

COVID-19: Q&A on the temporary impact on contractual procedures

This set of Q&A is designed to provide guidance on the interpretation of the contractual provisions during the current COVID-19 pandemic. It is a working tool and it is not legally binding, nor can it be relied upon to challenge a contracting authority's decision, judicially or otherwise.

The partner country/contractor/beneficiary/organisation should always discuss directly with the contracting authority for any individual action.

Questions

Signature of legal commitments

1. Is it possible to sign legal commitments through an electronic signature system only? (v.6 April 2020)

DG DEVCO and DG NEAR temporarily accept exchanges of signed and scanned copies of procurement contracts, grant agreements, financing agreements, transfer agreements, delegation agreements, contribution agreements and addenda (hereinafter collectively referred to as "legal commitments") in pdf format by email. The scanned signed copy shall include the signature date and the responsible authorising officer's name. The contracting authority will send the scanned signed legal commitments by email. The legal representative of the contractor, beneficiary, partner country or partner organisation (hereinafter collectively referred to as "recipients") should countersign them, indicate the signature date and send the contractual documents back to the email address of the contracting authority.

Please note that the countersigned documents must be sent from an official email address of the recipient. The countersigned version will be checked and must be identical to the electronic version sent by the contracting authority. The contracting authority reserves the right to refuse the financing of the legal commitment if this is not the case.

The receipt, by the contracting authority, of the scanned copies of counter-signed legal commitments shall trigger, if so provided by the contractual provisions, the payment process of the 1st pre-financing.

This is a temporary measure, which only applies in the current exceptional situation and until further notice by the Commission. While a legal commitment is deemed valid as from the signature of the scanned version, a formal exchange of blue ink signatures will be required at a later stage, once the situation allows it.

This means that the signature process will involve two steps where first scanned copies, and then paper copies are exchanged. However, it is underlined that the date of signature of the scanned copy shall remain the legally binding date of signature of the legal commitment.

2. Regarding legal commitments, which type of signed documents do DG DEVCO and DG NEAR accept from recipients? (v.6 April 2020)

As a rule, DG DEVCO and DG NEAR only accept scanned pdf documents signed by the recipient's legal representative(s).

If the recipient can demonstrate that it is unable to submit a signed legal commitment in PDF format, the contracting authority may consider accepting, as legally valid, unsigned copies of such legal

commitment. However, this acceptance will be subject to a risk assessment by the contracting authority.

If accepted by the contracting authority, the recipient shall commit, in writing, to provide the duly signed original legal commitment as soon as possible. Non-compliance with this requirement will lead to the annulment of the legal commitment.

3. 'Force majeure' (v.6 April 2020)

a) Can the unavailability of key staff or impossibility of carrying on activities in a zone affected by the virus be qualified as 'force majeure'?

A 'force majeure' situation may imply the non-performance of a legal commitment due to abnormal and unforeseeable circumstances beyond the control of the party invoking force majeure and whose consequences could not have been avoided in spite of the exercise of all due care. It allows the party invoking it not to perform its contractual obligations to the extent caused by the force majeure situation.

In this respect, 'pandemics' are considered as a situation that may be invoked as a force majeure preventing recipients, for a given period of time, from fulfilling their obligations without being in breach of contract. It should be underlined that to be qualified as force majeure, such situations must have an impact on the implementation of the legal commitment and could not have been foreseen by the parties, nor be attributable to their error or negligence.

Moreover, the parties must have exhausted all possibilities to execute their contractual obligations. Considering the current situation due to the COVID-19 outbreak, and taking into account the 'social distancing' measures recommended by the World Health Organisation to fight the pandemic, the unavailability of key staff and/or the impossibility of carrying on activities in zones affected by the virus may be qualified as 'force majeure'.

In case of doubts, the contracting authority may, on a case-by-case basis, request the recipient to provide evidence demonstrating that the force majeure circumstances are/have been preventing the performance of the legal commitment.

These considerations apply to all types of legal commitments that include contractual provisions on 'force majeure'.

b) Clarification on the conditions for suspension of legal commitments.

The suspension of legal commitments due to force majeure can be requested both by the contracting authority or by the recipient. Each party should give prompt notice of the event in question giving rise to a possible suspension of the legal commitment's performance. Before notifying suspension based on force majeure, the contracting authority or the recipient should always verify that the provisions of the legal commitment allow for this possibility.

If the suspension is initiated by the recipient, information on all measures taken to minimise damages, the detailed consequences of the suspension and, if possible, the foreseeable date of resumption of the implementation should be provided to the contracting authority. Moreover, the recipient should draft a proposal on the minimum requirements/activities/costs to be ensured/maintained/covered during the period when the legal commitment is suspended (i.e. in terms of staff, operating costs, etc.). Given the circumstances, such information may be submitted by email.

The contracting authority may agree to cover certain costs incurred during the period when the legal commitment is suspended, in line with the applicable contractual provisions and on a case-by-case basis.

As a result of suspension due to force majeure, the contracting authority does not have the right to claim liquidated damages. Also, the recipient is not entitled to receive interest on delayed payments if such delays are caused by force majeure.

The assessment of the circumstances leading to a suspension due to force majeure is always made on a case-by-case basis by the contracting authority. The contracting authority may request the recipient to provide the necessary evidence to demonstrate that the force majeure circumstances are/have been preventing the contract performance.

Examples that could justify a suspension due to force majeure:

- COVID-19 related conditions in the country/region/place of operations (the continuation of the activities endangers the personnel on site);
- Unavailability of staff and/or supplies;
- Staff cannot travel (borders closed – absence or cancellation of flights – travel bans or restrictions based on nationality – imposition of quarantine – medical reasons – having been in an area considered at high risk)

c) Can the provisions on force majeure be applied to an ongoing specific contract when the corresponding framework contract (FWC), which contains the provision on force majeure, has expired?

The provisions of an expired Framework Contract, e.g. Commission 2015, remain applicable to its related ongoing specific contracts.

4. In a situation where force majeure is invoked by the contracting authority, can the latter amend the legal commitment to extend its period of implementation/performance without a request from the recipient? (v.6 April 2020)

Once the contracting authority notifies the situation of force majeure to the recipient, an agreement must be reached with the latter on any amendment of the legal commitment. The contracting authority should assess the situation on a case-by-case basis and decide, in agreement with the recipient, if the period of implementation of the legal commitment should be extended.

The request for amendment can be done via email according to the temporary measures for the exchange of documents explained below.

Invoices, payment requests, audit reports, expenditure verification reports, financial guarantees, etc.

5. Can the contracting authority accept invoices/payment requests in pdf format sent via email by recipients? (v.03 February 2021)

The contracting authority can agree to process invoices/payment requests sent via email in PDF format from recipients.

Therefore, where the registration of original documents may be delayed or interrupted, recipients are requested to send an electronic version of the payment request or invoice (e.g. ideally a scanned version or an electronically signed PDF document) by e-mail to the e-mail address indicated by the contracting authority.

To be compliant, invoices/payment requests sent by email:

- must be sent from a corporate e-mail address of the recipient.

Considering the current situation, pdf invoices and payment request sent via email can be safely accepted and are considered as valid, provided safeguards are implemented, such as the reception of these invoices in a functional mailbox indicated by the contracting authority, from which notification of receipt is sent automatically to the contractor/beneficiary/partner organisation. Hence, no further regularisation by requesting originals being sent by paper would be anymore necessary. This applies retroactively to all pdf invoices and payment requests received since the beginning of the COVID outbreak, when the safeguards mentioned above are in place.

6. How should we handle financial guarantees during this exceptional period? (v.6 April 2020)

Scanned versions may be provisionally accepted for financial guarantees subject to a verification of validity, by the contracting authority, with the bank/issuing institution.

When the contracting authority is required to release a financial guarantee, in line with the contractual provisions, but is unable to return the original financial guarantee, the contracting authority may be asked to inform the guarantor by e-mail that the contractor/beneficiary is released from all obligations linked to the financial guarantee. Once the situation allows it, the contracting authority should return the original financial guarantee to the contractor/beneficiary.

7. What is the approach on the eligibility of costs when the recipient is prevented from implementing the activities? (v.6 April 2020)

The guiding principle is that when the recipient is prevented from implementing activities due to the COVID-19 pandemic, the following costs could be regarded as eligible costs on the condition that they are not reimbursed from other sources:

- travel or accommodation expenses incurred for individuals who were to take part in meetings or events and who were prevented from doing so on grounds of force majeure (borders closed – absence or cancellation of flights – travel bans or restrictions based on nationality – imposition of quarantine – medical reasons – having been in an area considered at high risk –);
- costs incurred in relation to meetings which have been cancelled such as flight or hotel bookings which had to be cancelled;
- costs incurred for activities to be implemented in areas which are subject to lock down or quarantine measures;
- costs incurred for activities that are cancelled due to the application by the beneficiary/contractor/partner organisation of social distancing measures as recommended by the World Health Organisation (WHO) and/or imposed by national authorities.

There is thus no one-size-fits-all approach in order to assess the eligibility of costs. Not all costs resulting from the COVID-19 crisis can or should be covered by the contracting authority. Assessment

of the costs depends on the location, the time frame when the costs were incurred, the recommendation of the WHO and the instructions from the relevant regional or national authorities. An important date to take into consideration is the 11th of March 2020, when the WHO declared the COVID-19 outbreak a pandemic, recommending worldwide social distancing measures in order to fight the spread of the virus. WHO recommendations have not been evenly implemented across the globe. Following WHO recommendations, companies or organisations have implemented social distancing measures prior to the enforcement of those measures by regional or national authorities. Furthermore, some countries, regions or cities have implemented mandatory social distancing measures before the WHO pandemic declaration. **A case-by-case approach based on the specific merits of each situation is necessary.**

The justifications for costs of activities that could not be implemented should be documented in the narrative report accompanying the invoice or financial report. Apart from a narrative description, supporting documents substantiating the eligibility of these costs are required.

Examples of supporting documents are (non-exhaustive list):

- evidence that travel costs cannot be reimbursed (by the travel agency, airline, hotel, or insurance company);
- a declaration on honour in case of close contact with a person suffering from COVID-19 which impedes travelling or attending a meeting;
- for the cancellation of conferences, the contractual conditions regarding the hiring of the venue and the cancellation fees;
- instructions from regional and/or national authorities about social distancing; and
- social distancing instructions enacted by recipients towards their staff.

The acceptance of these costs is subject to a decision by the contracting authority and should be based on the documented evidence provided by the recipient.

8. How to handle payments without expenditure verification reports? (v.6 April 2020)

Under the current restrictions of movement, auditors might also experience difficulties. This can have an impact on invoices/payment requests that must be accompanied by an expenditure verification report.

Following a risk analysis by the contracting authority, the requirement to submit an expenditure verification report for interim payments may be temporarily lifted in case objective factors prevent it from being provided or when this could cause excessive delays in the submission of the requests for payments/invoices.

In practical terms, regarding the payment itself:

- If an expenditure verification report exists, a scanned version can be accepted and the original should be submitted as soon as possible thereafter.
- If not produced yet, a payment without an expenditure verification report can be accepted **but only for interim payments (never for a final payment)**. An expenditure verification report covering the period concerned plus the following one should then be submitted together with the next report.
- If an expenditure verification report is not submitted with the final report, the corresponding final payment should remain suspended until reception of the final expenditure verification report. For final payments, a scanned version of the original expenditure verification report as well as of the previous ones accompanying interim reports are needed. The contracting authority should receive the missing original expenditure verification reports before closure of contracts.

As a general rule, the contracting authority always has the right to question the eligibility of previous payments if an error is detected, expenses are not properly substantiated, or on the basis of audits and checks.

9. Can the obligation to submit audit opinions under contribution agreements and delegation agreements be waived? (v.29 April 2020)

For delegation agreements concluded with Member State organisations, due to the current COVID-19 pandemic and based on their risk-analysis, contracting authorities may accept to pay further pre-financing (even in cases where the pre-financing rate is 100%), subject to the following:

1. The implementation of the action would be put at serious risk if the payment of further pre-financing is suspended, pending receipt of the audit opinion. This should be justified by the organisation and accepted by the contracting authority.
2. The organisation should provide a written confirmation from the auditor that the execution of the audit and the submission of the audit opinion are not possible at this point in time.
3. The organisation should commit to provide the audit opinion as soon as possible once the situation allows.

Where the organization has not concluded an arrangement with the Commission on the annual submission of an audit opinion covering one or more projects, the documentation required under points 1 to 3 of the preceding paragraph shall be sent by the organization to the contracting authority. However, where such an arrangement exists and if the audit opinion for the relevant period has not already been provided to unit DEVCO.R3 (Legal Affairs):

- Unit DEVCO.R3 should ask the organisation to submit the missing audit opinion or, failing that, the statements mentioned under point 2 and 3 of the preceding paragraph.
- The contracting authority should then assess if further pre-financing payments are justified in the light of the individual project and the justifications provided by the organization, in accordance with point 1 of the preceding paragraph.

In all other cases, the submission, if applicable, of audit opinions should comply with the contractual provisions.

As far as final reports and final payments are concerned:

- Where the organization has not concluded an arrangement with the Commission on the annual submission of an audit opinion covering one or more projects, if the audit opinion(s) related to the intermediate report(s) have not been sent by the submission of the final report, the approval of the latter as well as the corresponding payment process (if applicable) should be suspended till the missing audit opinion(s) are submitted. The approval of the final report and the corresponding payment process (if applicable) should also be suspended if the audit opinion related to the final report is not submitted within 1 month after the submission of the management declaration/final report, as provided for by the contractual provisions.
- Where such an arrangement exists, if the required annual audit opinion(s) have not been sent by the submission of the final report, the approval of the latter as well as the corresponding payment process (if applicable) should be suspended till the required annual audit opinions are submitted.

In all cases, contracting authorities may choose to accept audit opinions submitted by e-mail, in PDF format, in accordance with the general guidance provided above.

Submission of offers/proposals, submission deadlines, evaluation and cancellation

10. Is it possible to allow for an extension of the deadline for the submission of the application/tender (procurement) or concept note/full application (grants)? (v.6 April 2020)

Due to the COVID-19 outbreak, the contracting authority may consider an extension of the deadlines for submission of concept notes/full applications or applications/tenders in accordance with the rules of the procedure.

11. For procurement: Is it possible to send applications/tenders by email (NO PAPER file)? (v.6 April 2020)

Due to the exceptional circumstances of the COVID-19 outbreak, the contracting authority may consider accepting applications/tenders sent by email based on a risk assessment (i.e. risk of contamination, risk of postal services not being available, risk of potential candidates/tenderers working from home and not being able to print, etc.).

If the contracting authority decides to offer this possibility, it should inform, in accordance with the rules applicable to the concerned procurement procedure, all potential candidates/tenderers. Where an economic operator has already submitted an application/tender by post and where it is not possible for this economic operator to re-submit by email, the contracting authority may consider accepting applications/tenders received long after the initial deadline.

12. What about public opening sessions of tenders? (v.6 April 2020)

Considering that for open procedures (supplies/works), authorised representatives of tenderers must be offered the possibility to participate to the opening session, the contracting authority may decide to either (i) postpone the opening session (taking into account the validity of the offers) or (ii) organise an opening session via a video conference ensuring that the representatives of the tenderers have been identified and notified.

13. Cancellation of on-going procurement and grant award procedures (v.6 April 2020)

Contracting authorities will assess whether it is necessary, in light of the COVID-19 situation, to discontinue (i.e. cancel) any ongoing procurement or grant award procedure.

In case of cancellation, potential candidates/tenderers or applicants are notified in accordance with the rules applicable to the concerned award procedure and will not be entitled to compensation (see PRAG section 2.6.13 for procurement procedures and PRAG section 6.5.9 for grant award procedures).

14. Where it is impossible for an entity to provide the necessary evidence on the absence of exclusion situations as listed in Art 137(3) of the Financial Regulation, for example due to the closure of judicial and administrative authorities which issue the documentary evidence, can the contracting authority waive the obligation for an entity to submit the documentary evidence? (v.6 April 2020)

In the current circumstances it may be difficult (or even impossible) for an entity to provide the contracting authority with the required documentary evidence on the absence of an exclusion situation. In this case, the contracting authority may decide, based on an assessment of the justifications presented by the entity, to temporarily waive the latter's obligation to submit such documentary evidence.

15. Can the contracting authority accept scanned and signed copies of declarations on honour? (v.6 April 2020)

Considering the current exceptional circumstances, the contracting authority may agree to temporarily accept exchanges of scanned and signed copies of declarations on honour in PDF by email, based on a risk assessment (i.e. risk of contamination, risk of postal services not being available, risk of candidates/tenderers or applicants working from home and not being capable to print, etc.). If the contracting authority decides to offer this possibility, it should inform all potential candidates/tenderers or applicants in accordance with the rules applicable to the concerned award procedure.