

THE GOVERNMENT PROCUREMENT REVIEW

Third Edition

Editors

JONATHAN DAVEY AND AMY GATENBY

LAW BUSINESS RESEARCH LTD

Chapter 11

GREECE

*Irene Economou*¹

I INTRODUCTION

The legal framework of public contracts in Greece includes a set of laws and regulations, that have in fact been adopted from 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 within their scope. More specifically, European Directive 2004/18/EC (the Public Sector Directive) has been transposed into domestic law by Presidential Decree 60/2007; European Directive 2004/17/EC (the Utilities Directive) has been transposed into domestic law by Presidential Decree 59/2007; and, finally, Directive 2009/81/EE (the Defence Directive) as currently in force has been incorporated by Law 3978/2011.

Additionally, the rules of European Directive 89/665/EEC as currently in force (the Remedies Directive) have been adopted in Greece – initially by Law 2522/1997, which was subsequently repealed by Law 3886/2010, which is currently in force. In the same year, Greece ratified the principal international agreement on public procurement, the WTO Government Procurement Agreement, 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 within the scope of the European directives, as well as the stage of execution of public contracts, are regulated by rules of Greek law.

1 Irene Economou is a senior associate at Bahas, Gramatidis & Partners.

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

In contrast to the way it is used in the European directives, the phrase 'public contract' is not used with identical meaning in all of the provisions of Greek law. This difference is mainly due to a non-uniform use of terms in relation to one of the contractual parties in a 'public contract' (i.e., due to the non-uniform use of the term 'awarding authority'). This inconsistency has introduced many issues of interpretation into the implementation of public procurement law, particularly where, in establishing the meaning of the term 'awarding authority', provisions make reference to the definitions for the term 'public undertaking' or 'public sector entity'.

In addition, the Greek legislation on public contracts makes a further conceptual distinction between public contracts and administrative contracts.³ This distinction mainly concerns 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, for those contracts that do not fall within the scope of European directives and cannot be characterised as administrative contracts, the Greek civil courts are the competent courts to resolve legal disputes arising at the awarding stage and upon execution. Conversely, in the case of disputes regarding administrative contracts, only the Greek administrative courts are competent to judge.

The Treaty on the Functioning of the European Union (TFEU) also sets additional restrictions in the Greek legal system in relation to public contracts.

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 proportionality and mutual recognition, as these principles are established by primary European law, the European Commission Interpretative Communication 2006/C 179/02 (Official Journal of the European Union, C 179/2, 1 August 2006) and the case law of the European Court of Justice.

3 According to Greek case law, the following characteristics are, cumulatively, necessary for a public contract to be considered an administrative contract: (1) at least one of the contracting parties has to be the legal person of the state, or a 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 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 public, to meet a basic, common need, as defined by Greek law; 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 with the ability to intervene unilaterally in the contractual relation and thus create an exceptional contractual status.

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

The first is the principle of equal judgment, 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 that wishes to challenge an individual decision of the tender evaluation process (issued either by the awarding authorities or the bidding committees), claiming specific reasons related exclusively to that particular decision, is obliged to do so immediately; the participant, however, is not able to challenge a prior decision of the awarding authority on the occasion of the issuance of a separate decision, even within the same bidding contest.

In Greece, the body with responsibility for integrating government purchasing within the unified procurement programme is a special department of the Ministry of Development, the General Secretariat of Commerce (GSC), and more specifically a particular department of the GSC, the General Directorate of Public Procurement.

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

Greek law includes provisions that establish procedures through which both the aforementioned responsible bodies and national authorities enforce compliance with public procurement legislation. One such authority is the Independent Single Public Procurement Authority, which operates as an independent authority and has responsibility for supervising, controlling the conduct of bidding contests for the conclusion of Greek

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 relevant legislative framework and they must apply exclusively, even if the relevant legislative framework provides otherwise.

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

6 As regards co-financed projects from the European Union, a public limited company, Information Society SA, plays the role of the GSC, carrying out procurement procedures and operating as a central body between suppliers and the public entities subject to its authority.

7 The approval and implementation of product supply and services provision contracts of value over €60,000 (excluding VAT) that are necessary for the operation of Greek state hospitals and health and social care facilities are the responsibility of particular bodies that are special services of the Ministry of Health.

public contracts and ensuring compliance with the relevant European and Greek legislation. Moreover, responsibility for preserving the legitimacy of bidding contest procedures and for the execution of Greek public contracts is granted by Greek law not only to the awarding authorities, but also to those authorities hierarchically superior to the awarding authorities, and ultimately to the courts. Among the courts, the Court of Auditors is competent to determine the legitimacy of the awarding process only in relation to contracts of economic importance, 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

The provisions of the New Directives of the European Parliament and of the Council have not yet been incorporated into Greek public contracts legislation. However, following the developments of 2012⁸, the years 2013 and 2014 brought innovative legislative interventions in the field of public contracts. The most significant of these concerned the following areas:

-
- 8 In 2012 there were several key developments in Greece regarding public contracts:
- a 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 public contracts for works, supply and services provision regardless of award procedure, if the contract budget is equal to or greater than €1,000. The requests of the public entities about the need to award public contracts, the approval 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. Failure to register this information will result in non-payment of expenses to the successful tenderer.
 - b The Independent Single Public Procurement Authority was established. This body is an independent administrative authority with responsibility for supervising and coordinating all central administration bodies in the public contracts sector, with the exception of those that fall within 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 public contracts, and to approve or reject decisions, taken by awarding authorities, in relation to the recourse to the procedure of negotiation. Furthermore, the Authority will hereafter publish standard notice issues and public procurement drafts.
 - c The processing of public contracts using electronic systems is now regulated in Greece by law. All public contract bidding contests will take place through the new online platform. Any economic operator willing to participate in a public contest will have the opportunity to visit the system website and upload his or her bid and all supporting documents necessary 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.

i Electronic procurement system

Law 4155/2013 regulated in detail the functioning of the national electronic system for processing public contracts. This system includes all the necessary data about the submission of the awarding authorities' requests regarding the contest process and the relevant approvals, as well as the proclamation, awarding, conclusion and execution of public procurement, services and works process. The aforementioned system is now easily accessible through the website www.promitheus.gov.gr to economic operators as stated in Article 2 Paragraph 8 of Presidential Decree (PD) 60/2007 and of Article 2 Paragraph 7 of Presidential Decree 59/2007, as well as to public servants within the execution of their duties. The use of this system requires user inscription and authentication by means of an advanced electronic signature in a special procedure pursuant to the aforementioned law and, on a supplementary basis, by Article 31 of Law 3979/2011, of PD 150/2001 and of ministerial decision MD/Φ.40.4/1/1989 and Π1/2390/16.10.2013. This system makes possible the electronic submission of offers, documents, certifications and declarations required for the participation in contests regulated by Public Sector Directive and Utilities Directive.

ii New legal framework for public contracts

By implementing Law 4281/2014 the Greek government voted for a new legal framework for public contracts. Law 4281/2014 (the New Law) regulates the process of awarding and providing legal protection for all public contracts for supplies, services and works (including contracts awarded by Greek utility companies) whose estimated value is more than €2,500 (excluding VAT).

In general, the New Law regulates public contracts that are governed both by the Public Sector Directive and the Utilities Directive. Furthermore the New Law also contains some of the settings of the New Public Sector Directive and New Utilities Directive, without, however, incorporating the new secondary EU law into national law. The new secondary EU law on public contracts is required to be transposed into national law by 18 April 2016. At present, the New Law has included only some of the New Directives rules, concerning (1) corruption, (2) malpractice, (3) conflicts of interest, (4) provisions regarding qualitative criteria for selection of participants, and (5) terms regarding reliance on the capacities of other entities. Furthermore, for the first time the New Law makes provision for a procedure for preliminary consultations with the market as well as rules on the modification of procurements.

d As a condition of admissibility of the application for interim measures, during the procedure of award of a public contract that falls within the scope of the Remedies Directive, the applicant must deposit a fee, which is set by law 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 levied on behalf of the Greek state and the Judicial Buildings Financing Fund, and is returned to the applicant only in the event of total or partial acceptance of his or her application by the court.

The following are the key points of the New Law:

- a* The legal framework previously used by local authorities, public utility companies and hospitals to award their contracts has been repealed. The New Law establishes a uniform and simplified legislative framework for all economic operators, contracting authorities or entities and competent courts with a view to overcoming the difficulties arising from the nearly 400 primary or secondary laws and regulations on public contracts that were in force in the Greek legal system. Uniform provisions are applied in bidding contests above as well as below the European thresholds; in the latter case, the New Law provides for the possibility of simplified proceedings.
- b* In this framework, contracting authorities or entities can directly award a public contract of up to €20,000 to a specific economic operator. Also it is at the sole discretion of contracting authorities or entities to follow simplified proceedings for public contracts of up to €60,000.
- c* To facilitate participation in bid contests and to reduce bureaucracy, provision has been made to limit the amount of supporting documentation required. More specifically, apart from legalising documents, each participant will only have to submit a formal declaration about meeting the technical and financial terms of the contract notice. This formal statement is intended to take the same form in all public procurement contests, while any further supporting documentation will be submitted following the award of the contract or when the awarding authority, at a given stage of the contest process, considers that a specific participant should provide further information. What is really innovative for the Greek public contract legal system is that the submission of participation letters of guarantee becomes voluntary for the participants, meaning that it depends on the awarding authorities' discretion according to the particularity and nature of each contract's object *in concreto*.
- c* The contest process will be shortened into two stages, instead of the three stages that are common practice in public contests at present. Furthermore, the possibility of correcting obvious, typical errors or insignificant defects is provided under the new regime, eliminating the current phenomenon of advantageous offers being rejected on the basis of unimportant technicalities.
- e* The newly introduced institution of preliminary consultation with market participants gives awarding authorities the opportunity to have a real dialogue with the market to define their needs, the technical standards of the products they need, and to determine the terms and conditions for the awarding and the execution of public contracts.
- f* The rules of publicity have been modified and publication of proclamations and public contracts (regulated by both Greek and EU law) in the Central Electronic Registry of Public Contracts is now obligatory. Publication in the Official Journal of the EU is still obligatory for public contracts regulated by European directives while the existing obligation for publicity at national level, apart from publication in the Central Electronic Registry of Public Contracts, now includes publication in the national press and on the websites of contracting authorities or entities.
- g* Provision is made for a special body, independent of the awarding authority itself, to facilitate the resolution of disputes arising between the awarding authority

and the participants within the contest process before such disputes seek judicial resolution.

- b* For the first time it is provided that employees with special skills and guarantees of non-corruption will participate in advisory committees and tender committees.
- i* Also included are special provisions against corruption in relation to the issues of conflicts of interest and the use of unfair tactics on behalf of participants. Furthermore, the new law adopts the institution of a blacklist for contest participation in specific cases, as provided by the New Directives.

The New Law was published in the Greek Official Government Gazette on 8 August 2014. However, the New Law itself gave 15 March 2015 as the date of its entry into force, unless specific provisions of the New Law provide otherwise. Unfortunately, many of its provisions are not directly applicable and presuppose the issuance of regulatory acts governing specific technical issues. Largely for this reason, therefore, Law 4321/2015, published on 21 March 2015, postponed the date of entry into force of the New Law until 31 December 2015.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The national provisions incorporating the Public Sector Directive and the Defence Directive apply to the following bodies:

- a* legal persons of the state (ministries);
- b* local or regional authorities;
- c* public law entities;⁹ and
- d* associations of the aforementioned local or regional authorities or of public law entities.¹⁰

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

⁹ Public law entities include (1) public undertakings and bodies governed by public law; (2) 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 of whose capital at least 51 per cent belongs to the state; and (3) private legal entities that belong either to legal persons that have a legal personality different from that of the state, but whose functioning is governed by the rules of public law, as they have responsibility for issuing administrative acts; or to local or regional authorities or public undertakings and public bodies; or 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 law or statute.

¹⁰ This categorisation of bodies comes from Annex III of the Public Sector Directive, to which the Defence Directive is also referred.

A further distinction concerning public contracts of supply and works should be made in relation to bodies that come under Greek law on public contracts but do not fall within the scope of European directives. More specifically, the basic legislative framework that regulates public supply contracts lists the following bodies:

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

The bodies referred in Article 14, Paragraph 1 of Law 2190/1994 are subject to the legislative framework that regulates Greek public works contracts (i.e., public sector bodies as defined by the provisions of Article 1, Paragraph 6 of Law 1256/1982 and its subsequent amendments). The following are also subject to the same legislative framework:

- a* the Presidency of the Republic;
- b* the Greek parliament;
- c* local or regional authorities and their undertakings of any kind;
- d* 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 subsidiary public limited companies;
- e* private legal entities that belong to the state or that are regularly financed, for the most part, by the state, up to at least 50 per cent of their annual budget; and
- f* public undertakings, bodies and public limited companies provided by Article 1 of Law 3429/2005.

ii Regulated contracts

Greek law on public contracts that do not fall within the scope of European directives includes provisions mainly on contracts for supplies, works and technical studies for the construction of public works.¹¹ More specifically, regarding 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 state unified procurement programme, is Law 2286/1995, the Basic Law on Public Sector Supplies.¹² Through authorisation of the above Law,

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

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

Presidential Decree 118/2007 has been issued, which includes general provisions on supplies for the public sector and public legal entities.

Furthermore, the local and regional authorities and certain other bodies (which are subject to special regulations on the conclusion of supply contracts under 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.¹³

Similarly, the supply of bodies that conclude utilities contracts is regulated on the basis of special regulations issued under Law 2286/1995. At the same time, the supply of main or secondary materials for the equipment of the Greek armed forces is regulated predominately by Law 3433/2006, under the title of Defence Material Supplies of the Armed Forces. Supplies not governed by Law 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 public works is regulated by Law 3316/2005, under the title of Public Contracts on Preparatory Studies and on Provision of Related Services. The meaning of the term 'awarding authority' in Law 3316/2005 is identical to the meaning employed by Article 9 of the Public Sector Directive.

Greek law does not include general provisions on the procedure of award and execution of public services contracts that do not fall within the scope of the Public Sector Directive and the Utilities Directive. Some general provisions on services contracts are included in Law 2362/1995 on services contracts concluded by a 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 regulated by special regulations on their conclusion and execution (applicable solely to public entities) or, 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 a legal person of the state are included in Articles 79 to 85 of Law 2362/1995.

The sale and rental of Greek public sector real estate is regulated by a special legislative framework, which includes many complementary provisions, analysis of which is beyond the scope of this chapter. In the context of the current economic difficulties facing the state, exploitation of Greek public sector real estate is carried out almost

13 Supply 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 of Single Regulation on Supplies of Local Authorities.

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, following 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 the 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 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 forms is required, on pain of nullity, for contracts with a value of over €2,500.

Moreover, concerning the matter of publication, the supply contracts of Law 2286/1995, which are integrated into the unified procurement programme, are allowed to be concluded without the prior publication of a contract notice in the following cases:¹⁴

- a* when no tenders or no suitable tenders have been submitted in response to an open procedure or a restricted procedure, and provided that all tenderers have been invited for negotiation and 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;

¹⁴ Additionally, the supply 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 to in points (a), (b), (d) and (e) above (in this latter case, only when the additional services or works do not exceed 50 per cent of the value of the original contract). Law 2362/1996 gives awarding authorities that 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 of 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.

- 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 a total annual value of 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 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.^{15, 16}

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The framework agreement in Greece is regulated by Article 26 of Presidential Decree 60/2007, while the requirements for selecting the contracting party are set out 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. Last year, this institution began to be used by the Ministry of Development for the supply of consumable materials and PCs.

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 a 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

15 In such cases, 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.

16 The Greek legislative framework introduces the following exceptions from the aforementioned basic rule. Presidential Degree 118/2007 provides for the possibility of amendment in objectively justified cases under three conditions: agreement of the contracting parties; existence of a contractual term, allowing the amendment; and 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 with the approval of the awarding authority.

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 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.

V THE BIDDING PROCESS

i Notice

At the national level, notices of awards of public works, services and supplies contracts, which are conducted through an open or restricted contest, are published in the current issue of the 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.¹⁷

Moreover, notices of public contracts on preparatory studies and on the provision of related services should also be published in Greek Technical Chamber's Newsletter and on its website. Furthermore, notices regarding the transfer of assets sold by the state for payment to the Public Department are also published, *inter alia*, on the Hellenic Republic Asset Development Fund website. The Hellenic Republic Asset Development Fund also publishes the selling procedures related to the state's real estate, which will be transferred for the aforementioned reason, on its web platform for electronic auction: e-publicrealestate.gr.

The Greek awarding authorities have published standard issues of notices regarding public contracts not regulated by European directives in the following three cases: for the award of public works; for the award of technical studies that are required for the construction of public works; and 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.

17 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 where the total estimated value is equal to or greater than €750,000; and 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 the case of conducting a restricted contest.

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

ii Procedures

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

In addition, for works, supplies and services whose annual budget is not greater than €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.¹⁸

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.

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 venture¹⁹ are allowed, but only with 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.^{20, 21}

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).²²

18 In particular, until 31 December 2013, the Presidency of the Republic, the ministries and the independent authorities could 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 such works did not exceed €60,000 (excluding VAT). If the annual cost of the above works ranged from €60,000 to €100,000, the aforementioned bodies had to conduct a draft (condensed) bidding contest.

19 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.

20 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.

21 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, amendment of the notice terms after the submission of the participants' offers is not allowed.

22 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

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.

In procedures where the award criterion is the most economically advantageous offer, three stages, which are totally discrete, are defined.²³

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.²⁴

ii Conflicts of interest

The impartiality of the members of the bidding committee is a requirement 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 results²⁵ 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.²⁶ If this proof is impossible, the participant who has the impediment to participation should be excluded from the award procedure.

notice, the temporary contractor may be excluded even at this stage. The same consequence is applied to the contractor where either it does not present the documents defined by the notice within certain time limits set out by the awarding authority; or it does not submit a proper execution bond before the signing of the contract.

23 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' leader board.

24 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.

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

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

iii Foreign suppliers²⁷

Foreign suppliers are not excluded *a priori* from the conclusion of public contracts in Greece, except for suppliers that come from countries that the Member States of the European Union have forbidden the conclusion of public contracts with as a form of sanction.²⁸

Provisions that specifically forbid foreign suppliers from participating in procedures of public contracts awards do not exist in Greek legislation. Furthermore, there is no general rule of law that requires, as a condition for their participation, the establishment of a local branch or subsidiary, or the obtaining of local tax residence and a tax representative in Greece.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 Greek legislation, the award criteria are the following: the lowest price; and 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. In the second case, specific scoring criteria of the technical offer are also set, and the weighting factor for each one of these criteria is defined. Subsequently, the most advantageous tender is established by a mathematical method (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

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

28 For example, the Islamic Republic of Iran.

29 Furthermore, according to the content of some public contract notices (including those published by the Hellenic Republic Asset Development Fund), natural or legal persons who have their residence or are established or have their registered office or domicile 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.

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.

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 submitted questions. These answers are communicated to all participants, and 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 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, 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.

Greek legislation provides for a procedure for objections at every stage of the evaluation process within a fixed deadline. Non-compliance with the deadlines results in the rejection of the objection as inadmissible. Under Presidential Decree 118/2007, entry fees varying from €1,000 up to €5,000 must be paid for the objection to be submitted.

The objections are evaluated either by special committees that recheck the offers, or by the awarding authority, based on the opinion of the same committee, whose decision may be challenged by objection. An application for interim measures may be submitted before the competent courts against a decision that rejects the objection. If the pre-contractual stage is related to public contracts that fall within the scope of the Remedies Directives, the payment of an entry fee, determined by Law 3886/2010 as 1 per cent of the contractual price, but which must not exceed €50,000, is required

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

for the submission and discussion of interim measures. However, the submission of an application for interim measures does not suspend the tendering procedure or the signing of the related contract.

Regarding contracts that fall under the scope of European directives, Law 3886/2010 also provides for a special objection against any illegal act or omission of the awarding authorities. This special objection must be submitted within 10 days of gaining comprehensive knowledge³¹ of the illegal act or omission.³² The submission of an entry fee is not a prerequisite for such a special objection.

ii Grounds for challenge

The Greek courts are competent to impose protective measures against illegal acts or omissions by the awarding authorities.³³ The grounds for challenge exclusively concern violations 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 violations also include:

- a* lack of reasoning of the challenged decision of an awarding body;
- b* violation of the fundamental principles of European and Greek law;
- c* substantial violation of a procedural precondition; or
- d* 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 by an awarding authority, when evaluating and scoring technical offers, could consist of the violation of the principle of equal judgment and may be challenged on these grounds.

During the past decade there has been excessive use of applications for protective measures by participants at the pre-contractual stage. This resulted in the suspension of awarding procedures, and finally in the cancellation of too many pre-contractual procedures. More specifically, according to relevant government statistics, 40 per cent of the total number of notified public contracts were finally not conducted either because the participants managed to annul illegal acts or omissions through judicial procedures or because the awarding authorities cancelled the tendering procedures because of the lengthy duration of their respective trials. This percentage is extremely high, taking into

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

32 The awarding authority must reply within 15 days of its submission. In the case of issuance of a decision that rejects the objection or in the event that the time limit for answer passes inactively, the participant may ask for temporary judicial protection by filing interim measures before the competent administrative court of appeal within 10 days of the explicit rejection response or the implied refusal of the award authority. During these time limits, the bidding contest procedure is suspended.

33 This possibility exists where such acts fall within the scope of European directives or are exclusively regulated by national law and European legal principles.

consideration the fact that the chances of a successful application for interim measures were very limited, and especially when these applications were submitted before civil courts.³⁴

iii Remedies

With regard to Greek public contracts, a participant challenging a decision of an awarding authority should not only submit an application for interim measures, but should also seek and obtain from the competent judge a temporary injunction 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 offers because if the financial offers are disclosed without the contest procedure having been suspended, the interim measures are left without an object. In which case, even though the participant's allegations have been recognised in the interim measures, the awarding authority would be obliged by law to cancel the contest procedure.

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 the 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 the required levels of transparency and publicity, both of which are basic requirements for the effective operation of the public sector and the reduction of corruption. Furthermore, the establishment of the obligation to lodge an excessively high entry fee for the submission to the competent court of a request for interim measures against illegal acts or omissions by an awarding authority has resulted in the acceleration of pre-contractual procedures, and at the same time raises issues regarding efficient judicial protection, as the awarding authorities will, essentially, be able to act without any control by the participants or the judicial system.

Finally, as has been previously stated, Greece has yet to incorporate the New Directives into its legislative framework. However, the Ministry of Development is currently preparing a new draft law that will simplify and codify the entire legal framework for public contracts in Greece; we hope that this draft law will also incorporate the New Directives and include provisions to deal successfully with the above-mentioned problems that arise at the pre-contractual stage of a public contest.

34 At present the establishment of the entry fee and the risk of losing it in the event of an unsuccessful application mean that participants cannot afford to challenge bidding contest procedures or illegal conduct by awarding authorities.