Monday, March 23, 2020

The impact of the COVID-19 pandemic on the global economy needs not restating. The saying “desperate times call for desperate measures” fits the current environment well. Governments throughout the world have instituted or are considering unprecedented measures to keep up with the demand for the medical products necessary to combat COVID-19. Several such developments come from Russia, including (1) the suspension of competitive bidding in government procurement, (2) allowing foreign companies to bid on government contracts, and (3) a zero customs duty for imports of medicines and medical devices along with other essential goods. The second—gaining momentum in the United States through endorsements by several governors—urges President Trump to nationalize the medical supply chains to stymie shortages and price gauging and decrease lead-time of medical products. However, President Trump has expressed reluctance to follow this path, instead relying on other measures to fight shortages and their associated behaviors.

As countries continue to promulgate new restrictions, confines, and regulations in an effort to thwart the commercial effects of COVID-19, supply chain stakeholders are advised to keep an ear to the ground not only to ensure they are optimally positioned to adhere to the new rules, but also to appropriately pivot so as to find
favorable business opportunity.

**Russia Relaxes State Procurement Rules**

On March 19, 2020, Russia’s Ministry of Finance amended the state procurement rules, citing state of emergency amidst the COVID-19 pandemic. Under the new rules, the state of emergency allows state purchasers to buy goods and services from a single contractor, bypassing the mandatory competition requirements for government purchases. The Russian government, citing force majeure, reasoned that the time-consuming state acquisition rules may not allow for the expeditious purchase of necessary goods. While the Ministry of Finance cited medical supplies and services as an example of items that may fall under the new rule, it also referred to “any goods, works and services” that relate to COVID-19.

The March 19 announcement is a significant departure from Russia’s state procurement rules. Federal Law No. 44-FZ on Placing Orders for Provision of Goods, Works, and Services for State and Municipal Needs governs the state procurement system in Russia. Amended over a dozen times since going into effect, the law establishes mandatory procedures for all federal, provincial, and municipal institutions that enter into government contracts. These procedures include calls for bids and auctions, which seek to ensure companies awarded government contracts offer “best conditions” for the performance of the contract or the lowest price.

The new relaxed rules on competition effectively do away with the “best conditions” and lowest price requirements in Russia’s state procurement system, at least with regard to medical supplies. The government is already discussing the possibility of creating a single mask supplier for all medical and pharmacy institutions in the country. Already in the two days since the relaxed procurement rules went into effect, the Russian Government has allocated more than 23 billion rubles (or about USD 290 million) to support medical and pharmaceutical producers. The funds will be used for public procurement of thermal imagers, contactless thermometers, air decontamination plants, and other medical devices.

Additionally, on March 17, 2020, Prime Minister Mishustin signed Plan No 2182p-FZ on priority actions related to COVID-19. The plan, in addition to already existing and other proposed measures, addresses provisions for government procurement contracts, including the suspension of the prohibition against foreign companies bidding on government contracts. This change is expected to go into effect on March 25, 2020. Once in place, the new rule will temporarily allow foreign companies to bid for government procurement of medicines and medical devices.

**Related Trade Measures in Russia**

Russia has also introduced amendments to its trade and customs rules in relation to COVID-19. As of March 20, all trade and customs restrictions on the supply of the essential goods, including medicines and medical devices, have been lifted for one month. Additionally, to speed up delivery to hospitals, certain medical supply items have become eligible for special registration procedure in Russia.

**US Governors Urge President Trump to Nationalize Medical Supply Acquisitions**

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In the past week, the United States has enacted two COVID-19-related packages and the third one—topping $2 trillion—is imminent. On March 18, 2020, President Trump issued an Executive Order on prioritizing and allocating health and medical resources to respond to the spread of COVID-19 in the US, citing the Defense Production Act of 1950 (“DPA”).

The DPA provides for a broad set of authorities to ensure domestic industry can meet national defense requirements. While the Department of Defense (DoD), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA) have used the DPA to acquire spare parts, protective equipment and supplies in times of natural disasters, its application in a global pandemic is novel. DPA permits the federal government to impose some control over private-sector industry to ensure the production of material that is deemed necessary for national defense. For example, the DPA would permit the federal government to alter the order in which companies fulfill their contractual obligations. As New York Governor Andrew Cuomo put it, the federal government would tell companies: “stop making dresses,” start making masks instead.

However, President Trump has not yet invoked the DPA to order companies to switch their manufacturing priorities to medical supplies. Several state governors, most notably New York’s Governor, have urged President Trump to do so. Further, Governor Cuomo and other states’ governors urge the federal government to nationalize the acquisition of medical supplies. These governors describe the medical supply chain as the “wild west” because states cannot get organized allocations of necessary medical products from the federal government. Rather, they are forced to compete with one another and globally on the open market for critical medical supplies. This not only has resulted in price gauging by sellers, but the decentralized approach is also failing to meet the ever growing demand in the US.

In response to this plea, President Trump responded, saying “[w]e’re a country not based on nationalizing business....” Rather, President Trump signed an Executive Order (not yet publicly released at this time) to combat price gauging of items considered integral to the nation’s fight against the coronavirus pandemic, including masks and ventilators. According to US Attorney General William Barr, under the new law, “if you’re sitting on a warehouse with surgical masks, you will be hearing a knock on your door.” Finally, FEMA has enacted a Supply Chain Stabilization Task Force, charged with scouring the US and abroad for necessary supplies and handling its import and subsequent distribution to critical demand spots in the US.

**What Does This Mean for Companies?**

The situation in the US has been changing by the hour. Whether President Trump will go along with the state governors’ pleas remains to be seen. As the spread of the virus across the country continues to progress, the likelihood of him doing so may increase. To prepare for this possibility, in the US, companies manufacturing products with potential medical applications should develop a continuity plan in the event that their production is requisitioned in support of combating COVID-19. In addition, such companies should ensure they understand their rights to compensation, purchase guarantees, and available loans in the event that they are selected in support of the effort to boost medical supplies in the US.
Following the lead of the newly established Supply Chain Stabilization Task Force, companies should also assess their medical supply capabilities. Companies should review their existing supplies not only for direct sale opportunities, but also to ascertain whether their products can be sold in support of other medical supply chains. In addition, companies should also assess their ability to convert their manufacturing processes to the manufacturing of medical supplies, including personal protective equipment, ventilators, and respirators.

In Russia, companies wanting to take advantage of the relaxed state procurement rules should clearly articulate how their goods and services advance the government’s response to COVID-19 pandemic. Smaller and medium-sized businesses with lines of business that directly relate to medical and other emergency needs should also be prepared for the possibility their operations may be taken over by larger state and private companies entering the COVID-19 market.

Foreign companies in the medical supply chain should take notice of Russia’s new rules on bidding as they will be allowed to bid on government contracts, even if there are two or more domestic or EAEU bidders. Finally, companies should take advantage of the special registration procedures now in place for thirty-six medical supplies.

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