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# Sharpening the teeth of the infringement procedure

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At the height of the COVID-19 crisis in Europe, the European Commission published guidance on options and flexibilities for Member States under the EU public procurement framework in the light of this emergency situation. Concerns have been aired, however, that contracts may have been awarded without any competitive tendering *and away from public scrutiny. As a result, taxpayers' money could easily be wasted on overpriced equipment or substandard services.* This Briefing will examine the Guidance look at the publication of notices for medical equipment, and discuss possible implications of the COVID-19 crisis for procurement.

### **What has the Commission proposed to keep procurement practice within EU rules?**

Public authorities in the EU Member States have had to act as quickly as possible in response to the pandemic. Recognizing the urgency, but also anxious to help Member States remain within EU rules, the European Commission published a Communication entitled, '[Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis](#)' on 1 April 2020.

The Commission recognises that 'hospitals and healthcare professionals urgently need medical supplies and personal protective equipment purchased by public authorities'. The Guidance is intended 'to help public authorities use the flexibility provided by the EU's public procurement framework to ensure rapid and efficient purchases of all necessary equipment'. It refers to three options for public purchasers in responding to the current COVID-19 emergency:

- alternative solutions and engaging with the market
- use of accelerated procedures
- negotiated procedure without publication

#### Alternative solutions and engaging with the market

The key message from the Commission in this case is that contracting authorities could contact directly potential contractors, hire agents with direct market knowledge, or send representatives to the relevant countries to ensure delivery and to contact potential suppliers for an increase or renewal of production. Examples of how companies have retooled or revamped their production for Personal Protective Equipment (PPE) and medical devices can be found on the EC website.

### Use of accelerated procedures in cases of duly justified urgency

The 2014 EU Public Procurement Directive ([Directive 2014/24/EU](#)) introduced the possibility of using an open accelerated procedure. In such a case, contracting authorities may reduce the minimum time limits for the submission of tenders to 15 days in case of urgency. For the restricted accelerated procedure, there are two phases for shortening the minimum time limits: at the expression of interest to 15 days, and at the stage of submission of tenders to ten days. However, the minimum standstill period of ten days between the award decision and the conclusion of contract still applies in these cases. The Guidance does not provide a specific duration for urgency and this may create some uncertainty for contracting authorities, in particular those relying on EU funding. If time limits are not applied correctly, this may lead to financial corrections.

### Negotiated procedure without prior publication

As explained in the Guidance 'this will allow for a faster awarding of contracts to provide for COVID-19 pandemic related needs.' Under Article 32(2) (c) of Directive 2014/24/EU contracting authorities may only use this procedure 'in so far as it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.'

## **Negotiated procedures without prior publication**

### The issue of transparency

This is a derogation from the basic principles of the Treaty concerning transparency. According to the case law of the Court of Justice of the EU (CJEU), all conditions for the use of this procedure must be met cumulatively, and need to be interpreted restrictively. The burden of proof to justify these exemptions is on the contracting authority. Furthermore, although the Commission points to the possibility for contracting authorities to negotiate directly with potential suppliers, a direct award to one preselected supplier would remain an exception, if only one supplier would be able 'to deliver within the technical and time constraints imposed by the extreme urgency.'

It is up to the contracting authority to determine whether it can use this procedure in specific cases, for specific contracts and under specific circumstances, and then to justify its use in the individual procurement report. Contracting authorities can also refer in their reports to the contract award notice which in any case needs to be sent to the publication office 30 days after the conclusion of the contract. The information to be included in the contract award notice on the results of the procurement requires a justification for the use of the negotiated procedure without prior publication.

This procedure lacks ex-ante transparency and can only be used in narrowly defined conditions laid down in the directive. Contracting authorities need to justify their decisions and provide ex-post transparency. This will be particularly relevant for auditors to see how taxpayers' money has been spent. In the light of the COVID-19 crisis and the needs for hospitals and health institutions to provide health treatment and supplies, the Commission aims to ensure that the criteria for the use of the negotiated procedure without prior publication are fulfilled.

### Publication of notices for medical equipment

In order to assess how these procedures are being used, one can monitor notices for 15 subcategories of medical equipment on a specifically installed SIMAP and TED [website](#). Between 1 February and 20 May 2020, EU Member States (and the UK) published 639 contract notices, 1126 contract award notices, and 19 voluntary ex-ante transparency notices (VEATs). Most of the contract award notices were for open procedures (838). In 253 cases, the negotiated procedure without prior publication was used due to COVID-19. Out of the 23 modifications, 21 were based on the Directive's provision allowing modification of contracts during their term without a new procurement procedure in specified circumstances.

No clear conclusions can be drawn from these notices, as they are unevenly spread among Member States, regions and individual contracting authorities. Even so, one can perceive a trend towards greater use of negotiated procedures without prior publication of a notice, and contract modifications justified by circumstances 'which a diligent contracting authority could not foresee'.

### The implications of COVID-19 for public procurement

The scarcity of lifesaving supplies at the height of the crisis, with supply-chain interruptions, lockdowns, production fall-outs and transport bottlenecks, has demonstrated the vulnerability of the European market in the field of public health, and Europe's total dependency on third-country suppliers. The fight for the necessary equipment - named by some a 'cowboy market' in which countries were competing with each other for the scarce medical supplies and those offering the highest price receiving the orders - resulted in skyrocketing prices for some materials.

Security of supply will become an issue for European decision-makers and production may shift, as some argue, from 'just in time' to 'just in case'. As to potential COVID-19 vaccines, following the initiative of four Member States to go ahead with joint procurement, the EC proposes to organise a central procurement process to the benefit of all EU Member States.

Transparency concerns arise in particular in relation to contracts and direct awards made in this emergency situation that have never been published, and do not fulfil ex-post transparency requirements either. This also applies to direct awards with some ex-post transparency, whereby the object of the contract cannot be fully identified, for example by using very general CPV codes. In addition, there may have been spillover effects from emergency procurement to other sectors.

*Concerns have been expressed, for example by Transparency International, that as a result, taxpayers' money could easily be wasted on overpriced equipment or substandard services.*

### Conclusions

Procurement rules cannot stay in the way when the protection of health and life of humans is at stake. During this emergency situation, some contracts may have been awarded without any transparency, and this may lead in some cases to challenges or enquiries. Those contracting authorities which have applied the exceptional procedure under extreme urgency have an ex-post transparency requirement. When relying on exceptional procedures and direct awards, contracting authorities have a duty to publish notices and keep a detailed record of all decisions, justifications of key decisions and actions taken to support transparency and future scrutiny.

As time passes, it may be very difficult to rely on extreme urgency and unforeseeable circumstances, since COVID-19 will stay with us until a vaccine or medication is found. The Guidance from the Commission does not provide a time-line for urgency, although the economic repercussions of the COVID-19 crisis are apparent. Contracting authorities require further certainty with respect to the duration and scope of application of the state of urgency.