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# Corruption Risks in Emergencies

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## **Abstract**

Following disasters, governments need to implement a range of responses, including the procurement of essential supplies in a short time to fulfil urgent needs. Good procurement principles such as open competition and value for money may hamper timely emergency response. Therefore, emergency clauses, which allow for deviations from open competition, are a standard component of government procurement laws. However, disaster situations and emergency clauses have the potential to be abused by corrupt public officials. In this chapter, we, first, highlight the potential corruption risks that can come about due to disasters. Second, we present a short discussion of emergency clauses in the European Union, South Africa, India, and New Zealand. We also discuss the susceptibility of the emergency clauses in these countries to corruption.

Keywords: corruption risk, emergency, disaster, public procurement, European Union, South Africa, India, New Zealand

## I. Background

Natural disasters such as earthquakes or pandemics as well as their man-made variants such as nuclear catastrophes trigger emergencies of different forms, shapes and sizes. Such emergencies or crises nearly invariably include wide ranging public policy responses mobilizing societal resources for countering the disaster. Emergency responses influence the two sides of the corruption control equilibrium in distinct ways. Such equilibrium theories of corruption control postulate that the level of corruption in society results from the balance between resources for (power discretion and material resources) and controls of corruption (legal and normative) (see e.g. (Mungiu-Pippidi [2015]), (Klitgaard [1988])). When a disaster hits triggering an emergency, the ensuing impact mechanisms linking emergencies and corruption are manifold and could both increase and decrease corruption in crisis situations (see e.g. (Fazekas, Nishchal and Søreide [2021])), On the one hand, taking public procurement as an example, emergencies enable the use of procedures for rapid purchasing with relaxed controls. This means that the usual anticorruption effect of competitors checking on each other and different administrative units controlling procedural fairness are greatly weakened. Moreover, additional funding is usually allocated to mitigate the crisis which may also create opportunities for corruption in contract allocation. On the other hand, emergencies often imply better control of corruption due to the greater attention of the public and policy-makers to crisis relief efforts. External sources of funding often needed in crisis situations may come with more (ex-post) controls. Finally, the moral constraint on corruption may also be stronger in a crisis when human lives and livelihoods depend on effective policy responses. Nevertheless, a key feature of impact mechanisms linking emergencies and corruption is that they often spill over to other domains. For example, emergency spending rules may remain in place long after the disaster is over, or relaxed corruption controls may be applied beyond the sector hit by the disaster.

These impact mechanisms are not static or one-directional. Instead, they are dynamic and complex, as it is not only disasters which impact corruption, but corruption can also impact disaster preparedness and the disaster itself (e.g. man-made disasters such nuclear power plant failures). Corruption can decrease the resilience of institutions and their preparedness for tackling emergencies by channelling crucially important funds away from preparations to private pockets. Moreover, corruption can contribute to, or even trigger, some technological (man-made) emergencies by siphoning off critical resources for mitigating crisis risks.

Crucially for any student of the nexus between emergencies and corruption risks, emergencies, crises and similar events are diverse, resulting in different weights of the two sides of the equation. For example, if an emergency is foreseeable (e.g. floods hit every 10 years), corruption in crisis response becomes a lot more important. Crises differ from each other in terms of i) type (e.g. natural or technological disasters (nuclear power plant accidents)); ii) magnitude (i.e. small-scale, localised emergencies or large-scale crises impacting a large area and population); iii) duration (i.e. short- versus long-duration emergencies and responses); and iv) main sector affected by the emergency (e.g. health sector in the case of COVID-19).

It is not only crises which differ but also the immediate policy responses addressing them. These initial policy choices shape the eventual impact on and of corruption. Crisis responses fall into four broad categories, some of which are directly related to legal analysis: i) spending changes (e.g. changes in procurement spending volume, speed, and composition, provision of loans, employment support, direct

subsidies); ii) organisational changes (e.g. conferring new powers to a public body); iii) modified rules and regulations (e.g. lax application of emergency clauses in public procurement); and iv) changes to laws and law-making (e.g. bypassing parliament when making laws).

In what follows, we demonstrate the diversity of crisis responses and prepared response types in the domain of rules and regulations for emergency public procurement. As has been showed above, direct public spending on disaster responses such as building roads or providing life-saving drugs represent one of the main avenues for governments to respond to crises. In addition, emergency rules and regulations in public procurement are well documented.

## II. Legal frameworks

Efficient procurement is essential during emergencies to ensure rapid delivery of supplies and to begin the process of rebuilding where it is necessary. The general principle of open competition, which is an essential part of ensuring value-for-money for taxpayers, might lead to delays. Therefore, emergency clauses are a standard component of countries' public procurement legislation. In this section, we discuss emergency clauses from the EU, South Africa, India, and New Zealand.

### 1. The European Union

The procurement of goods, services, and works in the EU is regulated by the Directive 2014/24/EU. In this directive, Article 32(2)(c) (European Union [2014]) regulates procurement under emergencies and provides certain exemptions to open-competition rules in cases of extreme urgency. The article allows two relaxations: first, it states that time limits for open procedure can be relaxed so that the procurement process (while still following open competition) can make the process faster. Second, competitive procedures themselves can be eschewed by contracting authorities so that they can award contracts without any competition, and urgent local needs can be fulfilled as quickly as possible. The Directive states that such deviations can be made only in cases which (a) are of extreme urgency, (b) could not have been foreseen by the contracting authority, (c) are not attributable to the contracting authority.

There are two aspects that must be considered here:

- **Definition of an extreme urgency:** While the directive grants necessary flexibility, there seems to be no overarching framework for what could potentially constitute an extreme urgency. The reliance on local officials' discretion could give rise to local definitions and regional differences within the EU since different areas have different susceptibilities to emergencies, preparedness levels, and risks of corruption.
- **Dimensions of unforeseeability and attributability:** the inclusion of unforeseeability and attributability are included to ensure that the emergency procedures are not implemented in cases of incompetence of the contracting authority either when an emergency could have been predicted or is caused by the contracting authority itself. Assuming that there are sufficient ex-post audits, this strengthens the directive and reduces the possibilities to misuse or prolong emergencies (Telles [2022]).

## 2. South Africa

Under South African Procurement Practice Note Number SCM 2 of 2005 and Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations, contracting authorities can award contracts through non-competitive procedures in cases of emergencies. As (Bolton [2006]) highlights, however, there is insufficient guidance about the definition of an emergency. Other safeguards like unforeseeability and attributability also do not exist.

A new draft bill proposed in 2020 (Ministry of Finance [2020]) does define an emergency as “a natural disaster, epidemic, riot, war, fire or any other situation that may result in a threat to— (a) life; or (b) health, welfare or safety of the public, which requires immediate action.” Furthermore, the bill also shed lights on issues like emergency preparedness and minimizing the use of emergency procurement. However, the draft bill is yet to become law.

## 3. India

In India, purchases are governed through a system of national and local rules. At the national level, Rule 166 of General Financial Rules and section 8.2 of Manual for Procurement of Goods 2017 allow for non-open procedures during emergencies. Under Rule 166, the reasons must be recorded and approval from appropriate authority obtained. Furthermore, the National Disaster Management Authority is also empowered to adopt non-competitive procedures to fulfill demands in cases of disasters. In addition, the system is partially decentralized where each state also has powers to follow non-open procedures during emergencies.

The Indian system lacks a synthesized procurement regulation and rules may differ across governmental agencies (Goyal [2022]) and as such there is no framework to define emergencies. Officials on-the-ground have the power to make decisions and differences between the center and state may arise leading to inefficient outcomes (Goyal [2022]).

## 4. New Zealand

The New Zealand procurement system has a well-designed framework for emergency procurement (New Zealand Government [n.d.]). Under Rule 15 of General Rules of Sourcing, the definition of emergency includes human and natural disasters, political emergencies, and critical security emergencies. Furthermore, there is a three-level framework in response to specific crises: (a) immediate response, (b) disaster relief, and (c) post-disaster reconstruction. In the first stage, the authorities are authorized to procure goods and services as quickly as possible. This stage allows for verbal agreements. In the second stage, which is enforced when the immediate threat has subsided, agencies are allowed to use non-competitive procedures, but the verbal agreements are no longer valid and agreements must be confirmed in writing. In the third stage, the procurement process starts to return back to normal with open competitive procedure as the norm but with the possibility of direct awards if justifiable.

## III. Procurement procedures and the risk of the corruption

The above regulatory details around emergency procurement are particularly important to understand the risks of corruption. (Schultz and Søreide [2008]) highlight that lack of clear definitions of emergencies, discretionary powers, and lack of written justifications as some of factors that could lead to an increase in the risk of corruption during and after emergencies. (Schultz and Søreide [2008])

present examples of corruption following the 2004 Indian ocean Tsunami. In one case, irregularities were observed in a housing project designed for Tsunami victims in Sri Lanka. Furthermore, 10 per cent 'incentive payments' in bids for contracts for Tsunami relief in Indonesia were observed by (IGAC [2005]).

Through bad planning, governments and contracting authorities can even contribute to situations of emergency. For example, (Goyal [2022]) and (Lalwani and Saikia [2021]) describe how after the first wave of Covid-19 in March 2020, the Indian government took eight months to invite bids for 162 oxygen plants, of which only 20% were functional when the deadly second wave of Covid-19 struck in April-May 2021. This contributed to the high death toll in April-May 2021 and extremely urgent procurement for oxygen supplies had to be conducted by the Indian government during the second wave. A further example of an artificial climate of emergencies is the planning for the 2010 Commonwealth games in India. According to (CAG [2011]), delays in construction of infrastructure and sporting facilities led to the creation of an artificial emergency whereby open-competition procedures were not followed. Several officials involved in corruption during the planning for the games have been criminally convicted.

As highlighted in the previous section, there exist variations in definitions and procedures followed during emergencies and jurisdictions where corruption is already a problem, emergencies are likely to increase risks of corruption whereby corrupt officials could misuse their discretionary powers to benefit themselves by procuring from suppliers that offer them bribes or misuse private information to favor firms they are connected to through, for example, family ties or by exaggeration or prolonging emergencies. An effective procurement response to emergencies would therefore require a combination of rules-based frameworks, emergency preparedness coupled with ex-post audits.

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