

Greece's public procurement framework heading to a less formalistic approach regarding bid submissions

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On March 2021 Law 4782/2021 (the “Law”) has passed, introducing a plethora of critical amendments to a wide range of the existing rules of the public procurement framework.

One of the most important amendments introduced by the Law is that the economic operators are permitted not only to clarify and supplement information and documentation already submitted in a tender but also to submit anew documents at a later stage, provided that the general principles of equal treatment and transparency are observed.

The above provisions apply to the procurement of (i) public works, supplies, and services contracts of all subject types entered into by public entities or private entities governed by public law, governed by Law 4412/2016, and (ii) PPP (*Public-Private Partnership*) Contracts usually applied by a decision of an Inter-Ministerial Committee in large scale projects, in which private entities assume the risk of construction, financing and operation of infrastructure and/or provision of public services against payment of availability payments by the State or a

consideration paid by the end-users, governed by Law 3389/2005. Surprisingly enough, the amendments introduced by the Law did not capture the respective provisions of the law on the procurement of public works and services concession agreements (Law 4413/2016). However, given that the law on concession constitutes a basic pillar of public procurement, we would expect that the new rules will soon be expanded to the procurement of concession agreements as well.

To illustrate the radical changes introduced to the “clarification – supplement of bids” rules, a short overview of the previous framework would be useful. In accordance with such rules, during the evaluation stage, the contracting authorities could, at their discretion, request the economic operators to clarify or supplement the submitted documentation. Such clarification/supplement could only refer to ambiguities, non-material deficiencies, and obvious standard errors (indicatively described in the law), however, it could not result in the submission for the first time of new documents or the replacement of already

submitted ones. Any resubmission could only encompass clarification and supplement (even with new documents) of already submitted documents. As a consequence of the above rules in conjunction with the general principle of the formality of the tender procedures, many economic operators were disqualified from a tender for non-material formalistic deficiencies, while in fact they fulfilled the selection criteria.

In accordance with the new provisions (which actually transpose the provisions of the 2014 Public Contracts Directive), where information or documentation submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, the contracting authorities request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit (10 to 20 days from such request), provided that such requests are made in full compliance with the principles of equal treatment and transparency. In accordance with the justification report of the Law, the new provisions aim to prevent the disqualification of bids for strictly formalistic reasons in cases where the participation and qualification criteria are met by the economic operator, thus ensuring the widest possible fair competition, preventing formalism and facilitating the access of small and medium-sized businesses to public contracts (in the

sense that such businesses usually do not engage legal or other advisors to assist them with the preparation of their bids and there is a higher risk their bids being incomplete or erroneous).

However, the right and obligation of the contracting authorities to request from the economic operators to clarify/supplement their bids and/or submit new documents for the first time is not unlimited.

The language of Law 4782/2021 and its justification report set the basic boundaries to the exercise of the above right of the contracting authorities.

First, such right should be exercised in compliance with the general principles of equal treatment and transparency. Practically, this means that the contracting authorities should treat all economic operators in an equal manner and shall ensure that at all times the exercise of the right to request clarification does not result in the modification of the bid in such a manner so as a specific economic operator gains unjustifiable advantage against the others.

Furthermore, the request of the contracting authorities should refer to documentation that was available prior to the expiry of the deadline set for the submission of bids and such availability can be proven on the basis of objective criteria. By way of example, if an economic operator has not submitted a

document, but reference to such document or its content is being made in other parts of the bid it would be unfair for the economic operator to be disqualified only for the absence of such document from its original submission.

In any case, it should be mentioned that the new provisions cannot result in material amendment of the bid or submission of a new bid and cannot allow non-diligent economic operators to remedy the numerous deficiencies of a submitted bid.

The new provisions may lead to disputes between the economic operators and the contracting authorities with respect to the exercise or not (and the extent of such exercise) by the latter of their right (and obligation) to request clarification/supplement of the bids. Such provisions will eventually be interpreted by the administrative courts, which will determine the context in which the right of the contracting authorities will be exercised.

In general, the new provisions constitute a positive step towards the modernization of the public procurement framework, aiming to put a halt to the unjustified disqualification of economic operators who fulfill the participation and qualification criteria and are disqualified due to deficiencies and ambiguities of their bids that are capable of being remedied or clarified. The new provisions supported also by other efforts of

modernization of public procurement framework (such as the new provision introduced by the Law that in cases of tenders conducted under the criterion of the most economically advantageous offer, the contracting authorities are entitled to issue a single decision – instead of three under the previous regime - for their evaluation validating the results of all stages of the procedure, i.e. participation documents, technical offer, financial offer and award documents) target the enhancement of fair competition and the best serving of public interest.

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