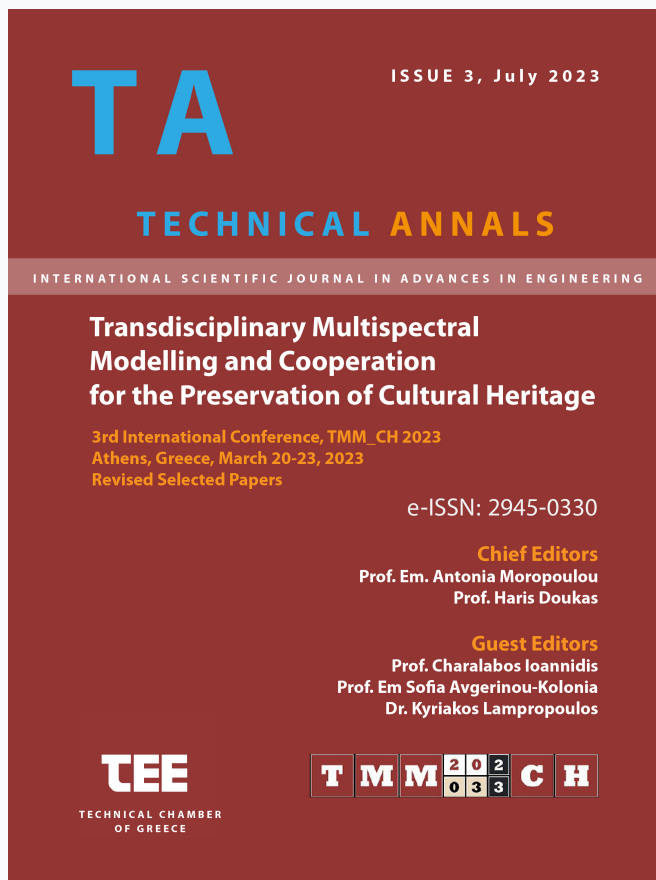


Technical Annals

Vol 1, No 3 (2023)

Technical Annals



Public Procurement and Mediation to Facilitate Procedures for the preservation of World's Cultural Heritage

Maria Sideri

doi: [10.12681/ta.34810](https://doi.org/10.12681/ta.34810)

Copyright © 2023, Maria Sideri



This work is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0](https://creativecommons.org/licenses/by-nc-sa/4.0/).

To cite this article:

Sideri, M. (2023). Public Procurement and Mediation to Facilitate Procedures for the preservation of World's Cultural Heritage. *Technical Annals*, 1(3). <https://doi.org/10.12681/ta.34810>

Public Procurement & Mediation to Facilitate Procedures for the Preservation of World's Cultural Heritage

Maria S. Sideri

Attorney at the Court of Appeal, LLM
Legal Representative at the Hellenic Union of Mediators
siderilawyer@gmail.com

Abstract: All levels of legislation from national rules to international Treaties include provisions for heritage procurement and alternative dispute resolution. Each law has got its own scope and field of application: some of those are obligatory, with direct effect and supreme. Practitioners thus need to apply the right texts for the conclusion of public contracts and for the resolution of their disputes. Mediation is being proposed as a very modern and flexible tool for disputes' settlements arising in a contest. Some examples of successful public procurement may be found here and a superficial approach to the Hagias-Sofia project.

Keywords: public procurement, mediation, world's ancient and religious heritage monuments

1 Introduction

Ancient monuments and other buildings of cultural heritage belong to the State, where they are located. National authorities have got the obligation to save their treasures, along with the power to exploit them. Some monuments in remote locations are bonded to eras of wealth and to immortal heroes [1]. In fact, some of those have got such a large significance to mankind that also lie under the surveillance of UNESCO and are protected from international Treaties [2].

We are arguing herein that public procurement and mediation methods may assist the initiative of the most interested parties, who want to be involved in cases of restoration and reuse of cultural heritage monuments. This is an article following my attendance of the 'International Conferences on transdisciplinary, multispectral modelling and cooperation for the preservation of cultural heritage' (*Athens, 2018-2023*) *.

2 Selecting Suitable Procurement Procedures

Public procurement regulation globally is nowadays aiming at markets' opening, at enhancing development worldwide, allowing growth in decentralized regions via public calls for offers of goods, supplies, services and works. At the same time regulation of procurement allows the combat of bureaucracy and corruption in the public sector. When the Authorities need to purchase, they must follow transparent procedures on a

non-discriminatory basis. It is vital that the contract notices drawn-up by the Authorities are advertised efficiently. We are referring to commercial contracts for pecuniary interest [3].

Provisions for public contracting may be found in all levels of legislation: national laws, the European Directives, the Government Procurement Agreement of the WTO, as well as the Uncitral Model Law of the United Nations [4]. Each type of legislation has got its own scope and field of application. To choose the most suitable framework corresponding to their needs, practitioners must first comply with obligatory rules of supremacy and direct effect.

2.1 Dealing with Procuring Authorities

It may be a Municipality, a Ministry, or other bodies governed by public laws [5]. We are referring to Authorities serving the general interest, being financially dependent from the State and strictly supervised by it. In other words, every State demands order and direction, free exercise of its *ius imperium* all in all [5]. This principle is important to all Entities, who are interested in going into business in a foreign country. It is a rather exceptional case but: appreciation, affiliation, autonomy and recognition of status is, what a religious Authority will expect, when established in a foreign country [6].

National Churches may act as procuring Authorities, while Churches abroad may only act as private entities: for example, in 2010 the ECHR declared the Orphanage of Pringkipos island as property of the Patriarchate of Constantinople. It follows that the Patriarchate is free to act privately for the restoration and reuse of that notable, wooden building of the 19th century [7]. Another kind of analysis would be required though, to explain property rights of religious movable and immovable monuments.

The exceptional tangible and intangible value of a monument may indicate the need for recourse to different types of procedures. For example, the holy Temple of Hagias-Sophia in Istanbul: it is cradle of a great, living religion – heritage of the mankind, an architectural authenticity at risk, it may thus require special procedures.

Additional close surveillance from the competent international organizations may be required in the case of restoration of most prestigious monuments (e.g. UNESCO committees, Churches' international Council).

Ideally, cooperating Authorities may agree on some common policy objectives, which may be included in a public contract as secondary policies [8]: e.g. a clause to fight unemployment during the execution period of the contract, or a common target for environmental protection and the case of pandemics.

2.2 Identifying the Economic Operators

The term includes suppliers, service providers and work contractors. Selection depends on qualitative criteria and on an equal-treatment basis. This means that the procuring authority will require high standards for the financial and technical capacity of the bidders: particular bidders involved in criminal practices, should be excluded and eliminated. Offerors may be groups of companies of various forms (*perhaps any institution to the extent it can justify commercial activity*), even natural persons etc.

Restoration of some monuments may allow offerors to participate in open contests. For example, for the preservation of the ancient theatre in the city-center of Larissa, an international competition was held from the local Authorities. In such cases the contracting entity will collect as many applications as possible; it will assess the offers and will lead to an impartial decision. There may be numerous opportunities for bidders, where public markets, can be opened-up to competition.

2.3 Institutional Funding

Public procurement should be open to institutional funding and procedures should be reviewed by the competent Courts, tribunals etc. There should be transparency at all stages along with equal treatment of the bidders.

Public funding *stricto sensu* had been initially introduced to correspond to the needs of entities, entrusted with a public service (*schools, hospitals and other services of general economic interest*). In Europe the preservation and reuse of monuments has been so important, that it includes 107 art. TFEU. Competent Authorities may receive direct state-aids for the protection of significant cultural heritage (*e.g. the EC state-aid to the Cyprus Cultural Centre*) [9].

Furthermore, there are other specialize institutions and international organization shaving as their scope cultural development. They may offer funds and may allow maintenance and operation of areas of cultural significance [10].

It would need further scrutiny, to understand, that the restoration, maintenance and operation of an emblematic Holy Temple should justify special treatment from the State, such as taxes' exclusion and other financial advantages [11]. One may speak about the exceptional social and spiritual activities of non-economic nature, namely offering pilgrimage and mass services corresponding to the needs and the history of many nations. Speaking in European terminology, a so-called block-exemption should be necessary for the ecclesiastical monuments of the Orthodox Patriarchate, that lie around the cradle-temple of Christianity in Istanbul.

However, the commercial reuse of the surrounding area, may distort competition in the local market and it should thus not be favouritised with advantages.

2.4 Relevant Types of Contracts

Design Contests: are used when the contracting authority needs a plan, especially in the fields of town-planning and civil engineering. They are mostly used in the case of prestigious buildings, also for the design of IT infrastructure projects. The publication of a 'Notice' for a negotiated or a restricted procedure, is necessary and then a Jury representing the procuring Entity, will assess the offers/proposed projects and will reach a decision. Design contests may be held independently from the rest of the work [12]. The design will be usually followed by either the execution of a public work, or the service of an IT project.

The complexity of each project, will indicate the need for recourse to a so-called '**framework agreement**' [13] for the parties to be able to identify all the contracts involved. These definitions are important, as they set the threshold values, consequently affected by the field of application of legislation. They may furthermore be helpful, to

create an eligible way in the multiple, administrative permissions and negotiations required, securing at the same time legal certainty.

Public Private Partnerships – PPPs: we are referring to multi-complex financial and legal agreements, which may cover all stages of a public contract and allow economic operators to enter in a competitive dialogue with the public sector [14]. PPPs nowadays fall within the scope of all legislations. They may be mostly suitable for the renovation and reuse of an ancient area and have proved to be very useful in practice.

Public Concession: is a special type of a PPP, where the works or services and supplies to be carried-out, would consist either in the right to exploit the work, or in this right together with payment. A concessionaire often accepts the works and then the operational and financial risk of providing a rather public service, in the broader sense, in return for the chance of making a profit through the exploitation of the service. A concession would be most suitable to combine private practice along with serving the public interest. In our thoughts a concession will be necessary for the reuse of a holy temple, as a museum open to tourists with special and exclusive rights granted.

P.F.I. – a Private Finance investment: we are arguing here that holy cultural heritage monuments, strongly bonded to the history of a great, living religion (*the Justinian-Byzantine temple of Hagia-Sofia*), should be entrusted to the experts of that nation [15]. We are talking about the cradle of Orthodox Christianity around the world, an architectural authenticity: that ethical criterion alone, should lead to the conclusion of a concession agreement via P.F.I., from entities representing the Patriarchate of Constantinople and for the nations whose memories are closely attached to it. That decision from the Turkish part, could be justified even on the basis of philanthropy.

Supplies and services contracts: supplies involve the purchase or rental of goods/subjects of commercial transaction e.g. the leasing of cranes. Services in an even broader category, which covers all public contracts for pecuniary interest, which do not fall within the field of application of works or supplies' contracts. These may include immersive reality tools in the case of virtual reconstruction of monuments, reconstruction and visualization of heritage artworks, other 3D modeling's, novel techniques and digital modelling.

- Repair services: *e.g. frescoes retouching*
- Research & development services [16]
- Technical consulting services: *e.g. eco-smart strategies*
- Architectural services [17]
- Computer supplies and services: IT software, *e.g. www.acropolisvirtualtour.gr*

At this point we should note that European, international and national laws set specific standards e.g. the European technical approval, so-called "EC". This means that the characteristics described in an offer/documentation, should meet certain criteria of methods, quality and functions [18]. However, technical requirements/norms should be setting minimum standards and by all means these should not have such a character, that will undermine free participation in a contest. The most important minimum standards should be requirements for security: public health and safety. It follows, that in contracts referring to the restoration of a place of significant cultural heritage, the required standards will be very high, even if the procedure will not be open to

competition. So, how will the parties involved, commit to the highest values and bring the best results?

3 Mediation & Dialogue's Facilitation

Mediation has been rapidly developing as an international language for dispute resolution. Although it began as a means to settle cases in the private sector only, its scope and field of application progressively proves to be efficient in all types of disputes [19]. The parties involved may deliberately choose mediation procedures rather than recourse to Court, which might end up to be exhausting: very expensive and time consuming. As a means to first serve the private sector, mediation may be useful in cases related to the trading of collectables. Furthermore, it can be very useful for the loan and exchange of movable monuments between museums.

Most importantly mediation will allow the parties to freely express their feelings for actions of the past. This is why we are arguing, that tracing mutually beneficial interests, is the most preferable way to bring closer people for centuries in conflict.

Relevant laws may be found at all levels of legislation: national laws, in the European directives, the Uncitral Model law and the globally known Panels for Disputes' Settlements of the WTO [20].

Court procedures are necessary, as Judges have got the power to impartially impose sanctions, to judge on criminal matters, to implement compensations, to re-assess relationships between private persons and the State. Access to the judicial system should not be undermined and no one should escape with impunity. The heads of the European Commission for citizens' rights argue that: 'better results will be reached by achieving a balanced relationship between mediation and judicial proceedings'[21].

3.1 Mediation in Public Contracts

Mediation should be part of the free access to review procedures at all stages of public procurement: from the first Notice to the execution of the contract. A '**mediation Clause**' should be included to all contracts for the parties to have equal access to justice and alternative dispute resolution. Such a clause is mandatory in European public contracts [22]. From another point of view, the Greek law of public procurement n. 4413/2016 has numerous provisions, giving to bidders the opportunity for recourse, arbitration, conciliations and other alternative dispute resolution means, issuance of non-binding Opinions, at the same time with a right for Court reviews (*from interim measures, to the highest levels of jurisdiction*).

Furthermore, before the conclusion of a contract, during the so-called '**technical dialogues**', the procuring Authority would require access to all kinds of information e.g. on new technologies, in this frame it will be the bidder's duty to present all the necessary know-how at a preparatory stage. These dialogues are almost vital, in contracts where confidentiality and security reasons prevail. However, such dialogues may not be used, during the award procedures as a means to distort competition. When there is a necessity to share exclusive information, when the parties need to tackle some technical issues and requirements, then dialogues are mostly indicated [23].

Mediation methods will also be useful during the '*competitive dialogues*' before the conclusion of a public-private partnership e.g. the exemplary PPP of the medieval city of Rhodes, as has been presented elsewhere. Dialogues among persons with mediation skills, will allow negotiations in confidentiality and impartiality, which are vital for a monument of world's cultural heritage, as it has been noted by S. Panagopoulos in [14].

3.2 Cross-Border Cultural Mediation

'Communities are the first Heritage Protectors' said Professor V. Michel of the Poitiers-HerMA Uni., on behalf of UNESCO in 2018 [24].

Further to legality, the author has taken into account this phrase: -who can best preserve a Holy Temple in a remote location, how can we be friendly to the local organizations and the civil servants? A bit of cross-border cultural mediation will be helpful, when the circumstances do not allow immediate understanding. For example, encouraging public dialogues between the inhabitants and the Orthodox Patriarchate in Istanbul, may be efficient, because these two Authorities are obliged to live together and share a small part of the city of Istanbul.

In the past Conferences the ideas of creating circular economies, as well as developing pilgrimage tourism have been presented [25]. These goals may not seem too far-fetched, if the Authorities and the most affiliated parties engage from the beginning to creative dialogues using mediation principles and skills. It will be necessary for locals to discuss in honesty and forgiveness, so as to be pro-active against violent reactions. The values of alternative dispute resolution may help to avoid blaming and bullying amongst inhabitants [26]. Mediation methods will allow approaches closer to human rights. For example, an invitation for cooperation between professional archaeologists, can be a further fine initiative.

Even in cases where recourse to Courts has been inevitable due to severe criminal acts of the past (*e.g. the case of Cyprus, where international Court judgements bind the parties*), mediation may provide a solution towards the future [27].

The Euro-Tunnel has been a European work followed by quite a fascinating legend: for centuries the French and the English had been suffering from dreadful sea-battles, which were taking place in the Manche Channel. One would just need to step on shipwrecks and cadavers to cross that Sea. But a bit after the end of the 2nd world war, those two countries realized their common interests: the French started digging from their part of the coast and the English started digging from their side, until they actually met underwater, where they shook hands, giving a promise for world peace. Since 1998 the Euro-Tunnel has been one of the busiest places in Europe transferring everyday people and goods.

4 Conclusion

The restoration of buildings of cultural heritage is included in all types of procurement, offerors should compete and such initiatives should be open to institutional funding and review procedures. PPPs may prove to be an ideal solution for emblematic monuments. A holy temple though, heritage to mankind, should be protected by a

concession contract and its restoration should be entrusted to the most affiliated party via a P.F.I.

Ideally, restoration and reuse procedures begin with a design contest. The parties should engage in creative, technical dialogues using mediation principles, so as to achieve the best results. Economic operators from their part will need to prove excellency in financial and technical qualifications along with competency. Dialogues and mediation will assist at every stage.

We have tried to tackle legal issues on initiatives that have been lasting for decades, accompanied by demanding administrative permits, international surveillance, tough negotiations and Court rulings. That effort should be easier in a framework of goodwill and legal certainty.

References

1. Io. Tsipitsiou-Karimpali, 'The protection of ancient monuments and of cultural heritage under the light of Greek law 3028/2002', Sakkoulas eds., 2004, esp. pp.15-100. Details on distinguishing between movable and immovable monuments, on the different historical periods, on ecclesiastical and ancient monuments etc.
2. A. Prepis, 'Restoration and management of world heritage cultural sites: problems and religious tourism – challenges and perspectives', in "Transdisciplinary multispectral modeling and cooperation for the preservation of cultural heritage", hereinafter as 'the Conference'*. Revised selected papers Vol.1-Part II, pp. 239-261, <https://www.tmm-ch.com>.
3. Prof. Sue Arrowsmith, detailed bibliography in <https://www.nottingham.ac.uk/law/people/sue.arrowsmith>
4. See for example in https://single-market-economy.ec.europa.eu/single-market/public-procurement_en, then for the Government Procurement Agreement of the World Trade Organisation https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm, and the Uncitral model law in <https://uncitral.un.org/en/texts/procurement>
5. P. Trepte, 'Public Procurement in the EU – a practitioner's guide', Oxford Uni. Press, 2007. Analysis in pp. 89-134 and then pp. 319-480.
6. Hannah Segal, in <https://psychoanalysis.org.uk/articles/the-mind-of-the-fundamental-istterrorist-not-learning-from-experience-hiroshima-the-gulf-war> '...the combination of the military and the religious is the most psychotic assumption, that may dominate human groups...'
7. J. Poullos 'on the greatest challenge in the management of living religious heritage: linking the authenticity of tourist experiences to the authenticity of religious tradition', in the Conference's Vol 1-Part II, pp. 262-271, 'religious communities are promoted as a group with the highest responsibility in the operation and management of their sites'.
8. European Court of Justice, case C-225/1996 'Nord Pas-de-Calais' (esp. par. 46-54).
9. European Commission Notice on the notion of State-Aid as referred to in Article 107 of the Treaty on the functioning of the EU. OJ C 262/2016.
10. B. Burnham, 'Towards a new heritage financing tool for sustainable development', in the Conference's Vol. 1-Part II, pp. 275-288. Also, see the organisation www.europanos-tra.org
11. E. Mouameletzi, 'Commenting on ECJ C280/00, the Altmark case', DiSKE issue 1/2004, pp. 42-54, same author and journal, issue 2/2004 'Recovery of unlawful state-aids' pp. 149-160.

12. See ECJ the 'Le Mans' judgement, C-340/2002. Further details on design contests in P. Trepte pp. 232-234 and 401-404.
13. G. Trantas, 'Framework Agreements – an introductory approach', in "Public Procurement and State-Aid Law Review", hereinafter "DiSKE". Magazine from the Centre of International and European Economic Law, Thessaloniki, 2004-2015, www.cieel.gr. Issue 2/2008.
14. C. Boniotti, 'Public built, cultural heritage management: the public-private partnership', in Conference Vol.1-Part II, pp. 289-298. Also, S. Panagopoulos, 'PPPs in Europe and Greece', in DiSKE issue 3/2005, pp. 337-348.
15. the Conference Vol. 1-Part I: the project of the rehabilitation of Holy Sepulchre's Holy Aedicule as a pilot multispectral, multidimensional, Novel Approach through transdisciplinary and co-operation in the protection of monuments, pp. 27-102. Also in Vol 2-Part I: Sustainable Preservation and Management lessons learnt on emblematic monuments, pp. 1-128.
16. in Conference Vol.1-Part II: chapter 'Digital heritage', pp.103-260. Also in conference Vol.2 the chapter on 'Scientific innovations in the diagnosis and preservation of Cultural Heritage', pp.1-50.
17. G. Padeletti 'Heritage Resilience against climate events on site- HERACLES project' Mission and vision', in Conference Vol. 1-Part II. In the same chapter St. Athanasiou 'the Holy Sepulchre as a religious building. How the earthquakes, were the incentive to restore the Holy Sepulchre'.
18. K. Gogos, 'the subject of a public contract following technical specifications', in DiSKE, issue 3/2005, pp. 316-321. Also see, K. Siountri et al 'The digitalization of the tangible cultural heritage and the related policy framework', the Conference Vol.1-Part I, pp. 250-260.
19. Io. Anastasopoulou 'Mediation in civil and commercial Disputes', Nomiki Vivliothiki eds., 2011. Further information in www.eledi.gr
20. Especially see the European directive 2008/52. On behalf of the United Nations there is variety on dispute resolution texts, mediation may be found in <https://uncitral.un.org/en/texts/mediation>. The WTO panels in https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p1_e.htm
21. G. de Palo & L. d'Urso 'Achieving a balanced relationship between mediation and judicial proceedings', DG for Internal Policies – citizens' rights & Constitutional affairs, 2016, pp.9-29.
22. See ECJ C-75/2016 Menini vs Banco Popolare, as well as the Alassini case in C-317-320/2008 on the principle of effective judicial protection and the condition to attempt an out-of-Court dispute settlement.
23. E.g. in the Conference's Vol. 1, Chapter 3 'Discussing resilience to climate change and natural hazards', Pp. 351-423.
24. K. Cloke 'Mediating dangerously: the frontiers of conflict resolution', San Francisco, Jossey-Bass, 2001.
25. Conference Vol. 1-Part II 'Reuse, circular economy and social participation as a leverage for the sustainable preservation and management of historic cities', pp. 273-321. Also, in Conference's Vol. 2 'Preservation, reuse and reveal of cultural heritage through sustainable land management. Rural and urban development to recapture the World in crisis through culture', pp. 229-284.
26. As in reference [6] above, on the assault of feeling of security: '...from the superego of a nation to the trauma of another... not learning from the experience'.

27. M. Pelekanos & B. Ioannou, 'Education and training for the preservation of cultural heritage, as a strategic aim of the department of Architecture – Frederick Uni. Of Cyprus', in Conference Vol. 1-Part I, pp. 285-308.