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Transparency in Emergency Procurement *ten recommendations for policy makers*

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in collaboration with



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The Tenders Guru Consortium is made up of leading transparency and anti-corruption organisations across Europe: Access Info Europe (Spain), Civio (Spain), ePaństwo Foundation (Poland), Funky Citizens (Romania), and K-Monitor (Hungary). The Tenders Guru Consortium carries out the following activities:

- Analysis of corruption risks in procurement carried out by national and local public bodies across Europe;
- Training of journalists and civil society on how to monitor public procurement, how to use data to identify problems, and how to engage in advocacy to address those problems;
- Managing an open-source IT Tool, the Tenders Guru Platform, that can be used to detect structural weaknesses and behaviour patterns likely to facilitate corruption, allowing local governments, civil society, and journalists to monitor procurement processes;
- In-depth research into international standards on public procurement transparency in order to formulate specific recommendations for the EU and national legislators on how to increase transparency and reduce corruption risks;
- Production of micro-learning materials, designed to help public officials, policy makers, journalists and civil society organisations gain a more in-depth understanding of how to identify and combat corruption in public procurement.

Information on the project, its recommendations and analysis of local level procurement data can be found on the website <https://tenders.guru/>

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Transparency in Emergency Procurement

ten recommendations for policy makers

Recommendations to ensure transparency in emergency procurement

- 1. The use of emergency procurement must be justified, recorded, and made public**
- 2. Emergency procurement should be the exception, not the rule, and should be judged on a case-by-case basis**
- 3. Emergency procurement data should be centralised on national e-procurement portals**
- 4. Full publication to maintain trust**
- 5. Publish information on emergency procurement processes in Open Data format**
- 6. E-procurement portals should be updated in the shortest possible time**
- 7. Transparency to prevent price gouging**
- 8. Open data on suppliers to strengthen due diligence and prevent fraud**
- 9. Publicise sanctions for fraudulent activity and bid cartels**
- 10. Cooperation with civil society, investigative journalists and whistleblowers**

Introduction: Emergency Procurement During Covid-19

The Covid-19 pandemic requires public authorities to procure products and services from the private sector with unprecedented urgency. During this crisis, quick decisions and resource allocations can often make the difference between life and death.

Recognising the need to conduct public procurement with extreme and unforeseeable urgency, the European Commission on 1 April 2020 released guidance on using the public procurement framework during the Covid-19 crisis.¹ It states that, a ‘negotiated procedure without publication’ can be used in certain circumstances as permitted by Article 32 of the EU’s public procurement directive 2014/24.²

This means that a government can award a contract directly to a preselected company, rather than using a normal competitive procedure (so-called open, restricted or competitive

¹ Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the Covid-19 crisis 2020/C 108 I/01 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.108.01.0001.01.ENG#ntc5-CI2020108EN.01000101-E0005>

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

procedures with negotiation). This enables public buyers to acquire supplies and services within the shortest possible timeframe (within a matter of days or even hours).

Yet, while flexibility is needed in order to get supplies to those in need, this flexibility should not compromise transparency. Transparency and open data are extremely important to help avoid corruption in public procurement. This is no different in times of a crisis. It has been seen from previous global health emergencies, such as the Ebola virus and swine flu that there are those who aim to profit from others' misfortune and that corruption thrives when institutions and oversight are weak. Public procurement is already a government's number one corruption risk,³ as the OECD,⁴ European Commission⁵ and UNODC all agree.⁶

The sheer scale of the market - governments spend over \$9.5 trillion on public contracting and procurement every year⁷ - and its general opacity and opportunities for discretion by officials make it a major corruption risk. Emergency procurement will be even more vulnerable to malfeasance, as it may involve sole sourcing, accelerated timeframes, prepayment and a general scramble to secure supplies that may minimise due diligence and supplier scrutiny.

In the EU, even in normal times, 28 per cent of cases of corruption in the health sector are related specifically to procurement of medical equipment.⁸ The higher risk of corruption during this crisis makes it vitally important to ensure transparency of any emergency public procurement.

This paper offers recommendations to governments on how to ensure transparency when using emergency procurement procedures during the Covid-19 crisis and explains why it is so important.

³ <https://www.open-contracting.org/wp-content/uploads/2018/10/OCP2018-IdiotsGuide-Open-Contracting-1.pdf>

⁴ <http://www.oecd.org/gov/ethics/public-procurement.htm>.

⁵ http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf, p.21

⁶ UN Office of Drugs and Crime. 2013. Guidebook on anti-corruption in public procurement and the management of public finances. p.1.

⁷ Center for Global Development. November 2014. Publishing Government Contracts. Addressing Concerns and Easing Implementation. p. ix.

⁸ http://ti-health.org/wp-content/uploads/2017/01/Making_The_Case_for_Open_Contracting_TI_PHP_Web.pdf

Recommendations in detail

1. The use of emergency procurement must be justified, recorded, and made public

Issue

Under normal conditions, procurements rules ensure that public authorities adhere to fair and reasonable timetables and procedures to encourage open competition. In situations of extreme urgency, however, public authorities can enter into a 'negotiated procedure without publication', which is essentially a direct award to a preselected company.

The Covid-19 crisis does not, however, give governments free reign to contract as they like. Rather their decision to make a direct award must be justified. According to the EU Directive, public authorities can only make direct awards for reasons of *extreme urgency* brought about by *unforeseeable* events which mean that the *time limits* for conducting a normal procedure *cannot be complied with*.

For each emergency procedure, the public authority must issue a report justifying its decision. Not only is it good practice to make this report open so that those spending public money can be held accountable, but this also helps protect against any challenges brought against the emergency procurement by another potential supplier. Publication of the justification is therefore also a safeguard for the awarded company that the emergency procurement is justified. Poorly documented decisions risk being challenged and undermine the audit requirements post crisis.

Recommendations

- All parties must ensure good record keeping of decisions made during emergency procurement.
- Public authorities should assess whether they are permitted to carry out a direct award and keep a written justification.
- This justification should be published openly to build public trust and as a safeguard against potential future challenges.

2. Emergency procurement should be the exception, not the rule, and should be judged on a case by-case basis

Issue

While Covid-19 purchases may be classified as unforeseen and therefore justify the use of a direct award, this crisis cannot and should not be used as an umbrella justification for all procurement that takes place during this crisis. There should be continuous assessments of whether a direct award is justified. As time goes on, what might be unforeseeable now, may not be so in future.

The European Court of Justice requires that the use of an emergency procedure must be exceptional, and that all the conditions justifying it have to be met cumulatively and to be interpreted restrictively.⁹

Emergency procurement should, therefore, be limited to what is absolutely necessary both in terms of what is being procured and the length of the contract. Direct purchasing can be used to meet immediate needs and to cover the gap until more stable solutions can be found, such as framework contracts for supplies and services which can be awarded through regular procedures (including what are known as “accelerated procedures” where timeframes are shortened but other aspects of procurement rules adhered to).

Recommendation

Electing to use emergency procurement is the exception, not the rule, even in a time of crisis. Public authorities should carry out a separate assessment before undertaking any subsequent or additional procurement to ensure that all the conditions are still met, particularly to test whether the circumstances are still unforeseeable.

3. Emergency procurement data should be centralised on national e-procurement portals **Issue**

To facilitate audit of Covid-19 related procurement, all emergency procurement contracts should be published online and should be clearly identifiable as emergency procurement contracts.

Emergency contracts should be tagged Covid-19 allowing for them to be collected and openly shared on national and local procurement portals on a special dashboard or page. Some best practices have already been identified. In Colombia, all data on Covid-19 related contracts must be disclosed in an open format using the government’s e-procurement platform.¹⁰ In Ukraine, procuring entities must report and publish their orders within one day of the contract being signed and a special Covid-19 dashboard has been set up to aid reporting and analysis.¹¹ In Portugal, the Public Procurement Institute (IMPIC) created an open dataset on the national open data portal, which is updated weekly, to publish all the public contract awards using the emergency legal framework.¹²

⁹ see, for instance cases C-275/08, *Commission v Germany*, and C-352/12, *Consiglio Nazionale degli Ingegneri*

¹⁰<https://app.powerbi.com/view?r=eyJrIjoiMGQ5YTkwNzltZWVhMC00ZTgxLWJmYzgtODE1NWWE0ZGmNDVkliwidCI6IjdiMDkwNDZlNTk0Y2IxLjc5ZDZlM2Q4YzFzISlmMiOjR9>

¹¹ <https://bi.prozorro.org/hub/stream/aaec8d41-5201-43ab-809f-3063750dfafd>

¹²<http://www.base.gov.pt/Base/en/SearchResults?type=contratos&query=texto%3D%26tipo%3D1%26tipocontrato%3D0%26cvp%3D%26adjudicante%3D%26adjudicataria%3D%26desdeprecocontrato%3D%26atepreccontrato%3D%26desdedatacontrato%3D%26atedatacontrato%3D%26desdedatapublicacao%3D%26atedatapublicacao%3D%26desdeprazoexecucao%3D%26ateprazoexecucao%3D%26pais%3D0%26distrito%3D0%26concelho%3D0>

Creating a specific section on national e-procurement portals for publication of either emergency procurement and/or all Covid-19 related contracts aids analysis, monitoring and evaluation and helps public accountability. It can also play an important role in helping other emergency buyers connect with suppliers and improving government coordination.

Recommendation

All Covid-19 related, both emergency and non-emergency, procurement data should be published in a specific section on national e-procurement portals.

4. Full publication to maintain trust

Issue

The high levels of discretion offered to public authorities through emergency procurement could create a breeding ground for corruption and eventual scandals. In order to avoid corruption and to ensure public trust, public authorities should go to extra lengths to act with integrity. Full publication of both awards and payments against milestones is an important check against corruption, helping to identify important red flags. This is also important to stop companies overpromising and under-delivering on supplies and services.

Recommendations

Public authorities should ensure proper record keeping of contracts that are awarded during this crisis. For each emergency procedure awarded, public authorities should publish:

- The justification for choosing to use a negotiated procedure without prior publication, showing that there are genuine reasons for extreme urgency, the events that have led to the need for extreme urgency were unforeseeable, due to this it is impossible to comply with the usual timeframes, and the situation is not attributable to the public authority
- Justification for why the selected provider was chosen
- The Contract Award Notice
- Emergency contracts in full (with minimal redaction of confidential information)
- Detailed pricing breakdown of what is being bought
- Terms of payment and delivery and subsequent payments against those milestones
- Value of the contract (including a justification if this value is higher than expected)
- Detailed evaluation of the tender in order to share experience, knowledge with the public and other contracting authorities.

5. Publish information on emergency procurement processes in Open Data format

Issue

Procurement data is most valuable for purposes of analysis and accountability when it is published in structured, open formats to a clear schema and made available to download via an API. Governments should standardise the format in which emergency contract information is released, publishing it in open, downloadable and machine-readable formats.

If possible, this information should be published in the Open Contracting Data Standard (OCDS),¹³ which is an open data standard for publication of structured information on all stages of a contracting process: from planning to implementation. Key elements of the standard include assigning each contract a unique ID, and publishing data in open formats. The OCDS is already being used by over 25 countries, cities and regions including several in Europe and is already being used to collate Covid-19 procurement information.

Recommendation

All emergency contracting data should be available in open, downloadable and machine-readable formats, ideally published in the Open Contracting Data Standard format.

Each procurement process should have:

- A unique Open Contracting ID (ocid);
- Timely publication of information at each stage, with regular updates;
- Data provided in structured machine-readable file formats such as CSV, JSON, and XML;
- Unique identifiers of contracting authorities and bidders.

E-procurement platforms should ensure:

- Regular releases of data, with records published in bulk files for download either as CVS or through an Application Programming Interface (API);
- That they are linkable to other datasets.

6. E-procurement portals should be updated in the shortest possible time

Issue

In times of extreme pressure to procure emergency supplies, it may not be possible for governments to update e-procurement portals as emergency procurements happen, for instance, when deals are decided in person or over the phone – a buying technique that has been accepted, for example, by the European Commission in order to speed up procurement directly related to Covid-19.

Flexibility on the acquisition of emergency goods and services should not, however, apply to the timely record keeping of emergency procurement. If it is not possible for the immediate updating of e-procurement portals on Covid-19 related procurement, governments should update their portals in the shortest time possible. The pressure to buy quickly during this crisis should not be used as an excuse for late and or poor record keeping.

While governments should update their procurement portals in the shortest time possible, there may be instances where questions are posed by interested parties such as journalists, for example during a press conference or via contact with a spokesperson. If information on

¹³ The Open Contracting Data Standard (OCDS) is a core product of the Open Contracting Partnership. It is an open data standard for publication of structured information on all stages of a contracting process: <https://www.open-contracting.org/data-standard/>

emergency procurement is held but has not yet been uploaded on the procurement portal, then public officials should provide the information that they have with the journalists. Once certain information has been provided to one or more journalists, then it should be published online immediately.

Recommendation

Governments should retain all data and decision-making information on purchases made during the crisis and update their e-procurement portals in the shortest time possible. Information on emergency procurement should be provided to journalists in response to their inquiries, and once this has been done there should be immediate publication online.

7. Transparency to prevent price gouging

Issue

The shortages of medical supplies and equipment, and the rate at which they are being used, are driving prices up. Due to this demand, it is normal to see price increases of certain products. However, this is intensified through “price gouging” when suppliers – either singly or in collusion – demand even higher than normal prices knowing that governments have no other option but to pay, because refusing to do so would mean lack of medical supplies that could cause subsequent deaths.

Governments need to recognise that price gouging is a problem and take action to avoid it. Having open data on procurement and on the prices paid during the crisis makes for a transparent procurement process. This means that watchdogs can efficiently assess the market, allowing for price gouging to be noticed and red flags of collusion to be spotted more easily. With nowhere to hide, unscrupulous suppliers are unable to practice price gouging and must charge governments reasonable prices.

Whilst prices may be higher than would be expected in a regular market, any abnormally high pricing should be approached with caution. There are also mechanisms that public authorities can use, such as concluding agreements with pricing reductions through the life of the contract. Where this is not possible, justifications for such a high-priced purchase should be recorded and kept for future auditing.

Governments have a duty to avoid payment for goods and services at inflated prices and they should implement mechanisms to counter this. For example, in order to tackle price gouging the Indian government has set up a helpline for citizens to report items being sold above the recommended retail price¹⁴ and companies such as Amazon have been actively

¹⁴ <https://www.thehindu.com/news/cities/bangalore/Covid-19-govt-steps-in-to-check-inflated-price-of-masks/article30994148.ece>

removing listings they believe are price gouging or falsely advertising products as being able to cure or protect against the virus.¹⁵

Recommendation

Governments should take action to achieve value for money in their emergency procurement contracts and put in place mechanisms to prevent price gouging on the market. Governments should:

- Continue to seek value for money even during this crisis
- Insert price reducing mechanisms in high-value emergency contracts
- Record the justification of purchasing emergency goods with abnormally high prices
- Encourage procuring entities to coordinate and conduct joint procurements instead of competing for the same product or service (if Covid-19 related procurement is not centralised)
- Carry out post hoc review of emergency contracts to determine if abnormal profits were made with a clawback provisions to prevent gouging.

8. Open data on suppliers to strengthen due diligence and prevent fraud

Issue

The rush by governments to react to the crisis can lead to poor sourcing, unqualified suppliers, and poorly written contracts. During a crisis, oversight can be weak, and consequently fraud can thrive. By combining open data on emergency procurement procedures with open company registers and beneficial ownership registers, governments can improve supply chain management, facilitate supplier search tools and carry out necessary due diligence on new suppliers.

Publishing information as open data can benefit governments by allowing improved analysis and data driven insight into supply chain management. It allows others to use the information, (including other public bodies from the same and other countries, journalists and civil society watchdogs and business) to share and combine the data, to add value to it, and to analyse it so as to identify patterns, problems, and opportunities.

The speed at which information is needed means that actors need to work from data not paper. Publishing open data on medical supplies and suppliers is already supporting supplier search tools that could aid governments in finding suitable suppliers. The free platform Openopps, which collects and shares open data on tenders from governments across the world,¹⁶ has a special Covid-19 page offering information on suppliers globally which have won contracts in the last three years for items that will be needed to respond to the pandemic. Tools such as these help buyers find suitable suppliers when their usual vendors

¹⁵ <https://www.cbsnews.com/news/coronavirus-price-gouging-amazon-suspends-3900-sellers/>

¹⁶ <https://www.openopps.com/>

are unavailable. This also helps monitoring by journalists and civil society watchdogs, who will also be able to identify any gaps in the data. Yet tools such as this will only work if data on procurement is open.

Open data can also help by aiding stronger due diligence. It is critical for government to understand who they are trading with at this time, not only to establish that their rapid procurement is with legitimate companies¹⁷ with some track record of delivering the goods they are selling, but also to avoid trading with known corrupt actors. Having open company registers and beneficial ownership registers will support governments in carrying out due diligence on potential suppliers. This will allow governments to avoid entering into contracts with fake “companies” which have suddenly popped up during the crisis, claiming to sell medical equipment.

Recommendation

Governments should release emergency procurement data as open data and should also have open company registers and beneficial ownership registers. Doing so will not only allow supply chain management but it will also facilitate finding new suppliers and carrying out due diligence on those suppliers.

9. Publicise sanctions for fraudulent activity and bid cartels

Issue

Given the increased risk of fraud and corruption in times of crisis, governments should ensure that those involved in the procurement process, both public officials and private sector suppliers, are made aware of the consequences of breaking the law.

The regular publication of sanctions given to companies during this crisis can help act as a deterrent for those who are thinking of committing fraud, and can also keep the public and public watchdogs informed of measures that the government is taking to ensure that funds allocated to the pandemic response are being well spent.

Recommendation

In order to reduce the temptation for either public officials or private companies to take advantage of the crisis, potential sanctions for fraud issued to those who enter into fraudulent activity or who form bid cartels during the crisis should be widely publicised to act as a deterrent. Any sanctions given to companies during this crisis should also be widely publicised.

¹⁷ <https://www.dw.com/en/coronavirus-police-bust-massive-face-mask-scam/a-53123078>

10. Cooperation with civil society, investigative journalists and whistleblowers

Issue

In times of crisis, government officials are spread very thin, meaning oversight and monitoring are weak. This is when corruption and fraud thrive. To tackle this, governments should ensure there is full cooperation with civil society, investigative journalists and whistleblowers.

Through making emergency procurement data open and transparent, civil society and investigative journalists can act as valuable allies by analysing procurement information and investigating suppliers to ensure that resources are allocated efficiently.

Whistleblowers are also a valuable tool in detecting corruption in emergency procurement. Through their close contact with the procurement system, they can effectively contribute to the detection of unlawful procedures in public procurement by disclosing information that may not be readily available or evident. Therefore, their protection contributes to the fight against corruption. For EU member states, in accordance with the Whistleblowing Directive,¹⁸ governments should ensure the implementation of appropriate reporting channels as well as protection for whistleblowers.

Recommendation

Governments should seek innovative partnerships during this crisis with civil society and investigative journalists. In making public procurement data open, civil society organisations and investigative journalist can act as governmental allies, analysing the data to ensure fair and efficient spending of public funds. Appropriate reporting channels and protection measures should be made available to whistleblowers.

¹⁸ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

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