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THE PUBLIC PROCUREMENT CODE: A GREAT TOOL

Real Estate and Construction Environmental Law Public Law and Public Procurement Law European Law | 21/12/18 | Vincent Brenot Emmanuelle Mignon Hélène Billery

2018 ends with the publication of the French **Public Procurement Code**.

Ordinance No.2018-1074 regarding the legislative part of the Public Procurement Code and Decree No.2018-1075 regarding the regulatory part of the Public Procurement Code were published in the *Journal Officiel* on December 5, 2018.

The Public Procurement Code will on be **applicable as of April 1st, 2019**, time to allow the "actors" (new terminology used by the table of contents of the code) of public procurement (buyers and economic operators) to become familiar with the new architecture of the applicable rules.

The thirty or so scattered texts that have, hitherto, governed French public procurements (texts relating to public procurement, concessions, payment periods, supervision of public works, electronic invoicing, arbitration, subcontracting, etc.) have been replaced by a single text of 1,747 articles.

A didactic architecture

The code is intended to be an easy tool to use on a daily basis by public procurement actors. It includes a preliminary title and three parts.

The preliminary title, composed of articles L.1 to L. 6, contains the main principles common to all public procurement contracts, which are in a way part of its identity.

The very first article (Article L.1) recalls the principle of free choice for contracting authorities, how they want to meet their needs (use of their own resources or through to public procurement).

Article L. 2 defines public procurement contracts by highlighting the four fundamental criteria: the existence of a contract, concluded for a consideration, by a contracting authority, to meet its needs.

Article L. 3 reorganizes the former articles 1 of Ordinance No. 2015-899 of July 23, 2015 on public procurement and Ordinance No. 2016-65 of January 29, 2016 on concession contracts about the fundamental principles of public procurement: the wording that prevailed until now (principles of free access to public procurement, equal treatment of candidates and transparency of procedures) is replaced by a wording that puts the principle of equality, which is the main objective, before the other two principles that are the modalities: "*Contracting authorities shall respect the principle of equal treatment of candidates for the award of a public procurement contract. They shall implement the principles of free access and transparent procedures, under the conditions defined by this Code. These principles ensure the effectiveness of public procurement and the proper use of public funds*".

Article L. 4 states that public procurement contracts may not be awarded to economic operators who have been subject to exclusionary measures defined by the Code. Article L. 5 recalls the principle that public procurement contracts are for a limited period. Article L. 6 incorporates some essential rules of public procurement such as the theory of unforeseen circumstances, the principle of continuity of service for contracts for the performance of the public service, the power of unilateral modification by the contracting authority, or the principle of compensation of the economic operator in the event of termination for public interest reasons.

Then, the code consists in three parts:

- the first one specifies the scope of the code excluding the transfers of competences and responsibilities between contracting authorities for the purpose of carrying out missions of general interest without remuneration for contractual services, subsidies and occupation of public lands, and sets out a number of definitions (public contracts, concessions, contracting authority, contracting entity, network operator, etc.);

- the second one is devoted to public contracts and is divided into five books: the first includes the general provisions, the other is devoted to the specific provisions of partnership contracts, defense and security contracts, contracts relating to public and private project management and finally "other contracts" (see below);

- the third one relates to concessions.

Not surprisingly, this is the binary distinction resulting from the 2014 European directives, which has obviously been the main focus of the structuring of public procurement since their enactment in 2016.

The plan of each of the parts devoted respectively to public contracts and concessions follows the chronology of the life of the contracts: preparation, choice of procedure, initiation of the procedure, examination of applications and then tenders, award, performance.

Some new features

The new corpus is a codification without modification of the existing rules, in other words a compilation of existing texts without legal innovation, subject to the modifications necessary to ensure respect for the hierarchy of norms and the editorial consistency of the texts, harmonize the state of law, remedy any errors, repeal obsolete or no longer applicable provisions, and adapt the texts to overseas communities. Experience proves that it is always in these details that the traps are hidden and that even a very rigorous codification cannot be made without few tiny modifications.

Some of the new features include:

- the removal of the distinction that existed between the competitive procedure with negotiation for contracting authorities and the negotiated procedure with prior call for competition for contracting entities, in favor of the procedure with negotiation: the procedure with negotiation is thus unified regardless of the status of the purchaser;

- the rewriting of the hypotheses under which public contracts and concessions can be amended without reopening competition. This clarification is more than welcome since the transposition of the 2014 Directives on this point was incomprehensible;

- a summary presentation and definition of the specific purchasing techniques (framework agreement, competition, qualification system, dynamic purchasing system, electronic catalogue, electronic auctions) to facilitate their identification;

- the integration of provisions on alternative dispute resolution (conciliation, mediation, transaction, arbitration) to encourage public procurement actors to move towards these forms of dispute resolution;

- The codification of well-established case law, in particular as regards unilateral modification or termination, *force majeure*, abnormally low bidding, the definition of returnable assets and their legal regime in concessions, or the possibility, in urgent cases, to award a concession without prior advertising or competition.

Some uncertainties

One of the fundamental questions that remains uncertain at this stage is whether excluded contracts (referred to as "other contracts" in the Code, Articles L. 2500-1 et seq.) have to comply with the fundamental principles referred to the Article L. 3.

The rapport President of the Republic relating to the code, states that: "*When the* Conseil d'Etat *examined the public procurement code, it stressed the need to draw the attention of public procurement actors to the fact that, in accordance with case law, these principles may apply, according to procedures that it is their responsibility to define, to the award of certain contracts, even though the code does not lay down any specific rules for them*".

Thus, purchasers are invited to assess, on a case-by-case basis, for excluded contracts, whether a minimum level of transparency and competition should be organized. The situation could differ depending on the contracts.

For contracts concluded in the context of internal public sector relations (in house, public-public cooperation), it seems possible to award them without a prior advertising or competition.

Likewise, once the bill of law regarding the removal of over-transposition of the European directives into French Law will be adopted and incorporated into the Code of public procurement, the legal service contracts regarding the legal representation of a client by an attorney and the provision of legal advice related thereto, should no longer be subject to publication and competitive tendering obligations. This seems to be the result of an opinion issued by the *Conseil d'Etat* on September 27 2018.

For other contracts, such as debt contracts, research and development services, etc. (article L. 2512-5), some doubts remains about their exclusion from the publication and competitive tendering obligations. It will be necessary to follow the evolution of case law on this point.

An evolving Code

In addition to the incorporating the provisions of the bill of law on the removal of over-transpositions of European directives into French law (see public legal service contracts mentioned above), the code will be amended by the draft law on the growth and transformation of companies (called "*loi PACTE*") with, in particular, a prohibition on issuing service orders for necessaries additional works for the proper completion of the work without remuneration to the contract holder.

In a shorter term, the code will incorporate Ordinance No. 2018-1135 of December 12, 2018 relating to the management of railway infrastructure and the opening to competition of rail passengers transport services along with, in principle before the end of 2018, draft decrees on various measures related to public procurement contracts.

The Legal Affairs Directorate of the Ministry of Economy legal announced that it will shortly publish a concordance table between the new Public Procurement Code and the 2015/2016 ordinances and decrees and that it will update its files before April 1st, 2019. The code will include an annex compiling all decrees and opinions related to public procurements (in particular the orders on thresholds) in order to make it a complete and practical tool for the public procurement actors.

The lawyers of our Public, Regulatory and Environmental Department will organize two training sessions at the beginning of 2019.