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Public procurement: dealing with the effects of Covid-19

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Overview

- Context
- Urgent awards
- The “extreme urgency” exemption
- Changes to ongoing public procurements
- Amending a concluded contract for Covid-19 related reasons



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Context

- Extraordinary circumstances
 - Have led to new urgent requirements
 - Have affected ongoing contract award procedures
 - Have affected the delivery of existing contracts
- How can contracting authorities deal with these challenges in a compliant manner?
 - European Commission guidance



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Need for urgent award (1)

Consider available options

- Existing framework agreements?
- Existing contracts that can be amended legally?
- Is there an exemption available?
- Is a competitive contract award still feasible despite the urgency?
 - Accelerated contract award procedure



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Need for urgent award (2)

Accelerated contract award procedure (Articles 27(3), 28(6) and 29(1))

- When urgency renders normal minimum time limits “impracticable” AND
- Despite the urgency, a competitive contract award is still feasible on the basis of accelerated timescales
- Available under the open, restricted and negotiated procedures



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Need for urgent award (3)

Procedure	Min. accelerated timescales
Open	15 days
Restricted - Request for participation	15 days
Restricted - Submission of tenders	10 days
<i>Negotiated – Request for participation</i>	15 days
<i>Negotiated – Submission of initial tenders</i>	10 days



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Need for urgent award (4)

Accelerated contract award procedure

- In practice, the period necessary to carry out a regulated procurement process can be substantially longer
 - Preparation of procurement documents
 - Carrying out of selection/tender evaluation
 - Notification of contract award decision and standstill period
- *Do these additional time considerations limit the usefulness of accelerated procedures in the current crisis?*



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Need for extremely urgent award (1)

- Article 32(2)(c) direct negotiations necessitated as a result of an extreme urgency
 - a) that has arisen as a result of unforeseeable events which are not attributable to the contracting authority
 - b) that renders impossible the award of a contract that respects the (accelerated) time limits for which the legislation provides; and
 - c) there is a causal link between the unforeseeable event and the extreme urgency that has arisen
 - If cumulative conditions met, can rely on this exemption “**insofar as it is strictly necessary**”



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Need for extremely urgent award (2)

Unforeseeability in a Covid-19 context

- Generally uncontroversial to assert that pandemic was unforeseeable
- Eight months on, can Covid-19 still be deemed to amount to “unforeseeable circumstances”?
- Is there a distinction to be drawn between an unforeseeable crisis *event* and an unforeseeable *unfolding* crisis?



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Need for extremely urgent award (3)

- Unforeseeable *crisis event*
 - Implications and consequences can generally be established relatively soon after the event has occurred
- Unforeseeable *unfolding crisis*
 - Ramifications not necessarily obvious at start of crisis
 - It might be plausible for the CA to proceed on what might appear as reasonable assumptions and plan purchases on that basis
 - But if likely length/impact of crisis cannot be established accurately early on, presumed ramifications might need revising as the crisis continues to unfold



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Need for extremely urgent award (4)

Unforeseeability in the context of Covid-19

- What might constitute an unforeseeable event?
 - the *onset* of the pandemic?
 - the *continuation* of the pandemic?
 - the *knock-on effects* of the pandemic, e.g.
 - lockdown
 - stretched/reduced resources?



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Need for extremely urgent award (5)

- *Can the time requirements for a competitive tender process be met?*
 - Assume accelerated open procedure (unless objective reasons render this process inappropriate)
 - Reasonable assumptions as to time for preparation of procurement documents and evaluation
 - Minimum standstill period



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Need for extremely urgent award (6)

- *Extremely urgent requirements – need for causal link*
 - Purchases which relate to fighting the pandemic itself
 - Medical supplies or equipment – still?
 - Purchases that seek to address the effects of the (extended) lockdown on the authority
 - IT equipment or software?
 - Purchases which have become “extremely urgent” with the passage of time?
 - Normally delay deemed attributable to authority
 - But what if delay the result of stretched or reduced authority resources due to pandemic/lockdown?
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Need for extremely urgent award (7)

- *What type of contract awards might be permissible under this exemption?*
 - Limited in scope and duration – the minimum necessary to allow time for a competitive tender process to be carried out for longer-term/greater scope purchases
 - Does the law permit authorities to take a longer-term view as to the scope of directly awarded extremely urgent purchases?



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Need for extremely urgent award (8)

- *Where the conditions of the "extreme urgency" exemption are met – can this lead to a direct award or is there a requirement to carry out some form of (non-advertised) competition?*

"A 'negotiated procedure without publication' allows contracting authorities to negotiate directly with potential contractors; a direct award to a preselected economic operator remains the exception, applicable if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency."

European Commission Communication (2020/C 108 I/01)

- *But is this view correct?*



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Changes to ongoing procurements (1)

- Possible effects of pandemic/lockdown
 - Practical difficulties in conducting evaluation or negotiations with bidders?
 - Delays in ongoing procurements also as a result of need to re-focus authority resources on (more) urgent purchases?
 - Bidders finding it difficult to meet original deadlines, participate in negotiations or remain appropriately engaged in the process?
 - Changes in the authority's requirements as a result of stretched budgets or changed priorities?



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Changes to ongoing procurements (2)

- Changes to contractual specifications
 - Issue not expressly addressed in legislation; some relevant case law but issue needs further clarification
 - Apply Article 72(1)(c) by analogy? This should allow changes to original contract specifications where:
 - i. need for modification result of circumstances which a diligent authority could not foresee;
 - ii. modification does not alter overall nature of the contract; and
 - iii. any increase in price not higher than 50% of value of original contract



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Changes to ongoing procurements (3)

- Changes to contractual specifications
 - The changes should be limited to the minimum necessary to address the effects of the pandemic (anything beyond that won't meet Article 72(1)(c)(i))
 - Where all conditions cannot be met (e.g. because overall nature of originally advertised contract would change) consider appropriateness of:
 - abandoning process; and
 - commencing new process (on basis of an accelerated procedure) or,
 - where an exemption applies, direct contract award



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Changes to ongoing procurements (4)

- Changes to contractual specifications
 - Would Article 72(1)(c), applied by analogy, be met if proposed change *reduces* scope and value of contract?
 - Question of reduction in value not addressed explicitly - only increase in value (Article 72(1)(c)(iii))
 - Consider whether *reduction* in value might change overall nature of original contract (Article 72(1)(c)(ii))



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Changes to ongoing procurements (5)

- Changes to procedural requirements
 - An even more difficult question: procedural changes can lead to discrimination vis-à-vis suppliers that have not expressed an interest in the process on the basis of the original requirements or those that did but have been eliminated at an earlier tender stage
 - Some court guidance as to question of when discrimination would arise – but further clarity needed
 - No actual or analogous “safe harbours”



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Changes to ongoing procurements (6)

- Changes to procedural requirements
 - Possible choices to consider:
 - No substantive changes to procedural requirements (*low risk*)
 - Abandon process (*low risk - but how realistic?*)
 - Where possible, seek to minimise discrimination (e.g. where relevant, by going back and repeating a stage in the process on basis of amended requirements) (*in the absence of judicial guidance, risky but depending on available steps that can be taken risk could be mitigated*)



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Covid-19 and contract modification

- In principle, the law recognises the need for flexibility in the relation to contract modifications which become necessary as a result of unforeseeable circumstances (Article 72(1)(c) Directive 2014/24)
- Although the relevant provision was introduced in the 2014 directives, the principle of the need for flexibility in this context predates them
- And yet, Covid-19 brings up a number of specific challenges when seeking to apply this “safe harbour”



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Article 72(1)(c)

Modification necessitated by unforeseeable circumstances

- i. the need to modify the contract brought about by circumstances which a diligent authority could not foresee;
 - ii. the modification must not alter the overall nature of the contract; and
 - iii. any increase in price must not be higher than 50% of value of original contract
- (iii) applies to value of each modification but successive modifications must not be aimed at circumventing the procurement rules
 - publication of a transparency notice



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Article 72(1)(c)

*The **need** for the modification must have been **brought about** by unforeseeable circumstances*

- Legislation accepts that there is a need for flexibility to adapt contracts to unforeseeable circumstances
- There must be a causal link between the proposed modification and the UC
- The modification must not go beyond what is necessary to adapt the contract to the UC



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Article 72(1)(c)

*The **need** for the modification...*

- Type of amendments that UC might, in principle, render necessary:
 - changes to the scope of the contract (normally, additional requirements/ extension of contract term – but also possibility of having to reduce scope/term of contract); and/or
 - changes to terms and conditions which are no longer capable of performance



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Article 72(1)(c)

*Circumstances unforeseeable by a **diligent** contracting authority*

- What is “diligent” might vary depending on, inter alia, the available means of each contracting authority

The circumstances “could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.” (Recital 109, Directive 2014/24)



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Article 72(1)(c)

Unforeseeability in the context of Covid-19

- Continuation of pandemic leads to difficulties in sourcing material; continued social distancing requirements lead to need to reduce activity at building sites; delays and other problems with supply-chain as a result of reduced workforce
 - Would it be justifiable to:
 - Reduce or otherwise change the scope of original contract to address these challenges?
 - Change the contract's technical specifications?
 - Extend time for delivery of requirement?
-



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Article 72(1)(c)

Examples - As the crisis continues, CA concludes that:

- existing IT services contract must be amended so as to adapt it to home-working requirements becoming the norm even after the pandemic
 - existing construction contract must be amended so that some of the extra office space being constructed is converted into additional housing stock
 - existing construction contract must be extended as project's original timelines unrealistic due to lockdown and social distancing measures (affecting workforce numbers)
-



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Article 72(1)(c)

Much more challenging examples - As the crisis continues, CA concludes that:

- existing 5-year IT services contract must be amended so as to adapt it to home-working requirements, this requires substantial review of deliverables (as original assumptions no longer valid), extension of contract by another 3 years and costs rise by just under 50%
 - existing construction contract must be amended so that instead of a new office block (which is no longer needed) new housing stock is built, this requires substantial modification of T&C, and predictably deliverables and costs rise by just under 50%
-



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Article 72(1)(c)

*Amendments must not alter **overall nature** of the contract*

- Clearly the more significant the changes, whether in terms of scope, length or terms & conditions that relate to performance, the more difficult to justify
- Although successive modifications, each up to 50% of the original contract value permissible, the greater the number of successive modifications the less likely that the overall nature of the contract would be altered



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Article 72(1)(c)

*Amendments must not alter **overall nature** of the contract*

- What if there is a need to reduce scope/value of contract?
 - *Finn Frogne* (C-549/14) has established that reduction in contract scope can constitute a substantive modification
 - Reg 72(1)(c) does not address this issue explicitly. Greater risk that reduction in scope would be deemed to affect overall nature of contact?



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Article 72(1)(c)

Risk mitigations

- Before proceeding with proposed changes, prepare and keep record of reasons why it was deemed justifiable to rely on Reg 72(1)(c)
- Keep changes to minimum necessary and keep in mind need to demonstrate causal link
- Remember, not least where there are successive modifications, need to ensure that overall nature of contract must not be altered



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Article 72(1)(b)

Additional purchases on basis of an existing contract

- Scope of Reg 72(1)(b) narrower than that of Reg 72(1)(c)
 - Can only be used, subject to certain conditions, in relation to the provision of “additional” works, services or supplies not included in initial procurement but subsequently become necessary
 - Assumption that original requirements still valid and deliverable on basis of original terms
 - Do the additional purchases need to be the same as those provided under original contract?



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Article 72(1)(b)

Additional purchases on basis of an existing contract

- How useful is Article 72(1)(b) as a modification justification basis in context of Covid-19?
 - Belt and braces approach in cases of doubt as to unforeseeability condition under Article 72(1)(c), where modification relates to additional purchases?



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Article 72(1)(b)

Additional purchases on basis of an existing contract

- Additional requirements that have become necessary and change of contractor:
 - i. cannot be made for economic or technical reasons
 - ii. would cause significant inconvenience or substantial duplication of costs
 - iii. increase must not exceed 50% of value of original contract
 - (iii) applies to value of each modification but successive modifications must not be aimed at circumventing the procurement rules
 - publication of a transparency notice



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Article 72(1)(b)

The additional requirements have become necessary...

- What is the standard or proof in demonstrating “necessity”?

Where a change of contractor cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement



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Article 72(1)(b)

Where a change of contractor cannot be made for economic or technical reasons...

- Does the CA need to show near impossibility?
 - Arguably not - if it does, the additional lower threshold condition of “significant inconvenience or substantial duplication of costs” would seem superfluous
 - It could also amount partly to duplication of Article 32(2)(b)(ii) (competition absent for technical reasons)
- But economic or technical reasons must be sufficiently significant that they would cause “significant inconvenience or substantial duplication of costs”



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Article 72(1)(b)

Risk mitigations

- Before proceeding with proposed changes, prepare and keep record of reasons why it was deemed justifiable to rely on Article 72(1)(b)
- Unlike Article 72(1)(c), no specific requirement that modification should not alter the overall nature of contract. However, consider whether successive modifications might alter overall nature of contract. If so, risk of breaching requirement that successive modifications should not be aimed at circumventing rules



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