

March, 26th 2020

Public procurement - Adaptation of the rules governing the award, procedure or performance of public contracts

The Ordinance on various measures for adapting the rules for the award, procedure or execution of contracts subject to the code of public procurement and public contracts that do not fall under it during the health crisis caused by the covid-19 epidemic, issued pursuant to Article 11 of Law No. 2020-290 of 23 March 2020 on emergency measures to deal with the covid-19 epidemic, was published in the OJ of 26 March (Order No. 2020-319).

Its content encourages buyers to agree to a certain number of flexibility measures, with the aim of protecting economic operators and allowing contracts to get back on track at the end of the health crisis.

1. Scope (article 1)

The scope of application of the Ordinance is broad, since its provisions ultimately apply to the following contracts:

- Those, public as private, subject to the public procurement code, in progress or concluded as of March 12, 2020, which includes public procurement contracts concluded before the entry into force of the Public Procurement Code under the regime of previous texts;
- Administrative contracts that are not subject to the public procurement code, such as domain occupation agreements.

It is intended to apply for a period covering the entire duration of the health crisis, increased by two months, which should give buyers and operators time to anticipate the resumption of consultations or contracts in progress.

However, the application of the provisions of the Ordinance will have to be studied and justified on a case-by-case basis, as these provisions should only be implemented "*insofar as they are necessary to deal with the consequences, in the award and execution of these contracts, of the spread of the covid-19 epidemic and the measures taken to limit this spread*".

There is therefore no automaticity in the provisions summarized below.

In practice, this means that the flexibilities offered by the Ordinance, particularly in terms of termination, cannot be implemented lightly by buyers; and that operators who request the implementation of the flexibilities in terms of deadlines and subsequent non-application of penalties will have to document their requests.



2. Adjustment of current procedures (articles 2 and 3)

The Ordinance allows for two types of adjustments to ongoing consultations for the award of a contract subject to the Public Procurement Code:

- Extension, for a "sufficient period", of the delivery deadlines, unless "the services which are the subject of the contract cannot be delayed".

In practice, a margin of appreciation is therefore left to the buyers on this point. Of course, attention must be paid to the delivery deadlines closest to the start date of the confinement, and to procurements in which a visit is made mandatory or in which services are expected. Moreover, there is nothing to prevent candidates from requesting appropriate postponements.

With regard to the implementing arrangements, it may be necessary to publish a corrective notice or even a request for an extension of the period of validity of the tenders (to be obtained from all the candidates competing in the competition).

- Adaptation, "in compliance with the principle of equal treatment of candidates", of the competitive tendering procedures initially provided for in the consultation file which "cannot be complied with by the contracting authority".

One thinks, of course, of procedures involving negotiations with candidates, which could not be held in person because of the confinement. The question will then be whether it is possible, or more appropriate, to replace meetings by videoconferences, for example, or whether it is preferable to extend the time limits for the procedure, it being recalled that the same measure will have to be taken with regard to all candidates.

3. Adjustment of contractual deadlines and penalties (articles 4 and 6, 1° et 2°)

In addition to the measures extending the consultation periods, the Ordinance authorizes the extension of the duration of contracts that would expire during its period of application, including beyond the maximum duration of four years for framework agreements, and without prior review for concessions.

A safeguard is nevertheless provided for: this extension may not exceed the duration necessary for reopening competition at the end of the period of application of the Ordinance (end of containment + 2 months).

Moreover, two specific cases of "difficulties in executing the contract, [...] notwithstanding any stipulation to the contrary, except for stipulations that would be more favorable to the contract holder" are provided for: the impossibility of execution or the impossible respect of contractual deadlines.



In such cases, and provided that he proves that the performance of the contract or an order form, or its execution within the contractual time limits "would require means the mobilization of which would place a manifestly excessive burden on [him]", the holder may be granted an extension of the time limits for execution upon request (again, this time limit may not exceed the time limit for application of the order), and may neither be sanctioned nor have his contractual liability incurred in the event of non-performance of the services which are the subject of the contract or of delay in performance.

On the other hand, the purchaser may, for his needs "which cannot be delayed in any way", and even in the presence of an exclusivity clause, have the services performed by a third party at his own expense within the framework of a substitute contract.

4. Framework for the financial consequences of the suspension and termination measures taken in application of the health crisis (article 6)

Finally, with the aim of protecting incumbent operators in the event of difficulties in execution, and always "notwithstanding any stipulation to the contrary, with the exception of stipulations which would be more favorable to the holder of the contract", the Ordinance provides for the financial consequences of certain measures:

- In the event of cancellation or cancellation of a purchase order following a state of health emergency (this causal link is intended to be justified), "the holder may be compensated, by the buyer, for expenses incurred".
It should be noted that in a number of contracts, global or concessive in particular, compensation in the event of termination for prolonged force majeure period goes beyond strict compensation for expenses incurred; to the extent that such a stipulation is to be regarded as "more favorable" to the contract holder than that provided for in the Ordinance, it should be allowed to continue to apply.
- If the buyer suspends performance of a lump-sum contract, "*he shall proceed without delay to settle the contract in accordance with the terms and for the amounts provided for in the contract*". At the end of the suspension, the parties shall make any necessary amendments by means of an amendment and shall draw the financial consequences thereof.
These provisions do not say whether the payment should concern the services actually performed, in accordance with the rule of the service rendered, which may require a contradictory statement of fact drawn up in accordance with procedures adapted to the current circumstances, or, exceptionally, the payment of the totality of the services corresponding to the lump sum.
- In the event of suspension of a concession by the grantor, "any payment of a sum to the grantor is suspended and, if the economic operator's situation justifies it and up to its needs, an advance on the payment of the sums due by the grantor may be paid to it".



This rule may concern, respectively, payments by the concessionaire of royalties or shares of the remuneration received from users, or payments by the grantor of subsidies for public service charges.

Moreover, if the grantor "significantly changes the terms of performance provided for in the contract, the concessionaire is entitled to compensation for the additional cost of performing the service or works, even partially, where the continued performance of the concession requires the use of additional resources not provided for in the original contract and which would represent a manifestly excessive burden in relation to the concessionaire's financial situation".

In the end, without finally addressing the notion of force majeure, the tone is set: buyers are in any case invited, in the context of the measures they will apply as a result of the health crisis, to protect their co-contractors financially. Constructive exchanges will have to be favored in order to implement adequate and proportionate measures, and to allow the continuation/resumption of contracts at the end of the period covered by the order.

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