

Public Procurement

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in 43 jurisdictions worldwide

2009

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Legislative framework

1 What is the relevant legislation and who enforces it?

Public contracts are regulated by different rules depending on whether their subject matter falls under public works, supplies or services. Following the adoption of the new EU procurement directives (ie, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors), member states were under an obligation to transpose them by 31 January 2006. As Greek legislation implementing these directives had not come into force by then, the Ministry for Development and the Ministry for Environment, Urban Planning and Public Works instructed public contracting authorities in early 2006 to apply the EU procurement directives even though they had not yet been transposed into national law. It was in March 2007 that Presidential Decrees 59/2007 and 60/2007 came into force, implementing respectively Directives 2004/17/EC and 2004/18/EC.

When the value of public contracts falls below the thresholds set in the EU procurement directives, the following pieces of national legislation apply:

Works	Statute 3669/2008 (codification of statutes on public works) This statute codified all the provisions of the preceding statutes
Supplies	Statute 2286/1995 (on public procurement) PD 118/2007 (Public Supplies Code) which replaced PD 394/1996
Services	Statute 3316/2005 (only for studies and other connected services relating to the design and performance of public works and falling within the scope of annexes IIA of Directive 2004/18/EC and XVIIIA of Directive 2004/17/EC).

Rules governing the award procedures of public contracts are enforced by the Council of State, the highest administrative court in Greece; whereas disputes arising from the performance of public contracts are heard by the administrative courts of appeal. When a public body or a public undertaking enters into a contract regarded as a private sector contract, competence lies with the ordinary civil courts, which also hear disputes involving the award or performance of public contracts in the case of entities which, although owned, managed and controlled by the public sector, have a private-law legal personality.

Public contracts of a high economic value (ie, €1.5 million for supplies and services and €2.9 million for public works), are subject to the prior control of the State Audit Office. Failure of the contracting authority to comply with this obligation results in the contract being declared void.

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

National legislation regulating public contracts falling below the EU thresholds follows, in broad lines, the principles and procedures adopted by EU secondary legislation. National legislation supplements the EU procurement directives by providing for faster and more flexible award procedures for contracts of small economic value. It must be noted, however, that the national legislation for the award of contracts below the threshold is quite detailed and deviations from the provisions of EU legislation do exist depending on the type of contract and the award procedure.

3 Are there proposals to change the legislation?

The EU procurement directives became national law on 16 March 2007. The new Public Supplies Code (PD 118/2007) which replaced PD 394/1996 came into force on 1 January 2008. Statute 3669/2008 codified all the provisions of the preceding statutes on public works.

4 What is the relevant legislation for the procurement of military equipment?

Statute 3433/2006 lays down the rules for the procurement of military equipment by the Ministry of Defence, including the procurement of arms, munitions and war material as defined in article 296 of the EC Treaty. The procurement of civil supplies, works and services is governed by the provisions of Statute 2286/1995 on public procurement.

Applicability of procurement law

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

Case law has overall been consistent about what constitutes a contracting authority and has included entities that, although owned, managed and controlled by the public sector, have a private-law legal personality. According to PDs 59/2007 and 60/2007, which transposed the EU procurement directives, contracting authorities refer to the state, regional or local authorities and bodies governed by public law (ie, bodies established for the purpose of meeting needs of general interest and financed, managed or controlled for the most part by the state, regional or local authorities and bodies governed by public law.) The national rules that apply to public contracts falling below the EU thresholds provide for a wide definition of contracting authorities that, in general terms, complies with the definition of PDs 59/2007 and 60/2007.

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

Some dispute exists over the extent to which entities of a private-law legal personality that are owned, managed and controlled by the public sector should be regarded as contracting authorities. To this end, the Local Government Code (articles 257 and 265-6) provides that contracts awarded by local companies serving the public interest or companies owned by local government bodies should be subject to the rules governing contracts of local government. Moreover, when applying national procurement legislation it is still in some dispute whether or not regulatory authorities (eg, the Regulatory Authority for Energy, the Hellenic Competition Commission, the Hellenic Telecommunications and Post Commission) should be treated as contracting authorities awarding public contracts.

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

For public contracts falling under the scope of PDs 60/2007 and 59/2007, articles 8 and 17 respectively are applicable. There are no specific domestic rules relating to the calculation of the threshold value of contracts apart from those of Statute 3669/2008 and 3263/2004 under which the estimated value of works contracts is based on price lists approved by the minister for environment, urban planning and public works.

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

The extension of an existing contract does not require a new procurement procedure provided that the contracting authority approves it and that such extension does not exceed a certain percentage of the initial contract duration (articles 46, 48 and 50 of Statute 3669/2008 for works, article 26 of PD 118/2007 for supplies and article 27 of Statute 3316/2005).

PDs 59/2007 and 60/2007 provide that contracting entities may opt for an extension without a prior call for competition in the case of supply contracts for additional deliveries by the original supplier, which are intended either as a partial replacement of normal supplies or installations or as the extension of original supplies or installations – where a change of supplier would oblige the contracting entity to acquire material having different characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; and in the case of works contracts for new works consisting of the repetition of similar works assigned to the contractor – to which the same contracting entities awarded an earlier contract – provided that such works conform to a basic project for which a first contract was awarded after a call for competition. The duration of such contracts must not exceed three years.

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

The amendment of an existing contract does not require a new procurement procedure and is subject to certain conditions depending on the subject matter of the contract.

According to the provisions of PDs 59/2007 and 60/2007, contracting authorities may opt for an extension without a prior call for competition: for additional works or services that were not included in the project initially awarded or in the contract first concluded but have, through unforeseen circumstances, become necessary to the performance of the contract and the separation of such additional services from the main contract would cause great inconvenience; and in the case of supply contracts for additional deliveries (see ques-

tion 8). In any case, the aggregate estimated value for additional works or services may not exceed 50 per cent of the value of the main contract whether above or below the EU threshold (articles 57, 73 and 179 of Statute 3669/2008, article 29 of Statute 3316/2005).

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

An existing contract may not be transferred to another supplier; it can only be terminated in the case of bankruptcy or breach of contract. Exceptionally, a contracting authority may terminate a contract and enter into a new one with the next-best bidder when the contractor is discharged through failure to meet its contractual obligations (article 6 of Statute 3263/2004).

- 11 In which circumstances do privatisations require a procurement procedure?

According to article 5 of Statute 3049/2002 regulating privatisations, the Intergovernmental Privatisations Authority may opt to follow procurement procedures for the contracts that are necessary to complete the privatisation process.

- 12 In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

Under the provisions of Statute 3389/2005 on PPPs, the public entity wishing to tender a PPP project or service may choose the open, restricted, negotiated or competitive dialogue procedures. Statute 3389/2005 covers PPPs for projects or services, where such projects or services fall within the authority of the public sector (except for services that constitute state tasks and cannot be tendered as PPPs, ie, national defence, policing, award and enforcement of justice); the private sector undertakes, for a fee in consideration for the services it will provide, a substantial part of the project risks relating to financing, construction, availability or demand; the project is financed, wholly or partly, by the private sector; and the total budget for the implementation of the PPP does not exceed €200 million.

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

According to the provisions of PDs 59/2007 and 60/2007, a services concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment. The rules set out by the PDs, however, do not apply to services concessions. In terms of national law, there is no specific legislation regulating services concessions.

- 14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

There are no specific statutory provisions for in-house contracts apart from the provisions of articles 268 and 269 of the Local Government Code according to which local government councils may award contracts without prior competition to public utilities and local public undertakings, provided that: the contract value does not exceed €45,000; the annual value of contracts awarded to such an undertaking without prior competition does not exceed €150,000; and the contracts are performed by the undertaking itself and not subcontracted.

 The procurement procedures

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

PDs 59/2007 and 60/2007 (articles 10 and 3 respectively) state these fundamental principles for tender procedures. Article 82 of Statute 2362/1995 on public accounting restates the fundamental principles for tender procedures. Such principles can also be found in other national statutes such as, for instance, in article 6 of Statute 3316/2005 where the principle of equal treatment is pointed out.

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

National rules provide for the composition of committees. There are no specific rules requiring independency and impartiality, although such committees are under an obligation to observe the general principle of impartiality.

- 17 How are conflicts of interest dealt with?

According to article 7 of the Administrative Procedure Code (Statute 2690/1999), which applies to committees awarding public contracts, administrative (ie, public) authorities and their members are under an obligation to refrain from participating in any decision-making process or expressing an opinion or proposal if they: could have a personal interest in the matter; have family ties with one of the interested parties (ie, being a spouse or relative by blood or marriage in a straight line and up to the fourth degree indirectly); have a special bond or bias with the interested parties.

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

In view of the general principles of non-discrimination, transparency and equality of treatment, a bidder's prior involvement in the preparation of a tender could distort or preclude competition. According to Statute 3316/2005, the contracting authority may assign the preparation of the tender file to third parties, yet it is not expressly stated whether such parties may bid for the contract. Nevertheless, the principle of equal treatment would probably be infringed if such a party were to bid for the contract.

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

The open procedure is the most common for public contracts of a significant value. The award without prior competition is often used for contracts of a small value (up to €15,000) as it is more flexible and less formal.

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

PDs 59/2007 and 60/2007 implement the relevant rules of the EU procurement directives in respect of negotiated procedures. Statutes 2286/1995 on public procurement and 3316/2005 on studies and services relating to the design and performance of public works comply with the EU requirements implemented by PDs 59/2007 and 60/2007.

- 21 When and how may the competitive dialogue be used?

Article 23 of PD 60/2007 implements article 29 of Directive 2004/18/EC regarding the competitive dialogue procedure. This procedure may also be followed in the case of PPPs as provided in article 13 of Statute 3389/2005.

- 22 What are the requirements for the conclusion of a framework agreement?

PDs 59/2007 and 60/2007 implement the provisions of Directives 2004/17/EC and 2004/18/EC regarding framework agreements. Moreover, such agreements are possible under article 8 of Statute 3316/2005 on contracts of studies and services relating to the design of public works. Article 8 of said Statute provides that this procedure may be followed when a series of similar studies or services is needed, yet such matters as, for instance, the contract's technical specifications cannot be determined whereas prices and quantities can. Such framework agreements whose duration cannot exceed three years are usually entered into for the execution of support studies.

- 23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

There are no such provisions currently in force.

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

As a rule, a contracting authority is free not to approve any amendments to the composition of a consortium. According to article 7 of PD 118/2007 (Public Supplies Code), when an offer has been made by a group of suppliers and a member of the group cannot meet its obligations, the remaining members may request its substitution. If such request is not made or is rejected, the remaining consortium members are responsible for the conclusion of the contract. Article 18 of Statute 3316/2005 also provides for such a substitution when one consortium member has been declared bankrupt or his or her licence has been revoked.

- 25 Are unduly burdensome or risky requirements in tender specifications prohibited?

There are no specific prohibitions.

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

In cases of contracts above the EU thresholds, contracting authorities have to assess the qualification of tenderers based on the criteria set out in PDs 59/2007 and 60/2007. For contracts below the EU thresholds, tenderers are assessed based on the criteria set out in the tender notice or terms of reference.

- 27 Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

There are no such specific mechanisms in force.

- 28 What are the requirements for the admissibility of alternative bids?

PDs 59/2007 and 60/2007 implement the relevant provisions of the EU procurement directives. In order for alternative bids to be admis-

sible, the award of a contract must be based on the criterion of the most economically advantageous offer. Contracting authorities shall indicate in the tender's terms of reference whether they authorise alternative offers and, if so, the minimum requirements to be met by the alternative offers and any specific requirements for their presentation.

According to the provisions of Statute 3669/2008 on works, alternative offers may be submitted if they are based on different technical solutions and if it is not prohibited by the tender notice or dossier. PD 118/2007 on public procurement provides that the tender notice or dossier must include the prohibition, if any, of alternative offers.

29 Must a contracting authority take alternative bids into account?

If alternative bids are authorised and the minimum requirements are met, the contracting authorities must take them into account. According to PD 609/1985 on works, if alternative bids are made on certain conditions and these bids meet the requirements of the tender notice or dossier, all bids including alternative ones are treated as 'equal and independent offers'.

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

Bidders may not change the tender specifications or submit their own standard terms of business. Should they do so, the contracting authority is expected to exclude them from the procurement procedure.

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

According to PDs 59/2007 and 60/2007, the criterion for the award of contracts is either the most economically advantageous offer or the lowest price. For contracts below the EU thresholds, Statute 3263/2004 on works provides that works contracts are awarded based solely on the criterion of the lowest price whereas Statute 3316/2005 provides that contracts for studies or other relevant services relating to public works are awarded based on the sole criterion of the most economically advantageous offer while taking into account the thoroughness of the proposal, the experience of the expert team and the financial offer. PD 118/2007 (Public Supplies Code) provides that the award criterion is either the most economically advantageous tender or the lowest price.

32 What constitutes an 'abnormally low' bid?

According to PDs 59/2007 and 60/2007 an offer that is unrealistically low in relation to its subject matter constitutes an abnormally low bid.

33 What is the required process for dealing with abnormally low tenders?

According to PDs 59/2007 and 60/2007, the contracting authority requests, before rejecting an abnormally low bid, clarifications regarding the offer which may relate in particular to:

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

regulations; and

- the possibility of the tenderer to obtain state aid. There are no specific requirements for dealing with such bids at a national level except for the provisions of Statute 3389/2005 on PPPs that take the same approach to abnormally low offers as PDs 59/2007 and 60/2007.

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

A bidder may regain the status of a suitable and reliable bidder through a 'self-cleansing' procedure pursuant to the following:

- according to article 48 of Statute 2190/1920 on Société Anonymes, when a petition for the dissolution of a company is heard before the Multi-Member Court of First Instance, the court gives the company concerned a deadline to rectify the irregularities that gave rise to the petition; and
- article 57 of the new Bankruptcy Law provides that a decision that declared a natural or legal person bankrupt may be revoked with a petition of the debtor, if the creditors were satisfied or they consent to the revocation.

It is evident from the above that irregularities resulting in exclusion from a tender procedure can be rectified thus enabling a bidder to regain reliability and participate in public tenders.

Review proceedings and judicial proceedings

35 Which authorities may rule on review applications?

During the tendering procedure bidders are entitled to raise objections against acts of the contracting authority before the competent tender committees. Judicial review of award procedures is vested with the Council of State whereas the three-member court of appeal is competent to rule on the award of damages. If the contracting authority has a private-law legal personality, competence lies with the ordinary civil courts.

36 How long does a review proceeding or judicial proceeding for review take?

In public contracts the Council of State may rule either according to the special procedure of Statute 2522/1997, which implemented Directive 89/665/EC (on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts), or within the context of normal proceedings. Normal proceedings take more than a year, while the special procedure of Statute 2522/1997 may take between four and six months.

37 What are the admissibility requirements?

The special procedure of Statute 2522/1997 is applicable only above the EU thresholds. Any person who has or had interest in being awarded a contract for works, supplies or services and has suffered or may suffer damages due to infringement of EU or national legislation, is entitled to request an injunction, the annulment of the contracting authority's actions and the award of damages. Before requesting an injunction and within five days from the day the illegal act or omission occurred or was noticed, the bidder must file a complaint with the contracting authority, which must respond within 10 days. If the complaint is rejected, the bidder may submit the application for an injunction, which must be based on the same grounds as the complaint that was filed with the contracting authority. An injunction is granted if it is highly likely that EU or national

Update and trends

Before the introduction of Statute 3669/2008, there existed quite a few pieces of legislation that included provisions on public works. Therefore, although said statute does not introduce any new rules but simply codifies the existing legislation on public works, its introduction makes access to relevant rules much easier for all interested parties.

legislation has been infringed and an interim measure is necessary to lift or prevent any negative repercussions the bidder suffered or may suffer. The court awards the interim measures it deems appropriate and is not bound by the pleadings of the parties. Should the bidder be awarded interim measures, he is then under an obligation to initiate normal proceedings within 30 days from the publication or issue of the decision granting these measures.

In normal proceedings before the civil courts the rules of the Civil Code and the Code of Civil Procedure apply.

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

Within the scope of Statute 2522/1997, before an interim measures petition is made and within five days from the day the illegal act or omission of the contracting authority occurred or was found out, the bidder must file a complaint with the contracting authority, which must respond within 10 days. If the complaint is rejected or if the contracting authority does not respond within the 10-day period, the bidder may then submit an interim measures petition within 10 days from the date the complaint was rejected or from the expiration of the 10-day response period. During the period that the bidder may file a complaint and an interim measures petition, the contract may not be executed. The hearing of the petition takes place within 15 days from the filing of the petition. The court must hand down a judgment within 15 days from the date of the hearing, yet in practice this tight schedule is not observed. Crucially, the judgment is not subject to an appeal. If the bidder is awarded the requested injunction, he may then request the annulment of the act or omission at issue or the award of damages pursuant to normal proceedings.

The deadline for an application of judicial review before the Council of State is 60 days from the publication of the act or from its notification or from the day the interested party finds out the alleged violation. The decisions of the Council of State are not subject to an appeal. If the civil courts are competent, the provisions of the Code of Civil Procedure apply and there is the possibility of appeal.

39 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

An application for review does not have an automatic suspensive effect; however, during the period that a bidder may file a complaint and an interim measures petition (see question 38), the contract may not be executed. According to Statute 2522/1997, the court may, upon the request of the applicant, issue an order suspending the award procedure. In normal proceedings, there is no such option.

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

There is no such provision currently in force. As a rule, the contract is formed with the notification of the award decision.

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

There is no such provision currently in force and its absence makes it difficult for a complaining bidder to prove his or her case adequately.

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

Review applications are filed quite often.

43 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

With respect to public contracts, both within the scope of Statute 2522/1997 and in normal proceedings before the Council of State the annulment of an act of the award procedure does not result in the annulment of the contract itself; the applicant is only entitled to the award of damages. Statute 2522/1997 provides that if the court annuls or declares an action of the contracting authority void, the contract is not annulled unless the award of the contract had been suspended following a decision of the court.

Within the civil courts' competence, the annulment of an act of the award procedure may lead to the annulment of the contract (article 297 of the Civil Code).

44 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

There are no express provisions relating to legal protection for de facto award of contracts. In such cases, the general principles of private and procurement law currently in force would be applicable enabling persons claiming legal interest to seek such legal protection.



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