

DEFENSE PROCUREMENTS Law No. 3978/2011

News Release: 4 December, 2012

I. Ethics

“Article 8. Transparency and Conduct Rules applied by the organs of the Armed Forces.

- 1. The military and civilian personnel of the MoD, irrespective of the type of employment relationship and in the ambit of its authority, is allowed to have contacts only with the legal representatives of the economic undertakings which participate in procedures for the conclusion and implementation of contracts.*
- 2. Prior to each contact notice is given to the head of the competent service and to the head of the respective general staff or to the general head of the respective General Directorate. After each contact a report is drawn up for the respective file. An announcement relating to each contact is uploaded on the MoD’s website on the day the contact occurred.*
- 3. (see below)*
- 4. Updates by companies concerning military equipment are allowed only in the context of the technical dialogue of art 31 or in the context of presentations or informative meetings organized by the relevant agencies for the presentation of new technological evolutions in specific areas, as well as in the context of their participation in international exhibitions and conferences.[Note re Art 31: the MoD may initiate a technical dialogue prior to initiating procurement procedures. The technical dialogue is initiated either by uploading an invitation on the Mod website or by special invitation were state secrets may be involved. The dialogue can generally last 15-60 days or more at the discretion of the MoD. Its purpose is to gather information and advice on essential technical matters].*
- 5. Violation of these provisions are disciplinary infractions for which the following penalties can be imposed:*
 - a) as to military personnel, the applicable usual or statutory disciplinary penalties*
 - b) as to civilian administrative employees, the penalties provided for in Law No. 3528/2007, (Code on the Status of the State’s Civilian Administrative Employees and Employees of Legal Persons of Administrative Law)*

c) as to personnel employed under a civil law contract, the penalties provided for by Law No. 410/1988 , unless the violation is a breach of essential duties permitting termination of the employment contract

d) as to lawyers and the personnel of the State's Legal Council, the penalties provided by the respective disciplinary provisions.”

COMMENT: Article 8 incorporates the basic provisions of the November 24, 2009 “Ethics Order”, which is not abolished and hence seems to remain in full effect. The ambit of the restriction remains the same. However the new law refers only to contacts during “*procedures for the conclusion and implementation of contracts*” i.e. at any time after official initiation of the process for conclusion and during implementation of contracts, whereas the Ethics Order covers also the period before any procedure is officially initiated. In view, though, of para. 4 which restricts the companies’ opportunities to present new advances, it would seem that the practical effects of the Ethics Order are not substantially changed. All contacts (whatever their nature or medium) between the MoD and companies are restricted only to companies’ legal representative, i.e. officially authorized representatives appointed as attorneys in fact or holders of powers of attorney by the governing bodies of companies. No commercial agents or sales representatives can initiate or participate in such contacts in such a capacity. The process remains substantially unchanged (prior notice to functional heads, report and website) with the difference that the website posting occurs on the same day but after the meeting rather than prior to the meeting. The residual authority of the GDDIA is absent from the law, but such matters normally fall within its scope of authority in any case.

The law does not change the fact that these restrictions are binding on the MoD civilian and military personnel and not on third parties. Thus, penalties are not provided for with regard to third parties violating the law. The penalties are extended though to lawyers and members of the State’s Legal Council.

One significant change seems to involve contacts initiated by companies. According to the law, contacts with the purpose of providing the MoD with information on new technologies or new products must be initiated by the MoD (art 31 technical dialogue or meetings conferences organized by the competent service). It would seem that the practice of companies to organize events with such a purpose is now limited to events in the context of international exhibitions (e.g. Defendory or Fairnborough) or conferences, rather than on an ad hoc basis.

II. Anti-corruption and Transparency

A) Anti-corruption

“Art 8 §3: *“The military and civilian personnel of the MoD irrespective of the type of employment is prohibited from soliciting, accepting, directly or indirectly, any*

material favour, gift or exchange, when it is handling cases in the scope of the exercise of its authority, even where their actions are not criminal.”

COMMENT: The extension of the prohibition against soliciting and accepting favours and benefits to cover even actions which are not, legally speaking, crimes, would seem to prohibit even accepting favours or benefits which otherwise would be considered tokens of appreciation or harmless social niceties.

“Art. 9: Transparency and anti-corruption rules which are imposed on the economic undertakings.

- 1. The economic undertakings and their legal representatives who participate in procedures to conclude and implement supply, services or works contracts in the area of defence are prohibited from having or using any intermediary, middleman or broker during the process of conclusion and performance of the contract.*

COMMENT: This provision seems to introduce a wholesale prohibition against engaging agents and sales representatives for provision of services and using their services when a procurement process has been initiated leading up (possibly) to a contract and during the implementation phase after award. It does not seem illegal to engage agents and representatives for services prior to commencement of procurement procedures. The use of the terms “intermediary, middleman and broker” would seem to exclude any and all manner of mediation services.

- 2. The economic undertakings of paragraph 1 receive professional advisory services in relation to a contract only from law offices, tax, technical and economic advisers.*

COMMENT: Bona fide consultants for legal, tax, technical and economic matters are allowed. This provision seems consistent with LD 5227/31 declaring illegal any agreement for commissions in relation to transactions with the State or State agencies with the exception of fees for technical and scientific services. However fees which “exceed the usual measure or are disproportionately excessive” in relation to the services rendered or which shall be rendered, “are invalid as to the excessive amount” (art 2.2)

- 3. The economic undertakings of paragraph 1 and their legal representatives are prohibited from using offshore companies or other similar economic undertakings, irrespective of legal form or incorporation or not, as subcontractors, suppliers of products or service providers relating to the subject matter of the contract. For the purpose of this law, “offshore company” includes the legal persons or legal entities which are seated in or are managed from or reside in States which are “non cooperating” or with a privileged tax status as*

per article 51A of the Income Tax Code (Law No. 2238/94) and any implementing ministerial decisions issued on its authority.

COMMENT: The purpose is to prohibit transfer pricing and overpricing through use of offshore companies, which can also be a medium for the payment of bribes and other illicit payments. Art.51 A of the Greek Income Tax Code reads as follows: “1. For the purposes of this chapter “State” is defined as any State or jurisdiction or overseas country or territory which is under any special dependency or association status as determined by international law. 2. For the purposes of this Code, “administrative assistance treaty” is defined as any international treaty allowing the exchange of all information necessary for the implementation of the taxation legislation of the contracting parties. 3. “Legal entity” shall mean any legal person, organization, offshore company, any form of private equity company, any form of trust or formation of a similar nature, any foundation or formation of a similar nature, any type of personal company,, any joint undertaking, any type of company for the management of capital, property, will, inheritance, bequest or donation, any form of joint venture, any form of civil law company and any other possible form of company organization, irrespective of legal personality and whether it has a commercial or other object. 4. “Non –cooperating” states are those which on Jan 1, 2010 and after are not EU member-states, their status in relation to transparency and exchange of information on taxation matters has been examined by the OECD and which by Jan1, 2010 a) have not signed an administrative assistance agreement on taxation matters with Greece and b) have not signed a similar agreement with at least 12 other States. Said conditions are cumulative. 5 Non cooperating states are determined by decision of the Minister of Economy....once a year in January of each year....7.For the purposes of this chapter the natural or legal person or legal entity shall be deemed to be subject to a privileged tax status in a state other than Greece even if its statutory or actual seat or residence or establishment is in a EU member state, on condition that in that state a) it is not in law or fact subject to taxation, or b) it is subject to taxes on profits or income or capital which is lower than half the tax which would be due in accordance with the provisions of Greek tax law, if said person or entity had a permanent residence as defined by art 100 of this Code in Greece. [Note: “permanent residence” is defined in article 100 in the same manner as in the OECD Model Double Taxation Avoidance Treaty].

4. *The economic undertakings of paragraph 1 which participate in procedures for the conclusion of contracts in the area of defence, whether these contracts are regulated by this law or others, are obliged to notify the awarding authority a list including the details of each contract that have or intend to conclude, whether oral or written, with any supplier, subcontractor, service provider or consultant of paragraph 2 related to the subject matter of the contract. The contractor is obliged to notify to the awarding authority, after the conclusion of the contract, the said list within 30 days from the conclusion or amendment of the contract. The*

notification includes at a minimum the following data: the identity of the other contracting party, the legal and tax situation, brief summary of the contract's subject matter. The awarding authority is entitled to require at any time and to receive from the economic undertakings of paragraph 1 and the contractors any additional data or copies of relevant contracts within any time frame it sets in its request.

COMMENT: Introduces an obligation to present the awarding authority with data concerning contracts with suppliers, consultants and subcontractors.

5. *The contractor is obliged to provide the awarding authority with true copies of the contracts it concludes with subcontractors when , with the concurring opinion of the awarding authority, it assigns rights arising from the contract concluded with the awarding authority.*

COMMENT: Refers to art 106 of the Law, prohibiting assignment of rights without concurrence of the awarding authority (same provision existed in previous laws N. 3433/2006 and PD 284/89)

6. ... (see below)

7. *In the event that contractors violate the obligations and prohibitions of this articles and do not cure same within 30 days from the relevant notice of non conformity, the awarding authority may ...declare the contractor forfeit or impose a penalty equal to 20% maximum of the contract's economic value...In serious cases the sanctions can be imposed cumulatively and in addition the contractor may be excluded from MoD contracts for a period of 3 years at least. If the economic undertakings violate the prohibitions of this article the violation may be deemed a serious professional violation in the meaning of article 57§4d.[Note: Art 57§4d allows the awarding authority to exclude from participation in any procurement procedure any candidate or economic undertaking which has committed a serious professional violation such as , in the context of a previous contract "violation of obligations concerning security of information or integrity of logistics").*
8. *Said obligations and prohibitions of paragraphs 1-6 apply to all members of a joint venture where the economic undertaking or contractor is a joint venture and, where the economic undertaking or contractor uses subcontractors, for its subcontractors. Where members of a joint venture or subcontractors are in violation of said prohibitions the aforementioned sanctions are imposed on the economic undertaking or contractor.*

COMMENT: The law introduces joint liability for the contractor where the violations occur through subcontractors or joint venturers.

B) Integrity Clause

“Art 10.

1.The awarding authority is obliged to include in the contractual documents a special integrity clause through which the economic undertakings or the legal representatives, who participate in a procurement procedure and implementation of a supply, service or works contract in the area of defence declare in binding manner that, during all the stages preceding the award of the contract they did not act unfairly, illegally or abusively and that they shall continue to not act in such manner during the implementation stage of the contract and after the expiry of the contract...In particular

a) did not possess insider information..., b) did not engage in activities distorting competition through manipulation of offers...as per antitrust law (Law No. 3959/2011), c) have not made prior to award, and shall not make during and after the expiry of the contract illegal payments for facilitations , assistance or services relating to the contract and the award process, d) did not offer prior to award, nor shall offer during or after the expiry of the contract, directly or indirectly any material favour, gift or exchange to employees or members of collective organs of the awarding authority, as well as to wives, direct relations whether through blood line or through marriage up to the third degree, or associates thereof, nor used nor shall use third parties to channel money to said persons, e)have not offered and shall not offer during or after the expiry of the contract, directly or indirectly, gifts, donations, charitable contributions, sponsorships or money and grants, under any pretext or cause, to political parties, party representatives or leaders of parties, Ministers or Under-Secretaries or revocable employees of the Government, members of Parliament or elected organs of the local and regional authorities or to organization headed by politicians, as well as to wives, relatives, whether through blood line or marriage to the third degree, or associates thereof, nor used or shall use third parties to channel money to said persons.

COMMENT: a) The reference in paragraph (b) to Greek antitrust law is important. The substantive provisions of Greek antitrust law are essentially the same as in the EU Treaty and i) prohibit agreements, decisions and concerted practices between two or more undertakings that restrict or distort or reduce competition by object or effect and ii) prohibit abusive exploitation of dominance. Price fixing is a hard core prohibition under both headings. Recent decisions of the Greek Antitrust Authority confirm that price rigging and other violations in the context of public procurements fall within its authority. Antitrust violations attract severe fines and other sanctions, including criminal prosecution of managers and officers. The search / raid entitlements of the Greek Antitrust Authority are very broad extending from company premises to the residences of

individuals, any files in whatever medium etc. Consequently, engaging in activities of this nature may initiate concurrent proceedings both under the military procurement and the antitrust laws. ii) Note the contrast between paragraph (e) and the previous paragraphs in that the declaration does not extend to events prior to the initiation of the procurement process. This is because the recent investigations concerning corruption have revealed that a number of companies had indeed made political contributions in the past and extending the declaration to time before the effective date of the Law would in essence exclude many interested parties.

2. In the event of violation....the following sanctions shall be imposed by Decision of the Minister of Defence:

a) if performance of the contract has not been completed, , cumulatively forfeiture of the economic undertaking and draw down of the good performance letter of guarantee and exclusion from any other MoD procurements for a period of three years at least,

b) if the performance of the contract has been completed, a penalty equal to the good performance letter of guarantee and exclusion from future MoD procurements for a period of three years at least.

3. The economic undertakings ...are obliged to include in the file of documents concerning any award a “responsible statement” of Law No. 1599/86, with certification of authenticity of signature, declaring that up till that time they had not violated any obligations referred to at paragraphs 1 and 5 and have been informed of the sanctions of paragraph 2...

COMMENT: Law 1599 “responsible declarations” are declarations to the state authorities that the events declared have or have not occurred. Untrue declarations can result in criminal prosecution of the person making the declaration.

4. The obligations and prohibitions of paragraph 1 apply, if the economic undertaking is a joint venture, to all the members of the joint venture and if the economic undertaking uses subcontractors to all the subcontractors. In the event of violation... and on condition that it is not cured within 30 days from respective notice to the economic undertaking, the awarding authority may by decision of the Minister of Defence, declare the economic undertaking forfeit an or impose a penalty equal to 10% maximum of the economic value of the contract...

5. The economic undertakings or paragraph’s 1 and 4 are obliged to impose sanctions in the event of violations and take remedial measures in the event that a manager, officer or employee of theirs violates the prohibitions of this article.

COMMENT: It is difficult to reconcile paragraphs 3 and 5. A Law 1599 “responsible declaration” that up till that time an undertaking had or had not sanctioned and taken remedial measures against managers presumably must refer to strictly domestic matters (i.e. the reference to “violation of this article”, but will raise serious concerns in the future, where allegations are being made but no specific conviction has occurred whereas until a conviction occurs, most probably no remedial measures can be taken .

C. Prohibition on employment of personnel

Art. 9.6 “The economic undertakings of paragraph 1 are prohibited from engaging, in whatever employment, work or mandate capacity military and civilian personnel of the MoD for a period of 3 years from their retirement or departure how-so ever occasioned.”

COMMENT: The Law amends art. 66§13 Law 1400/73 which read “ Regular officers in the reserve of the three branches of the Armed Forces are not allowed, for a period of five years after their retirement to represent in any way, directly or indirectly, commercial or industrial firms and enterprises in general, Greek or foreign, in their transactions with the Armed Forces”. The State’s Legal Council had interpreted this provision (Opinion 273/90) to mean that the prohibition extended only to acts of involvement in the conclusion of a contract, such as participation in negotiations, signing a contract etc., and conversely that simple participation as a board member or vice president without authorities to contact the service or employment as a technical manager without authority to contact members of the service were allowed. Now the law prohibits any form of employment, contract for work or mandate (which in our opinion would include any position based on trust, including any and all board memberships) and in this sense severely restricts the possibility to have revolving doors between suppliers and the MoD. Notably the prohibition now extends to all military and civilian personnel, and is not limited to retired officers and includes any form of disengagement from the service or the MoD, not only retirement. Most significantly, all the sanctions stated in art.9.6, and the joint liability introduced in 9.7, apply to violations of this paragraph also.

D. Transparency

“Article 11 : Audits and inspections of economic undertakings.

- 1. The awarding authority is entitled at its own expense to assign to independent audit companies audits and inspections of all the contractual relations and payments by economic undertakings and their legal representatives, which participate in procurement procedures and contract implementation... in the area of defence, with their subcontractors, suppliers, service providers or any third party in relation with the awarded contract...*

COMMENT: The investigative authorities of the awarding authority are not limited to the contractor but any company which participated in the award procedure or participates in the implementation of an awarded contract.

2. *....entitled to audit any document or element, electronic or printed, irrespective of manner of storage, wherever they are kept, in particular accounting, company and commercial books and electronic communications... take copies and excerpts,...including managing directors, managers, executive managers, administrators as well as employees whatever their employment relationship including lawyers on fixed retainer.*

COMMENT: The law introduces very extensive search authorities to the independent audit firms engaged for such a purpose. It is notable that legal privilege is partly undermined in that in-house lawyers' communications with economic undertakings retaining them are not privileged. This is in line with relevant EU case law in competition law matters (see AKZO), where only external lawyers' communications with their clients were deemed privileged. Consequently, it is advisable that sensitive communications are addressed to outside counsel and that any communication should be clearly marked as "privileged and confidential".

3. *The economic undertakings ...are obliged to assist the audit and ensure that the auditors ... have full and direct access to every information requested and which is in their possession or control"*
4. *The auditors are entitled to put questions to the personnel and managers...*
5. *The audit is conducted in such a manner as not to unduly interfere with the usual daily business of the economic undertakings*
6. *The awarding authority shall not disclose said information, data and documents to any third party without the prior written consent of the economic undertaking, unless mandatory law provides otherwise.*

COMMENT: Notably, if the information etc reveals criminal activity, the awarding authority is obliged to notify the prosecuting authorities under the Greek Criminal Procedure Code, as well as any other competent authorities such as the Money Laundering Authority, the Competition and Tax authorities. In short very little comfort can be taken from this clause.

7. *...refusal, obstruction...impediments to the audit and inspections...allow the awarding authority by decision of the Minister of Defence to declare the economic undertaking forfeit, or impose a penalty equal to 20% maximum of the economic value of the contract... In particularly serious cases, the said sanctions may be imposed cumulatively and in addition the economic*

undertaking may be excluded from MoD procurements for a period of three years at least.

COMMENT: Audit procedures akin to competition law “dawn raid” procedures should be put in place in all entities that may be inspected.

E. Change of Control and Management.

“Art. 12: Changes in ownership and management of the economic undertaking.

1. In the event that the economic value of the contract...is equal to or exceeds 5.000.000€, excluding VAT, the economic undertaking or its legal representative (if not a personal undertaking), shall notify the following prior to the conclusion of the contract:

a) the ten largest shareholders or partners, whether natural or legal persons, who possess, directly or indirectly, participations in or voting rights on the share capital as well as the respective percentages,

b) the persons who, even if not included in the case under a) above, exercise the control of the economic undertaking as defined below, and

c) the members of the management organs of the economic undertaking with their CV's.

2. Within 10 days after conclusion of the contract, the economic undertakings shall notify to the awarding authority the acquisition or assignment of participations in their capital, which will bring about any change to the identity or data of the persons in para.1 a,b,c above. Any natural or legal person who directly or indirectly acquires or loses control, as defined in para. 3 below, of the contractor is similarly obliged to notify same to the awarding authority, including any case of merger, spin-off, absorption, change of legal form or any other corporate transformation of contractor.

3. “Control” is defined to mean:

a) possession, directly or indirectly through subsidiaries or intermediaries, of the majority of the voting rights in a legal person, union of persons or other economic undertaking, or

b)the right to appoint the majority of the persons who manage the legal person, union of persons or economic undertaking, or

c)the control of the majority of the voting rights or of the management of the affairs of the legal person, union of persons or economic undertaking through written or other agreement.

4. The awarding authority is entitled within 3 months from such notification to:

a) to object to the notified participation or alteration or corporate transformation, when it considers that there are grounds based on national security or public interest and may request that the economic undertaking provide it with necessary documents, data and information within a period of time it considers adequate and not to exceed two months. After examination of said elements, the awarding authority may, if it concludes that there are reasons of national security and public interest, terminate the contract. The delayed, inaccurate or incomplete submission of the requested elements by the contractor entitles the awarding authority to terminate the contract, without further cause.

b) to object to the notified participation, alteration or corporate transformation, on condition that it concludes that there exist reasons of national security and public interest and terminate the contract.

In any event, public interest exists in particular where the persons who effected the participation in or who control the contractor, including the natural persons who directly or indirectly control the legal entities participating in or controlling the contractor, are not appropriate to guarantee the economic viability of the contractor and to ensure the proper administration of the contract until completion or ensure that conflicts of interest or influence are avoided which may damage national interests or where the awarding authority doubts the legality of origin, true ownership or adequacy of financial resources of the persons who effected the participation in, or control the contractor, as well as of the natural persons who directly or indirectly control said persons.

6. The termination of the contract occurs by decision of the Minister of Defence and is effective from service on the economic undertaking as per the contract. Additionally, the same decision may impose forfeiture of letters of guarantee and exclusion from MoD procurements for a period of at least 3 years.

COMMENT: No precedent to this article. Understandable if exercised prudently but with great potential of abuse. Unique in its scope and possible effects.

F. Dir. 2009/81/EC.

COMMENT: In addition to the particular Greek requirements outlined above, the new Law incorporates all the relevant transparency and anti-corruption provisions of Dir. 2009/81/EC such as that of art. 39 Dir. 2009/81/EC prohibiting participation to persons convicted of fraud, participation in a criminal organization, bribery, money laundering etc.

The Directive has also been fully transposed on matters concerning procedure for tenders , contract formation etc.

However, specific provisions of Law 3433/2006 (art. 34-42, 44,45, 48, 60-65, 68.1 and 70) concerning contractual terms and conditions, contract conclusion, amendment, termination, acceptance, delivery, payments, forfeiture of contractor, related sanctions, entitlements of the State, liability towards third parties, financing, jurisdiction and applicable law remain in force.

III. Offset Benefits.

“Art.105. Contract Implementation.

1...The provisions of Law. 3433/2006 concerning.....Offset Benefits as well as the administrative orders issued on their authority are abolished.”

“Art. 109. Transition provisions.

- 1. The provisions of this law apply to all works contracts, service contracts and supply contracts within in scope and the initiation of the process for their conclusion starts after the effective date of this law...*
- 2. Procedures for the conclusion of works contracts, supply contracts and service contracts which have started before the coming into effect of this law continue and are completed in accordance with the regulation in effect at the time the process started.*
- 3. Works contracts, supply contracts and service contracts concluded before the date this law comes into effect are implemented in accordance with the regulation in effect at the time of their conclusion.*

COMMENT: It would seem that the MoD will not issue further OB contracts when defence contracts are awarded in the future. In a recent law (No. 3883/2010) concerning employment matters of the military, the MoD had included the prelude to the abolishment of OB's: it allowed companies whose OB contracts had expired but remained partially or totally incomplete and penalties had been imposed on the OB contractors, to enter into new contracts on matters of interest to the MoD which must be completed by Dec. 31, 2014. If companies accepted this process and properly performed their obligations under the new contracts, the penalties they had attracted under the OB contracts would be revoked. The reason given for the abolition of the OB contracts as a necessary corollary to supply contracts was that OB contracts were vehicles for channeling bribes and rarely served any true interest of the MoD and the Armed Forces and suppliers calculated the cost of OB contracts and included it in the cost of the supplies and services sold to the MoD.

It seems now that OB's will be replaced by (forced) subcontracts in line with article 21 Dir. 2009/81/EC (refer to attached text) the provisions of which have been transposed into the new Law 3978/2011.