

The COVID-19-Accompanying Act on Public Procurement – run of deadlines and preclusion on (early) return

A public contractor who invites tenders for construction, delivery or services contracts usually needs them urgently, at least until a certain date. In practice, public projects to be implemented almost always tend to be subject to more, rather than less urgent time pressure. The legal protection system of the Federal Public Procurement Act complies with the public procurement reality of law. It determines, that the invitation to tender and the decisions taken by the public contractor within the award procedure, can only be challenged by a bidder within given time limits. This ensures that decisions on violations of public procurement law are taken as fast as possible. After passing the corresponding time limit, the invitation to tender or decisions of the contracting authority are final and conclusive, so that they can't be challenged by a mean of an application for review anymore, which is called the principle of preclusion.

Temporary suspension of the preclusion effect with the passing of the 2nd COVID-19-act:

The 2nd COVID-19 Act ("2. COVID-19-Gesetz), and specifically the "Administrative Law COVID-19 Accompanying Act" ("Verwaltungsrechtliches COVID-19 Begleitgesetz" – "COVID-19-VwBG"), announced on the 21st March 2020, was the first (temporary) repeal of the principle of exclusion. It ordered, that the deadlines in administrative proceedings will be interrupted until 30th April 2020 and that the interrupted time will not be included in the deadline to file applications on initiating proceedings.

This regulation had a massive impact on ongoing procurement procedures. It could have happened that the public contractor has opened tenders recently, although it is uncertain whether the tender is still being contested. Furthermore, it is possible that the public contractor had awarded the contract to the elected bidder with legal effect following civil law, as the standstill period was not affected by the interruption of the deadline. The public contractor has no certainty whether its award decision will be challenged after all, after it was communicated to the bidders, e.g. on 23rd March 2020. The period for appeal – based on the 2nd COVID-19 Act – would start to run on 30th April 2020.

Early return to the former deadline and preclusion reality with the 4th COVID-19-Act:

The legislator obviously recognised that it is unacceptable to apply the "principle of watering-can ", which normally applies to the suspension of time limits, to (ongoing) public procurement procedures without further actions. The legal consequences and especially the disadvantages for procurement projects would have been too hard when the regulation stipulated under the COVID-19-VwBG (2nd COVID-19-Act) had been retained.

Therefore, the legislator enacted the so-called COVID-19-Accompanying Act on Public procurement ("COVID-19 Begleitgesetz Vergabe") within the 4th COVID-19-Act ("4. COVID-19-Gesetz") passed on 03rd April 2020. According to the provisions of this COVID-19-Accompanying Act on Public Procurement, the provisions of the COVID-19-VwBG, which was included in the 2nd COVID-19 Act, only apply in a subsidiary manner and subject to the following amendments:

In the review proceedings or proceedings for issuing interim injunctions currently ongoing at the administrative courts, the interruption does not end on 30th April 2020, but earlier on 6th April 2020. The deadlines therefore start to run again on 7th April 2020 (see § 2 COVID-19-Accompanying Act on Public Procurement). According to the act-materials, applications for declaratory judgement are not affected by the special provision of § 2 and therefore the general provisions of COVID-19 VwBG continue to apply to them (interruption until 30th April 2020). To prevent that decisions in the award procedure cannot be established until the date provided for in COVID 19 VwBG, the legislator has considerably shortened the end of the interruption of the deadline for applications for legal protection to be submitted in the award procedure. The exclusion periods in connection with separately contestable decisions of the public contractor, which already began before COVID-19 VwBG got into force (22nd March 2020) or which were justified in the period since it got into force, now continue to run (again). The time of the extension of the periods for appeal ends with the day following the announcement of this Federal Constitutional Act (05th March 2020,

00:00h).

Further relevant changes introduced by the COVID-19-Accompanying Act:

Administrative courts can find their decisions using technical ways of communication. At this stage we would like to point out that it is possible for procurement contractors to carry out certain procedural steps, such as award negotiations or hearings, using electronic ways such as video or web conferences. If required, we can take over the handling of such measures in the legal and technical area.

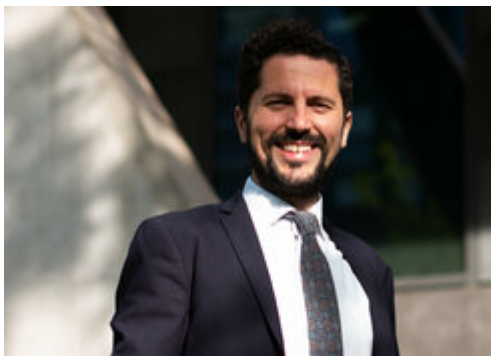
Furthermore, the legislator introduced particularly protected emergency procurement measures to prevent and combat the spread of COVID-19. Therefore, an application for an interim measure which is directed against the opening of a tender, the conclusion of a framework agreement or the award of a contract has no suspensory effect at all. The balancing of interests provided in the normal procedure under § 351 BVergG 2018 does not apply in these cases. The consequence of this regulation is, that such emergency procurement procedures will have to be conducted as declaratory proceedings.

In conclusion, it must be noted that due to the COVID-19 Accompanying Act on Public Procurement, the time limits in ongoing review proceedings and the (preclusion) periods for challenging contracting authority decisions have started to run again. Because of the return to the original reality of public procurement law as it existed before the Corona crisis, public contractors and tenders are strongly advised to clarify as quickly as possible whether there is a need for action with regard to appeals (contractors) or which deadlines must (still) be awaited in order to achieve permanence (public contractor).

Our experts of the SAXINGER COVID-19-Unit will be happy to advise you in this context.

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We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.



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