

# Bird & Bird & COVID-19 Public Procurement Q&A

*Emergency legislation / Regulatory relaxation during  
COVID-19 pandemic*



# Contents

Introduction	1
Australia	2
Belgium	4
China & Hong Kong	8
Czech Republic	14
Denmark	17
Europe	18
Finland	20
France	23
Germany	26
Italy	29
Poland	31
Singapore	35
Slovakia	37
Spain	39
Sweden	42
UAE	45
United Kingdom	47
About us	50

# Introduction

## Background

During the COVID-19 crisis, health bodies are facing extremely urgent and overwhelming needs for goods and services, such as masks, gloves, goggles and face-shields, as well as medical ventilators, testing kits and medicinal products.

The European Commission published [guidance](#) on tendering procedures available within the existing EU public procurement framework in the emergency situation related to the coronavirus outbreak. Many countries, regional and local contracting authorities have taken similar guidance documents in order to face the huge challenges that such urgent and extraordinary situation creates.

In this overview we tackle questions raised by our clients (including contracting authorities as well as (potential) bidders) in the jurisdictions in which we operate. As a summary of recent requests by our clients and on the basis of different publications (e.g. the “Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01), we have collected three essential questions and answered them from a “European Perspective” as well as for each individual jurisdiction concerned.

This overview is intended to summarise efforts in order to support our clients in their efforts to cope with the situation. This document does not constitute legal advice, if you require more information please feel free to reach out to the country contacts in this document.

# Australia

1

**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

## Procurement by Commonwealth entities

Procurement by Commonwealth entities must be conducted in accordance with the *Commonwealth Procurement Rules* ("CPRs"). Under the CPRs, there are several means of expediting procurement processes in response to COVID-19.

## Procurement under a Determination to protect human health

Under rule 6 of the CPRs, the procurement rules contained within the CPRs will not apply "to the extent that an official applies measures determined by their Accountable Authority to be necessary ... to protect human health".

The procurement processes set out by the CPRs may therefore be circumvented should the Accountable Authority of an agency (e.g. the Secretary of a Department) make a determination that a procurement is necessary to protect human health in response to COVID-19.

## Circumstances of extreme urgency

A limited tender, being a tender in which a limited number of suppliers are invited to make submissions (as opposed to an open approach), is generally only permissible where a procurement is below the relevant procurement threshold, being \$10,000 for non-corporate Commonwealth entities).

However, under rule 10.3(b) of the CPRs, a limited tender may also be conducted "for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the goods and services could not be obtained in time under open tender".

A limited tender may therefore be conducted in response to COVID-19 where the resources to be procured cannot be obtained by open tender because they are urgently required due to unforeseen circumstances arising from the pandemic.

Under rule 10.4, a limited tender does not need to meet the rules regarding time limits. As such, a limited tender under rule 10.3(b) may be conducted quickly, reducing the time until the procured resources can be delivered.

## National Medical Stockpile

The Federal Government maintains the National Medical Stockpile as a part of Australia's critical infrastructure. The stockpile includes essential pharmaceuticals and Personal Protective Equipment to be distributed on request by state or territory health authorities.

During COVID-19, PPE has been released from the National Medical Stockpile to support the continuity of health service provision. The Federal Government has also allocated AUD \$1.1 billion for the procurement of additional supplies for the National Medical Stockpile/ The Department of Health continues to work closely with industry to obtain additional PPE and critical pharmaceuticals (including ventilators).

### Procurement by State and Territory entities

Procurement by State and Territory authorities operate under the laws of the relevant jurisdiction.

We note that the NSW Government has issued "COVID-19 Emergency procurement procedure" guidelines. Heads of NSW Government agencies may expedite procurement during COVID-19 by authorising procurement to a value sufficient to meet an emergency situation under clause 4 of the *Public Works and Procurement Regulation 2019* (NSW).

Procurements made under that provision will be exempt from section 176 of the *Public Works and Procurement Act 1912* (NSW), and will therefore not be required to comply with directions of the Procurement Board.

Similar emergency provisions may be applied to the procurement regimes on other States and Territories in response to COVID-19.

**2** What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

There are no specific regulations in relation to planning and tendering of construction measures in response to the COVID-19 pandemic. The above response is also applicable in such scenarios.

**3** What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?

No legislation has been introduced as a result of COVID-19 to specify how contract amendments may be made during the contract period. Any amendments will be subject to general contract law.

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# Belgium

## 1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

The award of public procurement in the life-sciences field is regulated in a national level by the Federal Law of 17 June 2016 on public procurement and the Royal Decree of 18 April 2017 on the award of public procurement in the classical sectors.

These regulations implement Article 32 of Directive 2014/24 on public procurement on the use of the negotiated procedure without prior publication in Belgium.

This procedure is exceptional as it allows contracting authorities to award a contract to an operator without prior publication of a contract notice. In addition, when using this procedure, the contracting authorities may set shorter time for the submission of offers and derogate from the rules relating to exclusion grounds and selection criteria.

The negotiated procedure without prior publication can be used in accordance with Article 42 of the Law of 17 June 2016 and Article 90 of the Royal Decree of 18 April 2017. This procedure can be used in case of **extreme urgency** brought by events unforeseeable by the contracting authority. The contracting authority must also demonstrate that the time limits for competition cannot be complied with due to the unforeseen event(s).

This hypothesis can only be invoked for the purchase of services and goods which expressly serve to contain and manage the corona epidemic or to maintain the public administration's service operations in the event of a crisis. This is further confirmed by several guidelines adopted by national authorities in Belgium on the award of public procurements during the COVID19 crisis<sup>1</sup>. For example, a FAQ published on the official website of the Chancellor's Division on public procurement specifies that this procedure may only be used for certain urgent and necessary procurements, such as the purchase of protection masks<sup>2</sup>.

In accordance with Article 42 of the Law of 17 June 2016 (and Article 90 of the Royal Decree of 18 April 2017), the contracting authorities may also use this procedure (negotiated without advertisement) to award a contract without demonstrating any urgency providing that the contract value does not exceed EUR 139,000.

This is also the case for one or several lots of a public contract (irrespective of its object: work, service or supply) provided that: (i) the contract value is below the European threshold; (ii) the amount of the concerned lots is below EUR 100,000; (iii) the aggregate value of the lots is below 20% of the contract value. In addition, as far as contract amounted above the European threshold, the contracting authority may also use the negotiated procedure without prior publication to award a specific lot provided that: (ii) the amount of the concerned lots is below EUR 80,000; (iii) the aggregate value of the lots is below 20% of the contract value.

Even in a **negotiated procedure without competitive tendering**, it stems from the Law of 17 June 2016 that the contracting authority

<sup>1</sup> See: for the Wallonia Region, the Circular of the Region of 23 March 2020 (accessible through this [link](#) for the association of cities and districts of Brussels (accessible through this [link](#)

<sup>2</sup> This FAQ is accessible online through this [link](#)

shall to invite, to the extent possible, several economic operators to submit an offer. However, there are no formal rules applicable to such invitation. Thus, the contracting authority may contact the companies by e-mail or through a specific publication (with restrictive access to the concerned companies) online.

In addition, the contracting authority may reduce substantially the time limit for submission of tenders. There is no minimum threshold and a deadline of a few days can be set by the contracting authority. The time limit must however be reasonable in order to allow the tenderers to submit a proper offer.

Interesting is also the fact that the contracting authority may award the contract based on the initial tenders without entering into negotiations. In general, unless provided otherwise in the tender documents, both the selection decision and the award of the contract will take place immediately after the deadline for submission of tenders.

## 2 What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

General remark: Although the legislation on public procurement is a federal (national) matter each contracting authority (on regional level) may adopt specific policies in order to tackle exceptional circumstances in the planning, the tendering or the performance of its public contracts. As a result, several measures have been adopted in different levels in Belgium in order to take into account the COVID-19 pandemic. As far as public contracts of works are concerned, specific policy papers have been published by the Federal State, the Regions (Flanders, Wallonia and Brussels) and associations of local contracting authorities. However, these policies mainly recall the applicable rules on public contracts of work.

As far as the **planning** of works is concerned, all the above mentioned authorities recommend that the parties of a public contract should assess whether or not the measures taken in order to contain the COVID-19 pandemic impact the performance of contract. If so, , guidance documents of the different contracting authorities mainly refer to the general principles applicable on order of beginning the works, the eventual suspension of the contract or, in the worst case, its termination.

- **Order of beginning the works:** we note, for example, that according to the Guidance published by the Walloon Region on 2 April 2020<sup>3</sup>, the contracting authority may decide to set a new timeframe with or without the consent of the contractor or report the beginning of the works after the expiry of the measures taken in order to contain the COVID-19 crisis. The same recommendation has also been given by the other authorities as far as their procurements are concerned<sup>4</sup>;
- **Suspension of the contract:** the policies mainly re-iterate the possibility for the contracting authorities to suspend the performance of the contract. The latter may suspend unilaterally – without compensation – the performance of the contract due to unforeseeable circumstances which constitute an obstacle to the performance of the contract;
- **Termination of the contract:** the contracting authority may terminate, by its own will, the fixed-price contract, even though the work has already started. Although no formal notification obligation is imposed on the contracting authority, it is quite clear that it is recommended to contact the successful tenderer in advance. The latter has also the right to receive compensation for the works

<sup>3</sup> This note is accessible through this [link](#)

<sup>4</sup> For example, the guidance drafted by the Flemish Region, accessible online through this [link](#)

		<p>performed and the expenses.</p> <p>As far as the <b>tendering</b> of public works contracts is concerned, no specific Guidance or Policies is included. Therefore, our assessment regarding the use of negotiated procedure without prior publication of a contract notice will be applied mutatis mutandis.</p>
<p><b>3</b></p>	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>Articles 37 and seq. of the Royal Decree of 14 January 2013 on the performance of public procurements provides for the conditions under which a public contract may be amended without the need of a new tender procedure. These conditions transpose those of Article 72 of Directive 2014/24.</p> <p>In line with Directive 2014/24, Articles 37 and seq. of the Royal Decree of 14 January 2013 provide for the conditions and circumstances under which a contract can be modified without the need for a new tender procedure.</p> <p>Among these circumstances, the Royal Decree identifies, first, a "quantitative" criterion ("de minimis" rule). A modification is allowed if the value of the amendment is below the European threshold and 10 % of the initial contract value for services <u>and</u> supplies contracts and below 15 % of the initial contract value for works contracts.</p> <p>Second, when the value of the modification is higher than this value, only the following amendments/circumstances are legally acceptable (only relevant circumstances are identified in the following):</p> <ul style="list-style-type: none"> <li>• modifications due to circumstances which a diligent contracting authority could not foresee. In such case, the modification may not alter the overall nature of the contract nor lead to an increase in price higher than 50 % of the value of the original contract or framework agreement</li> <li>• modifications based on a general review clause enabling the modifications of the contract. NB, in such case, the Royal Decree provides that the concerned clause should be clear, precise and unequivocal. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. However, they shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement</li> <li>• modifications that could not be seen as substantial, irrespective of their value. In line with the Directive 2014/24 Article 38/6 of the Royal Decree provides that a modification shall be considered to be substantial where one or more of the following conditions is met: <ul style="list-style-type: none"> <li>– the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;</li> <li>– the modification changes the economic balance of the contract or the framework agreement in favor of the contractor in a manner which was not provided for in the initial contract or framework agreement;</li> <li>– the modification extends the scope of the contract or framework agreement considerably;</li> <li>– where a new contractor replaces the one to which the contracting</li> </ul> </li> </ul>

authority had initially awarded the contract in other cases than those provided in the Royal Decree.

NB, modifications to contracts whose value exceed the relevant European threshold must be published in the Official Journal of the European Union and the national *Bulletin des adjudications* (article 38/19 of the Royal Decree of 14 January 2013 on the performance of public procurements).

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# China & Hong Kong

## Mainland China

1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

China has announced a number of provisions to allow for the fast procurement of products needed to protect against or detect COVID-19. These provisions effectively provide priority for procuring those products, removes tendering/bidding requirements and also provides for a dedicated purchasing channel ("green channel"). The relevant provisions are:

- "Notice No.23 – Notice of the General Office of the Ministry of Finance on Facilitating Procurement for Epidemic Prevention and Control" ("MOF Notice No.23"), issued on 26 Jan 2020, outlined that State organs, institutions and organizations at various levels shall give first priority to procurement projects for epidemic prevention and control, and establish the "**green channel**" for such public procurement
- Notice No.29 – Notice of the General Office of the Ministry of Finance on Matters Related to Government Procurement Activities During the Epidemic Prevention and Control Period ("MOF Notice No.29"), issued on 6 Feb 2020, outlined that the public procurement in relation to epidemic prevention and control are considered as an **emergency procurement project** for which the procedural and review requirements on procurement are relaxed.

The above Notices are also elaborated on in the Notice 170 – Notice of the General Office of the National Development and Reform Commission on Actively Responding to Epidemic Situation, Conducting Bidding and Tendering Creatively to Ensure the Smooth Operation of the Economy ("NRDC Notice No.170") issued on 8 Feb 2020.

In addition, provincial level governments (e.g. Beijing, Shanghai, Zhejiang, Sichuan, Hubei, Heilongjiang) have also published corresponding notices to implement prioritized public procurement for epidemic prevention and control in their respective governmental regions.

### Green channel/emergency public procurement:

Pursuant to MOF Notice No.23 the green channel for public procedure of epidemic prevention materials allows procurement units (including state organs, institutions and organizations at various levels) **to not comply with the methods and procedures prescribed in the PRC Public Procurement Law and no examination and approval is required for procurement of imported materials.**

MOF Notice No.29 provides that the procurement project in relation to epidemic prevention and control shall be deemed as an emergency procurement project and shall be conducted in accordance with MOF Notice. No.23.

### Internal control mechanism:

MOF Notice No.23 requires each procurement unit to establish an internal control mechanism (that allows for continual improvement) for emergency procurement. This should be done while ensuring reasonable time limits for procurement, improving the efficiency of use

of procurement funds, and ensuring the quality of procured products.

**Move public procurement online:**

MOF Notice No.29 promotes the movement of public procurement to an online system. It also encourages all online public procurement platforms nationally to improve their organization around the sourcing of epidemic prevention and control materials, and to also set up specific locations to release information on what products are needed, so as to better match between the supply and demand.

**Non-emergency procurement:**

MOF Notice No.29 outlines that if procurement activities for non-emergency procurement cannot be carried out, or continued, within the prescribed time period due to epidemic prevention and control, they can be suspended or postponed as appropriate. It requires that relevant information on the suspension/postponement shall be published and relevant parties notified.

**Calculation of working days:**

MOF Notice No.29 requires that the calculation of working days for public procurement shall exclude the extended national holidays granted by the State Council and local people's governments at all levels.

**File record:**

MOF Notice No.23 requires that the procurement units shall improve the management of procurement documents and receipts of procurement items for epidemic prevention and control, and keep them for future reference.

**Termination:**

MOF Notice No.29 states that, from the day when the epidemic prevention and control is terminated, normal procurement activities will resume.

**Provincial regulations:**

At the provincial level, Beijing is encouraging the involvement of companies of all different sizes to contribute to procurement during the outbreak of COVID-19 pandemic. It published "Notice 195 – Notice on Strengthening Government Procurement to Support Small, Medium and Micro Enterprises During the Prevention and Control of COVID-19" ("Notice No.195) on 8 Feb 2020.

Notice No.195 provides in Article 3 that the procurer shall provide 10% price deduction to small and micro sized companies (definition depends on industry), and review the bidding documents based on the deducted price.

Article 4 requires that, for government procurement contracts with small, medium and micro enterprises, procurers are encouraged to reduce and exempt the payment of a performance bond, increase the proportion of prepayment, and shorten the deadline for full payment to within 30 days after receiving the invoice.

**2 What regulations are in place for the planning and tendering of construction measures and for construction contracts of**

The Notices provided in Question 1 also apply to the planning and tendering of construction measures and for construction contracts.

<p><b>urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>In particular, tendering for emergency medical facilities, isolation facilities and other construction projects that are urgently needed for epidemic prevention can proceed without bidding subject to certain conditions according to the National Development and Reform Commission Notice No.170.</p> <p>Also, the bidding process is recommended to be moved online to facilitate and simplify the whole process and improve efficiency.</p> <p>NRDC Notice No.170 requires the smooth progress of relevant procurement projects relating to the epidemic prevention and control.</p> <p>For construction projects that are urgently needed for epidemic prevention and control (such as emergency medical facilities and isolation facilities) if they meet the requirements in Article 66 of the PRC Bidding Law they <b>may be carried out without bidding or by shortening the time limits in the bidding documents.</b> (Article 66 – for a project concerned with national security, state secrets, emergency handling etc.)</p> <p>To minimize the epidemic's impact on bidding and other public resource trading activities, while still ensuring public safety, efforts shall be made to flexibly adjust the work arrangements according to changes in the epidemic prevention and control situation, the urgency of projects, and the demands of market participants.</p>
<p><b>3 What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>The state government has not published guidance on possible amendments to ongoing contracts due to the spread of the COVID-19 virus.</p> <p>The provincial governments including Hubei and Heilongjiang have published notices which include the amendment of public procurement contracts in the context of COVID-19.</p> <p><b>Hubei:</b></p> <p>"Notice No.1 – Notice of Hubei Provincial Department of Finance on Government Procurement During the Prevention and Control of COVID-19" issued on 30 Jan 2020 provides that, if the government procurement contract cannot be performed on schedule due to the epidemic situation, the parties to the government procurement contract shall fully negotiate and can agree to change, suspend or terminate the government procurement contract in accordance with the Article 50 of the PRC Government Procurement Law .</p> <p>In this case, the defaulting party shall not be liable for compensation.</p> <p>(Article 50 of the PRC Government Procurement Law provides that the parties to the government procurement contract shall not modify, suspend or terminate the contract unless the implementation of the public procurement contract will impair the interests of the state or the general public. The party at fault shall be responsible for compensations. If both parties are at fault, they shall be commensurately liable for compensation.)</p> <p><b>Heilongjiang:</b></p> <p>Notice No.4 – "Notice of the General Office of the Ministry of Finance on Issues Related to Government Procurement Activities During Epidemic Prevention and Control" issued on 12 Feb 2020 includes a similar provision to the Hubei Notice No.1.</p>

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**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

Since January 2020 the HK Hospital Authority ("HA") has expedited the procurement of protective equipment.

The Government Logistics Department ("GLD") has resorted to all possible means and channels to make direct procurement of masks and other protective items, bypassing tendering procedures on account of the urgency.

The Government has been making direct purchases on the open market if the items on offer meet the technical specifications required for the products.

Sections 331-333 of the *Stores and Procurement Regulations* allow for direct purchasing instead of tendering when "tendering would not be an effective means of obtaining the requisite stores or services or procuring revenue contracts, supported with very strong justifications".

On 21 February 2020, the Legislative Council Finance Committee approved the injection of HK\$30 billion into the Anti-epidemic Fund ("the Fund").

Of this, HK\$4.7 billion from the Fund has been provided to HA for tackling the epidemic, particularly for ensuring sufficient support and protection for frontline healthcare staff.

Aside from personnel-related expenditure, monies from the Fund will be used for procuring additional personal protective equipment ("PPE") and other necessary accessories for healthcare staff, enhancing support for laboratory testing, procuring drug and medical equipment, as well as strengthening a range of hospital support services such as cleaning, transport and supplies.

The HA will "use and deploy the resources flexibly as needed".

The HA will buy PPE and COVID-19 related products directly as needed but all other tenders remain as normal.

The HK Government has also developed the "Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance

(4 January 2020)" ("Response Plan")

The Plan includes three response levels of increasing risk: Alert, Serious and Emergency. The Department of Health (DH) and the HA are key members of the command structure and outline the PPE requirements at the hospital level and inspect and review PPE stock levels at the hospitals. At the Emergency Level, the HA will mobilise the PPE stockpile.

The HK Government also has the *Prevention and Control of Disease Ordinance* (Cap. 599) ("Ordinance") under which the Secretary for Food and Health may make regulations for the purposes of preventing, combating or alleviating the effects of the public health emergency and protecting public health. Under s8(3)(c), regulations can be made to requisition property for this purpose.

On 8 January 2020, "Severe Respiratory Disease associated with a

		<p>Novel Infectious Agent” was gazetted as a notifiable disease under the Ordinance.</p>
<p><b>2</b></p>	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>There is no specific piece of regulation for COVID-19 related construction contracts.</p> <p>In the "Information paper for the urgent questions raised in the Legislative Council meeting in February 2020", the HK Government indicated that they would increase the capacity of quarantine facilities, approving construction of about 450 temporary units of modular housing at three of the existing quarantine facilities.</p> <p>Construction of the first 100 units would be completed by end-February 2020 and could be used upon the provision of appropriate logistics supplies.</p> <p>Under the Response Plan, the Department of Health can also Liaise with Leisure and Cultural Services Department ("LCSD") for immediate conversion of designated holiday camps into quarantine centres.</p> <p>Under the <i>Stores and Procurement Regulations</i>, government procurement exceeding HK\$1.4 million (for goods and general services), HK\$3 million (for consultancy services) and HK\$7 million (for services for construction and engineering works*) in value is normally through open and competitive tendering procedures.</p> <p>However, under a "Single or Restricted Tendering "process (i.e. "limited tendering") tender invitations can be sent to only one or a number of suppliers/contractors approved by the Permanent Secretary for Financial Services and the Treasury ("Treasury") or the Director of Government Logistics. These procedures are only used in circumstances which do not permit open tendering, for example, on grounds of <u>extreme urgency</u> or security, for protection of patents, copyrights or other exclusive rights.</p> <p>A period of extreme urgency for limited tenders is considered to be for unforeseeable events and where the delay that would arise as a result of open or selective tendering could seriously harm the public or security interests of the Hong Kong.</p> <p>The HK Government Architectural Services Department ("ASD") awarded one limited tender in January 2020 and 4 limited tenders in February 2020 to 3 separate companies to construct temporary quarantine facilities in HK.</p> <p>The HK Government Development Bureau maintains a list of approved contractors.</p>
<p><b>3</b></p>	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>There has been no specific legislation or announcements related to adjustment of terms in Government supply tender contracts during the COVID-19 pandemic.</p> <p>Under the <i>Stores and Procurement Regulations</i>, purchasing by the HK Government is conducted predominately under tender.</p> <p>The Government Logistics Department ("GLD") does provide general terms and conditions for the supply of goods by GLD tender (GLD-T&amp;C)</p>

The GLD also provide a General terms and Conditions document for the supply of goods by tender through procuring departments/bureau (BD-T&C).

New BD-T&C and GLD-T&C came into force in April 2020. These documents contain the same terms and conditions. There are provisions outlined for non-performance and reasons for non-performance (e.g. force majeure).

When tendering with the HA, the tender document outlines the general terms and conditions of the contract. The contracts currently in force may vary depending on the goods or services provided as compared to the BD-T&C or GLD-T&C as the departments can add addendum as required. In addition, review of the contract would be required as force majeure in a recent tender document for the HA is stated to mean: "act of God, explosion, flood, tempest, fire, accident, war or threat of war, sabotage, insurrection or civil disturbance" as compared to the broader definition in the new BD-T&C (below). Other elements around delivery, acceptance and termination are similar.

#### GLD & BD General terms and Conditions for supply of goods

Under the general conditions of contract:

Section 6 – the tenderer must notify the Government should it become reasonably apparent to the Contractor that due to certain delay or disruption they will be unable to deliver in time. In this situation, the Government can change or postpone dates of delivery.

Section 10 – the Government can reject the goods if they do not meet the required specifications of the tender.

Section 19 – the tender can be terminated at any time with notice. Under s20, there are a number of termination consequences, including being liable to pay the costs of procuring other products under separate contracts to meet the tender requirements.

Section 32 – the tender contract may be suspended due to a 'force majeure' event. Force majeure is defined to include any outbreak of war, hostilities (whether war be declared or not), invasion, acts of foreign enemies, rebellion, revolution affecting Hong Kong or the Place of Origin or the delivery route. It also includes any event which is not caused or contributed to by, and is beyond the control of, the Contractor. These events must materially prevent the performance of the duties and obligations of any Party.

Section 37 – allows for variation of the tender conditions on an agreement in writing.

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# Czech Republic

1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

In the Czech Republic, the Ministry for Regional Development ("MRD") and also the Office for the Protection of Competition ("OPC") published guidelines for contracting authorities on recommended procedures in case of urgent need for purchase of goods and services during the current emergency situation caused by the COVID-19 pandemic (jointly referred to as "Guidelines").

The Guidelines confirm that contracting authorities can use one of the regimes that are foreseen in the Act on Public Procurement ("APP") in order to make available the necessary resources during the emergency directly linked to the COVID-19 epidemic. In each particular situation, the authorities shall consider whether there is an objective need for avoidance of the standard tendering procedure to make the necessary resources available, given the urgency of the situation. Depending on the level of urgency in the specific situation, contracting authorities may use one of the following regimes defined in the APP that are further described below:

- 1 **Shortened deadlines** - the deadline for the submission of tenders may be shortened if urgent unforeseeable circumstances that are not attributable to the contracting authority make it impossible to use standard periods pursuant to the general provisions of the APP.
- 2 **Negotiated procedure without prior publication** - contracting authorities are allowed to use this procedure where it is necessary due to extreme urgency that was unforeseeable by and not attributable to the contracting authority and the shortened deadlines as described in (1) are not sufficient to solve the urgency of the situation.
- 3 The contracting authority might not be obliged to award the public contract using the procurement procedure at all.

## Shortened deadlines

If urgency requires it, contracting authorities are entitled to shorten deadlines and periods for the submission of requests otherwise applicable. The urgency behind this decision has to be duly justified in the tender documentation.

Under the open procedure, the deadline for the submission of tenders can be reduced up to 15 days in cases of duly justified urgency pursuant to the Sec. 57 (2) (b) of the APP.

Under the restricted procedure pursuant to the Sec. 59 (5) of the APP and similarly under the negotiated procedure with prior publication pursuant to the Sec. 62 (3) of the APP the deadline of 30 days for the submission of requests to participate can be reduced up to 15 days. Similarly, the deadline for the submission of tenders may be reduced up to 10 days.

## Negotiated procedure without prior publication

In situations where the abovementioned shorter periods are not sufficient to solve the urgency of the situation, contracting authorities can award the contract under the negotiated procedure without publication. Pursuant to the Sec. 63 (5) of the APP the level of urgency must be extreme. Extreme urgency delineates the border between this

regime and regime of shorted deadlines as describe above.

According to the Guidelines, the urgency cannot be attributable to the contracting authority and it must be unforeseeable. Therefore, the urgency cannot result from the inactivity of the contracting authority, although, the emergency situation has been already known to this entity.

#### Awarding the contract without procurement procedure

According to the Guidelines, the current COVID-19 situation meets the conditions that allow contracting authorities to completely avoid use of procurement procedure and to award the contract directly to contractors.

Pursuant to the Sec. 29 (c) of the APP, the procurement procedure can be avoided if following conditions are met

- 1 the award of public contract results from the security measures adopted pursuant to the other legal regulation. According to the MRD's opinion, the declared State of Emergency and anti-epidemic measures adopted pursuant to the Sec. 5 and Sec. 6 of the Emergency Act are the examples of these security measures adopted pursuant to the other regulation; and
- 2 simultaneously any measure that would enable the conduct of the standard procurement procedure cannot be objectively adopted. According to the MRD, the anti-epidemic measures are of the nature to prevent contracting authorities to conduct a standard procurement procedure in some situations that, however, need to be duly justified.

The Guidelines mention several examples when the contract can be awarded without procurement procedure such as immediate purchase of respirators, face masks, medicaments or other medical products according to the adopted anti-epidemic measures. On the other hand, this exception cannot be used for awarding contracts on purchase of office supplies, planned purchase of cars or earlier planned constructional works etc.

Please note that government has declared the State of Emergency as of 12 March 2020 and it was later prolonged until 30 April 2020 by Chamber of Deputies of the Czech Parliament. Government has proposed to further prolong the State of Emergency until 25 May 2020, however, it has yet to be approved by Chamber of Deputies.

In addition, the OPC's Guidelines states that current COVID-19 situation can also meet the conditions for avoidance of procurement procedure pursuant to the Sec. 29 (a) of the APP. Therefore, procurement procedure can be avoided, if the conduct of the procurement procedure would threaten protection of the elementary security interests of the Czech Republic. According to the OPC, the protection of life and health of people can be considered as an example of the elementary security interests falling within the Sec. 29 (a) of the APP.

**2** What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

There is no specific regulation for construction contracts of urgency awarded in current COVID-19 pandemic. The Guidelines do not address the construction contracts as well. Therefore, the abovementioned exceptions from standard procurement procedure apply also to construction contracts of urgency that serve to contain the COVID-19 pandemic.

**3** What contract amendments are possible during their contract period due to the spread of the

Current COVID-19 situation affects number of awarded contracts. These contracts can be generally amended without the need for a new procurement procedure only if the amendments to the contract are not

## COVID-19 virus without the need for a new award procedure?

substantial pursuant to the Sec. 222 of the APP.

Specifically, due to the spread of COVID-19, the amendments are not considered substantial, and contracting authorities can amend the awarded contracts without the need for a new procurement procedure provided the following conditions as defined in the 222 (6) of the APP are met:

- a the need for amendment is arising out from circumstances that a diligent contracting authority could not foresee;
- b the overall nature of the contract is not modified by these amendments; and
- c the value of any modification cannot exceed 50% of the original value of the contract. If more than one modification to the contract is made, then this value is calculated from the summary of values of all modifications.

According to the MRD's Guidelines, amendments to the public contracts shall be made only if necessary according to the new circumstances arising out from the current epidemic situation. Therefore, the declaration of the State of Emergency and adopted anti-epidemic measures do not entitle contracting authorities to extend the contracts beyond the extent enforced by the urgent circumstances caused by COVID-19 epidemic.

Further, the OPC's Guidelines emphasize the obligations of the contracting authorities to record the circumstances that gave rise to the need for amendment of contracts without the need for a new procurement procedure, in each particular situation.

Pursuant to the Sec 222 of the APP, contracts might also be extended due to incapacity of suppliers to perform on time due to the circumstances caused by COVID-19 epidemic such as quarantine of employees, shortages of input supplies, isolation of the Contract Venue etc. In these situations, the contracting authorities can mutually agree on the amendments of the contracts with affected suppliers. According to the MRD's guidelines, contracting authorities shall request a confirmation from the suppliers about the reasons for their temporary incapacity to perform the contracts. Evidence might be later requested to justify the need for extension of the contract.

Besides above mentioned exceptions applicable specifically in situations such as COVID-19 epidemic, the general provision of Sec. 222 of the APP applies. Especially pursuant to the Sec. 222 (4) of the APP, the contracting authority can amend the awarded contract without the need for new public procurement, if the overall nature of the contract is not modified and if the value of amendment is less than 10% of the original value of the contract, or 15% of the original value of the contract on construction works that is not a concession.

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# Denmark

<b>1</b>	<b>In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?</b>	<p>The Danish public procurement rules allow a contracting authority to award a public contract by a negotiated procedure without publication in circumstances of extreme urgency. The procedure can be conducted as fast as possible.</p> <p><b>Circumstances of extreme urgency:</b></p> <p>The approach described from <b>Art. 32 II lit. c</b> Directive 2014/24/EU has been implemented as <b>Section 80 (5)</b> in the Danish Public Procurement Act.</p> <p>The Danish implementation in <b>Section 80 (5)</b> reads: "</p> <p><i>" A contracting authority may also apply negotiated procedure without prior publication when strictly necessary owing to circumstances resulting from events unforeseeable to the contracting authority as a result of which time limits for open procedures, restricted procedures or competitive procedures with negotiation cannot be observed."</i></p> <p>However, particular attention must be paid to the causal link between the <i>unforeseen event</i> and the requirement of <i>strict necessity/ extreme urgency</i>.</p> <p>The Danish Competition and Consumer Agency ("DCCA") has published a memo on COVID-19's effects the public procurement. In this memo, the DCCA concludes that COVID-19-situation constitutes an <i>unforeseeable event</i> that would justify the use of <b>Section 80 (5)</b>.</p> <p>The memo and analysis from the DCCA is available here: <a href="https://www.kfst.dk/media/56335/udbudsretlige-udfordringer-COVID-19.pdf">https://www.kfst.dk/media/56335/udbudsretlige-udfordringer-COVID-19.pdf</a> (Only available in Danish).</p>
<b>2</b>	<b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b>	<p>The <b>above statements</b> are also applicable to the field of planning and tendering of construction measures and for construction contracts.</p>
<b>3</b>	<b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b>	<p><b>Section 180/183</b> of the Danish Public Procurement Act allow contracts and framework agreements to be modified without a new procedure in accordance with the Act in different cases.</p>

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# Europe

1

**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

The European public procurement framework allows public buyers to purchase goods and services directly linked to the COVID-19 crisis as fast as possible.

The European Commission has published guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis on 1st April 2020 (Official Journal of the European Union, 2020/ C 108 I/01).

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In general, public buyers may consider the following in order to speed up their procurements:

- contact potential contractors in and outside the EU by phone, e-mail or in person
- hire agents that have better contacts in the markets
- send representatives directly to the countries that have the necessary stocks and can ensure immediate delivery
- contact potential suppliers to agree to an increase in production or the start or renewal of production

In addition public buyers may have to look for alternative and possibly innovative solutions, which might already be available on the market or could be capable of being deployed at (very) short notice, to satisfy their needs.

After **Art. 26 II** of the Directive 2014/24/EU the contracting authority can choose to award the contract following an open or a restricted procedure.

Both the open and restricted procedure do have deadlines for the submission of tenders applies/requests to participate, **Art. 27, 28** of the Directive.

The deadlines may be shortened in the following cases:

- either in case of a prior information notice not used as a means of calling for competition, but which included all the information required for the contract notice in Section I of Part B of Annex V and was sent for publication between 35 days and 12 months before the date on which the contract notice was sent;
- or in case of **urgency duly substantiated by the contracting authority** and that renders impracticable the applicable time limit.

### Cases of urgency:

In the open procedure, the deadline for the submission of tenders may be reduced to 15 days, **Art. 27 III** of the Directive.

In the restricted procedure, the deadline to submit a request for participation may be reduced to 15 days and to submit an offer to 10 days, **Art. 27 III, 28 VI** of the Directive.

With the negotiated procedure without publication, Union law provides an additional tool, which will allow for a faster awarding of contracts to provide for COVID-19 pandemic related needs.

After **Art. 32** of the Directive public buyers are able to negotiate directly with potential contractors and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements.

The following concrete application is conceivable, **Art. 32 II lit.c**:

Contracting authorities may award public contracts by a negotiated procedure without publication 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. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority

**2** What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

The **above statements** are also applicable to the field of planning and tendering of construction measures and for construction contracts.

Here too, particular attention must be paid to the causal link between the unforeseen event and the extreme urgency.

The construction measures must be urgently required to meet immediate needs, for example modifications and equipment to increase capacities.

**3** What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?

After **Art. 72 I** of the Directive 2014/24/EU Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in different cases:

For example, after **Art. 72 I lit. c** a modification without a new procurement procedure is allowed, where all of the following conditions are fulfilled:

- 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 or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive.

With this approach it is important that Contracting authorities shall publish a notice to that effect in the Official Journal of the European Union. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

# Finland

1

**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

The Procurement Act (based on the Procurement Directive 2014/24/EU) allows public buyers to purchase goods and services directly linked to the COVID-19 crisis as fast as possible.

Finland has not published any specific guidance in this regard. Hence, the European Commission's guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (Official Journal of the European Union, 2020/ C 108 I/01) may be followed.

The Procurement Act (based on the Procurement Directive 2014/24/EU) allows public buyers to purchase goods and services directly linked to the COVID-19 crisis as fast as possible.

Finland has not published any specific guidance in this regard. Hence, the European Commission's guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (Official Journal of the European Union, 2020/ C 108 I/01) may be followed.

The contracting entity can choose to award the contract following an open or a restricted procedure, which are described in **Sections 32 and 33** of the Procurement Act.

Both the open and restricted procedure does have deadlines for the submission of tenders applies/requests to participate, which are laid down in **Section 56**.

The deadlines may be shortened in the following cases:

- either in case of a prior information notice (**Section 61**) that was sent for publication between 35 days and 12 months before the date on which the contract notice was sent;
- or in case of **urgency duly substantiated by the contracting authority** and that renders impracticable the applicable time limit.

Cases of urgency:

In accordance with **Section 57**, the deadline for the submission of tenders in the open procedure may be reduced to 15 days.

In the restricted procedure, the deadline to submit a request for participation may be reduced to 15 days and to submit an offer to 10 days.

With the direct procurement (negotiated procedure without publication), the Procurement Act provides an additional tool, which will allow for a faster awarding of contracts to provide for COVID-19 pandemic related needs.

Pursuant to **Section 40** of the Procurement Act, in a direct procurement, the contracting entity may negotiate the terms and conditions of a procurement agreement with its selected suppliers without prior publication of a contract notice.

Pursuant to **Section 40(2)(4)**, a contracting entity may opt for direct

		<p>procurement if:</p> <ul style="list-style-type: none"> <li>• there is an unforeseeable event that causes the need for the procurement;</li> <li>• an extreme urgency exists;</li> <li>• there is a causal link between the extreme urgency and the unforeseeable event;</li> <li>• the urgency prevents the observation of time limits;</li> <li>• the unforeseeable event must be beyond the control of the contracting entity; <b>and</b></li> <li>• it is strictly necessary to conclude the agreement.</li> </ul>
2	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>The <b>above statements</b> are also applicable to the field of planning and tendering of construction measures and for construction contracts.</p> <p>Here too, particular attention must be paid to the causal link between the unforeseen event and the extreme urgency.</p> <p>The construction measures must be urgently required to meet immediate needs, for example modifications and equipment to increase capacities.</p>
3	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>Pursuant to Section 136(2) of the Procurement Act contracts and framework agreements may be modified without a new procurement procedure in different cases:</p> <p>Pursuant to Section 136(2) of the Procurement Act, an amendment without a new procurement procedure is allowed, where all of the following conditions are fulfilled:</p> <ul style="list-style-type: none"> <li>• the need for amendment is due to circumstances that a diligent contracting entity could not have foreseen;</li> <li>• the amendment does not affect the general character of the procurement agreement;</li> <li>• the value of the amendment shall not exceed 50 per cent of the value of the original agreement.</li> </ul> <p>If multiple amendments are made consecutively, then each amendment shall be assessed as an independent item. Such modifications shall not seek to circumvent the provisions of the Procurement Act.</p> <p>With this approach it is important that contracting entities shall publish an amendment notice in the Official Journal of the European Union within 30 days.</p>

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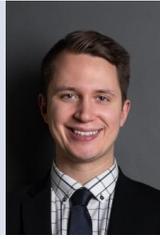
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# France

1

In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

The French public procurement code (“**FFPC**”) allows a public buyer to purchase goods and services linked to the pandemic COVID-19 faster than usual.

In addition to the award of procurement contract without Tender procedure as provided in article L. 2122-1 of the FFPC, French public buyers involved in coping with the COVID-19 may:

- reduce the deadline for receiving the tender, provided the conditions of the simple emergency exception are met; or
- purchases goods, equipment and services without organising any tender procedure, provided the conditions of the imperative emergency exception are met.

On 19 March 2020, the legal department of the French Ministry of Economy published guidelines and answers regarding the tender procedures applicable in case of health emergency (DAJ Bercy, *La passation et l'exécution des marches en situation de crise sanitaire*, 19 March 2020).

- 1 **The simple emergency procedure** allows a public purchaser to reduce the deadline for the receipt of bids. The emergency shall result in events caused by the public purchaser or unforeseeable events by the public purchaser events.

*For Open tender procedures:* The deadline for receiving the application may be reduced from 35 to 15 days in case an emergency prevents the public purchaser to meet the deadline (Article R. 2161-2 of the FFPC).

*For Restricted tender procedure:* The deadline for receiving the application may be reduced from 30 to 15 days in case an emergency prevents the public purchaser to meet the deadline (Article R.2161-2 of the FFPC).

*Negotiated procedure with competitive tendering:* The deadlines for receipt of applications and tenders may be reduced as follows: from 30 to 15 days for applications and from 30 to 10 for bids (Articles R.2161-12 and R.2161-15 of the FFPC).

*Sending additional information:* for formal procedure, additional information on the consultation documents may be sent to applicants not later than 6 days before the deadline for receipt of tenders. For emergency grounds, the time limit for the receipt of tenders is reduced may be reduced to 4 days (Article R. 2132-6 of the FFPC).

- 2 **The imperative emergency procedure** allows a public purchaser to sign a public procurement contract without organizing any tender procedure.

The imperative urgency conditions are very restrictive. Public purchasers may use this ground only when external circumstances, such as COVID-19, which could not be foreseen by the public purchaser and prevent the public purchaser to comply with the initial

		<p>tender procedure.</p> <p>The goods and services subject to this exceptional procedure shall be strictly necessary to deal with the emergency (for example: masks, cleaning, disinfection of buildings, exceptional transport). As specified by the Ministry of Economy legal department, the duration and amount of the concerned procurement contracts shall be limited and proportionate to the health crisis (<i>Ministry of Economy and Finance, Legal department, A fact sheet on the impact of the health crisis on public procurement, 19/03/2019</i>).</p> <p>The buyer shall justify his decision not to organise a tender procedure (Article R. 2184-3 of the FFPC).</p>
2	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>In France, planning and tenders for national construction measures will be continued despite the COVID 2019 crises.</p> <p>On 21 March 2020, the government and the Building companies unions signed an agreement in order to resume works, if the health conditions are adapted.</p> <p>On 2 April 2020 to, a guide summarized the safety recommendations for the continuity of building activities during the COVID-19 pandemic was published. It was developed by the “<i>Organisme professionnel de prevention du bâtiment et des travaux publics</i>” and has been approved by several French ministries.</p> <p>The emergency procedures mentioned in Question 1 apply for public construction contract and allows public purchasers to reduce the deadline or award directly construction contracts.</p> <p><b>Extension of deadlines for tenders and contracts award:</b> For contracts subjects to the French Public procurement code, the deadlines for receipt of applications and tenders shall be extended by a reasonable period, fixed by the contracting authority (<i>article 2 of the ordinance 2020-319</i>).</p> <p>To our knowledge, no specific regulations regarding the construction of new health infrastructures have been for now taken.</p>
3	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>1 Public purchasers may amend a procurement contract without launching any tender procedure, under certain very restrictive conditions (Article L. 2194-1 of the FFPC)</p> <p>The French government published an ordinance relating to COVID 2019 and its impact on contracts subject to the French public procurement code (Ordinance No. 2020-319 dated 25 March 2020), which was recently amended by another ordinance (Ordinance No. 2020-460 dated 22 April).</p> <p>2 These two ordinances allow public purchasers to amend some elements of procurement contract during the COVID-2019 pandemic.</p> <p>1 The amendments grounds provided for in article L. 2194-1 of the FFPC</p> <p>A contract may be amended without a new tender procedure when:</p> <ul style="list-style-type: none"> <li>– the modifications have been provided for in the initial contractual documents,</li> </ul>

- additional works, supplies or services have become necessary,
- the modifications are due to unforeseen circumstances,
- a new contractor replaces the initial contractor,
- the amendments are not substantial,
- the amendments are of small amount.

These amendments may not change the nature of the contract. And the amount of these amendments may not exceed 50% of the amount of the initial contract (*Article R. 2194-3 of the FPPC*).

**2 The amendments grounds provided for in Ordinances 2020-319, dated 25 March 2020 as amended by Ordinance dated 22 April 2020**

**Extension of contacts:** contracts expiring during the period provided for in the ordinance may be extended by amendment when the organisation of a tender procedure is impossible (*Article 4 of Ordinance No. 2020-319*).

The above mentioned period is from March 12<sup>th</sup> 2020 until the end of the health emergency state increased by a period of two months (*Article 1 Of ordinance No. 2020-319*).

**The payment of the advance:** purchasers may amend the conditions of the advance payment (*Article 5 of Ordinance No. 2020-319*).

**Publics contracts signed by local and regional authorities:** the amendments of concession of public service (DSP) and public procurement contracts leading to an increase in the overall amount of the contracts exceeding 5% are exempt from the prior usual opinion of the tender procedure committee (*Article 6-1 of Ordinance 2020-No. 319*).

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# Germany

## 1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

Services can be provided very quickly, via the negotiated procedure without competitive tendering pursuant to sec. 119 para. 5 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* - "GWB") in conjunction with sec. 14 para. 4 no. 3, sec. 17 of the Regulation on the Award of Public Contracts (*Vergabeverordnung* - "VgV").

The Federal Ministry of Economics and Energy (BMWi) presented these possibilities for **emergency procurement** in a circular sent out on 19 March 2020, emphasising that in the current crisis the conditions for emergency procurement in both the upper and lower thresholds were met.

This procedure can be used in accordance with sec. 14 para. 4 no. 3 VgV if:

- 3 an unforeseen event occurs,
- 4 there are extremely urgent and imperative reasons which make it impossible to comply with the time limits prescribed in other procedures,
- 5 there is a causal link between the unforeseen event and the impossibility of meeting the deadlines of other procurement procedures.

However, this can only apply to the purchase of services which expressly serve to contain and manage the corona epidemic or to maintain the public administration's service operations in the event of a crisis. According to the circular of the BMWi, this will have to be assumed for the following procurements, among others:

- Remedies and aids such as disinfectants, disposable gloves, masks, protective gowns, dressing materials, swabs, abdominal cloths
- Medical equipment such as ventilators
- Other services required in these times of crisis, such as mobile IT devices, e.g. for setting up home office workstations, video conferencing technology and IT management capacities

In principle, in a negotiated procedure without competitive tendering, the contracting authority would have to grant a period of 30 days for the submission of tenders (see sec. 17 para 6 VgV). However, the contracting authority may set a shortened time limit for submission of tenders, which shall be at least 10 days, if a duly justified urgency makes it impossible to meet the time limit for submission of tenders.

In addition, pursuant to sec. 17 para. 7 VgV, the contracting authority may fix the time limit for submission of tenders by mutual agreement with the candidates invited to submit tenders, provided that all candidates are allowed the same time limit for submission of tenders. There is then no lower limit below which tenders should not be submitted; a time limit of less than ten days can therefore also be agreed.

The contracting authority may award the contract based on the initial tenders without entering into negotiations if it has reserved this

possibility in the contract notice or the call for expressions of interest (see sec. 17 para. 11 VgV). This means that both the selection decision and the award of the contract can take place immediately after the deadline for submission of tenders.

Persuant to sec. 134 para. 3 s. 1 GWB, the obligation to inform other tenderers in cases of negotiated procedures without a call for competition is waived due to special urgency within the meaning of sec. 14 para. 4 no. 3 VgV. The contracting authority can then award the contract based on the initial tenders without entering into negotiations if it has reserved this possibility in the contract notice or in the call for interest confirmation.

This would make it possible, if necessary, to complete an award procedure from contract notice to contract award in less than 10 days.

## 2 What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

In addition to the letter of 23.03.2020 containing regulations on questions of building contract law in the context of the COVID-19 pandemic, the Federal Ministry of the Interior published information on 27.03.2020 on questions of public procurement law. It is envisaged that planning and tenders for federal construction measures will be continued despite the corona crisis. In addition, a number of exceptional rules may apply.

Analogous application of the instructions of the BMWi of 19 March 2020 on the use of negotiated procedures and direct awards of contracts due to special urgency also for construction contracts that serve to contain the COVID-19 pandemic. This concerns the following areas:

- Short-term creation of additional capacities in the hospital sector
- Modifications and equipment to increase the number of video conference rooms
- Installation of partition walls to separate offices with multiple occupancy

The list is expressly not exhaustive. What is decisive is that the construction contracts serve to contain the pandemic.

**Dealing with disruptions in the construction process:** For new contracts to be concluded, the tender dossier must be accompanied by the "Information sheet on dealing with disruptions to the construction process in connection with the COVID-19 pandemic". This clarifies that the consequences of the COVID-19 pandemic for the individual construction contract are still unforeseeable, i.e. the force majeure event according to sec. 6 para. 2 no. 1 lit. c of the German Construction Tendering and Contract Regulations (*Vergabe- und Vertragsordnung für Bauleistungen – "VOB/B"*) can also be triggered in new contracts.

**Presentation of up-to-date certificates:** If companies are not able to submit current certificates issued by third parties (e.g. certificates of good standing) in time despite having applied for them in due time because the issuance is delayed due to the COVID-19 pandemic, a self-declaration that the conditions for issuance still exist is to be allowed instead of the certificate, if all conditions specified in the decree are met.

**Deadlines for tenders and contracts:** Insofar as the schedule for the construction project permits, in order to maintain competition, the tender submission deadlines and, if applicable, the contract deadlines (e.g. commencement of the construction project) are to be set in the tender documents in line with the current situation and, where appropriate, the deadline is to be postponed to the same extent as

possible for all enterprises upon receipt of applications from the enterprises concerned. The same applies regarding requests to participate and to discussions in negotiated procedures.

**3** What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?

Sec. 132 GWB provides for various regulations according to which existing contracts **can be extended or their value extended** by agreement of the contracting parties **without the need for a new award procedure**.

In order to cope with short-term procurement needs, public contracts may be amended, extended and/or expanded once the EU thresholds are reached (see sec. 132 para. 2 s. 1 no. 3 GWB).

The development of the corona pandemic and the resulting concrete need in its scope and short-term nature could not be foreseen by the client due to the unexpected rapid spread of the COVID-19 pathogen. The change of order must not result in the client procuring an aluid in comparison to his original procurement. It is essential that no central elements that characterise the public contract (e.g. the type of contract or the type of refinancing of the contractor) are changed, so that it is no longer the changed original contract but another contract. A change in the overall character is v, insofar as legally typical contract forms such as purchase, service, rental and work contracts are converted into other contract types. For example, it is not possible to purchase a service instead of a delivery service or to convert the construction contract into a service contract. The situation is different, for example, when only the quantities of the agreed service are increased or when an existing supply contract is supplemented by other objects with the same or a similar purpose.

Finally, it should be noted that in the case of contracts awarded in accordance with upper threshold public procurement law, contract amendments must be published in the Official Journal of the EU in due course (see sec. 132 para. 5 GWB).

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# Italy

<p>1</p>	<p><b>In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?</b></p>	<p>While no general formal change to the national public procurement legislation has been introduced, a number of interventions were aimed at reinforcing traditional purchasing bodies and creating special units with the purpose of securing the supply of essential goods and services required to tackle the COVID-19 pandemic.</p> <ul style="list-style-type: none"> <li>• National central purchasing bodies have been awarded special funding to carry out fast-track procedures to purchase medical equipment (e.g. ventilators).</li> <li>• National enactment provisions of the EU public procurement directives even before the publication of EU guidance allowed emergency procedures to be carried out in a reduced timeframe. Such procedures have become the rule for purchase of essential goods and services.</li> <li>• Section 122 of decree law 17 March 2020, n. 18 has entrusted an extraordinary commissioner appointed by the Prime Minister with the task of purchasing critical healthcare equipment (such as PPEs and ventilators), essential services, and even with the procurement of spaces and buildings through compulsory purchase proceedings. The extraordinary commissioner is responsible for ensuring nation-wide sufficient supply of critical healthcare equipment, PPEs and essential services, and its role has been key at the height of the outbreak in Italy (mid-late March).</li> <li>• Replicating previously experimented means of managing emergencies, the Commissioner has been awarded wide powers to waive and disregard any national legislation in his activities - but at least formally it has to comply with EU rules.</li> <li>• Military personnel under the supervision of the Ministry of the Interior provincial representative have also been made available to supplement the ranks of doctors and nurses, also with the creation of field hospitals in the most affected areas of the country. The military has also been tasked with the provision of provide sanitization, logistics services.</li> </ul>
<p>2</p>	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>The <b>above statements</b> are also applicable to the field of planning and tendering of construction measures and for construction contracts.</p> <p>In a number of cases regional governments have adopted special building permits to allow the creation of COVID hospitals. Most hospitals have been built within existing structures or with temporary constructions that are strictly linked to the emergency and will have to be dismantled when no longer necessary.</p>
<p>3</p>	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>Italian public procurement legislation (section 106 of the Italian public procurement code) mimics art. 72 of Directive 2014/24/EU.</p> <p>While no waiver to section 106 has been introduced, a number of provisions have dealt with the impact of COVID-19 on contracts, but they are mostly aimed to justify delays and non-performance when and if specifically connected to the COVID emergency.</p>

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# Poland

1

**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

In response to the COVID-19 pandemic, the Polish legislator has adopted a package of regulations (measures) in order to prevent COVID-19 spreading, referred to as the so-called "**Anti-Crisis Shield**". The most important regulations in this area are contained in the Act of 2 March 2020 on Special Arrangements for the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and the Crisis Situations Caused by Them (the "**COVID-19 Act**").

According to Article 6 of the COVID-19 Act, the provisions of the Act of 29 January 2004 – the Public Procurement Law (the "**PPL**") shall not apply to the procurement of services or supplies necessary to counteract COVID-19 if there is a high probability of rapid and uncontrolled spread of the disease or if the protection of public health so requires.

Therefore, the prerequisites for being exempt from the obligation to apply the PPL are:

- 1 the necessity of a given purchase to counteract COVID-19, and
- 2 one of the following circumstances:
  - a a high probability of rapid and uncontrolled spread of the disease;  
or
  - b the protection of public health requires it.

According to Article 2 (2) of the COVID-19 Act, 'preventing COVID-19' means all activities relating to the control of the infection, the prevention, prophylaxis and combating the consequences, including socio-economic consequences, of the COVID-19 infectious disease caused by SARS-CoV-2.

Only those supplies and services which are necessary, i.e. required for the prevention of COVID-19, and related to the objective of prevention of COVID-19 are excluded. In each case, the Contracting Authority will be obliged to demonstrate that the premises justifying the exclusion of the provisions of the PPL actually exist.

Please note that one of the prerequisites for excluding the PPL is to establish a high probability of rapid and uncontrolled spread of the disease or requirements related to health protection. According to information from the Public Procurement Office, explanations and guidelines on the interpretation of the above mentioned provision may be provided by the authorities competent for health protection, in particular the Minister of Health, the Main Sanitary Inspectorate, etc.

For example, the legislator has indicated orders such as the purchase of medical equipment, medical devices, personal protective equipment or preparations for disinfection.

In the Communication on the European Commission's Guidelines on the application of the framework for public procurement in an emergency situation related to the crisis caused by the COVID-19 epidemic (2020/C 108 I/01), the European Commission explains what

resources are available to the Contracting Authorities, indicating that purchases directly related to the occurrence of COVID-19 can be made through negotiations without prior announcement due to the urgent need to award a contract (in Polish law, Article 67 Sec. 1 item 3 of the PPL). The Communication does not recommend that Member States introduce additional epidemic-related exemptions.

Therefore, wherever the purchase is co-financed by the European Union and the value of the contract exceeds the so-called EU thresholds, the Contracting Authority should consider whether it cannot be made by way of a Single-source Procurement (instead of using the exemptions provided for in Article 6 of the COVID-19 Act). In this way, the Contracting Authority will eliminate the risk of possible doubts as to the compliance of Article 6 of the COVID-19 Act and other provisions excluding the application of the PPL with EU law.

**2** **What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?**

The exemption from the obligation to apply the PPL, pursuant to Article 6 of the COVID-19 Act, only applies to supplies and services. With regard to construction works, the legislator amended the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Human Beings. Pursuant to Article 46c of this Act, 'the provisions on public procurement shall not apply to service, supply or works contracts awarded in connection with preventing or combating an epidemic in the area where the state of epidemic or state of emergency epidemic has been declared.

The abovementioned Article 46c will also apply to the fight against any epidemic (not only to the coronavirus pandemic). In addition, unlike Article 6(1) of the COVID-19 Act, this provision will enter permanently into the legal order. In addition, Article 46c will apply only in an area where an epidemic emergency or state of epidemic has been declared. The coronavirus-related epidemic hazard state was introduced in the territory of the Republic of Poland on 14 March 2020. Only from this moment Article 46c can be applied.

In addition, the COVID-19 Act contains a special regulation on the design, construction, reconstruction, overhaul, maintenance and demolition of buildings in connection with the counteraction of COVID-19.

Pursuant to Article 12(1) of the COVID-19 Act, in relation to the design, construction, reconstruction, overhaul, maintenance and demolition of buildings, including changes in use, in connection with the COVID-19 counteraction, the following regulations will not apply:

- a the Act of 7 July 1994 – The Construction Law,
- b the Act of 27 March 2003 on Spatial Planning and Development, and
- c the Law of 23 July 2003 on the Protection and Care of Monuments,
- d and, if it is necessary to extend the basis for granting health benefits, also the provisions provided under Article 22(3), (4) and (4a) of the Act of 15 April 2011 on Medical Activity.

In subsequent regulations, the legislator indicates that the performance of construction works and a change in the manner of use of a construction object or a part thereof in connection with counteracting COVID-19 requires immediate notification of the architectural and construction administration authority.

The above information, for the architectural and construction administration authority, should indicate:

- a the type, scope and manner of execution of construction works and the date of their commencement - in case of execution of construction works;
- b current and intended manner of using the construction work or its part - in case of change of the manner of use.

In the case of conducting construction works in connection with COVID-19 counteraction, the commencement of which, in accordance with the provisions of the Act of 7 July 1994 - The Construction Law, requires a decision on a building permit, the investor is obliged to ensure that the management and supervision of these works are taken over by a person holding a building permit in appropriate specialties (indicated in special regulations).

However, it should be noted here that on 18 April 2020, Article 12b was introduced into the COVID-19 Act, which provides that for the design, construction, reconstruction, overhaul, maintenance and demolition of buildings relating to the maintenance of continuity of essential services, in particular telecommunications, public communications, transport, health services, energy, commerce, water or sewage management, sewage treatment, public order, defence, Article 12 applies accordingly. Thus, under the new regulation, the investments listed in Article 12b are as privileged as the construction intentions related to the COVID-19 counteraction. The only condition is that they serve to maintain the continuity of essential services.

Please note that the COVID-19 Act did not exclude the application of the provisions of the Act of 23 April 1964 - The Civil Code, in particular in the part relating to the construction contract and the contractor's liability for damage resulting from the construction site. This means that contractors undertaking construction works pursuant to Article 12 of the COVID-19 Act must take into account their liability under the Civil Code.

**3** **What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?**

Under Article 15r of the COVID-19 Act, Contracting Authorities, having determined that the circumstances surrounding the occurrence of COVID-19 may affect or affect the proper performance of the contract, may, in agreement with the contractor, amend the contract, in particular by:

changing the deadline for performance of the contract or parts thereof, or temporarily suspending performance of the contract or parts thereof;

- 1 changing the way supplies, services or works are carried out
- 2 changing the scope of the contractor's performance and corresponding changes to the contractor's remuneration, provided that the increase in remuneration caused by each subsequent change does not exceed 50% of the original contract value.

The COVID-19 Act only provides that the Contracting Authority may (and does not have to) amend the contract in the event of circumstances related to the occurrence of COVID-19.

Consequently, the COVID-19 Act does not provide, for example, for an automatic mechanism for waiving the calculation of contractual penalties.

It should be noted that there are plans to introduce further changes to the COVID-19 Act, in particular the obligation to modify the public procurement contracts affected by COVID-19.

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# Singapore

**1** In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

Under the Government Procurement Act, when there is a "state of urgency", tender awards can be made in not less than 20 days under selective tenders which involves a period of not less than 10 days for an invitation to suppliers to participate, and a further 10 days after pre-qualification and publication or notification of the tender before the award of the tender.

If there is an "extreme urgency" brought about by events unforeseeable by the contracting authority and the goods or services cannot be obtained in time by means of open tendering or selective tendering, the relevant contracting authority can make the award by limited tender contacting its supplier or suppliers of choice. There are no specified minimum timelines for limited tenders and given the "extreme urgency", will likely be shorter than the 20 days under selective tenders.

**Under the Government Procurement Act ("GPA"):**

- "limited tendering" means a procurement method whereby the contracting authority contacts a supplier or suppliers of its choice to submit a tender
- "qualified supplier" means a supplier who has been shortlisted, pursuant to a qualification of suppliers, for a procurement;
- "selective tendering" means a procurement method whereby only qualified suppliers are invited by a contracting authority to submit a tender.

**For selective tendering:**

- Where there is a state of urgency duly substantiated by the contracting authority, the time period for submission of a request for participation may be reduced to not less than 10 days from the date of publication of the notice of intended procurement (Section 22 (1), (2), GPA).
- The time period for tendering can be reduced to not less than 10 days from the date suppliers are notified that they will be invited to submit tenders, when there is a state of urgency, duly substantiated by the contracting authority (Section 22 (3), (4), GPA).

**For limited tendering:**

- Under Section 26 of the GPA, limited tendering can be conducted when it is strictly necessary, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the goods or services cannot be obtained in time by means of open tendering or selective tendering.

**2** What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?

There are no specific regulations addressing the COVID-19 pandemic. The above statements are also applicable to the field of planning and tendering of construction measures and for construction contracts.

3

**What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?**

There are no specified procedures or regulations for contract amendments during the contract period. Any amendments will be subject to general contract law.

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# Slovakia

1

**In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?**

From the Slovak law perspective, the § 81 letter c), § 98 par. 1 letter c) and § 115 par. 1 letter c) of the Slovak Public Procurement Act (Act No. 343/2015 Coll.) deal with the direct negotiation procedure (*in Slovak: "priame rokovacie konanie"*) during the extraordinary circumstance (situation).

The Administration of State Material Reserves of the Slovak Republic (*in Slovak: "Správa štátnych hmotných rezerv Slovenskej republiky"*), in cooperation with the Ministry of Health of the Slovak Republic, selects suppliers for PPEs in electronic form in direct negotiation, via the electronic tool, taking into account the latest published guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis, published on 1st April 2020 (Official Journal of the European Union, 2020/ C 108 I/01).

The PPEs sources by the Administration of State Material Reserves of the Slovak Republic are distributed based on the application of each municipality, which is in general, competent for distribution to doctors' surgeries and small/local hospitals in its territorial jurisdiction.

Primarily, large universities' hospitals have been pre-stocked to be able to cover their own reserves, especially for the first days of the outbreak of COVID-19, and currently they are applying for sources from the Administration of State Material Reserves of the Slovak Republic, or are using direct negotiation procedure to obtain the necessary equipment.

According to the § 81 letter c) (similarly according to the § 98 par. 1 letter c) and § 115 par. 1 letter c)) of the Slovak Public Procurement Act (Act No. 343/2015 Coll.), the direct negotiation procedure may be used provided that the following (cumulative fulfilment) conditions is met - the contract for the supply of goods, for the execution of works or the provision of services, is awarded due to an extraordinary circumstance (situation) not caused by the contracting authority (public procurer), which could not have foreseen and, in view of the time constraints, the public tender (*in Slovak: "verejná súťaž"*) or the restricted tender (*in Slovak: "užšia súťaž"*) or the negotiation procedure with publishing (*in Slovak: "rokovacie konanie so zverejnením"*) could not take place.

The Office for Public Procurement of the Slovak Republic has also published a guidance regarding the direct negotiation which is the preferred procedure during an emergency to procure and use immediate satisfaction of essential needs. The direct negotiation procedure must be related to an extraordinary circumstance (situation) in a given period - specifically with the declared pandemic of the COVID-19 declaration of a pandemic of this disease and the WHO declared a pandemic of this disease - and it is possible to use it e.g. for urgent purchases of medical devices, or PPEs such as drapes, respirators, lung ventilators, or disinfectants.

The starting point is the presumption that the contracting authority is interested in securing PPEs for the inhabitants without delay, for reasons of public health protection, i.e. must act immediately.

2	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>We are not aware of any specific regulations adopted in the Slovak Republic for the planning and tendering of construction and for construction contracts of urgency to date.</p> <p>The direct negotiation procedure (<i>in Slovak: "priame rokovacie konanie"</i>) shall apply in case of occurrence of an extraordinary circumstance (situation) not caused by the contracting authority (public procurer), that could not have been foreseen by him, moreover taking into consideration the time pressure it would be very hard to run the public tender (<i>in Slovak: "verejná súťaž"</i>) or the closer tender (<i>in Slovak: "užšia súťaž"</i>) or the negotiation procedure with publishing (<i>in Slovak: "rokovacie konanie so zverejnením"</i>).</p> <p>The COVID-19 pandemic would most likely represent such extraordinary circumstance.</p> <p>For more information please see the response to Q1 above.</p>
3	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>From the Slovak law perspective, the § 18 of the Slovak Public Procurement Act (Act No. 343/2015 Coll.) generally recognizes the situations when the contracts may be modified during their term.</p> <p>Align to the extraordinary situation caused and related to COVID-19 pandemic, we do believe that justification for modification of contract would need to be brought about by circumstances which a diligent contracting authority could not foresee.</p> <p>Also, such modification could not change the nature of the contract and has its limits - any increase in price shall not be higher than 50 % of the value of the original contract/framework agreement.</p>

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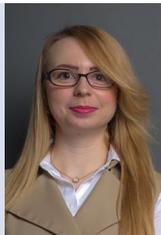
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# Spain

## 1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

A variety of regulations have been issued to streamline public procurement proceedings relating to the resources needed to address COVID-19:

1 **Emergency procurement:** Article 16 of [Royal Decree Law 7/2020, of 12 March](#) ("**Royal Decree Law 7/2020**") contains the following measures to streamline the public procurement procedures related to the COVID-19 crisis:

- All the entities of the public sector will be entitled to use the so-called "emergency procurement procedure" to tender and grant any kind of contract needed to cope with the COVID-19 outbreak. In particular, the emergency procurement procedure may be used to award contracts aimed at addressing: (i) the needs arising from the protection of individuals; and (ii), to carry out any other measure adopted by the Council of Ministers in relation to the COVID-19 crisis.

The "emergency procurement procedure" is regulated by Article 120 of Law 9/2017, of 8 November, of Public Sector Contract Law ("**LCSP**"), being its main features the following:

- Verbal contracting (Articles 37.1 and 120.1 of LCSP).
- The contracting authority may award the contract without processing a procurement file and without complying with general formalities (Article 120.1 of LCSP).
- The performance of the contract must be initiated within a month since it was awarded (Article 120.1.c) of LCSP).
- The general requirements to order payments in advance shall not apply. The contracting authority shall assess whether paying in advance is really necessary because there are no other reasonable alternatives.
- Special rules, much more flexible than the ordinary ones, for the release of the necessary funds relating to expenditure on measures adopted under the COVID-19 situation.
- Special rules are also laid down for contracting abroad, such as for the release of funds or the person responsible for the formalization of the contract.
- The obligation of electronic invoicing is excluded for invoices issued by non-domestic suppliers established abroad.

2 **Simplified public procedure:** The Seventh Final Provision of [Royal Decree Law 15/2020, of 21 April](#), allows the opening of the economic offer through IT solutions and not only through a public act.

3 **"Administrative agreements":** Administrative agreements ("convenios administrativos") are a type of agreement which is entered into by two public bodies or by a public body and a private person for the achievement of a common purpose. This kind of agreements, unlike an ordinary contract, has no price as all the

		<p>parties pursue a mutual benefit.</p> <p>The formalization of the administrative agreements is subject to some formalities. Article 39 of <a href="#">Royal Decree-Law 8/2020, of 17 March</a>, has relaxed the requirements for entering into "administrative agreements" related to COVID-19: (i) it will not be necessary to present neither a justification report nor a report from the legal service; (ii) prior authorization from the Ministry of Finance is not required; and (iii), they will be effective upon their signature and not upon registration, instead of after its publication in the Official Gazette.</p> <p><b>4 Centralized procurement proceedings:</b> When there are problems of shortage of any type of product necessary for health, Article 4 of <a href="#">Royal Decree-Law 6/2020, of 10 March</a> allows the Spanish Government to centralise the purchase of that product.</p>
2	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>The above statements are also applicable to the field of planning and tendering of construction measures and for construction contracts.</p>
3	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>Article 34 of Royal Decree-Law 8/2020 allows three contract amendments due to COVID-19 or due to measures agreed by the public authorities to address it: suspension of certain services, supply and construction contracts, extension of certain services, and supply contracts and restoration of economic balance of certain concessional contracts.</p> <p>These amendments do not apply to contracts for pharmaceutical health services or supplies, or to contracts which aim is directly linked at COVID-19. Nor do they apply to contracts for security services, cleaning or IT services (with exceptions), to contracts for necessary services or supplies related to transport, or to contracts concluded by public entities that are listed on stock markets and do not receive any income from the State budget.</p> <p><b>1 Contract suspension</b></p> <p>The suspension of ongoing continuous service contracts, continuous supply contracts and construction contracts is permitted in case the circumstances of COVID-19 crisis or the measures taken by the authorities as a result of the COVID-19 crisis impede the execution of the contract. The suspension of the contract is not automatic but must be requested by the contractor who must justify the specific impact of COVID-19 on the execution of the contract at hand. The contracting authority will decide on the suspension within 5 calendar days of the request. If the contracting authority does not decide within this period, the application may be understood as rejected (please note that this does not prevent that the contracting authority expressly grants the requested suspension once that term has elapsed).</p> <p>When requesting the suspension and provided that it is duly accredited, the contractor may also request compensation for the following expenses incurred during the period of suspension:</p> <ul style="list-style-type: none"> <li>– Salary costs actually paid by the contractor to the staff affiliated on 14 March 2020. According to the report of the State Legal Service of 23 March 2020, these labor costs do not include the salary costs of the workers employed by a subcontractor.</li> </ul>

- Expenses for maintenance of the final guarantee.
- Rental and maintenance of machinery.
- Insurance policies stipulated in the contract clauses.

## 2 Extension of the duration of the contract

Continuous service contracts and continuous supply contracts:

The extension is appropriate if, due to the suspension of tenders (caused by the interruption of deadlines established in [Royal Decree 463/2020, of 14 March](#)), it has not been possible to conclude a new contract that guarantees the continuity of the service or the supply. In such cases, the contract will be extended, under the same conditions, for a maximum period of 9 months.

Non-continuous service and supply contracts (those with deliverables to be provided in a certain deadline):

The extension of the date when the services or the supply must be delivered shall apply when the circumstances of COVID-19 or the measures taken by the authorities to address it make the on time delivery impossible. The extension of the contract will not be automatic but must be requested by the contractor and the impact of COVID-19 on the performance of the contract must be justified.

In such cases, the contractor may request compensation for additional salary expenses up to a maximum of 10% of the initial contract price. In no case the extension will imply either the termination of the contract or the imposition of penalties on the contractor.

The report of the State Legal Service of 19 March 2020 establishes that this extension is also appropriate for minor contracts, even if this means that their duration is extended beyond 1 year (maximum period established generally for these contracts in Article 118 LCSP).

## 3 Restoration of economic balance

If the circumstances of COVID-19 or related measures impede the execution of an ongoing works or service concession contract, and provided that certain requirements are met, the contractor may ask the contracting authority to readjust the balance of the contract.

This rebalancing would compensate the loss of income or the increase of costs suffered by the contractor and could result in measures such as the extension of the initial duration of the contract up to a maximum of 15%, or in the modification of the economic clauses of the contract.

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# Sweden

## 1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

Even though the public sector remains subject to the public procurement regime during the ongoing COVID-19 pandemic, the procurement regulations do provide exceptions to the main rules. The purpose with the exceptions is to facilitate for contracting authorities in exceptional situations. However, it should be remembered that when considering exceptional measures during the ongoing COVID-19 pandemic, any exceptions to the main rules is intended to be just that, exceptions.

In Sweden, the Swedish National Board of Health and Welfare (Sw. Socialstyrelsen) has been assigned to, during the ongoing COVID-19 pandemic, coordinate and carry out procurements of medical materials, protective equipment and certain medical technical equipment at a national level. For anyone that wants to offer medical materials, protective equipment or similar products, it is possible to notify the Swedish National Board of Health and Welfare about this on their webpage.

Although, the Swedish National Board of Health and Welfare has been assigned, during the ongoing COVID-19 pandemic, to coordinate and carry out procurements at a national level, the agreements and ordering procedures of the contracting authorities' remain in force and contractors may, in the same way and in accordance with the same provisions, communicate directly with the contracting authority. Hence, if the contracting authority has an existing framework agreement that includes the relevant products or services the need shall be met through a suborder under such framework agreement. One should also remember that the Swedish Public Procurement Act contains provisions regarding the possibility of implementing amendments to existing agreements, more on this under question 3 below.

Sweden is, in the same way as other countries in the world, facing an unprecedented challenge due to COVID-19, which, among other things, entails a need of medical materials and protective equipment which has never been seen before. Thus, there is a great risk that contracting authorities must procure more and/or other material than covered by the existing framework agreements, which means these authorities have to rely on the exceptions in the Swedish Public Procurement Act.

In response to the ongoing COVID-19 outbreak, contracting authorities may award direct contracts in accordance with Chapter 19 or Chapter 6 Section 15 of the Swedish Public Procurement Act, as long as that the contract value for all procurements of the same kind is less than SEK 615,312 (about € 58,000) or if the following cumulative conditions are met:

- adhering to the normal procedures and deadlines would be impossible due to an extreme urgency brought about by external factors;
- these external factors must have been unforeseeable to the contracting authority;
- the situation is in no way attributable to the contracting authority (i.e. the contracting authority may not rely on the exception if the

		<p>urgency is due to its own delay); and</p> <ul style="list-style-type: none"> <li>• the procurement must be absolutely necessary for the contracting authority.</li> </ul> <p>Although the notion of extreme urgency has generally been interpreted narrowly, the suddenness and scale of the current COVID-19 outbreak has led to the Swedish National Agency for Public Procurement (Sw. Upphandlingsmyndigheten) stating that the outbreak satisfies the requirements for extreme urgency. However, this does not mean that all current public procurements will fall under the exemption during the COVID-19 outbreak or that the notion of extreme urgency will apply for as long as there is a spread of infection of the COVID-19 virus in Sweden. A case-by-case analysis of the contract to be awarded and the actual availability of the direct award exception are still warranted.</p>
<p><b>2</b></p>	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>Procurements, including planning and tendering thereof, of construction contracts falls under the same legislation as other products and services that a contracting authority procures. Hence, the rules and regulations described under question1 above apply in the same way for construction contracts.</p> <p>In response to the ongoing COVID-19 outbreak, contracting authorities may award direct contracts in accordance with Chapter 19 or Chapter 6 Section 15 of the Swedish Public Procurement Act, as long as that the contract value for all procurements of the same kind is less than SEK 615,312 (about € 58,000) or if the following cumulative conditions are met:</p> <ul style="list-style-type: none"> <li>• adhering to the normal procedures and deadlines would be impossible due to an extreme urgency brought about by external factors;</li> <li>• these external factors must have been unforeseeable to the contracting authority;</li> <li>• the situation is in no way attributable to the contracting authority (i.e. the contracting authority may not rely on the exception if the urgency is due to its own delay); and</li> <li>• the procurement must be absolutely necessary for the contracting authority.</li> </ul> <p>Although the notion of extreme urgency has generally been interpreted narrowly, the suddenness and scale of the current COVID-19 outbreak has led to the Swedish National Agency for Public Procurement stating that the outbreak satisfies the requirements for extreme urgency. However, this does not mean that all current public procurement will fall under the exemption during the COVID-19 outbreak or that the notion of extreme urgency will apply for as long as there is a spread of infection of the COVID-19 virus. A case-by-case analysis of the contract to be awarded and the actual availability of the direct award exception is still warranted.</p> <p>However, should the contracting authority acquire or rent the property needed (as opposed to procure a construction contract), there is an exemption, in Chapter 3 Section19 of the Swedish Public Procurement Act, that entails that the Public Procurement Act does not apply. In such cases the contracting authority may acquire or rent property in accordance with the same conditions as any other (non-public) entity.</p> <p>Up to date, two field hospitals have been built in Sweden in order to handle the COVID-19 outbreak. This has been done through collaboration between the country councils (Sw. Regioner) and the Swedish Armed Forces (Sw. Försvarmakten). Since, it is collaboration between two contracting authorities; the provisions in the Swedish</p>

Procurement Act do not apply (according to Chapter 3 Section 17 of the Swedish Public Procurement Act). Hence, if contracting authorities can collaborate in order to contain the COVID-19 outbreak, the current public procurement regime will not impose any restrictions.

**3** **What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?**

As mentioned in question 1 the main rule is that if the contracting authority has an existing framework agreement that includes the relevant products or services, the need shall be met through a suborder under such framework agreement. However, given the circumstances, there is a great risk that contracting authorities must procure more and/or other material than covered by the existing framework agreements. This means that the contracting authority may turn to the provisions in Chapter 17 of the Swedish Public Procurement Act regarding the possibility of implementing amendments to existing agreements.

According to Chapter 17 Section 9 of the Swedish Public Procurement Act an agreement may be amended if the amendments are of "less value", that is amendments that entails changes in the contract value below 10 per cent (15 per cent for construction contracts).

Furthermore, according to Chapter 17 Section 10 of the Swedish Public Procurement Act, the agreement may be amended in accordance with any amendment or option clause in the agreement.

The third way to amend the agreement, and probably the most useful given the circumstances, is that the agreement may be amended due to unforeseeable circumstances in accordance with Chapter 17 Section 12 of the Swedish Public Procurement Act. The Swedish National Agency for Public Procurement concludes that COVID-19 outbreak amount to an unforeseeable circumstance. Amendments in accordance with said provision may only be implemented if:

- the need for modification has been brought about by circumstances which were unforeseeable to a diligent contracting authority;
- the modification does not change the overall nature of the contract; and
- any increase in price does not exceed 50 per cent of the value of the original contract.

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## 1 In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

Until date, the Ministry of Health and Prevention (“**MoHaP**”) and other local authorities have not issued any guidance/public announcements in respect of the emergency procurement amid the COVID-19 outbreak in the UAE.

Although, we flag that the MoHaP has great discretion in the UAE and may, on an exceptional basis, authorize the import of unregistered medical devices and equipment that are required by health institutions and in emergency situations. Such authorization is subject to the following conditions:

The medical product in question must not be available in the UAE;

- A similar alternative medical product with the same purpose and use is not available in the UAE;
- A purchase order from a hospital/healthcare facility must be issued and must include the required quantity of such medical product;
- The purchasing hospital/healthcare facility must submit a letter to the MoHaP whereby the former confirm their liability and responsibility in respect of the use of the medical product; and
- The hospital that requires such medical product must confirm the number of cases/patients which require such device as part of their treatment.

To the extent that the MoHaP has not publicly disclosed any emergency regulations relating to procurement amid the COVID-19 outbreak, the **Suppliers Relationship Management Guide issued by the MoHaP in 2018-2019 (the “Guidelines”)** mentions that a purchase by direct order (i.e. direct award of contracts) is used in the event of:

- a state emergency;
- in the extreme necessity of supplying materials, providing services, or implementing works; or
- when there exists a sole source of supply of materials and provision of services.

The Guidelines mention that the implementation of a contract resulting from a direct award commences after eight (8) working days from the handover of the written award letter.

As a result, the winning supplier will be required to sign a contract with the MoHaP and complete a performance bond (whose value cannot be less than 10% of the estimated value of the bid).

Although there have been no public announcements in the context of COVID-19, we foresee that the UAE government, particularly the MoHaP, has full authority and discretion to make a purchase by following the direct order procedures in order to purchase equipment, medical devices, and the procurement of services.

In addition to the purchase by direct order, there exists a general tender procedure (for contracts exceeding AED 10 million) and

		restricted tender procedures (for contracts ranging between AED 250,000 -AED 10 million).
2	What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?	<p>The UAE government has not publicly disclosed any emergency regulations relating to the tendering and planning of construction measures and contracts of urgency amid the COVID-19 outbreak. However, we are unable to confirm whether any emergency regulations have been disclosed to or agreed upon with construction companies directly.</p> <p>To our understanding, the bids for construction tenders, government construction contracts, UAE civil works tenders, civil construction tenders, and road construction tenders remain unaffected and continue despite the COVID-19 outbreak.</p> <p>To such extent, Financial Circular No. 16 of 1975 on the Regulation of Methods of Procurement and Business Contracting (the “<b>Circular</b>”) applies. We also flag that certain emirates in the UAE, such as Dubai and Abu Dhabi, also have local laws on procurements, tenders, and bids which may be relevant in a construction context.</p> <p>The Circular clarifies that from a general standpoint, the procurement of construction works are regularly carried out by open tender. However, the Circular also mentions that such procurement of construction works may be carried out in exceptional circumstances by direct order. We would be happy to advise you further on the different tender procedures in the UAE, if required.</p> <p>Apart from planning and tendering of construction contracts, we flag that the construction industry has been excluded from any lockdown limitations due to the COVID-19 outbreak and therefore not largely affected. The sole limitation in this context is limiting construction workers to operate in the emirate in which they reside. The transportation of construction workers from one emirate to another is therefore prohibited.</p>
3	What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?	<p>The Guidelines provide that the MoHaP may, at their sole direction, consent and grant the supplier an additional period to fulfil their obligations under a contract. The Guidelines also mention that the additional period granted to a supplier may not exceed ten (10) days.</p> <p>In the event that a force majeure or unseen circumstance beyond the supplier’s control caused the supplier’s delay, the Guidelines provide that the MoHaP may exempt the supplier from the payment of any fines as a result of such delay. This exemption will only apply if the supplier notifies the MoHaP within twenty (20) days of the date of the event resulting with the delay.</p>

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# United Kingdom

1

In the current situation, how can the necessary resources be made available quickly for hospitals, doctors and all other administrative units, institutions and persons involved in coping with the COVID-19 pandemic?

The UK government has released a Procurement Policy Note ("PPN") setting out guidance on public procurement regulations and responding to the COVID-19 crisis.

The PPN states that the following options are available for goods, services or works which are subject to the Public Contract Regulations 2015 ("PCR") but need to be urgently procured due to COVID-19:

- direct award due to extreme emergency;
- direct award due to absence of competition or protection of exclusive rights; or
- call for competition using a standard procedure with accelerated timescales.

These options are explored in more detail below.

## Direct award due to extreme emergency

Under **Regulation 32(2)(c) PCR**, the negotiated procedure without prior publication (i.e. the direct awarding of a contract) may be used where *'for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open or restricted procedures or competitive procedures with negotiation cannot be complied with'*.

In the context of COVID-19 this allows contracting authorities to enter into contracts without competing or advertising the requirement as long as the following conditions are met:

- 1 there are genuine reasons for the extreme urgency;
- 2 events that have led to the need for extreme urgency were unforeseeable;
- 3 it is impossible to comply with the usual timescales in the PCRs; and
- 4 the situation is not attributable to the contracting authority.

The PPN recommends that contracting authorities should keep a written justification that demonstrates the satisfaction of the above four conditions.

## Direct award due to absence of competition or protection of exclusive rights

Under **Regulation 32(2)(b) PCR**, the direct awarding of contracts may also be used where the works, goods or services needed to respond to COVID-19 can only be supplied by a particular supplier because:

- competition is absent for technical reasons; or
- for the protection of exclusive rights such as intellectual property rights.

This option is only available when:

		<ul style="list-style-type: none"> <li>• there is no reasonable alternative or substitute available; and</li> <li>• the contracting authority has not artificially narrowed the scope of the procurement, thus limiting potential substitutes/alternatives.</li> </ul> <p>Contracting authorities should keep a written justification that satisfies the above tests.</p> <p><b>Using a standard procedure with accelerated timescales due to urgency</b></p> <p>The PPN states that contracting authorities can reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation '<i>if a state of urgency renders the standard timescales impracticable</i>'.</p> <p>A clear justification for the use of a reduce timescale should be provided by the contracting authority.</p> <p>In cases of urgency, the shortest time period for the return of tenders is 15 days from dispatch of an OJEU notice (under the open procedure).</p>
2	<p><b>What regulations are in place for the planning and tendering of construction measures and for construction contracts of urgency that serve to contain the COVID-19 pandemic?</b></p>	<p>The scope of the <b>above options</b> also extends to the field of planning and tendering of construction measures and for construction contracts.</p>
3	<p><b>What contract amendments are possible during their contract period due to the spread of the COVID-19 virus without the need for a new award procedure?</b></p>	<p>Under <b>Regulation 72(1)(c) PCR</b>, contracts can be modified without the requirement for a new procurement procedure, if the following conditions are fulfilled:</p> <ul style="list-style-type: none"> <li>• the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;</li> <li>• the modification does not alter the overall nature of the contract; and</li> <li>• any increase in price does not exceed 50% of the value of the original contract or framework agreement.</li> </ul> <p>As always, contracting authorities are advised to keep written justification that the above three conditions are satisfied. This justification should demonstrate that any extension or modification of the procurement contract has been limited to only what is absolutely necessary to address the unforeseeable circumstance, in this case the COVID-19 outbreak.</p> <p>The modification of or extension to the contract should be published by way of an OJEU notice and should state that <b>Regulation 72(1)(c) PCR</b> has been relied on.</p> <p>Alternative grounds for modifying contracts under <b>Regulation 72 PCR</b> include:</p> <ul style="list-style-type: none"> <li>• if the proposed variation has been specifically provided for in the contract (<b>Regulation 72(1)(a) PCR</b>);</li> <li>• where a change of contractor cannot be made for economic or technical reasons (<b>Regulation 72(1)(b) PCR</b>); or</li> <li>• where the modifications are not substantial (<b>Regulation 72(1)(e) PCR</b>).</li> </ul> <p>Multiple modifications to a contract are permissible as long as each one doesn't exceed 50% of the original contract value, and where multiple grounds for modification have been relied on these must be included in</p>

the written justification.

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