
Greece introduces new legal framework on the award and performance of concession contracts

On 8 August 2016 the Greek Parliament enacted a new law on the award and performance of concession contracts. The new Law 4413/2016 transposes Directive 2014/23/EU into the Greek legal order and addresses for the first time a category of contracts which under the previous regime remained largely unregulated.

What is the scope of the new law?

While the transposed Directive only addresses concession contracts exceeding the threshold of Euro 5,225,000, the new law takes a step further and captures contracts below this amount as well. Contracts below the threshold are, however, subject to less regulation; such contracts, among others, exempt from specific rules relating to publication of the tender notice in the Official Journal of the European Union (OJEU), dispatch of an award notice to the OJEU etc.

The new legal framework encompasses contracts where the consideration given to the concessionaire consists in the right of the latter to exploit the works or services that are the object of the contract. Unlike procurement contracts, the main feature of concession contracts is that the economic risk is transferred to the concessionaire. Under the pertinent case law of the Court of Justice of the European Union (CJEU)¹ which the new legal framework codifies, the risk transferred must *"involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible"*.

Concession contracts extend to a wide array of sectors from rail transportation, port and airport services, operation and maintenance of public roads, waste management, utility services to leisure facilities and car parks.

¹ C-274/09 *Privater Rettungsdienst and Krankentransport Stadler*, C-348/10 *Norma-A and Dekom*, and C-206/08 *Eurawasser*

Are there any exemptions from the scope of application of the new law?

Specific sectors which under the Greek Constitution belong to the direct and exclusive competency of the State are excluded from the scope of application of the new law. Such sectors are, in particular, national defense, civil defence (policing), the award of justice and the execution of penalties imposed by competent courts.

Other types of contracts which are exempt from the application of the new set of rules include contracts for the acquisition or lease of land, certain audiovisual media services, arbitration and conciliation services, specific types of legal services, financial services in connection with securities, political campaign services, concessions for lottery services made on the basis of an exclusive right etc. The water sector is also specifically exempt from the scope of application of the new law.

It is also worth mentioning that the new law does not have a retroactive effect. This means that the concession contracts which were already in place or whose award procedure had commenced before the new law entered into force will not be affected by it.

Which are the contracting authorities captured by the new law?

Similarly to the previous Directive 2004/18 and the respective national law (Presidential Decree 60/2007), the new rules on concession contracts are binding on state, regional or local authorities and public law organizations. The new law is also binding on contracting entities which pursue activities in specific sectors set forth by the new law (such as gas and heat, electricity, operation of networks in the field railway and other types of transport etc.)

Notwithstanding the aforementioned legal definition, it is currently uncertain which organisations will be ultimately bound by the new set of rules. This is expected to be clarified in practice within the context of implementation of the new law.

What is the duration of concession contracts?

In line with the Directive, the new law provides that the duration of concession contracts shall be limited. For concessions lasting more than five years, the maximum duration of the relevant contract must not exceed the time that a concessionaire could reasonably be expected to take to amortize the investments together with a return on invested capital.

What are the main features of the concession award procedure?

Some of the main features of the concessions award procedure are as follows:

Publication of concession and award notice

For contracts exceeding the threshold of Euro 5,225,000, a concession notice must be published in the OJEU; concession contracts below the above threshold need to be published at a national level.

For contracts exceeding the aforementioned threshold, an award notice needs to be sent to the OJEU within 48 hours detailing the results of the award procedure.

Deadlines and time scales

The minimum time limit for the receipt of applications is thirty days from the date of publication of the tender notice whether on EU or a national level. When determining the relevant time scales, contracting authorities should take into consideration the complexity of the concession and the time required for preparing the relevant bids or applications.

Award criteria

Under the new legal framework, assessment of bidders should take the place on the basis of specific criteria, which are determined and disclosed to all operators in advance. Selection criteria should relate to the subject matter of the contract and should not offer the contracting authority unrestricted freedom of choice. They may include social or environmental criteria or criteria relating to innovation. The criteria used should be listed by the contracting authority in descending order.

Can a concession contract be modified during its term?

The new law provides for the possibility of modification of the concession (as opposed to a new award procedure) in cases of minor changes of the contract and provided that such changes are up to a certain economic value. In case the changes to be effected are material a new award procedure may be needed.

What are the rules governing judicial review of concession contracts and award procedures?

Review procedures at the pre-award stage

Under the pertinent legal framework, concession contracts above the threshold of Euro 5,225,000 benefit from the legal provisions transposing into Greek Law the Remedies Directive and relating to interim judicial protection during the pre-award stage. Following the enactment of Law 4412/2016 (on public contracts for works, and procurement of goods and services), the relevant rules have been modified; however, a key rule which continues to apply is the existence of a standstill period before the execution of the concession contract.

Review procedures following the execution of the concession contract

Any disputes on the interpretation, performance or validity of the concession contracts' terms and clauses will be reviewed by the competent Administrative or Civil Court of Appeals.

Conclusions

The introduction of a new legal framework on the award of concession contracts is a welcome development, in the sense that it brings significant legal clarity and certainty to a previously unregulated sector. On the other hand, the new legal regime introduces a considerable extent of bureaucracy in the form of publications and notifications, which will certainly burden the contracting authorities and ultimately bidders. Whether the benefits will overcome downsides and the new legal regime will result in increased investment, innovation and development of infrastructure through private resources remains to be seen.

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