



# **POLICY BRIEF**

## **PUBLIC PROCUREMENTS AND ORGANIZATION OF COMPETITIVE PROCEDURES UNDER CRISIS CONDITIONS**

**Skopje, July 2022**



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# ■ INTRODUCTION

Emergence of the COVID-19 pandemic has created a need for fast adjustment to the newly created situation, especially in respect to procurements that should be urgently implemented on the account that the people's security, life and health are directly threatened.

While the legislation on public procurements in the Republic of North Macedonia is largely aligned with the EU Public Procurement Directives, numerous questions have been raised about the best manner to address consequences of the pandemic that completely distorted markets and supply chains. This resulted in many challenges, not related only to implementation of public procurement procedures, but also to management of already awarded procurement contracts.

On that account, this policy brief aims to provide a summary of experiences and to propose possible solutions aimed at improving the legislation and practices related to public procurements under crisis circumstances. On one side, the system should be sufficiently flexible to adjust to any contingencies that might arise during a crisis, but on the other hand, it should ensure maximum level of lawfulness, transparency and accountability, thereby reducing possibilities for abuses.

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# NEGOTIATING PROCEDURES WITHOUT PREVIOUSLY ANNOUNCED CALL FOR BIDS

Negotiating procedures without previously announced call for bids are used in limited situations, when certain strictly-defined legal conditions are met. This type of procurement procedures is most adequate for organization at times of crisis because it allows urgent and fast implementation and is sufficiently flexible to take into account possible distortions on markets for goods and services needed to deal with the crisis and to ensure continuity of supply.

On the other hand, these procedures are non-competitive and contracting authorities need to justify and document fulfilment of relevant conditions for organization of such procurements. Non-transparency of this type of procedures could be indicated as the main challenge in implementation of urgent procurements at times of crisis, which has been proved by the analysis of implemented public procurements related to COVID-19.

Namely, the analysis of public procurements intended to address the COVID-19 health crisis has shown that, when implementing negotiating procedures, contracting authorities often send a request for submission of bid only to one economic operator, and rarely to two or more economic operators. This does not mean that contracting authorities have violated the law and the possible reason for such action could be lack of sufficient time to identify more companies that supply the procurement subject needed in order to address them with request for submission of bids. Practice shows that, at times of crisis, bidders easily adjust to market demand and could offer new products which they have not supplied earlier or they could provide other alternative solutions that meet market demand.

In this regard, this document proposes reconsideration of several policy measures that could mitigate risks associated with implementation of negotiating procedures for urgent reasons without previously announced call for bids, i.e. public procurements organized under crisis circumstances. They include:

- publication of the invitation for submission of bids in the Electronic Public Procurement System (EPPS), accompanied by descriptive documents and procurement needs specifications;
- greater use of voluntary, proactive transparency notifications;



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- other possibilities to increase competition in negotiating procedures without previously announced call for bids;
  - access for competent authorities to documents from implemented procurement procedures.

## Publication of the invitation for submission of bids in EPPS, together with descriptive documents and procurement needs specifications

To address the challenge of non-transparency in the case of urgent procurements at times of crisis and to ensure cost-effective spending of public funds and a system for facilitated and simplified review and audit, possible remedy actions could include publication of procurement notices in the form of invitation for submission of bids in EPPS. Given that highly sophisticated and centralized platform for public procurements is already in place (EPPS), the same could be upgraded with a module for publication of invitations for submission of bids. Publication of such invitations would be performed in the same manner as publication of procurement notices, i.e. after having logged in the system, contracting authorities will have to insert the procurement's subject and select the relevant category of procurement subjects and the relevant category of public procurement procedures, and then attach the document that contains data on procurement needs and other information.

All economic operators registered on EPPS will receive "INFO" that particular contracting authority needs the procurement subject in question. The invitation for submission of bids will be publicly available on EPPS and the entire public will be able to view and download it from EPPS without having to be registered in this system. This will ensure greater competition and provides an opportunity for participation of all domestic and foreign bidders without any preconditions and payment obligations. Publication of descriptive documents and procurement needs specifications will serve as corrective mechanism, i.e. contracting authorities would have to pay special attention in developing such documents, making sure they are as open and generic as possible, in order to avoid favouritism of particular solutions or bidders.

The law stipulates that when public procurements are implemented due to urgency reasons that are a result of events which contracting authorities were unable to anticipate, and when law-stipulated deadlines for other procurement procedures cannot be applied, contracting authorities are allowed to set procurement deadlines independently and based on their urgent needs. It goes without saying that, in such cases, circumstances that justify the urgent procurement cannot be of such nature that they could be attributed to the contracting authority.

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Accordingly, while the invitation for submission of bids will be published, contracting authorities would not be obliged to enforce certain law-stipulated minimum deadlines. Bids could be submitted in hardcopy or via e-mail.

After submission of bids within the deadline defined by the contracting authority, the same could take the selection decision or engaged in negotiations with qualified bidder when it needs additional clarification and establishment of procurement conditions, for example, delivery conditions, payment method and the like. Negotiations can take place in person or online, using a particular platform.

This solution could also be used under business-as-usual circumstances, provided that relevant conditions for organization of negotiating procedures for urgent reasons without previously announced call for bids are met. In order to encourage use of this solution, it could be stipulated that, in such cases, contracting authorities do not need to request and obtain an approval from the Bureau of Public Procurements (BPP) concerning compliance with relevant conditions for organization of negotiating procedures. Due consideration should also be made whether this solution for publication of the invitation for submission of bids should be mandatory or optional, in which case it would not be subject to previous approval by BPP.

As is the case with other procurement procedures, contracting authorities will need to complete and submit the notification on contract signed within a deadline of 10 days from contract award. Having in mind that the invitation for submission of bids will be published, it will also include information that the contracting authority has serious intent to procure the goods/service/works in question. EPPS could be upgraded in this respect as well, i.e. within a reasonable deadline, for example, within a deadline of 30 days, EPPS could block the concerned contracting authority from publishing new procurement notices until it completes and submits the notification on contract signed or the notification on tender procedure annulment.

Under the current law, in the cases of procurement procedures organized in paper form, contracting authorities are obliged to attach in EPPS all documents related to such procurement, starting with the decision on public procurement needs and justification for use of this type of procedures, tender documents, bid/bids received, minutes taken during negotiations, etc., and to create an evidentiary record for the procurement procedure in question. Contracting authorities are able to attach these documents much earlier, but the field for attaching documents appears as mandatory requirement at the moment when contracting authorities complete the notification on contract signed and are obliged to also attach the procurement contract.

Publication of the invitation for submission of bids in EPPS will ensure maximum transparency and greater competition, resulting in submission of bids characterized by better quality and more realistic prices.

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## Voluntary, proactive transparency notifications

Also, due consideration should be made of ways to encourage contracting authorities to more frequently use voluntary, proactive transparency notifications, which are already anticipated in the Law on Public Procurements and broadly used in EU member-states. Namely, contracting authorities can publish voluntary, proactive transparency notification in cases when they award contracts under negotiating procedure without previously announced call for bids. This type of notifications may be used by contracting authorities when implementing negotiating procedures without announced call for bids. Moreover, these notifications can be used for public procurements implemented under non-transparent procedures and are intended to inform the public about the procurement procedure organized and the planned award of contract.

This notification is published in EPPS on the day when the contracting authority forwards its selection decision to bidding companies that participated in the concerned public procurement.

In cases when contracting authorities have failed to publish voluntary, proactive transparency notification and have failed to publish notification on contract signed, in compliance with Article 147 of LPP, an appeal is logged within a deadline of 60 days from learning about award of such contract, but not later than expiration of a six-month period from the day when the contract was signed.

## Other possibilities to increase competition in negotiating procedures without previously announced call for bids

In order to increase the number of economic operators invited to submit bids in negotiating procedures without previously announced call for bids, contracting authorities should use and analyse other similar tender procedures available in EPPS in respect to bidding companies that have participated in these procedures and accordingly expand the list of economic operators that will be invited to submit bids in their tender procedure. Practice shows that greater competition, i.e. higher number of bids, results in better prices and conditions offered by bidding companies.

Hence, contracting authorities should continuously follow and, when needed, analyse market developments, which would make them better prepared for organization of public procurements under possible future crisis circumstances.

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## Access for competent authorities to documents from implemented procurement procedures

In order to ensure greater control and monitoring of public procurements under crisis conditions and in light of the need to analyse procurements on case-to-case basis, starting with technical specifications, prices and competition in individual tender procedures, as well as control of quantities purchased, efforts are needed to ensure that competent authorities have systemic and unrestricted access to documents from so-called “crisis” procurements. This could be done by connecting EPPS with relevant electronic systems disposed by the competent authorities.

Allowing such access for competent authorities does not only facilitate detection of possible abuses, but also identification of good practices that could later be used to improve overall implementation of public procurements under crisis circumstances.

## IMPLEMENTATION OF TRANSPARENT PROCEDURES WITH SHORTER DEADLINES

As mentioned earlier, negotiating procedures for urgent reasons without previously announced call for bids are used in exceptional circumstances and only when certain law-stipulated requirements are met. However, it should be noted that after expiration of particular time period, like in the case of the COVID-19 pandemic, the unpredictability of circumstances can no longer be readily used as justification for organization of this type of procedures.

The Law on Public Procurements anticipates another opportunity for situations in which regular deadlines are too long, but the urgent reason is not of such nature that could justify use of non-transparent procedures, and that is organization of transparent procedures with shorter deadlines. According to Article 50, paragraph 6 of LPP, deadlines for open procedures can be shortened from 30 to 20 days on the grounds of urgent reasons which contracting authorities need to elaborate in their decision for organization of public pro-

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curement. It should be noted that the law does not define what constitutes urgent reason, thereby providing some flexibility in respect to decision-making on shorter deadlines. EU regulations also allow shorter deadlines for open procedures, which can be set in duration of at least 15 days.

Similar provision is in effect for procedures organized in several stages, but this policy brief will not elaborate them separately because such procedures are rarely used in the practice.

Moreover, findings of the State Audit Office based on its audit of COVID-19 procurements show that different contracting authorities use different procurement specifications for meeting same procurement needs. The crisis has demonstrated that, in many cases, economic operators are in much more favourable market position compared to contracting authorities, especially due to the small number of economic operators in some market segments and market demand distortions. This allows them to dictate prices and other conditions in public procurements. Such risks could be mitigated by introducing some level of centralized needs for procurement subjects that can be easily standardized and are used by large number of contracting authorities, for example, surgical gloves, medical masks, and the like. The contracting authority with the most extensive experience in the given procurement subject could develop the relevant specifications in cooperation with other contracting authorities whose needs will be covered by the public procurement. On the account of avoiding price manipulations, the state could also reconsider measures for capping profit margins of key products needed to deal with the crisis, which it has already used in the case of basic food products and in response to higher prices caused by the war in Ukraine.

In that respect, several measures that could be reconsidered for use in regular procurement procedures with shorter deadlines under crisis conditions are:

- additional reduction of already shorter deadlines for open procedures to 15 days (and for other procedures organized in several stages, as anticipated in EU Directives) and
- promoted use of shorter deadlines by the Bureau of Public Procurements for transparent procedures under crisis conditions as an alternative to negotiating procedures for urgent reasons without previously announced call for bids; this could be done by strengthening BPP's education program, developing and publishing a manual for organization of public procurements under crisis conditions and the like.

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# CHANGES TO PROCUREMENT CONTRACTS DURING THEIR VALIDITY PERIOD

The COVID-19 pandemic has caused problems not only in respect to organization of public procurement procedures, but also in respect to management of already awarded contracts. A common practice in the Republic of Macedonia is for public procurement contracts to be signed under fixed and unchangeable prices for the entire duration of contract performance. This approach is easier for management, and in the past several years the markets were rather stable, guaranteeing stability of offered prices. However, the emergence of several crises that started with the COVID-19 pandemic, followed by the energy crisis and the war crisis in East Europe, caused complete market distortion and price instability. Economic operators reacted to this situation with lower interest for participation in tender procedures, but also with requests for price changes or early termination of already signed procurement contracts.

Changes to conditions established under procurement contracts might arise during its performance, especially at times of crisis. In particular, such changes could be related to delivery deadlines, procurement prices, etc.

Article 119 of the Law on Public Procurements anticipates an opportunity for amending procurement contracts during their validity period, but only in strictly stipulated circumstances, i.e.:

1. when changes, irrespectively of their monetary value, are anticipated in tender documents in clear, precise and unambiguous manner, for example, there are provisions in place that allow correction of prices or options. These provisions must clearly define the scope and the nature of possible changes or options, as well as conditions under which they can be evoked, but should not result in essential change to the nature of the concerned procurement contract or framework agreement;
2. in the case of procuring goods, services and works from the initial procurement holder which are not covered under the primary contract, but are deemed necessary due to unpredictable circumstances, and when replacement of the initial procurement holder:

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- ▶ is not possible due to economic or technical reasons, for example, in cases involving replacement or interoperability of existing equipment, services or installations procured under the initial tender procedure; and
  - ▶ would give rise to serious difficulties or would significantly increase the contracting authority's costs;
3. when changes are needed due to circumstances which the contracting authority could not have been able to anticipate or when changes do not substantially alter the nature of the concerned procurement contract or framework agreement;
  4. when the initial procurement holder is replaced by another economic operator that meets all terms and conditions initially defined in tender documents related to the concerned procurement and the new economic operator is legal successor of the initial procurement holder following company restructure, including acquisition, joint venture, merger or bankruptcy, provided that such action does not include significant changes to the procurement contract and does not imply evasion to enforce this law;
  5. when changes, irrespectively of their value, are not significant in the meaning of paragraph (4) of this article.

Hence, it seems that the existing legal framework is in line with EU regulations, but adequate practice is missing to help contracting authorities properly enforce above quoted legal provisions under crisis circumstances. Also, further precision is needed in respect to force majeure regulated under the Law on Obligations, and model contracts need to be properly updated with improved provisions on force majeure.

In that respect, due consideration should be made of the following contract management measures:

- improve the practice on enforcement of legal provisions related to changes to procurement contracts during their validity period by developing guidelines with best practices from the region and the EU;
- develop guidelines for use of applicable prices for particular procurements;
- improve legal provisions on force majeure in the Law on Obligations to cover crisis situations as justifiable reason for non-performance of contractual obligations.



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