient scope yet. Indeed, the fact that women's enterprises is only %1 in public procurement accounting for an expense item at the ratio of 20% of GDP on a global scale is an indicator of the issue stated above (UN-SDG, 2021). The situation remains largely unchanged in terms of the position within national procurement legislation (Caranta, 2022). In recent times, there has been a growing awareness of sensitivities and efforts have been made to implement gender-responsive public procurement, as instructed by international organizations. Currently, governments are utilizing their regulatory functions to integrate gender equality regulations into procurement procedures. Additionally, financial incentives are provided to enhance the appeal of the process (UN-WOMEN, 2023). In this context, the process of supporting gender-responsive public procurement can be described in the framework of the preparation, acquisition, and implementation processes (Grandia et al. 2023) which are the three main stages of public procurement.

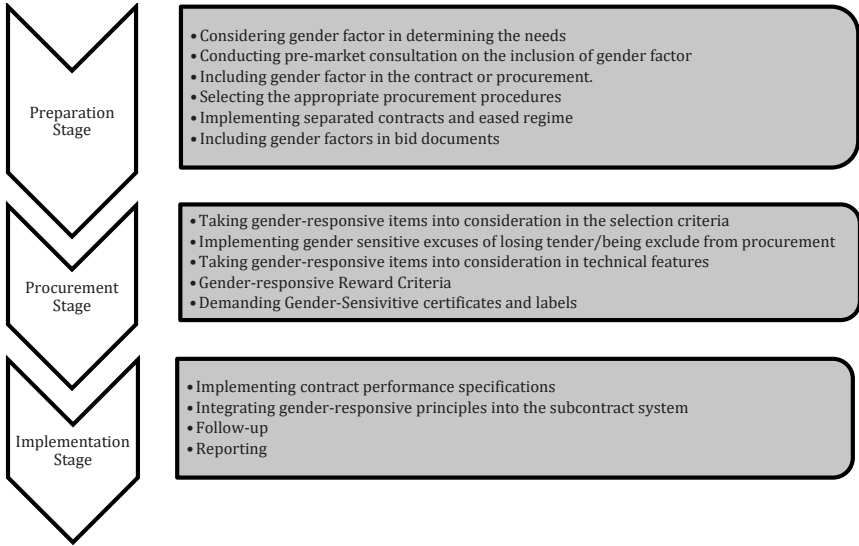


Figure 1. Implementation Methods of Gender-Responsive Public Procurement (Source: EIGE: 2022: 11).

Figure 1 illustrates that the procurement stage consists of three main cycles, which present significant opportunities to incorporate a gender perspective into public tenders. The next part of the study will also focus on the implementation methods related to integration of the gender factor into public procurement, while considering globally best practices.

Implementation of Gender-responsive Approaches in the Preparation Stage

The initial stage of the public sector procurement cycle is the preparation stage. The objective of this stage is to examine supply needs and initiate the actual procurement processes. (Grandia et al., 2023). The preparation stage also referred to as the planning stage of the tender cycle is the most suitable process for creating the general structure for the development of public procurement policies. Hence, women are likely to be overlooked in the bidding process unless a policy is implemented for the sake of gender-responsive features of public tenders (Ruiz, 2020).

During the preparation stage, it is crucial to prioritize conducting a thorough needs analysis and assessing whether the contract incorporates a gender perspective. In this particular context, it is necessary to ascertain the demand for goods or services in order to cater to the requirements of both women and men. Additionally, it is important to assess the impact of the gender-based approach on the procurement process. Engaging in conversations with stakeholders will help assess the market's ability to achieve gender-sensitive outcomes and enhance the objectives of the bidding authority. These discussions will then focus on how to incorporate the gender factor in the contract's implementation (EIGE, 2022b). As per the OECD Advisory Decisions on Public Procurement for the identification of availability of gender-responsive procurement during the preparation stage, one must search for the answers to these inquiries: "Is public procurement an effective means to promote the implementation of gender-responsive practices in society? During which stage or stages of the acquisition cycle is the implementation of gender equality practices targeted? What are the potential hazards associated with this approach? Is there an issue regarding the process of gathering data? What are the challenges encountered when implementing gender equality practices and what measures can be taken to address them?" (OECD, 2021).

Checklists are considered a fundamental practice for incorporating the gender factor when addressing needs. In 2018, the Belgian Institute for Women and Men's Equality released a handbook and checklist that provide guidance to public institutions on incorporating gender differences into the planning and execution of public procurement contracts, as well as promoting equality. Canada mandates a gender-based preliminary analysis for large-scale public procurement that necessitates a treasury declaration (OECD, 2021). In Gironde (France), a policy has been implemented to create a settlement plan that is sensitive to gender issues. This policy ensures that the recommendations of a gender expert are considered in the design of spaces before procurement services for the construction and renovation of secondary schools (EIGE, 2022).

An important concern in public procurement is the explicit inclusion of the gender factor in defining the subject of procurement, in order to address specific needs. Authorities with the autonomy to decide the subject of the tender may explicitly mention gender-related aspects in the title of the contract (such as services for analysing gender-disaggregated data or uniform supply for both women and men) and in declarations (EIGE, 2021).

Designating the purchasing/procurement procedure is one of the basic steps of the preparation stage. The open tender procedure, which is open to participation by all and adopted as the basic tendering procedure, is a procurement procedure that promotes widespread participation and competition (SIGMA, 2010). This approach, which limits the adaptability of alternative procurement methods, fails to offer sufficient opportunities for attaining gender equality or other social goals through public procurements. In this particular context, it is advisable to prioritize alternative methods for implementing a gender-responsive approach. Procurement methods, including marketing, dialogue, and direct supply are effective purchasing methods at the point of integrating gender elements into procurement procedures. The European Union has established a procedure called the eased regime for social and other private services in Directive 2014/24/EU, which outlines fundamental approaches and public procurement methods. The objective is to enhance the connection between public procurement and social responsibility through this purchasing method, which entails less strict regulations compared to other purchasing methods. It encompasses the domains of health and social care, education and teaching, community and cultural services, and event organization. Procurement under this method creates gender-responsive preconditions, including women's employment, equal pay and equal working conditions (EIGE, 2022).

One of the policy proposals similar to the implementation of the eased regime is for assigned/quoted/reserved contracts. This approach, aimed at adopting gender-responsive approaches to public tenders and

increasing the participation of female suppliers in public procurement, envisages that a certain proportion of public contracts should be allocated to women suppliers that meet basic criteria relating to gender equality (KAGİDER, 2020b). In 2018, the Indian government implemented a policy stating that 25% of its public procurement should be allocated to micro and small enterprises, while 3% of that share should be allocated to women's enterprises. In the Dominican Republic, "The Dominic Sustainable and Inclusive Supply Model" mandates that 15% of government procurement by ministries must come from SMEs, and a minimum 20% of that quota must be comprised of SMEs of women. In Senegal, "The Small Business Act" mandates that 15% of public contracts must be allocated to enterprises owned by women and youth (UN-WOMEN, 2023). In Kenya, "The Public Procurement and Disposal Regulation" mandates that 30% of government procurement for goods, services, and construction works be allocated to women, young people, and persons with disabilities, so a positive procurement is implemented (UN-WOMEN, 2021).

The main step in the progression from the preparation stage to the tendering stage in the public procurement process involves the preparation of tendering documents. The tender documents comprise of administrative specifications, technical specifications, draft contract, and other essential information and documents. However, they may be subject to modification based on the procurement procedure method. The administrative specifications which include essential directions in terms of managing the tendering process, determining the fundamentals of the process, participation documents and conditions in tenders, grounds for exclusion, eligibility criteria, and conditions for proposal and assessment along with the technical specifications determining technical conditions regarding procurement (Boynikar, 2020) are the leading basic processes where gender factor can be included in public procurement. Although the documentation process is in the preparation stage, its impact will be seen at the procurement stage, so the assessments of this segment will be addressed along with the procurement stage.

Implementation of Gender-responsive Approaches at the Procurement Phase

The first approach to integrating gender equality into public procurement at the procurement phase is exclusion from participating in tenders. Exclusion regimes are the conditions in which contractors are denied public tenders because they exhibit serious criminal or unethical practices, cause breaches of institutional responsibility, or have previously exhibited poor performance. Trafficking in human beings, child labor, occupational abuse, fraud, threats, non-compliance with previously signed contractual requirements, and violation of tax obligations are among the reasons for being excluded from public procurement (EC, 2021).

Non-compliance with environmental, social and labour law obligations in countries that have policies for socially responsible public procurement is also one of the reasons for exclusion. In this context, EU Directive 2004/24/EU clearly stipulates that “parties who exhibit behaviour that violates the principle of equal treatment and opportunity for women and men at the point of employment may be excluded from public tenders for a temporary period of three years” (Arnaiz, 2010).

National procurement legislation also includes exclusion grounds, including principles of equality, in terms of pay and employment. For gender-based exclusion grounds to be applicable, the grounds must be related to the subject of the contract and have been specified in advance in the notice or in the tender documents (EIGE, 2022b). When examples of implementations regarding the approach in question are examined, in Switzerland, within the scope of Article 8 of the Federal Law on Public Procurement, companies with at least 50 employees are required to sign a declaration that women and men work for equal pay in order to be able to participate in public tenders. In Iceland, companies that have a workforce of more than 25 employees must comply with the same requirements as those in Switzerland under the “ÍST 85” regulations. In Italy, companies with over 50 employees must provide reports on the gender breakdown of their workforce, including information on job distribution, employment status, redundancies, recruitment, training, retirement, promotion, career paths, work-life balance policies, and problem-solving measures. These reports are necessary for companies to qualify for public tenders.

Australia was one of the countries that requested a report based on similar criteria. In Spain, companies with over 250 employees are exempt from tendering procedures if they do not have an equality plan that includes measures to eliminate gender barriers and promote gender equality (OECD, 2021; UN-WOMEN, 2023).

One of the approaches leading to gender equality in the procurement stage is to include regulations on the subject in technical specifications and selection criteria. Technical specifications are documents that outline the precise technical requirements that goods, services, or construction work must meet in order to be purchased. They provide detailed information about the specific qualities and features that are being sought in the market. It is feasible to incorporate social factors relevant to the contract's subject matter into the technical specifications, in a manner that is appropriate and commensurate with its purpose. Nevertheless, it is important to acknowledge that the issues in question do not significantly undermine equality and competition (EC, 2021). In order for gender element to be included in the technical specifications, gender elements must be incorporated into the subject of the contract. In technical specifications, gender factor is generally embodied in the form of a clear statement of requirements (e.g. the inclusion of gender-responsive planning and designing conditions in a contract of a public building construction) and the requirement of a gender consultant in service procurement contracts. The Prime Minister's Office in Hungary has issued a service tender to illustrate the requirement that a specialist must possess a minimum of 24 months of research and analysis experience in the field of equal opportunities. Additionally, it is stipulated that at least one specialist should have practical experience within the same time frame (EIGE, 2022b).

The most critical aspect in the decision-making stage of public tenders is that the responsibility for the process is given to the candidate who presents the most economically advantageous proposal. Therefore, it is feasible to incorporate both price and non-price factors into the selection criteria (Boynikar, 2020). At this point, there are legal regulations in some countries that address social issues within the framework of non-price elements (Ruiz, 2020). Countries that have the relevant regulation award gender-responsive elements based on qualitative selection criteria. As an illustration, in 2016, the Municipality of Salamanca (Spain) declared

its intention to employ distinct contracts in certain tender processes² and provide assistance to social-purpose enterprises. The institution in question has implemented the award criteria system for a tender related to gardening services. The scoring system considers both price (35 points), and social and economic aspects such as the inclusion of disadvantaged individuals, emission control, and waste management. One of the requirements is the development of a gender equality plan consisting of five key points. The La Mancha Regional Authority in Spain has established social criteria as a means of differentiating between bids that receive the same score in tender involving separate contracts. One of these criteria is the significant representation of women in the workforce (EU, 2020).

When applying gender-responsive award criteria, the primary consideration is that the award criterion is directly related to the subject of the tender. Country practices typically employ a scoring system to evaluate tenders that have a social objective within the framework of distinct contracts. Moreover, the criteria should specifically address the procurement process that is directly applicable and should not pertain to broader corporate policies or practices. In the case of a tendering process that rewards the number of female employees, the rating should not be determined by the existing distribution of female employees within the institution; but rather, should be based the distribution of staff who will be involved in the tendering process. Otherwise, it will be in violation of the principles of competition and equality. In addition, the following issues should be taken into consideration carefully: regarding the rating system, establishing its boundaries, implementing it in a way not to hamper competition and making it clear so that bidders can understand; allocating weight to criteria to be included in the rating and declaring them in the announcements/documents, and conducting in accordance with the principle of transparency (EC, 2021).³

² This applies to tenders in the areas of gardening, insect control, cleaning, food services, collection of second hand clothing, waste collection and management, and oil recycling.

³ In a relevant verdict, The European Court of Justice has decided that the gender-based rating criteria should be designated to meet the social requirements on the condition that they should be relevant to the purpose of the tender, proportional, announced, should not be discriminatory and should mean an unlimited freedom of choice for contracting authority (Arnaiz, 2010).

A substantial way to include a gender factor during the procurement stage is through the implementation of certification or labelling programs. These programs offer an impartial and independent third-party monitoring for governments to identify companies that meet the eligibility criteria established by the procurement law and to gather data on firms owned by women. These programs, along with other procurement policies that consider gender, have multiple objectives. These include identifying and providing financial support to women, implementing quota requirements for female participation in public procurement, incorporating gender criteria into acquisition standards, and considering award criteria based on certification (George & Kendall, 2021; ADB, 2022). For example, in Chile, “ChileCompra”, established under the Ministry of Economy and aimed at increasing the participation of women in public tenders, provides “Sello Empresa Mujer” (Supplier Certificate for Women) for companies where more than half of their employees and legal representatives or CEOs are women (KAGİDER, 2020). This seal ensures that the gender-based criteria required in the purchase process are documented (UN-WOMEN, 2023). Another example of this practice is in Japan. “Eruboshi” certification is granted to firms that implement an action plan to support women in the workplace and are properly informed about it, in accordance with “The Law on Promoting Women’s Participation and Advancement in the Workplace”. Extra points are available to certified companies during the assessment stage of the proposal (ADB, 2022).

Implementation of Gender-responsive Approaches in the Implementation Stage

Implementation stage or, in other words, post-procurement stage is a process in which the conditions agreed upon by public institutions and successful bidders during the tendering process are monitored (EIGE, 2022b). The most important of the concrete steps towards the inclusion of gender-responsive aspects in this process is to ensure the implementation of the previously clearly stated contractual performance conditions. Performance conditions are regulations that impose gender equality obligations on the successful bidder. The contracting authorities have the ability to apply certain performance conditions, including

economic, social, or employment-related provisions, provided that they are supported by legal regulations, relevant to the subject, and published within the scope of the tender. The performance conditions that correspond to the selection criteria expressed during the purchasing stage have no impact on the evaluation of proposals during the implementation stage. Therefore, the adequacy of the bidders' compliance with such provisions is verified during the execution of the contract, not during the evaluation of the proposal (EIGE, 2021). For example, in Vienna (Austria), bidders with a value exceeding €50,000 and at least 6 months of service contracts are required to implement one of the four different actions if they have more than 20 employees. These categories include promoting women through recruitment and career development, implementing education programs to enhance women's qualifications, work-life balance, and structural actions. In a similar manner, a self-declaration checklist has been developed in Berlin, Germany, for companies with more than 10 employees to choose from 21 different socially motivated activities (such as internships for women, improving work-life balance, etc.) (EIGE, 2022b). In Canada, contractors who win contracts worth at least 1 million Canadian dollars are required to create employment opportunities for one of the four designated investment groups (women, disabled individuals, minorities, indigenous people) under The Employee Investment Act. Various financial penalties are also imposed to support the enforceability of the measures set forth herein (UN-WOMEN, 2023).

It is observed that performance conditions are adopted by the countries that do not prefer to link competition in the procurement process to non-price factors but want to support socially responsible public procurement. It is necessary to consider the requirements for including selection criteria at the tender stage. Within this context, it is necessary to adhere to fundamental requirements such as limiting the content of the condition to the bidding process only instead of general policies, ensuring its relevance to the subject, being proportionate, and announcing it in a clear and transparent manner when determining the performance condition (EC, 2021).

The responsibility assigned to contractors in the procurement process, as well as the implementation of performance conditions, should also apply to subcontractors in the transferred contracts. This includes conducting

examinations to determine whether gender-responsive conditions are being implemented, carrying out inspections and third-party audits, requesting reports on compliance with contractual requirements, and creating gender-disaggregated statistics by public procurement authorities. These are among the other gender-responsive approaches at the implementation stage (OECD, 2021; UN-WOMEN, 2023).

Evaluations and Recommendations Regarding the Applicability of Gender-responsive Public Procurement in the Turkish Public Procurement Legislation

The fundamental law that regulates the expenditure process related to public tenders in the Turkish financial legislation is The Public Procurement Law No. 4734. When examining Article 40 of this Law regarding the evaluation of proposals, it can be observed that the approach of “the most advantageous proposal economically” is adopted in the decision-making process of the tender. The fundamental approach adopted in Turkish public procurement is primarily based on conducting the tender process with a focus on “advantageous price”. However, it is stated that in evaluating the most advantageous offer economically, only the price factor can be taken into account, as well as non-price factors such as “operating and maintenance costs, cost-effectiveness, efficiency, quality, and technical value” can also be included in the evaluation. When examining the scope of the relevant regulation, it becomes apparent that it is not possible to evaluate gender-responsive qualitative selection criteria as a non-price factor.

As per Article 53/3 of the Public Procurement General Communiqué, which includes regulations regarding the inclusion of non-price factors, it is stated that non-price factors should be clearly specified in the administrative specifications in a manner that does not violate the principles stated in Article 5 of Law No. 4734. When looking at Article 5 entitled “Basic Principles”, it can be observed that administrations are held responsible for adhering to the principles of transparency, equal treatment, competition, reliability, confidentiality, public scrutiny, meeting needs in appropriate conditions and time, and efficiency in tenders. Within this context, when considering the connection between gender-responsive procurement approach and these principles, the issue

should be evaluated within the scope of the principle of equal treatment. The principle of equality signifies that the contracting authority should be impartial during the tender process and should not discriminate between participants. This principle, which is also binding in terms of competition, is among the fundamental principles of tender process (Üstün and Çalış, 2018). However, when considering the principles of non-price factors and equal treatment together, it can be observed that exceptions are included within the provisions of Law No. 4734. The first of these is the price advantage applied to domestic goods and domestic bidders within the scope of Article 63 of this Law. The other type refers to public procurement for regional development and technological advancement, as regulated in Annexed Article 9 of the same Law. It can be observed that both articles prioritize certain factors other than price within the context of socio-economic reasons. Article 63 includes provisions regarding the participation of only domestic bidders in tenders and granting price advantage to domestic bidders and domestic product offers, provided that certain conditions are met. At Annexed Article 9 titled “The Use of Public Procurement for Regional Development and Technological Advancement”, negotiations and collaborations with interested parties regarding the conditions/criteria/contract terms related to the characteristics of the need are mentioned within the scope of the objectives of achieving regional development, enhancing domestic production based on strategic sectors and technology transfer, promoting project-based investments, research, development, and innovation. It is stated that it will be possible to apply a higher price advantage for domestic products in the provinces where regional development programs are implemented, a certain portion of the need can be supplied from the bidders who are engaged in production or activities in these provinces, and procurement guarantees can be provided for technological development purposes.

Based on the exceptional implementations mentioned above, it can be understood that relative deviations from the principle of equality may be possible, provided that they are amended in the legislation. Therefore, it is possible to evaluate gender-responsive public procurement within this framework. Furthermore, based on Article 10 of the Turkish Constitution, the fundamental source of the principle of equality, which states “Women and men have equal rights. The state is responsible for ensuring the implementation of this equality (Additional paragraph of Law No. 5170/1

Art., dated 7/5/2004). The measures to be taken for this purpose cannot be interpreted as contrary to the principle of equality (Additional clause of Law No. 5982/1 Art., dated 7/5/2010).”, it is believed that a gender-responsive equality criterion would not be contrary to the Constitution. In this context, to consider gender factor as a non-price element in public procurement, the legislation should explicitly regulate positive privileges regarding gender inequality, as stated in Article 63 and Annexed Article 9 of Law No. 4734. Furthermore, the monetary values and relative weights of those privileges should be scored. The existence of this regulation will enable the inclusion of gender-responsive issues in scoring criteria and pave the way for the implementation of gender-responsive reward criteria. Thus, this will enable the implementation of reasons for the criteria of gender-responsive exclusion from bidding in procurement processes, along with the demand for gender-responsive labelling and certification. A provision similar to what is stated in Article 5 of Law No. 4734, namely “It is mandatory to have received an affirmative certification of Environmental Impact Assessment (EIA) for projects that require an EIA report in order to proceed with the tender”, will enable the request of various certificates for tenders involving gender factors. Furthermore, within the provisions of Article 58 of Law No. 4734, which regulates the exclusion from tenders, the inclusion of provisions prohibiting gender discrimination will be facilitated.

Among the other issues to be taken into consideration are taking gender-responsive procurement out of the basic procedure under Article 3 of Law No. 4734 entitled “Exceptions”; designating an exceptional procurement procedure regarding the procurement aimed at this approach, just like in the EU; and defining of the group to be discriminated by including the definition of female entrepreneur or business manager under the title of the Law for definitions.

Conclusion

The traditional function of public procurement is to meet the needs of public organizations under the most advantageous economic conditions. However, it is observed that with the increasing prevalence of the concept of sustainable development, the functions assigned to public procurement have also expanded. The approach of sustainable public

procurement emphasizes the need to consider the long-term effects of public procurement. Sustainability in public procurement has three fundamental pillars: economic, environmental, and social. The approach of “gender-responsive public procurement” which is the focus of this study, is one of the social purchasing. The approach of gender-responsive public procurement attribute a meaning to the procurement process beyond price and incorporates gender-responsive qualitative selection criteria into various stages of the process. The aim is to support the participation of women and women-owned businesses in public procurement, taking into account the needs of women as well as disadvantaged women and women-owned businesses in terms of economic activity and competition.

Gender-responsive public procurement is not a limited approach that can be narrowed down by only one stage of procurement process or one support mechanism. By examining national legislations of public procurement, it is possible to observe a variety of support mechanisms that are integrated in the stages of preparation, procurement, and post-procurement. For implementation of gender-responsive approaches in public procurement, it is crucial that especially the procurement legislations should include regulations related to this issue, and their scope should be determined explicitly. Particularly the scope should be determined in a way that does not conflict with the fundamental principles of the tender process. More clearly, it is not possible to integrate this approach into the entire tender process. There are different options available at this point. The first is to take the gender factor into account in procurement conducted in specific institutions and areas. In the selection of the relevant institutions and areas, procurement process must be directly linked to the gender factor. Another option would be to impose a specific and measurable quota on institutions that conduct public procurement over the determined amount per each year, ensuring that gender-responsive qualitative selection criteria are included in tenders included in that quota. Another option is to define and ensure the feasibility of performance targets aimed at eliminating gender inequalities. In this method, which is particularly suitable for service procurement, goals concerning gender factor are determined in relation to the implementation stage rather than the decision-making process. When the cases of bidders are equal in the classical procurement process, qualitative selection criteria based on gender is among the options here

as a decisive factor. Addressing a gender factor as a selection criterion in all public tenders without the restrictions mentioned here will lead to a situation which is contrary to the basic principles of tendering, primarily competition, equality, and public interest.

Along with the options stated in terms of context, following are among other important support mechanisms: the request for a certificate demonstrating that gender equality is respected in gender-related procurement; the inclusion of gender inequalities in the grounds for exclusion from bidding; preferring different procurement procedures regarding gender-responsive public procurement; the evaluation of those procurement within the framework of exceptional procurement; and the designation of eased regimes.

Although significant progress has been made in implementing gender-responsive approaches in public procurement, it is difficult to say that the desired standards have yet to be achieved. Along with the literature upon the subject, the reports of international organizations and civil society organizations as well emphasize this fact clearly. This viewpoint has been confirmed also by the findings of the survey titled “Benefitting from Responsible Business Behavior through Public Procurement”⁴, carried out by OECD which conducts important studies to promote gender-responsive public procurement. This survey study shows that only 57% of the member states have a regulatory framework for gender-responsive approaches in public procurement. Another finding in the same study suggests that there are deficiencies in understanding how gender-responsive approaches should be implemented. Despite of those limitations, there are successful outcomes of implementations; the increasing numbers of those implementations indicate that gender inequalities have been decreased in the public procurement of the countries applying gender-responsive public procurement policies.

When examining the Turkish public procurement legislation, it can be observed that there are no specific regulations pertaining to gender-responsive procurement processes, both in the primary source, namely Public Procurement Law No. 4734, and other secondary sources. However,

⁴ For detailed information, please see; <https://www.oecd.org/gov/promoting-gender-equality-through-public-procurement-5d8f6f76-en.htm>.

it is seen that Law No. 4734 includes environmentally and economically sustainable practices such as environmental impact assessment (EIA) reports; advantageous prices for domestic products and producers; advantages for regional development and technological advancement in public procurement. Therefore, through additions in the law, it is possible to expand a similar exception like those, which are proposed for socio-economic reasons, by the aspect of gender-responsive recruitment. Furthermore, the provision at Article 10 of The Turkish Constitution, stating that measures aimed at ensuring equality between women and men will not be contrary to the principle of equality, constitutes an important basis regarding this expansion. Among the regulations needed to be made at this point, the following options should be considered: including a definition of women-owned businesses in the definition section of the law and determining who can benefit from support mechanisms; creating a certificate similar to the report of Environmental Impact Assessment (EIA); incorporating gender-based qualitative criteria into non-price factors; adding gender inequalities to the section on prohibited acts and behaviors to be used in gender-related tenders; adopting supportive and regulatory mechanisms such as facilitating regimes in relevant procurements by incorporating the gender factor into the conditions for tendering procedures and direct procurement among certain bidders.

In conclusion, it is not possible to approach the entire process of Turkish public procurement from a gender-oriented perspective in terms of competition, equality, and public interest. Indeed, this is not the approach globally adopted and desired. However, it is necessary to include women and women-owned businesses in the process through reward and certification programs or specific quota measures related to the tender, particularly in areas involving the gender factor. At this point, it is recommended to focus specifically on service procurement tenders, to include gender-responsive criteria within the scope of non-price factors, to include gender-responsive procurement in the tender procedures and direct supply conditions among certain bidders; to establish performance criteria for the elimination of gender inequalities following the tender process and to impose sanctions on their practicability. As in the other countries having taken measures on this matter, the existence of the relevant regulations is anticipated to show efficient results in reducing gender inequalities in public procurement.

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