G. Verveniotis & Partners

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Newsletter

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Sale and lease back of the State's real estate

Law 3581/2007 on "Sale and lease back of the State's real estate, long term and financial leasing contracts of the State", ratified by the Parliament at the beginning of June, establishes the legal framework under which the State and its entities may exploit their immovable property through its sale and lease back and similar methods.

In particular, the new law provides under Article 1 par. 1 that the State may conclude contracts, by which it transfers full ownership or other rights in rem or assigns rights of use or exploitation of its property by simultaneously agreeing to lease back the same piece of property. The said contracts may provide for the purchasing party's or assignee's obligation to construct new buildings on the property or to renovate the existing ones. The aforementioned contracts may have a duration of up to 99 years and may provide for the State's right or obligation to purchase the leased object when the contract expires. The law covers further the conclusion of long term (12-99 years) leasing contracts by the State.

Article 1 goes on to determine the organizations competent to decide on the conclusion of the aforementioned contracts - mainly the Interministirial Privatization Committee (IPC) and the Hellenic Public Real Estate Corporation (HPREC) - and to conduct the procedures for the award thereof. With respect to the latter it is provided that Presidential Decrees 59/2007 and 60/2007, which transposed EC directives 2004/17 and 2004/18, apply to the award of the contracts that fall within their field of application. The law further regulates the award of contracts not falling within the scope of the aforementioned directives and awarded by the HPREC. Finally, the law stipulates that contracts may be awarded directly, i.e. without a tender notice, if the parties to it are Public Law Legal Entities on the one side and the State or Public Law Legal Entities on the other side, as long as this procedure is compatible with the aforementioned Presidential Decrees.

In order to allow for more flexibility, law 3581/2007 follows the example of other recent legislation (i.e law 3389/2005 on PPPs) by stipulating that the contracts falling within its scope are governed by the Greek Civil Code. Any contradictory legislation and in particular the law for lease and sale agreements of the State or Public Law Legal Entities as well as the law on commercial lease agreements are explicitly declared not applicable. Furthermore, it is provided that the contracting parties may by virtue of the contract determine exclusively the reasons for its termination. According to the preamble of the law, this provision aims to contribute to the clear risk allocation between the parties. Moreover, Article 6 stipulates that rights and claims deriving from the sale and lease back contracts may be pledged or assigned and thus facilitates the financing of the pertinent transactions.

The law also provides for tax benefits. More specifically, the aforementioned contracts and the related acts are declared free from certain taxes, including capital gains tax, any duty or stamp duty or any other burden in favor of the State. Further tax benefits may be granted by decision of the IPC.

Finally, Article 8 provides that the State or the HPREC may establish companies, either as sole shareholder or jointly with Public Law Legal Entities or Private Law Legal Entities. These companies may obtain, among others, ownership or other rights to use or exploit immovable property and then lease such property to the State. In the event that the HPREC purports to establish a company with a Private Law Legal Entity, it must choose its private partner pursuant to a tender procedure and according to the criteria contained in the call for tender.

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Agency and Distributorship

Presidential Decree 219/1991 on "commercial agents" (transposing European Directive 86/653/EEC) was recently modified by Law 3557/2007. The said law extends the aforementioned P.D.'s scope of application to further categories of commercial contracts, while it also provides that the provisions of the P.D. are applicable even when the contract in question was not concluded in writing

More particularly, according to article 14 par. 4 of law 3557/2007, the provisions of P.D. 219/1991 are to apply by means of analogy to agency contracts for the provision of services, as well as to exclusive distribution contracts, if by virtue of such contracts, the distributor operates as part of the supplier's commercial organization. This legislative extension of the P.D.'s application field was necessary, since, due to the lack of an explicit legal framework regulating the aforementioned categories of contracts, Greek Courts issued contradictory decisions as to whether the P.D. applies to them.

As mentioned above, the new law clarifies that the commercial agency contract needs not be in writing in order for the provisions of the P.D. to apply. It should be noted in this respect that Greek Courts have expressed controversial opinions on this issue. The reason for this divergence of opinion in Greek jurisprudence is to be sought in the wording of article 8 par. 1 b of P.D. 219/1991, which transposes article 13 par. 1 of Directive 653/1986 and provides that: "b.1." Each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any terms subsequently agreed". In part of its recent decisions, the Supreme Court ruled that in lack of a written agency contract, the provisions regarding the termination of contracts of an indefinite period, as well as the provisions regarding agents' indemnification pursuant to P.D. 219/1991, would not apply. On the contrary, according to other, also recent, decisions of the Supreme Court the agency contract would not need to be in writing, since the "signed written document" mentioned in article 8 par. 1 b of P.D. 219/1991 would merely serve evidential purposes and would not constitute a prerequisite for the application of P.D. 219/1991. This legislative intervention solves the long-running dispute between the different departments of the Supreme Court on the aforementioned issue and promotes certainty of law.

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Renewable Energy Sources

The Ministry of Development issued in March 2007 the new Regulation on permits for the Production of Electric Power with the use of Renewable Energy Sources and through high-efficiency Cogeneration of Electricity and Heat. The new Regulation, which complements Law 3468/2006 and was issued in execution thereof, promotes the establishment of clearer structures regarding the issuance, modification and revocation of production permits and introduces regulations that simplify and accelerate the relevant procedures.

The Regulation introduces, among other things, a new periodical system for the submission of applications for the issuance of production permits. Accordingly, interested parties must submit their applications within a ten day period commencing at the beginning of each second month. This provision seeks to address the problem of the comparative evaluation of applications submitted at different times and thus contributes to the equal treatment of the applicants. Furthermore, the Regulation expressly specifies that the Regulatory Authority for Energy (RAE) is competent to review the completeness of an application, evaluate it according to the criteria set out under Article 9 of the Regulation and submit an opinion to the Ministry of Development with regard to its issuance.

Among the evaluation criteria to be considered by RAE is that of environmental protection. The Regulation provides, in particular, that the application for the issuance of a production permit must be accompanied by the Preliminary Study of the Environmental Impact (P.S.E.I.) of the contemplated project. The P.S.E.I. is evaluated by the competent environmental authority, which submits an opinion to RAE in this respect. However, the Regulation fails to explicitly impose on the environmental authority a deadline for the issuance of its opinion. This may delay the overall procedure, since RAE must take into consideration the environmental authority's opinion in order to form its own.

The aforementioned constitute a significant novelty introduced by law 3468/2006 and specified by the Regulation, as according to the previous regime the Preliminary Environmental Assessment (P.E.A.) process followed the issuance of the production permit and took place in the frame of the procedure for the issuance of the installation permit. This change may be rendering the procedure for the issuance of the production permit more expensive and time-consuming, but addresses the investor's interest to have at the earliest possible stage some reassurance about the contemplated investment's compatibility with the environmental protection rules.

Once formed, RAE forwards its opinion to the Minister of Development, who must issue his decision within 15 days – instead of 30 days as was the case before - upon receipt thereof.

The Regulation also amends the requirements and the procedures for the modification of production permits. First of all, it enumerates the cases, in which the modification of a production permit is required and classifies them into two categories, the first related to the technical elements of the production permit and the second to the shareholding of the permit holder and the financing of the project. The Regulation further sets up detailed procedures for both aforementioned categories, which the permit holder must follow in order to achieve the respective modification of the production permit.

A further novelty is introduced for what may be called "minor changes", such as modifications of less than 5% in the permit holder's shareholding; change of certain equipment to be installed, if this change does not lead to the modification of the total installed capacity etc. In such cases the permit holder may proceed

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to the contemplated modification without having to follow the modification procedures. RAE issues instead a certificate, which registers the modified element of the permit and attests that there is no need to follow the modification process.

In order to resolve the problem of production permits, which remain undeveloped for a long time, the Regulation provides that a production permit is to be revoked if the permit holder fails to achieve the issuance of an installation permit within 24 months from the issuance of the production permit. The production permit is also revoked in the following cases: a) upon the relevant request of the permit holder, b) when the activity for which the permit was initially issued stops for any reason, c) when the realization of the project is rendered impossible, as well as when the permit holder infringes his obligations deriving from law and the terms of the production permit.

Finally, it should be mentioned that the Regulation contains provisions regarding hybrid stations to be installed on sites connected or not connected to the grid, and especially regarding the issuance of the respective production permits and the stations' operation.

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Health Sector Procurement

Law 3580/2007 on "Supplies by Entities supervised by the Ministry of Health and Social Support and other provisions", which was ratified by the Greek Parliament in June this year, aims at straightening things out in the most problematic field of purchases by entities of the health sector. So far these entities have been obtaining goods and services at a decentralized level and in accordance with procedures of questionable transparency. There have been chronic complaints about the inefficiency of the system and intense allegations about distortions in competition resulting in the health sector obtaining goods and services at prices considerably above market value.

In order to address these deficiencies and concerns the new law provides for the establishment of a new institution within the Ministry of Health and Public Welfare, the Committee for Health Supplies (CHS), and delegates to it extensive planning, coordinating and supervising powers. The CHS shall thus be competent, among others, for drawing up in cooperation with the Ministry of Economy and Finance the annual Program of Supplies and Services of the health sector entities, which shall contain the products and services to be purchased by the such entities described by category, determine the maximum purchasing prices, delivery schedules and modalities, payment methods etc. The law contains under Article 10 a list of the goods and services that fall within its scope, while it provides that further goods and services may be submitted to its provisions by relevant decision of the competent ministries. The Committee determines each time the adequate tender procedure, drafts model tender documents and contracts and monitors the execution of contracts, while it also approves the technical specifications of products and services. It is further competent for the financial administration, which includes among others the consolidated registration of health sector entities' claims against the Health Insurance Funds and the cashing of such claims, the conclusion of the contracts for the purchase of goods and services on behalf of the health sector entities and the effecting of payments in execution thereof. The law goes on to provide that the Committee may conclude (under certain conditions) loan agreements with banks for this purpose. Requests by health sector authorities for the revision of the Program of Supplies and Services due to unforeseeable and acute reasons have to be approved by the CHS. The CHS also delivers opinions to the Ministry for the improvement of the legal framework regarding the purchase of goods and services by the health sector entities and for the implementation of good practice policies.

The conduct of the tender procedures is delegated, depending on the category of the goods and services to be purchased, to two already existing stock companies, which are publicly owned. The health sector entities may only exceptionally, and following a reasoned opinion of the CHS and relevant approval by the Minister of Health and Social Support, conduct their own tender procedures mainly for the purchase of certain, non-medical products and services such as nutrition products, fuel, cleaning services etc. The law further designates to another entity (also a publicly owned stock company) the responsibility to establish and maintain a Registry of Approved Goods and Services, which shall also include the acceptable prices for such goods and services, as well as of a Registry of Approved Suppliers and Service Providers. The aforementioned entities are bound to cooperate closely under the supervision and guidance of the CHS during the preparation and conduct of the tender procedures in order to assure compliance with the Program of Supplies and Services

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and the legal framework regarding the award of public contracts.

Due to the significant modifications introduced by the new law, its full implementation has been postponed initially for a period not to exceed twelve months from its ratification (with an option to extend this implementation by a further twelve-month period). The law, however, provides that from the date of its ratification the health sector entities may not conclude any contracts for the purchase of goods and services falling within its scope, or extend any such existing contracts without the prior approval of the CHS.

Despite its certain weak points (i.e. the fact that not all goods and services fall within its scope, and that certain provisions impose duties in favor of a newly established Fund and of the health sector entities), it may be expected that the new law will open up competition and cross-border commerce in this market sector.

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