

White Paper conference Procuring for extreme urgency under Regulation 32:

How sustainable is the COVID justification as we get further into the pandemic

Kate Gough, Counsel, Freshfields Bruckhaus Deringer LLP

2020



Freshfields Bruckhaus Deringer

Agenda

- 1** What is the question and why does it matter
- 2** Reminder of provisions of Regulation 32(2)(c)
- 3** Key principles
- 4** Where does that leave us?

What is the question

Will consider

Will consider this question in two parts:

- When can you use extreme urgency under Regulation 32 (2)(c) to award a contract without a competition?
- How sustainable is the COVID justification as we get further into the pandemic?

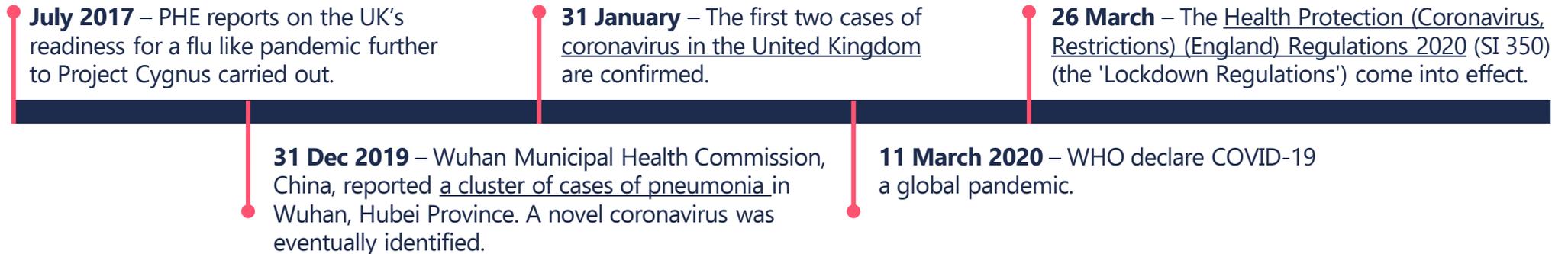
NB This is not the only avenue available to contracting authorities – See PPN 01/20

- eg Regulation 32 (2)(b); Regulation 72; call offs from existing framework agreement or dynamic purchasing system; and standard procedures with accelerated timescales.

Why does it matter

- In the exceptional circumstances of the COVID 19 pandemic contracting authorities needed to procure goods, works and services with extreme urgency
 - Published nearly 400 contracts worth £1.6bn relating to the response to the Covid-19 crisis
 - Significant increase in the use of direct awards
 - A quarter of contracts – worth in excess of £200m – were awarded to economic operators who had not previously carried out public contracts
- *See June 2020 Tussel Report “Covid 19 & UK public procurement”

Pandemic Timeline



Why does it matter

Contract awards now coming under scrutiny

When secret coronavirus contracts are awarded without competition, it's deadly serious

The Guardian, 15 July 2020

UK government paid £1.7bn to private groups for coronavirus contracts

Financial Times, 4 June 2020

Britain's £5.5bn bill for procuring emergency PPE brings scrutiny

Financial Times, 8 July 2020

When can you use extreme urgency under Regulation 32 (2)(c) to award a contract without a competition?

Regulation 32 (2)(c) PCR 2015

Regulation 32 2 (c)

‘The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

...

(c) insofar as 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.’

Regulation 32(4) PCR15:

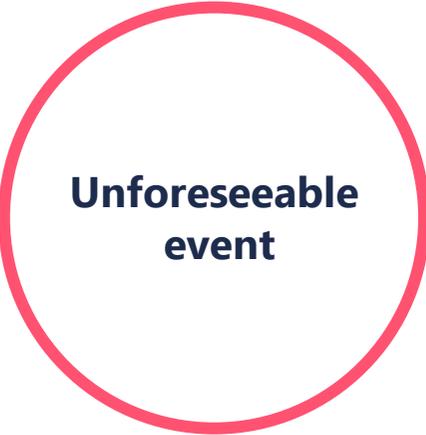
‘For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.’

What is the test?

Clear it requires more than just a situation of urgency – significant judicial consideration of the requirements



Extreme urgency



**Unforeseeable
event**



Strict necessity



**Unattributability
to the contracting
authority**

Government guidance on use of Reg 32 (2) (c) in the context of COVID-19?

- CCS has published a number of PPNs in the wake of the coronavirus crisis.
- PPN 01/20 published in March 2020 set out the options for the urgent procurement of goods and services.
- Notable relies on **existing** flexibilities within the procurement regulations including Regulation 32(2) (c).
- Provides further guidance on the use of Regulation 32(2)(c) – must demonstrate all the following are met:
 - 1) There are genuine reasons for extreme urgency, eg:
 - you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;
 - you are reacting to a current situation that is a genuine emergency – not planning for one.
 - 2) The events that have led to the need for extreme urgency were unforeseeable, eg:
 - the COVID-19 situation is so novel that the consequences are not something you should have predicted.
 - 3) It is impossible to comply with the usual timescales in the PCRs, eg:
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
 - here is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
 - 4) The situation is not attributable to the contracting authority, eg:
 - you have not done anything to cause or contribute to the need for extreme urgency.

How sustainable is the COVID justification as we get further into the pandemic?

When does the COVID justification still meet the test?

PPN 01/20 itself notes:

'You should carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. **For example, as time goes on, what might amount to unforeseeable now, may not do so in future.'**



Thank you

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales authorised and regulated by the Solicitors Regulation Authority) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'. For regulatory information please refer to www.freshfields.com/support/legalnotice.

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2020

DS84187