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REPLY TO THE CASES AND QUESTIONNAIRE FOR THE ESCL CONFERENCE Copenhagen, August 28th, 2009

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A. Introductory note

The Directive 2004/18/EC was transposed into Greek law by virtue of the Presidential Decree 60/2007. Since the provisions of the EU Directive were mostly taken over word for word, unless otherwise noted, no distinction is made in the present reply between the content of the EU legislation and the Greek legislation implementing it.

B. I. Case 1 – The floors

1. **Did the contracting authority act in accordance with the EC-Directive? If not- which articles in the EC Directive were not complied with?**

   According to article 40 of the P.D. 60/2007, by which article 24 par.1 of Directive 2004/18/EC was transposed into Greek law, contracting authorities may authorise tenderers to submit variants but only where the criterion for award is that of the most economically advantageous tender.

By allowing in the procurement procedure the submission of variants, despite the fact that the award criterion is not the most economically advantageous offer but rather the lowest price, the contracting authority breached the aforementioned provision of the P.D.

Furthermore, the contracting authority seems to have breached the provision of article 53 par. 8 of P.D. 60/2007 implementing 23 par. 8 of Directive 2004/18/EC, according to which *"Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products"*. In the present case reference to a specific product, namely product A, was made in the tender documents. Unless it can justify such choice of product, the contracting authority has acted in violation of the aforementioned provision of article 53 par. 8 of the P.D.

Finally, it could be argued that by inserting ambiguous clauses in the tender documents and more particularly by providing for variants but leaving only one blank space for the pricing, the contracting authority has breached its obligations deriving from article 3 of P.D. 60/2007 (article 2 of Directive 2004/18/EC). This article provides that contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way. In order to ensure that the award procedure will be conducted in a transparent way, the contracting authority must stipulate its requirements clearly and unambiguously.

2. Which measures would be appropriate if the rules in the directive were not complied with?

2.1. As recently ruled by the ECJ on case 503/04 *(Commission vs. Germany)* although the second subparagraph of article 2. par. 6 of Directive 89/665 permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the

contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts. The ECJ further ruled that even if the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission of a contract concluded in breach of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, a Member State cannot in any event rely on those principles or that right in order to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade its own liability under Community law (par. 36).

2.2. The law 2522/1997, by which Directive 89/665 was transposed into Greek law, makes use of the option provided for in article 2 par. 6 of the Directive and thus foresees in its article 4 par. 2 that if the court annuls a decision of the contracting authority or acknowledges its invalidity after the conclusion of the contract, then the validity of the contract is not effected, however the persons harmed by the infringement may claim damages according to article 5 of law 2522/1997 *(with regard to the legal basis and the extent of such damages see below under V)*.

2.3. Nevertheless, according to the aforementioned jurisprudence, the Member State that has concluded a contract in breach of Community law may not evade its liability towards the EU by invoking the pacta sunt servanda principle. It seems therefore that the only way that a Member State can effectively ensure its conformity with EU legislation and avoid the consequences of the breach of Community law and the application of articles 226 and 228 EC is to terminate the contract in question.

Such termination may however not always be possible according to national law. For example, Greek law on public works allows for the termination of public work contracts by the owner of the work (article 66 of law 3669/2008). Such right is also provided, as a general rule, in contracts for the execution of designs (article 34 of law 3316/2005). However, no right to termination of the contract by the contracting authority is foreseen in Greek legislation on supplies (p.d.118/2007). Furthermore, as Greece does not have a law specifically regulating services

(other than services for the execution of designs) there is no law providing for a right of the employer to terminate such services contracts.

2.4. As regards the right of tenderers to compensation see below under V.

II. Case 2 – The waterfront

1. **Did the contracting authority act in accordance with the EC-Directive? If not- which articles in the EC Directive were not complied with?**

   In this case, although the contracting authority had determined in the contract documents that it would not accept major reservations, it did then award the contract to a tenderer who had included such reservation in his tender. By not treating all candidates equally and not following the tender rules it itself had set, the contracting authority violated article 3 of P.D. 60/2007 (i.e. article 2 of Directive 2004/18/EC), which provides that contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

   See above under I.2.

III. Case 3 – The carpets

1. **Did the contracting authority act in accordance with the EC-Directive? If not- which articles in the EC Directive were not complied with?**

   It seems in the present case that the contracting authority evaluated at the stage of the award of the contract the ability of the contractor to execute the contract. Should this be the case, the contracting authority has violated articles 42 par.1, 43 et seq and 51 of P.D. 60/2007, implementing articles 44 par.1, 45 et seq and article 53 of Directive 2004/18/EC. More particularly, as it has been ruled by the ECJ in its recent decision on case 532/2006 *(Lianakis vs Dimos Alexandroupolis)*, the 'award criteria' of

article 36 of Directive 92/50 do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question. The ECJ further ruled that, in a tendering procedure, a contracting authority is precluded by articles 23(1), 32 and 36(1) of Directive 92/50 (now articles 44 par. 1, 48 and 53 of Directive 2004/18/EC) from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.

The ECJ has ruled similarly also in previous cases *(e.g. C-315/01, Gesellschaft für Abfallentsorgungstechnik (GAT), C-513/99, Concordia Bus Finland, C-19/00, SIAC Construction Ltd, C-31/87, Beentjes)*.

2. **Which measures would be appropriate if the rules in the directive were not complied with?**

See above under I.2.

IV. Case 4– The cleaning

1. **Did the contracting authority act in accordance with the EC-Directive? If not- which articles in the EC Directive were not complied with?**

According to article 52 of P.D. 60/2007, which implements article 55 of Directive 2004/18/EC if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant. In the present case the contracting authority rejected the most economically advantageous offer and then annulled the tender procedure, without first requesting from the successful tenderer details regarding the elements of its tender *(see relevant ECJ decisions on cases C-285/99 &*

286/99, Lombardini – Mantovani, C-103/88, Fratelli Constanzo, C-76/81, Transporoute).

2. Which measures would be appropriate if the rules in the directive were not complied with?

2.1. If a tenderer is interested in the continuance of the bidding procedure, then he may request from the competent Court to set aside the unlawful decision, by which the bid is annulled. The tenderer may further request from the Court to issue an interim order, by which it will forbid the contracting authority to launch a new tender procedure for the same contract until the Court decides on the petition to set aside the challenged decision *(Council of State decisions no. 787/2003, 721/2003, 29/2002, 713/2001)*.

2.2. If a tenderer decides not to pursue the continuance of the bidding procedure, and seek compensation instead, he may refrain from filing a petition for interim measures and claim compensation according to the below mentioned under V.

V. The right to compensation and the extent thereof

1. According to article 5 of law 2522/1997 tenderers harmed by an infringement may request to be awarded damages. According to par.2 of the aforementioned article a prerequisite in order for the Court to award damages is that the harmful decision has previously been set aside or acknowledged as invalid.

2. It should be noted in this context that in the Greek legal system the tender procedure and disputes arising in relation thereto (including claims for compensation) are judged by different Courts depending on the nature of the contracting authority. More particularly, if the contracting authority is a legal entity of public law the pertinent disputes are brought before administrative Courts, while if the contracting authority is a legal entity of private law the disputes are brought before civil courts. And while it is possible to adjoin the two claims to set aside the unlawful decision and to award compensation before civil courts, this is not possible before

administrative courts. In particular, within the system of administrative courts in Greece, it is the Council of State (Symvoulio Epikrateias) that is competent to set aside the contracting authority's unlawful decision, while ordinary administrative courts are competent to award damages. This means that if a contracting authority of public law issues an unlawful decision, the tenderer who wants to be awarded damages must first request before the Council of State that the said decision be set aside or acknowledged as invalid and then file before the ordinary administrative courts a claim for damages. This leads to significant delays in the awarding of compensation.

3. The extent of compensation:

3.1. According to article 5 par.1 of law 2522/1997 a tenderer who has been excluded from the participation in a public tender or from the award of a contract based on a decision violating EU law or national legislation, has the right to compensation based on the provisions of articles 197-198 of the Greek civil code on culpa in contrahendo.

This compensation covers the damages (e.g. preparation costs etc) that the tenderer has suffered because of his trust in the rightful conduct of the contracting authority during the tender negotiations up to the conclusion of the contract. On the contrary it does not cover the tenderer's lost profit, i.e. the profit that the tenderer would have gained had he executed the contract. The tenderer requesting damages must prove the contracting authority's wrongful behavior during the negotiations, the extent of his damages as well as the causality between the unlawful act and the damages incurred.

3.2. It is arguable in Greek legal theory whether the tenderer has the right to seek restitution of his lost profit. Part of the legal theory argues that article 5 par. 1 of law 2522/1997 mentions exclusively the provisions based on which the tenderer may request compensation; according to this opinion the tenderer has merely the right to seek compensation according to the aforementioned articles 197-198 of the Greek Civil Code (culpa in contrahendo).

Others argue that the tenderer's right to compensation according to the provisions on culpa in contrahendo does not exclude his right to seek compensation for damages based on article 914 of the Greek civil code on unlawful acts, provided that the tenderer can prove that the contracting

authority has acted unlawfully. The compensation provided in article 914 of the GCC also covers lost profit. However, even if this argumentation is accepted, the tenderer will meet severe difficulties in substantiating his claim for lost profit. First of all, he would have severe difficulties in proving that it would be his tender that would be awarded the contract. Further, the tenderer will very unlikely be able to prove the extent of his damage. More particularly, "lost profit" is defined in article 298 of the Greek Civil Code as the profit "which can be reasonably anticipated in the usual course of things or by reference to the special circumstances having regard to the preparatory steps taken". This means that in the case of a public contract, in order to establish his lost profit, the tenderer would have to deduct from the amount of his tender the expenses for the execution of the contract. However, it is very hard to prove what the expenses for the execution of the contract would be, more so in complex public works contracts.

3.3. Following the above, in the present cases the tenderers would be adjudicated compensation according to articles 197-198 of the Greek Civil Code (culpa in contrahendo). Should it be accepted by the Courts that the provisions of articles 914 and 298 of the Greek Civil Code also apply, then the tenderers would bear the burden to prove their lost profit with regard to the specific contract according to the aforementioned (under 3.2.) principles. In this case, given the definition of "lost profit" by the Greek legislation, the average profit margin of previous years would not be considered. It should finally be noted that a tenderer may not simultaneously request compensation for his lost profit and reimbursement of his preparation costs.