

# Circular clarifies the payment rules concerning public procurement contracts

As is well known, the Act of 2 August 2002 on combating late payment in commercial transactions was amended by the Act of 22 November 2013 (Belgian Official Journal of 10 December 2013) (see our newsflash of 5 December 2013).

As is also well known, the Royal Decree ("RD") of 22 May 2014 changed the payment rules concerning public procurement contracts and public works concessions from the General Implementation Rules [AUR = Algemene Uitvoeringsregels] of 14 January 2013 ("RD AUR 2013") on a number of important points (see our newsflash of 23 June 2014).

With the circular of 20 November 2014 (Belgian Official Journal of 26 November 2014), the Michel I government wishes to clarify the above-mentioned new payment rules, in particular with regard to public procurement contracts.

This new circular replaces the circular of 12 March 2009 (Belgian Official Journal of 16 March 2009), which nevertheless maintains its application for contracts concluded prior to 1 July 2013. The recent circular explains:

- what the impact is of the new payment rules of the RD AUR 2013 as amended by the RD of 22 May 2014;
- whether, and since when, the rules from the RD AUR 2013 or those from the amended RD AUR 2013 apply after the "Repair Royal Decree" of 22 May 2014.

## 1. Impact of (several) new payment rules

The circular goes into great detail on the innovations entailed by the amended RD AUR 2013. In each case it indicates when this is a provision or a change that is introduced by the Royal Decree of 22 May 2014.

A number of comments that draw attention relate to the longer payment period in the health sector and the global verification and payment period.

For example, the circular clarifies that the approach of regarding the verification and payment period as a single global period is designed to prevent the verification period from all too often being ignored in practice. The payment rules in the RD AUR 2013 in particular only provide a sanction when the payment period is exceeded. For this reason, in the event that the verification

period is exceeded, the payment period is shortened by an equal number of days.

The payment period for contracting authorities which provide healthcare amounts to 60 calendar days instead of 30 calendar days. Nevertheless, article 127, paragraph 2 of RD AUR 2013 links this exception only to contracts associated with this specific activity. The circular further explains this by stating that when a single legal entity besides a healthcare facility also includes another entity, e.g. an educational institution, the longer payment period then applies only for the contracts that are issued by the care-providing entity. On the other hand, the long payment period applies for all contracts that are issued by the healthcare institution. It is thus not only applicable to the acquisition of medical equipment, drugs, etc., but also for the works, supplies and services that are not specifically intended for providing healthcare.

For a detailed discussion of the amended payment rules, reference is made to the text of the circular itself.

## 2. Personal and substantive area of application

The circular also delineates the scope of application of the RD AUR 2013 vis-à-vis the Act of 2 August 2002. For example, according to the circular the following business transactions do not fall under the RD AUR 2013, but instead under the general payment rules (of the Act of 2 August 2002):

- business transactions between companies with one another; and
- business transactions involving small contracts between companies and government authorities-debtors (when the estimated amount is smaller than or equal to 8,500.00 EUR, excl. VAT).

The Michel I government clarifies in the circular that public enterprises also fall under the notion of "company". Consequently, the general payment rules of the Act of 2 August 2002 are applicable to companies and public enterprises. The public procurement contracts of these public enterprises also fall under these rules. The consequence of this clarification is that public procurement contracts of public enterprises such as De Lijn, NV NMBS or NV Belgacom fall under the general payment rules, and not under the specific payment rules in the RD AUR 2013. That also follows from art. 6, §2, 3° RD AUR 2013 which expressly provides that the specific payment rules from that decree do not apply to public enterprises.

Substantively there is little difference between the general and specific rules, since they both find their origin in the same directive (DIR 2011/7/EU). However, it is important to refer to the correct legal ground when invoking the payment rules. Moreover, the application of the general payment rules for public enterprises does have some impact vis-à-vis the past (for contracts published before 1 July 2013, in any event, the general contracting terms (AAV - algemene aannemingsvoorwaarden) still apply for public enterprises).

## 3. Temporal scope of application

The circular also situates the applicability of the different payment regimes over time.

The amended Act of 2 August 2002 applies to payments in implementation of contracts concluded, renewed or extended as of 16 March 2013. It is in any case applicable to payments in execution of current agreements as of two years counting from 16 March 2013.

Public procurement contracts that are published before 1 July 2013, date of entry into force of RD AUR 2013, fall within the scope of application of the RD AUR of 26 September 1996 with its annex on the general contracting terms (AAV). Public procurement contracts that are published as of 1 July 2013 fall within the scope of application of the RD AUR 2013. Public procurement contracts that are published as of 9 June 2014, date of entry into force of the Royal Decree of 22 May 2014, fall within the scope of application of the amended RD AUR 2013. To be sure, the original payment rules of the RD AUR 2013 do apply to contracts published between the date of entry into force of the RD AUR 2013 and the date of entry into force of the aforementioned amendment decree of 22 May 2014.

For more information on this specific subject, please contact Jan De Leyn and Barbara Bastiaensen (the authors) and Kris Lemmens (head of department).

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