



Legal Alert

2 April 2020

Weinhold Legal

State of emergency and public procurement

As part of our information service to help you understand the current evolving and constantly changing situation regarding the coronavirus pandemic (COVID-19) and government measures which are being taken, we bring you selected information insofar as it relates to the world of public procurement.

First, it should be noted that neither the declared **state of emergency** nor the COVID-19 epidemic related **measures** taken by the government (without prejudice to other legal consequences) **directly affect the ongoing procurement procedures or the performance of public contracts**. Of course, this does not mean that there are no legal issues arising in the area of public procurement in the current extraordinary situation – below, you will find an overview of the most important practical issues that we are now dealing with our clients.

Ongoing procurement procedures

Deadlines in the procurement procedure

The state of emergency **does not change anything** in the ongoing procurement procedures without any intervention of the contracting authority - **the initiated procurement procedures continue**, including all deadlines: key deadlines for submission of bids and the related deadlines for submitting an application for explanation of the tender documentation, deadlines for filing objections against the tender conditions, etc.

It is clear that the contracting authority only disposes with time limits (deadlines) which it is entitled (obliged to) to set in the procurement procedure. The statutory deadlines (e.g. the deadlines for filing objections, for the notification of the outcome of the procurement procedure, for the notification of the cancellation of the procurement procedure, etc., respectively) cannot be modified in any way due to the announcement of a state of emergency.

Is there any way to extend the deadline for submission of bids?

Of course, suppliers have the **possibility to ask the contracting authority to extend the deadline for submitting bids**. It is at the **discretion of the contracting authority** whether, on the basis of its assessment of the situation, the circumstances relating to the awarded public procurement and the reasons given by the supplier for possible extension of the deadline for the submission of procurements; in principle, however, the contracting authority is not obliged to extend the deadline for the submission of bids.

On the other hand, **the contracting authority always has the option of extending the time limit (deadline) for submitting bids at its own initiative**. In light of the current state of emergency, we believe that contracting authorities should, as far as possible, extend the deadline for the submission of procurements, particularly in situations where the end of the deadline falls within the declared state of emergency.



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If the contracting authority proceeds to adjust (extend) the deadline for submission of bids, it is always necessary to fully **comply with all the publicity obligations** (contracting authority profile, Public Procurement Bulletin, TED – depends on the type of public contract and the procurement procedure).

What to do if the contracting authority has set a deadline for a specific action and the supplier has difficulty responding in a timely manner?

It should also be remembered that the contracting authority sets deadlines to the supplier, for example for asking for clarification of the offer (clarification or completion of data, documents, samples or models), inviting the submission of qualification documents or the beneficial owner, inviting the contract, etc.

In such cases, the contracting authority should set the supplier a **time limit proportionate** to the requirement itself (applying the principle of proportionality), and at the same time the law allows in many cases **to extend this time limit**. Suppliers may be advised that if they fail to respond properly to the contracting authority within a given time limit, they shall request the contracting authority to extend the period with appropriate justification as soon as possible. The contracting authority may **also forgive the failure to meet the deadline**.

Procurement procedure

In principle, the law does not stipulate deadlines within which the contracting authority is to perform individual

key acts in the procurement procedure (evaluation of procurements, assessment of conditions of participation, etc.). It can be inferred from the general legal principles and basic principles that it should do so **without undue delay**. Obviously, the current situation (e.g. limitation of work capacity on the part of the contracting authority or supplier) may be a reason for delaying some acts.

In this context, it is necessary to draw attention to the pitfalls that the **award period** may entail (the contracting authority is obliged to set the award period if it requires the suppliers participating in the procurement procedure to provide a bid bond).

If the contracting authority has set the award period (i.e. the period during which the parties are not allowed to withdraw from the procurement procedure), it has assumed the statutory obligation to **send a notice of selection of the supplier during this period**. If the contracting authority fails to do so (e.g. because it simply failed to perform or complete the necessary tasks due to the current situation), **the procurement procedure is terminated by virtue of law**.

Additionally, the contracting authority shall reimburse the participants **their purposefully spent costs** incurred in connection with the participation in the procurement procedure in such a case. In this context, the law allows the contracting authority to agree on a different solution with the suppliers – thus, the fate of the procurement may depend on the willingness of the suppliers to accept such an agreement.



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It is therefore necessary for the contracting authorities to monitor the running of the award period (if stipulated in their procurement procedure) and to adapt the procedure in the procurement procedure to comply with their legal obligation or to resolve the matter by other means anticipated by law.

Performance of existing contracts

The fulfillment of existing contracts, which are public contracts, **is not necessarily affected by the state of emergency** and the announced measures. It is therefore necessary for both the contracting authorities and suppliers to fulfill all their obligations under the concluded contract; the state of emergency itself is not a reason for either party to cease to fulfill its obligations, and it is always necessary to investigate the impact of specific government measures.

Should, however, any unfavourable development occur on the side of any of the contracting parties, it could be relevant to consider a change in the contractual obligation.

Change in contractual obligation

Although the law allows for certain changes in obligations, it nevertheless lays down the principle that there **must be no material change in the obligation**. In particular, a material change in the obligation is a change that would

- ▶ allow the participation of other suppliers or could influence the selection of supplier in the original procurement procedure, provided that the terms of

reference of the original procurement procedure correspond to that change;

- ▶ change the economic equilibrium of the contractual obligations in favor of the selected supplier; or
- ▶ lead to a significant extension of the scope of the public contract performance.

The law also stipulates several conditions, the fulfillment of which will not be considered a prohibited material change in the obligation. In the current situation, it is possible to consider, for example, the possibility of a 'permissible' change of obligation if all the following conditions are met:

- ▶ the need for change arises **as a result of change in circumstances that the contracting authority could not foresee with due diligence**,
- ▶ the change in question does not change **the overall nature of the public procurement**; and
- ▶ the value of the change **does not exceed 50% of the original value of the obligation**; if multiple changes are made, the sum of the value of all such changes is decisive.

For a change in contractual obligation, which is a public contract, it should be borne in mind that, from a private law perspective, it is a change of a contract that essentially requires a written form – typically **an amendment to a contract** where both parties must agree.

Furthermore, the rules on changes in obligations must be interpreted **restrictively**; therefore, any



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consideration of changing the obligation requires, first of all, a careful analysis of the fulfillment of all statutory conditions.

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For further details on the impact of the coronavirus epidemic on contractual relations, please refer to the special issue of [Legal Alert](#) dated March 20, 2020, which dealt with this issue in detail.

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics covered in this bulletin should be consulted before any decision is made. At the same time, the information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences. Furthermore, please note that there may be different legal opinions on some of the issues raised in this bulletin. It is therefore possible that in the future a different legal opinion will prevail from that stated in the text.

For further information, please contact the partner / manager you are usually connected to.



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