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A Review of Recent Legislative Developments in South Africa and Turkey

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ABSTRACT

Both the South African and Turkish construction industries like elsewhere in the world play pivotal roles in national economic growth and development.

Since the first democratic elections in South Africa in 1994, the government and the construction industry have engaged in a vigorous process to redirect this growth and performance in support of the social and economic agenda of the nation. Consequently, many laws have been overhauled and/or amended with more than 30 laws having direct bearing on construction and the development of the industry. These legislative developments have significantly changed the environment in which construction activities occur. On the other hand, in Turkey many changes to the legislative framework have been effected in recent times to comply with standards of the European Union to which it seeks membership. These include amendments to the Construction Control Law (2001), Civil Invitation Law (2003), Labor Law (2003), and Turkish Penalty Code (2004). In both countries these laws and regulations have potential negative and positive impacts on the construction sector. The paper discusses briefly the impacts of some of the recent legislation as well as the findings of recent relevant research.

Keywords: Construction Industry, Health, Safety, Regulations, Workers, Legislation

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1. INTRODUCTION

The construction industry plays an important role in the economies of countries throughout the world. This role in economic development has been validated by several seminal studies (Strassman, 1975; Turin, 1969; Wells, 1986; Ofori, 1988). These studies established a strong statistical relationship between the state of the construction industry and economic growth. For example, Turin (1969) in his groundbreaking study concluded that a positive correlation existed between the value added by construction and the gross domestic product (GDP) of the country. Strassman (1975), who argued that the construction industry mirrored a pattern of structural change that reflected a country's level of economic development, echoes this conclusion. It has further been established that where economic growth has been significant, the growth of construction output has been even more dramatic (Wells, 1986).

Turkey

Given that Turkey is a candidate country to join the European Union, several new laws have been introduced and present laws amended recently to make them compatible with the European Union legislative framework. Among them are laws and regulations that impact the Turkish construction sector. These include regulation of building inspections, revisions to labor laws, public sector procurement practices and the criminal code.

This paper provides an overview of various aspects of these legislative changes with reference to their impact on the industry in both countries. Where appropriate findings of research studies by the authors are cited.

South Africa

The South African government has recognized the pivotal role of the sector by declaring it a national asset to be developed, maintained and transformed. After the first democratic elections in South Africa in 1994, the government and the construction industry have engaged in a vigorous process to redirect the growth and performance in support of the social and economic agenda of the nation (CIDB, 2004).

Broadly supported by the industry itself, the approach of the government to industry development is embodied in the White Paper that was the culmination of a three-year broad based process of policy development, consultation and implementation (DPW, 1999). This far reaching policy document sets out the cornerstones of an enabling strategy aimed at sustainable growth, stability and employment, enhanced delivery,

improved industry performance and competitiveness, value for money and empowerment and growth of the emerging sector. The strengths and weaknesses of the construction industry and the realities of South African society informed this policy which has as its vision,

“... a construction industry policy and strategy that:

- Promotes stability,
- Fosters economic growth and international competitiveness,
- Creates sustainable employment,
- Addresses historic imbalances as it generates new industry capacity.

It presupposes a growing and active industry supported by an effective institutional framework representative of all parties who embrace this vision. It is premised on the ability of government to exert its influence to foster operating practices conducive to an enabling environment (DPW, 1999).”

Many of the country's laws have been overhauled and/or amended. Several of these have been influenced and informed by the White Paper such as the establishment of the Construction Industry Development Board and the Council for the Built Environment, the introduction of the Preferential Procurement Policy Framework, and the regulation of project management in terms of the Project and Construction Management Professions Act.

2. EXAMPLES OF LEGISLATIVE CHANGES IN TURKEY

2.1 BUILDING INSPECTION, 2001

Prior to 2001, a civil engineer or an architect was technically responsible for a building when a building permit was issued. According to the 28th article of the Building Code this person was responsible to municipality issuing the permit or the office of the governor for the construction of the building in terms of the scope of the permit and any addendums. Further, this person could be technically responsible person for more than one building, ensure necessary controls throughout the various stages of construction, but did not necessarily have to be present at the construction site continuously. In practice this approach has not worked. Although a technically responsible person was required to be appointed for each construction project in terms of the Building Code frequently the requisite functions and duties were poorly performed.

Investigations following the collapse of buildings during the 1999 Marmara earthquake revealed that the erection of reinforced concrete structures was deficient with respect to the correct concrete mixes with

many violations of the engineers' specifications. Many of the collapsed structures had serious defects that had not been identified during inspections which the appointed technically responsible persons was expected to have performed.

Consequently the Building Inspection Law was introduced in 2001. The primary objective of this law was to correct this important deficiency by setting out in detail the requirements of inspections and enforcing implementation of these provisions. Companies, which include engineers and architects, called Building Inspection Institutions were established to carry out these inspections. Their duties, authority and responsibilities were clearly spelt out. Guidelines were provided for the inspection fee structure taking into account the various types of projects. The large-scale inspections which have been done since 2001 by these "experts" have proven useful. Concerns have been raised by clients about the comparatively high fees charged for these inspections. However, considering that Turkey is in an earthquake zone, these increased costs will remain given the focus on improving construction safety from a technical perspective.

2.2 LABOR LAW, 2003

Important changes were introduced in 2003 to the Labor Law to align labor practices with those in the European Union. Since there were too many changes made, only those absent from the previous legislation are referred to.

An important change is the introduction of making engineers and technical staff responsible for construction worker safety. In terms of article 82, employers are responsible to employ one or more engineer or technical person dependent on the nature of the work or degree of risk, to manage the construction worker safety on site, prevent workplace accidents and occupational diseases where more than fifty workers were continuously present on site and the duration of the work was more than six months. The amended Labor Law also sets out the educational qualifications, duties, authority and responsibility, working experience and technical knowledge of engineer or technical staff responsible for construction worker safety.

This change is new for Turkish construction and necessary. The fact that the law does not require the appointment of a construction safety engineer on sites employing less than 50 workers is a deficiency given that approximately 70% of occupational accidents occur on construction sites where less than 50 workers are employed (Müngen, 1993).

In terms of article 83 of the Labor Law any worker who has been exposed to a hazardous working condition or environment which threatens the occupational health and safety of the worker may require the occupational health and safety committee to intervene and advise him or

her of his or her rights in terms of the law. This ruling by the committee must be communicated to the worker in writing on the day that the application was made by the work for such a determination.

This formal request is made to the employer or the agent of the employer when there is no committee for occupational health and safety in the workplace. The worker is entitled to have this determination set out in writing. If the committee determines that the worker has legitimate concerns, the worker may refuse to work until such time that the necessary health and safety interventions have been introduced. During this period the worker will continue to be paid. Arguably, this new form of protection of workers especially in construction is a positive intervention. There remains concerns by workers relative to retribution by employers should they raise such objections.

2.3 PUBLIC PROCUREMENT LAW, 2003

Prior to 2003, the State Procurement Law promulgated in 1984 was in effect. During the period 1984 through 2003 construction projects in the Turkish public sector were typically characterized by time and cost overruns, incompleteness due to contractor losses, corruption and unjust enrichments. It became necessary, therefore, to overhaul the system with the result that the Public Procurement Law was introduced in 2003. Some of the key features of this law include:

- The scope has been broadened to include all tenders in the public sector.
- Tenders may not be called for without procuring the land, completing the ownership transfer, expropriation, and public works processes where necessary.
- Bids on public sector projects had to be on a turnkey lump sum price basis.
- Previously construction tenders were called for on the basis of the Unit Price Procedure using the unit prices announced by Ministry of Public Works and Settlement. These prices announced at the beginning of a year and remain valid for the rest of that year tended to become less than ruling market prices after about six months. Consequently, contractors sustained losses overall despite price adjustment provisions.
- The Approximate Cost approach has been introduced in terms of which price approximations are determined after extensive research and monitoring of market prices.

- Provisions that prohibit corruption in the tender process have been introduced to ensure greater transparency and neutrality in tender awards.
- The tender prequalification process has been substantially revised to evaluate the financial, resource and project capabilities of prospective tenderers to ensure that tenderers who possess the necessary qualifications participate in the bidding process.
- It is now possible to bid for technical consulting services related to research, project works and conducting inspections given the loss of experienced staff from the public service due to economic reasons.
- A Public Procurement Committee has been established to address areas of conflict relative to the public sector procurement process that include initiating the whole bid process, directing implementation of the procurement approach, educating the public and private sector about procurement, gathering and publishing statistics related to tenders, maintaining the registers of blacklisted tenderers.
- Previously work was awarded solely on the basis of lowest price. This practice has not changed extensively and is heavily criticized. However, extremely low tenders are isolated and an explanation required from those tenderers relative to their submissions. Failure to provide adequate explanations result in being blacklisted.
- Punitive sanctions have been introduced that affect both tenderers and administration staff, who have been involved with actions and behavior that is prohibited (Müngen, 2006).

2.4 TURKISH CRIMINAL CODE, 2004

The Turkish Criminal Code which has been in effect since 1921 has been extensively modified. An important aspect that impacts the construction sector is "crimes committed by imprudence" which include construction and motor vehicle accidents which result in either death or injury. Penalties are clearly outlined in the code as indicated as follows:

- Previously anyone convicted of causing the death of person was subject to a penalty of 2 to 5 years imprisonment. Where more than one person died and one or more persons were injured, the penalty imposed was imprisonment of 4 to 10 years. In both cases fines could additionally be imposed. Where there were no deaths the maximum penalty was 30 months imprisonment determined, inter alia, by the severity of the injuries. These could also be accompanied by fines.

- In the amended code, the penalties have been made more severe. In the case of a single death the term of imprisonment is from 2 to 6 years and where there are multiple deaths and injuries the term of imprisonment is between 2 and 5 years. Where there were no deaths the maximum penalty is 36 months imprisonment determined, inter alia, by the severity of the injuries. These could also be accompanied by much heavier fines.

If the court determined that there was "impudence" the penalties are increased by one third to one half (Müngen 2005).

3. EXAMPLES OF LEGISLATIVE CHANGES IN SOUTH AFRICA

3.1 TRAINING AND EDUCATION

3.1.1 The Skills Development Act, No. 97 of 1998

Considering that the improvement of the working skills of all South Africans is critical to grow the national economy, the Skills Development Act (SDA) was promulgated to create the structures and framework for the national skills development strategy. In terms of the SDA employers are obliged to provide formal structured education and training to their workers. According to the SDA, the needs of employers, the economy and communities dictate which skills should be developed. It covers structured, targeted and generic training – implying that all training interventions should be planned and managed as projects. Employers together with their workers are required to formulate workplace skills plans (WSPs) to enable them to realize their employment and training targets.

All designated employers pay a monthly skills development levy of 1% of their budgeted payrolls to the National Skills Fund (NSF), via the South African Revenue Service (SARS). Of this amount, employers can claim back 70% in the form of a discretionary grant, provided that they submit a WSP and Implementation Report (IR) annually and conduct special training projects.

These levies finance the implementation of the National Skills Development Strategy (NSDS). Sector Education and Training Authorities (SETAs) such as the Construction Education and Training Authority (CETA) receive 10% of the skills levies paid by construction employers for administration costs, the NSF receives 20%, and 70% is available to be claimed back by these contributing employers. However, international trends show that companies need to spend between 4% and 7% in order to be successful in addressing the current skills shortages and gaps (National Advisory Council on Innovation (NACI), 2003).

6. HEALTH AND SAFETY

6.1 THE OCCUPATIONAL HEALTH AND SAFETY ACT AND REGULATIONS 85 OF 1993

The South African government has captured the essence of the pivotal relationship between employers and their employees in the Occupational Health and Safety Act (OHSA) 85 of 1993. In terms of OHSA clause 8(1) all employers in South Africa are required to provide and maintain a working environment that is safe and without risk to the health of their employees.

Additionally, OHSA clause 8(2)(e) requires employers to provide such information, instructions, training and supervision as may be necessary to ensure the health and safety at work of their workers. Several studies have confirmed a well-established link between safety training and the performance of companies.

The provisions of the Construction Regulations promulgated on July 18, 2003 heralded a welcome and overdue departure in particular from previous approaches to the management of construction safety and health in South Africa (Haupt, 2003). Previously contractors were held solely responsible for the safety and health of their workforce. The regulations represent a major paradigm shift in that the responsibility for safety and health is redistributed away from contractors to include all participants in the construction process, with particular emphasis on the pivotal role of clients. This is necessary in an industry that is largely client-driven. Rather than setting and insisting on compliance with myriads of standards the regulations are performance driven. Instead the emphasis is on hazard identification and risk assessment prior to the execution of construction activities. Further, all parties are encouraged to eliminate risks at source, reduce exposure to risks, or protect against the consequences of unavoidable risks. It is apparent that the regulations have been influenced and informed by developments elsewhere such as in Europe, Australia and New Zealand.

While the regulations present the industry with an opportunity to improve its consistently poor safety and health performance, there are several issues that might restrict the attainment of this result in practice. The first issue revolves around the cost of implementation. It is not inconceivable to expect building costs to increase commensurate with the recovery of these additional costs. The sobering thought though is that like in the UK the quantifiable costs might outweigh the immediate quantifiable benefits. Secondly, clients are expected to prepare a pre-bid documented health and safety specification for most construction projects they undertake to do to ensure that provision has been made in contractors' tenders for the cost of safety and health measures during construction.

3.1.2 Construction Education and Training Authority, 2000

The Construction Education and Training Authority (CETA) was established in terms of the Skills Development Act to give effect to construction skills development that is 'accessible, equitable and promotes the sustainable formation of the industry's skills base' (CIDB 2004:8). CETA pays back a percentage of the levy to construction employers in the form of grants provided they produce, for example, a WSP. However, because of the uncertainty of workflow many construction employers have not been able to commit to WSPs. They have been slow to take up the training opportunities available, citing bureaucracy, red tape, system bottlenecks such as the development of the new qualification standards and framework, and resistance to government imposed transition to the new skills training environment. The results of a survey conducted by Fester and Haupt (2003; 2004) showed that construction employers regarded the CETA as ineffective in addressing the training and education needs of construction. CETA, like other SETAs, lacks information on quantitative skills requirements, which is further exacerbated by a qualitative gap in the identification of skills categories (NACI, 2003).

Haupt, Smallwood and Miller (2004) and Fester and Haupt (2003; 2004) have conducted several studies relative to the state of construction industry related education programs offered by not only universities of technology but also other higher education institutions that include traditional universities. These studies suggest that with only a few exceptions education and training offered at South African higher education institutions (HEIs) are inadequate for the needs of the construction industry. Employers argue that graduates lack the necessary theoretical skills, training and managerial understanding to ensure immediate meaningful employment creating a mismatch between what employers appear to want and what higher education provides. For example, construction graduates from universities of technology are perceived as being ill prepared to contribute to the economic growth of the country, less able to adapt to new skills, and less able to respond to the speed of technological advance.

Many programs at South African HEIs are regarded as irrelevant and outdated with overall quality of tuition being poor. Typically HEIs lack meaningful linkages with industry and have largely been disconnected from the local economy. Studies conducted in the universities of technology sector further confirmed that the majority of construction employers regarded experiential learning as a necessary part of construction management studies. They required experiential learning to be structured and assessed jointly by both themselves and academic institutions. With regard to the timing and duration of experiential learning, the majority of employers suggested that this period in industry should take place after a full academic year and preferably after the second year of academic study.

Employers were keen to provide remunerated experiential opportunities of preferably a year provided they were involved in the curriculum and evaluation processes of construction education offerings. On the other hand, academic institutions argue that employers were merely interested in employing students-in-training as a cheap source of skilled management labor.

3.1.3 Adult Basic Education and Training Bill, 2002 (ABET)

The main purpose of the ABET is 'to redress past discrimination and ensure representativeness and equal access, to pursue excellence and to promote the full realization of the potential of every employee, the tolerance of ideas and an appreciation of diversity' (NACI, 2003:46). Accordingly, all construction workers should be trained in basic life skills that include financial, numerical and language literacy. The National Skills Development Strategy (NSDS) aims for all employees to at least have reached the first level of the National Qualifications Framework (NQF) by 2005. Anecdotal evidence suggests that this objective has not been, nor will be, attained within the desired timeframe.

4. EMPLOYMENT AND RECRUITMENT

4.1 LABOUR RELATIONS ACT 66 OF 1995 (LRA)

The Labour Relations Act has a major impact on the activities of every organisation or workplace in South Africa. Among other provisions, it "regulates the organisational rights of trade unions"; and "promotes employee participation in decision-making through the establishment of workplace forums". The LRA establishes a single industrial relations system for all employees, promotes collective bargaining, and establishes new procedures and institutions for resolution of disputes (CIDB, 2004).

Essentially, the LRA together with the Basic Conditions of Employment Act (BCEA), prevent the practice of hiring and firing of workers at will. Arguably, the introduction of this legislation has contributed to the shift to informal employment and increased the use of labor brokers, some of whom supply cheap labor including illegal immigrants. Further, the

industry relies heavily on subcontracting⁴ and particularly on labor only subcontracting. Consequently, performance at all levels is negatively impacted. On the other hand, labor has perceived improvement in relationships on construction sites as a result of the LRA (CIDB, 2004).

4.2 EMPLOYMENT EQUITY ACT 55 OF 1998

The Employment Equity Act (EE) recognizes that the apartheid system spawned discriminatory laws and practices that have led to disparities in employment occupation and income within the national labor market. Further these disparities have created such pronounced disadvantages for certain categories of people such as females, that simply repealing discriminatory laws cannot redress them. The stated purpose of EE is to achieve workplace equity relative to the under-representation of designated groups in employment such as women and to build a workforce that is representative of the country's population. To achieve this end every employer is required to promote equal opportunity in employment through the elimination of unfair discriminatory policies and practices. This Act further expects employers to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. The Act specifically prohibits unfair direct and indirect discrimination on the basis of gender, race, sexual orientation, etc.

Haupt and Smallwood (2004), Madikizela and Haupt (2004) surveyed 363 participants as part of a study relative to gender issues in construction during a series of more than 40 national multi-stakeholder workshops and seminars. The findings of the survey indicated that despite legislation such as EE, the SA construction industry continued to be hostile towards and uncommitted to achieving workplace gender equity. The study found that 54% of employers had less than 50 workers in their employ, less than 15% of whom were women. Less than half of the sample (49%) responded that their firms had a written gender equity policy in place. Just more than a third of the respondents (34%) provided their workers with educational material on gender issues. Only 84% reported that they provided separate toilet and ablution facilities for female workers. Further, only 66% of the firms had management that visibly endorsed non-discriminatory employment practices and education programs or information about gender issues. These largely took the form of corporate policy. According to 42% of respondents this gender policy was not communicated to workers in simple, clear and unambiguous terms. While

⁴ The authors prefer to use the term 'co-contractors' considering the pivotal role these contractors play in construction as members of the project execution team. 'Sub-contractors' suggests that these contractors are less than contractors and historically have been poorly treated in the industry.

87% of respondents reported that their firms provided equal opportunities for female workers to be promoted, only 48% indicated that funding was available specifically targeted at improving the status and qualifications of their female employees. Relative to whether there had been any discriminatory practices against workers because they were women, 11% reported such practices had taken place in their firms.

Comments such as "If employed, women would not be treated equally and [will] face harassment from employers and fellow workers!" confirm the deep-rooted reluctance of the industry to transform itself and redress the gender disparities in employment, occupation and income within SA construction.

5. INDUSTRY DEVELOPMENT

5.1 THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD (CIDB) ACT, 2001

The CIDB Act was aimed at integrating development and planning in the construction industry. The CIDB was established to provide the necessary leadership for an enabling regulatory and development framework that enhances the role of stakeholders in industry growth, delivery, performance and transformation (CIDB, 2004). Initiatives that the CIDB has led include the establishment of a Code of Practice to govern parties engaged in construction procurement; national registers of contractors and projects.

5.2 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT (BBEE) ACT, 2004

The BBEE Act provides a legislative framework within which to promote black economic empowerment redressing the economic disparities of the past. Codes of practice include procurement criteria, indicators, weightings and guidelines. A Construction Industry Transformation Charter has been developed that includes a program of actions and targets. The South African construction industry has been described as the most untransformed industrial sector as is evidenced from Table 1. The industry is still dominated by white male management.

Table 1. Management Profiles by Sector, 1999

Sector	African	Asian	Coloured	White	Female	Male
Building & Construction	5%	6%	3%	86%	8%	92%
All Industry	7%	4%	4%	84%	17%	83%

Adapted from CIDB (2004) citing BEE Com Report, 2001

The third issue is related to the apparent reliance on what is deemed to be reasonable and practicable – a concept which is open to differing interpretations. A fourth issue involves the question of the possession of necessary competence by the various parties involved in construction.

Smallwood and Haupt (2004) found in a recent study in South Africa during which 252 industry stakeholders were surveyed, that:

- The recognition that all stakeholders can contribute to H&S;
- The perceived importance of H&S relative to the traditional project parameters of cost, quality and time; and
- The perceived extent to which the Construction Regulations will contribute to an improvement in H&S

underscored the need for the promulgation of the Construction Regulations. Furthermore, the findings of this study and conclusions indicated a need for the following:

- Endeavors to enhance the H&S culture of the industry;
- The realization that all accidents can be prevented;
- The motivation for H&S based upon the impact of the cost of accidents on the cost of construction;
- The implementation of Quality Management Systems during design and construction;
- The inclusion of construction H&S in designer tertiary education; and
- The integration of design and construction through among other, procurement systems such as design-build (Smallwood and Haupt, 2004).

7. CONCLUSIONS

In Turkey the recent legislative changes have impacted the construction sector. These have related to the poor implementation and enforcement of previous legislative requirements. Others were either abolished or amended based on large-scale criticism of their appropriateness. It is generally accepted that these changes driven by Turkey's efforts to be included in the European Union are necessary, positive and beneficial. Arguably, a legislative framework is being developed that compares well with international trends and standards.

The South African government has recognized the pivotal role of the construction industry in national economic growth and development. It has through various forms of legislation attempted to support its social and economic agenda. Consequently, these developments have impacted the environment in which construction activities occur in South Africa. While

most of these have been well-intentioned, the findings of various research projects in South Africa suggest that the industry still remains largely untransformed. However, the government remains resolute in its commitment to use the sector as the vehicle for reconstruction and development of the South African society. Considering that several of the legislative changes have only been introduced fairly recently, the full impact of these on the industry have not yet been evaluated relative to whether they help or constrain industry development. However, it is argued that the efforts of government might be stifled by over-regulation considering the volume of legislative and regulatory changes introduced in a relatively short period of time. The challenge facing South Africa is to find the balance between social and economic development, industry performance and competitiveness, and improved value to clients and society.

While the legislative framework in both countries has experienced substantial change in the past few years, the acid test will be the measure of overall improved performance that manifests in the next few years given the admission that legislation by itself will not bring about change.

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