

PUBLIC PROCUREMENT DURING STATES OF EMERGENCY: MINIMUM REQUIREMENTS TO ENSURE THE INTEGRITY OF CONTRACTS AWARDED DURING CRISES

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Public procurement during states of emergency

Countries are exposed to multiple risks during emergencies, and it is of vital importance that the authorities make appropriate use of the available public resources to mitigate, contain and recover from the adverse effects of such events.

In emergencies of the magnitude of the 2020 coronavirus pandemic, the increased demand for goods and services and the effects of limited economic activity due to restrictions on normal operations present States with serious and economic challenges. Emergency situations can provide opportunities for the manipulation of information and can generate conditions that encourage the improper use of emergency funds and extraordinary budgets.

States allocate resources programmatically to deal with potential emergencies such as the one we are currently facing. Depending on the magnitude of the crisis, additional resources may also be allocated. In parallel to the efforts of government, extraordinary funds to address the emergency channel resources to companies, international or civil society organizations. In both cases, extraordinary rules govern the allocation of funds, in order to ensure the timely provision of public goods and services, the continuity of critical services such as healthcare, and the implementation of economic measures to ensure countries' stability.

This spending exercise takes on particular importance, because poor use of these extraordinary funds would be a breach of people's rights. To ensure the integrity of these extraordinary resources for public purchasing and contracting, and the proper exercise of people's rights during an emergency, governments should ensure the following recommendations are fully considered:

Transparency and open data

The resources designated for the emergency and their use must be the subject of full, continuous, timely, true and verifiable information, expressed in understandable language. Information on purchases and contracts in periods of emergency must be published in open data formats, making them accessible to different types of audience.

The information generated about public procurement must be concentrated in a specific and accessible public place such as an official website, ensuring standardization of its content. At a minimum, this standard information must cover the following ten elements:

- Information on goods and services acquired in the procurement process, including technical specifications of the goods, quantity and quality.
- Unit and total price of the procured goods and services.
- Type of procurement procedure used.
- Details of the natural or legal person who is contracted, including: identity, location, contact details, tax data, identity of governing bodies, information on income, holders of shares or participating interests and total income.
- Technical and economic justification of the procurement.
- Information on the requirements for performance of the contract, such as date, place, terms of delivery.
- Population or necessity to which the procurement is responding.
- Mechanisms and elements for verification of compliance with the terms of the contract.
- Public entity and officials responsible for the procurement, including the head of the procuring public body.
- Information on the results of audits carried out in the course of the procurement process.

Administration of resources

The budget allocated to cover emergencies and crises must be administered in accordance with the principles of efficiency, effectiveness, economy, transparency and impartiality, and must ensure the best conditions for the State, at whatever level of government. This budget must fulfil the agreed objectives in respect to the need it is addressing.

It is essential for governments to report on the origin of the resources it is allocating to deal with emergencies, the effects on the funding or budgets of other departments, the justification for how allocations were determined and the general rules governing the use of these resources. These rules must define:

- The period or conditions when it is considered that the emergency exists, thereby avoiding improper use of the available funds.
- The needs that are covered by the resources allocated to deal with the emergency.
- Designation of the authority responsible for supervision of compliance with these rules.
- The means and form by which transparency of the use of these resources is assured. Governments would ideally use available budgetary transparency platforms, or through a specialized microsite for information on the extraordinary resources allocated to the emergency.
- Real-time audits to ensure compliance with the principles governing public procurement and the rules on extraordinary funds authorized to deal with the emergency.

Reporting

In addition to real-time transparency mechanisms, governments must report at the end of the emergency on the results of the allocation of the resources. In particular, it is necessary to report on:

- The total resources invested in tackling the emergency in relation to the resources authorized.
- The actions taken with the invested resources.
- The number and location of the beneficiaries of the actions taken to tackle the emergency.
- The contracts concluded to meet the needs of the emergency and the status of performance of each.
- Evaluation of the efficiency of these contracts.
- Additional actions that could be taken with the remaining budget, if any, or the mechanisms to reintegrate it in the assets of the State.

To ensure reporting of procurement processes in periods of crisis, it is useful to have independent monitoring mechanisms to review whether the procurement processes comply with the legislation and adjustments to laws for the emergency. These mechanisms must ensure citizen participation both through access to information and also as part of the control processes for the extraordinary emergency funds.

Ensure economic competition

Governments must avoid emergency procurement procedures encouraging concentration or hoarding, whether for the acquisition of consumer goods or contracting of services during the emergency.

In addition, appropriate measures must be taken to ensure that micro, small and medium-sized enterprises participate in the provision of goods and services necessary for responding to the emergency, assessing the benefit cost that this would represent, not only the direct cost of the goods but also the potential effects of promoting economic activity.

Governments are responsible for promoting free competition and competitiveness, and they have a duty to avoid payment for goods and services at inflated prices. The use of framework contracts must be a priority strategy in public procurement to tackle the emergency, when national laws allow.

Governments have the obligation to avoid and sanction price increases, hoarding and speculation in the provision of services. Governments must eliminate any potential or actual advantage in favour of one or more individual or company over their competitors.

To ensure economic competition, the contracting entities must provide justification, review similar contracts and establish the basis upon which maximum prices for goods or services that they consider necessary to get through the contingency are established. The State, and the responsible entities, must promote free and equal competition to safeguard their own interests and to contract on the best terms.

Governments will likely face shortages of the goods needed to deal with emergencies. It is essential for the economic competition authorities to prevent unfair practices. Companies awarded contracts during the emergency must know that by engaging in unfair practices, they will be subject to the same sanctions and administrative liability to which individuals and public officials who participate in illegal acts are subject.

Monitoring of public expenditure during an emergency

Faced with an emergency, it is necessary to revise extraordinary budgets under extraordinary measures that ensure efficiency and integrity in the use of the resources. To that end, additional oversight mechanisms need to be implemented over and above those foreseen by national and local government legislation.

In particular, it is necessary for audit and control bodies to maintain constant coordination with the contracting entities to keep effective control of both the budget and the goods and services contracted to deal with the emergency situation.

The control bodies must establish an action protocol for real-time monitoring and audit of the application and destination of resources.

The audit and control bodies must have access to the records of the procurement procedures, including contracts, agreements, documents, data, books, files and supporting documentation relating to the public expenditure and fulfilment of the objectives. This must be in accordance with the needs determined by the contracting entities, as well as any other information that may be necessary for the audit and control of the budget allocated to tackle the emergency.

At the same time, mechanisms to allow citizens to report or denounce irregularities that they observe must be implemented. These mechanisms must ensure the anonymity and security of those who report, as well as the follow-up of these reports.

The technical bodies at each level of government or contracting entity must evaluate the results of the budget expenditure meant cover the needs of the populace during the emergency. The information derived from this evaluation must be published on the website designated to provide information on the emergency.

The audit and control bodies must, on an ongoing basis, publish reports that contain observations and recommendations concerning the audited files, and the related follow-up actions. This information must be published through the emergency information platform.

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