

A new PPP law in Greece

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2005 has not been a particularly active privatisation year for Greece. With the notable exception of the €1.3bn sale of 17% of the state gaming company (OPAP) through a public offer in Greece and an international private placement in July, no other significant privatisations took place. In contrast, 2005 had been a busy year for PPPs: the tendering and awarding pace for the main road projects of Greece that started back in 2000-01 was significantly accelerated. By March 2006, in two projects (the Thessaloniki submerged tunnel and Maliakos-Kleidi roadway) the financial closing was pending, while in another two (the Korinthos-Kalamata and Ionian Motorway) the selection of preferred bidder was on the way, and for the remaining three (Central Greece, Korinthos-Tsakona roadways and remaining roadworks of Attica), initial deadlines for the submission of the binding bids had been set. Furthermore, and perhaps more importantly, Greece introduced a new law on PPPs in September 2005.

The new law, 3389/2005 (the “PPP Law”), intends to create a market-friendly legal framework, to abolish the approval of all concession agreements by Parliament (a requirement under the current regime) and to set a standardised procedure for the tendering of concession agreements. In general it implements the intention to expand the concession concept in Greece in less significant infrastructure projects. Already, the Greek state seems to be looking into applying the new law to school and hospital projects and perhaps harbours.

Given the expected importance of the new law, we will take a closer look at its most important provisions.

Which concessions?

The PPP law governs concessions which meet the following cumulative criteria:

- relate to services or projects that belong to the competence of public authorities;
- allocate – for a consideration – an essential part of the risks related to the financing, construction, availability or demand of the project to the private sector;
- stipulate that the financing is arranged by the private sector; and
- do not have a contractually budgeted cost over €200,000,000¹.

The special Inter-Ministerial PPP Committee (IMC) may extend the application of the law to special projects which may not fulfill all the abovementioned criteria. In any event, activities which belong under the Constitution directly and exclusively to the State, such as defence, policing,

attribution of justice and enforcement of penalties cannot be the object of a Concession.

Competent bodies

The PPP law introduces two new specialised bodies within the public administration:

- The **Special PPP Secretariat** within the Finance Ministry: Each public authority that wishes to examine the possibilities of a concession can seek the support and knowledge of the Secretariat and conversely, the Secretariat is expected to function as a central point of reference, to collect all relevant information, and support with its expertise the public administration. Further, the Secretariat is the consulting and supporting body of the IMC. Currently, the Secretariat is examining the possibility of launching the first tenders for schools and perhaps hospital concessions.
- The **IMC** is the concessions decisive and awarding body, and consists exclusively of Ministers and is chaired by the Finance Minister.

Procedure

The PPP Law allows for all concession award procedures that are available under the EU public procurement framework. It is noteworthy that for the first time the competitive dialogue concept and other similar provisions of Directive 2004/18/EC on the coordination of procedures for the award of public work contracts, are introduced into Greek law.

In any case, the relevant invitation to tender should define the basic terms and conditions of the concession agreement.

Risks assumed by the public authorities

One of the most important aspects of the PPP law is that certain obligations and risks are mandatorily undertaken by the relevant public authorities:

- In the case of **archeological findings**, the public authority, after notification by the project company, reports these facts to the competent Archeological Service, which, within 60 days, is obliged to propose ways of continuance of the works and to go through the necessary actions for the safeguard and preservation of the antiquities.
- All necessary **environmental investigations** regarding environmental consequences as well as any specific environmental conditions have to be determined before the award of the concession agreement.
- The **expropriation of real properties** or the establishment of real property rights necessary for the projects are to be treated as being in the public interest and processed on a priority basis and in any event concluded within the period set

in the relevant expropriation deed.

- Finally, any relevant **public authority or utility company** is under the obligation to provide immediately all necessary assistance and in a priority basis for the execution of the projects. If any of the above risks materialise, the project company has the right to seek compensation for its losses and, with the exception of environmental issues, ask for the extension of the concession timetable.

Measures for facilitating financing

The new law also has a set of enabling clauses, in order to assist the financing of concessions.

The public authorities can enter into direct agreements with the concession financiers.

The project company is allowed to assign its contractual rights, present or future, to financial institutions or to special purpose vehicles for securitisation purposes.

Furthermore, project company creditors' security interests are not affected by bankruptcy or by collective proceedings for the satisfaction of creditors.

Other components of the new regulatory framework

The consent of public authorities is to be sought in the case of modifications in the project company, such as transfer of shares before the concession's operation, share capital increases, amendments to the articles of association, issuance of bonds, other corporate transformations, listing of the project company's shares or issuance of convertible debentures.

Moreover, the new law contains certain tax provisions applicable to the project companies, consistently with the practice that has been followed in the existing concession agreements (i.e. no income tax on accrued interest until commencement of operation period, any state contribution is treated as capital subsidy and relieved from VAT, income tax and other levies, losses can be carried forward and deducted from taxable earning for 10 years, refundable VAT is refunded within 90 days from the relevant application).

It is also worth mentioning that concession contracts are to be governed by Greek law. Additionally, the exclusive forum for the resolution

of any concession dispute is arbitration. The concession agreement is to specify the remaining arbitration details (such as place, language, rules, appointment of arbitrators, etc.).

Note:

Concessions with a budget cost over €200,000,000 still remain under the old regime, i.e. they must be ratified by the parliament.

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