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WHITEPAPER PROCUREMENT CONFERENCE

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- ❖ How do you procure for urgency as justified by Covid?
- ❖ How sustainable is the Covid justification as we get further into the pandemic?



Agenda

- EU and National Guidance (European Commission/Office of Government Procurement)
- What are the exceptions under EU Law for urgent procurement?
- What tests need to be satisfied?
- Continued reliance - How sustainable is the Covid justification?
- Areas to be aware – is litigation coming?

HOW DO YOU PROCURE FOR URGENCY AS JUSTIFIED BY COVID?

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European Commission Communication

- Communication from the Commission – Guidance from the European Commission on using Public Procurement Framework in the emergency situation related to the COVID-19 crisis (2020/C 108I/01 April 2020)
- OGP Information Note - Covid 19 (Coronavirus) and Public Procurement Update – 22 March 2020



European Commission Communication

- Recognise that agility required with immense increase in demand for similar goods/services – supply chains disrupted
- Refers specifically to PPE, ventilators, medical supplies, hospitals and IT infrastructure
- To name only a few – not only health products, OECD has recognised other goods/services urgently required, e.g. digital tools for home working, online services in public sector (OECD 30 July 2020)





Options to consider

- Reduced timelines for accelerated open/restricted procedures
- Negotiated procedure without publication – extreme urgency
- Alternative solutions- engage with market
- Contract Modifications
- Light Touch



Public buyers may also consider

- Contact potential contractors (phone, email, in person)
- Hire agents with contacts in market
- Send reps to countries with stock who can ensure immediate supply
- Contact suppliers to increase production



Other ideas?



- Hackathons for new concepts, e.g. enable reusing protective masks after cleaning
- Work more closely with innovation, ecosystems or entrepreneur networks
- Use joint procurement initiatives, existing frameworks, ensure Contracting Authority identified in framework
- More medium term - procedures with reduced timelines- more reliable means of VfM, wider range of suppliers

In cases of urgency – standard timelines impractical

- **Article 27 (3) (EU Directive 2014/24/EU)- Open Procedure**
 - “Where a state of urgency duly substantiated by the contracting authority renders impractical the time limit laid down in the second paragraph of paragraph 1, it may fix a time limit which shall not be less than 15 days.....”
- **Article 28 (6) - Restricted procedure**
 - “where a state of urgency duly substantiated by the contracting authorities renders impractical the time limit...”



Choice of procedures for urgency/extreme urgency

Procedure	Minimal regular deadlines	Minimal shortened deadlines
Open	35 days	15 days
Restricted (Step 1-PQQ)	30 days	15 days
Restricted (Step 2-Tender)	30 days	10 days



In cases of extreme urgency

- **Article 32(2)(c) – Directive 2014/24/EU**
 - *“insofar 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 procedure with negotiation **cannot be complied with**”*
- The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority



Article 32 (2)(c) - What are the tests?

Extreme Urgency

Unforeseeability

Strictly Necessary

Impossibility of Usual Time Limits

Not Attributable to Contracting Authority



“Events unforeseeable by the contracting authority in question”

- These events and especially their specific development has to be considered unforeseeable for any contracting authority (EU Commission)
- The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment could, certainly, not be foreseen and planned in advance, and **thus constitute an unforeseeable event** for the contracting authority



“Extreme urgency making compliance with general deadlines impossible”

- Immediate needs of the hospital and health institutions have to be met with all possible speed
- Impossible to respect very short deadlines – **assessed on a case by case basis**
- Likely in most cases- short terms needs as infection curve rises
- If invoked - procurement need has to be satisfied without delay, narrow interpretation of grounds for use (**Case C-352/12 June 2013**)



“Extreme urgency making compliance with general deadlines impossible”

- Cannot be invoked for award of contracts that take longer than they would have if restricted procedure used – including accelerated procedures
- Commission v Italy (Case C -107/92) – avalanche barrier construction, CA not shown why accelerated restricted procedure could not be used
- Casual link with COVID-19 cannot be doubted
- Only used to cover gap until more stable solutions can be found through regular procedures



“Extreme urgency making compliance with general deadlines impossible”

- Commission v Spain (Case C-394/02) – procedure cannot be relied on to ensure security of supply of pharmaceuticals to prevent future shortages, only when a shortage actually occurred
- Commission v Greece (C-275/08) – Court considered that urgency did not exist since the procedure could have been launched much earlier than it was
- Burden of proof-on the Contracting Authority (Case C-199/85)



Oifig um Sholáthar Rialtais
Office of Government Procurement

Information Note

Covid-19 (Coronavirus) and Public Procurement

Update - 22 March 2020

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Options to Contracting Authorities (S.I. No. 284/2016)

- Direct award - extreme urgency (Regulation – 32(2)(c))
- Direct award due to absence of competition or protection of exclusive rights (Regulation 32 (2)(b))
- Standard procedure with accelerated timelines (Regs, 27, 28 & 29)
- Social and other specific services (Light Touch Regime- Regulation 74)
- Contract Modification (Regulation 72)





Regulation 32(2)(b) – Negotiated Procedure

- Works/supplies/services can only be supplied by particular economic operator:
 - i. Creation/acquisition of unique work/artistic performance
 - ii. Competition absent for technical reasons
 - iii. Protection of exclusive rights (e.g. IP)
- No reasonable alternative or suitable substitute
- Not artificially narrowing scope
- Written justification
- Contract award notice

OGP – Accelerated Timelines - OJEU Notice, Clear Justification

- *“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of contracting authority] sufficient time to comply with the standard [open procedure/restricted procedure/competitive procedure with negotiation] timescales for this procurement. [Contracting authority] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract Regulations 2015 (regulation [27(5) for the open procedure/28(10) for the restricted procedure/29(10) for the competitive procedure with negotiation]) in respect of this procurement”.*
- **NB: Reference to UK legislation, not Irish Regulations**

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Light Touch Regime – Regulation 74

- Health and Social Care Related Services
- Advertise contract and contract award notice
- Flexibility to use any process (open, restricted, negotiated or competitive dialogue)
- Timelines to be reasonable and proportionate

Q. What services fall under the Light Touch Regime?

A. Services that fall within this category are explicitly listed (with CPV codes) in Annex XIV of Directive 2014/24/EU. There are 14 categories of services and these are listed below.

- Health, social and related services
- Administrative social, educational, healthcare and cultural
- Compulsory social security services
- Benefit services
- Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services not excluded by Article 10(d) of Directive 2014/24/EU
- Other administrative services and Government services
- Provision of services to the community
- Prison related services, public security and rescue services not excluded by Article 10(b) of Directive 2014/24/EU
- Investigation and security services
- International services
- Postal service
- Miscellaneous services



Contract Modification – Regulation 72

- Most useful in present circumstances is Regulation 72(1)(c)
- where the following conditions are fulfilled:
 - (i) the need for modification has been brought about by circumstances which a **diligent contracting authority could not have foreseen**
 - (ii) the modification **does not alter the overall nature** of the contract

Provided that

any increase in price is **less than 50%** of value of original contract

- written justification
- **contract modification notice within 30 days** of modification



Contract Modification – Regulation 72

- Limit extension to what is **absolutely necessary**
- Related to Covid-19 outbreak- refer to specific facts
- OGP example – staff maybe procuring urgent requirements to deal with Covid-19, cannot engage in new procedure, staff sick?
- **Multiple modifications** are permissible – **each one should not exceed 50%**
- Limit duration and scope- run procedure for longer term requirements
- **Note Regulation 73** – Contracting Authorities should have ability to terminate if substantial modification made- could have impact if modification challenged



Contract Modification – Regulation 72

- Other options?
- Regulation 72(4) – de minimis threshold, 10/15% of contract value
- Regulation 72 (1)(b) - change cannot be made for economic or technical reasons and significant inconvenience or substantial duplication of costs

HOW SUSTAINABLE IS THE
COVID JUSTIFICATION AS
WE GET FURTHER INTO
THE PANDEMIC?

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OGP Guidance

- Unaffected by COVID-19 – use competitive process (VfM, transparency and equal treatment)
- Written justification
- Separate assessment before subsequent or additional procurement
- ***“As time goes on, what might amount to unforeseeable now, may not do so in future”***
- Absolutely necessary – what is procured and length of contract



OGP Guidance

- Delaying or failing to do something – does not qualify as extremely urgent, unforeseeable, not attributable to Contracting Authority
- Plan efficiently to use competitive procedure
- Alternatives? e.g. accelerated open procedure can be quick
- Case law held -knowing somethings need done -> foreseeable
- Delay could be attributable to Contracting Authority

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Conclusions– Beware!

- Article 84 Report – record of justification of use of procedure
- Contract Award Notice (Article 32) – 30 days after award
- Contract Modification Notice – 30 days after modification
- Circular 40/02 – Report Direct Award (contracts below €25,000)
- Ensure quality of supply (fraud, no track record)
- Litigation beginning in UK (PPE contracts), likely to come?



Thank you

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