

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

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



# 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.

# 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).

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).

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.

# About us

Through a combination of our strong experience in the life sciences sector and our legal expertise, our mission is to develop both short and long term commercial solutions that will assist you in taking your idea from inception to market place and beyond.

Bird & Bird is a global law firm. Altogether, we have over 1,100 lawyers and legal practitioners working on our clients' issues and business goals worldwide. Our core objective is to select and develop people who possess a rare and invaluable grasp of strategic commercial issues.

By combining this talent with exceptional legal expertise and deep industry knowledge, our advice is always informed, up to date, focused and relevant.

With over 240 experts globally and a wealth of hands-on experience from working inside life sciences companies and regulatory bodies, clients choose us as their strategic partner to guide them through some of their most complex legal challenges.

Our recommendations are practical, realistic and clear.

For more information or useful materials and contacts visit us [here](#) at our website or at our specialist news hub page, [BioTalk](#).

twobirds.com

Abu Dhabi & Amsterdam & Beijing & Berlin & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & San Francisco & Shanghai & Singapore & Stockholm & Sydney & Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.