

Covid-19 Procurement and Global Challenges to Access to Information

Nino Japarashvili

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Covid-19 Procurement and
Global Challenges to Access to Information (ATI)

Desk Research by Nino Japarashvili

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Weesperstraat 3
1018 DN Amsterdam
The Netherlands
<https://www.freepressunlimited.org/>
kq@freepressunlimited.org

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INTRODUCTION

It is generally accepted that corruption thrives in times of crisis due to the conducive environments that are fed by disorder and confusion ([G20, 2020](#)). With COVID-19 vaccines being approved for use in different parts of the globe, the scale and complexity of their manufacture, allocation and distribution globally is unprecedented ([UNODC, 2020](#)). This presents various corruption risks that may threaten vital public health goals.

The risks include the entry of substandard and falsified vaccines into markets, theft of vaccines within the distribution systems, leakages in emergency funding designated for the development and distribution of vaccines, nepotism, favouritism and so forth. ([UNODC, 2020](#)). One of the most vulnerable areas to corruption in times of Covid-19 pandemic is the procurement of vaccines and materials ([Transparency International, 2020](#)).

When the protection of health and life of humans is at stake, procurement rules cannot stay in the way as always. During the emergency situation, public procurement may be conducted without transparency; this increases the risk of corruption in the health sector ([UNODC, 2020](#)).

With some already existing examples of corruption and poor, often non-inclusive, policies undermining COVID-19 responses and recoveries around the world, upholding the right to information matters now more than ever ([Transparency International, 2020](#)).

Unfortunately, there is a disturbing trend. Numerous countries have curtailed the right to public information (RTI) under the pretext of responding to the pandemic. This is not only the case under regimes where this right is regularly brushed aside, but also in countries where it is both protected by law and usually respected ([DW Akademie, 2020](#)).

Access to accurate and timely information during the pandemic is essential. It helps people make safe choices, for themselves and their families, with governments having a corresponding obligation to disseminate widely public interest information and to address disinformation ([UNESCO, 2020](#)).

Furthermore, ensuring the right to information allows journalists and NGOs to monitor the work of government institutions and share information about public decision-making ([Transparency International, 2020](#)). This allows the detection of corruption and lowers the likelihood of corrupt behaviour and practices ([UNODC, 2020](#)).

PUBLIC PROCUREMENT & CORRUPTION

Public procurement is a crucial pillar of services delivery for governments as it refers to the purchase by governments and state-owned enterprises of goods, services and works. As public procurement accounts for a substantial portion of the taxpayers' money, governments are expected to carry it out efficiently and with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interest ([OECD, 2020](#)). Under normal circumstances, the public procurement process poses one of the greatest risks for corruption among all government functions ([UNODC, 2020](#)). The large volumes of funds that are involved in public procurement make it highly vulnerable to corruption risks ([UNODC, 2013](#)).

In many countries, public procurement is estimated to comprise as much as 15 - 30% of the gross domestic product. And, normally, an estimated 10% to 25% of a public contract's value is lost to corruption every year ([UNODC, 2013](#)). In the EU, 28% of health-related corruption cases are related specifically to procurement of medical equipment ([Transparency International, 2017](#)).

Generally, corruption risks can be found throughout the procurement cycle ([Kohler & Dimancesco, 2020](#)):

- **During the pre-bidding phase**, corruption risks include inaccurately estimating the demand for a particular product or service, circumventing tender procedures, and deliberately tailoring tender documents to favour a particular bidder.
- **During the bidding phase**, there is the risk of government officials receiving bribes or kickbacks from suppliers, as well as the risk of collusion and market division between bidders themselves. Such closed networks thrive by virtue of their exclusion and even more so when oversight is traded for speed and rapid impact.
- **In the post-bidding phase**, corruption risks include false invoicing, changing contract agreements, and the failure to deliver procured vaccines.

Corruption risks in the area of public procurement are amplified in a public health crisis by the urgency of needs, required flexibility and requested speed ([UNODC, 2020](#)).

COVID-19 PROCUREMENT & CORRUPTION RISKS

New Purchasing Environment

Covid-19 health crisis created a radically new purchasing environment never before experienced by governments and public bodies ([OECD, 2020](#)).

They are not only required to purchase with extreme urgency, but also under high uncertainty and within a rapidly changing landscape ([OECD, 2020](#)).

- Many countries have to face the **upending of procurement strategies** (e.g. optimising the management of stocks versus urgent provision of large volumes) for items which were, until the crisis, regarded as easily available and therefore seen as a low priority in procurement strategies.
- Public procurement practitioners across the world are under immense pressure as they respond to the **exponential demand and shortage of supply for medical equipment**, such as disinfectant, masks, gloves, medicines, ventilators, and other essential items in containing the new coronavirus outbreak.
- Furthermore, in the immediate response phase, governments are experiencing **extremely high demands for the very same specific medicines and personal protective equipment**, due to the worldwide nature of the epidemic.
- Not only are **countries competing against each other** for the same products and services, within each country as well, central governments are being made to compete with their regional and local authorities for the same vital supplies.
- The rivalry among public buyers has changed the behaviour of suppliers too. The demand-driven approach that is common for procurements under normal circumstances has changed to **supplier-driven approaches**.
- Another new development in the market, especially in the health sector, is **intermediaries** (brokers) stepping in between the public sector and the suppliers, despite most public buyers having **little or no experience** in or knowledge of dealing with them.
- In addition, many suppliers are demanding **advance payments** to secure supplies (which is legally forbidden in public contracts in most countries), but in some cases even this was not enough of a guarantee to secure the goods.

Covid-19 Emergency Procurement

Early efforts of Covid-19 procurement in most countries focused on increasing capacity and equipping the health care system using emergency contracting frameworks ([OECD, 2020](#)).

Most of the countries decided to use their established rules on emergency contracting for urgent purchasing needs, as the existing procurement frameworks provide many flexible options for rapid and appropriate responses to essential procurement needs in times of emergency. These rules usually allow public buyers to negotiate directly with potential contractor(s).

This means:

- there are no prior publication requirements,
- no time limits,
- no minimum number of candidates to be consulted,
- and some other procedural requirements are also released (such as shorter bid validity period, no requirement for bid security, lighter checks on firms' past experience, electronic/virtual opening of bids).

The procedure constitutes a *de facto* direct award. In these cases, the authorities can act as quickly as technically and physically feasible. In some countries, such as the United States and Slovenia, the threshold for applying simplified tender procedure or direct award was elevated.

Flexibility applied to not only the procedural rules, but also regarding the contractual terms in emergency contracts ([OECD, 2020](#)).

In most countries, the emergency contracting procedures are regulated by the general procurement frameworks and enacted by an emergency decree that sets out when normal rules can be circumvented, and the conditions that justify the use of the emergency contracting.

However, some countries were facing a situation where their existing emergency procurement rules were not equipped to face the task at hand and have therefore developed and implemented new emergency procurement laws or guidance that deals specifically with the COVID-19 crisis.

Such measures included flexible terms for the volume and the date of delivery, waived requirements for performance security, or introduction of special *force majeure* clauses.

In terms of delivery, quality control and payment during the contract implementation phase, simplification included:

- flexibility of (on-the-spot) inspections of the goods and services,
- flexibility of payment terms and insurance terms,
- or advance payments without bank guarantee.

Furthermore, the possibilities for contracting authorities included the use of:

- simplified procurement procedures and negotiated procedure without a prior call for tenders,
- simplified the procedure of verification of anomalous bidding,
- reduced the deadlines for the ordinary award procedures on duly justified grounds of urgency
- the opportunity for the contracting authorities to sign the contract and execute it immediately after the end of the procedure without having to comply with the standstill period 10 of 35 days (in specific cases).

Covid-19 had an impact on the procurement guidelines of the EU as well. The European Union published a [guidance](#) on to which options and flexibilities are available under the EU public procurement framework for the purchase of the supplies, services, and works needed to address the crisis.

Corrupt Contracts

The procurement of medicines and supplies in health systems is typically one of the most vulnerable areas for corruption. Approximately 7% is lost to corruption and inefficiency ([Transparency International, 2020](#)). With Covid-19 pandemic, the area of procurement for pharmaceuticals and medical devices is particularly prone to corruption ([UNODC, 2020](#)).

Because of the emergency situation, the contracting authorities have legitimate reasons not to comply fully with the usual advertising and competitive tendering requirements established under procurement laws ([Article 19](#)). This increases the risks for corruption in the Covid-19 procurement cycle.

With Covid-19 procurement, one can already observe the following:

Lack of competition: under the pressure to buy quickly, many countries have issued direct contracts to procure goods and services related to COVID-19 without competitive processes, abandoning standard procurement protocols to ensure that controls are in place to detect and prevent abuses and corrupt practices ([G20, 2020](#)).

Nepotism & conflict of interest: contracts to procure vaccines and pricing agreements between governments and pharmaceutical companies often remain confidential, despite the drugs being paid for with taxpayer money. Opaque contracts that keep the price and terms of vaccine purchases secret can hide corruption risks such as conflicts of interest ([Transparency International, 2020](#)). Even in an advanced democracy, such as the [United Kingdom](#), it was documented that the government purchased Covid-19 goods from companies that had no prior experience in producing them, but which had close connections to the ruling party, either through political campaign contributions or family ties ([Transparency International, 2020](#)).

Overspending: government officials may seek to enrich themselves, or those connected to them, through the procurement process by demanding kickbacks from suppliers; suppliers, on the other hand, may exploit shortages to demand grossly inflated prices from government purchasers and collude with other suppliers to their advantage ([Kohler & Dimancesco, 2020](#)). One report carried out by the Latin American network of journalists, [Red PALTA](#), revealed that governments in Mexico, Colombia, Peru, and Uruguay had purchased N95 masks at almost double their normal cost.

ATI & COVID-19 PROCUREMENT

ATI in Times of Emergency

The right to information is recognised as a fundamental right under international law, to “impart” but also to “seek” and “receive” information and ideas. This right places a positive obligation on States to recognise the right and develop user-friendly systems to enable practical access to information, both by responding to requests for information and by disclosing information proactively.

The right to information is not an absolute right. Under international law, limitations on the right to information must be justified in one of two ways ([UNESCO, 2020](#)).

1. Limited restrictions on these rights are allowed, during both normal times and emergencies, in accordance with a strict three-part test:
 - a. Is provided by law
 - b. Protects a legitimate interest
 - c. Is ‘necessary’ to protect legitimate interest
2. Special derogations from this right may be allowed during an emergency.

Most emergencies have been based on security threats rather than public health crises, but [international standards](#) suggest that an emergency may exist where there is a threat to the “physical integrity of the population” and the “basic functioning of institutions indispensable to protecting human rights”.

The UN Human Rights Committee has [stressed](#) that each right should be subject to a separate analysis “based on an objective assessment of the actual situation”. In addition, derogations must be of an “exceptional and temporary nature” and cease as soon as the circumstances necessitating them come to an end. Furthermore, principles of legality and the rule of law should still apply. This means that derogations should be properly authorised under the domestic legal framework. Also it should be possible to challenge the legitimacy of any derogation before an independent oversight body (such as a court) ([UNESCO, 2020](#)).

Changes to ATI Laws due to Pandemic

Covid-19 has had varied impacts on the ATI laws worldwide. The Global Right to Information [COVID-19 Tracker](#) lists some 20 countries which have made such changes out of 129 countries globally with right to information laws.

*Several countries explicitly affirmed that their right to information **obligations would remain in place.***

- For instance, the oversight bodies in Australia, Canada and New Zealand, where right to information obligations were not formally suspended, affirmed that public authorities were still required to process requests in line with the legislation, although they also highlighted ways in which their respective right to information laws incorporated some flexibility to take into account extenuating circumstances ([UNESCO, 2020](#)).

*Some countries **have suspended or altered RTI obligations.*** Most formal amendments to right to information rules referred to the deadlines for responding to requests for information.

- In [France](#), an [Ordinance](#) dated 25 March 2020 suspends all statutory time limits which expire starting on 12 March 2020 until one month after the date on which the state of emergency ends.
- In Poland, Polish news sources indicated that deadlines for responding to right to information requests are suspended.
- Romania: The presidential decree enacting a state of emergency specifically provides that during the state of emergency the deadline for processing and replying to RTI requests will double.

*Others have published **additional information on RTI laws** during COVID-19.* Many public authorities adjusted their working methods and procedures to accommodate new working arrangements.

- In the [United Kingdom](#), the Information Commissioner's Office (ICO), on 15 April 2020, released a [statement](#) that it will continue to take new RTI complaints and will take a "pragmatic" approach to resolving complaints which will minimise engagement with public authorities. On 17 July 2020, the ICO also announced an online [toolkit](#) to help authorities self-assess their RTI performance.

A few countries took formal steps to **prioritise requests for information** relating to the pandemic.

- For example, in [Italy](#), the original Decree-Law suspending the processing of requests contained an exception for urgent requests. A subsequent government statement clarified that requests for information relating to the pandemic would be treated as urgent requests.

ATI Advocacy

Transparent and accountable public emergency procurement processes are vital during a pandemic ([UNODC, 2020](#)). Without critical information about the nature and costs of COVID-19 vaccine contracts, it is virtually impossible for citizens to demand accountability ([Transparency International, 2020](#)).

[Access Info](#) has issued 10 recommendations for ensuring transparency in emergency procurement considering the amplified corruption threats in times of Covid-19. These included:

1. The use of emergency procurement must be justified, recorded, and made public;
2. Emergency procurement is 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. Open Data on emergency procurement;
6. E-procurement portals should be updated in the shortest possible time;
7. Transparency to prevent price gouging;
8. Open data to strengthen due diligence on suppliers and prevent fraud;
9. Publicise sanctions for fraudulent activity and bid cartels; and,

10. Cooperation with civil society, investigative journalists and whistleblowers

[The World Justice Project](#) recommendations included the following:

- Public procurement mechanisms should be relaxed only when a clearly defined urgency test is met and documented, and only to the extent necessary
- Regardless of how expedited the process, procurements should be auditable
- All public contracts under emergency procedures should be promptly published openly
- Similar principles and approaches should apply to government distribution of emergency economic stimulus packages and support programs for business and households
- Institutions designed to provide oversight and accountability of public actors should be protected and reinforced
- The right to information should be honored to the extent practicable and supported through proactive government publication of information
- **A free and independent media should be protected in its role as a check on government fraud and abuse**

The Open Government Partnership recommendations on RTI can be found [here](#).

Reporters Without Borders (RSF) launched [Tracker-19](#) to monitor and evaluate the impacts of the coronavirus pandemic on journalism and to offer recommendations on how to defend the right to information.

RESOURCES

Websites:

Transparency International Corruption Perception Index (CPI):

<https://www.transparency.org/en/cpi/2020/index/nzl>

RSF, Tracker-19: <https://rsf.org/en/rsf-launches-tracker-19-track-covid-19s-impact-press-freedom>

Covid-19 Tracker: <http://www.rti-rating.org/covid-19-tracker/>

UNESCO: https://en.unesco.org/sites/default/files/unesco_ati_iduai2020_english_sep_24.pdf

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https://www.unodc.org/pdf/corruption/G20_Compndium_COVID-19_FINAL.pdf

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Guidebook on anti-corruption in public procurement and the management of public finances - Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption, UNODC, 2013

https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf

Ensuring the Public's Right to Know in the COVID-19 Pandemic, Article 19, 2020

https://www.article19.org/wp-content/uploads/2020/05/Ensuring-the-Publics-Right-to-Know-in-the-Covid-19-Pandemic_Final-13.05.20.pdf

Jillian Clare Kohler and Deirdre Dimancesco, "The risk of corruption in public pharmaceutical procurement: how anti-corruption, transparency and accountability measures may reduce this risk." Global Health Action, 2020, vol. 13, Issue sup1.

<https://www.tandfonline.com/doi/full/10.1080/16549716.2019.1694745>

Corruption and the Covid-19 Pandemic, World Justice Project, 2020

<https://worldjusticeproject.org/sites/default/files/documents/Corruption%20Design%20File%20V2.pdf>

Corruption in the time of Covid-19: A double-threat for low income countries, Sarah Steingrüber, Monica Kirya, David Jackson, Saul Mullard, 2020

<https://www.u4.no/topics/covid-19-and-corruption/basics>

Investigation into government procurement during the COVID-19 pandemic, National Audit Office, United Kingdom, 2020

<https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf>

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