

ARTICLE

CORONAVIRUS AND PUBLIC PROCUREMENT

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On 18 March 2020, the Legal Affairs Department (the "LAJ") of the French Ministry of the Economy and Finance issued a press release clarifying the conditions to use negotiated procedures without prior publicity or competitive tendering for the award of certain public procurement contracts, due to the "extreme urgency" caused by the current health crisis. The LAJ also clarified the statements of the Minister of the Economy and Finance regarding the possibility for the contracting parties to a public procurement contract to invoke the *force majeure* that also arises from the COVID-19 pandemic.

1- Public procurement during the health crisis

Public entities, especially public hospitals, are facing specific urgent needs to contain the health crisis. The necessity to satisfy these urgent needs almost immediately is not compatible with the duration of standard public procurement procedures set by the French Public Procurement Code (the "FPPC").

However, the FPPC allows public authorities to waive procurement procedures in the event of an "urgent emergency" (Article R. 2122-1 of the FPPC), which may be justified, among other things, by public health considerations. While there is obviously an urgent need to proceed with certain public purchases (e.g. medical protection equipment), the LAJ nevertheless points out that "such purchases must be made only for the amounts and duration strictly necessary to satisfy urgent needs. They may be renewed if the deadlock is extended". Thus, the LAJ follows the intent of the text of the FPPC, whose article R. 2122-1 specifies in fine that "the contract is limited to the services strictly necessary to meet the emergency situation".

Implicitly, the LAJ indicates that the health crisis shall be used as an opportunity for a public entity to simplify purchases that do not satisfy an immediate need or constitute a deadweight for certain companies by securing public orders for an excessive amount or duration.

Despite the extreme gravity of the current health situation, both the FPPC and the clarification provided by the LAJ and the case law developed by the French administrative judge and the Union judge call for caution and moderation in the use of negotiated procedures without competitive tendering procedures.

Thus, public authorities wishing to award a public procurement contract without prior publicity or competitive tendering must ensure that the contract does not last longer than the duration of the health crisis, that the services provided for by the contract are performed only during the crisis, that the scope of the contract is limited to the fight against the plague or its immediate consequences and that the amount or volume of the services is not disproportionate to the need resulting from the health crisis.

2- The performance of public contracts during the health crisis

Due to the health crisis, the performance of some public procurement contracts is jeopardized (delays due to supply difficulties, movement restrictions or staff unavailability).

However, failure to comply with deadlines can be sanctioned by penalties inflicted to the contracting party of the public authority. The recognition of a case of *force majeure* allows the contracting party to suspend or no longer perform its contractual obligations. For an event to be considered as a case of force majeure, it must be unforeseeable, irresistible and external to the parties. The administrative judge is usually very strict when assessing whether these three cumulative conditions are met. To avoid adding uncertainty to the current confusion, the Minister of the Economy and Finance announced on 28 February 2020 that the coronavirus would be considered as a case of *force majeure* for companies in the context of public contracts concluded with the State.

In its communication of 18 March 2020, the LAJ clarified the legal scope of the ministerial statement by indicating that "without presuming provisions that could be adopted as part of the emergency bill to deal with the COVID-19 epidemic, these difficulties may fall under the force majeure regime, which exonerates the parties to the contract from any contractual fault. In such situations, therefore, companies should not be subject to penalties or any other contractual sanction in the silence of the contract on force majeure".

The LAJ extends the scope of this declaration to all public purchasers, including local authorities (for the latter, due to the decisional autonomy that they enjoy as a result of the decentralisation process, this is however only a recommendation and not an obligation).

In addition, the LAJ invites public purchasers, as with the use of negotiated procedures without competitive tendering procedures, to be vigilant by encouraging them to "check whether the situation resulting from the current health crisis, in particular containment, actually no longer allows the service provider to fulfil its contractual obligations".

Finally, it should be noted that the Government clearly considers *force majeure* solely from the perspective of exemption from penalties and other contractual sanctions and not from the perspective of the termination of public contracts.

