



PUBLIC PROCUREMENT LAW

Legal Framework & Reality

Newsletter I, June 2023

Public Procurement – AALAWYERS LAW FIRM

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I. CONCEPT - LEGAL FRAMEWORK

Public contracts are contracts concluded by the **public sector** (State, public authorities, public entities, local authorities, municipal enterprises, etc.) with economic operators for the supply of goods, the provision of services, the preparation of design, the execution of works, etc., against payment.

The modern state develops a multifaceted and intense activity aiming at economic development and improving the living standards of citizens through also public procurement, instead of unilateral administrative action. In this way, the public sector deals flexibly with legal relationships, cooperating with private individuals to meet its needs. Public procurement is social in nature and serves the public interest, as it relates to the functions of the State and the development it promotes, while raising issues of accountability and transparency.¹

The field of public procurement and concessions contracts, is regulated by the **European Union Directives** (2014/24/EU, 2014/25/EU and 2014/23/EU), the **national legislation** incorporating them (Law 4412/2016 and Law 4413/2016), as well as by the decisions of the Court of Justice of the European Union and the national courts.

1. See. A. Gerontas, S. Lytras, P. Pavlopoulos, C. Siouti, S. Flogaitis, Administrative Law, Sakkoulas Publications, second edition, p. 247 et seq. and D. Raikos, Public Procurement Law, Sakkoulas Publications, 3rd edition, 2019, p. 1 et seq.

Law **4412/2016** regulates the procedures for the award and performance of public works, services, supplies and design contracts, while Law **4413/2016** regulates the corresponding procedures for public works and service concessions. Both include provisions in relation to legal protection at the pre-contractual stage on the one hand and at the stage of contract performance on the other hand.

II. PUBLIC PROCUREMENT IN PRACTICE

A) PUBLIC WORKS CONTRACTS - SUPPLIES - SERVICES - DESIGNS

The **«architecture»** of a public contract, from its design to its performance, includes the following stages:

1. Preparation and design of the contract
2. Drafting of the terms and publication of the tender notice
3. Submission of tenders
4. Evaluation of tenders
5. Award of the contract
6. Performance of the contract

Contracting authorities **choose the type of competitive procedure** for the award of a public contract. They may choose between open or restricted procedures or innovation partnerships. There is also provision for the competitive negotiated procedure, the competitive dialogue, and the negotiated procedure without the publication of a tender notice, the use of which is exceptional and subject to the conditions laid down by law. The contracting authority may also award a public contract without a competitive tendering procedure by direct award to an economic operator of its choice, following a market investigation, provided that the estimated value of the contract does not exceed €30,000.

Contracting authorities shall **select a criterion for the award of the contract**, which must be linked to the subject matter of the contract. The basic

criterion is that of the **most economically advantageous tender**, which may be determined either on the basis of price (competitive tendering) or on the basis of cost (life-cycle costing) and may include the best value for money balance that could be based on a number of criteria -social, environmental, technical/qualitative- such as, for example, the employment of workers belonging to «vulnerable» population groups, the fight against discrimination and inequalities, etc.

Each candidate submits his tender, which must meet the cumulative conditions and **requirements set out in the regulatory framework of the tender (the notice)**, and must not be subject to any of the **grounds for exclusion** laid down by law and the notice (e.g. irrevocable criminal convictions for certain offences, infringements of labor, environmental, social



security legislation, bankruptcy, special liquidation, debt restructuring, etc.), as well as meeting the **qualitative selection criteria** (financial standing, technical and professional capacity). In addition, economic operators are required to offer guarantees to the contracting authority, such as a participation guarantee, a performance guarantee, and a guarantee of satisfactory performance.

Law 4412/2016 introduced the **electronic conduct** of public procurement procedures through the National System for Electronic Public Procurement (ESIDIS) and, more generally, the use of electronic means in the field of public procurement, which is constantly developing. This was preceded (Law 4013/2011) by the establishment of the **Central Electronic Public Procurement Registry** (KIMDIS), the information system that aims to collect, process, and publish data relating to public procurement.

The documents constituting the tender of an economic operator are divided into the **Participation Documents**, the **Technical Offer**, and the **Financial Offer**.

After the submission of the tenders, the contracting authority **opens and evaluates** them – in stages, if provided for. The contracting authority may ask for clarification of the documents relating to a tender in order to correct obvious errors or minor omissions. Subsequent submission of critical supporting documents by candidates is prohibited.

The evaluation of the tenders is followed by **the selection of the provisional contractor**. When invited by the contracting authority, the provisional contractor must provide the supporting documents proving the information declared at the time of submission of its tender concerning the absence of grounds for exclusion and the fulfilment of the selection criteria.

This is followed by the **award of the public contract** following a relevant decision issued by the contracting authority, **the signing of the contract**

with the contractor and the **execution** of its scope according to the agreed terms. For contracts with a high financial value of more than €1.000.000, a pre-contractual audit by the Court of Auditors is foreseen.

After the performance of the contract, the **acceptance of the work or service or materials** by the competent committee of the contracting authority follows, which draws up a relevant protocol. During the acceptance procedure, the necessary checks shall be carried out in accordance with the provisions laid down in the contract and a representative of the contractor may be invited to attend. Acceptance by operation of law may be possible if the time limits laid down by law have elapsed since the delivery of the subject-matter of the contract.

Contracting authorities are obliged to comply with the **general principles** of public procurement law (Articles 18-24 of Law 4412/2016), namely:

1. The principle of equal treatment of tenderers
2. The principle of transparency-publicity, in particular regarding the terms of the Notices
3. The principle of proportionality
4. The principle of the protection of the public interest
5. The principle of freedom of competition
6. The principle of environmental protection and sustainable development (green public procurement, e.g., blue development with green ports)

Law **4782/2021** amended Law 4412/2016 in order to **«Modernize, simplify and reform the regulatory framework of public procurement»**, as the legislation is titled.

According to the explanatory memorandum, it seeks to reform the existing regulatory framework for public procurement, Law 4412/2016, which has a **number of shortcomings**, as pointed out by contracting authorities and economic operators since its entry into force. An attempt had been made to correct them, but in a **fragmentary manner**.

It is characteristic that the provisions of Law 4412/2016 had been **amended 400 times by 2020²**.

This overregulation contributes to the creation of a feeling of insecurity with regard to the legal framework in force at any given time, both for private entities interested in participating in tenders and in the performance of a public contract, and for contracting authorities that need to conduct the tender procedure lawfully, aiming to find the best bid and the successful performance of the contract.

B) CONCESSION CONTRACTS

Concessions contracts are divided into works and service concessions, in which the State entrusts the execution of works or the provision and management of services to one or more economic operators, and the **reward** consists either exclusively in the **right to exploit** the works or services respectively, which are the subject of the contract, or in **this right together with payment**.

This shifts the risk arising from the exploitation of the works or services in question to the concessionaire. For example, an economic operator builds a motorway with its own resources, which it agrees to manage for a fee coming from the collection of tolls. It thus assumes the risk that it may not be able to recover the costs of its construction.

The nature of the reward and the shift of risk are the main **differences** between concessions and public contracts in which the economic operator receives a fixed fee.

2. Annual report on the activities of HSPPA for the year 2020
<https://www.eaadhsy.gr/index.php/category-articles-ethsies-ektheseis/694-ekthesi-pepragmenon-gia-tin-periodo-2021-martios-2022-tis-e-a-a-di-sy>



Concessions are used in sectors that **affect the standard of living of citizens**, such as road and rail transport, port and airport services, maintenance and management of road networks, waste management and energy supply. Investments in public infrastructure and services are thus made with the contribution of private capital and expertise.

C) LEGAL PROTECTION

A crucial issue is the establishment of **effective mechanisms** for providing legal protection to balance both the rights of **economic operators** and the **public interest in the field of public procurement**.

Law 4412/2016 established for the first time an **Authority for the Examination of Preliminary Appeals (AEPA)**, already the **Hellenic Single Public Procurement Authority (HSPPA)**, responsible for examining the **preliminary appeals** of economic operators at the stage preceding the award of the contract. The Authority enjoys functional independence,

administrative and financial autonomy and is not subject to control or supervision by government bodies or other administrative authorities. It shall be subject only to the control of the Parliament, in accordance with its Rules of Procedure. In this way, the impartiality and objectivity of the judgments on the appeals of candidates is ensured, since they are no longer examined by the contracting authorities themselves, as was previously the case, but by an Independent Authority with a high level of expertise in the field of public procurement.

Law 4782/2021 established a common pleading for the application for suspension and annulment of the decisions of the Hellenic Single Public Procurement Authority (HSPPA) before the Courts, with the aim of speeding up the administration of justice and the tendering procedures.

It also provides for short time deadlines for pre-litigation and appeals, as well as increased fees, as a means of preventing manifestly inadmissible appeals that obstruct the tender procedure.



III. PUBLIC PROCUREMENT IN NUMBERS

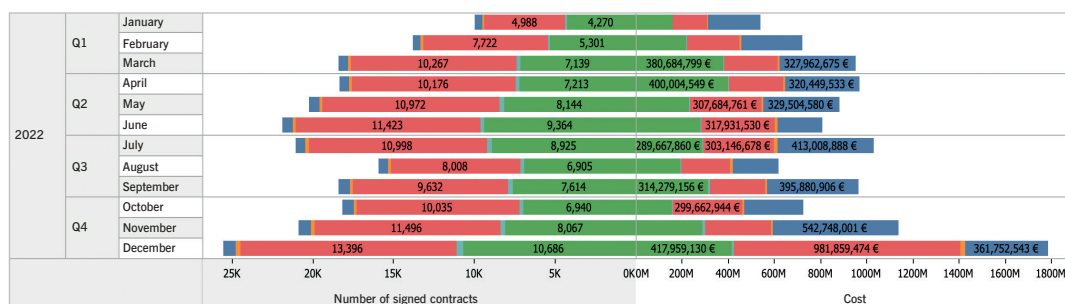
A) Number of public contracts for the years 2021 and 2022 based on data from the Central Electronic Public Procurement Registry (KIMDIS) with registration date up to 31-12-2022:

216606	7760	2143	120858	3362	82483
Contracts	Works	Design	Supplies	Technical or other relevant services	Services
2021					
222204	7517	2297	119113	2909	90568
Contracts	Works	Design	Supplies	Technical or other relevant services	Services
2022					

Source: HSPPA (Hellenic Single Public Procurement Authority)

<https://ppp.eaadhsy.gr/index.php/el/apeikoniseis/2020>

B) Number and cost of public procurement by contract category in 2022:



Source: HSPPA (Hellenic Single Public Procurement Authority)

https://ppp.eaadhsy.gr/index.php/el/?option=com_sppagebuilder&view=page&id=131

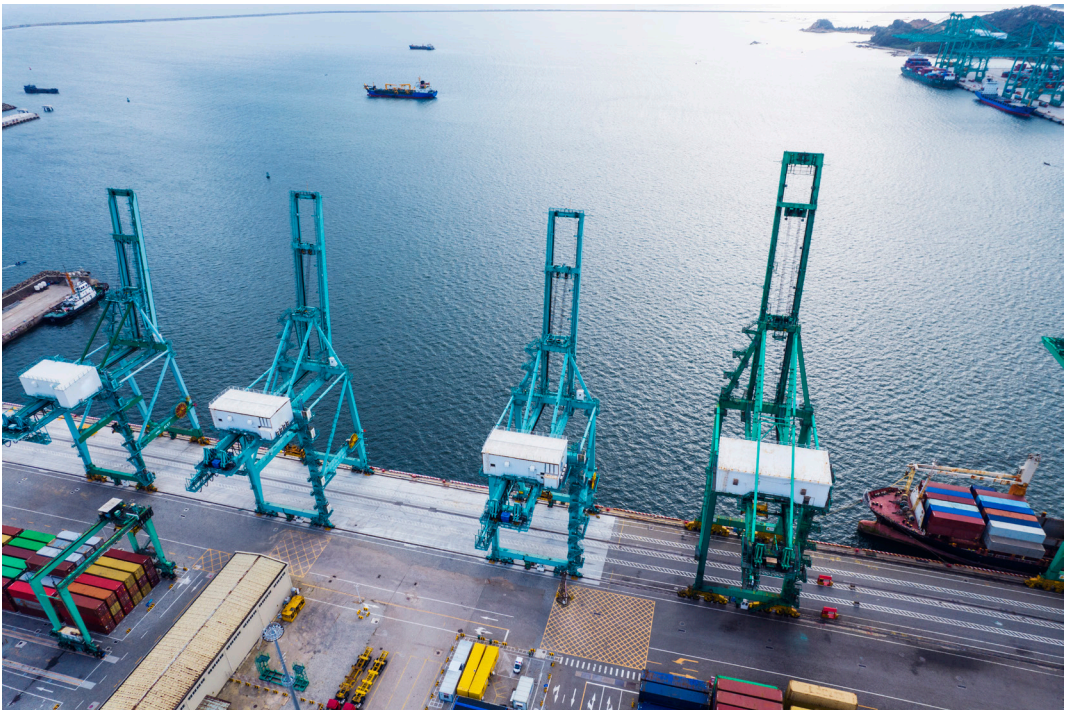
Type of contract

- Works
- Design
- Supplies
- Technical or other relevant services
- Services

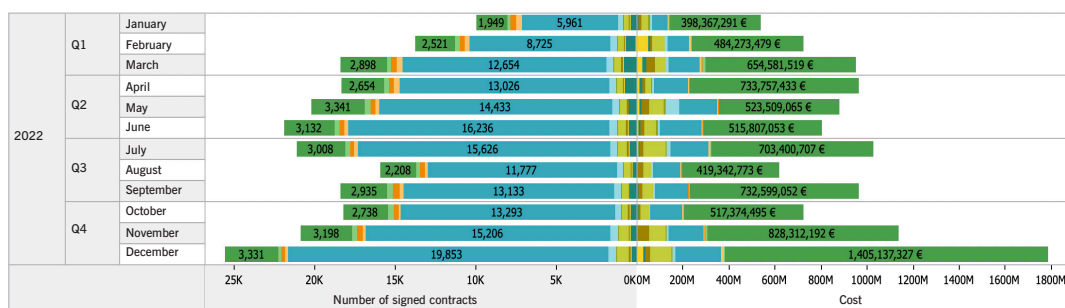
Based on the data presented, the total number of public contracts signed in 2022 amounted to **222,204**, for a total amount of **€11,138,307,421.00**.

Indicatively, in December 2022 were signed, among others:

- 13,396 public supply contracts, amounting to €981,859,474.00,
- 10.686 service contracts, amounting to €417.959.130,00,
- 809 works contracts, amounting to €361.752.543,00.



C) Number and cost of public procurement by type of procedure in 2022:



Source: HSPPA (Hellenic Single Public Procurement Authority)

https://ppp.eaadhsy.gr/index.php/el/?option=com_sppagebuilder&view=page&id=131

Type of procedure

- Open procedure
- Competitive procedure with negotiation
- Competitive Dialogue
- Direct award (Covid-19)
- Direct award
- Procedure of Art. 128 Law 4412/2016
- Negotiation with prior publication of Notice
- Negotiation without prior publication of Notice (Covid-19)
- Negotiation without prior publication of Notice
- Close procedure
- Innovation partnership
- Concise tender procedure
- Special procedures (concessions, transport Reg.)

Indicatively, in December 2022 there were signed, among others:

- **19.853** contracts by **direct award** procedure, amounting to €196.821.589,00,
- **3.331** contracts by **open procedure**, amounting to €1.405.137.327,00 and
- **724** contracts by negotiated **procedure without prior publication**, amounting to €94.444.145,00.

IV. OUR COMPANY - EXPERIENCE & KNOWLEDGE

Our firm provides full legal support to economic operators for their participation in tendering procedures governed by public procurement legislation, at the stage of awarding the contract and at the stage of its performance. In particular:

- providing full legal advice and support for participation in a tender procedure (type of tender, participation documents, selection criteria, award criteria), assistance in asking for clarifications from the contracting authorities,
- legal representation before administrative authorities, representation before the Single Public Procurement Authority (HSPPA, formerly AEPA) in pre-litigation appeals against a) the terms of the regulatory framework of the tender procedure (notice), b) the decisions of the contracting authority on the exclusion of an economic operator during the evaluation stage, and c) the decisions of the contracting authority to accept tenders from competing economic operators. Interventions before the HSPPA against pre-litigation appeals of competing economic operators,
- judicial representation of economic operators before the Council of State and other Administrative Courts through the filing of applications for suspension and annulment of decisions of HSPPA, as well as interventions on applications for suspension and annulment of competing economic operators and/or the contracting authority,
- specialized legal support for public procurement contractors during the contract performance stage, through consensual resolution of disputes with the contracting authority or through contract amendments, as well as providing legal representation of contractors in court.

Over the last years, full and specialized legal support was provided to economic operators in numerous tendering procedures for the award of public contracts. Legal services were also provided to contractors on issues of amendment of public contracts and payment of additional fees to a contractor due to an unexpected change in circumstances, and legal services during the stage of preventive control of contract legality by the Court of Audit.

Our firm also provides legal services to **contracting authorities**, in particular



advising on the maturity of a contract to be tendered, the choice of the type of tender procedure depending on the scope of the contract to be awarded, the prevailing conditions and needs it intends to cover, legal support in the drafting and preparation of the tender notice, as well as in the drafting of clarifications in response to economic operators. Lastly, we represent and support the contracting authorities in the dispute resolution procedure before the HSPPA and the courts. ■

