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# GREEK LAW DIGEST

The Official Guide to Greek Law

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## Michailopoulos & Associates

INVESTMENTS AND DEVELOPMENT  
The legal–institutional framework

BEST PRACTICES FOR TENDERERS  
REGARDING THE AWARD, CONCLUSION  
AND EXECUTION OF PUBLIC CONTRACTS

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2nd EDITION



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Greece General Information .....	24
Useful Insights of the Greek Economic Environment .....	27
Visa & Residence Permits Information .....	48
Judicial System .....	53
Alternative Dispute Resolution - Mediation .....	127
Aspects Of Greek Civil Law .....	139
Citizens & The State .....	175
Business Entities .....	185
Finance & Investment .....	233
Capital Markets .....	327
Mergers & Acquisitions .....	341
Financial Contracts .....	367
Financial Tools .....	387
Competition .....	399
Industrial & Intellectual Property Rights .....	437
Shipping .....	471
Transportation .....	501
Private Insurance .....	521
Insolvency- Bankruptcy .....	533
Tourism .....	553
Technology-Media-Electronic Communications - Internet .....	565
Energy- Minerals .....	613
Physical & Cultural Environment .....	647
Real Estate .....	701
Health & Life Sciences .....	737
Consumer Protection .....	761
Data Protection .....	773
Games Of Chance .....	787
Sports .....	799
Employment .....	811
Foreign Citizens & Immigrants .....	827
Exports/Imports/Customs .....	831
Tax .....	835
Related Information .....	880

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# GREEK LAW DIGEST

## ■ FINANCE & INVESTMENT



NOMIKI BIBLIOTHIKI

# INVESTMENTS AND DEVELOPMENT: The legal–institutional framework

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## I. INVESTMENT OPPORTUNITIES AND CHALLENGES IN GREECE

Despite the economic crisis that emerged in 2010, Greece remains appealing as an investment destination; this is mainly due to the reasons, outlined here below.

Firstly, Greece, as a member of the European Union, benefits from the **European Structural and Investment Funds**; according to European Union's budget allocation for the period 2014 -2020 EUR 26 billion are expected to be channeled into the Greek economy, thus providing funds and supporting the country's development course. Furthermore, the Investment Plan for Europe can play a crucial role for investments in Greece. The new **European Fund for Strategic Investment (EFSI)** plans to generate an estimated EUR 315 billion worth of investments into the European economy, by providing guarantees for higher-risk projects. Notwithstanding these funds, Greece, due to its recent distressful economic situation, is also entitled to a significant influx of funds through **International Financial Institutions (IFIs)**, as the European Investment Bank (EIB).

Secondly, Greece, by virtue of the **Memorandum of Understanding**, signed in August 2015 between the European Commission, the Hellenic Republic and the Bank of Greece, has undertaken the commitment to implement an unprecedented privatization programme. To this end, a new Super – Fund under the name "Hellenic Corporation of Assets and Participations S.A." (H.C.A.P.) has been recently established by virtue of law 4389/2016, which will own and manage a large number of assets belonging to the Greek State. Additionally, H.C.A.P. will operate as the holding company of four subsidiaries already managing valuable Greek assets. This enactment is further fostering the privatization process already implemented by the **Hellenic Republic Asset Development Fund (HRADF)**, which has already attracted considerable infrastructure, energy and real estate investments, such as the lease and management of 14 regional airports and the sale of the state gambling monopoly and the country's biggest sports sponsor.

Last but not least, Greece has recently introduced a series of legislative **reforms aiming at facilitating and enhancing the implementation of investment** projects. The reforms on licensing legislation, the adoption of a 'fast-track' mechanism for strategic investments and the establishment of the institution of 'Ombudsman' constitute measures designed to unblock the implementation of investment projects, which have considerably improved the institutional business framework of Greece.

However, due to the lack of consolidation and codification of the incumbent legislation, investors are exposed to a legislative 'labyrinth', where a myriad of legal acts impose considerable difficulties in identifying and interpreting the optimum path. The arduous task of fully grasping the Greek legal environment becomes even more complicated, due to the recurring, for the implementation of a certain investment, involvement of various stakeholders, sometimes with overlapping roles and competences.

This brief legal guide aims at depicting, in a comprehensive and structured way, the legal and institutional framework related to investments and development. Its goal is to provide clear legal guidance so as to quickly and reliably identify the relevant legislation for each case of interest for investors and for tracing the optimal investment plan. The first part focuses on the **incentives and possibilities of financing investment projects**, the second part outlines the legal acts that regulate **major sectors of business activities**, while the third part depicts the legal acts that **support and facilitate the implementation of investments**.

## II. OVERVIEW AND STRUCTURE OF THE LEGAL-INSTITUTIONAL FRAMEWORK

### A. Financing

The atmosphere of risk aversion created by the economic crisis has notably affected the supply of financial resources and, consequently, investment-financing issues are of vital importance. This part is systematically divided into the following sub-parts: **Investments co-financed by Public Funds**, namely *Aids* and *Opportunities via Public Contracts* and **Self-financed investments**.

#### 1. Investment co-financed by Public Funds

##### 1.1. Aids

Field: **Incentives Law**

Legal act: Law 3908/2011 relating to 'Aid for Private Investment to promote Economic Growth, Entrepreneurship and Regional Cohesion' (OJ 8/A'/01.02.2011), as it has been amended.  
Law 4399/2016 relating to 'Institutional framework for the creation of Private Investment Aid schemes for the regional and economic development of the country - Development Council recommendation and other provisions' (OJ 117/A'/22.06.2016).

Main idea: The newly introduced Investment Incentives law mainly foresees the following types of aid: tax reliefs, subsidies, leasing grants, employment cost grants (in order to provide incentives for job creation), stable income tax rate and risk finance aid through holding funds.. It abides by the Regional Aid Map and, therefore, the ceilings of the permitted percentage of aid, which *grosso modo* depends on the size of the economic entity, the type of investment and the location of the investment, are in conformity with the State Aid rules.  
The total amount of aid per investment project approved can reach the amount of EUR 5 million, while the total amount granted per business cannot exceed EUR 10 million and EUR 20 million per group of companies. Furthermore, a special status is predicted for strategic investments with considerably high estimated value: the types of aid granted are limited to stable income tax rate at the time of the application submission, tax reliefs and fast-track licensing. For such strategic investments, different limits on maximum amount of aid are predicted.  
It should be noted that investment projects already submitted and assessed under the provisions of Laws 3299/2004 and 3908/2011 are granted an extension for completing the investment under certain conditions and shall be implemented under the same legal framework (e.g. Laws 3299/2004 and 3908/2011 respectively, as amended by law 4399/2016). However, it should be stressed that the subsidy for these specific projects will be allotted in seven annual installments.

- Key-remarks:** Eligible Economic entities have to be established under Greek law or have a branch in Greece.  
Economic entities that receive aid have a deadline to implement the investment plan within three years from the date of publication of the relevant granting decision, which can be extended up to two years (five years in total).  
In comparison with previous Incentives law 3908/2011, a shift from the era of *direct grants* towards one of *tax reliefs* is a main amendment implemented by the new law. This shift aims at supporting potentially profitable investments, instead of enhancing the realization of costs irrespective of the outcome of the investment.
- Field:** **State Aid schemes**
- Legal act:** Block Exemption Regulation (EU) no. 651/2014, De minimis Regulation (EU) no 1407/2013, *ad hoc* schemes.
- Main idea:** These grants mainly refer to medium-scale projects and concern small and medium-sized enterprises (SMEs). According to the state aid schemes that each time apply for a certain period of time and under certain conditions eligible expenses are usually related to construction, equipment and services. These schemes are usually addressed to economic entities active in tourism, energy, manufacturing, ICT and transport.
- Key-remarks:** Eligible Economic entities have to be established in Greece under national law. Given that these schemes are tailored-made, in order to address a certain policy priority in conformity with EU State-aid rules, the relevant legal framework is structured *ad hoc* usually in the form of ministerial decisions. Hence, the applicable rules, contrary to the case of 'Incentives Law' are not predetermined, and, therefore, interested parties have to be vigilant.
- Field:** **Financial Engineering Instruments (FEIs)**
- Legal act:** Joint Ministerial Decision No 35996/EΥΣ/5362 regarding the establishment of 'JESSICA Holding Fund Greece' (OJ 1388/B'/03.09.2010), as it has been amended. Joint Ministerial Decision No 39481/EΥΣ 5227 regarding the establishment of 'JEREMIE Holding Fund Greece' (OJ 1751/B'/01.09.2008), as it has been amended. Joint Ministerial Decision No 12017/1245 regarding the establishment of 'Fund of Entrepreneurship' (OJ 1697/B'/27.10.2010), as it has been amended.
- Main idea:** Financial instruments already available in Greece, primordially under the form of low interest loans, aim at growth leverage with the assistance of revolving instruments, rather than grants.  
Through the financial instrument of JESSICA, Greece is being given the option of using some of the EU grant funding to make repayable investments in projects forming part of an integrated plan for sustainable urban development. These investments, which may take the form of equity, loans and/or guarantees, are delivered to projects via Urban Development Funds and, if required, Holding Funds. It is noteworthy that in 2014 the EIB achieved record financing for Greece, with new lending agreements totaling EUR 1.48 billion. JEREMIE is an initiative of the European Commission developed together with the European Investment Fund (EIF). It promotes the use of financial engineering instruments to improve access to finance for SMEs and may support the creation of new businesses or expansion of existing ones.



**Key-remarks:** Eligible Economic entities have to be established in Greece under national law. These instruments are developed and supported by International Financial Institutions and mainly by EIB and EIF. The experience, during the Programming Period 2007-2013, has shown that the relevant Regulatory Framework proved to be very rigid in its application to FEIs and, therefore, for the new period 2014-2020, it is being reworked in order to be more efficiently deployed.

### *1.2. Opportunities via Public Contracts*

- Field:** **Partnership Agreement for Development Framework - NSRF 2014-2020**
- Legal act:** Law 4314/2014 relating to the 'Management, control and implementation of development interventions for the programming period 2014-2020' (OJ 265/A'/23.12.2014).  
Ministerial Decision for the 'National expenditure eligibility rules for NSRF period 2014 – 2020' (OJ 1822/B'/24.08.2015).
- Main idea:** Defines stakeholders, procedures and control mechanisms for the management and allocation of European Structural funds to beneficiaries, according to EU cohesion policy's approved thematic targets. NSRF structure is based on *Sectoral Operational Programmes* (OP Competitiveness, Entrepreneurship and Innovation, OP Transport Infrastructure, Environment and Sustainable Development, OP Human Resources Development, Education and Lifelong Learning, OP Public Sector Reform, OP Technical Assistance, Rural Development Programme and OP Fisheries and Maritime) and *Regional Operational Programmes*, covering all principal sectors of economy and development.
- Key-remarks:** The NSRF ecosystem is characterized by intense bureaucracy with a multitude of government agencies involved in the investments' lifecycle. Strong emphasis is given on formal compliance with relevant acts, as the legality and regularity of all expenses is thoroughly reviewed. The Framework can accommodate small to very large-scale projects (with budgets well in excess of EUR 50 million) and is considered as the principal funding mechanism for implementing both infrastructure projects and value-added services till 2022. As of 2016 the Programme is practically beginning to gain momentum. There are also various other similar Programmes funding domains such as Rural Development and Interregional Cooperation, which are based on the same principles and rules.
- Field:** **Public Private Partnerships (PPPs)**
- Legal act:** Law 3389/2005 relating to 'Public-Private Partnerships' (OJ 232/A'/22.09.2005), as it has been amended.
- Main idea:** Promote large-scale projects via Private Sector involvement especially in the fields of environment, waste-management, energy, urban development, transport and digital-convergence.

**Key-remarks:** Due to the lack of public funds and the State aversion to fund the construction and performance of public assets, nowadays PPPs appear to be an appealing vehicle for large-scale projects.

The 'PPP Special Secretariat of the Ministry for Development and Competitiveness' is a well-established centralized authority –that has recently earned worldwide recognition– entrusted to coordinate and to safeguard the interests of all parties by providing clarity, continuity and security at all stages of a PPP project lifecycle.

Law 3389/2005 offers a solid legal and regulatory framework, which has been 'successfully tested' before the competent courts during its application, thus providing legal certainty for the proper implementation of long-term projects. Furthermore, the PPP Special Secretariat has been pioneer at European level by applying the blending of funds deriving from the European Structural and Investment Funds, the EIB, along with private funding.

## 2. Self-financed investments

**Field:** HRDAF / Privatization Programme / H.C.A.P.

**Legal act:** Law 3986/2011 relating to 'Urgent Measures for the application of Mid Term Fiscal Strategy Plan 2012-2015' (OJ 152/A'/01.07.2011), as it has been amended. Law 4336/2015 relating to 'Reforms for the implementation of the Financing Agreement as well as Ratification of the Draft Agreement on the Financial Assistance by the European Stability Mechanism (E.S.M.)' (OJ 94/A'/14.08.2015). Law 4389/2016 relating to 'Urgent measures for the implementation of the agreement relating to fiscal targets and structural reforms and other provisions' (OJ 94/A'/27.05.2016).

**Main idea:** The Hellenic Republic Asset Development Fund (HRADF) was established in 2011 under the medium-term fiscal strategy. Its *raison d'être* is to restrict governmental intervention in the privatization process and further develop it within a fully professional and private-driven context.

The new 3 year Programme, ratified by the Greek Parliament in August 2015, lays down the establishment of an independent **Privatization Fund** assigned with the task to quickly identify, transfer and manage valuable Greek assets through privatization and other means.

Following to the above, a new Super – Fund under the name "Hellenic Corporation of Assets and Participations S.A." (H.C.A.P.) has been established at the end of May 2016, which will own and manage a large number of assets belonging to Greek State. H.C.A.P. will also operate as the holding company of four subsidiaries: a) the Hellenic Financial Stability Fund, entrusted with the stabilization of Greek banking sector, b) the Hellenic Republic Asset Development Fund, the entity that has so long managed the privatization programme, c) the Public Properties Company, which will own and manage all real estate assets of the Greek State, d) the Public Participations Company, which will own all the participation of the Greek State in a number of public enterprises.



**Key-remarks:** Following to the above provisions, H.C.A.P. will exploit and optimize the value of all assets owned by its subsidiaries, operating under private economy and thus overcoming any bureaucracy obstacles. At the same time, H.C.A.P. will be the sole competent body for designating the masterplan and the rules governing the operation of its subsidiaries (such as rules and procedures for procurement, their internal operational framework, e.t.c.), which will then undertake the implementation of such masterplan. The above framework sets a very ambitious and challenging privatization package, the implementation of which could create a 'flood' of investment opportunities.

**Field:** **Venture Capitals**

**Legal act:** Law 2992/2002 'Measures for fostering of Capital Markets and the development of entrepreneurship' (OJ 54/A'/20.03.2002).  
Law 4141/2013 relating to 'Investment Tools for Development, Financing and other Provisions' (OJ 81/A'/05.04.2013), as it has been amended.  
Communication of 04.12.2015 regarding Crowdfunding issued by the 'Hellenic Capital Market Commission.

**Main idea:** Greek legislation foresees the setting-up of a Venture Capital Mutual Fund (VCMF), which is a pool of assets consisting of transferrable securities and cash, divided into units.  
The VCMF's headquarters must be in Greece and its duration may not exceed 15 years.

**Key-remarks:** VCMFs are deprived of legal personality and, therefore, are represented before third parties, Courts and authorities by their management companies. Though Crowdfunding is not yet regulated, the Hellenic Capital Market Commission, has issued a Communication allowing for the performance of crowdfunding platforms in Greece, under certain conditions.

## **B. Major business sectors**

This part provides brief explanatory remarks with regard to the business sectors of Tourism, Energy, Real Estate and Medical Tourism and a reference to the investments-development laws pertained to the sectors of R&D, Business Parks, Logistics and NPL's.

**Field:** **Tourism**

**Legal act:** Law 4002/2011 relating to 'Issues falling within the competence of the Ministry of Finance, the Ministry of Tourism and the Ministry of Labour and Social Security' (OJ 180/A'/22.08.2011), as it has been amended.  
Law 4276/2014 relating to the 'Simplification procedures for operating tourism businesses and tourism infrastructure, special interest tourism and other provisions' (OJ 155/A'/30.07.2014), as it has been amended.

**Main idea:** Law 4002/2011 has introduced the notion of 'Complex Tourist Resorts' and has laid down the definition of 'Areas of Integrated Tourism Development'. In an 'Area of Integrated Tourism Development' it is allowed for more than one hotel to be land planned, irrespectively of the number of owners. Such areas are receptors for complex and integrated tourism resorts that include hotels, summer resorts -available for sale or long lease- and special tourism facilities such as golf courses, spas, conference centers etc..

Law 4276/2014 sets the framework for Agrotourism and Enotourism.

**Key-remarks:** These legal acts introduce new promising investment opportunities in the field of Tourism that, in any case, is considered to be the most attractive business sector in Greece.

**Field:** **Energy**

**Legal act:** Law 3851/2010 relating to 'Accelerating the development of Renewable Energy to address climate change and other provisions on jurisdiction of the Ministry of Environment, Energy and Climate Change' (OJ 85/A/04.06.2010), as it has been amended.

Law 3855/2010 relating to 'Measures on the improvement of energy end-use efficiency and energy services' (OJ 95/A/23.06.2010), as it has been amended.

Law 4001/2011 relating to 'The operation of Electricity and Gas Energy Markets, for Exploration, Production and transmission networks of Hydrocarbons and other provisions', (OJ 179/A/22.08.2011), as it has been amended.

Law 3428/2005 relating to the 'Liberalization of Natural Gas Market' (OJ 313/A/27.12.2005), as it has been amended.

Law 4336/2015 (*see above*).

**Main idea:** The independent 'National Regulatory Authority' (RAE) is entrusted with material power and extensive competences with respect to the operation of all energy market sectors, namely Electricity, Natural Gas, Oil Products, Renewable Energy Sources, Cogeneration of Electricity and Heat etc.

**Key-remarks:** During the last year there has been a remarkable expansion in the Renewable Energy Sources sector (RES). Electricity produced by RES is sold to the Public Power Company (DEI) at fixed purchase prices agreed in advance and guaranteed for a long-term period. Special attention should be paid to the regulatory obligations and administrative formalities that apply when transferring a RES project.

Law 4336/20154 – New Programme (see under HRDAF / Privatisation Programme / New Fund) foresees a string of important reforms in the fields of electricity, gas and RES, aiming at making them more modern and competitive, by reducing monopolistic rents and inefficiencies and favouring a wider adoption of renewables and gas.

**Field:** **Real Estate**

**Legal act:** Law 2778/1999 relating to “Real Estate Mutual Funds - Real Estate Investment Companies and other provisions (OJ 295/A/30.12.1999), as amended by law 4141/2013 relating to “Investment Tools for Development, Financing and other Provisions” (OJ 81/A/05.04.2013), and law 4389/2016 relating to ‘Urgent measures for the implementation of the agreement relating to fiscal targets and structural reforms and other provisions’ (OJ 94/A/27.05.2016).

**Main idea:** Law 4141/2013 provides the legal framework for ‘Real Estate Investment Companies’ (REICs). REICs are investment vehicles used in large scale real estate investment, allowing for investment in residential property and tourist property, property under construction and in land. REICs have to be formed as a special purpose Greek ‘*Société Anonyme*’ with registered shares that have to get listed to the Athens Stock Exchange Market in Greece for the listing of its shares within two years after establishment. The initial minimum share capital required is of EUR 25 millions.

**Key-remarks:** REIC is an attractive investment vehicle operating under a favorable tax framework and providing significant incentives for the investors, both medium and long-term.

**Field:** **Medical Tourism**

**Legal act:** Law 4179/2013 relating to ‘Simplifying procedures for strengthening entrepreneurship in tourism, restructuring of the Greek Tourism Organisation and other provisions’ (OJ 175/A/08.08.2013), as it has been amended. Joint Ministerial Decision no 27217 relating to ‘Terms and conditions for operating in the field of Medical Tourism’ (OJ 3077/B/03.12.2013), as it has been amended.

**Main idea:** Law 4179/2013 introduces simplification of required procedures in order to promote entrepreneurship in Tourism and facilitate organized and complex investments in the sector, with specific mention to Medical Tourism. Common Ministerial Decree 27217/2013 sets the basic framework for service providers and defines the procedures required to obtain a license from the National Tourism Organization.

**Key-remarks:** Key stakeholder is ELITOUR, an NGO whose mission is to promote health tourism in Greece and to cooperate with respective international organizations on global issues related to medical tourism.

#### Various fields

**Field:** **R&D**

**Legal act:** Law 4110/2013 relating to ‘Provisions on the Taxation of Income, Regulations on Issues pertaining to the competence of the Ministry of Finance and other regulations’ (OJ 17/A/23.01.2013), as it has been amended. Law 4310/2014 ‘Research, Technological Development and Innovation’ (OJ 258/A/08.12.2014), as it has been amended.

Field:	<b>Business Parks</b>
Legal act:	Law 3982/2011 relating to the 'Simplification of the licensing of professional technical and manufacturing activities and business parks and other provisions' (OJ 143/A/17.06.2011), as it has been amended.
Field:	<b>Logistics</b>
Legal act:	Law 3333/2005 relating to the 'Establishment and operation of intermodal distribution centers' (OJ 91/A/12.04.2005), as it has been amended.
Field:	<b>NPL's (non-performing business loans)</b>
Legal act:	Law 4354/2015 relating to the 'Management of non-performing loans' (OJ 176/A/16.12.2015).

## C. Implementation of investments

This part depicts the legislation that has introduced the mechanism of 'Fast Track', the role of 'Enterprise Greece' and 'Ombudsman', the licensing route and the exceptional operation of offices of foreign entities in Greece.

Field:	<b>Fast Track</b>
Legal act:	Law 3894/2010 relating to the 'Acceleration and Transparency of Implementation of Strategic Investments' (OJ 204/A/02.12.2010), as it has been amended.
Main idea:	The main objective of ' <i>Fast Track</i> ' is to accelerate the licensing of procedures for investments deemed strategic to the Greek economy. In order for an investment to be classified as strategic it has to fulfill specific quantitative and qualitative features (e.g. investment over EUR 200 million, or EUR 75 million that creates 200 working positions).
Key-remarks:	Fast Track accelerates the licensing procedure by a) creating a legally-binding timeframe for the issuance of licenses with significantly reduced deadlines, b) immediately activating the investment process, and c) enhancing the speed and efficiency of public bodies' relevant actions.
Field:	<b>Enterprise Greece and 'Investor Ombudsman'</b>
Legal act:	Law 3894/2010 relating to the "Acceleration and Transparency of Implementation of Strategic Investments" (OJ 204/A/02.12.2010), as it has been amended. Law 4072/2012 relating to 'Improving the Business Environment' (OJ 86/A/11.04.2012), as it has been amended. Law 4146/2013 relating to 'The creation of a Development Friendly Environment for Strategic and Private Investments' (OJ 90/A/18.04.2013), as it has been amended.
Main idea:	<b>Enterprise Greece</b> is the official agency of the Greek State, operating under the supervision of the Ministry of Economy, Development and Tourism, in order to attract investment in Greece, promote exports and render Greece more attractive as an international business partner. It assists foreign investors and enterprises in doing business with Greece and provides key investment and business information.

**Key-remarks:** Enterprise Greece offers the service of the 'Investor Ombudsman', designed to unblock and facilitate the implementation of investment projects. The Investor Ombudsman is available for investment projects exceeding the value of EUR 2 million. It mediates on behalf of the investor during the licensing procedure, aiming at resolving bureaucratic obstacles, delays, disputes or other difficulties related to State services. It should be noted that it enjoys a strong political support and, therefore, has proven to be a very effective institution.

**Field:** **Licensing legislation**

**Legal act:** Law 4014/2011 relating to 'Environmental licensing of works and activities, regulation of illegal constructions in connection with environmental stability and other provisions falling under the competence of the Ministry of Environment.' (OJ 209/A'/21.09.2011), as it has been amended.

**Main idea:** All projects with potential environmental impacts are assessed through specific environmental studies, which have to include: information for the allowed land uses in the area; a clear description of the project; the alternative options that were examined; data on the natural and manmade environment; a description of the potential significant impacts as to natural resources, emissions and waste disposals; a detailed description of the proposed measures; a draft of an environmental management and monitoring system.

**Key-remarks:** Law 4014/2011 has codified the environmental legislation, which was fragmented into several legal acts and has also simplified the licensing process of all projects having environmental impacts.

**Field:** **Establishment of a seat for foreign entities**

**Legal act:** Law 89/1967 relating to the 'Establishment of a seat for foreign entities' (OJ 132/A'/01.08.1967), as it has been amended.

**Main idea:** Foreign entities may establish an office in Greece under the provisions of Law 89/1967; their activities are exclusively limited to providing to their head offices or to their foreign affiliates, established abroad, mainly advisory services, accounting support, marketing and data processing services. The office's annual operating expenses must amount to at least EUR 100.000,00 covered by direct foreign funding; at least six people have to be employed.

Foreign entities under Law 89 enjoy a scheme of favourable taxation and other benefits; they are not required to maintain double-entry accounting books but only receipts and expenses book, they are not subject to any statutory audit requirements and they are not obliged to publish any financial information.

**Key-remarks:** Law 89/1967 sets an exceptional framework for the establishment of an office –circumventing the obligation of setting up a company under Greek law– that can carry out the management of foreign entities' operations in Greece. It should be noted that most shipping companies operate in Greece under law 89/1967.

### III. CONCLUSION

The overview of the legal–institutional framework relevant to investments and development confirms that, despite the economic crisis and the regulatory deficiencies, Greece is a country that offers considerable investment opportunities and presents significant development perspectives in the near future.

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**Public Procurement Law**

**Public Finance**

**Corporate Law /  
Commercial Contracts**

**EU Law / State Aid**

**Banking & Financial Law**

**Tax Law**

**Intellectual Property & Patents**

**Dispute Resolution**

### BUSINESS SECTORS

**Co- financed Projects  
(NSRF, EU Funds and  
Institutions)**

**Financial Instruments /  
Project Finance**

**Construction**

**Tourism**

**Energy**

**Real Estate**



# BEST PRACTICES FOR TENDERERS REGARDING THE AWARD, CONCLUSION AND EXECUTION OF PUBLIC CONTRACTS

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## What do we mean by 'best practices'?

In the present context, 'best practices' are most adequately conceived as concrete guidelines for the proper understanding, prevention and effective handling of issues which are crucial for the optimal participation in a public tender and, eventually, for the successful conclusion and execution of the respective contract. Consequently, our point of view will not be strictly legal (relevant legal matters are extensively analyzed in other parts of this guide); while taking the legal framework fundamentally into account, we will also focus - from a more complex point of view which combines legal, practical and entrepreneurial standpoints - on selected issues that could potentially arise, and, indeed, have arisen in the process of the award, conclusion and execution of a public contract. These key issues and practical points, of a non-strictly legal nature, extracted from our long experience as legal advisors to both tenderers and contracting authorities, often transcend the absolutely necessary, albeit not always sufficient for successful results, knowledge of legal provisions. Though sometimes seemingly secondary or imperceptible at a first glance, they could seriously impede the successful award and proper execution of a public contract, hence endangering the entrepreneurial interests of the tenderers qua investors; our purpose is to prevent, not to face ex post impasses.

## What are the phases of legal life of a public contract?

The process of execution of public contracts is initiated by *the official publication of the relevant contract notice* that gives legal birth to the contract; we can generally and schematically capture the stages of life of a public contract as follows:

*Publication of the contract notice* → *submission of the tender - offer* → *qualitative selection, technical and economic evaluation* → *award of the contract* → *submission of supplementary contract documents* → *drafting and conclusion of the contract* → *execution of the contract*

It is essential to note that this process *constitutes a both substantial and procedural legal unity*: the applicable legal framework and the concrete terms which are laid down in the tender documents, compulsively 'follow' and regulate the public contract in all the phases and aspects of its life qua object of law.

## What are the key issues related to the specification of the applicable legal framework?

Although the applicable legal framework to **procedures for the award of public works, supply and service contracts** generally follows the provisions of respective European Union directives (e.g. Directives 2014/24/EU, 2014/23/EU, 2007/66/EC, as transposed in the national legal order) it is primordial to keep in mind that the directives' provisions are only occasionally sufficiently detailed and usually leave a considerable regulative discretion to the

national *largo sensu* legislator. Consequently, and within the framework of EU provisions and principles, relevant crucial and practice-orientated procedural details are specified in national legal texts (including ministerial and administrative acts or, even, circulars and instructions) and tender documents, as well as, eventually, in the particular Public Procurement Regulations - rules applicable to certain contracting authorities; such Regulations can be directly included in the relevant constitutive laws or acts of contracting authorities of the so-called '*largo sensu* public sector' (especially of Sociétés Anonymes owned by the state, such as, e.g., The Hellenic Republic Asset Development Fund -HRADF) or can be issued by their governing bodies<sup>1</sup> (and usually ratified by a law or administrative act). Obviously, within a certain selected type of procedure for the award of a contract, apart from the particular legal form of the contracting authority, the applicable legal framework essentially depends on the total estimated value of the contract and relevant thresholds (including options or renewals of the contract – cf., e.g., art. 5 of Directive 2014/24 EU).

In view of this dispersion of the relevant legal provisions, it is imperative for tenderers to have, from the beginning, a clear and thorough knowledge of the applicable, both substantial and procedural, legal framework and of its particularities (including full clarification of the relevant jurisdiction – i.e. of civil or administrative courts for eventual judicial protection), a fortiori because arguments and reasons eventually used in an application for review in front of the contracting authority for an alleged infringement of applicable legal provisions have to be, *grosso modo*, essentially identical with arguments used at later stages of judicial protection (interim measures according to law 3886/2010, writ of annulment before the Council of State etc.).

Although circulars or instructions, e.g., are binding only for actors of the Public Sector (and their provisions can be reversed by court decisions), they are at least provisionally valid and legally effective and, most importantly, generally followed by contracting authorities; consequently and independently of their erga omnes validity, a transgression of their content could lead, in practice, to serious complications and relevant delays that could jeopardize the whole procurement process and the tenderer's action and investment plan; particular attention should be given to the guidelines and instructions regularly issued by the relatively recently (cf. law 4013/2011) established Hellenic Single Public Procurement Authority.

Likewise, it is crucial to take into account updated interpretative and jurisprudential developments, especially by higher courts (as the Council of State) or the Court of Audit, but also by first instance courts.

### Are there practical instructions for successfully submitting an offer?

Submission of an offer is *a highly formal procedure*, often accentuated by the sense of responsibility of the public or semi-public officials participating in the contracting authority's governing body or forming the tender's Evaluation Committee; consequently, *prima facie* minor defects (as, e.g., imperceptible defects in various documents, obvious unintended slips or oversights in the use of words or numbers, or, even, simple typing mistakes in the calculation of the final economic offer etc.) could, at a first instance, lead to an initial rejection of the offer; the fact that such probably unjustified exclusions of the tenderer by the contracting authority could be later reversed by court decisions (as, e.g., cases of a harmless

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1. Some of these regulative particularities will be probably abolished by the imminent introduction of a new law for public contracts, currently under elaboration; however, they are still in force at the time of printing.

'*falsa demonstratio*') cannot compensate for the delays thus caused, as well as for the tenderer's direct or indirect expenses in money, human resources and for the disorientation of his time-schedule and business plan.

The offer should be crystal clear, ideally understandable from a non expert and drafted in strict compliance with the relevant provisions of tender documents; the tenderer should keep in mind that not all members of the Evaluation Committee are necessarily experts in the tender's subject-matter, especially in the case of contracts of highly specialized services.

The successful tenderer should, in particular and indicatively, keep in mind to:

- Obtain a certified electronic signature for the legal representatives of the participating economic entities by the relevant Certification Authorities, which is a prerequisite for submitting a tender using the 'National System for Online Public Contracts' (for contracts above the threshold of 60.000 euros).
- Acquire a fair familiarity with the system of e-procurement used for the electronic submission of tenders (established by law 4155/2013 and relevant ministerial decisions); extended guidelines are available in relevant websites (e.g. of the Hellenic Single Public Procurement Authority).
- Continuously secure that letters of guarantee and other requested documents are recently and timely issued. Requested documents have to be produced by every member of an eventual consortium.
- Appoint a representative or agent, e.g. for in situ inspection of the place of execution of the contract; this is often stipulated, especially in tenders for the provision of works.
- Obtain, 'hand by hand', 'Contract Documents of Technical Specifications', as often required by tenders for provision of works.
- Never wait till the last moment of the expiration of the deadline for the submission of an offer through the e-procurement system, in order to avoid technical problems and ensuing legal complications.
- Have at least one extra full copy of the offer (in electronic and paper format) 'ready for submission' and immediately available.
- Submit a sufficiently specific and clear relevant agreement if the tenderer is allowed and wishes to rely on the capacities of other entities for the execution of a particular contract (cf., e.g., article 63 of Directive 2014/24/EU).
- Pay particular attention to the eligibility and the requested documents to be submitted by eventual sub-contractors.
- Be prepared to fully and specifically justify in detail the low cost of his offer in case of an eventual submission of an 'abnormally low tender' according to the terms of the contract notice (cf., e.g. 69 of Directive 2014/24/EU).

### **What are the key issues during the stage of the evaluation of the offer?**

Indicatively, we should firstly note that, occasionally (e.g. for the application for review to the contracting authority), the time-limits, which are stipulated in national legal texts or tender documents are expressed in working and not calendar days.

Relatively, responses of the contracting authority are often communicated on Fridays, the relevant deadline of the application for review expiring on Tuesdays; therefore, the ten-

derer should receive legal assistance and capably prepare relevant documents during the weekend.

Most importantly, the tenderer should be ready to deal with *recurring delays* of the Evaluation Committee in reaching a decision and of the competent body of the contracting authority in issuing the relevant enforceable act.

According to relevant jurisprudential developments, while the stage of qualitative selection can be unified with the stage of the technical evaluation of the offer, technical and economic evaluation cannot be collated to one stage.

Physical presence of a representative of the tenderer in the time and place of the 'opening of tenders – offers' by the relevant committee is often necessary or recommended, also in view of eventual remarks expressed by tenderers during the process.

### **What are the issues of importance in the drafting and conclusion of the contract?**

Primarily, the contract terms should be clear and specific – this is not always the case of 'standard' contract formats used by certain contracting authorities.

Deliverables and dates, as well as modes of delivering agreed works, goods or services have to be clearly determined.

An advance payment up to 30% of the total contract value is often possible, usually via the submission of a respective letter of guarantee by the contractor.

Specific terms for eventual delays imputable to the contracting authority (for which the contractor cannot be held responsible) shall be included in the contract.

Submission of recently issued documents (specified in relevant terms of the contract notice) as, e.g., of a recent tax clearance certificate, is required for the award and the conclusion of the contract.

If the contractor is a consortium of economic operators, it is usually requested that one of its members should be appointed as 'project leader'.

### **Indicative guidelines related to the execution of the contract**

As mentioned above at 'phases of legal life of a public contract', no material amendments of the contractual terms are allowed during the contract's execution. However, modifications corresponding to the particularities of the contract and to the need for practical adjustments, that would not have allowed for the admission of tenderers other than those initially admitted, do not extend considerably the scope of the contract and do not alter the economic balance of the contract, could be accepted.

During the whole tender process and in particular during the execution of the contract, communication with the contracting authority should always be formal and in writing.

Again, some delays should be expected from the committee in charge for the receipt and approval of deliverables and patience is often required for effective problem-solving.

Provided that deliverables are duly accepted by the relevant authorized committee and the contracting authority, updated documents as, e.g., certificates that the contractors have no outstanding tax or national insurance liabilities, are usually necessary for the execution of every partial payment of the total contract value.

## Are there suggestions of best practices regarding the appropriate attitude of a tenderer?

Attitude related guidelines for successful tenderers should primarily include a recommendation for the adoption of an attitude *targeted to preventive problem solving*; the future or actual contractor should keep in mind that 'the devil is in the details' and that *a thorough preparation for all the aforementioned process saves time, money and energy*.

In all the above stages, someone should be ready to confront usually non-intentional delays (due to technical issues or administrative malfunctions) from the contracting authorities; it is, therefore, vital to be patient and flexible and to have alternative action plans for the conclusion of the contract, to be co-operative but firm and ready to negotiate or make reasonable concessions.

For all purposes, amicable resolution of any dispute (and especially at the stages of the conclusion and execution of the contract) is the optimal path to follow, also in view of the time-consuming and uncertain outcome of a relevant judicial process (a fortiori as deliberation time is necessarily abbreviated in the issuing of the cardinal decision on eventual application for interim measures); however, this does not imply that resort to judicial protection is an inappropriate option; despite some deficiencies (mainly due to lack of material and human resources) the Greek judicial system, as well as the Hellenic Single Public Procurement Authority, generally fulfill their role regarding the respect of legality and the protection of rights of participants in public contracts, thus establishing a laudable tradition and practice of impartiality, independence and reasonable application of the relevant legal framework.

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