

May 28, 2020

## **A MESSAGE FROM THE PRESIDENT OF ETHICS**

Dear ETHICS members – Welcome to our Fifth Special Edition of ETHICS In Action. This edition focuses on ethical, legal and compliance matters relating to European public procurement in the context of the COVID 19 Crisis and provides a summary of the public procurement guidance issued by the European Commission on April 1, 2020. We would like to thank Steffen Amelung of Clifford Chance’s Frankfurt Office for assisting our Editor, John McLoughlin, in the preparation of this Special Edition.



Roeland Van Aelst

Do not miss our next COVID 19 WEBINAR which will be held on Tuesday, June 2nd (see below to register).

**THE NEXT ETHICS COVID 19 WEBINAR WILL TAKE PLACE  
ON JUNE 2nd AT 16h00 CET. IT WILL FOCUS ON  
PUBLIC PROCUREMENT IN THE CONTEXT OF COVID 19, SUPPLY CHAIN  
DISRUPTIONS, PRODUCT SHORTAGES, UNJUSTIFIED EXCESS PRICING AND  
FRAUD**

Registration is free. You may invite colleagues to join. Click on the link below to register:  
<https://www.eventbrite.fr/e/billets-ethics-webinar-3-on-covid-19-public-procurement-in-times-of-crisis-106740365306>

## **EUROPEAN PUBLIC PROCUREMENT IN THE CONTEXT OF COVID 19 – ETHICAL, LEGAL AND COMPLIANCE ISSUES**

Due to the COVID 19 pandemic, Healthcare companies are finding that in many European countries the normal tender procedures for new public contracts relating to the purchase of pharmaceuticals, medical devices and personal protection equipment are being thrown out the window as public health authorities and individual public hospitals compete for urgent supplies. Furthermore, companies are reporting that for some public contracts that went into effect prior to the current crisis, hospitals and public health authorities are demanding price reductions, delays in delivery and, in some cases, the total cancelation of those contracts.

This Special Edition will examine these issues.

**Background of EU Public Procurement Law Prior to COVID 19.** Public procurement in Europe is based on the principles of transparency, open tender procedures, set time-lines for responding to tenders, competitive bidding and non-discrimination. These principles were set out in the first two EU procurement Directives enacted in 2004 (EU Directive 2004/18/EC “the classic public sector directive” and EU Directive 2004/17/EC “the utilities directive”). The idea behind these Directives was to establish a clear set of European-wide procurement procedures in order to facilitate the single market. Another goal was to avoid favoritism and corruption in the awarding of public contracts. In 2014, those Directives were replaced by EU Directives 2014/24/EU and Directive 2014/25/EU. The new Directives seek not only to ensure fair bidding in the awarding of public contracts, but also include a number of social goals such as environmental protection, combating climate changes as well as promoting innovation, employment, public health and other social considerations.

**COVID 19 - EU Guidance Regarding New Public Procurement Contracts.** The COVID 19 crisis has in many respects upset some of the basic principles set out in the EU Directives given that public authorities are struggling to meet immediate and urgent healthcare demands. To address this situation, on April 1, 2020 the European Commission issued a Communication entitled “Guidance on using the public procurement framework in the emergency situation related to the COVID 19 crisis.” The Guidance Communication summarizes the basic public procurement rules set out in 2014 Directives and the exceptions to those rules as they relate to new public procurement contracts entered into during the current emergency.

The Guidance Communication explains that under Article 32 of Directive 2014/24/EU public buyers in cases of extreme urgency may make purchases within a matter of days or even hours if necessary without complying with the normal bidding procedures mandated by the Directive. According to the Commission, the COVID 19 crisis constitutes a situation of extreme urgency. Accordingly, public buyers may negotiate directly with potential sellers without publishing requests for tender or respecting tender time limits if the situation so requires. Also, a minimum number of potential sellers need not be consulted if only one company is able to deliver within the technical and time constraints imposed by the extreme urgency. The Guidance quotes Article 32 of the Directive which refers to these exceptional purchasing arrangements as “negotiated” procedures. They must be brought about by unforeseeable events and are permitted only as strictly necessary. The Guidance Communication also points out that, based on the jurisprudence of the European Court of Justice, in all cases of extreme urgency the procurement must be made “without delay”. It cannot be used to disguise a long term arrangement that could have been entered into under the normal rules.

For the full text of the EU Guidance Communication go to <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0401%2805%29>

**COVID 19 Impact on Existing Public Procurement Contracts.** The EU Guidance Communication referred to above only applies to new contracts. It does not apply to public procurement contracts which were already in effect when the COVID 19 crisis began. However, there have been reports that some public hospitals and purchasing authorities have decided, based on the crisis, not to respect the terms and conditions of existing contracts and are demanding delays in payment, the postponement of the delivery of goods ordered or the modification of the contract terms. There have even been reports of contract cancellations. Some of these demands, although not always legal, are understandable. For example, many hospitals have temporarily closed certain departments, such as trauma wards and cancer

treatment centers. As a result, they do not need and cannot use medical products for those activities at the present time. From an operational perspective postponing shipments makes sense. Also, handling unnecessary deliveries may be next to impossible for some overextended hospitals. However, agreeing to such demands creates problems for healthcare companies in terms of production, supply chain management and meeting sales targets. Other demands, such as payment delays and contract cancellations, are even more difficult to deal with. These types of situations require careful decision-making by management as well as detailed legal analysis particularly since the contract issues involved are not covered by the EU Directives but, instead, are subject to the laws of each European member state. Set out below are several examples of national laws which permit public authorities to change or even cancel procurement contracts:

**France** – Article L6 of French Ordonnance N°2018-1074 allows French public authorities to unilaterally modify or terminate public contracts. In such cases, the co-contracting party may claim indemnification for losses actually incurred. Article L6 is based on the French administrative law principle that French public authorities in the exercise of their mission must continually evaluate public requirements and, if those requirements change, they may impose on their suppliers modifications based on the evolution of such requirements.

**Germany** – The amendment or termination of an existing contract is in principle only possible if the contract contains corresponding provisions permitting amendment or termination. Otherwise, an adjustment or termination of the contract can only be considered if the basis of the contract ceases to exist in accordance with § 313 of the German Civil Code. This may be the case if it would be unreasonable for at least one of the parties to adhere to the contract.

Ethics and compliance officers should make their voices heard when companies are confronted with requests from overwhelmed public health systems for contractual delays or modifications, even if they do not conform to contractual requirements.

**Avoiding Illegal Practices in Public Procurement During the Crisis.** One thing is certain, healthcare companies, their legal departments and compliance officers must be alert to legal, ethical and compliance issues when dealing with new emergency public procurement situations. It is both illegal and unethical to use the emergency procedures set out in Article 32 of Directive 2014/24/EU to avoid the application of the normal European public procurement rules. On the other hand, where a real emergency exists which meets the requirements of the Directive, the extreme urgency provisions referred to in the Commission’s Guidance Communication may be applied. However, the healthcare company responding to such an emergency request should require the public authority or hospital to certify in writing that the normal tender and bidding procedures cannot be used due to “extreme urgency” and, therefore, the authority or hospital is applying the “negotiated” procedure set out in Article 32 of Directive 2014/24/EU. Likewise, where changes to a pre-existing public contract are requested by a local public authority, a careful review of local legal requirements as well as the company’s ethics and compliance guidelines should be made before agreeing to any such changes.

If you have ideas, experiences or compelling stories which could help your colleagues and that you would like to share with other ETHICS members relating to the impact of COVID 19 on ethics and compliance, please let us know by contacting the ETHICS In Action editor, John McLoughlin, at [john.mcloughlin.ethics@gmail.com](mailto:john.mcloughlin.ethics@gmail.com)