

Protecting Public Funds through Pre-Contractual Audit of Public Contracts with Significant Financial Value in the Greek Legal System

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Abstract

This study examines the institutional framework and legal significance of the pre-contractual audit of public contracts with significant financial value in the Greek legal system. Rooted in Article 98(1)(b) of the Greek Constitution, this audit—conducted by the Court of Auditors—serves as a preventive mechanism to ensure legality, transparency, and fiscal responsibility prior to the conclusion of major public contracts. The paper analyzes the nature and scope of this audit, distinguishing it from other forms of judicial and administrative control exercised by public authorities and courts. It explores both the subjective and objective dimensions of the audit, focusing on the entities involved, the types of contracts subject to review, and the monetary thresholds that determine its applicability. Furthermore, the research highlights the principles underpinning the audit process, particularly the principles of legality, sound financial management, and fiscal sustainability. By preventing the signing of unlawful or financially unsound contracts, the pre-contractual audit functions as a vital safeguard of public funds and an instrument for enhancing good governance in public procurement. The paper concludes that this mechanism not only strengthens financial accountability but also reinforces public confidence in the integrity and efficiency of state financial management.

Keywords: Pre-Contractual Audit, Public Contracts, Court of Auditors, Financial Legality, Fiscal Governance, Transparency, Greece.

Introduction

Scope of the Subject Matter

After the completion of the tender process and before the signing of a high-value public contracts, it must be submitted to the Court of Auditors for review. This review is enshrined in the Constitution, specifically in Article 98(1)(b), and is independent of the review carried out by H.S.P.P.A (Hellenic Single Public Procurement Authority) and the competent courts (Council of State and Administrative Courts), which are seized following the lodging of relevant administrative appeals and legal remedies by the tenderers. This is because the pre-contractual review procedure by the Court of Auditors, as demonstrated in this chapter, differs substantially from the control exercised by both H.S.P.P.A and the competent courts.

However, before analyzing the pre-contractual audit process, it is useful, for a more complete and meaningful understanding of how this audit works, it is useful to refer to the nature and powers of the Court of Auditors, as the body responsible for carrying out this control. In this regard, it is also necessary to define the scope and results of pre-contractual review in relation to other forms of legal protection available during the pre-contractual stage of public tenders.

a. Nature and Powers of the Court of Audit

The powers of the Court of Auditors were first enshrined in Article 98 of the 1975 Constitution. The Court's judicial, administrative, and auditing powers include, among others, the repressive and—to the extent that it has not been abolished—preventive

control of state expenditure, the auditing of public accounts, the resolution of pension disputes, and the issuance of opinions on draft legislation concerning pension rights. A simple overview of the above powers raises the fundamental question of the nature of the institution as administrative, advisory, or judicial, an issue that is directly reflected in the nature of pre-contractual control. In the past, it has been argued that, in view of its numerous and diverse responsibilities, the Court of Auditors is a dual body of a mixed nature¹.

However, in recent years it has been unanimously accepted that the Court of Auditors is a court and, in fact, the highest "financial" court in our country, which, among its jurisdictional powers, also has other powers of an auditing or administrative nature². One of these powers is the pre-contractual audit of public contracts, in the exercise of which the Court of Auditors, without losing its organic status, acts as the Supreme Administrative Authority³, constituting the guarantor par excellence of efficiency in the field of public finances and, in particular, public contracts⁴.

The Scope of the Audit

a. Subjective Delimitation—Contracting Parties

The first necessary delimitation, in order to determine the scope of pre-contractual control, concerns those persons who fall within the concept of "the State" as defined in the constitutional provision, as follows: "[...] the contracting party is the State or another legal entity that is equated with the State in this respect." The first basic interpretative issue that arises, therefore, concerns the specification of this vague legal concept of "other legal entity treated as equivalent to the State".

This is because, although it is logically clear that the concept of the public sector includes, in terms of proximity to the legal entity of the state, local government bodies and their legal entities, other legal entities governed by public law, and public enterprises or bodies⁵. However, in order to define the concept of persons "equivalent to the public sector," certain criteria must be adopted, such as the purpose of the specific audit, which, as mentioned above, consists in ensuring fiscal legality and transparency in the activities of the public sector in the broad sense.

In this sense, and taking into account that the organisation of the state takes various forms, legal entities equivalent to the State should be considered those that are established to serve the public interest and maintain a relationship of dependence on the State, but mainly if they manage State resources, i.e., public money⁶. Regardless, therefore, of the organizational structure or

affiliation with the public or private sector, the most critical factor for the obligation to perform a pre-contractual audit is the management of public resources⁷. This criterion of "fiscal functional affinity" between the above persons and the State is more closely related to the very nature of both the audit and the Court of Auditors, which deals primarily with issues of a fiscal nature⁸.

Moreover, the Court of Auditors itself accepts that the criterion on the basis of which each entity will be subject to pre-contractual control in the exercise of its transactional activity cannot be determined a priori, but that an individual assessment is necessary in each case, based on the specific statutory provisions of that entity, taking into account the legal and factual data relating to its operation⁹.

b. Objective Definition

i. The Concept of "Contract"

According to established theory, the State, in the broad sense, acts through legal and material actions to achieve its objectives, which manifest themselves either as unilateral or bilateral legal acts, the latter primarily including public contracts. However, the interpretations attributed to the concept of "public contract" vary. Specifically, the concept of "high-value public contract," as described in the Constitution and Law 4700/2020, does not coincide with the established concept of an administrative contract, which is defined as a contract that seeks to serve a public purpose and in which one of the two contracting parties is the State or a legal entity under public law, vested with exceptional powers¹⁰. On the contrary, the Court of Auditors itself has pointed out that the concept of a public contract¹¹, on the basis of which the objective scope of pre-contractual control is determined, is autonomous in relation to the corresponding concepts as provided for in other legislation¹².

This is also confirmed by the fact that Law 4700/2020 on the definition of the concept of public contract does not refer to other legislation. Therefore, pre-contractual control concerns any transactional activity of a contractual nature by the State or bodies equivalent to it, of significant economic value, provided that it involves the disbursement of public funds, without necessarily aiming to make a profit¹³. In terms of the type of object being contracted, the concept of contracts under Law 4700/2020 covers public contracts relating to works, supplies, services, and public service concession contracts¹⁴.

ii. The Concept of "Significant Economic Value"

In order to specify ratione materiae the scope of pre-contractual

¹N. Barbas, *Public Finance Law*, Sakkoulas Publications, 2024, p. 198.

²K. Giannakopoulos, *The relationship between the Court of Auditors' pre-contractual legality audit and other forms of legality audit of public procurement in the national legal order*, EfimDD - 4/2013, p. 457.

³See the analysis of the relevant opinions in N. Milionis, *The Court of Auditors – Contemporary trends and developments*, published by Nomiki Bibliothiki, 2024, pp. 133-147.

⁴C. Dellis, *The Court of Auditors as guarantor of the effectiveness of public action*, EfimDD 3/2023, p. 297.

⁵See also Article 14(1) of Law 4270/2014 "on Public Accounting" regarding the definition of the term "Public Sector."

⁶N. Barbas, *op. cit.*, p. 229.

⁷C. Dellis, *op. cit.*, p. 451.

⁸(decision VI Dept.) 1927/2016, (Act Z') 187, 288/2021, (Act St') 313/2019 of Court of Auditors

⁹554/2022, para. 16 of Court of Auditors.

¹⁰A. Gerontas/S. Lytras/P. Pavlopoulos/G. Siouti/S. Flogaitis, *Administrative Law*, Sakkoulas Publications, 5th Edition, 2022, p. 352; S. Flogaitis, *The Administrative Contract*, ed. Ant. Sakkoulas, 1991.

¹¹The abandonment of the organic criterion and the functional approach now followed by EU legislation means that the concept of public procurement is particularly broad and is disconnected both from the formal form of organization of the public legal entity that performs contractual activities (the State, public legal entities or public law entities) and from the legal regime governing the content of the contract (administrative contract or private law contract). N. Simantiras, in: P. Pavlopoulos/N. Simantiras/Th. Fortsakis, *General Administrative Law*, Sakkoulas Publications, 2025, p. 137.

¹²380/2022 of Court of Auditors.

review, i.e. the concept of "significant economic value" of a contract, the legislator sets further quantitative criteria. Specifically, it sets monetary thresholds for the budget of each contract, the exceeding of which makes the contract in question one of high economic value and subjects it to mandatory pre-contractual review. It is obvious that these monetary thresholds are variable and may be adjusted by the legislator at its discretion. However, this discretion cannot lead to the abolition of the general audit competence of the Court of Auditors, for example by setting very high thresholds for audit.

Under the current regulations, auditing is mandatory for public contracts—regardless of the category of the contractual subject matter—whose budget exceeds €300,000. It should be noted that the estimated expenditure taken into account is the amount estimated to be required to meet the contractual needs of the contracting authority, excluding VAT.

iii. Supplementary Contracts

In addition to the main contracts, it is accepted that their supplementary contracts are also subject to the same audit, regardless of their amount, provided that the initial contract is subject to audit. This is because these contracts are ancillary to the main contracts and are not independent in nature. However, in order to avoid circumvention, even if the estimated expenditure of the initial contract did not exceed the threshold for pre-contractual audit, if its value, combined with the value of the supplementary contract exceeds the threshold set by law, then in this case the contract becomes subject to *ex post* review¹⁵.

In this way, the common practice of dividing contractual objects in order to avoid exceeding the monetary threshold for review is suppressed. The same rationale applies to the inclusion of pre-contractual audits and amending agreements, provided that the main contract has also been audited¹⁶.

The Audit Conducted

a. Nature of the Audit

The administrative function of the state in the field of tenders for the conclusion of public contracts for works, supplies, and services of high economic value, during the stage prior to the signing of the contract, is subject to full preventive judicial control for reasons of transparency. The assignment of this control by the constitutional and ordinary legislator to the Court of Auditors and the provision for it to be carried out by panels composed of judges was due to the nature of the Court of Auditors as a court and the consequent constitutional guarantees of independence and impartiality of its members, as well as its expertise and long experience in the preventive control of public expenditure in general¹⁷.

This control, although exercised by judicial panels, does not fall within the jurisdiction of the Court, and the judicial acts issued do not constitute judicial decisions, as they do not give rise to *res judicata*¹⁸. In fact, the nature of these judicial acts, issued in the context of the above preventive control, has not changed since this control, after its establishment by law¹⁹, acquired constitutional status, given that neither its purpose was changed nor was the Court of Audit granted, by way of derogation from the provisions of Articles 93, 94, and 95 of the Constitution, any relevant jurisdictional competence. This is also evident in the wording of the constitutional text, since, with regard to the audit powers of the Court of Auditors, it refers to "auditing expenditure", "contract control" and "account control"²⁰, while its judicial powers are described as "adjudication of disputes" and "adjudication of cases"²¹.

The audit nature of this power is also confirmed by the scope of the audit. In particular, the audit carried out by the Commissioner and the Audit Committee of the Court of Auditors extends *ex officio* to all acts of the tender procedure. Therefore, the *ex officio* universal audit of the procedure would be incompatible with its judicial nature, which would require limiting the audit only to the complaints of the affected private individuals, so as to rule authoritatively only on the occurrence or non-occurrence of the legal consequences invoked by the parties²². Indeed, the Court of Justice of the European Union, in its judgment of 19 December 2012 in Case C-363/2011, ruled that the Court of Auditors, in exercising the above competence, does not act as a judicial body and does not constitute a court under European law, and is therefore not in a position to refer a question for a preliminary ruling for a decision to be taken before it.

Similarly, decisions issued on appeals for revocation and review, which are organized in a "quasi" judicial system of adjudication²³, in order to enable the contracting authority and the economic operator affected by the negative decision of the Panel or the Commissioner to request that the correctness of that negative decision be examined, subject to judicial safeguards the correctness of the negative decision in question²⁴.

It should also be noted that the decisions issued during the pre-contractual review by the Commissioner and the Court's panels are called Acts or Minutes and do not constitute court decisions, from which *res judicata* arises²⁵. From the above, it follows that the above acts of the Court of Auditors, as they do not create *res judicata*, are not binding on other administrative courts which, within the framework of the parallel system of judicial protection, deal with disputes at the stage of the award of public contracts²⁶. However, it should be noted that despite the lack of *res judicata*, the executive authorities, i.e. the contracting entities or authorities, are obliged to comply with the findings

¹³E.-E. Kouloumpini, *Pre-contractual control by the Court of Audit following Laws 4700/2020 and 4820/2021. Case law developments and prospects*, in *Collective Work: The Court of Auditors in the contemporary fiscal environment*, ed. E.-E. Kouloumpini, published by Nomiki Bibliothiki, 2023, and 380/2022 para. 16, 18 of Court of Auditors.

¹⁴See Article 324 of Law 4700/2020.

¹⁵E. Balta, *Preventive control of public expenditure by the Court of Auditors*, Sakkoulas Publications, 2009, p. 149.

¹⁶See paragraph 5 of Article 324 of Law 4700/2020.

¹⁷2822/2011 of Court of Auditors.

¹⁸See, among many others, 2822/2011 of Court of Auditors, S. Poulis, *Preventive control of public contracts – The specter of conflict of competences*, ThPDD 12/2013, p. 1045 ff.

¹⁹See Article 15 of Law 2145/1993.

²⁰Article 98(1)(a), (b), and (c) of the Constitution.

²¹Article 98(1)(f) and (g) of the Constitution.

of the pre-contractual review and, consequently, must repeat the procedure if it is found to be flawed by the Court²⁷.

b. General Characteristics of the Review

The pre-contractual review is *ex officio*, universal, and independent of any objections, administrative appeals, and other legal remedies that may have been filed, limited only by the existence of *res judicata* in cases where the competent courts have ruled on issues brought before them by participants in the tender procedure seeking judicial protection²⁸. In particular, it constitutes a review of the legality of the entire administrative procedure for the conclusion of the public contract and the draft contract. It constitutes a genuine preventive review, since it is carried out before the contract is signed²⁹, and at the same time an external review, since it is carried out by bodies not involved in the conduct of the tender procedures. It is not initiated at the request of the contractor or the other bidders in order of lowest bid, so in this respect it is *ex officio*. Given the above, it is safer and broader than the corresponding judicial review, since the latter depends on the will of the appellants and is limited by their legal interest.

It is also comprehensive, because it extends beyond the draft contract itself to the entire range of administrative acts that precede and prepare for the conclusion of the contract. In particular, it starts with the control of the lawful assumption of the budgeted expenditure and the necessary budgetary commitment³⁰ and extends to the award of the contract.

The Court of Auditors, therefore, examines exclusively the legality of the transactional action of the Administration to prevent the conclusion of illegal contracts, and does not resolve disputes on behalf of other courts with regard to the control they exercise over the process of concluding such contracts after legal action has been brought before them. In other words, the Court of Auditors' control aims to establish the objective legality of public contracts³¹. This means that the procedure leading to the conclusion of the contract complies, on the one hand, with the EU and national rules governing it and the terms of the relevant notice, and, on the other hand, with the public interest, through the protection of the principles of transparency, equal treatment of tenderers, and free competition³².

c. Content of the Audit

The pre-contractual audit is an audit of compliance with legality, i.e. the correct application of the law. On the one hand, the compatibility of the procedure with legality in the broad sense is examined, which, among other things, includes the formal legality of the award procedure, and on the other hand, compliance with

financial legality is checked.

The part of the audit concerning the legality of the procedure examines compliance with the formal rules for its implementation, such as issues relating to the establishment and composition of the Tender Committee, compliance with critical deadlines by bidders, the submission of the supporting documents required by the tender notice, the invitation of economic operators to complete their bids within the legal limits, etc. Furthermore, compliance with the conditions set out in the relevant regulatory framework, which is binding on both the contracting authority and the tenderers, is checked. It should also be noted that the audit extends to the legality of the regulatory framework itself, so that the Panel and the Commissioner of the Court of Auditors can check whether the requirements of the tender notice are disproportionate in relation to the purpose served or whether they are "photographic" in the sense that they "photograph" only one or a few economic operators capable of fulfilling them, thereby excessively restricting the development of free competition in the process³³.

However, the Court of Auditors does not review technical judgments or the appropriateness of the Administration's actions, replacing it, but limits itself to reviewing the reasoning, i.e. reviewing the contracting authority's judgments regarding the correct assessment of the facts, the specification of vague legal concepts, and the use of its discretion. In this context, however, compliance with the limits of the contracting authority's discretion is examined³⁴.

Beyond the above parameters, pre-contractual control also includes another component, which relates to compliance with the principle of sound financial management, in which (i.e. component) its differentiation from the control exercised by other courts is identified, among other things.

The principle of sound financial management requires the prudent management of assets with a view to ensuring fiscal sustainability. A specific aspect of this is the principle of economy, which aims at the rational use of the means available to the body to achieve its objectives and to prevent its budget from being burdened with disproportionate costs. In light of the above principle, there is scope for control even over the public body's own decision to resort to external partners, avoiding the use of its own resources.

Furthermore, in the context of pre-contractual review, the balance between the costs and the means used to achieve an objective may also be examined³⁵. Thus, such a review may examine

²²See, among many others, 2822/2011 of Court of Auditors.

²³Articles 324 *et seq.* of Law 4700/2020.

²⁴1473/2024 of Court of Auditors, Council of State 1504/2024. See also 783/2024 and 498/2025 of Court of Auditors.

²⁵Supreme Special Court 4/2019

²⁶N. Barbas, *op. cit.*, p. 227

²⁷Council of State 770/2021

²⁸1735/2024, of Court of Auditors (decision VII Dept.) 498/2025, 743/2025, 182/2025, etc.

²⁹See also Article 105 of Law 4412/2016, which states that the legal effects of the award decision, and in particular the conclusion of the contract, shall only take effect when, among other things, the pre-contractual audit by the Court of Auditors has been completed.

³⁰N. Milionis, *op. cit.*, p. 1004 ff.

³¹763/2019, 1354/2018 of Court of Auditors.

³²258/2025, 498/2025, 963/2022, etc. of Court of Auditors. See also P. Degleris, *Public Contracts in the EU Legal Order*, Sakkoulas Publications, 2025, p. 166 ff.; K. Gogos, *Legal services as the subject of public procurement contracts*, DiDik 3/2022, p. 371.

³³A.S. Graells, *Public Procurement and the EU Competition Rules*, Hart Publishing, 2011, p. 9 ff.

³⁴1078/2024, 743/2025 of Court of Auditors.

the budget set by the contracting authority for the performance of the contract and whether, for example, in line with the market prices of the items to be supplied, but also whether the tenders submitted are unusually low, so that they may prove to be unsustainable in practice.

In addition, the principle of effectiveness as a specific aspect of the principle of sound financial management is also subject to review. Although the nature of the above principle requires *ex post* control of the contract, i.e. after its completion and the crystallization of the results achieved, at the pre-contractual stage, the Court of Auditors examines the adequacy and correctness of the contracting authority's planning, i.e. whether the objectives of the public action, as set out in the contract to be awarded, were clearly defined in advance in terms of both time and quality³⁶.

Legal Consequences of not Subjecting the Draft Contract to Pre-Contractual Review

Subjecting the draft contract, which falls within the financial limits provided for by law, to pre-contractual review is an essential part of the procedure, with the result that any violation thereof leading to the automatic invalidity of the unchecked contract³⁷. The above automatic invalidity cannot be remedied by any subsequent submission for review after the contract has been signed and its execution has commenced, and the Panel/Commissioner then lacks the temporal competence to carry out the review and must in any case refrain from doing so³⁸.

The practical consequences of invalidity due to failure to comply with the required audit arise at the stage of payment to the contractor for the services provided. The contracting authority, in other words, often appears to refuse to pay the debt by failing to make the financial payment. The issue may also arise in cases where the relevant payment order is not approved by the Court of Auditors in the context of the required audit of the relevant expenses.

In any case, in the absence of "validation" of the procedure through pre-contractual control, there is no provision due under the contract based on the invalid contract itself. Therefore, the contractor's claim can only be pursued on a different legal basis, and the alternative route that the counterparty may follow in order to claim the contractual consideration is an action based on the provisions on unjust enrichment.

Conclusion

The purpose of the Court of Auditors' pre-contractual audit is to ensure the legality and transparency of public contracts, especially those of high economic value, before they are signed. Specifically, the purpose of pre-contractual audit is to verify that contracts comply with the principles of fiscal sustainability and fair competition, in order to prevent any illegal or disputed contracts and to protect the public interest by safeguarding public funds and ensuring sound financial management, i.e. efficiency, effectiveness, and economy in public spending.

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³⁵A. Sakellarou, the audit of public contracts by the Court of Auditors based on the principle of economy, THPDD 2/2018, p. 153.

³⁶1312/2022 of Court of Auditors.

³⁷A. Gerontas, Epitome of General Administrative Law, *op. cit.*, p. 352 and indicatively (decision VI Dept.) 1343/2018 of Court of Auditors. K. Papanikolaou, Invalidity of a public contract due to failure to carry out a pre-contractual audit by the Court of Auditors, DiDik 1/2016, p. 14 ff.

³⁸1172/2012, 3007/2012 of Court of Auditors with a minority opinion accepting that "the contract in question was not legally signed, as it could not be signed while the deadline for filing an appeal against the decision of the VI Division before the Major – Seven-Member Composition of the Court of Audit, at which point the pre-contractual review of public contracts by the Court of Audit is completed."