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EXPLANATORY NOTE
DECISION PROCESS IN THE STEERING COMMITTEES MANAGING THE JOINT
PROCUREMENT MECHANISM

Subject: Implementation of article 7 of the Joint Procurement Agreement– Analysis and examples

The purpose of this note is:

- to explain what has been the rationale behind the drafting of article 7 of the Joint Procurement Agreement (JPA) for medical countermeasures on “Procedures for approvals and opinions”,
- to clarify how the decision process and voting systems provided for in article 7 of the JPA will be implemented at the level of both types of Steering Committees that will be created to manage the joint procurement mechanism and processes:
 - The Joint Procurement Agreement Steering Committee (JPASC)
 - The Specific Procurement Procedure Steering Committee (SPPSC)

Disclaimer: This is a technical document prepared for the purpose of supporting a discussion on the Joint Procurement Agreement. Any views expressed in this document are purely those of the writers and may not in any circumstances be regarded as stating an official position of the European Commission.

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1. RATIONALE OF ARTICLE 7 “PROCEDURES FOR APPROVALS AND OPINIONS”

1.1. Approvals and opinions of the Steering Committees

Approvals and opinions of both types of Steering Committees (SCs) that will be created to manage the joint procurement are inspired from the principles laid down in the Comitology procedure, whereby the decision making process is based on opinions of Committees composed of representatives of the Member States. The Comitology procedure itself is regulated by Regulation (EU) 182/2011. Approvals roughly correspond to the “examination procedure” (where the opinion of the Committees are binding on the Commission) while opinions correspond to the “advisory procedure” (where the opinion of the Committees are not binding on the Commission), as described in that Regulation.

The Agreement defines on a case-by-case basis in which case an opinion is required and in which case an approval is needed. The table in annex 1 lists the decision procedures applicable in the JPA and shows in which case an approval or an opinion are requested from both types of SCs.

As a general rule, the procedure is a Commission Decision on the basis of an approval by one of the SCs.

An opinion is required in a limited number of cases; it is not binding on the Commission. An opinion can be in favour or not in favour. Where an opinion (in favour or not in favour) of one of the SCs has been delivered, the Commission may adopt the proposal taking into utmost account any opinion delivered.

1.2. Article 7

Paragraph 1 provides:

Where this Agreement requires an approval or an opinion of a Steering Committee, Contracting Parties represented in the particular Steering Committee shall endeavour to act by common accord.

Paragraph 2 tackles the way opinions are decided upon.

Paragraph 3 provides that the basic rule is that approvals are delivered by common accord or by qualified majority.

Paragraph 4 should be read together with paragraph 3; it contains a special procedure for a situation where a qualified majority of the Contracting Parties present or represented in favour of a proposal cannot be reached, and where a second vote, and possibly a third one, needs to be organised, according to different voting procedures. The purpose of this provision is to avoid situations where any progress, move would be blocked.

1.3. Qualified majority versus simple majority

The JPA contains a specific definition of the notion of qualified majority that has been adapted to the specificities of a joint procurement procedure. The

quantities of medical countermeasures purchased by a Member State are not necessarily proportional to its weight in terms of population or of GDP. The estimated financial volume of the participation of each Contracting Party to the call for tender was considered as the most appropriate and objective criterion to determine a qualified majority.

Only relying on simple majority in some cases could create situations in which a Member State wanting to purchase a significantly larger volume of medical countermeasures than other Member States participating in the tender could de facto outweigh all others.

Such a situation is not acceptable in democracy, nor compatible with Article 3.3 of the TFEU which states that the Union shall promote economic, social and territorial cohesion, and solidarity among Member States.

If a Union framework is to endure, it must recognise the solidarity of its members as a fundamental principle, and share both the advantages, i.e. prosperity, and the burdens equally and fairly among its members.

2. DECISION PROCESS AND VOTING SYSTEM IN THE JOINT PROCUREMENT AGREEMENT STEERING COMMITTEE (JPASC)

We do consider that the decision process at the level of the JPASC will not require using article 7 by the mere nature of the decisions to be taken at that level it will basically decide the following issues:

- Countermeasure to be procured in common;
- Participation by Member States;
- Timetable of specific procedures;
- Changes to the JPA.

2.1. Countermeasure to be procured in common

The JPASC will be the place where Member States will come together to suggest the organisation of different joint procurement procedures for different medical countermeasures and identify if there is a critical mass to launch a call for tender that could have an added value.

This will in the vast majority of the cases require no vote as Member States are free to suggest and discuss which medical countermeasures could be purchased, as long as they can be considered as “medical countermeasures to combat serious cross border threats to health”, as defined by Decision 1082/2013/EU.

2.2. Participation by Member States

Participation in a specific procurement procedure is decided on a voluntary basis by each Member State and does not absolutely require consensus, as far as 5 Contracting Parties (including Commission) agree.

2.3. Timetable of specific procedures

What timetable will be followed for the different procurement procedures should not be subject to harsh discussions or disagreement.

2.4. Changes to the JPA

Changing the JPA will only be possible in exceptional situations and subject to unanimous approval as it would require full ratification of the amended version by all Member States.

3. DECISION PROCESS AND VOTING SYSTEM IN THE SPECIFIC PROCUREMENT PROCEDURE STEERING COMMITTEE (JPPSC)

Decisions to be taken by the different SPPSC's that will be created on an ad hoc basis to manage the different call for tenders to be launched in the frame of the implementation of the JPA will be concrete and practical decisions in the frame of transaction on the economic markets.

Reaching a common accord will always be favoured, but voting "in case those participating in a call for tender could not reach a common accord" might have to take place. In circumstances as the ones described below we will not always be in a position to "just reject a proposal", we will "have to reach a decision".

The SPPSC will basically decide the following issues:

- Before the launch of a call for tender;
- During the evaluation of the tenders;
- For the award of the market.

3.1. Before the launch of a call for tender

Definition of the technical specifications, including allocation criteria, could lead to divergences and might require some form of voting.

Nevertheless, a Member State that would not recognize itself in the final version approved by the relevant SPPSC will always have the possibility to step down before publication of the call. In such a case, and if this Member State represents a significant share of the identified needs, this might endanger the feasibility of that call and will most probably foster further negotiations.

If a Member State does not agree with the decisions that need to be taken before the launch of a call for tender, like the type of the procurement procedure, type and terms of framework contract, content of tender documents, it may still decide not to participate in the joint procedure.

3.2. During the evaluation of the tenders

Evaluation of the tenders received is a process during which one cannot "just reject the opinion elaborated by the evaluation committee",

Decisions will have to be taken at the different steps of the evaluation on proper matching of the tenders received with both selection and award

criteria, for instance. They will have to be approved by the SPPSC on the basis of the opinions received from the evaluation committee.

Simply rejecting the “proposal” is not an option since it would not allow going ahead with the call.

It has been confirmed by the Legal Service of the Commission that abandonment and cancellation of procurement procedure are often causes of legal actions by the contractors in courts. Thus, the possibilities of abandonment and cancellation should always be well-grounded, substantiated and unambiguous (see conditions reflected in Article 24 of the JPA).

3.3. For the award of the market

The same applies for the award of the market as what is described under point 3.2 for the evaluation of the tenders. The role of the SPPSC is to agree on the final decision on the successful and unsuccessful tenderers or candidates, according to Article 21 of the JPA. The SPPSC has to assume its role and reach a decision since this specific issue cannot simply be rejected and left unresolved.

Joint Procurement Agreement to procure medical countermeasures

Article 7

Procedure for approvals and opinions

1. Where this Agreement requires an approval or an opinion of a Steering Committee, Contracting Parties represented in the particular Steering Committee shall endeavour to act by common accord.

Abstentions by Contracting Parties shall not prevent a Steering Committee from reaching a common accord.

Where the Contracting Parties represented in a Steering Committee cannot achieve a common accord, they shall vote. The Chair shall determine when to call a vote.

2. A Steering Committee delivers a favourable opinion if there is a common accord or if a simple majority of the Contracting Parties present or represented vote in favour.

Where an opinion of a Steering Committee has been delivered, or where no opinion is delivered despite the Commission calling for a vote, the Commission may adopt the proposal taking into utmost account any opinion delivered. The opinion shall not be binding on the Commission.

3. A proposal shall be considered approved by a Steering Committee if there is a common accord in favour or if a qualified majority of the Contracting Parties present or represented vote in favour.

A qualified majority is defined as 55% of the present or represented members of the Joint Procurement Agreement Steering Committee, and representing Contracting Parties comprising at least 65% of the total amount of medical countermeasures covered by the joint procurement.

For proposals on matters that only concern the Specific Procurement Procedure Steering Committee, a qualified majority will be defined as 55% of the members of the Specific Procurement Procedure Steering Committee and representing Contracting Parties comprising at least 65% of the total actual or estimated cost of medical countermeasures covered by the concerned Contracting Parties.

4. If a qualified majority of the Contracting Parties present or represented in favour of a proposal cannot be reached, and without prejudice to paragraph 5, a second vote shall be organised at a subsequent meeting. By way of derogation from paragraph 3, the proposal shall be considered approved by a Steering Committee, if there is a simple majority of the Contracting Parties present or represented vote in favour, representing Contracting Parties comprising at least 50% of the total actual or estimated cost of medical countermeasures covered by the joint procurement, or, where applicable, covered by the Contracting Parties in the Specific Procurement Procedure Steering Committee.

If such a majority cannot be reached, a third vote shall be organised at a subsequent meeting, without prejudice to paragraph 5. If the majority as defined

in the first subparagraph cannot be reached again, the proposal shall stand approved unless there is a qualified majority against it.

5. Where the approval of a proposal by a Steering Committee is required on urgent matters, the Committee shall meet virtually via telephone or other appropriate means of distance communication, and consecutive votes can be held at the same meeting.
6. Notwithstanding the first subparagraph, paragraphs 3 and 4 shall not apply where the unanimous agreement of the members a Steering Committee is required under this Agreement.