

The European Commission's Guidance on COVID-19 and Public Procurement & Malta's Approach to Emergency Procurement

On 1 April 2020, the European Commission (the "**Commission**") issued a [Communication](#) entitled *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis* (the "**Communication**").

The Communication serves as a reminder to contracting authorities in Europe on the alternatives allowed by the current EU public procurement legislative framework in urgent emergency situations akin to the COVID-19 pandemic. It also contains crucial guidance on how the Commission is minded to interpret and apply the relevant provisions in the legislative framework to the current crisis.

This note attempts to go over the options set out by the Commission in the Communication, but it also sets out the Commission's guidance on how to apply those options. This note will then proceed to an overview on how Malta is approaching emergency procurement during this current crisis.

A. The Commission's Communication

The Communication outlines the following options to contracting authorities:

1. Accelerated procedure
2. Negotiated procedure without prior publication
3. Alternative and innovative solutions

The Commission recommends contracting authorities to pursue a multi-stage strategy for their procurement requirements: negotiated procedures should be resorted to for immediate and projected short-term needs, while the accelerated procedure is used to address medium-term needs.

1. Accelerated Procedure

The EU public procurement legislative framework allows the shortening of standard time limits applicable to the open and restricted procedures in cases of a "*state of urgency [which] renders impracticable the time limits*" in the law.

In the case of the open procedure, the standard time limit for the submission of bids can be shortened from 35 days to 15 days. In the case of the restricted procedure, the standard time

limit for the submission of bids can be shortened from 30 days to 10 days, but only if it was preceded by a request for participation, whose time limit can also be in turn shortened from 30 days to 15 days.

Contracting authorities are reminded that the reasons for resorting to the accelerated procedure have to be duly substantiated and available to bidders in the publication notices and/or the procurement documentation.

The Commission recommends the use of the accelerated procedure during the current pandemic for it "*complies with the principles of equal treatment and transparency and ensures competition even in cases of urgency*". However, it points out that the accelerated procedure might not be appropriate where the "immediate needs" of contracting authorities in a "*matter of days, even hours, if necessary*". That is where the other options highlighted by the Commission might be more appropriate.

2. Negotiated Procedure without Prior Publication

While the negotiated procedure without prior publication has become the procurement procedure of choice in health and medical procurement during these challenging times, it is perhaps beneficial for contracting authorities (but also for economic operators) to take stock of the Commission's approach to its use at this time.

The Commission has taken a reassuringly flexible approach in the Communication on the interpretation of the provisions relating to negotiated procedure without prior publication in the EU public procurement legislative framework, principally, the [Classic Directive 2014/24/EU](#) and the [Utilities Directive 2014/25/EU](#).

The Commission perceives the current COVID-19 crisis as a situation of "*extreme and unforeseeable urgency*"—one of the instances where contracting authorities may resort to the exceptional negotiated procedure without prior publication.

The Commission boldly states that in such cases of "extreme and unforeseeable urgency" the EU public procurement framework does not, in its view, contain "procedural constraints" for procurement by contracting authorities. It reminds contracting authorities that under the negotiated procedure without prior publication:

- Contracting authorities may negotiate directly with potential contractor(s);
- There are no publication requirements;
- There are no time limits;
- There are no minimum number of candidates to be consulted;
- There are no other procedural requirements.

The Commission encouraged contracting authorities, who have elected to resort to the negotiated procedure, to contact potential contractors in and outside the EU by phone, e-mail or in person; to hire agents that have better contacts in the markets; to send representatives directly to the countries that have the necessary stocks and can ensure immediate delivery; and to contact potential suppliers to agree to an increase in production or the start or renewal of production.

The Commission also offered its guidance on how to interpret the essential requisites for the case of "extreme and unforeseeable urgency" to subsist:

- a) **Events unforeseeable by the contracting authority in question.** The Commission takes the view that the daily increase in the number of COVID-19 patients requiring medical treatment constitutes an event which has to be considered unforeseeable for any contracting authority. The Commission writes that, in the current circumstances, the following procurement requirements could not be foreseen and could not have been planned in advance:
- 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.
- b) **Extreme urgency making compliance with general deadlines impossible.** The Commission writes that there is no doubt that the "immediate needs" in public health systems have to be met with "all possible speed". Contracting authorities were advised by the Commission that an assessment, on a case by case basis, has to be made to verify that it is indeed impossible to comply with the time limits in the EU public procurement legislative framework, including, the shortened time limits under the accelerated procedure.
- c) **Causal link between the unforeseen event and the extreme urgency.** Under this indent the Commission again states that there is no "reasonable doubt" that there is a causal link between the "immediate needs" of public health systems which need to be addressed quickly and the current COVID-19 pandemic.
- d) **Only used in order to cover the gap until more stable solutions can found.** The Commission warns that the negotiated procedure without prior publication can be used to address the "immediate needs" of public health systems and as a stop-gap solution.

3. Alternative and Innovative Solutions

The Commission points out that irrespective of concluding the formal procurement process quickly, whether through the accelerated procedure or through the negotiated procedure without prior publication, the contractor might still encounter difficulty to actually deliver or perform in view of: (i) the exceptional increase in demand of similar goods, products and services; and (ii) the significant disruption of the supply chain.

For these reasons, the Commission encourages contracting authorities to explore alternative and innovative solutions and to engage with the market in order to address the immediate needs of the public health system.

The Commission specifically recommends that contracting authorities:

- use innovative digital tools to trigger a wide interest among economic actors able to propose alternative solutions. For example, they could launch hackathons for new concepts that enable reusing protective masks after cleaning, for ideas on how to protect medical staff effectively, for ways to detect the virus in the environment, and so on;
- work more closely with innovation ecosystems or entrepreneurs' networks, which could propose solutions.

B. Malta's Approach to Emergency Procurement

As of 7 March 2020, Malta's Superintendent of Public Health has formally declared the current COVID-19 pandemic as a public health emergency in Malta in terms of the Public Health Act. This is a formal recognition that the COVID-19 pandemic is an "emergency", and therefore, the stage is set for contracting authorities to consider the options identified in the Commission's Communication.

Malta's [Department of Contracts](#) has not issued any guidance on emergency procurement to date (except for a circular on the conduct of public procurement at this time, which we reported on [here](#)).

In the absence of such guidance, the Commission's Communication is helpful to contracting authorities in Malta where the procurement procedure falls within the scope of national legislation transposing EU public procurement legislative framework, particularly, the Public Procurement Regulations and the Public Procurement of Entities operating in the Water, Energy, Transport, and Postal Services Sectors Regulations.

1. Negotiated Procedure without Prior Publication

Malta appears to have resorted to the negotiated procedure without prior publication at this time too in health and medical procurement. An example is the negotiated procedure issued for the supply of a field hospital with approximately 90 beds and approximately 70 ventilators. The full procurement documentation for the *Request for Participation for the Purchase, Delivery and Installation of modular extendable Sandwich Panel Negative Pressure Field Hospital* can be found [here](#).

Contracting authorities in Malta are to note that there are specific internal administrative approvals which have to be obtained and other formal requirements which have to be satisfied before pursuing this exceptional procurement procedure.

2. Innovative Solutions and Market Engagement

Malta has also engaged with the market to pursue innovative solutions to address the immediate needs for PPE. The most interesting case is that of [Invent 3D](#) reported in the press over the last few days. Invent 3D designed a face shield which can be used by healthcare professionals during the current COVID-19 pandemic. According to Invent 3D, the design for this face shield, which is freely available as [open source](#), was based on a similar design used in Czech Republic and then tailored to Malta's technical specifications. The 3D printing community in Malta initiated a [private crowd funding effort](#) in order to finance the cost of production of these face shields which will be supplied at no cost to the public health system. Following these efforts, the Ministry of the Education [announced](#) that roughly 45 3D printers

which were scattered around a number of public schools in Malta have been aggregated in a public school in Żabbar to be used by Invent 3D to scale up production of these face shields. On the same day, the Ministry for the Economy announced that Invent 3D will be granted a financial grant to assist with production.

While these creative and innovative solutions should be welcomed, contracting authorities and economic operators should verify compliance with public procurement law and with EU State aid law too.

3. Other Industry Sectors

The Commission's Communication addresses principally contracting authorities' need in health and medical procurement and it provides little to no guidance to public procurement in other sectors which might be affected, but there are lessons to be drawn for other sectors in the Communication.

It is submitted that for contracting authorities in industry sectors, other than health or medicine, are also able to resort to the accelerated procedure or to the negotiated procedure without prior publication, but it is crucial that the contracting authority identifies a causal link between the COVID-19 pandemic and the immediate needs which have to be procured quickly. The negotiated procedure without prior publication should continue to be used on an exceptional basis in order to avoid market distortions and unnecessary breaches of the general principles of public procurement.

Below the financial thresholds of public contracts set by the EU public procurement legislative framework, and where such public contract are not of a certain cross-border interest, contracting authorities are generally not constrained by European Union law when purchasing supplies, services and works. In such cases, contracting authorities in Malta may pursue either: (i) emergency procurement under the Emergency Procurement Regulations; or (ii) direct orders.

4. Emergency Procurement Regulations and Direct Orders

Malta has had a framework for emergency procurement since October 2016 in terms of the [Emergency Procurement Regulations](#). These Regulations apply where the procurement procedure's estimated financial value is less than €135,000 (exclusive of Value Added Tax) and where:

*the procurement of supplies, services or works, which becomes necessary either due to an unforeseen surge in the use of supplies resulting in a month stock level, or **which are otherwise necessary due to issues of national health, security or strategic importance.***

The only two contracting authorities allowed to use emergency procurement according to the Regulations are the Central Procurement Supplies Unit, which is the public health system's purchasing arm, and the Civil Protection Department.

Emergency Procurement Regulations requires compliance with the general principles of public procurement, namely, equal treatment and transparency:

- the emergency procurement must be advertised;
- the technical specifications and the award criteria are published in advance;
- bids are evaluated by an evaluation committee of not less than 3 members;

- bidders are to be informed of the successful bidder's identity and financial bid and also informed of the reasons why the bidder's offer was technically non-compliant, where applicable.

The emergency procurement has to be advertised on an electronic platform, but not necessarily on Malta's [e-PPS](#). CPSU's dedicated electronic platform for emergency procurement can be found [here](#).

The time limit for the submission of bids in emergency procurement can be as short as 4 days.

5. Direct Orders

Contracting authorities may procure supplies, services or works by way of a direct contract in "exceptional cases" and where necessary internal administrative approvals have been obtained. The direct order option should only apply where the public contract's estimated financial value is below the thresholds set by the EU public procurement directives and where it is not a contract of certain cross-border interest.

6. Other Alternatives

Contracting authorities may also pursue the negotiated procedure where the supplies, services or works can only be provided by a specific economic operator either because competition is absent for technical reasons; or because of the protection of exclusive rights, including intellectual property rights.

Contract modifications of public contracts which have already been awarded may also be appropriate during the current crisis where the following conditions are satisfied:

- the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- the modification does not alter the overall nature of the contract;
- any increase in price is not higher than 50% of the value of the original contract.

Yet again, there are internal administrative approvals which have to be obtained beforehand, but also, the parties to the contract have to see that the terms of the public contract allow the modification.

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