

When a Private Party challenges an Administrative Order determining the outcome of public procurement, should that Order remain effective or be suspended pending the Court's decision?

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The issue addressed in this article is the following.

Where a government agency conducts a public procurement process and issues an administrative order determining that one bidder is unsuccessful while another bidder is selected as the successful bidder, and the unsuccessful bidder, being dissatisfied with the result, brings an action before the Administrative Court in a public procurement case on the ground that the order is unlawful, the question arises:



Should such an administrative order continue to have effect in all circumstances even after it has been challenged before the court, or should its effect be suspended pending the court's consideration?

This issue reflects an interesting difference between **Thai, French and German administrative law**.



THAI ADMINISTRATIVE LAW

Under Thai law, the general principle continues to apply, influenced by the general principles of French administrative law, namely that an administrative order is immediately enforceable (*le privilège du préalable*) and that the filing of an action does not suspend the execution of an administrative order (*le principe de l'effet non suspensif du recours*).

As a result, in a **public procurement case**, a claimant before the Thai Administrative Court generally does not merely file a complaint, but will also apply to the court for a **temporary suspension of the execution of the administrative order**.



IN PRACTICE

The Thai Administrative Court has generally regarded applications of this kind as matters that do not necessarily require urgent determination. The court will therefore first consider the admissibility of the complaint and will ordinarily have to send the application and relevant documents to the government agency concerned for its objection or explanation before proceeding further with the application.

This is part of the normal procedure, and the overall consideration may take a considerable period of time—possibly two, three or four months, or even longer. There is no definite statutory time limit. During the period in which the court is considering the application, without any definite time frame, there is also no legal guarantee preventing the government agency from signing the contract before the court issues its order.

If the government agency has already entered into the contract, Thai public procurement law provides that the filing of an action before the court does not affect the contract that has already been executed. Even the court cannot revoke such contract. Accordingly, even if the private party ultimately succeeds in the case, there will no longer be any legal means by which the court can restore to the claimant the opportunity to become the contracting party with the government agency.

The right is therefore permanently lost and cannot be restored.

In other words, the consequence becomes irreversible.

FRENCH ADMINISTRATIVE LAW

When the French administrative law system is considered, however, **French law does not apply the general principle in the same manner to public procurement cases.**

Article L.551-4 of the *Code de justice administrative* provides:

“Le contrat ne peut être signé à compter de la saisine du tribunal administratif et jusqu’à la notification au pouvoir adjudicateur de la décision juridictionnelle.”

In other words, under French law,

Once a private party has brought the matter before the Administrative Court, the government authority may not sign the contract until the court has rendered its decision and that decision has been notified to the contracting authority.



IN PRACTICE

In practical terms, this produces what may be described as an **automatic suspensive effect** (*l’effet suspensif automatique*), preventing the government agency from proceeding to sign the contract before the court has had an opportunity to determine the matter, thereby avoiding a situation in which the bidder’s exercise of its right to judicial review becomes ineffective in practice.

This constitutes an important exception to the general principles of administrative law applicable in France.

In public procurement cases or judicial proceedings relating to the pre-contractual stage of an administrative contract:

French law places particular importance on ensuring the effectiveness of judicial protection. It therefore provides that proceedings brought before the contract is signed have the effect of automatically “stopping” the conclusion of the contract pending the court’s determination.



Thai law has adopted the general principle derived from French law (*le privilège du préalable*), but has not enacted this important exception for situations in which such an exception may be necessary.



GERMAN ADMINISTRATIVE LAW

The approach under German administrative law is equally interesting.

Section 80(1) of the *Verwaltungsgerichtsordnung* (VwGO) provides that:

“An objection and a rescissory action have suspensive effect.”

Under this provision, the general rule in Germany is that, once a private party brings an action before the court, the effect of the administrative order is **automatically suspended**.



IN PRACTICE

The structure of German law is therefore the reverse of the general approach under French and Thai law.

The continued enforceability of the administrative order during the pendency of the proceedings is instead treated as an exception, which must fall within the conditions of necessity prescribed by Section 80(2) or other relevant statutory provisions.

Question for the Thai legal system

When this is compared with Thai law, the difference becomes apparent.

In a **public procurement case**, in which

- private party brings proceedings before the Thai Administrative Court alleging an administrative order concerning public procurement or the **pre-contractual process relating to an administrative contract** is unlawful
- Thai law has not yet been amended so the filing of such an action automatically suspends the administrative order or prohibits the government agency from signing the contract pending the proceedings, as under French or German law



How should the Thai Administrative Court intervene to help fill this gap in the system?

The essence of administrative justice may not lie merely in allowing the public to “bring a case before the court”. Judicial remedies must also be capable of protecting rights **effectively and in a timely manner, with appropriate safeguards**.

Accordingly, one temporary means of mitigating the adverse consequences of this issue may be for the Thai Administrative Court to expedite its consideration and determination of applications for **provisional measures or interim relief before judgment**.

FRANCE

In France, where the case does not concern a public procurement order but instead involves another type of administrative order, and a private party applies to the court for temporary suspension of the execution of that administrative order, **the filing of the main action itself does not suspend the administrative order**, consistently with the general principle referred to above.

Nevertheless, the French Administrative Court will consider such an application promptly, and the determination will generally take approximately **no more than 15 days**.

GERMANY

In Germany, the legal safeguard is even more firmly established because the general rule is that the **filing of an action has the effect of suspending the administrative order pending judicial review**, unless the case falls within an applicable exception.

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Weerawong C&P advises and represents businesses in matters involving Thai government entities, including public procurement, government contracts and concessions, licensing, administrative orders and state liability. Our dedicated team combines specialist knowledge of Thai public law with extensive experience in administrative disputes, helping clients assess risks, develop practical legal strategies and protect their rights and commercial interests, from early advice through litigation before the Administrative Courts..

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