

Guidance for Contracting Authority beneficiaries to consider for the purchase of supplies, services, and works needed to address the Covid-19 crisis.

Adapted from 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) For the full guidance please use this link: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN)

Please also refer to the WFO COVID-19 Conditions for Support and Frequently Asked Questions document found here:

<https://gov.wales/sites/default/files/publications/2020-04/coronavirus-covid-19-european-structural-funds-supported-projects.pdf>

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Note to beneficiaries: *For clarification, beneficiaries should only consider following this guidance for buying goods or services that are needed as a direct result of the Covid-19 pandemic.*

1. COVID-19 is a health crisis that requires swift and smart solutions and agility in dealing with an immense increase of demand for similar goods and services while certain supply chains are disrupted.
2. In the first instance, beneficiaries should approach their WFO Project Development Officer to discuss any proposed changes to their procurement activity as a result of the Covid-19 pandemic. Each case will be reviewed on an individual basis, however this document pulls together some of the information and guidance available for beneficiaries to use around procuring during the Covid-19 pandemic.
3. Options and flexibilities under the public procurement framework
4. Public buyers have several options they can consider:
 - a. Firstly, in cases of urgency they can avail themselves of possibilities to **substantially reduce the deadlines** to accelerate open or restricted procedures.
 - b. Should those flexibilities not be sufficient, **a negotiated procedure without publication** can be envisaged. Eventually, even a direct award to a preselected economic operator could be allowed, provided the latter is the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency.
 - c. In addition, public buyers should also consider looking at **alternative solutions and engaging with the market.**

5. This guidance focusses especially on procurements in cases of extreme urgency, which enable public buyers to buy within a matter of days, even hours, if necessary.
6. The **negotiated procedure without publication** allows public buyers to acquire supplies and services within the shortest possible timeframe. Under this procedure, as set out in Art. 32 of Directive 2014/24/EU (the 'Directive') (2), public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery.
7. In addition, Article 72(1)(c) of the Directive also allows for **contract modifications without a new procurement procedure** in case of a need for modification brought about by circumstances which a diligent contracting authority could not foresee, when the modification does not alter the overall nature of the contract and within a limit of increase in price of 50% of the value of the original contract or framework agreement. In fact, this provision allows for the modification of contracts when such modification results from circumstances which the contracting authority could not foresee.
8. Art 72(1)(e) of Directive 2014/24/EU allows for non-substantial modifications, as defined in Article 72(4) of said directive, of contracts during their terms.
9. In order to speed up their procurements public buyers may also consider to:
 - 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.
10. However, confronted with situations of an exceptional increase in the demand of similar goods, products and services coupled with a significant disruption of the supply chain, it may be physically/technically impossible to procure using even the fastest available procedures. If so, public buyers may consider engaging with the market and looking for alternative innovative solutions.
11. Public buyers are fully empowered under the EU framework to engage with the market and in matchmaking activities. There are various ways to interact with the market to stimulate the supply and for the medium term needs, the

application of urgent procedures could prove a more reliable means of getting better value for money and wider access to available supplies.

12. Choice of procedures and deadlines under the EU public procurement framework – especially in cases of urgency and extreme urgency

13. For contracts falling within the scope of the Directive, the contracting authority can choose to award the contract following an open or a restricted procedure (Article 26(2) of the Directive).

- a. For **open procedures** subject to the Directive, a deadline of 35 days for the submission of tenders applies (8).
- b. In the case of **restricted procedures**, the Directive foresees a deadline of 30 days for the submission of requests to participate followed by an additional deadline of 30 days for the presentation of tenders (9). This last deadline may, where the national legislation has implemented this option, be agreed between sub-central contracting authorities, such as regional or local authorities, and the participants; if an agreement cannot be reached, then a minimum deadline of 10 days may be applied (10).

14. In addition, in both open and restricted procedures, these deadlines may be shortened:

- (1) 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;
- (2) or in case of urgency duly substantiated by the contracting authority and that renders impracticable the applicable time limit (see point 2. hereafter).

In cases of urgency – shortened deadlines:

15. If urgency requires it, the Directive foresees a substantial reduction of the general deadlines: under the open procedure, the deadline for the submission of tenders may be reduced to 15 days in cases of duly justified urgency (11); under the restricted procedure, the deadline to submit a request for participation may be reduced to 15 days (12) and to submit an offer to 10 days (13). This allows for a speedy award of the contract.

16. Using an 'accelerated' open or restricted procedure complies with the principles of equal treatment and transparency and ensures competition even in cases of urgency. In cases of urgency that render the applicable time limits under normal circumstances impracticable, contracting authorities may

shorten the deadlines, which are applicable to an open or a restricted public procurement procedure in line with the Directive.

Procedure	Minimal Regular deadlines	Minimal Shortened deadlines
Open procedure	35 days	15 days
Restricted procedure (step 1: Request for participation)	30 days	15 days
Restricted procedure (step 2: Submission of the tender)	30 days	10 days

In cases of extreme urgency – negotiated procedure without publication

17. 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.

18. 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.’ (Article 32(2)(c) of the Directive).

19. As contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and are to be interpreted restrictively.

20. Each contracting authority will have to evaluate whether the conditions for using such a ‘negotiated procedure without prior publication’ are met. It will have to justify its choice of such a procedure in an individual report (19). In the individual assessment of each case the following cumulative criteria will have to be fulfilled:

a. *Events unforeseeable by the contracting authority in question* - The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment could, certainly, not be foreseen and planned in advance, and thus constitute an unforeseeable event for the contracting authorities.

b. *Extreme urgency making compliance with general deadlines impossible* - It cannot be doubted that the immediate needs the hospitals and health institutions (supplies, services and public works) have to be met with all possible speed. (Whether this makes it impossible to respect even the very short deadlines of the accelerated

open or restricted procedure (15 and 10 days respectively to submit the offers) will have to be assessed on a case-by-case basis. [For more detail on this, see the full guidance]

- c. *Causal link between the unforeseen event and the extreme urgency* - For the satisfaction of the immediate needs of hospitals and health institutions within a very short timeframe the causal link with the COVID-19 pandemic cannot reasonably be doubted.
- d. *Only used in order to cover the gap until more stable solutions can be found* - Negotiated procedures without prior publication may offer the possibility to meet immediate needs. They cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures).

PPN 01/20 and PPN 02/20 – Procurement Policy Notes from UK Government

- 21. PPN 01/20 and PPN 02/20 are UK Government Cabinet Office Policy Notes which the Finance Minister for Wales has confirmed will both apply to Wales, and as such will be taken into consideration by WEFO when and if they are applicable.
- 22. Link to PPN 01/20: <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>
- 23. **UK Government Cabinet Office Policy Note - Supplier relief PPN02 /20. Are there any changes to procurement rules as a result of COVID 19? Can I release advance payments to my suppliers to ensure continuity once the crisis is over?**

Link to PPN 02/20: <https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>
- 24. Due to the current COVID-19 crisis it may be that advance payments to suppliers are unavoidable, in order to support those suppliers at risk to ensure that they are better able to cope and resume normal service delivery and fulfil their contractual obligations when the crisis is over. Therefore payments in advance for services as part of an approved contract & which are applied in line with the Cabinet Office Policy Note will be eligible for support.
- 25. From an eligibility perspective, as noted in the FAQ, WEFO eligibility rules already provide options for advanced payments for goods. Section 7.3.4 notes that: *If you are required to pay for goods or services in advance, including deposits, you may include these costs in you claim to us as a 'paid' cost but only where:*

- *these are the standard business terms of the supplier or contractor and is at their request or unavoidable; and*
- *to secure the best price or secure significant discounts (for example, travel tickets and accommodation); or*
- *to secure the best quality (e.g. book early to secure the best venue for a key event integral to the success of the project).*

26. All beneficiaries in taking this approach will also need to ensure that they have a full justification for any advance payments and that they record/ document & maintain all decisions taken and reasons for doing so, **thereby ensuring a robust audit trail for all the decisions taken for making such advance payments and which will potentially form the basis of future audits by WEFO/ WG/ WAO and/ or the EC.**

Note to beneficiaries:

Beneficiaries must still comply with all applicable EC, UK and Welsh laws/ government policies when letting contracts partly funded by the EU funds.

When following any of the above procedures, please remain aware of the importance and need to record and document all decisions taken and reasons for doing so, and keep the records for future audit purposes.

If you should experience any impact on your procured contract/ procurement process as a result of Coronavirus (COVID-19), please refer to your relevant WEFO contact for further advice.