Developments in the area of public procurement

Law 4635/2019 (Government Gazette A 167/30.10.2019) introduces much awaited amendments to Law 3959/2011 on protection of free competition thus ending a long period of insecurity as to the eligibility of construction companies to participate in public tenders, affected by two recent rulings of the Hellenic Competition Commission (HCC).

The deadlock created by past HCC rulings

Almost all major construction companies frequently participating in public tenders and engaged in pending tender procedures for emblematic infrastructure projects in Greece have been found to have participated in a cartel aiming at the allocation of public works contracts among its members by virtue of Decisions 642/2017 and 647/2017 of HCC issued in September 2017 and March 2019 respectively. All companies against which infringements have been found are bound to disclose the relevant facts upon participation in new tenders, as well as update their eligibility status by disclosing the same in the context of pending tenders. **All companies found to have participated in the cartel have been until now at equal risk of disqualification or forfeiture in new or pending tender procedures, since all of them have been found to be invariably covered by the ground for exclusion related to past agreements aimed at distorting competition and bound by the respective obligation to disclose the HCC rulings upon participation in public tenders along with any self-cleaning measures adopted to rectify the situation hoping that the latter would become accepted by the bodies prescribed by the law.**
According to the jurisprudence of the Supreme Administrative Court of Greece, which is consistent with ECJ case law, said obligation to disclose HCC convinctions exists for the three–year period following the publication of the respective HCC decision. This position alone **extends considerably the period of instability**, seeing as the exclusion period entailed by the publication of the latest of the above HCC decisions should last **until March 2022**.

The remedies introduced by the new law

Law 4635/2019 introduces critical amendments to article 44 Law 3959/2011 ensuring that the exclusion ground related to past agreements aimed at distorting competition **will not be applicable** with regard to companies having proven their commitment in actively assisting HCC in its investigation or in complying with their obligations in light of issued convictions. Specifically:

- the law provides that the ground for exclusion related to past competition law infringements is not applicable with regard to economic operators a) either the **HCC leniency program as per article 25** of the same law and having been awarded immunity or having paid in full a reduced fine imposed against them, b) or involved in the **HCC fine settlement process as per article 25a** of the same law and paid in full the fines imposed against them;
- the amendments make clear that the above benefit is also applicable to companies having entered procedures for **partial settlement** of fines imposed against them as long as they

comply with their obligations in this context; also that the benefit is applicable with regard to **already issued HCC decisions** finding infringements and until expiry of the three-year exclusion period ensuing their publication.

- A memorable **exception to the above benefit** applies in the event of **recidivism**, namely if a new decision finding infringements is issued within six (6) years of the issuance of a previous decision finding such infringements.

Law 4635/2019 further introduces amendments to Law 4412/2016 and Law 4413/2016, reflecting those relevant to the above outlined benefit.

The aftermath

Prior to the recently introduced amendments, applicability of the competition law – related exclusion ground to almost every potential tenderer in major public works tenders had led awarding authorities to opt out of the specific exclusion ground altogether. In the context of pending tenders, awarding authorities had been tempted to circumvent the provisions related to the corresponding obligation of suggesting appropriate self-cleaning measures, eager to approve any measures and accompanying evidence as sufficient without proper scrutiny, in order to ensure sufficient competition and actual completion of tender processes, while the litigation arising from the existence of the specific exclusion ground had de facto halted their progress. The introduced amendments appear to remedy the situation -at least in part- **to the benefit of economic operators having shown willingness to assist HCC in its investigations and to comply with its rulings**. More than that, the amendments create a **significant incentive for assistance and compliance in the future** for all economic operators, particularly those engaged in sectors naturally prone to competition law violations and highly active in public procurement procedures.

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