

Public procurement contracts and the exemption regime

By judgment dated February 10, 2010^[1], the *Conseil d'Etat*^[2] voided certain provisions of the Decree of December 19, 2008 that amended Article 28 of the French Public Procurement Contracts Code (“FPPCC”) with regard to the threshold under which contracting authorities are exempt from certain market tendering procedural rules.

Article 28 of the FPPCC, as amended by the Decree of December 19, 2008, defines the conditions in which the award of contracts for the supply of goods, services or works (i) may be implemented pursuant to a so-called “adapted procedure” or (ii) may be exempt from any formal procedure.

In this last case, the aforementioned Article 28 offers contracting authorities the possibility to award a contract without publishing a contract notice and without opening the contract to competition if the amount of the contract is estimated below EUR 20,000 (exclusive of taxes).

The Decree of December 19, 2008 had precisely raised this threshold from EUR 4,000 to EUR 20,000 (exclusive of taxes).

This modification was made in the context of the economic crisis in order to soften competitive tendering rules for low-value contracts and facilitate access to public bidding.

This exemption allowed contracting authorities to escape a legal framework that was too burdensome given the small amounts at stake and to implement, in the most adapted manner for each case, the fundamental principles of transparency, freedom of access and equal treatment in respect of public bidding, as set forth in Article 1 of the FPPCC.

In its decision dated February 10, 2010^[3], the *Conseil d'Etat* first recalled that the fundamental principles of public bidding did not preclude exemptions insofar as the procedure appeared impossible or useless because of the nature of the to-be-awarded contract, its amount or the level of competition in the relevant sector of activity. Yet, the *Conseil d'Etat* voided some provisions set forth in the Decree of December 19, 2008,

considering that the increase of the threshold to EUR 20,000 (exclusive of taxes) rendered the scope of application of the exemption too broad and infringed the principles of equal access to public bidding, equal treatment of tenderers and transparency of procedures.

Nevertheless, contracts awarded in the past on the basis of the EUR 20,000 threshold will not be challenged on the basis of the February 10, 2010 decision as the *Conseil d'Etat* indicated that the nullification of the exemption provisions would only become effective on May 1, 2010. It specified, however, that courts could refer to the ruling of the *Conseil d'Etat* to adjudicate legal disputes initiated as of February 10, 2010 in connection with contracts awarded on the basis of this EUR 20,000 threshold.

As such, as from May 1, 2010, contracting authorities will continue to be exempt from competitive tendering procedural rules if the amount of the contract is below EUR 4,000 (exclusive of taxes). Above that amount, they will have to implement the so-called “adapted procedure” ^[4] or, as the case may be, launch a formal call for tenders.

While this decision is justified by the necessity to comply with the fundamental principles of public bidding, it re-introduces a burdensome process for the award of low-value contracts, at the risk of thwarting the efforts made by France and its European neighbors to boost the economy. Incidentally, it is interesting to note that in many other European countries, the exemption threshold is higher than EUR 4,000 (exclusive of taxes)^[5].

[1] CE, 7^e and 2^e sub-sect., February 10, 2010, req. N°329100, M.Perez : JurisData n°2010-000403

[2] Highest Administrative Court in France

[3] Ibid

[4] For details, please see the explanatory note issued by the Directorate of Legal Affairs of the Ministry of the Economy (in French only): http://www.minefi.gouv.fr/directions_services/daj/marches_publics/annulation_seuil_20_000_euros.pdf

[5] For examples, Denmark applies a EUR 70,000 threshold and the UK, Italy, Sweden and Austria a EUR 20,000 thresholds.

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