COVID-19: the French Government’s emergency measures in public procurement law

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The French Government has taken emergency measures in public procurement law to deal with the COVID-19 outbreak.

1. Regarding awarding and execution of public procurement contracts in a situation of a health crisis in France

The direction of legal affairs of the French Economy Ministry (the DAJ) has issued a recommendation dated 18 March 2020 as a reminder of the national rules applicable to i) the award and, ii) the execution of public procurement contracts in the situation of a health crisis.

i. Award of public procurement contracts: the use of accelerated procedures

As reminded by the DAJ, where private contractors are unable to carry out the work for which they have contracted, public authorities have the option of having these services carried out by other companies without this constituting a contractual fault. They, however, need to award new public procurement contracts.

In this context, public authorities can use two specific tools:

- If their need is urgent, public authorities can then apply reduced advertising deadlines (3° of article R. 2161-8 of the Code de la commande publique (CCP)) as part of a competitive bidding process.
- They may also implement the procedure without prior advertising or competitive tendering provided for in cases of pressing emergency (Article R. 2122-1 of the CCP) if the urgency is such that meeting their needs is incompatible with these reduced deadlines.

In any event, the DAJ points out that such purchases should only be made for the amounts and duration of the purchase strictly necessary to meet urgent needs. They may be renewed if the deadlock is extended.

ii. Execution of public procurement contracts: the recognition of the characterization of force majeure cases.

As general containment measures have been decided on Monday 16 March 2020, many companies holding public procurement contracts will be unable to comply with any or all of part of their contractual commitments.

The DAJ reminds that these difficulties can fall under the regime of force majeure, which exonerates the parties to the contract from any contractual fault. Except in cases of contractual arrangements for cases of force majeure, parties will determine on a case-by-case basis whether the following three cumulative conditions are met:
a. The event was unforeseeable. According to the DAJ, this condition is met in the present case.

b. The event is external to the parties. According to the DAJ, this condition is also met.

c. The service provider or public purchaser is absolutely unable to continue, momentarily or definitively, the execution of all or part of the public contract (deadlines, quantities, compliance with certain specifications of the services to be performed, etc.).

Finally, it is interesting to note that following Government’s request, the DAJ recommends that public authority, in view of the exceptional aspect of the crisis, not hesitate to acknowledge that the difficulties encountered by their co-contractors are attributable to a case of force majeure.

If the recommendation focuses on public procurement contracts (= marchés publics), the same principles should apply to concession and public-private contracts and all “public law ruled” contracts in France.


As provided under Article 11 of the emergency law to deal with the COVID-19 outbreak (Loi n° 2020-290 du 23 mars 2020 d’urgence pour faire face à l’épidémie de covid-19) (the Emergency Law), the French Parliament has entitled the Government to order several exceptional measures to adapt our rules to the emergency needs of the country.

Following that, the Ordinance no 2020-319 dated 25 March 2020 adapts the rules governing the award, procedure or performance of contracts subject to the Code de la commande publique and public contracts not covered by it during the health crisis caused by the COVID-19 outbreak. These rules apply to contracts performed or concluded during the period starting 12 March 2020 until the end of the state of health emergency declared by article 4 of the Emergency law dated 23 March 2020 (i.e. 23 May 2020, but this period can be extended by the law), increased by a period of two months (i.e. at least 23 July 2020). It is interesting to note the following measures:

- Regarding award of public contracts subject to the Code de la commande publique: deadlines for the receipt of applications and tenders in ongoing procedures must be extended for a “sufficient” delay to enable economic operators to submit applications or tenders (article 2). For ongoing award procedures, the public authorities are also allowed, under certain circumstances, to amend competitive tendering procedures set out in the consultation documents (article 3).
- The possibility of extending beyond the term contracts which have expired during this period if a new competitive tendering procedure cannot be implemented, by amendment (article 4).
- Public authorities can, through an amendment, modify the terms of payment of an advance, and its rate can be superior to 60% of the amount of the contract or purchase order (article 5).
- Execution of public contracts: new rules apply in case of execution difficulties if the contract does not provide more favorable rules to the contract holder (article 6):
  - Prorogation of the execution delay of the contract if the contract holder is not able to comply with the initial delay at the holder’s request and before expiry of the delay.
  - Under certain circumstances, if the contract holder is not able to execute all or any part of the contract, i) he must not be sanctioned by the public authority, nor be held liable and ii) the public authority is entitled to conclude a substitution contract with another company for needs that cannot be delayed.
  - If the contract or a purchase order is canceled or terminated because of measures taken by the administrative authority, in the context of health crisis, the contract holder may be compensated by the public authority for expenses incurred if directly attributable to the execution of a canceled purchase order or a terminated contract.
  - In the case of a suspension of a lump-sum ongoing contract decided by the public authority, the contract must be settled following the terms and for the amount provided under the contract. At the end of the suspension measure, an amendment will determine the consequence of such measure on the contract.
  - Regarding concession contracts:
    - If the public authority has to suspend the execution of the contract, any payment to such entity is suspended if the situation of the contract holder justifies it and according to its needs, an advance on the payment of the sums due by the public authority to the contract holder may be paid.
    - If the public authority has to significantly amend the terms and conditions of the execution of the contract, the contract holder is entitled to compensation for the additional cost resulting from the change only if the continuation of the contract execution requires the use of additional means not provided for in the initial contract and which
would represent a burden that is manifestly excessive for the contract holder's financial situation.

Two other Ordinances dated 25 March 2020 also concern public contracts.

The Ordinance no 2020-305 adapts rules regarding proceedings before the administrative court. It allows for the adaptation of the rules relating to the composition of the court, and the modalities of judgment (e.g. ruling without hearings in certain specific cases, using electronic communication including for hearings and the transmission of procedural acts, etc.). It also specifies that article 2 of Ordinance no 2020-306 of 25 March 2020 on the extension of time limits during the period of public health emergency and the adaptation of procedures during that period is applicable for appeals before the administrative court (article 15). Therefore, any appeal related to a public contract that should have been lodged within a period between 12 March and 23 June 2020 will be deemed to have been made if it is made, from the expiry of this period, within the legal time limit for action and in any case within the limit of two months.

In addition, the provisions of Title II of Ordinance no 2020-306 provide for a certain number of adjustments to the rules applicable to time limits and procedures in administrative matters. These include the suspension of time limits at the end of which an implicit decision may be taken, from 12 March 2020, if they have not expired, until 23 June 2020 (article 7).

Therefore, these temporary procedural rules concern public contracts and projects both at the pre-contractual stage (prior administrative authorizations in particular) and at the litigation stage.

In this exceptional context in relation to the health crisis in general and in the application of these new measures in particular, our Public Law and Project team had the opportunity over the last few days to:

- assess the possibilities for the contracting parties to invoke the theories of *force majeure*, unforeseeability and “*fait du prince*” and their consequences in terms of exemption from contractual sanctions, termination of the contract and/or compensation for losses suffered;
- advise various clients on the notification of legitimate causes or cases of force majeure in relation to the health crisis and its consequences;
- assist clients, contracting authorities and candidate consortia, in the decision to postpone or the request for postponement of the deadlines for the submission of applications and tenders;
- apply to the court for interim relief (in pre-contractual emergency proceedings) and participate to a public hearing by telephone.

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