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## Late and incomplete application of public procurement – exceptional circumstances

### Transaction(s)

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Audited Amount in €	7 386 918.76
Budget Line	06 07 01 00
Budget Area	COHESION

### Background

EU Programme and legal basis	Emergency Support Instrument (ESI) Council Regulation (EU) 2016/369 as amended by Council Regulation (EU)2020/521 of 14 April 2020
Audited project (code, title and acronym)	Grant Agreement No. ECHO/ESI/2020/C/020/835247 Transport operation of medical items to respond to COVID- 19 crisis
Responsible Commission service	Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO)
Audited beneficiary	Ministerie van Volksgezondheid, Welzijn en Sport (Ministry of Health, Welfare and Sports)
Member State	The Netherlands
Audited period	24 April to 10 September 2020
Project co-financing rate	16.68 %
Expenditure accepted by the Commission and related EU contribution	€44 802 756.81 EU contribution: €7 386 918.76
ECA audited expenditure	€19 088 071.29 (42.6 %)

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**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) Official Journal 1 April 2020**

*"1. Introduction – Options and flexibilities under the public procurement framework*

*[...]*

*2. Choice of procedures and deadlines under the EU public procurement framework – especially in cases of urgency and extreme urgency The European Union currently faces numerous challenges due to the sudden, widespread COVID-19 health crisis. This guidance provides an overview of the possibilities for public buyers, the contracting authorities (6), to acquire supplies and services of first necessity quickly and, where needed, also additional infrastructure. European public procurement rules provide all the necessary tools to satisfy those needs, under the provisions of the Directive*

*2.1. Choice of procedures in general 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) ( 7 ). For open procedures subject to the Directive, a deadline of 35 days for the submission of tenders applies ( 8 ). 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 ). 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).*

*2.2. In cases of urgency – shortened deadlines 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.*

*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 ( 14) 15 days Restricted procedure (step 1: Request for participation) 30 days ( 15) 15 days ( 16) Restricted procedure (step 2: Submission of the tender) 30 days ( 17) 10 days ( 18)*

*2.3. In cases of extreme urgency – negotiated procedure without publication 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. 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). 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 (see, for instance cases C-275/08, Commission v Germany, and C-352/12, Consiglio Nazionale degli Ingegneri). A ‘negotiated procedure without publication’ allows contracting authorities to negotiate directly with potential contractors; a direct award to a preselected economic operator remains the exception, applicable if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency. 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:#*

*2.3.1. ‘Events unforeseeable by the contracting authority in question’ The number of COVID-19 patients requiring medical treatment is rising daily and, in most Member States, is expected to increase further until the peak will be reached. These events and especially their specific development has to be considered unforeseeable for any contracting authority. 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.*

*2.3.2. 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, but it is likely in most cases, at least as regards the significantly increased short-term needs as the infection curve rises. As clarified in the Court’s jurisprudence (20), if extreme urgency is invoked, the procurement need has to be satisfied without delay. The exception cannot be invoked for the award of contracts that take longer than they would have taken if a transparent, open or restricted, procedure had been used, including accelerated (open or restricted) procedures.*

*2.3.3. 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.*

*2.3.4. 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*

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The contract with KLM is undated

At an undisclosed moment, on behalf of the beneficiary and its national consortium of medical supplies, Mediq Nederland BV (the beneficiary's agent) signed a contract with Koninklijke Luchtvaartmaatschappij NV (KLM).

KLM charged the costs based on the terms in the contract. Neither the beneficiary nor its agent was able to provide an overview of the start and completion of the negotiating process, which leaves open whether the contract presented was signed when or before the services were rendered. However, excluding the flight KL 830 on 4 June 2020 (cost item 5) operated

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with a Boeing 777-300ER (which is not mentioned as a possible aircraft to be chartered), the flights we examined were charged in line with the presented contract.

The national consortium medical supplies (LCH) included KLM staff

In addition, some publicly available information appears to indicate that the process of setting up the flights between China and the Netherlands started at the end of March and was completed in early April, for example in:

NL: <https://publiekdenken.nl/nieuws/bestuurskracht/luchtbrug-van-amsterdam-naar-shanghai/>;

EN: [https://publiekdenken-nl.translate.google.nl/nieuws/bestuurskracht/luchtbrug-van-amsterdam-naar-shanghai/?\\_x\\_tr\\_sl=nl&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=de&\\_x\\_tr\\_pto=wapp](https://publiekdenken-nl.translate.google.nl/nieuws/bestuurskracht/luchtbrug-van-amsterdam-naar-shanghai/?_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=de&_x_tr_pto=wapp));

NL: <https://nieuws.klm.com/klm-en-philips-zetten-speciale-vracht-luchtbrug-op-van-amsterdam-naar-china/>

EN: [https://nieuws-klm-com.translate.google.nl/klm-en-philips-zetten-speciale-vracht-luchtbrug-op-van-amsterdam-naar-china/?\\_x\\_tr\\_sl=nl&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=nl&\\_x\\_tr\\_pto=wapp](https://nieuws-klm-com.translate.google.nl/klm-en-philips-zetten-speciale-vracht-luchtbrug-op-van-amsterdam-naar-china/?_x_tr_sl=nl&_x_tr_tl=en&_x_tr_hl=nl&_x_tr_pto=wapp)

The publications show a close cooperation between the beneficiary, the national consortium for medical supplies (LCH) and Mediq Nederland BV (the agent) and the airline, including KLM staff as part of the LCH in charge of arranging the agreement with KLM NV.

The beneficiary did not apply the steps required by Article 2.37 of the Dutch public procurement law

Neither the beneficiary nor its agent announced the intention to purchase the airfreight services. The agent negotiated directly with KLM.

The beneficiary did not apply steps b, c and e of Article 2.37 of the Aanbestedingswet 2012.

At our request, the beneficiary informed us that it had effectively applied Article 2.32(1)(c) of the Aanbestedingswet 2012 (equal to Article 32(2)(c) of the Directive 2014/24/EU). The beneficiary referred to internal legal advice and the Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis published in the Official Journal of 1 April 2020 (OJ (2020/C 108 I/01).

The beneficiary provided an analysis/report of the actual process applied and concludes that *that air transport costs were rightly not procured at European level for reasons of extreme urgency.*

## Analysis

Initially the beneficiary did not apply public procurement

The beneficiary did not apply the national public procurement rules at the moment it entered into contract with Koninklijke Luchtvaartmaatschappij NV (KLM). Initially, the beneficiary took the position that the agent (Mediq Nederland BV) was not subject to the public procurement rules (EU or national). However, the latest in the process of obtaining the audit certificate required under Article I.4.4(d) of the grant agreement, the beneficiary accepted that as the agent was acting on its behalf, the contract with KLM was subject to the Dutch public procurement law (Aanbestedingswet 2012).

Only later the beneficiary indicated the application of article 2.32(1)(c) of the Aanbestedingswet 2021

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The beneficiary analysed the steps that the agent did take on its behalf and the legal framework applicable from 1 April 2020.

In the beneficiary's view, it and its agent could apply Article 2.32(1)(c) of the Aanbestedingswet 2012 that allows the contracting authority to *use the negotiated procedure without publication if to the extent strictly necessary, where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority and not attributable to the contracting authority, the time limits of the open, restricted or competitive procedure with negotiation cannot be complied with.*

Commission guidance on the emergency situation

Specifically on this, the Commission issued guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis on 1 April (Official Journal 2020/C 108 I/01). In its analysis, the beneficiary referred to this guidance and concluded that it met the conditions for applying Article 32(2)(c) of the Directive 2014/24/EU, the article comparable to article 2.32(1)(c) of the Aanbestedingswet 2012.

We agree that the Commission's guidance on sections 2.3.1, 2.3.2 and 2.3.3. can be applied for transport by air. However, the same guidance states in section 2.3.4 that:

*"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."*

The beneficiary and its agent did not attempt to regularise the contractual arrangements applying for example Article 2.28(1)(a)(1) of the Aanbestedingswet 2012. The beneficiary and its agent used it as a framework contract throughout the grant agreement period.

It is unclear whether the reduction of deadlines could have allowed for a regularised contract

The Commission guidance reduced deadlines from 30 days to 15 and 10 days for the restricted procedure. These deadlines also apply to the competitive procedure with negotiation. This allows for a shorter completion of the process from public announcement to awarding the contract.

While the needs were clearly set out beginning of April, as indicated by the arrangements in place with KLM at that time, it is unclear whether this reduction could have allowed for a regularised contract in time for effective use.

**Impact**

Conclusion – the public procurement rules were not applied

The beneficiary did not apply the public procurement rules, in particular the steps mentioned in Article 2.37 of the Aanbestedingswet 2012. The beneficiary did not publish the result of the procedure neither at the time of completion nor at any later stage.

However, we acknowledge the unexpected situation of the COVID outbreak and we recognise the extreme urgency in which timing was crucial at that particular moment.

As such, we can accept the application of the exception of Article 2.32(1)(c) of the Aanbestedingswet 2012 corresponding to Article 32(2)(c) of the Directive 2014/24/EU.

Based on the above, we classify the finding as an "other compliance issue".

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**Error***Characteristics of the error*

<b>Detectable?</b>	Yes by National authorities
<b>Error classification</b>	Error on sample
<b>Level of error</b>	Final beneficiary
<b>Cause of the error</b>	Weak design of the supervisory and control systems

**EC's Reply**

The beneficiary agrees to the conclusion of the Court of Auditors in which they accept the application of the exception of Article 2.32(1)(c) of the Aanbestedingswet 2012 corresponding to Article 32(2)(c) of the Directive 2014/24/EU.

The uncertainty and unclarity of the unfolding of the pandemic and the disruptions in supply chains of PPE as from the end of March 2020 - amongst which transport – imposed enormous threats to the public and individual health of Dutch citizens.

The beneficiary, LCH and agent concluded that no other options were available but the immediate acquisition and transport by air of additional PPE. Investigating supply options of transport by air revealed KLM as the only realistic option regarding e.g. rapid available capacity, use of pre-corona costs and landing rights and access to China and ensuring direct delivery to the Netherlands. These criteria were stressed since the European market for the urgently needed PPE was temporarily characterized by lack of available capacity, immense cost increases and the closure of national borders for the transportation of PPE.

In addition, the uncertainty and unclarity of the unfolding of the pandemic and the disruptions in supply chains as from the end of March 2020 - amongst which transport – were still fully imminent during the first months of the pandemic. Nonetheless, the beneficiary reduced the use of transport by air to return to normal as soon as possible, which was accomplished already mid May 2020 by starting transport by sea and rail.

Within this context the beneficiary is of the opinion that all actions and measures were taken with regard to her obligations under the legislation and regulations as in effect at that moment.