

ECONOMIST CONFERENCES

DEFENCE & SECURITY SUMMIT

The outlook for stability in SE Europe and the Middle East

Friday, May 16th 2008

Sofitel Hotel – Athens International Airport “Eleftherios Venizelos”

Alexandros Lykourazos’ speech

“Defence Procurement in Greece - A Basic Legal Overview”

Ladies and Gentlemen,

I am very happy to be with you today to briefly present the Greek Defence Procurement Law, a fairly unknown area of Law to the general practitioner, which may seem intriguing at first sight.

In the limited time I have, I shall attempt to present the new and modern legal framework in Greece and also the challenges facing our modern legal system for establishing a functional market in this area.

As I mentioned, the Law of Defense Procurement, may sound fascinating to the untrained ear and not surprisingly so. This is mainly because a layperson normally attributes to this market far more characteristics than it actually has.

So, as a matter of Law and Practice, what is Defense Procurement? I will be very brief in this.

First of all, it is a “Market”, but with obvious peculiarities both in the commercial aspect as well as from a legal viewpoint.

This, in my view, is mainly because, the proper regulation of this market must accomplish a difficult balance between the needs of a commercial market and the fine and delicate issues surrounding “State Secrets” and National Defence needs. Let’s not forget that the end-product here is the safety of a Nation. This can hardly be described as a commodity or as an end-user task.

In strictly legal terms of art, the State itself, when contracting in this area of law must define and observe the rather vague limits between acting as commercial party (as a *fiscus*) and exercising its sovereign power (as *imperium*).

Basic Economic Theory indicates that a limited and closed market should be the exception and not the rule. I think that the rule here is that the market of defence procurement is by definition a market for specialists and a “members-only area” of trade. This poses an even greater challenge to the lawmakers, on the one hand to respect this nature of the market and on the other hand to implement a fair and just process in this special area of law and trade.

Now, briefly, what defence procurement is NOT:

First of all, this area of law is not regulated by EU Law. Article 265 of the EU Treaty (and special decisions by the Council of the European Union) specifically exclude major elements of defence procurement from the ambit of Community Competence. This means that the entire EU legislation (such as Directive 2004/18) on public procurement and the valuable principles introduced in this legislation do not apply.

This is mainly because defence procurement is not a classical form of public works or procurement. There is no room for privatization and a classical contractual clause on "mistake" or "breach of contract" has a totally different meaning in defence procurement contracts.

However, as a matter of legal theory and practice, this "special legal treatment" of defence procurement does NOT and must NOT exclude the application of principles of public policy, especially in the interests of the local market and, naturally, the national security.

So, this is a brief picture of defence procurement and its reality. It is evident that the challenges facing this market are great and sensitive.

Greece has responded to the needs of this market, by enacting a new law in 2006 (Law 3433/2006 on defence procurement).

This law substituted and unified the scattered legislation in force from the end of the 1980s.

It is commonly accepted that this law does indeed provide the proper legal framework and does adhere to the commercial needs of the market.

And, as there always is room for improvement, this law also opens discussions on further legal considerations.

I will briefly refer to these matters.

Let's start with an overview of the proper legal framework introduced with the New Greek Law.

First of all, it is very important that the law introduces principles of EU (constituting "acquis communautaire"), although, as it was mentioned, the Greek lawmaker was not obligated to do so. It is very important and positive to see that the law is inspired by and observes the principles of transparency, publicity, free competition, equal treatment of all stakeholders and bidders. It also introduces the principle of efficiency, which is also very important and unique in this market. On transparency in particular, the new law limits the type of procurement from 11 previously to 3:

Open procedure (which is the rule).

A more restricted negotiation procedure for exceptional circumstances.

And, lastly, bilateral and other international agreements and trade between States, which is also an exceptional case.

Previous practices of direct procurement have been abrogated.

The law also provides for legal protection of bidders, who may file objections during the tender proceedings. This also introduces another very important EU principle, that of access to justice.

Lastly, and more importantly, the law gives a louder voice to the specialists. The very delicate and decisive procedure of selecting the needs of the armed forces of Greece has been successfully regulated by granting authority to specialist bodies, such as the General Directorate for Defence Investment and Armaments.

Transparency and openness is also enhanced by special legislation, in the form of Ministerial Decisions by the Minister of National Defence, which regulate from matters of tender details (such as acceptable guarantee letters for bidding) to the more important matters of introducing fixed and objective criteria for selecting the best bidder.

Now, a brief look at the commercial aspect of this new law.

A modern law also means modern market. It is not by chance that the new law observes and incorporates terms and practices from international trade and insurance (such as INCOTERMS and insurance of product).

The law also gives the proper attention to the necessary effort for enhancing the local market.

“Greek added value” (i.e. the obligatory participation of local companies providing secondary services for the preparation of the end-product) is very important but also very difficult to enforce in practice. The current ratio of 35% seems satisfactory and leaves an open window for more involvement of the local market, possibly even in joint-construction of end-products.

Offsetting is also a very vague term with many legal challenges.

This new law undoubtedly modernizes the market for many reasons. I shall mention one, but in my view, the most important example:

Article 43 of the new law introduces the right of assignment of rights from the contract to a bank for the funding of a project. This resembles the “step-in” clauses in private finance. The same article also provides for set-off of obligations arising from a contract, either between the parties or against a bank that is funding the project. This provision is a true breakthrough in the Greek Law in this market.

The enactment of the new Greek Law undoubtedly places the Greek market on the right track.

Its new and modern provisions, also open the road for further legal considerations.

I shall briefly mention only the most important considerations:

It has been proven in practice that the defence procurement market is a bankable market. More needs to be done in this direction.

Transparency included in the law also means more detailed contracts, not on the product per se, but also on the distribution of funds and who is actually getting paid and for what.

Traditionally, the contract governing the trade will restrict buyer's right to re-sale the product. I believe that a provision in the law allowing such clauses, will eventually urge the market to place such clauses which will boost the local market. The same can be said about the prospect of Greece exporting defence material abroad. To date there is no legislation in force on this topic.

The new law has not yet been applied in practice. Parliament has also recently passed some minor changes to the law, particularly on practical issues of the tender committee and the procedure for awarding the project.

But it is unquestionable that this piece of legislation has opened a new, transparent and modern Greek market with exciting opportunities for investment and, as all things, more room for improvement.

Thank you for your kind attention!!!