



The Legal 500 Country Comparative Guides Hot Topic

How public procurement in France faces the Covid-19 crisis and now turns to a promising future

Contributing Firm



Bignon Lebray

Authors



Sébastien Pinot
Partner and Head of
the Administrative Law
Practice
The Legal 500

spinot@bignonlebray.com

How public procurement in France faces the Covid-19 crisis and now turns to a promising future

Public procurement in France represents more than 10% of the gross domestic product each year and amounts to around 200 Bn €. It is therefore key for the French economy and a key factor for the government to (re)boost the economy.

Potential and current operators of the public sector, whether local or based abroad, thus continue to gain business opportunities through French public procurement during the Covid-19 crisis, all the more since the launch of new contracts is adapted (1) and current contract holders are protected by legal tools. The Covid-19 crisis also revealed the need to adjust public procurement regulations on a long-term basis (2).

1. The adaptation of public procurement tendering

In order to enable public buyers to face the Covid-19 crisis and better organise the tendering of public procurement and thus to offer operators additional business opportunities, the government enacted an ordinance on 25 March, 2020, a few days after the first Covid-19 lockdown was ordered.

Moreover, on 7 December, 2020, a new law, now commonly named « ASAP law » was enacted, and notably provides that public buyers may execute a public procurement contract without the need for a tender process for public work contracts under a 100.000 € threshold, whereas this threshold was set at 40.000 € before the Covid-19 crisis (Art.142); the use of this exception will be possible until 31 December, 2022.

More importantly the public buyers will be able to execute a public procurement contract without the need for a tender process if the contract is founded on a reason of general interest (Art.131).

This new possibility applies whichever the value of the contract and is not time-barred. It aims at implementing the outcome of the European Union Council of 30 November, 2020¹, which pointed out that public procurement is an essential tool in favour of public investments which are necessary for the recovery of the European economy and for the creation of employment.

The European Union Council asked the European Commission and the Member States to « identify additional measures to reduce bureaucratic burden and compliance costs and to also reduce procedural constraints on the public buyers with the aim to simplify and enhance public investment ».

The government will now have to enact a decree in order to further define the content of this exception of general interest in the context of public procurement.

Moreover, the question arises as to whether European procurement directive 2014/24/UE dated 26 February, 2014, which contains the fundamental principles applicable to all Member States will have to be adjusted in this respect, as it does not provide per se for the possibility to

avoid a tendering process for reasons of general interest.

2. The adaptation of public procurement performance

Operators have been protected for a long time by legal principles relating to force majeure and to hardship (imprévision). These principles are founded on French administrative case-law principles, that were established in 1916 on the basis of a major ruling of the French administrative supreme court (Conseil d'Etat, 30 March, 1916, *Compagnie Générale d'Éclairage de Bordeaux*). A specific regulation is not necessary to apply such principles.

In order for an event to be considered as force majeure, it has to be unpredictable, exterior to each of the parties and irresistible. If such conditions are cumulatively met, the operator is exempted from his obligation to perform the contract; however, such operator is not in principle indemnified, save clauses to the contrary appearing in the contract.

Hardship is also an unpredictable event which is exterior to the parties but is not irresistible in the sense that it does not totally impede the contract to be performed. In such a case, and save if the public buyer terminates the contract, the operator is bound to perform the contract. In case it suffers additional costs, such costs are borne by the public buyer up to 90%.

Even before the 16 March, 2020 lockdown was ordered, the French minister of the economy declared that the Covid-19 crisis met two of the force majeure and hardship criteria²: unpredictable and exterior to the parties. The question as to whether Covid-19 totally prevented a contract to be performed or render such performance more difficult and more expensive for the operator should have to be assessed on a case-by-case basis.

A few days after the 16 March lockdown was ordered, and among a series of regulations which were enacted on 25 March, 2020, a public procurement-focused ordinance (ordonnance n°2020-319) provided for principles aiming at reassuring both public buyers and operators and enabling them to have more visibility on the contractual consequences of the Covid-19 crisis.

In this respect, it provided for the possible extension of the duration of the contracts, for the possibility for operators to obtain a higher amount of advance payments than what they could usually be granted, and other measures such as the possibility to temporarily freeze the performance of the contract, exempt operators from late penalties etc.

Article 132 of the ASAP law gives tools for public buyers and operators in order for them to be able to face from now on exceptional circumstances in the long-term future in a more efficient manner.

Such tools are inspired by the mechanisms enacted in the 25 March ordinance to face the Covid-19 crisis which are in a certain way perpetuated for other major crisis which could arise in the future.

Therefore, operators are likely to be granted more visibility and stability with respect to the consequences of a major crisis on the performance of their contract.

The French government launched on September 3, 2020, a massive and historical 100 Bn € recovery plan to stimulate the economy and shape France's future. One third of this 100 Bn € amount is dedicated to the financing of ecological transition.

More generally, the actions stemming from such plan have to be elaborated and implemented while pursuing a single objective : make France become Europe's first decarbonated economy and achieve carbon neutrality by the year 2050 thanks for instance to industry and agriculture decarbonation, ecological bonus and public buyers' real estate termic renovation.

This provides great opportunities for public procurement and public concession operators based in France and abroad, who will from now on benefit from even more efficient and stable tendering processes, notwithstanding the burst of a sanitary crisis.