



GREEK LAW DIGEST

The Ultimate Legal Guide
to Investing in Greece

Varotsos & Varotsos
Law Offices

LEGAL PROTECTION OF THE PARTIES
PARTICIPATING IN THE AWARD
PROCEDURE OF PUBLIC CONTRACTS

WATER - PROTECTION AND
MANAGEMENT



NOMIKI BIBLIOTHIKI



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LEGAL PROTECTION OF THE PARTIES PARTICIPATING IN THE AWARD PROCEDURE OF PUBLIC CONTRACTS

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Who does the term parties refer to herein?

The term parties refers to economic operators, who are interested in participating in a call for tenders for the award of a public contract, are candidates in an awarding procedure, or after the public contract has been awarded, are objecting such award.

Is Greece as an EU Member State in line with the EU rules relating to the petition of review procedures in the award of public law contracts?

For the transposition of Directive 89/665/EEC Greece adopted Law 2522/1997, 1997, for the transposition of Directive 92/13/ECC it adopted Law 2864/2000, and for the transposition of Directive 2007/66/EC Law 3886/2010 was adopted, which entered into force on September 30th, 2010. On the same date law 2522/1997 and law 2864/2000 have been abolished, with some exceptions mentioned below.

Which contracts does L. 3886/2010 cover?

L. 3886/2010 covers all public contracts falling within the scope of Directives 2004/17/EC and 2004/18/EC. The Law also covers public work concession contracts, framework agreements as well as dynamic purchasing agreements.

Under which provisions are parties protected in cases of contracts not falling within the scope of L. 3886/2010?

In the cases of public supply contracts Presidential Decree 118/2007 shall apply, in the cases of public work contracts L. 3669/2008 shall apply and in the cases of design contracts, the provisions of L. 3316/2005 shall be applicable. There are also several private entities of the public sector, which have their own contract awarding regulations.

It is to be noted that recent L. 4013/2011 provides the establishment of an independent authority, the task of which among others will be the coordination of the awarding procedures and of the performance of public contacts falling within the scope of Directives 2004/17/EC and 2004/18/EC, the frame agreements, the work concession contacts as well as the dynamic purchasing systems.

Which are the legal proceedings provided for in L. 3886/2010?

The Law provides for the following legal proceedings:

- a) the “prejudicial” recourse for review (“recourse for review”) before the awarding authority (“the authority”) against any enforceable act of the authority relating to the awarding procedure starting from the publication of the call for tenders until the conclusion of the contract;
- b) the filing before the President of the Administrative Court of Appeals (“the judge”) competent in the area of the seat of the authority of a petition seeking interim measures;
- c) the filing before the Administrative Court of Appeals competent in the area where the seat of the authority is located (“the Court”), of a request for annulment against any act or omission of the authority violating the EU law, the internal law or the tender documents;

- d) the filing before the Court of a request for annulment of the contract already concluded; and
- e) the filing before the either Administrative Court of Appeals or Civil First Instance Court, competent in the area where the seat of the authority is located, depending on whether the authority is a public authority or entity or a private entity of the public sector, of a lawsuit for damages suffered by a party from any act or omission of the authority during the awarding procedure or from the conclusion of the contract.

By exception, the Council of State (i.e. the Supreme Administrative Court) shall be competent for disputes concerning i) work or service concession contracts, ii) contracts falling within the scope of Directive 2004/17/EC, and iii) contracts the estimated value of which is above 15,000,000.00 euro including VAT.

Which acts of the authority may be challenged?

Any act or omission of the authority which is enforceable and is deemed to infringe the EU or internal laws or the tender documents may be challenged.

Upon the conclusion of the contract, this may be challenged only on the grounds specifically provided by law 3886/2010.

Who is entitled to challenge an act or omission of the authority during the awarding procedure?

On the condition that the applicant may claim that he is suffering damage:

- The tender documents may be challenged by any person interested in participating in the awarding procedure for being the contractor, on the grounds that one or more terms of the call for tenders or other tender documents prohibit it from participating in the procedure, and such terms are in breach either of the EU or the Greek law.
- During the awarding procedure acts or omissions of the authority may be challenged by any candidate; the grounds may be that their interests are being harmed, for example in cases when its bid is rejected or its technical or economic offer should not have been rated lower than others'.
- After the conclusion of the contract, this may be challenged as being null and void by any one that was interested in being awarded the contract and only in the specific cases provided for in L. 3886/2010.
- If the applicant is a consortium the recourse for review, as well as any other legal proceedings may be filed only by the consortium.

How is recourse for review filed?

Recourse for review is filed before the authority and it may be signed either by an attorney or by the representative of the applicant. It may be submitted even by fax, in which case the document bearing the original signature of the signatory must be submitted to the authority within five days. Applicants may file only one recourse for review against the same act or omission. The recourse for review cannot be filed against the decision of the authority that admits the recourse of a third party. Such decision may only be challenged through a petition seeking interim measures.

The recourse must be notified by the applicant to anyone who could suffer a prejudice in case the recourse is admitted. If the recourse is not notified, the petition for interim measures is not rejected in case the recourse for review has been dismissed.

The authority must either admit or reject the recourse for review within the time limit set out by the Law. If the authority does not issue a decision within this time limit, the recourse is considered as being rejected.

Can the contract be concluded during the time limits provided for challenging the awarding decision of the authority?

During this period the authority cannot proceed to the conclusion of the contract under penalty of nullity of the relevant decision ("standstill period").

L. 3886/2010 provides the following standstill periods: **i)** the time limit for the filing the recourse for review against the awarding decision, which is ten days; **ii)** the time limit for the decision on the recourse to be issued, which is fifteen days; **iii)** the time limit for the filing of a petition seeking interim measures against the decision on the recourse for review, which is fifteen days. Same time limit applies following the silent rejection of the recourse; **iv)** the time after the hearing of the petition for interim measures, until the issue of the decision by the Court; this standstill period may be lifted according to an injunction issued by the judge of the interim measures. The injunction may, among others, allow the conclusion of the contract, particularly if the petition is obviously inadmissible or unfounded in substance. There is no standstill period in connection with other acts or omissions that may be challenged, for example during the awarding procedure.

How is the petition for interim measures filed and heard?

The petition for interim measures is filed with the judge as defined above. Copy thereof must be served upon the authority and the parties to be indicated by the judge. Should the authority be different from the agency that receives the tender offers, the petition is to be served upon it. Anyone who has an interest in the interim measures not to be granted may file an intervention which is heard together with the petition for interim measures. All supporting documents must be submitted to the Court at the latest until the hearing of the petition.

The judge, following prior invitation of the authority, can issue an injunction for appropriate measures (e.g. suspension of the act or of the progress of the awarding procedure) until the hearing of the petition. Save what is said above with regard to the standstill period, such injunction is not required when the conclusion of the contract is challenged during the relevant standstill period. On the other hand, the injunction can be revoked following a request of the authority and after prior invitation of the applicant.

The prior filing of the main proceedings, i.e. the request for annulment, against the act or omission that the petition for interim measures is challenging, is not necessary for the validity of the petition for interim measures.

What should be the grounds of the petition for interim measures?

The petition for interim measures, under penalty of rejection, must be based on the same grounds as those of the recourse for review.

What happens when the petition for interim measures is admitted?

The Court accepts the petition for interim measures, unless it deems that imperative reasons for the protection of the public interest must prevail over the interest of the applicant, in which case the petition is rejected.

If the petition is admitted, the Court decision among other appropriate measures mainly orders: **i)** the suspension of the call for tenders or of any document relating to the award

procedure, **ii**) the suspension of the enforcement of any act or omission of the authority, **iii**) the prohibition of any legal or material action by the authority, **iv**) the performance of any action that is deemed necessary, e.g. documents or other data to be conserved, **v**) the suspension of the conclusion of the contract.

The applicant must file the main proceedings within the time limit set out by the law otherwise the enforcement of the decision ordering interim measures is ipso facto lifted. On the other hand, the authority may either recall or amend its act or proceed with the omitted act in conformity with the decision. In this cases the main proceedings, if already filed, are in principle abrogated.

What happens when the petition for interim measures is rejected?

The applicant is not deprived from filing any other appropriate proceedings against the act or omission challenged through the petition for interim measures. Such proceedings are the request for annulment of the infringing act or omission and the lawsuit for damages, the latter on the condition that the request for annulment has previously been admitted. The request for annulment shall not necessarily be founded on the grounds included in the petition for interim measures. If the petition is rejected or the candidate had not previously filed a petition for interim measures and the relevant contract has been concluded prior to the hearing of the request for annulment, the trial on the request for annulment is in principle abrogated.

What happens if the request for annulment is admitted after the contract is concluded?

If an act or omission of the contracting authority is cancelled after the conclusion of the contract, the latter remains valid and binding upon the contracting parties, under the following conditions: **i**) the judge competent for the interim measures ordered the conclusion of the contract not to be suspended during the standstill period or **ii**) the award of the contract was not suspended either by the decision ordering interim measures or through an injunction. Nevertheless, even when the contract has been concluded, the party whose request has been admitted may seek damages on the conditions cited below.

In which cases can a contract that has already been concluded be cancelled?

Any party that has an interest therein, may file before the Court a request for annulment of the contract, even if it had not participated in the awarding procedure, based on the following grounds: **i**) the contract has been concluded without prior publication in the Official Journal of the EU, in the cases that this is required, **ii**) the standstill period was not observed, or **iii**) in the cases of conclusion of a frame contract or of application of a dynamic system, if the obligations set out in article 25 par. 4 subpar. 2 indent 2 (Directive 2004/18 article 32) and in article 27 par. 5 and 6 of PD 60/2007 (Directive 2004/18 article 33) had not been observed. The interested party may also seek the suspension of the performance of the contract until the issue of the Court decision on the request for annulment through a petition for interim measures. Neither recourse for review nor standstill period are provided for in the Law in this case. The performance of the contract may be suspended until the hearing of the petition for interim measures upon an injunction issued by the judge. However, I. 3886/2010 provides the conditions, which, if they are fulfilled by the authority, the contract remains valid. Moreover, as a general rule, a third party who did not participate in the awarding

procedure because of the requirements of the tender documents, e.g. because of the technical specifications which it could not comply with, may seek annulment of the contract already concluded, in case it contains a clause which deviates from the call for tenders or the awarding decision, which would have allowed it to participate.

What are the results if the public contract is cancelled?

Should the contract be cancelled all relevant results are retroactively cancelled and the interested party may seek damages against the contractor for unlawful enrichment. The Court decision which admits the request for annulment or rejects it for public interest reasons should also condemn the authority to pay to the applicant a fine not exceeding 10% of the economic object of the contract.

Moreover, should the applicant be successful in cancelling the contract, he may seek compensation from the competent Court as referenced above, based on articles 197 and 198 of the Greek Civil Code (liability from pre-contractual negotiations).

What if the time limits set out by the L. 3886/2010 are not observed?

All time limits within which the interested party is entitled to file recourse for review and legal proceedings are exclusive. If they are not observed the relevant proceeding cannot any more be filed, or if filed is inadmissible. The time limit for filing recourse for review starts either as of the notification of the act to the interested party or when it gets full knowledge of the reasons of the act. If it is a Court decision, the time limit starts as of its notification.

On the contrary, all time limits within which the Court must fix the hearing of the case or issue its decision are indicative only.

Are there any other types of recourse against the award of a public contract?

Any interested party may file a complaint before the EU Commission, which intervenes to the Government if it considers that there has been a serious breach of EU law.

Important note

It is to be noted that because L. 3886/2010 covers the disputes regarding acts issued or omissions arising as of October 1, 2010, while its provisions on jurisdiction and competence entered into force on January 1, 2011 its interpretation by the Courts is expected with great interest. To this effect, the interpretation and the application by the Council of State of previous L. 2225/1997, the respective provisions of which have been abolished on the same dates, will offer a valuable base.

Main differences between L. 3886/2010 and the provisions applicable for contracts of a value under the thresholds of Directives 2004/17/EC and 2004/18/EC

- During the awarding procedure the interested party may be obliged, depending on the applicable provisions, first to appeal against the act or omission of the authority before a higher authority, under penalty of inadmissibility of the request for annulment.
- In case of a supply contract, a duty is payable in case an objection against an act or omission of the authority is filed.
- There is no recourse for review.
- In case the authority is a public one or a public entity, the interested party, instead of interim measures, should first file a request for annulment with the competent

Administrative Court of Appeals and then apply for suspension based on the request for annulment. If the first one is not filled the latter is inadmissible.

- There is no standstill period. Any suspension of the awarding procedure, including the conclusion of the contract, can be ordered by the Committee for Suspension of the Administrative Court of Appeals, until the hearing of the request for annulment. The President of the Court may issue an injunction suspending the progress of the procedure until the hearing of the request for suspension.
- The request for suspension is being heard before the Committee for Suspension of the Administrative Court without interlocutory procedure, except if the President of the Court orders otherwise.
- If the awarding authority is a private entity, interim measures may be filed with the Civil One Member First Instance Court, the filling of which does not depend on the prior filing of the lawsuit. A lawsuit seeking damages may be filed before the Civil First Instant Court.

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WATER - PROTECTION AND MANAGEMENT

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Legal framework for water protection and management in Greece

In fulfillment of Directive 2000/60/EC of the European Parliament and of the EU Council, Greece adopted Law 3199/2003 and Presidential Decree 51/2007 concerning the protection and management of surface waters and ground water. The latter provide for the separation of Greece into river basin districts and the drafting and issuing of river basin management plans which shall be revised and updated every six years. Management plans shall include programmes of measures and monitoring of the water status.

Greece has been separated into 14 river basin districts.

According to L. 3199/2003, water uses include: water supply, irrigation, industry, energy and leisure.

In addition, L. 3199/2003 provides for the issue of permits, which cover the use of water resources and the execution of works concerning the exploitation of water resources (hereunder "water works"). Permits are required in all cases concerning water supply, use of water, water works, and works or activities for the protection of water from pollution caused by discharge of liquid waste into the environment. Permits may be granted to any legal or natural person for the satisfaction of their real needs. Water works may also be undertaken for the satisfaction of third parties' needs, as long as general interest is served.

Permits are granted based on the respective river basin management plans, and the programmes of measures, which give substance to the provisions of such management plans. In order for the permits to be granted, the availability of the quantity of water to be used and the purpose of the use of water should be established.

Relevant bodies for water protection and management in Greece.

The Central Water Agency established within the Environment, Energy and Climate Change Ministry is responsible for establishing national water policy and drafting national programmes for the protection and management of water resources. These programmes are separated between long-term plans (with a duration of over six years) and medium-term plans (with a duration of two to six years).

The National Water Committee is responsible for approving national programmes for water resource protection and management and for cooperation with other EU members or third countries in case of river basin districts extending into their territory.

River basin management plans are issued by decision of the General Secretary of the relevant Decentralised Administration (Apokentromeni Dioikisi).

Permits for the use of water resources and the execution of water works are also issued by decision of the General Secretary of the relevant Decentralised Administration.

Additional permits may be required, depending on the work or activity to be undertaken (e.g. in cases of hydroelectric works, transfer of water, drillings etc.)

Have river basin management plans provided for in L. 3199/2003 been issued? How does the absence of river basin management plans affect the issuing of permits?

According to L. 3199/2003 the first river basin management plan should have been drafted and approved by 22.12.2009. However, none of the river basin management plans have been issued yet. At the time the present article was written, some of the plans were under public consultation, whereas others are expected to enter into consultation in the next few months. Consultation shall last 6 months.

The Hellenic Council of State (Symvoulío tis Epikrateias), that is the Greek Supreme Administrative Court, has ruled that, since management plans had not yet been issued, permits to use water resources and execute water works may not be granted. The Hellenic Council of State has also ruled that while management plans are pending, permits could be granted in line with the programmes for water resource development, stipulated in previous Law No 1739/1987, but again provided that such programmes had been approved (see inter alia Decisions 1987/2010, 1125/2008 of the Hellenic Council of State). For the above reasons the Hellenic Council of State has been annulling issued permits.

At the same time, the Hellenic Council of State, has ruled that in cases of existing infrastructure (where water works had also been undertaken) which need to be modernised, it shall be deemed acceptable to draft and plan modernisation works (even where river basin management plans are not issued beforehand), so long as such works do not entail a significant increase in water consumption (see Decision 2639/2009 of the Plenary Session of the Hellenic Council of State).

On 13.07.2011 the Environment, Energy and Climate Change Ministry issued Circular no. 150673. According to this Circular, when an application for a permit is filed but the relevant river basin management plan has not yet been issued, the permit shall be granted on the condition that the work or activity to be undertaken is deemed to be compatible with the policy of rational water management and environmental protection applicable to the specific region. The Greek National Registry of Protected Areas must also be taken into consideration.

Administrative and criminal penalties applicable to breaches of the provisions of L. 3199/2003.

L. 3199/2003 provides for administrative and criminal penalties for the following cases: pollution or other deterioration of the water status, breach of the law or of any other acts issued in fulfillment of this law, breach of the terms and provisions laid down in the permits:

- A fine of 200 to 600,000 euros is imposed according to the significance, frequency and relapse of the breach, independently of any criminal or civil liability or administrative penalties set by other provisions.
- In case of extremely significant pollution or deterioration of the water status and especially in the cases where the type or the amount of pollution or the extent or the significance of the deterioration constitute a threat of death or severe bodily harm or ecological perturbation or destruction, the fine may reach the amount of 1,500,000 euros.
- If a business or activity causes pollution or other deterioration of the water status, its operation may be temporarily prohibited until the adequate measures are adopted in order to permanently stop the pollution or the deterioration. Permanent interruption of its operation may be imposed if the party at fault does not comply with the imposed measures or if it is impossible to adopt adequate measures. A fine of 500 to 50,000 euros may also be imposed for each day such prohibition is violated.
- Criminal penalties shall also be imposed, in the above cases, according to L. 1650/1986.

Civil liability

According to the following provisions of civil law, any natural or legal person or other entity (acting as representative of the rights and interests of its members), with legal interest therein, may appeal before the competent courts for the protection of their rights and for damages for the pollution or deterioration of water resources:

- Art. 29 of L. 1650/1986: “any natural or legal person who pollutes or otherwise causes deterioration of the environment is liable to damages, unless that person proves that the harm caused is due to force majeure or to a third party’s intentional fault”. This provision provides for the polluter’s objective liability.
- Art. 6 of L. 2251/1994: This provision provides for objective liability of producers in case of damage to the environment caused by a defective product.
- Art. 57 of the Greek Civil Code: The right to water use (water being a public resource) as well as the profit gained from this use constitutes part of the right to personality. For the right to personality to be considered offended, it must be established a) that the right to use water has been impeded in such a way that its public use is distorted or annulled or a person’s health (physical or mental) is damaged and b) that the offence is illegal; in order to establish illegality, it is sufficient to show that by impeding the right to use water or by damaging a person’s health, the party at fault has acted in a way which is contrary to what law and order require or prohibit; there is no requirement for a specific provision of the law to be breached. This means that even if the party at fault has the right to perform a specific act or omission (e.g. in case an operator has been granted a permit to conduct a specific activity), if it is established that the right to use water is more important or that the act of the offending party is performed in an abusive way, then the party who suffers the offence is protected through the lawsuits for cessation of the offence, non-recurrence in the future (in case there is an imminent threat of recurrence), compensation [see below under (d)] and reparation of moral damages according to Art. 59 of the Greek Civil Code (See inter alia Decision 1158/2010 of Halkida Court of First Instance granting Interim Measures, Decision 77/2000 of Messologgi Court of First Instance etc.).
- Art. 914 of the Greek Civil Code: “Anyone who in violation of the law causes damage to another through his fault is liable to compensate them.”

Specific cases: water transfers and hydroelectric works

a) Transfer of water from one river basin to another

In view of the fact that river basin management plans had not been issued, L. 3199/2003 was later amended (in 2006 and in 2007). Its new provisions provided for the abstraction of water from a specific river basin and its transfer to another. This may be done in accordance with an approved management plan for the specific river basin district(s) (not be issued by the aforementioned Decentralised Administrations, but by a different authority) for the purposes of:

- Water supply to cities and villages, to satisfy imminent needs.
- The protection and improvement, both at quantitative and qualitative level, of surface water and groundwater bodies.
- The environmental enhancement of the various regions, taking into consideration the protection of habitats.
- Hydroelectric power production.

The relevant management plan should establish the availability and sufficiency of water resources after the transfer, as well as the sustainable use of transferred resources in the

receiving water basin, taking into consideration the need for a long-term protection of available water resources.

The above provision was challenged before the Hellenic Council of State, which ruled that it was not in conformity with Directive 200/60/EC. The Court also ruled that the transfer of water from one river basin to a neighboring one may be permitted as an exception in order to cover water supply needs, only if the receiving river basin cannot in any way cover its needs with its own water resources. The Hellenic Council of State has postponed the issue of a definite decision and referred the case to the Court of Justice for the issue of a preliminary ruling (Decision 3053/2009 of the Plenary Session of the Hellenic Council of State). At the time of writing the present article, no decision has been issued (C-43/10; on 13.10.2011 the Advocate General issued an opinion).

b) Small hydroelectric works

According to the jurisprudence of the Hellenic Council of State, permits for small hydroelectric works were also annulled in the same way as other permits for water resource use and execution of water resource exploitation works, because of the absence of management plans (or programmes stipulated in previous L. 1739/1978). For this reason L. 3199/2003 was further amended in 2009 to facilitate the issue of permits to use water and carry out water works prior to the issue of river basin management plans or programmes stipulated in previous L. 1739/1987, for cases of small hydroelectric works undertaken under specific conditions. According to the amended law, plans at sub-basin level shall suffice for the issue of such permits.

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