The following guidance addresses ongoing public procurement procedures, future procedures and existing contracts in the Netherlands.

Ongoing procurement procedures are not automatically suspended

The Dutch government has left it up to contracting authorities to decide whether suspensions or extensions of time limits are appropriate. Many contracting authorities have already extended deadlines for procurement procedures, realising the difficulties tenderers now face to adhere to certain deadlines. Tenderers will be hindered by the virus measures in their internal organisations and in obtaining necessary documents for submitting a valid tender.

We advise potential tenderers to ask contracting authorities to extend deadlines if they haven’t done so already. Contracting authorities in turn will be able to ask tenderers to extend the validity of their tenders since the periods by which tenderers are bound will not be extended automatically.

No extended use of simplified procurement procedures

The Dutch government has taken no measures that expand on the possibilities currently available in the Dutch
Public Procurement Act for simplified procurement procedures.

The Dutch Public Procurement Act allows for a simplified procurement procedure with shortened deadlines in the case of urgent situations and if this urgency is not attributable to the contracting authority. Furthermore, the Dutch Public Procurement Act provides for the possibility to make use of the negotiated procedure without prior publication if necessary for reasons of extreme urgency brought about by events unforeseen by the contracting authority (and not attributable to the contracting authority). This will only be possible when the time limits for the open or restricted procedures or a negotiated procedure – even when the deadlines of these procedures are shortened by use of the simplified procurement procedure – cannot be complied with.

In our view, these requirements are met for certain supplies and services urgently needed due to the current pandemic (e.g. urgently needed medical equipment or other supplies and services required for the proper functioning of the healthcare system and public order). In other cases, it will be hard to imagine contracting authorities being able to use these exceptions, but this will need to be assessed on a case-by-case basis.

We note that the European Commission has also recently issued a guideline that explains when the use of these exceptions is appropriate and how they can be used effectively by contracting authorities.

Special measures and extending the use of electronic means during procurement

If part of a procurement procedure involves face-to-face contact (e.g. presentations), contracting authorities should assess whether it is possible to opt for digital means of communication, such as video conferencing. If this is not possible, contacting authorities could still take measures to ensure that the government’s recommendations relating to the outbreak of the virus, such as social distancing, are observed. We would recommend making any necessary changes, provided that the principles of equal treatment, non-discrimination and transparency are obeyed. Hence, it is essential that the same conditions apply to all tenderers and that these conditions are clearly communicated to them.

We stress that changes to the award criteria or other important conditions should not be allowed.

No automatic suspension of certain deadlines for remedies

The deadlines for challenging award decisions are not automatically extended. Tenderers will generally be obligated to start injunction proceedings within 20 days after the award decision, although this time period can vary in certain procedures.

Considering the effects of the pandemic, subsequent government measures and the closure of Dutch courts that are only digitally hearing urgent cases, we strongly urge contracting authorities to extend deadlines for remedies and advise tenderers to request the contracting authorities to do so if they haven’t sufficiently done so already. Despite difficulties caused by the virus, it would still be advisable for tenderers to file complaints and challenge award decisions as soon as possible.

What options does a contracting authority have if no offer has been submitted?

If no suitable tenders or requests for participation have been submitted in response to an open or restricted procedure, a contracting authority may choose the negotiated procedure without prior publication, provided that the initial conditions of the contract are not substantially altered. In our view, the latter condition prohibits special
changes that might attract other bidders and might influence a bidder's interest in a contract.

Modifications of existing contracts in the context of COVID-19

If contracting authorities and contractors believe that the outbreak of the virus gives rise to the need to amend their contract, they should be aware that public procurement law forbids that the terms of the initial contract be modified in any fundamental manner.

The Dutch Public Procurement Act, however, sets out certain exceptions to this rule. If the conditions to one of these exceptions are met, a modification will be allowed. We point to the de minimis exception for modifications with a relatively small value, the exception pertaining to additional services or works, the exception for modifications due to unforeseen circumstances and the exception for the replacement of a contractor. Each of these exceptions has unique sets of conditions. Case-by-case analyses will have to be done to determine if one or more of these conditions apply.

We can imagine that the exception pertaining to unforeseen circumstances can seem like a logical option in these times of crisis. This exception applies if: the need for modification has arisen from circumstances that a diligent contracting authority could not foresee; the modification does not alter the overall nature of the contract; and any increase in price of each modification (provided that consecutive modifications are not aimed at circumventing the law) does not exceed 50% of the value of the original contract. The use of this exception will need to be published on TenderNed and possibly TED.

Conclusion

The coronavirus crisis is taking its toll on every part of society. Although the direct effect on public procurement in the Netherlands seems to be limited at this time, it is important for contracting authorities and contractors to take a critical look and see how they can mitigate any negative effects. Contracting authorities have a special responsibility in this. They will need to appreciate the difficulties the market is currently facing and take appropriate steps to ensure that their procedures, time limits and actions are in line with the principle of proportionality.

For more detailed advice on conducting public procurement in the Netherlands, contact your regular CMS advisor or local CMS experts.
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Expertise

CORONAVIRUS (COVID-19), PUBLIC PROCUREMENT