

Direct contract awards

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- When is it reasonable to make a direct contract award, e.g. pandemic, lack of market competitors, public sector economic constraints?

Regulation 32(2)



(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

(2) The negotiated procedure without prior publication may be usedin any of the following cases:—

....

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—

....

(ii) competition is absent for technical reasons,

(iii) the protection of exclusive rights, including intellectual property rights,

but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

(c) 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.

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

- European Commission Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 1/01)
 - *“a health crisis that requires swift and smart solutions and agility”*
 - *“options and flexibilities are available under the EU public procurement framework”*
 - *“European public procurement rules provide all the necessary tools to satisfy those needs [supplies, services and infrastructure of first necessity quickly]”*

- PPN 01/20 – Responding to COVID 19

- The options
 - Urgency (Reg. 32(2)(c))
 - Absence of competition or protection of exclusive rights (Reg. 32(2)(b))
 - Existing framework or dynamic purchasing system
 - Standard procedure with accelerated timescales
 - Modification under Reg. 72(1)(c) – unforeseeable circumstances
 - Light touch regime

➤ The guidance

- Need for written justification
- Limit requirements to only what is absolutely necessary
- Delaying doesn't make a situation extremely urgent, unforeseeable or not attributable to the CA
- Continue to achieve value for money
- Continue to use good commercial judgment

- The Boardman reports
- The NAO reports
- Recommendations, including
 - Need to publish basic information on contracts
 - Need to issue further guidance on risks under Reg. 32(2)(c)
 - Need for clear documentation for establishing and using procedures
 - Need clear documentation on considering and managing potential conflicts of interest and bias

- PPN 01/21 – Procurement in an Emergency

Key points:

- Need for value for money, good commercial judgment and sound decision-making
- Need for proper records of decisions
- Need for documentation on conflicts of interest
- Consider whether it is possible to publish some form of advertisement, run an informal competition and/or undertake due diligence on supplier market before direct award

R (The Good Law Project) v Minister for Cabinet Office and Public First Ltd [2021] EWHC 1569 (TCC)

- Focus group services – to understand public opinion to deliver guidance

- Direct award to Public First

- Grounds of challenge
 - No basis for a direct award under Reg 32(2)(c)
 - Award of contract for 6 months was disproportionate
 - Decision to award to Public First gave rise to apparent bias

- C failed on Grounds 1 and 2:
 - Extreme urgency was unforeseeable, unpredictable and not attributable to the D
 - D determined that it needed additional qualitative research carried out immediately to inform policy and strategy
 - Time limits for other procurements could not be complied with
 - Procuring the services was strictly necessary
 - 6 months was not disproportionate

- But succeeded on Ground 3 (apparent bias):
 - D's failure to consider any other research agency, by reference to experience, expertise, availability or capacity, would lead a fair minded and informed observer to conclude that there was a real possibly or real danger that the decision-maker was biased

Absence of competition:

- Proof, investigation or assertion?
- Beware of existence of reasonable alternatives
- Beware of artificially narrowing competition (Reg. 32(2)(b) and 18(2) and (3))
- Don't forget Recital 50 (Directive 2014/24)
- Mitigation measures – VEAT, unwind provisions

Public sector economic constraints:

- Re-negotiate the contract?

- Substantial variations can be reductions as well as increases:
 - *Finn Frogne (2016)*
 - Smaller contract may be of interest to smaller tenderers
 - Smaller contract may permit reduction in level of abilities required and permit further tenderers to apply

Proposals:

- Retain negotiated procedure without prior publication – but re-name as limited tendering procedure
- Grounds will be broadly unchanged
- New circumstance – crisis or extreme urgency
- Mandatory to publish VEAT notice; and to have 10 day standstill period – except where contracts placed due to crisis or extreme urgency
- Requirement to publish contract award notice to be retained

- New crisis situation:
 - An event which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts life or health
 - Where measures are required to protect public morals, order or safety or
 - Where measures are required to protect human, animal or plant life or health

- For national or local emergency

- Minister for Cabinet Office declares crisis

- A crisis or extreme urgency does not necessarily mean direct award – consider a degree of competition and, if not, record reasoning

- Contracts not subject to automatic suspension

Make sure:

- The contract falls within the (strict) requirements
- There is a sufficient documentary record
- Conflicts of interest have been fully considered and documented