

**EAST AFRICA PUBLIC PROCUREMENT SUB-REGIONAL  
NETWORK**

**KNOWLEDGE AND EXPERIENCE SHARING SESSION**

ENSURING COMPLIANCE WITH CORE PROCUREMENT  
PRINCIPLES WHILE PROCURING DURING STATE OF EMERGENCY

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# UNPRECEDENTED TIMES

- Current pandemic without precedent
- Has caused legal problems in all jurisdictions – in developed and developing countries alike
- Some problems stem from the weaknesses in procurement regulation, but no procurement system, however well drafted, would be able to address all the problems thrown up by the pandemic
- Less a legal problem than a question of market failure
  - lack of supply (shortage and security) – some countries leveraging power and resources to buy up supply and stockpile; escalating prices – supply and demand; unfair and abusive pricing; fraudulent entrants; higher risk of corruption; contract non-performance

## BEING PREPARED

- Initial problems may appear legal (and this must be sorted out for future) but the scope and severity of the crisis means that there would always be more that needs to be done.
- Very few emergencies will be on this scale but
  - they may be predictable, e.g. weather based disasters (hurricanes, droughts, flooding);
  - best solution will be to be prepared
- Frameworks agreements are probably the best solution for predictable emergencies

# COMPLIANCE WITH CORE PRINCIPLES

- Key is to ensure compliance with the procurement legislation in force:
  - competitive procedures whenever possible, especially when normal timelines can be met
    - not every procurement in an emergency situation requires immediate action
    - palliate obstacles where possible
  - maximising use of flexibility and speed under the legislation. Usually means using some form of single source procurement
    - normal in emergency situations but many procurement systems are so fearful of this that make it very difficult and sometimes ineffective
- Need to balance risk and outcomes

# TRIGGER FOR EMERGENCY PROVISIONS

- Emergency declaration
  - delay (US – 20 days after WHO)
  - discretionary (often conditions not clearly established)
  - length of validity not dependent on continuing existence of urgency
- Existence of ‘immediacy’
  - insufficient time to use normal procedures (bidding periods)
  - lack of foreseeability
  - but issues of
    - degrees of urgency
    - approval

# QUESTION OF TIME AND SPEED

- Distinction in procurement methods generally concerned with bidding periods
- But also issues concerned with
  - preparation of technical specifications; requirement for bid securities; site visits; clarifications; bid opening; evaluation; award procedures and approvals etc.
- Procurement legislation a blunt instrument in this respect
  - in practice, has required special guidance
  - sometimes just an explanation of the law (question of capacity)
  - but often indicates shortcomings in the law (which needs to be amended)
- Irony is that by the time the guidance is prepared, the emergency is over

# PREPARING FOR NEXT TIME

*(IN THE HOPE THAT THERE IS NO NEXT TIME!)*

- Have frameworks in place to deal with predictable emergencies
- Clarify the law to trigger flexible procedures quickly and simply
- Remove obstacles which do not add value
  - bid securities – declarations
  - approvals – use or strengthen complaint mechanism
- Have manual in place to cover extraordinary situations – lessons learned
- Be ready to address market failures
  - apply competition rules; anti-corruption provisions
  - engage in cooperative procurement