

Chapter 9

GREECE

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I INTRODUCTION

The legal framework of public contracts in Greece includes a set of laws and regulations, that have in fact been adopted by the respective institutions of French administrative law and of European law on public contracts.

First, Greece, as a Member State of the European Union, has incorporated in its legal system the European directives, which basically regulate the pre-contractual stage of the specific category of public contracts that fall into their scope. More specifically, European Directive 2004/18/EC as in force ('the Public Sector Directive') has been transposed into domestic law by Presidential Decree 60/2007; European Directive 2004/17/EC ('the Utilities Directive') as in force has been transposed into domestic law by Presidential Decree 59/2007; and finally, Directive 2009/81/EE ('the Defence Directive') as in force has been incorporated by Law 3978/2011.

Additionally, the rules of European Directive 89/665/EEC as in force ('the Remedies Directive') have been adopted in Greece initially by Law 2522/1997, which afterwards was repealed by Law 3886/2010, currently in force. In the same year, Greece ratified the International Agreement on Public Procurement with Law 2513/1997.²

However, because the European directives do not apply to all cases of award of public contracts, the pre-contractual stage preceding the conclusion of public contracts that do not fall under the scope of European directives, as well as the stage of execution of public contracts, are regulated by rules of Greek law.

According to Greek law, the meaning of 'public contract' does not have the same content compared to its definition in European directives. This differentiation regards

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2 According to Article 28 of the Greek Constitution, all of the aforementioned legislative and regulatory framework prevails over any conflicting provision of Greek legislation.

mainly the matter of the awarding authorities that are responsible for the notice and conclusion of contracts regulated by the Greek legislation on public contracts. These awarding authorities are not determined in a uniform manner regarding the public contracts of supplies, services and works. The issue of the subjective determination of the awarding authorities has become more intense, as the meaning of the 'public undertaking' and of 'public sector' (terms used to define the meaning of awarding authorities) occurs in many provisions, without always having an identical content.

In addition, the Greek legislation on public contracts makes a further conceptual distinction between public contracts and administrative contracts.³ This distinction regards mainly the differentiation of the jurisdiction of the courts, which have to resolve the legal disputes that arise at the pre-contractual stage and at the stage of the execution of the contract. Therefore, regarding the contracts that do not fall under the scope of European directives and cannot be characterised as administrative contracts, the competent courts to resolve the legal disputes that arise at the awarding stage and execution are the Greek civil courts. On the contrary, in case of administrative contracts, only the Greek administrative courts are competent to judge on the relevant disputes.

At this point we should mention that the Treaty on the Functioning of the European Union ('TFEU') sets some additional restrictions in the Greek legal system on Public Contracts.

More specifically, the competent Greek awarding authorities are always obliged, when awarding a public procurement contract (as long as the procurement is related to the functioning of the European market), to respect the rules and principles of the TFEU regarding the free movement of goods, the right of establishment, the freedom to provide services, non-discrimination on grounds of nationality, the principle of equal treatment, the principle of transparency and finally the proportionality and mutual recognition, as the content of these principles is formed by primary European law, the European Commission Interpretative Communication 2006/C 179/02 (Official Journal of the European Union C 179/2/1.8.2006) and the case law of the European Court of Justice ('ECJ').

3 According to Greek case law, the necessary elements for the characterisation of a public contract as administrative are cumulatively the following: (1) at least one of the contracting parties has to be the legal person of the state, or local or regional authority, or a legal entity governed by Greek public law because of its responsibility to unilaterally enact rules of law, or a private legal person acting though at the behest of and on behalf of these bodies; (2) the subject matter of the contract must be related to the provision of goods or services to the citizens, in order to meet some basic needs of theirs, as these are defined each time by the Greek Legal Order; and (3) the conclusion and execution of the contract must be governed, at least partly, by the rules of administrative law and the terms of the contract have to provide the contracting public entity the ability to intervene unilaterally in the contractual relations and thus create an exceptional contractual status.

Moreover, at the pre-contractual awarding stage of all Greek public contracts two additional general principles apply, the content of which has been defined by the case law of the Greek Council of State.⁴

The first is the principle of equal judgement, according to which the evaluation of the participants' offers is not allowed to be more rigorous or more lenient regarding exactly the same factual or legal issue.

The second principle regards timeliness, according to which every participant has the obligation to challenge immediately any individual decision on the tender evaluation, issued either by the awarding authorities or the bidding committees, claiming specific reasons related exclusively to this particular decision, without being able to challenge a prior decision of the awarding authority on the occasion of the issuance of another decision within the same bidding contest.

In Greece, the body with responsibility for integrating government purchasing within the Single Government Purchasing Programme is a special department of the Ministry of Development called the General Secretary of Commerce ('GSC'), and more specifically a particular department of the GSC called the General Department of Government Procurement.

Furthermore, Greek law gives responsibility for government purchasing to other bodies too. However, this responsibility is recognised on the additional condition of either the legislative recognition of this possibility, or of the approval of a special procurement regulation applicable exclusively to these bodies,⁵ or, finally, of the grant by the GSC of a relative authorisation for conducting procurement of usually low value.^{6,7}

Apart from the aforementioned responsible bodies, Greek law includes provisions that set the process of enforcing compliance by national authorities. One such authority is the Administrative Authority of Public Contracts, which operates as an independent authority and has the responsibility of supervising, controlling the conduct of the bidding contests for the conclusion of Greek public contracts, and ensuring compliance with the

4 At the same time, in all the awarding procedures of public contracts in Greece, the principle of typicality of the bidding process applies. According to that principle, the substantive rules of law contained in the tender documents of a bidding contest, as long as they have not been checked by the awarding authority or they have not been successfully challenged by a candidate bidder or a bidder in the contest, prevail over the provisions of the relative legislative framework and they must apply exclusively, even if the relative legislative framework provides otherwise.

5 For example, the local and regional authorities, the Public Power Corporation, the Athens Water Supply and Sewerage, the Ministry of Defence regarding the purely military supplies, etc.

6 As regards to the co-financed projects from the European Union, a public limited company called 'Information Society SA' plays the role of the GSC: It carries out procurement procedures, operating as a central body among the suppliers and the public entities that are subject to it.

7 More specifically, regarding the products supply and services provision contracts of value over €60,000 (excluding VAT), which are necessary for the operation of the hospitals and of health and social care facilities of the Greek state, the bodies that are responsible for approving and implementing them are special services of the Ministry of Health.

relevant European and Greek legislation. In any case, the responsibility for preserving the legitimacy of the contest procedures and for the execution of every Greek public contract is granted by Greek law not only to the same awarding authorities but also to those authorities hierarchically superior to them and ultimately to the courts (among the courts, the Court of Auditors is competent to control the legitimacy of the awarding process regarding only contracts with an important economic subject, while the civil and administrative courts are responsible for resolving disputes arising at the pre-contractual and execution stages of the public procurement process).

II YEAR IN REVIEW

In 2012 there were a few key developments in Greece regarding public contracts.

The Greek Ministry of Development created a central electronic registry for the collection, processing and publication of information with regard to public contracts concluded in writing, by electronic means or orally. The central electronic registry of public contracts covers all the public contracts of works, supply and services provision regardless of award procedure, if their budget is equal to or greater than €1,000. The requests of the public entities about the need to award public contracts, the approvals of these requests, the notices for the award of the relevant contracts and the payment orders of the successful tenderers will be listed in this registry. Not registering this information will have as a consequence the non-payment of any expense to the successful tenderer.

The Administrative Authority of Public Contracts has been established. This body is an independent administrative authority and has the responsibility of supervising and coordinating all the bodies of the central administration in the sector of public contracts, with the exception of those that fall under the scope of the Defence Directive and Article 346 TFEU. One of its responsibilities is also to ensure the implementation of European and Greek legislation on public contracts, to give an opinion before the adoption of any rule regarding the public contracts, and to put in force decisions about the recourse to the procedure of negotiation. Finally, the Authority will hereafter publish standard notice issues and public procurement drafts.

The conduct of electronic public contracts has been regulated in Greece by law. The new system will be an online platform in which all the public contract bidding contests will take place. Any economic operator willing to participate in a public contest will have the opportunity to visit the website of the system, to upload his or her bid and all the necessary supporting documents, in order to take part in online auctions. The intention of the Greek government is the mandatory application of the electronic contracts system in all awards before the end of 2015.

As a condition of admissibility of the application for interim measures, during the procedure of award of a public contract that falls under the scope of Remedies Directive, the applicant must deposit a fee, which is legally provided and has to be submitted to the court before the first hearing. The amount of this fee is 1 per cent of the budgeted value of the public contract, including VAT, and cannot exceed the amount of €50,000. This fee is issued in favour of the Greek state as well as of the Judicial Buildings Financing Fund and is returned to the applicant only in case of total or partial acceptance of his or her application by the court.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The national provisions that have incorporated Public Sector Directive and Defence Directive apply to the following bodies:

- a* the legal persons of the state (ministries);
- b* the local or regional authorities;
- c* the public law entities;⁸ and
- d* the associations of the aforementioned local or regional authorities or of the public law entities.⁹

The subjective definition of the scope of the Utilities Directive does not differ in Greece from the Public Sector Directive, as the approach of the meaning of the 'public entity' in Greece includes the meaning of the 'public undertaking'.

Regarding the bodies that come under Greek law on public contracts that do not fall into the scope of European directives, a further distinction concerning the public contracts of supply and of works should be made. More specifically, under the basic legislative framework that regulates public supplies contracts the following bodies are listed:

- a* the legal persons of the state (ministries);
- b* legal entities that have a legal personality different from that of the state, however their functioning is governed by rules of public law, as they are responsible for issuing administrative acts;
- c* the public undertakings provided for by Law 3429/2005;
- d* the banks wholly-owned or more than 50 per cent owned by the state;
- e* the undertakings affiliated with the above bodies;
- f* associations of persons established by the above bodies; and
- g* the local or regional authorities.

The bodies referred in paragraph 1 of Article 14 of Law 2190/1994 are subject to the legislative framework that regulates Greek public works contracts (i.e., the public sector

8 Public law entities includes (1) the public undertakings and bodies governed by public law; (2) the private legal entities that belong to the state or that are financed, for the most part, by the state, up to at least 50 per cent of their annual budget or whose capital belongs to the state by at least 51 per cent; and (3) the private legal entities that belong either (a) to legal persons that have a legal personality different from that of the state, however their functioning is governed by the rules of public law, as they have the responsibility to issue administrative acts; or (b) to local or regional authorities or public undertakings and public bodies; or (c) to legal persons referred to above in (2), which are regularly financed up to at least 50 per cent of their annual budget by the same legal persons according to the law or their statute.

9 This categorisation of the bodies results from Annex III of the Public Sector Directive, to which the Defence Directive is also referred.

bodies as defined by the provisions of Article 1, paragraph 6 of Law 1256/1982 and its subsequent amendments. Additionally, under the same legislative framework come:

- a* the Presidency of the Republic;
- b* the Greek parliament;
- c* the local or regional authorities and their undertakings of any kind;
- d* the banks where the appointment of the Chairman of the Board comes under the provisions of Article 49A of the Standing Orders of Parliament, as well as their subsidiaries public limited companies;
- e* the private legal entities, which belong to the state or which are regularly financed, for the most part, by the state, up to at least 50 per cent of their annual budget; and
- f* the public undertakings, bodies and public limited companies that are provided by Article 1 of Law 3429/2005.

ii Regulated contracts

Greek law on public contracts that do not fall into the scope of European directives includes provisions mainly on the contracts of supplies, works and technical studies for the construction of a public work.¹⁰

More specifically, regarding the public supplies contracts, the legal framework is as follows.

The basic law that regulates the conclusion and execution of public supplies contracts, integrated into the single procurement programme of the Greek state, is Law 2286/1995, the 'Basic Law on Public Sector Supplies'.¹¹ By authorisation of the above Law, Presidential Decree 118/2007 has been issued, which includes general provisions on supplies of the public sector and of the public legal entities.

Furthermore, the local and regional authorities, as well as other bodies, relating to which special regulations on the conclusion of supply contracts have been issued by authorisation of Law 2286/1995, do not come under the regulations of Presidential Decree 118/2007. They come under more specific residual regulations and Presidential Decrees, both exclusively applied to each one of them.¹²

Similarly, the supplies of the bodies that conclude utilities contracts are regulated on the basis of special regulations issued by authorisation of Law 2286/1995. While at the same time the supply of main or secondary materials for the equipment of Greek armed forces is regulated predominately by Law 3433/2006 under the title 'Defence Material Supplies of the Armed Forces'. The supplies that are not governed by Law

10 In any case, even regarding these contracts, an awarding authority may apply voluntarily and complementarily the provisions of European directives on public contracts.

11 Additionally, especially regarding the supplies contracts that are not integrated into the single procurement programme and which are concluded by the legal person of the state, Articles 79 to 85 of Law 2362/1995 on Public Accounting apply.

12 The supplies contracts concluded by local or regional authorities are regulated by Law 3463/2006 (Municipal and Community Code) and by Ministerial Decision 11389/1993 under the title 'Single Regulation on Supplies of Local Authorities'.

3233/2006, as well as the performing of contract works and the provision of services to the armed forces are carried out according to the provisions of Law 2286/1995.

Regarding public services contracts, the legal framework is as follows.

The issue of award and execution of public contracts on technical studies required for the construction of a public work is regulated by Law 3316/2005 under the title 'Public contracts on preparatory studies and on provision of related services'. The meaning of the awarding authority of Law 3316/2005 is formed by Article 9 of the Public Sector Directive.

Greek law does not include general provisions that refer to the procedure of award and execution of public services contracts that do not fall under the scope of the Public Sector Directive and the Utilities Directive. Some general provisions on services contracts are included in Law 2362/1995 on the services contracts concluded by the legal person of the state. Only public service contracts concluded by the local authorities are regulated by Article 209 of the applicable Municipal and Community Code. In practice, public service contracts that are excluded from the scope of the aforementioned Directives are either (1) regulated by special regulations on their conclusion and execution (applicable solely to public entities); or (2) in the absence of such regulations, proportionally subject to Presidential Decree 118/2007.

Regarding public works contracts, as well as the sale and rental of real estate, the legal framework is as follows.

The rules related to the conclusion and execution of Greek public works contracts have been codified by Law 3669/2008, while general provisions on works contracts concluded by the legal person of the state are included in Articles 79 to 85 of Law 2362/1995.

The sale and rental of the Greek public sector's real estate is regulated by a special legislative framework, which includes many different provisions that complement each other, the analysis of which goes beyond the intentions of the present chapter. In the context of the difficult economic situation of the Greek state, the exploitation of the Greek public sector's real estate is carried out almost exclusively by the Fund for the Exploitation of the Private Property of the Greek State and the provisions of Law 3986/2011, on the basis of which contracts of real estate sale or rental are concluded, after the conduct of international bidding contests.

With regard to the existence of financial thresholds below which Greek public contracts are not regulated, Greek law, as a general principle outlined in Article 79 of Law 2362/1995, provides that 'contracts which create obligations at the expense of Greek state cannot be concluded unless they are defined by general or special provisions or contribute to the fulfilment of its purposes'. As a consequence, the financial subject of a contract concluded by the Greek state is not directly related to whether it is regulated by law. The only provision that connects the validity of the contract with thresholds is the provision of Article 80 of Law 2362/1995, according to which the keeping of written form is required, on pain of nullity, for contracts with a value of over €2,500.

Moreover, concerning the matter of publication, the supplies contracts of Law 2286/1995, which are integrated into the single procurement programme, are allowed to be concluded without the prior publication of a contract notice, in the following cases:¹³

- a* when no tenders or no suitable tenders have been submitted in response to an open procedure or a restricted procedure and provided that (1) all tenderers have been invited for negotiation; and (2) the terms of the notice have not changed significantly;
- b* when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
- c* when the products involved are manufactured purely for the purpose of research, experimentation, study or development and application standards;
- d* for reasons of extreme urgency brought about by unforeseeable events, for which the awarding authority is not to blame;
- e* for additional works or services, when the change of the initial contracting party would force the awarding authority to conclude a contract with different technical features that would cause technical difficulties or financial charges;
- f* when the supply of goods should be awarded to correctional institutions, youth foundations, or educational institutions for research, experiment or development purposes; and
- g* for supplies of total annual value up to €20,000 (excluding VAT).

Finally, a substantial amendment of the terms of a Greek public contract, without being provided by a contractual term or by deviation of the terms of the relevant notice, is not allowed by Greek law, even if it concerns the substitution of the contractor. In general, in Greek public supplies, works and services contracts, the awarding authority does not

13 Additionally, the supplies contracts that do not fall under the scope of Law 2286/1995, as well as the services and works contracts that come under Law 2362/1996 may be concluded without publication of the notice in the cases referred above in points (a), (b), (d) and (e). In this last case, however, only when the additional services or works do not exceed the 50 per cent of the value of the original contract. Law 2362/1996 gives awarding authorities, which conclude public works contracts with the successful participants of prior technical studies bidding contests, the possibility not to publish a notice. This possibility is also recognised for new works or services consisting in the repetition of similar works or services, entrusted to the economic operator to whom the same awarding authorities awarded an original contract, under the condition that the possible use of this procedure is disclosed as soon as the first project is put up for tender and only during the three years following the conclusion of the original contract.

have the competence to accept substantial amendments to the contractual relations, even if caused by the contractor or by facts that fall within its sphere of influence.^{14,15}

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The framework agreement in Greece is regulated in Article 26 of Presidential Decree 60/2007, while the requirements of selecting the contracting party are set in Article 51 of the above Presidential Decree. On the basis of a framework agreement, more contracts are concluded between the awarding authorities and the economic operator who was contracting party of the framework agreement in the first place.

The framework agreements in Greece mainly apply to procurements in the public health sector, without this institution having been extended to more awarding authorities and economic operators at present.

ii Joint ventures

Joint ventures of public and private sector partnership are regulated by Law 3389/2005. This type of partnership is aimed at attracting private capital mainly for the execution of major infrastructure projects and the exploitation of the public real estate. Greek law treats public-private partnership only as a contract. Greek law does not regulate the joint establishment of a mixed capital company or the transfer of part of the capital share to a company. This type of partnership, despite its successful application in other EU Member States, has not successfully operated in Greece.

Furthermore, according to Greek law, it is not necessary for private joint ventures to have legal personality in order to participate in public procurement procedures or upon contract completion. They can operate on the basis of a written agreement without being required to comply with the rules of publicity.

14 In such a case, the awarding authority must maintain the execution of the contract and if the contractor does not comply with its relevant recommendations, it must declare the contractor as forfeited and dissolve the contract, according to the provisions of the contract or of the relevant applicable rules of law. If the contractor is forfeited, the next, in order of evaluated participants in the bidding contest or in the negotiation procedure may be invited to complete the contract.

15 The Greek legislative framework introduces the following exceptions from the aforementioned basic rule. Presidential Decree 118/2007 provides for the possibility of amendment in objectively justified cases under three conditions: (1) agreement of the contracting parties; (2) existence of a contractual term, allowing the amendment; and (3) the previous opinion of the contest evaluation committee. Moreover, the substitution of the contractor in Greek public works contracts is exceptionally allowed in the interest of the work and only after the approval of the awarding authority.

V THE BIDDING PROCESS

i Notice

At national level, the notices of awards of public works, services and supplies contracts, which are conducted with an open or restricted contest, are published in the current issue of public contracts notice of the Official Government Gazette, as well as in at least two newspapers published in the country's capital and in a local newspaper, published at the place of execution of the work or of the service provision.¹⁶

The Greek awarding authorities have published standard issues of notices regarding public contracts not regulated by European directives in the following three cases: (1) for the award of public works; (2) for the award of technical studies that are required for the construction of public works; and (3) for the award of supplies and services contracts co-financed by the European Union and carried out by the Information Society SA and the bodies that come under it.

ii Procedures

For the Greek public supplies contracts the awarding authorities may use the open contest procedures, the restricted contest procedures or the negotiated procedure, with or without notice publication.

In addition, for works, supplies and services whose annual budget is not greater than the amount of €60,000 (excluding VAT), the responsible bodies may conduct draft (condensed) bidding contests. Where the annual budget of the work, supply or service is not greater than €20,000 (excluding VAT), the conclusion of the contract with a direct award is allowed.¹⁷

Finally, the latest amendment of Presidential Decree 118/2007 established the ability of the awarding authorities to conduct an electronic auction when the terms and in general the specifications of a public contract can be precisely defined.

16 According to Presidential Decree 118/2007, the Greek awarding authorities that fall under its scope are obliged to notify information about the relevant supplies or services contracts that they intend to award over the following 12 months. This obligation exists (1) where the total estimated value is equal to or greater than €750,000; and (2) when the awarding authorities exercise the right to shortening the time limits for the conduct of an open contest or for the submissions of tenders in case of conducting a restricted contest.

Additionally, by Law 3861/2010, there is an obligation of the legal person of the state, the local or regional authorities, the public entities and in general the bodies of the public sector, to post the summaries of the notices, the decisions and acts of award of public works, services and supplies contracts on the internet.

17 In particular, until 31 December 2013 the Presidency of the Republic, the ministries and the independent authorities may conclude public contracts of provision of advisory and auditing services, of computer services and compilation of studies services (except for the studies of technical works) with direct awards, as long as the annual cost of the above works does not exceed €60,000 (excluding VAT). If the annual cost of the above works ranges from €60,000 to €100,000, the aforementioned bodies will have to conduct a draft (condensed) bidding contest.

iii Amending bids

Regarding the awarding procedures of Greek public works contracts, Greek law does not provide for a participant's substitution or widening of the participant consortium. The transfer of the participation rate of a joint venture member to another member and the renaming of the joint venture¹⁸ is allowed, but only after the approval of the competent awarding authority.

In Greek supplies award procedures a bidder's withdrawal or even replacement is allowed, but in this case an explicit written approval from the awarding authority is required.^{19,20}

At the stage that follows the selection of the temporary contractor of a public contract and until the proclamation of the final contractor, changes may occur as regards the temporary contractor, but not in the terms of the contract (in cases where the draft of the contract is at the same time as the annex of the bidding contest notice).²¹

VI ELIGIBILITY

i Qualification to bid

In procedures where the award criterion is the lowest price, the relevant notice usually defines two evaluation stages. At the first stage the supporting documents as well as the documents that prove the participant's technical ability, experience and financial sufficiency are checked and evaluated in terms of their completeness and correspondence with the award terms. At the second stage, the price of the tender is evaluated.

18 In studies bidding contests, changes in the composition of the partnership or joint venture that has submitted an offer, because of the entry or exit of members, is not allowed after the disclosure of technical offers.

19 In any case, however, the possibility of the participants' differentiation must be provided by the notice, otherwise any change of the participants' identity is not allowed.

20 Generally, substantial differentiation of the notice terms can take place neither at the stage of the award of a public contract nor in the context of the clarificatory answers of the awarding authority without transferring the timing of tenders. In any case the amendment of the notice terms after the submission of the participants' offers is not allowed.

21 Therefore, if it is judged either after a participant's objection, or by the awarding authority in its own right, that the temporary contractor did not meet all the requirements defined by the notice, the temporary contractor may be excluded even at this stage. The same consequence is applied to the contractor where either (1) it does not present the documents defined by the notice within certain time limits set out by the awarding authority; or (2) it does not submit proper execution bond before the signing of the contract.

In procedures where the award criterion is the most economically advantageous offer, three stages, which are totally discrete among themselves, are defined.²²

The participants in a contest of a Greek public contract award are excluded when the competent bodies of the contest judge their offer as inadmissible after checking or after an objection submitted by another participant. An offer should be rejected and cannot be evaluated when its content violates the rules of national and European law or when it violates substantial terms of the notice that are set on pain of nullity. This rejection may occur at any stage of the bidding procedure.²³

ii Conflicts of interest

The impartiality of the members of the bidding committee is a demand connected with the principle of equal treatment, which, as a principle of the primary European law, applies in all the award procedures of public contracts in Greece. Therefore, if evidence indicating that a participant is connected with a person who took part in establishing the terms of the contest or in the evaluation of its results²⁴ is revealed, the competent bodies of the contest must conduct an objective investigation in the context of which the participant should have the possibility to prove that he or she did not obtain any advantage because of this connection.²⁵ If this proof is impossible the participant who has the impediment to participation should be excluded from the award procedure.

iii Foreign suppliers²⁶

Foreign suppliers are not excluded *a priori* from the conclusion of public contracts in Greece, except for those who come from countries that the Member States of the European Union have forbidden the conclusion of public contracts as a form of sanction.²⁷

Provisions that specifically forbid foreign suppliers from participating in procedures of public contracts awards do not exist in the Greek legislation on Public Contracts. Furthermore, there is no general rule of law that requires as a condition for

22 First stage: checking of papers and supporting documents regarding their correspondence with the award terms; second stage: checking and scoring of technical offers; third stage: checking of the financial offers and drawing up of the tenders' leaderboard.

23 Thus, a participant may be excluded from the stage of the award of a public contract because he or she did not present all the supporting documents provided by the notice, or because his or her technical offer does not comply with the technical specifications of the notice. Similarly, it may be rejected because of deficiencies of his or her offer or when it is judged as extremely low.

24 For example, contest commission, consultant of the awarding authority.

25 *AFCOn Management Consultants* case T 160/2003 and C-21/2003, C-34/2003 (*Fabricom SA v. Belgium*).

26 Meaning the suppliers who do not have a permanent residence in a Member State of the European Union.

27 For example, the Islamic Republic of Iran.

their participation the establishment of a local branch or subsidiary, or the obtaining of local tax residence and tax representative in Greece.^{28,29}

VII AWARD

i Evaluating tenders

Every participant will have to know the criteria of the award and of the evaluation of his or her offer.

According to the Greek legislation on Public Contracts, the award criteria are the following: (1) the lowest price; and (2) the most economically advantageous offer. In the first case, the correspondence of the supporting documents with the terms of the bidding contest and the bidder's financial offer is taken into account. In the second case, the supporting documents are taken into account, but additionally the technical offer is scored. Also in the second case, specific scoring criteria of the technical offer are set, and the weighting factor for each one of these criteria is defined. Subsequently, the most advantageous tender comes from a mathematical type (which should be known to the participants *a priori*) that defines the proportion between the scoring of the technical offer and the offered price.

ii National interest and public policy considerations

According to the applicable legislative framework, evaluation criteria that take into account this factor are not provided. Nevertheless, local economic operators who participate in contract award procedures at a regional level may be favoured in practice, as the evaluation committees consist of local operators and in any case the cost of executing the contract will be *de facto* lower for the specific participant.

Moreover, the awarding authorities are not allowed to accept only products or services that have national quality certification.

28 In any case, however, it is pointed out that according to a relative term that is repeated in many Greek notices for the conclusion of public contracts, it is provided verbatim that 'Eligibility for participation in contests have natural persons and legal entities or cooperatives legally operating in Greece or in another member state of the European Union or the European Economic Area or in third countries which have signed the Agreement on Government Procurement of the World Trade Organization, as ratified by Law 2513/1997. Right of participation also have associations of persons (without having the obligation to obtain a certain legal form), on the condition that they fulfil certain requirements, such as the lawful operation of each person of the association in Greece or in another member state of the European Union or the European Economic Area or in third countries which have signed the Agreement on Government Procurement of the World Trade Organization'.

29 Furthermore, according to the content of many public contract notices, natural or legal persons, who have their residence or are established or have their registered office or domicile, or in high risk and uncooperative states and territories, as they are specified each time by the Financial Action Task Force (www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1_1,00.html) are not allowed to participate in the bidding contest procedure.

VIII INFORMATION FLOW

According to Greek law, the economic operators who are interested in participating in the pre-contractual stage of a Greek public contract award may pose written questions to the awarding authority regarding the terms of the bidding contest. The awarding authorities set a closing date for submitting clarification questions. They are also obliged to answer all the questions submitted. These answers are communicated to all participants and they are published on the website of the body that carries out the bidding contest.

In many cases the interested parties are obliged to conclude a confidentiality agreement with the awarding authority in order to receive information regarding the technical description of the subject of the contest. However, the participants may be informed of the content of the other competitors' offers, but they may not always obtain copies of them. The participants may not be informed of the offer documents that include confidential information.³⁰

The terms of the contract define whether the awarding authorities are obliged to notify the disqualified or rejected participants. In any case, the rejection of a candidate should arise out of a reasoned decision by the body that is responsible for the bidding procedure.

IX CHALLENGING AWARDS

i Procedures

Unofficially, the participants may submit a memorandum regarding the content of the submitted offers before the issuance of the bidding committee's decision which is responsible for checking and evaluating the offers. This memorandum is not legally binding for the bodies of the bidding contest.

The Greek legislation on Public Contracts provides for a procedure of objections at every stage of evaluation within an exclusive deadline. Non-compliance with the deadlines results in the rejection of the objection as inadmissible. By Presidential Decree 118/2007, entry fees whose value varies from €1,000 up to €5,000 must be paid in order for the objection to be submitted.

The objections are evaluated either by special committees which recheck the offers, or by the awarding authority, based on the opinion of the same committee, whose decision may be challenged by objection. Against the decision that rejects the objection an application for interim measures may be submitted before the competent courts. However, the submission of the application does not suspend the conduct of the bidding contest or the signing of the related contract.

30 The whole text of a technical offer or the financial offer cannot be considered as confidential.

Regarding contracts that fall under the scope of European directives, Law 3886/2010 provides for a special objection procedure to be submitted within a time limit of 10 days since comprehensive knowledge³¹ of the adverse decision.³²

ii Grounds for challenge

The Greek courts are competent to impose protective measures against illegal decisions of the awarding authorities.³³ The grounds for challenge regard exclusively the violation of European and national law. The provisions of the notice of a specific bidding contest are also included in the rules of the national law. Such a violation is also the lack of the reasoning of the challenged decision, the violation of the fundamental principles of European and Greek law, the substantial violation of a procedural precondition, or the factual error of the awarding authority.

The purely technical judgments of the competent bodies cannot be controlled by the administrative courts. However, in any case an illegal decision of an awarding authority, when evaluating and scoring technical offers, could consist in violation of the principle of equal judgment and may be challenged on this ground.

During the past decade there has been an excessive use of applications of interim measures by the participants in the context of the pre-contractual stage. This fact resulted in the suspension of the awarding procedure and finally in the cancellation of too many pre-contractual procedures – 40 per cent of the total number of public contracts that had been notified, according to the respective statistic elements of the Greek government. For this reason the chances of a successful application of interim measures were very limited, especially when these applications were submitted before civil courts.³⁴

iii Remedies

Regarding Greek public contracts, the participant who challenges a decision of the awarding authority should not limit him or herself to the submission of the application for interim measures, but additionally should ask and get temporary injunction by the competent judge in order to suspend the award procedure. The successful outcome of this action is very important in cases where the challenged decision concerns the scoring of technical and financial offers. The reason is that if the financial offers are disclosed,

31 Comprehensive knowledge is considered to be not only the knowledge of the operative part of the decision, but also of all the documents that support its grounds.

32 The awarding authority will have to reply within 15 days since its submission. In case of issuance of a decision that rejects the objection or in case that the time limit for answer passes inactively, the participant may ask for temporary judicial protection before the competent Administrative Court of Appeal within 10 days since the explicit rejection response or since the implied refusal of the award authority. During these time limits the bidding contest procedure is suspended.

33 This possibility exists either where they fall under the scope of European directives or they are exclusively regulated by national law and European legal principles.

34 At present the establishment of the entry fee and the danger to be lost in case of unsuccessful application has as an immediate consequence the financial inability of the participants to challenge the bidding contest procedures and the illegal acts of the awarding authorities.

without the suspension of the contest procedure, the interim measures are left without object. The same danger occurs at the stage of financial offers as well, as the participant will have to react immediately in order to prevent the signing of the contract. In a different case the complainant participant cannot pursue the adoption of his or her claims by the awarding authority, while his or her only remaining right is to ask for compensation if and insofar as his or her main legal remedy is accepted.

X OUTLOOK

The great effort that has been made in Greece to streamline the expenditure of public money has rallied the government to try to modernise and reform the public procurement legal framework according to European standards. It has been realised that the use of internet for conducting public contests and for monitoring public contracts will reduce the waste of public money, and will accelerate the absorption of EU funds and the utilisation of public resources. In addition, it will provide transparency and sufficient publicity, both being basic requirements for the effective operation of the public sector and the reduction of the corruption. On the contrary, the establishment of the obligation regarding the deposit of an excessively high entry fee has resulted in the acceleration of the pre-contractual procedures, and at the same time raises matters of efficient judicial protection, as the awarding authorities will be able to act without any essential control by the participants or the judicial system.