

PPP AND PFI

# COVID-19: Evolving Considerations in Public Procurement

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As 2020 draws to a close, public and private sector entities alike are in a better position to formulate their responses to the COVID-19 pandemic than they were in March 2020. How does this impact the application of public procurement law?

When awarding contracts, public bodies must treat tenderers in a fair and proportionate way, and they must exercise objectivity, transparency and equality of treatment. The European Union (Award of Public Authority Contracts) Regulations 2016 (the “Regulations”, which transpose [Directive 2014/24/EU](#)) provide a framework within which to do this. They set out procurement procedures and requirements relating, for example, to publication of calls for competition and contract award, minimum time limits which must be allowed for preparation of tenders, and minimum numbers of candidates to be consulted.

As the COVID-19 outbreak began, questions of procurement law arose in a number of ways. Public buyers were under intense pressure to urgently procure medical equipment and infrastructure amid supply shortages. In procurement competitions already underway, awarding authorities potentially had to consider how the impact of COVID-19 should be addressed by tenderers. For contracts already in existence, contracts managers had to ensure that any departure from original terms – for example, extension of the term – complied with Regulation 72 of the Regulations.

## RECAP: WHAT WAS THE APPROACH IN EARLY 2020?

In April 2020, the European Commission's [Communication](#) outlined the options and flexibilities under the public procurement framework that could be used in the emergency situation related to the COVID-19 crisis. They are summarised below.

- **In cases of urgency** accelerated procedures could be used. In other words, in the Open Procedure, the minimum time that must be allowed from the call for competition until the deadline for receipt of tenders could be shortened from 35 to 15 days. In the Restricted Procedure, the minimum time for receipt of requests to participate could be shortened from 30 days to 15 days, and for receipt of tenders, from 30 to 10 days.
- **In cases of extreme urgency** the Negotiated Procedure without Publication could be considered. Moreover, even a direct award to a preselected economic operator could be allowed, provided the operator was the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency.

It is important to note some key legal obligations that already applied to these procedures, as well as how the Commission viewed these in light of the pandemic situation in April 2020.

- **Accelerated Procedures:** the Regulations provide that they can be used where a state of urgency duly substantiated by the contracting authority renders impracticable the time limits.
- **Negotiated Procedure without Prior Publication:** the Regulations allow the procedure to be used insofar as is strictly necessary where, for reasons of extreme urgency not attributable to the contracting authority and brought about by events unforeseeable by the contracting authority, the time limits specified for the other procedures cannot be complied with. An additional line is included in the Directive: “The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.” The Communication made it clear that “the use of this procedure remains exceptional” and “all the conditions have to be met cumulatively and are to be interpreted restrictively”. The Commission considered these conditions in the terms described below.

- **Events unforeseeable by the contracting authority:** the number of patients requiring treatment was rising and the equipment needed could not have been foreseen and planned in advance.
- **Extreme urgency making compliance with general deadlines impossible:** the immediate needs of hospitals had to be met with all possible speed. Even the accelerated deadlines would likely not suffice, though that would have to be assessed on a case-by-case basis. To rely on 'extreme urgency' the procurement need had to be satisfied without delay; it would not do if it took longer than it would have if a transparent procedure (even if accelerated) had been used.
- **Causal link between the unforeseen event and the extreme urgency:** the causal link between the COVID-19 pandemic and satisfaction of the immediate needs of hospitals within a very short timeframe could not be doubted.
- **Only used in order to cover the gap until more stable solutions can be found:** negotiated procedures without prior publication were for immediate needs, to cover the gap until more stable solutions could be found (such as framework contracts awarded through regular procedures).
- **Negotiated Procedure without Prior Publication resulting in direct award of a contract:** this remained the exception.

Contracting authorities required a strong justification for using the above procedures.

In Ireland, the Office of Government Procurement published [guidance](#) in March 2020 which similarly addressed use of these procedures. It also addressed considerations when extending or modifying existing contracts under Regulation 72.

It should also be said that, even if a prospective contract is below the thresholds caught by the Regulations, fundamental procurement principles (fairness, proportionality etc.) still apply and so the types of issues outlined above were engaged.

**WHAT TIMEFRAME WAS ENVISAGED FOR APPLICATION OF THE COMMUNICATION?**

The Communication spoke in terms of "a multi-stage strategy".

**For immediate and short-term needs,** public bodies were advised to fully exploit the flexibilities of the procurement framework and, as a complementary tool, to procure jointly and to take advantage of the Commission's joint procurement initiatives.

**For medium term needs,** accelerated procedures were more appropriate to achieve value for money, availability of supplies, and access for business. Examples were given of how to use digital tools, ecosystems or entrepreneurs' networks to engage with the market to encourage alternative solutions.

**WHERE ARE WE NOW?**

At any stage, careful consideration had to be given as to whether the use of the above procedures was justified (particularly the Negotiated Procedure without Prior Publication). Public authorities are frequently required to justify their choices (for example, to the Commission, to the Public Accounts Committee, to the Courts).

As regards procurement of medical supplies and equipment, as time progresses it becomes more difficult for awarding authorities to substantiate that all of the conditions outlined above exist, particularly as there has now been some time to plan how to meet requirements.

In terms of new procurement competitions (for example in

infrastructure projects) it will be prudent for awarding authorities to invite tenderers to address in their submissions how they will deal with delay and additional cost attributable to the impact of COVID-19. Decisions need to be made about how risk will be allocated to deal with health and safety adaptations, delays in receiving plant and equipment, staff shortages arising from illness or quarantine requirements, site-specific shutdowns, wider geographical shutdowns, and changing conditions in the insurance and bonds markets.

In terms of ongoing procurement competitions, awarding authorities will wish to consider how this can be achieved within competition rules and in a manner that ensures fairness (including proportionality), objectivity, transparency and equality of treatment. This may pose particular challenges in competitions that have reached an advanced stage at which, for example, bidders have been eliminated in previous rounds, or a preferred bidder has been appointed. However, the good news is that it is not unprecedented for unexpected, external factors to impact a procurement procedure, and it is possible to develop mechanisms to deal with such events while remaining compliant with the rules of the competition and public procurement law more generally.

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

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