



# Completion of underground projects respecting applicable EU and national legislation

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# Outline of applicable EU legislation- Directive 2004/18/EC

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- Directive 2004/18/EC on the award of public works contracts, public supply contracts and public service contracts
- Key contents include rules on specifications and contracting documents, procedures, advertising and transparency, public works concessions



# Outline of applicable EU legislation- Design and construction of public works

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- Design of public works falls within the scope of the Directive as public service contracts
- Construction of public works falls within its scope as public works contracts
- Article 31 (4) thereof provides for possibilities to use negotiated procedure without a contract notice for public service and public works contracts



# Outline of applicable EU legislation- Additional works

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- Negotiated procedure without publication may be used for additional works or services not included in the initial project and publication,
- Which have become necessary for the performance of works or services through UNFORSEEN CIRCUMSTANCES
- On the following conditions



# Outline of applicable EU legislation- Conditions

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1. Additional works or services cannot be technically or economically separated from the original contract
2. When such works, although separable from the performance of the initial contract, are strictly necessary for its completion
3. Additional works cannot exceed in value 50% of the value of the initial contract or concession



# Outline of applicable Greek national legislation-5

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- Article 61 of the Directive includes identical provisions in respect of awarding additional works to the concessionaire in the case of Public works Concessions
- Directives 2004/17 and 2004/18 have been transposed to the legal order of EU 27
- In Greece, Presidential Decree 60/2007 ensures transposition of Dir. 2004/18
- A series of Decisions of the EU Court of Justice have established the applicable jurisprudence regarding the exact meaning and implementation of these provisions



# Poor quality , failure , incompleteness of designs and EU legislation on additional works

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- The EU Court of Justice and the EU Commission do not consider that additional works are legal in the context of the above provisions in case of
  - Incomplete design and study
  - Poor quality or failure of the study
  - Failure of the awarding authority to perform its normal duties



# Designing underground works

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- Unforeseen circumstances in the performance of underground public works cannot be attributed to insufficient information collected by the designer about the underground water and geological conditions in force for the project concerned
- Even if insufficient info collection has happened in agreement with the awarding authority





# The Perfect Design of Underground Works

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- Can the designer ever have a perfect knowledge of the underground water and geological conditions for major underground projects?
- On that basis, is the perfect design of underground works possible?
- What is then the optimal scale and detail of site investigations ?



# Urgency and cost limitations

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- What about time and budget constraints in the design phase, which are independent to the designer?
- Negative effects due to interventions and pressure by people who often are not aware of legislation constraints
- On transparency and additional works



# Call for tenders and Contracting Underground Works

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- A good call for tenders, based on a good design, is the key factor for the successful implementation of an underground project
- A detailed call including clear provisions for future options and possibilities of the awarding authority is the best tool to adjust to future rather expected uncertainties, i.e. due to future court decisions on environmental terms, due to possible geological complications, etc
- The quality of Contracting documents is also a key factor for future success.
- It may be also a source of future uncertainties and delays

# Implementing Underground works



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- Adjustments to initial designs often necessary during implementation of underground works
- If adjustments are foreseen by the contract or if they are minor in terms of budget and time foreseen by the contract, they do not cause substantial problems
- New Commission proposal for future Directive on public procurement in force from 1/1/2014, suggests the 5% limit for minor budget adjustments
- However the necessary adjustments of initial designs often go beyond this limit in budget terms



# Cost and time overruns

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- Cost overruns and non respect of contractual time is often the case in the implementation of underground works
- In accordance with EU legislation, additional works **MUST BE** retendered
- Awarding authorities, designers and contractors often claim and defend that their individual case needs not **RETENDERING** – but....



# Failure to complete projects

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- Failure of Designs and designers
- Failure of contracted budget due to failure of designs or due to unjustified additional works approved by the awarding authority
- Failure of contractor to execute the project
- Combined Failure of all these stakeholders possible



# Retendering the completion of non completed Underground works

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- Legal Difficulties in closing initial contracts
- Difficulties in defining executed quantities after adjustments of designs in case of new categories of works
- Often Necessity for supplementary studies before retendering
- New updated tender documents, specifications, quantities, new provisions for options and possibilities of the awarding authority are **NECESSARY** before retendering
- If not, again the project might not be completed



# Failure of legislation or failure of stakeholders?

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- Could one say that FAILURE is excluded if modern and available technology is combined with :
  - Timely and good preparation of specifications by the awarding authority
  - Sufficient preliminary investigations on the site
  - Good quality of design
  - Wisely flexible and inclusive call for tenders





# EU Commission proposals for public procurement after 2014

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- The Commission published in 2011 its proposals for new legislation applicable to public procurement after 2014 - COM (2011) 896, Brussels 20.12.2011
- Extensive public consultation preceded the publication of Commission proposals
- The principle that any substantial modification of a contract is not permitted, is maintained. Limit of 5% accepted budget increase introduced.
- A new tendering procedure is necessary in other cases



# EU Commission proposals for public procurement after 2014

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- The possibility for up to 50% additional works is maintained,
- But strictly in case of unforeseen circumstances, which could not have been foreseen by an awarding authority fully and correctly executing its duties
- A complete design based on sufficient site investigations is a basic duty in all cases



# Possible ways forward

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- The awarding authorities of underground works must be specialized and experienced
- Everybody cannot do everything
- Awarding authorities lacking expertise should have the possibility to subcontract or to act jointly with other entities, confirmed in managing successfully underground works



## Possible ways forward - 2

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- Designers, contractors and project owners should become in substance more responsible vis a vis the tax payer who is financing underground works
- Designs, Calls and Contracts including all the possible scenarios of possible technical solutions to the inherent uncertainties of underground works ARE NECESSARY