Public Procurement

Contributing editor
Totis Kotsonis

2018

GETTING THE DEAL THROUGH

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Totis Kotsonis
Eversheds Sutherland

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Preface

Public Procurement 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of Public Procurement, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Cape Verde, Chile, Mozambique, Panama, São Tomé and Príncipe and Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland for his assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2018

Greece

Alexandros A Kortesis, Athanasios S Taliadouros and Ifigeneia Lentza

PotamitisVekris

Legislative framework

1 What is the relevant legislation regulating the award of public contracts?

On 1 August 2016 Law No. 4,412 on Public Procurement entered into force, introducing a centralised, comprehensive procurement procedure framework for all national tenders. The Law implements the EU Procurement Directives 2014/24/EU on public procurement and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors), in one single legislative act. In particular, Book I of Law No. 4,412/2016 (articles 3 to 221) contains provisions that are applicable to procurement procedures with respect to public contracts of works, supplies or services as well as design contests; whereas Book II (articles 222 to 338) contains provisions that are applicable to procurement procedures in relation to public contracts of works, supplies or services by entities operating in the water, energy, transport and postal service sectors.

Law No. 4,412/2016 applies to all national procurement procedures, irrespective of whether they do or do not meet the relevant European thresholds. More specifically:

- procurement procedures in relation to public contracts of works, supplies or services (Book I of Law No. 4,412/2016, articles 3 to 221):
  - articles 25 to 115: general provisions that are applicable to all procurement procedures that meet the EU thresholds; and
  - articles 116 to 128: apply only to procurement procedures that fall under the EU thresholds; and
- procurement procedures in relation to public contracts of works, supplies or services by entities operating in the water, energy, transport and postal service sectors (Book II of Law No. 4,412/2016, articles 222 to 338):
  - articles 263 to 317 are general provisions that are applicable to all procurement procedures that meet the EU thresholds; and
  - articles 326 to 333 only apply to procurement procedures that fall under the EU thresholds.

As far as the review proceedings are concerned, the dispute settlement procedure referred to in articles 345 to 373 of Law No. 4,412/2016 (Book IV) is applicable to disputes arising from tender procedures that have been initiated:

(i) after 26 June 2017, for supply and services contracts;
(ii) after 1 January 2018, for contracts concerning works or study design contracts above the EU thresholds; and
(iii) after 1 March 2018, for contracts concerning works or study design contracts above €60,000, but below the EU thresholds.

For tender procedures that have initiated before the aforementioned dates, Law No. 3,886/2010 applies in cases (i) and (ii), and article 127 of Law 4,412/2016 in cases (iii).

In addition, the stipulations of Directive 2014/23/EU on the award of concession contracts have been transposed into national legislation via Law No. 4,413/2016.

2 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 (fields of defense and security). Moreover, Greece has established a detailed legal framework regarding the selection of private investors in public-private partnerships (PPPs). Law No. 3,389/2005 regulates public procurement processes relating to PPP contracts.

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 etc), is governed by Law No. 3,894/2010, as amended by Laws Nos. 4,072/2012 and 4,242/2014. The principal aim of the Fast Track Law is to accelerate the licensing procedures for investment deemed strategic for the Greek economy.

Finally, as already mentioned above, Law No. 4,413/2016, which entered into force as of August 2016, regulates public work concession contracts.

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

Greece has ratified the World Trade Organization's Agreement on Government Procurement (GPA) with Law No. 2,513/1997. Notice that, according to article 28(1) of the Constitution, international conventions form an integral part of domestic law and prevail over any contrary provision, as of when they are ratified by statute and become operative according to their respective conditions.

4 Are there proposals to change the legislation?

No. See question 1.

Applicability of procurement law

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

Pursuant to article 2(1) of Law No. 4,412/2016, contracting authorities shall mean the state, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or one or more such bodies governed by public law.

Examples of public and private public bodies, currently considered not to constitute contracting authorities include, among other things:

- Hellenic Telecommunications Organisation SA;
- churches constituting unique 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.

Further, note that the status of private legal entities not belonging, in the strictest sense, to the public sector, albeit vested with administrative and financial autonomy, might be disputed.

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

No. Notwithstanding their respective value, all tendering procedures are governed by Law No. 4,412/2016. However, as far as contracts falling short of the new directives' thresholds are concerned, the Greek

legislature has exercised its residual competence on certain aspects of the procurement procedure (eg, judicial protection, choice of procurement procedures, etc).

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Pursuant to article 132 of Law No. 4,412/2016, a modification of an existing contract requires a new procurement procedure, except in the following cases:

(i) When the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses.
- these clauses may include price revision clauses or options;
- such clauses must state the scope and nature of possible modifications or options and the conditions under which they may be used;
- no modifications or options that would substantially alter the overall nature of the contract or the framework agreement are allowed (see point (v) below); and
- any increase in price shall not exceed 50 per cent of the value of the original contract.

(ii) When additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement, and only when a change of contractor:
- cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
- would cause significant inconvenience or substantial duplication of costs for the contracting authority.

(iii) When several successive modifications are made (the aggregate value of which may not exceed 50 per cent of the value of the original contract or framework agreement) and the following conditions are fulfilled:
- the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee;
- the modification does not alter the overall nature of the contract; and
- any increase in price is not higher than 50 per cent of the value of the original contract or framework agreement.

(iv) When a new contractor replaces one a contracting authority initially awarded the contract to, as a consequence of:
- an unequivocal review clause or option;
- the initial contractor being wholly or partially replaced following corporate restructuring or insolvency by another economic operator that fulfils the criteria for qualitative selection initially established (provided no other substantial modifications to the contract are required); or
- the contracting authority itself assuming the main contractor's obligations towards its subcontractors.

(v) When the modifications, irrespective of their value, are not substantial. A modification is considered 'substantial' where it renders the contract or the framework agreement materially different in character from the one initially concluded.

Similar provisions on the modification of public contracts are included in article 156 (in relation to public contracts of works) and article 186 (in relation to design contests) of the aforementioned law.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Greek courts have addressed the subject matter issue in an exhaustive matter. In particular, it has been held that an amendment is allowed, as long as the following conditions are fulfilled:
- objectively justified circumstances;
- agreement among contracting parties;
- such possibility of modification needs to be provided for by a contracting authority in the respective tender documentation; and
- previous legal opinion of the competent authority.

Notwithstanding the above, the amendment of contracts and framework agreements without a new procurement procedure is expressly provided for in the newly enacted legislation, subject to the analysis in question 7. However, since the above provisions have just entered into force, there is no case law to-date clarifying said provisions.

9 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 law aims to restrict governmental intervention in the privatisation process.

The Fund is a public limited company, 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, pre-selection, 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 into account, among other things:
- international practice in analogous transactions;
- the specificities of each asset; and
- the existence and characteristics of investment interest, with a view of optimally utilising the Fund's assets.

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 European Court of Justice's (ECJ) jurisprudence and the relevant Communication of the European Commission (2006/C 179/02).

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

Law No. 3,389/2005 regulates public procurement relating to the selection of private investors in PPPs. Article 1(2) defines PPPs as 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 in the form of a public limited company;
- 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).

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

With regard to public contracts that meet the EU thresholds, contract notices and prior information notices shall be drawn up, transmitted by electronic means to the Publications Office of the EU and published in full in the official language(s) of the institutions of the EU chosen by the contracting authority (article 65 of Law No. 4,412/2016). Subsequently, such notices and the information contained therein shall be published

at national level on the centralised electronic register of public contracts, according to article 66 of the above-mentioned Law.

It should be mentioned that notices published at national level shall not contain information other than that contained in the notices dispatched to the Publications Office of the EU or published on a buyer profile, but shall indicate the date of dispatch of the notice to the Publications Office of the EU or its publication on the buyer profile.

With respect to public contracts that fall under the EU thresholds, contract notices and relevant information notices are only published on the centralised electronic register of public contracts.

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

According to article 75 of Law No. 4,412/2016, contracting authorities may only impose criteria relating to suitability to pursue the professional activity, economic and financial standing, and technical and professional ability as requirements for participation. In this context, contracting authorities shall limit any requirements to those that are appropriate in order to ensure that a candidate or tenderer has the legal and financial capacity, as well as the technical and professional ability, to perform the contract to be awarded. In this context, the contracting authority shall verify the fulfilment of the criteria related to the technical and professional capacity laid down in the declaration, specifying the appropriate means of proof which are exhaustively listed in Part II of Annex XII of Appendix A to Directive 2014/24/EU, establishing a closed system of assessment and control of the tenderers' technical capacity and thereby limiting the ability of the contracting authority to define the corresponding requirements of technical and professional capacity. Note that all requirements shall be related and proportionate to the subject matter of the contract.

In relation to the award criteria in case of concession contracts, these shall be objective in the sense that they ensure that tenderers are assessed in conditions of effective competition. Thus, according to article 45 of Law No. 4,413/2016, the award criteria shall be linked to the subject matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority. Note that environmental, social or innovation-related criteria may also be included.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

Pursuant to article 84 of Law No. 4,412/2016, in restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender, provided that a minimum number of qualified candidates is available. Note that contracting authorities shall indicate, in the contract notice or in the relevant invitation to the selected candidates, the objective and nondiscriminatory criteria that they intend to apply, the minimum number and, where appropriate, the maximum number of candidates.

In short, as far as restricted procedures are concerned, the minimum number of candidates shall be five. In the competitive procedure with negotiation, competitive dialogue and innovation partnership the minimum number of candidates shall be three. Nonetheless, in any event the number of candidates invited shall suffice so as to ensure effective competition.

Last, where the number of candidates meeting the selection criteria, as described in article 75(5) of Law No. 4,412/2016, is below the minimum number, the authority may continue the procedure by inviting only such number of candidates with the required capabilities.

14 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?

Article 73 of the new Law No. 4,412/2016 introduces the concept of 'self cleaning' into Greek procurement law. Consequently, Greek law now explicitly recognises that it is disproportionate and thus unjustified to exclude and debar a currently unreliable bidder from public contracts for an indefinite period of time.

Said mechanism allows for economic operators to regain suitability and reliability by providing evidence that they have taken sufficient measures to demonstrate their reliability, despite the existence of a relevant ground for the mandatory and discretionary exclusion of a bidder. Such measures include:

- paying or undertaking to pay compensation in respect of any damage caused by the misconduct;
- clarifying the facts and circumstances by actively collaborating with the investigating authorities; and
- taking concrete technical, organisational and personnel measures that are appropriate to prevent further misconduct.

In cases where the competent authority considers the measures taken to be insufficient, the unreliable bidder shall be informed.

'Self-cleaning' is a novel concept in Greek procurement law, and its practical implications are yet to be tested.

Lastly, Law No. 4,412/2016 introduces time limits for exclusions. An economic operator subject to a mandatory exclusion can be excluded for a maximum of five years from the date of the relevant conviction, and an economic operator subject to a discretionary exclusion can be excluded for a maximum of three years from the date of the relevant event.

The procurement procedures

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

Yes, pertinent legislation states the fundamental principles pertaining to procurement procedures. In more detail, according to article 18 of Law No. 4,412/2016, contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. Regard shall be given to issues pertaining to mutual recognition, protection of public interest, protection of civil rights, environmental law, sustainable development and unfettered competition.

Further, the design of the procurement and the calculation of the budget shall not be made with the intention of excluding it from the scope of Law No. 4,412/2016 or artificially narrowing competition.

These core principles are strengthened by the administration's obligation to state reasons to enforce the principles of legal certainty and reasonable expectations, sound administration, and privacy of offers, enshrined both in the respective statutes and applicable case law.

Finally, article 48 of Law No. 4,412/2016 requires that, where a candidate or tenderer or an undertaking related to 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 by the participation of that candidate or tenderer.

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

See question 15. In addition, notice that 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. However, the new Law No. 4,412/2016 attempts to comprehensively address the subject matter and contains an explicit provision in article 24 under the heading 'Conflicts of Interest'. Said provision's aims are to identify and remedy – in a timely and effective manner – any conflicts of interest arising during procurement procedures and to ensure the 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, 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 stipulations results in the revocation of the tenderer's contract.

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 48 of the new Law No. 4,412/2016 (see question 15) which provides that, in such cases, the contracting authority shall take appropriate measures. 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.

As long as all competitive disadvantages have been compensated, an exclusion is deemed illegal and in violence of the proportionality principle.

Lastly, the Greek Competition Commission shall be informed accordingly.

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 norm; whereas procurement procedures among a limited number of participants are only allowed as exceptions. Suffice it to say, open procedures are used in most standard tender processes.

20 Can related bidders submit separate bids in one procurement procedure?

As mentioned above, procurement procedures should be governed, among others, 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. Thus, in principle, related bidders should not be allowed to submit separate bids in the same procedure.

However, related companies may legally submit different offers in a procurement procedure 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) pursuant to which the approach envisaged by the Court is to allow related bidders to participate as long as they can demonstrate that, in their case, there is no risk of collusion. It should be noted that the aforementioned risk of collusion is mitigated in cases where related companies submit separate bids that – nonetheless – concern different product categories or services. In such cases the respective economic offers are, in essence, not comparable and consequently the fundamental principle of privacy of offers is deemed to be complied with.

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Competitive Dialogue

It should be stressed at the outset that the new regime envisaged by Law No. 4,412/2016 provides greater flexibility during both the selection and the award phase. 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 can consist of several phases of negotiations before the dialogue is completed and candidates are called to submit their final offer on the basis of the negotiations. The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio as envisaged in article 86(2) of Law No. 4,412/2016.

According to article 26 of the aforementioned Law contracting authorities may apply a competitive dialogue in the following situations:

- with regard to works, supplies or services where one or more of the following criteria are met:
  - 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; and
  - the technical specifications cannot be established with sufficient precision by the contracting authority; 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.

Competitive Procedure with Negotiations

In addition to the above, the new Law (articles 29 and 32) envisages that negotiated procedures without prior publication of a contract notice should be used only in 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).

Thus, 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. Authorities relying on this exception should provide adequate reasons. Suffice it to say that during negotiations, contracting authorities shall ensure the equal treatment of all tenderers and they may provide for the procedure to take place in successive stages with a view of reducing the number of tenders to be negotiated by applying the award criteria in the notice or specifications.

Lastly, note that the minimum requirements and the award criteria shall not be subject to negotiations.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

In light of the recent and significant amendments introduced by Law No. 4,412/2016, the practical implications of the new legislation are yet to be tested.

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 regards to price and, where applicable, the quantity envisaged. Contracting authorities may not use framework agreements improperly or in an abusive manner that results in hindrances to effective competition. Note that, pursuant to article 39 of Law No. 4,412/2016, the general provisions of Greek procurement law also apply to the award of framework agreements.

In principle, the term of a framework agreement may not exceed four years (and eight years respectively with regards to utilities – article 273 of Law No. 4,412/2016). Where such an agreement is concluded with a single economic operator, pertinent contracts shall be awarded within the limits of the terms laid down in the framework agreement. It goes without saying that contracting parties may under no circumstances make substantial amendments to the terms stipulated in the framework agreement.

Lastly, note that all framework agreements and pertinent contracts undergo ex-ante control by the Greek Court of Audit; whereas according to well established case law, any omission to precisely describe the maximum purchase volume, in the context of tendering procedures pertaining to the conclusion of framework agreements, constitutes a material breach of public law.

24 May a framework agreement with several suppliers be concluded?

Framework agreements can be concluded with several suppliers for the same goods, works or services. Pursuant to article 39 of Law No. 4,412/2016, where a framework agreement is concluded with more than one economic operator, such an agreement shall be performed in one of the following ways:

- where the framework agreements sets out all pertinent terms, the agreement shall follow the terms and conditions of the framework agreement, without reopening competition;
- where not all terms governing the provision of the works, services and supplies are laid down in the framework agreement, a simplified competitive procedure shall precede the award of the contract; and
- as long as it is explicitly stipulated in the framework agreement, contracting authorities may use both procedures (ie, no reopening of competition for those works, services and supplies whose terms are elaborated upon in the framework agreement and simplified competitive procedure for the rest).

In addition, the competitions referred to above shall be based on the same terms as those applied for the award of the framework agreement and, where necessary, more precisely formulated or other terms in accordance with the provisions of article 39 of Law No. 4,412/2016.

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

Law No. 4,412/2016 provides, under certain conditions, for the substitution of the representative of the consortium, for a specific public contract of work, or its alternate. Such substitution, which is always subject to the approval of the awarding authority, is allowed only at the stage when the works are being carried out – that is to say the phase following the signature of the contract between the contractor and the awarding authority and not at a stage prior to award of the contract. Also, note that in the event the substitution of the representative or its alternate is requested by any member of the consortium, the consent of all members of the consortium is required.

Further, contracting authorities may lay down specific rules regarding the change of consortia members in the tender documents. The general view seems to be that members of consortia may change, as long as the changed consortium can:

- fulfil the contract requirements;
- meet any pre-qualification criteria; and
- not create a distortion of competition as a result of changing.

26 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?

The new legislative framework provides for a variety of measures in relation to the participation of small and medium-sized enterprises (SMEs), in particular:

- the possibility of separating contracts into lots: contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject matter of such lots. contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots to be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest;
- in addition, national legislation provides for special methods pertaining to the calculation of a public contract's value. said provisions are set out in articles 6 and 236 of law no. 4,412/2016 as well as article 8 of law no. 4,413/2016;
- a prohibition of selection criteria that requires bidders to have an annual turnover greater than two times the estimated contract value;
- the introduction of the european single procurement document. this aims to reduce the hurdles smes encounter when attempting to participate in procurement procedures by not asking for detailed evidence of their compliance with certain requirements; and
- rules on the use of subcontractors, for instance, allowing direct payment to subcontractors in certain circumstances.

Finally, with regard to criteria relating to economic and financial standing, and to criteria relating to technical and professional ability, an economic operator may, pursuant to Article 78 of Law No. 4,412/2016, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links it has with them.

27 What are the requirements for the admissibility of variant bids?

In principle, currently tender announcements indicate that tenderers are not allowed to submit variant bids. Therefore, only where it is explicitly stated in contract notices are variant bids admissible.

In more detail, pursuant to article 57 of Law No. 4,412/2016, contracting authorities may authorise or require tenderers to submit variants. In such case, they shall indicate in the procurement documents to confirm interest whether or not they authorise or require variant bids.

In addition, contracting authorities authorising or requiring variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

28 Must a contracting authority take variant bids into account?

If the contracting authority has explicitly indicated in the contract notice that it will consider variant bids, then it is under an obligation to do so. However, only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration as elaborated upon in question 27.

29 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 is without prejudice to tender documents that explicitly make allowances for changes according to the tender's notice.

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

According to article 86 of Law No. 4,412/2016, contracting authorities shall base the award of public contracts on the 'most economically advantageous tender'. This shall be identified either on the basis of the lowest price or on the basis of the price or cost, using a cost-effectiveness approach, as elaborated upon in article 87, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental or social aspects, linked to the subject matter of the pertinent contract (eg, quality, technical merit, organisation, qualification and experience of staff assigned to performing the contract, technical assistance etc). However, the cost element may also take the form of a fixed price on the basis of which tenderers will compete on quality criteria only.

Implementing pertinent European case law, the new regime provides that award criteria shall be considered to be linked to the subject matter of the contract where they relate to the works, supplies or services to be provided under that contract, and shall not have the effect of conferring an unrestricted freedom of choice on the authority. Importantly, authorities shall specify in the documentation the relative weighting given to each of the criteria in order to determine the most economically advantageous tender.

From a practical perspective, however, it should be stressed that to-date the vast majority of contracts are awarded pursuant to a lowest-price criterion. Hence it remains to be seen whether Greek contracting authorities shall make use of the more flexible rules envisaged by the new regime, as well as how such criteria will be dealt with by the judiciary.

31 What constitutes an 'abnormally low' bid?

In line with the previous regime, the notion of an 'abnormally low' bid constitutes a vague legal concept and is not defined exhaustively under Law No. 4,412/2016.

However, Greek administrative courts have held that in principle the respective bids of competitors should be examined, among other things, in terms of the administrative costs inherent in each work or service, which should include the general operating expenses of the undertaking, as well as other costs arising from the notice, consumables' costs etc. In addition, it should be examined whether the contested bid allows for a certain profit margin; nonetheless, the exact margin is to be decided by the competent court or authority on ad hoc basis and on the facts of the case at hand.

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

Pursuant to article 88 of Law No. 4,412/2016, where tenders appear to be abnormally low in relation to the works, supplies or services, contracting authorities shall require economic operators to explain the price or costs proposed in the tender, within 10 days following the pertinent request.

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, and health and safety regulations.

Further, the contracting authority may request clarifications regarding the possibility of the tenderer having obtained state aid. All in all, the contracting authority shall assess the information provided and it may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price. Nonetheless, contracting authorities shall reject the tender, where it is established that said tender is abnormally low due to its non-compliance with the obligations postulated in article 18(2) of Law No. 4,412/2016 (non-compliance with applicable obligations in the fields of environmental, social and labour law established by union law, national law, collective agreements or by the international environmental, social and labour law provisions).

Review proceedings

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

Pursuant to the new dispute settlement mechanism provisions envisaged in Law No. 4,412/2016 a new review procedure for complaints against violations of the procurement rules is established. As per the previous similar provisions of Law No. 3,886/2010, the new law grants candidates the right to complain against infringements of the procurement rules during an award procedure.

According to the new dispute settlement mechanism for public contracts, the estimated value of which exceeds €60,000, which has been in force since the dates mentioned in question 1, pursuant to the provisions of Book IV of Law No. 4,412/2016 (articles 345 to 373), candidates have the right to challenge procurement decisions, acts or omissions of the contracting authority by filing a review application before the newly created Authority for the Hearing of Review Applications (AEPP).

The function and operation of AEPP is set out in Presidential Decree No. 38/2017. The regulation for the procedure of the assessing review applications before AEPP is provided for in Presidential Decree No. 39/2017.

If the review application is accepted, the contracting authority is obliged to comply with such a decision, as per article 367 of Law No. 4,412/2016. If the review application is rejected, candidates have the right to seek judicial protection before the competent Administrative Court of Appeal (or the Council of State in case of public contracts the estimated value of which is above €15 million or in case of public concession contracts) in accordance with article 372. Candidates are entitled to file a petition requesting the suspension of the enforcement of the AEPP's decision, and of any other illegal act or omission by the contracting authority, within 10 days of AEPP's decision being issued, and to file a petition for the annulment of the AEPP's decision, and the other acts or omissions.

However, the filing of a suspension request does not depend on the filing of an annulment petition. But if a suspension request is successful, candidates must file a petition for annulment within 10 days of being notified of the suspension.

The filing of a review application automatically suspends the conclusion of the contract (see question 38).

Finally, the filing of a suspension request prevents the conclusion of the contract, unless a competent judge decides otherwise in an interim order.

As far as the tender procedures that have initiated before the aforementioned dates in question 1 are concerned, Law No. 3,886/2010 is applicable. In particular, candidates have the right to challenge illegal acts (or omissions) of the contracting authority and have the right to file a review application before the authority within 10 days of becoming aware of its illegal acts (or omissions). In such cases, the authority should respond within 15 days of the date the objection was submitted. An application for review automatically suspends the conclusion of the contract.

If the candidate's review application is rejected, or if the contracting authority does not respond within the 15-day period (in which case the review application is deemed as tacitly rejected), candidates have 10 days, commencing from the notification date of the rejection, or the date on which the 15-day period lapses, to file an interim measures petition before the competent Administrative Court of Appeal. (In cases where the estimated value of the public contract is above €15 million, or in case of a public concession contract, the petition is filed with the Council of State.) The petition requests that the court suspends the authority's rejection of the candidate's review application, or the authority's rejection of the candidate's request for it to review an act or omission by the authority (article 5 of Law No. 3,886/2010).

Candidates are not obliged to file a petition for the annulment of actions or omissions before filing a petition for interim measures. However, if candidates successfully obtain interim measures, they are obliged to file a petition for annulment of the challenged acts or omissions within 30 days of the interim measures being awarded.

Previously, the automatic suspension of a tender contract's execution would last until the issuance of the interim measures award by the competent court. Under the new regime a suspension lasts until the issuance of the AEPP's decision. Consequently, under the new mechanism, candidates should seek an injunction relief by the competent

court, in order to retain the suspension, until their suspension request against the authority is awarded.

With regard to public contracts valued at less than €60,000, candidates have the right to file an objection before the contracting authority within five days they became aware of its illegal act (or omission), pursuant to article 127 of Law No. 4,412/2016. The contracting authority must issue a decision within 10 days.

If the candidate's review application is rejected, candidates may also file a petition for the suspension of the enforcement of the act (or omission) of the contracting authority, as well as a petition for the annulment of the act (or omission) before a competent court.

Importantly, neither the time limit for the filing of the suspension request, nor the suspension request, automatically suspends the execution of the contract to be awarded: candidates must submit a specific request for the issuance of an injunctive relief award before the court suspending the execution of the contract or the progress of the procurement procedures.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Subject to the preamble of our analysis in question 1 and 33, regarding disputes arising as from 26 June 2017, the sole administrative authority that may rule on a review application shall be the AEPP, whereas, up till that date, the contracting authority performing the tender was the only administrative authority competent to rule on the review application of the candidates.

However, if the review application is rejected, candidates may seek judicial remedies before the competent Administrative Court of Appeal (or where applicable, the Council of State), as per our above analysis under question 33.

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Please see question 33. Under the current legal regime, the administrative and judicial proceedings for the review of any procurement decision could last up to three or four months.

36 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 prove that the contracting authority has acted or neglected to act in breach of EU and national provisions; and
- 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.

37 What are the time limits in which applications for review of a procurement decision must be made?

When the estimated value of the public contract exceeds €60,000, the following shall apply: as per our above analysis in question 33, and until the time frames described in question 1, Law No. 3,886/2010 provides a time limit of 10 days from the candidate's knowledge of the issuance of the procurement decision for the filing of a review application.

Following the entrance into force of the new regime (on 26 June 2017 for supply and service contracts, on 1 January 2018, for contracts concerning works or study design contracts above the EU thresholds, and on 1 March 2018, for contracts concerning works or study design contracts above €60,000, but below the EU thresholds) the time limits that apply are as follows:

Review application against a procurement decision

The filing of a review application against an act of the contracting authority, pursuant to article 361 of Law No. 4,412/2016, must take place:

- within 10 days of the time the illegal decision of the contracting authority was notified to candidates by electronic means;
- within 15 days from the time the illegal decision of the contracting authority was notified to candidates by any other means of communication; or
- within 10 days of the time candidates become fully aware of the illegal decision of the contracting authority.

Review application against an omission

The filing of a review application against an omission of the contracting authority must take place within 15 days of the occurrence of such an omission.

When the estimated value of the public contract is equal to or less than €60,000, the following shall apply: the filing of an objection before the contracting authority shall take place within five days of the time candidates become aware of the illegal acts or omissions.

Also see question 33.

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

As already analysed above (see question 33), an application for review results in an automatic suspension of the contract's conclusion. Under the new legal regime to be in force pursuant to Law No. 4,412/2016, such a suspension lasts until the issuance of the decision on the review application.

If a review application is denied, candidates may file a petition for interim measures and a petition for injunctive relief requesting that the competent court extend the suspension until the court issues its ruling upon the petition of the interim measures.

As per the regime of Law No. 3,886/2010, such automatic suspensive effect lasts until:

- the lapse of the time limit for the filing of a review application;
- in case of filing a review application;
- until the lapse of the time limit for the filing of a petition for interim measures; and
- in case of filing an interim measures petition, until the award of the competent court upon such petition.

Law No. 3,886/2010 enables the contracting authority to file a petition seeking the lifting of an automatic suspension granted by the court on grounds pertaining either to the inadmissibility of the interim measures petition or to the manifestly unfound nature of the latter. However, the new Law No. 4,412/2016 does not explicitly provide for the above possibility.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

As practice now stands, the contracting authority respects in almost all cases the automatic suspension of the review application until the competent courts issue the award for interim measures. Petitions for lifting of such automatic suspension are rare.

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

The contract is concluded with the notification of the award decision, which is notified to all bidders that were participating until the last phase of the procurement procedures.

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

Yes. The new Law No. 4,412/2016 (article 21) makes specific allowances for candidates' right of access to other candidates' procurement files, in accordance with the terms and conditions envisaged in the tender invitation. This is without prejudice, however, to pertinent ECJ case law postulating that the right of access to information relating to the award procedure has to be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

Practically speaking, given that most procurement procedures now take place through electronic means, the candidates have immediate and automatic access to the files of the other candidates following the opening date of the respective offers.

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

Yes.

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

According to article 373 of Law No. 4,412/2016, any candidate that was excluded from the procurement procedure or from the conclusion of the public contract, in breach of the EU or national respective legislation, shall be entitled to bring a claim for compensation before the contracting authority in accordance with articles 197 and 198 of the Greek Civil Code. Similar provisions apply under the regime of article 9 of Law No. 3,886/2010. Further, if the interested party can demonstrate that, in the absence of the aforementioned infringements, it would be awarded the contract, it may claim damages in accordance with general provisions of Greek civil law (eg, loss of earnings, loss of profit and non-pecuniary damages).

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?

Such a possibility exists under the regime of Law No. 3,886/2010 and the current regime of Law No. 4,412/2016. Nevertheless, such review applications are not usually filed.

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

Under both legal regimes, anyone with legal interest can seek the annulment of a contract awarded without any procurement procedure (illegal direct award or de facto award).

46 What are the typical costs of making an application for the review of a procurement decision?

With regard to public contracts the estimated value of which exceeds €60,000, pursuant to article 363 of Law No. 4,412/2016, the most significant cost associated with an application for review is an administrative fee amounting to 0.5 per cent of the total estimated value of the contract to be awarded (excluding VAT). Irrespective of the contract's value, said administrative fee cannot be lower than €600, and is capped at €15,000.

As far as interim measures petitions are concerned, an administrative fee amounting to 0.1 per cent of the total estimated value of the contract to be awarded (including VAT) is required according to article 372 of new Law No. 4,412/2016. Said fee cannot be lower than €500, whereas it is capped at €5,000.

As per the legal regime of Law No. 3,886/2010, for the filing of an interim measures petition, an administrative fee amounting to 1 per cent of the total estimated value of the contract to be awarded (including VAT) is required. Said fee is capped at €50,000.

With respect to public contracts the estimated value of which is equal to, or less than €60,000, for the filing of an objection before the contracting authority an administrative fee amounting to 1 per cent of the total estimated value of the public contract is required according to article 127 of Law No. 4,412/201

POTAMITISVEKRIS

Alexandros A Kortesis **alexandros.kortesis@potamitisvekris.com**
Athanasios S Taliadouros **athanasios.taliadouros@potamitisvekris.com**
Ifigeneia Lentza **ifigeneia.lentza@potamitisvekris.com**

9 Neofytou Vamva Street
106 74 Athens
Greece

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

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