

Flash Covid-19 - Public Law Team

Order No. 2020-319 of 26 March 2020 relating to the measures applicable to public procurement contracts during the Covid-19 health crisis

The Order No. 2020-319 which provides details on the measures applicable to public procurement contracts during the Covid 19 health crisis, was published on 26 March 2020.

Three comments stand out from its reading.

1. For ongoing contracts, and subject to compliance with the provisions of the enabling Act (cf. Article 11, I 1° f of the Act), and subject to the justification by the contracting parties of the need to resort to them, these measures are essentially of two kinds:

- Advances (the regime of which is very much relaxed for the benefit of the contract holder - Article 5 -, or the concession holder whose concession is suspended - Article 6, 5°);
- The creation of a hybrid concept, between force majeure and unforeseen circumstances, articulated around the criterion of manifestly excessive burden (*charge manifestement excessive*), making it possible to grant the contracting party an extension of time, or to discharge him of his liability in the event of impossibility of performance (article 6, 1° and 2°).

On this second point the text is profoundly innovative.

Article 6(2) provides that where the holder is unable to perform (...) in particular where he demonstrates that the mobilisation of sufficient resources would place a manifestly excessive burden on him, then he cannot be sanctioned or held liable, and if a substitute contract is awarded, it cannot be to his detriment.

However, traditionally, either performance is impossible, and the circumstances fall within the scope of force majeure, or it is merely made more onerous, and the circumstances fall within the scope of unforeseeable events (*imprévision*), whose compensation implies a disruption of the economy of the contract (*bouleversement de l'économie du contrat*). In the latter case, two outcomes are possible: either the modification of the contract and the compensation allow the financial situation of the contract to be restored, or the situation is irreversible and the public entity may then terminate the contract for administrative force majeure (*force majeure administrative*) (CE, 9 December 1932, *Compagnie des tramways de Cherbourg*, Rec. 1050 and L. RICHER et F. LICHERE, « Droit des contrats administratifs », LGDJ, 10th edition, p.282 and CE, 14 June 2000, *Commune de Staffelfelden*, n° 184722).

The Order therefore operates an original synthesis, the impossibility of performance being established by the mere increase in costs, and a relaxation of the latter, a manifestly excessive burden being sufficient.



The assessment of this criterion could be tricky. Manifestly excessive burden in relation to the costs of the contract, or the contractor's means? As far as concessions are concerned, the text makes this clear: with regard to the financial situation of the concessionaire. It is therefore not the concession that is taken into account, but the concessionaire. What about equal treatment for comparable concession contracts with holders with different profiles?

2. As far as public contracts are concerned, the Order only deals with fixed-price contracts (Article 6, 4°), forgetting contracts with another method of remuneration, including price schedule contracts, without any reason at least explicit.

This is the only provision of the Order that deals, very indirectly, with the essential question for the contracting parties of the resumption of the execution of contracts, which everyone knows will not be able to be done under the initial conditions, as it is already the case for contracts that the buyers and principals have not suspended.

It is stated that «*at the end of the suspension, an addendum determines any necessary modifications to the contract*». Two questions immediately arise, the answers to which are expected by the contracting parties:

1. Does the requirement for an addendum preclude a unilateral act of resumption of execution, in the form of a service order? Does this mean that the contracting parties must agree on the conditions of the resumption and that, otherwise, there would be no resumption of performance? Legal certainty and the necessary search for resolution of disputes as close as possible to their emergence, justify favouring the exclusive route of the addendum and thus not resorting to the sole power of direction of the buyers and principals.
2. Compensation and remuneration of the contracting parties. A distinction must be made in this respect between :
 - the period of suspension, whether ordered or resulting from the factual situation defined in Article 6.1 of Order 2020-319,
 - the resumption of execution under conditions different from those initially forecast, which is more than likely given the imperative constraints and immediate application of the distancing and barrier instructions that will survive for some time during the period of the health emergency.

The State Purchasing Department of the Ministry of the Economy and Finance, in its e-mail of 17 March 2020, indicated that, at the end of the crisis, a compensation phase will begin for which a «*precise doctrine will have to be developed*».

Admittedly this augurs well, but nothing prevents from thinking about and even more from wondering about the end of the health emergency period, which will not put the contractors back in the situation that existed before the pandemic. Sanitary measures will continue and new methods will have to be devised and implemented.

In construction operations that make use of engineering and works contracts, sometimes on a lump-sum basis, particularly in the construction sector, the pursuit of their execution is made all the more complex by the fact that it is carried out in interaction with a number of contracting parties and that the resolution of the issues raised by the new sanitary guidelines does not take place in a single contract or agreement but must be stipulated and articulated in multiple contracts or agreements.



3. Finally, the question of resuming the performance of these contracts at a time when there is a risk of spreading the virus, as well as that of continuing their performance, implies that the question of the remuneration of the contracting parties should not be deferred. This is a topical issue if we want to reconcile the imperative need to fight the pandemic with maintaining a level of activity. Thus, the question will arise as to whether or not the agreed modifications fall within the sensitivity threshold of 15% (works) of the initial contract amount, applicable in the context of traditional addenda.

Article R.2194-3 of the public procurement code, applicable to contracts awarded by contracting authorities after 1 April 2016, allows for the modification of services for additional works, supplies or services, whatever their amount, that have become necessary and that are not included in the initial contract, provided that a change of holder is impossible for economic or technical reasons, and within the limit of a threshold of 50% of the amount of the initial contract; these provisions should be able to be applied.

Moreover, the Community threshold applicable to amendments to current contracts awarded by contracting authorities is 50% of the value of the initial contract (Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on the award of public contracts, Article 72.1, last paragraph).

In any event, the implementation of these arrangements, any actions or claims arising therefrom, if any, will be done within the more general framework of the other Order of 25 March 2020 relating to the execution of public procurement contracts, Order 2020-306 of which Article 4 deprives of effect penalty payments, penalty clauses (*clauses pénales*), (penalties for delay), termination clauses and forfeiture which penalise the non-performance of an obligation within a period which expires between March 12, 2020 and the expiry of the one-month period from the cessation of the state of health emergency.

As we can see, therefore, texts urgently adopted and which, as such, will raise questions of application and interaction between them.

Altana's teams are mobilised and are standing by your side during this period of health emergency to inform you about the impact of Covid-19 on the execution of public procurement contracts.

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