

ARTICLE

COVID-19: ADJUSTMENT OF THE RULES OF PUBLIC PROCUREMENT

Real Estate and Construction Environmental Law Public Law and Public Procurement Law European Law |
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Article 11 of Act no. 2020-290 of 23 March 2020 *on emergency measures to deal with the covid-19 epidemic* (the "**Covid-19 Act**") authorises the Government to issue an ordinance within three months following its enactment in order to take all necessary measures to tackle the covid-19 health epidemic crisis. The Government is also entitled to take retroactive measures that may apply as of 12 March 2020.

With regard to public contracts, article 11 of the Covid-19 Act allows the Government to adapt by ordinance "*the rules for awarding, delays for payment, performance and termination, in particular those relating to contractual penalties, set in the public procurement code, as well as the provisions of public contracts having such a purpose*".

On these grounds, the Government adopted Ordinance no. 2020-319 of 25 March 2020 *on various measures for adapting the rules for the award, procedure or execution of contracts subject to the Public Procurement Code and public contracts not covered by it during the health crisis caused by the covid-19 epidemic* (the "**Ordinance on Public Procurement and Covid-19**"). This Ordinance is applicable until the end of the state of health emergency, extending by an additional two-month period.

This ordinance will provide legal grounds to several existing solutions, the statements made by the Government as well as the numerous press releases published by the various State departments, in particular the State Purchasing Department (the "**SPD**") and the Legal Affairs Department (the "**LAJ**").

The Government has also adopted two other ordinances likely to impact public procurement contracts: one concerns the extension of deadlines and the other concerns the organization of administrative jurisdiction during the health crisis.

1- Public procurement rules during the health crisis

The health crisis is likely to impact public procurements in the two cases discussed below.

On the one hand, the need to respond almost immediately to certain requirements resulting from the health crisis is inconsistent with the duration of standard public procurement procedures provided for in the Public Procurement Code (the "**PPC**"). In a press release dated 18 March 2020, the LAJ thus specified that the exemption set by Article R. 2122-1 of the PPC, which allows a public authority to waive the rules for awarding contracts in the event of an "urgent emergency", should apply for the awarding of public contracts to satisfy the needs resulting from the health crisis (for more details, see our flash of 20 March[AD1]).

On the other hand, the health crisis could have an impact on pending procurement procedures. Indeed, as a result of the disruptions caused by the health crisis, it may be necessary to postpone the dates for applications or submission of bids, as well as the date of selection of bids. Administrative case-law has already recognised the possibility for a public authority to extend the deadline for the submission of applications and tenders. Extending the deadline for the submission of applications or tenders requires the publication of a corrective notice, the amendment of the consultation rules and the amendment of the contractual deadlines impacted by the extension, such as the starting date for the performance of the services.


The public authority may also extend the period of validity of the bids submitted, provided that it has been requested to do so and that all candidates agreed to such extension (*Conseil d'Etat*, 24 June 2011, Commune de Bourgoin-Jallieu, no. 347889).

Articles 2 and 3 of Ordinance on Public Procurement and Covid-19 provide that the deadlines as well as the terms and conditions of competitive bidding procedures may be amended in order to allow candidates to submit their applications and to comply with the principle of equal treatment of candidates.

With regards to the ongoing consultations, the SPD recommended in a press release of 20 March 2020 that the pending tender procedures should be pursued to ensure that the contractual documentation be prepared and effective, so that the restart of the activities can be initiated as quickly as possible as of the end of the crisis, by granting, on a case-by-case basis and if necessary, extensions to the deadlines for receipt of applications or tenders. The SPD also recommends that the conditions for site visits and the negotiation or dialogue sessions should be adapted if necessary. For example, negotiation sessions could be held by videoconference.

Finally, in the event that it is impossible to continue the procedure, the public authority may still declare the procedure null and void and initiate a new procurement procedure with the candidates once the health crisis is over (Articles R. 2185-1 and 2185-2 of the PPC).





As authorized by the Covid-19 Act, the Government enacted Ordinance no. 2020-305 of 25 March 2020 *adapting the rules applicable before the administrative courts* provides for the possibility for the interim relief judge to rule without a hearing on applications for interim relief. Article 7 of the same ordinance also provides for the administrative courts to schedule hearings by any electronic means of communication to hear the various parties to the proceedings.

In practice, the containment measures taken to contain the Covid 19 epidemic have drastically slowed down the activities of the administrative courts. The extension of deadlines could thus make it possible to safeguard the deadline for candidates evicted from procurement procedures, in particular for pre-contractual summary proceedings. However, the suspension of the deadline for judicial review could also paralyse the action of public authorities, as they are no longer allowed to sign their contracts once a pre-contractual summary procedure has been filed, until the order of the judge in charge of the interim measures is issued. Finally, throughout the duration of the health crisis, the starting point of the deadlines for the judge to reach a decision is postponed to the first day of the second month following the date of termination of the state of health emergency.

2- The performance of public contracts during the health crisis

The health crisis is also likely to make more difficult the performance of public contracts, if not impossible, because of the difficulties in supplying companies or in mobilising staff due to confinement measures, thus resulting in exceeding the contractually agreed performance deadlines.

For this reason, in order to avoid undermining companies, the Minister of the Economy and Finance has decided to recognise the health crisis as a "case of force majeure" for all State and local authority procurements. This recognition will thus enable companies to avoid penalties for delays and to request the termination of the public contract in case of impossibility to perform the contract (for more details, see our flash of 20 March).

In a press release dated 20 March 2020, the SPD also advised the State's main purchasers and its public institutions to support companies in order to allow the performance of services to continue and to avoid any further undermining of these companies. Although the SPD does not have the power to impose legal obligations on public authorities, these recommendations could be put forward by companies in their exchanges with them.

The SPD therefore recommends the following measures to adapt the performance of public contracts:

- jointly identifying all useful measures to enable the continued performance of the contract; and
- granting an extension of the time limits for performance when the contractor is prevented by the health crisis from performing the contract.

The SPD also recommends the implementation of support measures for businesses in:

- waiving penalties for delay, when the delay is due to the health crisis;
- implementing all actions necessary to respect stick to payment deadlines and granting advances and down payments, in order to support companies facing serious cash flow difficulties, with priority given to small and medium-sized enterprises; and
- not punishing certain contractual breaches due to the current crisis with termination, and termination should only be used as a last resort.

The Covid-19 Act provides that the Government may issue an ordinance in order to adapt the time limits and procedures for public consultation and the extension of time limits for taking administrative decisions.

Article 5 of the Ordinance on Public Procurement and Covid-19 also provides for the possibility for public purchasers to extend the duration of public contracts for the duration of the health crisis as well as for the duration necessary to re-compete the public contract at the end of its expiry.

With regards to advance payments and payments on account granted to contract holders, Article 6 of the Ordinance on Public Procurement and Covid-19 also provides that such advances may exceed more than 60% of the amount of the contract or purchase order. In addition, public authorities may waive the requirement to provide a first-demand guarantee for advances exceeding 30% of the amount of the contract.

Article 6 of Ordinance on Public Procurement and Covid-19 also specifies the provisions to be adopted to deal with difficulties in the performance of current contracts. The principle adopted is the application of the provisions most favourable to the contractor in the event of difficulties in the performance of the contract, whether those provisions are laid down in the contract or those laid down by the Public Procurement and Covid-19 Ordinance. Holders of public contracts must ensure in their dealings with public authorities beforehand that they do not benefit from more favourable conditions in their contract than those laid down in the Ordinance on Public Procurement and Covid 19.

Article 6 of the Ordinance on Public Procurement and Covid-19 regulates six distinct cases resulting from the Covid-19 epidemic:



- the incapacity of the contractor to respect the time limit provided for in the contract or the situation where the performance of the contract would place a manifestly excessive burden on the contractor. If the contractor so requests, the Ordinance provides for the postponement of the time limit for performance by a period equivalent to the duration of the state of public health emergency with a two-month extension;

- the incapacity of the contractor to perform the contract or the performance of the contract would place a manifestly excessive burden on the contractor. In such a case, the public authority shall not impose penalties or hold the contractor liable. However, the public entity may freely conclude at its own expense a substitution contract with a third party to meet needs which cannot be delayed;

- when a contract is terminated by the public authority as a result of measures taken by the competent administrative authorities in the context of a state of health emergency, the contractor may seek compensation for expenses incurred directly in the performance of the contract;

- where the public authority suspends the performance of a fixed-price contract, it shall pay without delay the sums due to the contractor;

- when the concessionaire is compelled to suspend the performance of the concession, payment of the sums due to the public authority may be suspended and the concessionaire may receive an advance from the public authority; and

- when the concessionaire modifies the means of performance of the concession, the concessionaire shall be entitled to compensation from the public authority if such modifications made necessary for the continued performance of the concession result in charges that are manifestly excessive in relation to the concessionaire's financial situation.

The Covid-19 Act provides that the Government may issue an ordinance to extend the time limits for taking administrative decisions.

Ordinance No. 2020-306 of 25 March 2020 relating to the extension of time limits during the health emergency period and the adaptation of procedures during the same period (the "**Ordinance on Deadlines and Covid-19**"). This Ordinance shall apply to all deadlines and measures expiring between 12 March 2020 and the expiry of a period of one month from the date of termination of the state of public health emergency. The starting point of all deadlines is postponed to the date of the end of the state of health emergency and the deadline to act is set at two months. Finally, all the deadlines applicable for the administration to reach a decision are suspended for the duration of the state of health emergency.

In accordance with the provisions of article 4 of Ordinance on Public Procurement and Covid-19, Ordinance on Deadlines and Covid-19 provides that periodic penalty payments, penalty clauses, termination clauses and clauses concerning disqualification, when their purpose is to punish failure to fulfil an obligation within a specified deadline, are deemed not to have taken effect, if that deadline has expired during the period of the state of public health emergency.

Suspension of the deadlines for consulting the public or for decision-making could affect the performance of certain public contracts, in particular in the case of public works contracts involving the issue of a building permit. The impossibility of carrying out public enquiries could hinder the performance of works. The same difficulty could also arise in the context of the performance of private works.

However, Article 3 of the Ordinance on Time Limits and Covid-19 provides for all authorisations, permits and approvals that would expire during the entire period of a state of health emergency to be withheld and to expire two months after the end of that period.
