

COVID: Issues in Public Procurement and State Aid

Emergency Procurement and the Negotiated Procedure without Notice

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Urgent Procurement in the Old Times

- Alternatives available without any need for choice such as Framework, Exclusive rights, Modification
- Use of Negotiated Procedure without Notice, for instance Regulation 32(2) of PCR 2015
 - Insofar as is strictly necessary
 - For reasons of extreme urgency
 - Brought about by events unforeseeable to contracting authority
 - Time Limits cannot be complied with
- Accelerated Timetables

Innocent Times

- Case 194/88R, Italy
- Case C 24/91, Spain
- Case C 107/92, Italy
- Case C 328/92, Spain
- Case C 318/94, Germany
- Case C 385/02, Italy
- Case C 394/02, Greece
- Case C 126/03, Greece
- Case C 275/08, Germany
- Case C 352/12, Consiglio Nazionale degli Ingegneri
- And see Recital 50 Directive 2014/24: need to show no reasonable alternatives

Salt International Ltd v Scottish Ministers [2015] CSIH 85

- Inner House upholds analysis of first instance judge
- Purchase of Salt for 2 winters (2009 and 2010).
 - First instance judge found extreme urgency for both winters; salt would not have arrived on time (issue on timetable)
 - For winter 1 the severity and prolonged nature of the winter weather had not been forecast
 - For winter 2 the same could not be said; winter 1 was notice; delay was to an extent self-created
 - But challenger would not in any event have been successful tenderers

The First Wave of Urgent Procurements

- Ventilators and so forth
 - Lots of (continuing) news coverage
 - Lively academic debate about appropriateness of contracts for ventilators (see references at end)
- Apply the Approach of the Old Times
 - Insofar as is strictly necessary
 - For reasons of extreme urgency
 - Brought about by events unforeseeable to contracting authority – see, for instance, National Risk Register of Civil Emergencies, 2017 edition
 - Is a consequence of “Austerity” going to be capable of challenge? We made a judgment, just turned out to be wrong?
 - Time Limits cannot be complied with – ventilators not delivered in time for this peak and in the end we’ll build a stockpile

Non-Legislative Guidance

UK PPN 01/20

- Keep Records of Decisions
- Publish a Contract Award Notice
- Cumulative tests with examples given
- Records to include written justifications for each limb
- Achieve value for money and use good commercial judgment
- Log for future audit
- Consideration of other options under Reg 32 and 72

Communication from EU Commission

- Public procurement contains all necessary flexibility – contact suppliers proactively
- Multiple references to innovation
- Emphasis on shortened deadlines for accelerated procurement down to 10 days
- Necessity to be measured by reference to these shortened timetables
- Procurement must be satisfied without delay
- Only used to meet immediate needs/fill gaps

What are we worried about?

- Delivery – Timing
- Performance - Effectiveness
- Fraud – an enhanced Challenge in Times of Crisis
- Corruption - ditto
- Supply Chain and Cross Border Issues
- Overcharge or other value issues
- Fairness
- Audit Capability

What sort of Decision deprives the Authority of the Ability to rely on Urgency?

- Lots of Risks; I decided not to spend the money on this one
- It didn't occur to me, but perhaps it should have done
- I deliberately ignored the obviously inevitable

Challenges and Outcomes?

- Who can challenge?
 - In case of single tender...probably has to be actual or potential competitor
 - But can you show you would have won? And who's going to give declaration of ineffectiveness?
 - Overriding reasons relating to a general interest under Regulation 100 PCR 2015
 - Other breaches of principle or manifest error? eg demand was for the wrong thing. Some may not be challengeable..
- In an emergency call out to the sector?
 - What did you lose from choice of procedure? Just a bid challenge based on breach of principles and manifest error
- What interests are protected?
 - Only those of would-be bidders; the wider interests are not protected
 - Notable that all those cases were Commission enforcement

Do the Current Procedures Work?

- Urgent Broadcast of Opportunity
 - Not necessarily able to be definite about requirements but the market needs to be primed quickly
 - Compromise certainty and transparency with opportunity for speed and innovation
- Transparency
 - As protection against the concerns identified
- Do current procedures work?
 - Urgency, Innovation Partnership, Call for Competition
 - Is the real problem going forward going to be not urgency, but that this is not an opportunity that is best put out to procurement on traditional models?
- Is joint procurement the answer?

Select References

- Academic Debate
 - See recent entries on <https://www.howtocrackanut.com/> and www.telles.eu and materials referenced from there
- Guidance
 - <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>
 - [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN)
- Threats
 - <https://www.gov.uk/government/publications/international-public-sector-fraud-forum-guidance>
 - And see especially the most recent (Feb 20) “International Public Sector Fraud Forum: Fraud in Emergency Management and Recovery”
- Joint Procurement
 - https://ec.europa.eu/health/preparedness_response/joint_procurement_en

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Regulation 72 Public Contracts Regulations 2015 and COVID-19

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Recap of Regulation 72 PCR

- Deals with modification of contracts during their term, without the need for a new procurement procedure.
- Likely to be uptake of the Regulation in the light of Covid-19 as confirmed by Cabinet Office Guidance.
- As confirmed by Directive 2014/24/EU, Reg. 72 implemented to codify well-established EU law. See also *Edenred (UK Group v HM Treasury)* [2015] UKSC 45, per Lord Hodge JSC at [29] and [30].

Permissible modifications under Reg. 72

- The Starting point is to ask whether a modification will be “substantial”, as defined by Reg. 72(8). If it is not substantial then no new procedure needs to be undertaken (Reg. 72(1)(e)).
- Next – where the modification is below the values set out in Reg. 72(1)(e) – (a) the relevant threshold (Reg. 5) and 10% of initial contract value (services and supply) and 15% (works).

Permissible modifications under Reg. 72 - continued

- Next – does the Contract or Framework Agreement provide for a “clear, precise and unequivocal review clause”, and where the modification would not alter “*the overall nature of the contract*”? Potentially a tricky area, especially so in the light of the comment of Lord Hodge JSC in *Edenred* (at [45]) that the meaning of 72(1)(a) was not *acte clair*.
- Reg. 72(1)(b) – the need for additional works, services and supplies, where a change of contractor cannot be made for “*economic or technical reasons*” and would cause “*significant inconvenience or substantial duplication of costs*”

Reg. 72(1)(b)

- A potential example: in the health and social care context, where different supplies need to be provided, but due to the current crisis, it is too difficult to start working with new economic operators. The Authority may rely upon **Reg. 72(1)(b)**.
- However, it must be recalled that the 72(1)(b) can only be used where it does not lead to an increase in price which exceeds 50% of the value of the original contract.
- *Procurement Policy Note – Responding to Covid-19, Information Note PPN 01/20 March 2020.*
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20 - Responding to COVID19.v5_1 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5_1.pdf)
- This does refer to 72(1)(b) but as a secondary ground.

Reg. 72(1)(c)

- Instead, the main ground referred to in the Cabinet Office Guidance is Reg. 72(1)(c).
- Reg. 72(1)(c): the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen; the modification does not alter the overall nature of the contract and any increase in price does not exceed 50% of overall contract value.

Reg. 72(1)(c) - continued

- Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance.
- The justification should demonstrate that the change was due to COVID-19 with reference to specific facts.
- The examples given are the Contracting Authority's staff are diverted by procuring other urgent requirements to deal with COVID-19 consequences, or staff are off sick so they cannot complete a new procurement exercise.

Reg. 72(1)(c) – continued (2)

- You should publish the modification by way of an OJEU notice to say you have relied on regulation 72(1)(c). That is a requirement under Reg. 72(3) for modifications under (1)(b) and (c).
- You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.
- If more than one ground is applicable this may lower the legal risk and therefore you should ensure all relevant grounds are included in your written justification.

Reg. 72(1)(d)

- Where a new contractor replaces the one to which the contract was awarded, as a result of
 - (i) an unequivocal review clause or option, or
 - (ii) universal or partial succession, following corporate restructuring,

and there are no substantial modifications to the contract, and it is not aimed at circumventing the public procurement regime generally.

- Not mentioned in the Cabinet Office Guidance – for obvious reasons – but still relevant.

Supplier relief due to Covid-19

- See further Guidance - Procurement Policy Note – Supplier relief due to Covid-19, Action Note PPN 02/20:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf

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