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Sally Roe

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GETTING THE DEAL THROUGH

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Contributing editor

Sally Roe

Freshfields Bruckhaus Deringer LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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CONTENTS

Greece

Alexandros A Kortesis, Athanasios S Taliadouros and Vasiliki Karamani

Potamitis Vekris

Legislative framework

1 What is the relevant legislation and who enforces it?

The legal framework of public contracts in Greece includes a multilayered set of laws and regulations. More specifically, Greece has incorporated the following relevant European Directives that basically regulate the pre-contractual stage of the respective category of public contracts falling within their ambit:

- Directive 2004/18/EC has been transposed into national law via Presidential Decree No. 60/2007;
- Directive 2004/17/EC has been transposed into national law via Presidential Decree No. 59/2007; and
- Directive 2009/81/EC has been incorporated by Law No. 3,978/2011.

In addition, the stipulations of Directive 89/665/EC have been transposed into Greek Law first by Law No. 2,522/1997, subsequently repealed and replaced by Law No. 3,886/2010, currently in force.

The pre-contractual stages preceding the conclusion of public contracts that do not fall within the ambit of the European thresholds, as well as the stage of execution of public contracts, are governed by domestic legislation. In more detail, the main instrument regulating the conclusion and execution of public supplies contracts is Law No. 2,286/1995.

Executive Presidential Decree No. 118/2007 includes details pertaining to the supplies of the public sector, irrespective of whether said contracts exceed the relevant EU thresholds.

Further, pursuant to Law No. 4,013/2011 the Greek Single Public Procurement Authority was established; whereas pursuant to Law No. 4,155/2013 a national 'e-procurement' mechanism was set in place.

It should be noted that according to article 8 of Law No. 3,310/2005, the shares of *societes anonymes* applying for procurement procedures exceeding €1 million shall be registered in their entirety.

That being said, recently (as of August 2014) Law No. 4,281/2014 was adopted. In short, said Law repeals and re-codifies the aforementioned pre-existing domestic legislation that incorporated the respective European Directives. The Law introduces a fine-tuned approach regarding public procurement; aiming to capture all public contracts regarding works, services and supplies, including public work concessions, framework agreements and design tenders. Nonetheless, following its adoption the Law has been consecutively suspended (for the time being, until 29 April 2016).

It should be noted that in the Memorandum of Understanding (MoU) signed in August 2015 between the European Commission, acting on behalf of the European Stability Mechanism (ESM), and the Hellenic Republic, it is explicitly stipulated that a consolidated, comprehensive and simplified legislative framework (primary and secondary legislation) on public procurement and concessions including the transposition of the new Directives should enter into force within 2016.

Finally, the transposition of the new EU procurement Directives, namely Directives 2014/23/EU; 2014/24/EU and 2014/25/EU, is expected shortly. The three governmental bills jointly prepared by the Ministry of Economics and Ministry of Infrastructure were put to public consultation as of March 2016. The consultation period ended in 28 March 2016; hence the new legislation is expected to enter into force once adopted by the Greek parliament.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In addition to European procurement rules, Greek law has provisions regarding the award of contracts falling short of the European thresholds. From a practical perspective, said divergences mainly concern the mechanisms pertaining to judicial resolution of disputes.

Further, Greece has ratified the WTO Government Procurement Agreement with Law No. 2,513/1997. According to article 28(1) of the Greek Constitution, international conventions, as of the time they are ratified by statute and become operative according to their respective conditions, shall form an integral part of domestic Greek law and shall prevail over any contrary provision.

3 Are there proposals to change the legislation?

Yes. Regarding the transposition of the new EU procurement Directives, see question 1.

4 Is there any sector-specific procurement legislation supplementing the general regime?

The Greek legislature has transposed Directive 2009/81/EC into national law by Law No. 3,978/2011.

Moreover, Greece has established a detailed legal framework regarding the selection of private investors in public-private partnerships (PPPs). Public procurement relating to PPP contracts is regulated by Law No. 3,389/2005.

A separate legal framework concerning 'fast-track' works, namely the acceleration and transparency mechanism for procedures relating to the implementation of strategic investments in Greece, whether these consist of private-private ventures (a private investment in a private asset, such as a hotel or tourist development, an industry, etc) or PPPs (a private investment in a state asset or property, such as the development of the old Athens airport site, the development of Greek state-owned tourism real estate, development of an airport, etc), is governed by Law No. 3,894/2010 as amended by Laws No. 4,072/2012 and 4,146/2013. The principal aim of the Fast Track Law is to accelerate the licensing procedures for investments deemed strategic for the Greek economy.

Finally, an independent section in Law No. 4,182/2014 (postponed for the time being) regulates public work concession contracts. Nevertheless, Greece should transpose, by 18 April 2016, the new Directive 2014/23/EU on the Award of Concession Contracts.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Examples of public and private public bodies, currently considered not to be a contracting authority include, inter alia:

- Hellenic Telecommunications Organisation SA;
- churches constituting sui generis public law entities;
- chambers of industry and commerce; and
- certain public entities incorporated under private law whose stocks are listed on the Athens Stock Exchange.

Law No. 4,281/2014 (postponed for the time being) contains a comprehensive list pertaining to entities not constituting contracting authorities for public procurement purposes.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

The status of private legal entities that do not belong to the stricto sensu public sector, vested with administrative and financial autonomy and exclusively operating under the rules of private economy, might be disputed.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

As per Presidential Decree No. 60/2007, the financial thresholds are set out as follows:

- €137,000 regarding public contracts for the supply of goods and provision of services, awarded by central governmental procurement authorities, mentioned in Annex IV to Presidential Decree No. 60/2007 (eg, the Health Procurement Committee);
- €211,000 with regard to public contracts for the supply of goods and provision of services awarded by authorities other than those mentioned in Annex IV to Presidential Decree No. 60/2007, or by authorities that are mentioned in the above Annex but that operate in the field of national defence, or by any public authority with regard to the services mentioned in Annex II A; and
- €5.278 million with regard to public contracts for the assignment of construction works.

As per Presidential Decree No. 59/2007, the minimum thresholds, excluding VAT, are out set as follows:

- €422,000 with regard to contracts for supplies, services and project planning; and
- €5.278 million concerning contracts for the assignment of construction works.

For the contracts, the value of which falls below the above thresholds, the provisions of Law No. 2,286/1995 apply.

Finally, the aforementioned thresholds will be in force until 29 April 2015. As of 30 April 2016, Law No. 4,281/2014 will regulate procurement procedures whose estimated value exceeds €2,500 (excluding VAT).

8 Does the extension of an existing contract require a new procurement procedure?

Pursuant to the principle of equal treatment of bidders, prima facie an extension of an existing contract is not allowed. The main terms and conditions of the contract must remain unchanged. Consequently, an extension is allowed only if such possibility is explicitly stipulated in the relevant notice and contract, and as long as the stipulations of article 24 of Presidential Decree No. 118/2007 (elaborated upon in question 9) are fulfilled.

9 Does the amendment of an existing contract require a new procurement procedure?

Prima facie such amendment is not allowed. However, according to article 24 of Presidential Decree No. 118/2007, an amendment is allowed, as long as the following conditions are fulfilled:

- objectively justified circumstances;
- agreement among contracting parties;
- such possibility of modification needs be provided for by a contracting authority; and
- previous legal opinion of the competent authority.

That being said, the administrative petition regarding the modification shall be subjected to a strict review pertaining to the fulfilment of both the legality and necessity of the contemplated modification from a public purpose perspective.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

According to administrative practice, in general, public contracts include the following clause: 'The successful bidder is not allowed to transfer or assign – totally or partially – this contract to any other third party, without the previous consent of the contracting authority'.

That being said, and in line with the answer question 9, a transfer is prima facie not allowed, as long as such transfer is not provided for under the terms of the declaration or contract, or both. Be that as it may, any transfer of contract is subjected to the prior approval of the contracting authority. According to Greek administrative practice, for the transfer to be valid, a relevant petition must be filed and be accepted by the contracting authority.

Finally, the new entity must fulfil the same objective and subjective prerequisites and criteria deemed necessary with regard to the initial successful bidder. Said criteria will once again be assessed with a view of fulfilling public purposes of sound administration.

11 In which circumstances do privatisations require a procurement procedure?

The Hellenic Republic Asset Development Fund was established in July 2011 (Law No. 3,986/2011), under the medium-term fiscal strategy. The new law aimed to restrict governmental intervention in the privatisation process. Subsequently, the old privatisation process under Law No. 3,049/2002 was abandoned.

The Fund is a *societe anonyme*, of which the Hellenic Republic is the sole shareholder with a share capital of €30 million. The Fund is not a public entity and is governed by private law. The assets transferred to it by the state do not form part of its share capital. Most of the assets contained in the medium-term plan have been transferred to the Fund, while other assets, which the Hellenic Republic has decided to develop or sell, will also be transferred. Any asset transferred to the Fund is to be sold, developed or liquidated; the return of any asset back to the state is not allowed.

The Fund's board of directors approves key points of the tender process, preselection, principal terms of the contract and selection of the final investor. An independent evaluator intervenes at the end of the process, whose opinion is also taken into account by the board in its deliberations. Upon the adoption of a decision, the contract is submitted to the Audit Office for a pre-contract audit.

Further, according to article 5 of Law No. 3,986/2011, the Fund decides upon the specific form pertaining to the process of counterparties' finding, taking account, inter alia, international practice in analogous transactions; the specificities of each asset; the existence and characteristics of investment interest, with a view of optimally utilising the Fund's assets.

Be that as it may, the Fund shall respect EU law legislation regarding the conclusion of contracts not covered by public procurement law, as such rules are elaborated upon in ECJ jurisprudence and the relevant Communication of the European Commission (2006/C 179/02).

12 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Public procurement relating to the selection of private investors in PPPs is regulated by Law No. 3,389/2005. Article 1(2) defines PPPs as the written commercial cooperation agreements ('Partnership Agreements') for the performance of construction work or services, or both, between public entities and entities governed by private law.

Moreover, the requirements set out in Law No. 3,389/2005 are the following:

- a private partner operator should be a special-purpose ('vehicle') company vested the form of a *societe anonyme*;
- the Partnership Agreements' object is the execution of works or the provision of services in an area that is part of the public entity's responsibility, as defined by law or by agreement, or in its memorandum of association;
- the financial contribution of the private partner operator in return can be sought – either in whole or in part – by the final users of the works or services, or alternatively by the public entity, usually assured through the public investments budget funding the public investment programme;
- private entities are to finance, either in whole or partly, the execution of the work of services; and
- the Partnership Agreements' object is the execution of works or the provision of services up to €500 million (excluding VAT).

13 What are the rules and requirements for the award of works or services concessions?

Until now, the subject matter is dealt with in a piecemeal manner; no comprehensive legislative framework exists regulating the award and execution of concession contracts. From a practical perspective, large contracts (usually exceeding €200 million) are ratified by parliamentary statute, with a view of vesting their regulatory provisions with increased validity and formality.

That being said, as of 1 March 2016 a governmental bill prepared by the ministries of economics and infrastructure was put to public consultation. Said bill shall implement Directive 2014/23/EU on the award of concessions contracts, the first legislative instrument at the European level duly reflecting the specificity of concessions as compared to typical public contracts. The consultation period ended on 11 March 2015, thus a new Law reflecting the provisions of said Directive on both works and services concessions is anticipated to enter into force once adopted by the Greek parliament.

14 To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

Public contracts in Greece are concluded between a contracting authority or a contracting entity and an economic operator. 'Economic operator' means any natural or legal person or public entity or group of such persons or entities, including any temporary association of undertakings that offers the execution of works or a work, the supply of products or the provision of services on the market. On the basis of the above, public contracts can be concluded between two or more contracting authorities. As a result, the rules that regulate public contracts apply in these cases, unless the following cumulative conditions are met:

- the contracting authority exercises such control over the other contracting authority, which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80 per cent of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal entities controlled by that contracting authority, regardless of the beneficiary of the contract performance; and
- there is no direct participation by a private economic operator in the capital of the controlled legal entity, since in such circumstances the award of a public contract without a competitive procedure would provide the private economic operator having a capital participation in the controlled legal entity an undue advantage over its competitors.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The core principles pertaining to public procurement procedures can be summarised as follows:

- transparency and publicity: inter alia, article 3 of Presidential Decree No. 60/2007; article 4 of Presidential Decree No. 118/2007; and article 16 of Law No. 4,281/2014;
- equal treatment: inter alia, article 3 of Presidential Decree No. 60/2007; article 2 of Law No. 3,304/2005; and article 16 of Law No. 4,281/2014;
- impartiality: inter alia, article 7 of Law No. 2,690/1999; and
- competition: undistorted competition is considered as a general guiding principle, which is further supplemented by the principles of equality, transparency, sound administration, non-discrimination and privacy of offers. See, inter alia, article 1 of Law No. 3,959/2011; article 22A of Presidential Decree No. 118/2007; article 3 of Presidential Decree No. 60/2007; and article 16 of Law No. 4,281/2014.

The aforementioned core principles are further strengthened by the administration's obligation to state reasons, the principles of legal certainty and reasonable expectations, proportionality and mutual recognition, etc, enshrined both in statute and case law.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

See question 15.

Also, the principles of objectivity and impartiality of the administration constitute a direct manifestation of the rule of law, as enshrined under article 25 of the Constitution.

17 How are conflicts of interest dealt with?

Until now such conflicts were resolved pursuant to the general principles applicable to public procurement procedures, namely transparency, impartiality and equality of treatment. The notion 'conflicts of interest' was dealt with in a piecemeal manner via fragmentary references in several public law instruments (eg, article 2 of Law No. 4,057/2012, article 36 of Law No. 3,528/2007 and article 7 of Law No. 2,690/1999). However, the new Law No. 4,281/2014 (postponed for the time being) attempts to comprehensively address the subject matter and contains an explicit provision in article 45 under the heading 'Conflicts of Interest'. Said provision's aims are identifying and remedying, in a timely and effective manner, any conflicts of interest arising during procurement procedures with a view to mitigating any hindrances to undistorted competition and ensuring equality of treatment among bidders.

'Conflict of interest' is defined as a situation where certain persons (eg, employees, managers, etc, of the contracting authority, as well as relatives thereof) have a direct or indirect 'private' (ie, pecuniary or personal, or both) interest in the conclusion of a procurement procedure that might be interpreted as impeding their objectivity and impartiality. Moreover, the article contains detailed notification obligations concerning both contracting authorities and bidders. In short, contracting authorities must immediately contact the Hellenic Single Public Procurement Authority (HSPPA) (an independent administrative body) and take any reasonable action with a view to remedying the conflict. As long as less restrictive means are not available, the contested bidder is disqualified from the procedure. Additionally, contracting authorities are responsible for the avoidance of conflicts when electing personnel responsible for a specific procurement procedure. Finally, the successful bidder upon completion of the procurement procedure signs a relevant contractual clause ('impartiality clause') stipulating that throughout the procurement process and until completion of the work or service no illicit, abusive or unfair actions were undertaken on his or her behalf. Breach of the aforementioned results ipso facto in revocation of the tenderer's contract.

Finally, article 24 of the new Directive 2014/24/EU (transposition expected) explicitly states that member states shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Previous participation of a bidder in the preparatory work of a tender procedure that bestows him or her with a privileged position vis-à-vis other bidders might raise serious implications pertaining to the application of the principle of equal treatment.

That being said, pursuant to the *Fabricom* judgment (Case C-21/03) such prior involvement may lead to the exclusion of the bidder, as long as the information gained is liable to hinder competition. Thus, in order to ensure equality of treatment, procedures must be in place through which – and in accordance with the principle of proportionality – an ad hoc evaluation is undertaken pertaining to assessing potential distortions of competition. In this vein, contracting authorities must assess the facts of the case at hand in order to ensure transparency in the award procedures and the unbiased and objective evaluation of tenders. In addition, the bidder must be given the opportunity to rebut any presumptions relating to unjustified advantages.

Note that the subject matter is now explicitly addressed in article 41 of the new Directive 2014/24/EU (transposition expected), stating that where a candidate or tenderer has advised the contracting authority, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted. Such measures shall include the communication to the other candidates of relevant information exchanged in the context of, or resulting from the involvement of, the tenderer in the preparation of the procurement procedure. The candidate or tenderer concerned shall be excluded from the procedure only where there are no other less restrictive means to ensure compliance with the principle of equal treatment.

19 What is the prevailing type of procurement procedure used by contracting authorities?

According to national administrative case law, open or restricted procedures constitute the rule, whereas procurement procedures among a limited number of participants are only exceptionally allowed. Suffice it to say, the open procedure is used in most standard tender processes.

20 Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

As already mentioned, procurement procedures should be governed, inter alia, by the principles of effective competition and privacy of offers. In this vein, the principle of privacy ensures the uniqueness of each offer and the prevention of possible collusion and unfair practices among tenderers.

Related companies may legally submit different offers in a procurement procedure only when such companies have commercial and financial autonomy and act independently during the submission of offers. Said criteria can be summarised as follows:

- autonomy of each company: this concerns the establishment of marketing strategy, pricing policy and consequently respective bid (offer independence); and
- performance independence: respective offers shall be prepared and submitted after the quest to attain the best cost-efficiency relationship regarding the offered products.

Finally, regard should be had to core principles deriving from ECJ case law, namely the rulings in *Assitur* (Case C-358/07) and *Serratoni* (Case C-376/08).

21 Are there special rules or requirements determining the conduct of a negotiated procedure?

Under Greek law, only in the specific cases and circumstances explicitly referred to in articles 24 and 25 of Presidential Decree No. 60/2007 can contacting authorities apply a negotiated procedure, with or without publication of the contract notice.

Contracting authorities may award public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

- in the event of irregular tenders or the submission of tenders that are unacceptable under national provisions;
- in exceptional cases, when the nature of the works, supplies, or services do not permit prior overall pricing;
- in the case of services insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision; and
- in respect of public works contracts, for works that are performed solely for purposes of research, testing or development.

During negotiations, contracting authorities shall ensure the equal treatment of all tenderers. Further, they may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice or the specifications.

Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the cases exhaustively defined in article 25 of Presidential Decree No. 60/2007.

Suffice it to say, articles 51 and 52 of Law No. 4,281/2014 (suspended for the time being) reiterates the aforementioned stipulations.

Finally, Directive 2014/24/EU (transposition expected) introduces significant amendments to both regimes. Most importantly, according to the Directive negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances (eg, where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract). Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself. Contracting authorities relying on this exception should provide adequate reasons.

22 When and how may the competitive dialogue be used? Is it used in practice in your jurisdiction?

Article 23 of Presidential Decree No. 60/2007 explicitly stipulates that in the case of 'particularly complex contracts', where contracting authorities consider that the use of the open or restricted procedure, or both, will not allow the award of the contract, the latter may use the competitive dialogue. Particularly complex contracts are contracts where contracting authorities are objectively incapable of determining the technical means to meet their goal or the legal or financial conditions of the project.

Contracting authorities may limit the number of suitable candidates they will invite to conduct a dialogue, provided a sufficient number (a minimum of three) of suitable candidates is available. The procedure itself may consist of several phases of negotiations. Once the dialogue is declared completed, the bidders hand in their final offer on the basis of the negotiation (selection phase). The tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender provided this does not have the effect of modifying substantial aspects of the tender (award phase).

Article 49 of Law No. 4,281/2014 (suspended for the time being) reiterates the aforementioned stipulations.

Finally, according to Directive 2014/24/EU (transposition expected), contracting authorities may apply a competitive dialogue in the following situations:

- with regard to works, supplies or services fulfilling one or more of the following criteria:
  - the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - they include design or innovative solutions;
  - the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them;
  - the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; and
- with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

It should be stressed that the new regime envisaged by the new EU Directives provides greater flexibility during both the selection and the award phase.

23 What are the requirements for the conclusion of a framework agreement?

A framework agreement is defined as an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. As a general rule, contracting authorities may not use framework agreements improperly or in an abusive manner that results in hindrances to effective competition.

According to Article 26 of Presidential Decree No. 60/2007, in principle, the term of a framework agreement may not exceed four years. The parties to the framework agreement shall be chosen in accordance with the general rules prescribed under article 51 of the aforementioned Decree. Moreover, where such an agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the term laid down in the framework agreement. It should be stressed that said procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement. Further, when awarding contracts, the parties may under no circumstances make substantial amendments to the terms laid down in the framework agreement. According to Greek Court of Audit case law, within the context of a tender pertaining to a framework agreement an omission to describe the maximum purchase volume constitutes a material breach of public law.

Further guidance on the subject matter can be found in article 126 of Law No. 3,669/2008 (regarding public works contracts); article 8 of Law No. 3,316/2005 (regarding services); and article 22A of Presidential Decree No. 118/2007 (regarding public supply contracts).

Suffice to say, articles 53 and 54 of Law No. 4,281/2014 (suspended for the time being) reiterate in large the aforementioned stipulations. Further, Directive 2014/24/EU, article 33 (transposition expected) provides greater clarity and more flexible rules.

24 May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

According to article 26 of Presidential Decree No. 60/2007, where a framework agreement is concluded with several economic operators, the latter must be at least three in number, as long as there is a sufficient number of economic operators to satisfy the selection criteria.

An additional competitive procedure is not required, as long as all the terms for the contracts to be awarded are governed by the framework agreement. Contrariwise, where not all terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, the contract will be awarded based on the detailed procedure described under article 26 of the aforementioned Decree. In short, the contract shall be awarded to the undertaking that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

In compliance with the principles of equal treatment and transparency, the main terms and conditions of the contract to be signed by the successful bidder should remain unchanged until the conclusion of the relevant agreement. Hence, the content of the contract should not be amended materially.

The tender procedure in the main proceedings is principally governed by Law No. 1,418/1984, as codified by Law No. 3,669/2008 on public works and related matters. Said legislation provides, on certain conditions, for the substitution of a member of a consortium which has been awarded a particular contract. Such substitution, which is always subject to approval by the awarding authority, is allowed only at the stage when the works are being carried out, that is to say the phase which follows signature of the contract between the contractor and the awarding authority and not at a stage prior to award of the contract.

Last, in the event the substitution is requested by a member of the consortium, the consent of all members of the consortium is required.

26 Are unduly burdensome or risky requirements in tender specifications prohibited?

No. There are no explicit prohibitions regarding burdensome or risky requirements in tender specifications.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

Contracting authorities have to assess the qualifications of tenderers based on the criteria set out in Presidential Decrees No. 59/2007, No. 60/2007 and No. 118/2007.

Furthermore, there are cases where the contracting authority must exclude candidates from the procurement procedure. For instance, when candidates are not fulfilling the financial or technical standards set out by the contracting authority; when they are declared bankrupt or have submitted a petition for bankruptcy, or are subject to a rehabilitation process; when they fail to comply with the existing environmental obligations, as well as legal constraints regarding labour law; when they have been convicted for a crime regarding their professional capacity; when they have violated the rules regarding competition between candidates, or have tried to influence the contracting authority by using unlawful means; and when they fail to provide evidence of the fulfilment of their tax and insurance obligations, etc.

28 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Notwithstanding the fact that contracting authorities should not split a works project or proposed purchase of a certain quantities of supplies or services or by using special methods for calculating the estimated value of public contracts (article 9(3) of Directive 2004/18/EC and article 17(2) of Directive 2004/17/EC), there are cases when contracting authorities proceed to the division of a public contract into lots, with a view of ensuring that the financial thresholds of each separate public contract do not exceed the above-mentioned thresholds.

That being said, in order to avoid the undervaluation of public contracts and consequently the non-implementation of EU Directives, national legislation provides for special methods pertaining to the calculation of a contracts' value. Said rules are set out in article 8 of Presidential Decree No. 60/2007 and article 17 of Presidential Decree No. 59/2007.

29 What are the requirements for the admissibility of alternative bids?

The subject matter is dealt with by Presidential Decrees No. 60/2007 and No. 59/2007. Contracting authorities may authorise tenderers to submit alternative bids where the criterion for award is that of the most economically advantageous offer. In that case, contracting authorities shall indicate in the tender's terms of reference whether or not they authorise alternative bids, and if so, they shall state the minimum requirements to be met by them, as well as any specific requirements for their presentation. Contrariwise, tenderers shall not be authorised to submit alternative bids without the aforementioned indication in the tender's terms of reference.

In addition, pursuant to Presidential Decree No. 609/1985, alternative bids may be submitted, as long they are based on different technical solutions and are not prohibited by the tender notice or dossier. Further, Presidential Decree No. 118/2007 provides that the tender notice or dossier must indicate the prohibition – if any – of alternative bids.

Last, Law No. 4,182/2014 (postponed for the time being) provides the same criteria regarding the admissibility of alternative bids.

30 Must a contracting authority take alternative bids into account?

As mentioned above, as long as the criterion for award is that of the most economically advantageous offer, alternative bids shall be taken into account provided that tenderers are authorised to submit such bids and the minimum requirements set out in the tender's terms of reference are met. Regarding Presidential Decree No. 609/1985, if alternative bids are submitted that meet the requirements set out in the tender's notice or dossier, such bids shall be treated as 'equal and independent offers'. That being said, procurement practice reveals that most invitations to tender explicitly prohibit such possibility.

31 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders should not change the tender specifications or submit their own standard terms of business. Should they do so, the contracting authority is obliged to exclude them from the procurement procedure. This does not apply to tender documents that explicitly allow changes according to the tender's notice.

32 What are the award criteria provided for in the relevant legislation?

Pursuant to the provisions of Presidential Decrees No. 60/2007, 59/2007 and 118/2007, the contracting authority may award the public contract based on either the most economically advantageous offer, or the lowest price. In the former case, the award shall depend on various criteria relating to the subject matter of the public contract, namely, quality, price, technical merit, functional characteristics, environmental characteristics or aftersales service, technical assistance, etc. Whatever the case, the contracting authority should clearly state in the tender's notice the criterion by which the award will take place.

33 What constitutes an 'abnormally low' bid?

According to Presidential Decrees No. 60/2007 and 59/2007, an offer unrealistically low in relation to the subject matter of the public contract shall be considered as an 'abnormally low' bid. If for a given contract, tenders appear to be abnormally low in relation to the goods, works, or services; the contracting authority shall, before rejecting those tenders, request in writing details of the constituent elements of the tender that it considers relevant.

34 What is the required process for dealing with abnormally low bids?

Before rejecting an abnormally low bid, the contracting authority may request clarifications regarding the offer. Said clarifications may relate in particular to:

- costs of the manufacturing process, of the services to be provided and of the chosen construction method;
- technical solutions chosen and any exceptionally favourable conditions available to the tenderer for the supply of goods or services, or for the execution of the work;
- originality of the supplies, services or work proposed by the tenderer; and
- compliance with employment obligations, health and safety regulations.

Further, the contracting authority may request clarifications regarding the possibility of the tenderer to obtain state aid. National legislation does not stipulate specific requirements on the subject matter, except for the provisions of Law No. 3,389/2005 on PPPs, which follows the same approach to abnormally low bids as Presidential Decrees No. 60/2007 and 50/2007.

35 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Directives No. 2014/24/EU and 2014/25/EU introduce the concept of 'self-cleaning' on a European level. However, the provisions of the aforementioned Directives have not yet been transposed into Greek public procurement legislation.

Review proceedings and judicial proceedings

36 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Acts or decisions issued by the contracting authority in breach of procurement law may be challenged by any person having legal interest both during the pre-contractual stage and the contract execution stage.

With regard to contracts falling within the ambit of the EU Directives, pursuant to the provisions of Law No. 3,886/2010, candidates have the right to have access to judicial proceedings against acts and omissions of the contracting authority by filing a complaint before the contracting authority within 10 days from the time they become aware of its illegal acts or omissions. In such case, the contracting authority should respond within 15 days from the date of the submission of the complaint. If the complaint is rejected or if the contracting authority does not respond within the 15-day period, the bidder may submit an interim measures petition before the competent Administrative Court, or if the value of the contract exceeds €15 million before the Supreme Administrative Court, within 10 days of the date the complaint was rejected or from the expiration of the 15-day response period. Moreover, in the case candidates obtain interim measures, they have the right to initiate ordinary proceedings and submit an application regarding the annulment of the illegal act or omission. Finally, candidates may claim damages if the contracting authority proceeds to the execution of the contract, despite the interim measures, or in cases where they had been excluded or the tender was not awarded, the contracting authority acting in breach of EU directives and national legislation.

With regard to contracts falling below the relevant European thresholds, any person having or having had an interest in obtaining a particular public supply or public works contract and who has been – or risks being – harmed by an alleged infringement may file a complaint before the competent authority according to the provisions of Presidential Decree No. 118/2007 (article 15).

Despite the above, Law No. 4,281/2014 (suspended for the time being) introduces important innovations regarding judicial proceedings in the event of illegal acts or omissions of the contracting authority. In particular:

- when the estimated value of the public contract exceeds €60,000, candidates have the right to have access to judicial proceedings against acts and omissions of the contracting authority by filing a complaint before the HSPPA. If the complaint is rejected, candidates may submit an application regarding the annulment of the illegal act or omission or an interim measures petition before the Administrative Court of Appeal. When the estimated value of the public contract exceeds €15 million or when the public contract is of great value, candidates (in the case their complaint before the HSPPA was rejected) may submit an application regarding the annulment of the illegal act or omission or an interim measures petition before the Supreme Administrative Court. The same provisions apply in PPPs or public work or services concessions;
- when the estimated value of the public contract is equal to or less than €60,000, candidates may file an application for judicial review before the competent administrative court of appeal. If the application is rejected, candidates have the right to submit an interim measures petition before the aforementioned court; and
- candidates are expected to claim damages, if the contracting authority proceeds to the execution of the contract in cases where they have been excluded or the tender was not awarded, from the contracting authority acting in breach of EU Directives and national legislation before the competent administrative or civil courts.

37 How long does an administrative review proceeding or judicial proceeding for review take?

The duration of the proceedings before the competent administrative body is limited to 15 days, starting from the receipt of the relevant application; whereas the length of review proceedings (interim measures) before the competent court will practically take around three to four months.

38 What are the admissibility requirements?

The requirements can be summarised as follows:

- the candidate must have an interest in the awarded contract, which is generally proven by the submission of an offer;
- the candidate must claim that its rights were violated over the fact that the contracting authority acted in breach of EU and national procurement law;
- the candidate has to demonstrate that it has suffered a loss, or might be about to suffer a loss, as a consequence of the alleged violation of procurement provisions; and
- the complaint shall be inadmissible if it is filled more than 10 days from the time the candidate became aware of the contracting authority's illegal acts or omissions.

39 What are the deadlines for a review application and an appeal?

Review application before the contracting authority

The review application before the contracting authority under the ambit of Law No. 3886/2010 shall be filed within 10 days of the date on which the candidate becomes aware of the contracting authority's illegal act or omission. The contracting authority should respond within 15 days of the date of the submission of the application.

Application for interim measures

The candidate may submit an interim measures petition within 10 days of the date the review application was rejected or of the expiration of the 15-day response period. When such period has elapsed without a response on the contracting authority's part, an implicit rejection of the petition is inferred.

Application for annulment of the illegal act or omission

In cases where the interim measures petition is upheld, the request for annulment is lodged within 30 days of the service of the relevant ruling on interim measures.

40 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

An application for review does not have an automatic suspensive effect; yet during the period that a candidate may file a complaint and an interim measures petition, the public contract may not be executed.

41 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

There is no such provision currently in force. The contract is concluded with the notification of the award decision.

Update and trends

In the memorandum of understanding signed in August 2015 between the European Commission, acting on behalf of the European Stability Mechanism, and the Hellenic Republic, it is explicitly stipulated that a consolidated, comprehensive and simplified legislative framework (primary and secondary legislation) on public procurement and concessions including the transposition of the new Directives should enter into force within 2016.

The transposition of the new EU procurement directives, namely Directives 2014/23/EU, 2014/24/EU and 2014/25/EU is expected shortly. Three governmental bills jointly prepared by the Ministries of Economics and Infrastructure were put to public consultation as of March 2016. The consultation period ended on 28 March 2016; hence, the new legislation is expected to enter into force once adopted by the Greek parliament.

42 Is access to the procurement file granted to an applicant?

Presidential Decree No. 118/2007 postulates that candidates shall have right of access to the other candidates' procurement files, in accordance with the terms and conditions envisaged in the initiation to tender.

43 Is it customary for disadvantaged bidders to file review applications?

Yes. The vast number of applications pertaining to protective measures by tenderers during the pre-contractual stages of the procedure has all too often led either in the suspension of awarding procedures, or in the cancellation of pre-contractual procedures.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

According to article 8 of Law No. 3,886/2010, anyone with legal interest can seek the annulment of the contract on grounds pertaining to:

- the award of the contract by the contracting authority without prior publication of the notice;
- breach of the standstill requirements following filing of interim measure; and
- breach of the specific deadlines envisaged in the context of framework agreements.

That being said, the way the Greek legislator will make use of the grounds for termination envisaged in the new EU public procurement directives remains to be seen.

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Yes. According to article 105 of the Introductory Law of the Greek Civil Code, any person who has suffered damage, as a result of any unlawful or omission of public bodies entrusted with the exercise of public powers, shall be entitled to receive compensation from the state. Moreover, as a matter of law the possibility exists for filing an application for annulment before the Supreme Administrative Court.

46 If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

As a matter of law, disadvantaged bidders can claim damages in accordance with article 914 of the Greek Civil Code, pursuant to which a person who has caused illegally and through his or her fault prejudice to another shall be liable for compensation. However, from a practical perspective, in the context of procurement procedures such claims usually fail, especially if interlocutory measures have been accepted.

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Alexandros A Kortesis **alexandros.kortesis@potamitisvekris.com**
Athanasios S Taliadouros **athanasios.taliadouros@potamitisvekris.com**
Vasiliki Karamani **vasiliki.karamani@potamitisvekris.com**

9 Neofytou Vamva Street
Athens 10674
Greece

Tel: +30 210 33 80000
Fax: +30 210 33 80020
www.potamitisvekris.com

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