

PROMOTING FAIRNESS, OPENNESS & TRANSPARENCY IN FEDERAL PROCUREMENT

**OFFICE OF THE
PROCUREMENT
OMBUDSMAN**

**KNOWLEDGE
DEEPENING AND
SHARING:**

**EMERGENCY
PROCUREMENT**



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1.0 Introduction

1.1 The Office of the Procurement Ombudsman

The Office of the Procurement Ombudsman (OPO) is a neutral and independent organization of the Government of Canada that works collaboratively with federal organizations and Canadian businesses to promote fairness, openness and transparency in federal procurement. OPO delivers on this mandate by connecting stakeholders, investigating complaints, resolving problems, making recommendations and sharing best practices.

OPO employees:

- Review the practices of federal departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department;
- Review any complaint respecting the award of a contract for the acquisition of goods below the value of \$26,400 and services below the value of \$105,700 where the criteria of the Canadian Free Trade Agreement would otherwise apply;
- Review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department, regardless of dollar value; and
- Ensure that an alternative dispute resolution process is provided, if the parties to the contract agree to participate.¹

In 2018, OPO launched a knowledge deepening and sharing (KDS) initiative to better understand key issues in federal procurement. Through the publication of KDS studies, OPO intends to share knowledge and provide meaningful guidance for federal procurement stakeholders.

1.2 Purpose of the study

This study was undertaken during the COVID-19 pandemic with the purpose of identifying how emergency procurement practices have been utilized in response to past disasters, and what, if any, lessons learned could be drawn from these experiences for use in future situations involving emergency *procurement*.

1.3 Scope of work

Through a review of audits, scholarly research, legal frameworks, and guidance documents, this study draws together relevant examples of past procurement responses to emergency situations.

This study is not intended to provide a comprehensive examination of emergency procurement, or an analysis of Canada's response to the COVID-19 pandemic. Methods adopted by Canada in response to the COVID 19 pandemic have been highlighted in this report insofar as they serve to illustrate a particular strategy for engaging in emergency procurement.

1.4. Audience

This study may be of interest to members of the purchasing community engaged in emergency procurement, as well as those seeking to understand the legal framework that forms the basis of government purchasing during an emergency.

1.5 Development methodology

A review of the regulatory and policy frameworks governing emergency procurement was undertaken as well as other publicly available sources such as academic studies, audits, and news articles. Examples of emergency procurement have been draw from a range of institutions, including provincial and state governments as well as multilateral institutions and non-profit organizations. While these institutions

are not all bound by the same procurement rules, e.g. international trade agreements, they nevertheless serve to illustrate the varying approaches to managing emergency procurement for the purpose of identifying good practices.

1.6 Enquiries

Enquiries should be directed to:

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2. Federal approach to emergency procurement

The *Government Contracting Regulations* (GCRs) have the force of law and establish the requirements that federal departments must respect when contracting for goods, services and carrying out construction.² Both the GCRs and the Treasury Board Contracting Policy (TBCP) contain several exceptions to the general rule requiring competition (i.e. the solicitation of competing bids); one of those exceptions is the case of a pressing emergency.³

A pressing emergency is defined in the Treasury Board Secretariat (TBS) Contracting Policy Notice 2007-4 - Non-Competitive Contracting as a situation that may involve “an actual or imminent life-threatening situation; a disaster that endangers quality of life or safety of Canadians; a disaster that results in the loss of life; a disaster that results in significant loss or damage to Crown property.”⁴ Section 10.2.2 of the TBCP states “an emergency may be an actual or imminent life-threatening situation, a disaster which endangers the quality of life or has resulted in the loss of life, or one that may result in significant loss or damage to Crown property.”⁵ The rationale for this exception to the general rule requiring competition is provided in the TBCP which states that “emergencies are normally unavoidable and require immediate action which would preclude the solicitation of formal bids.”⁵

Similar exceptions for emergency circumstances are provided in several of the trade agreements. For example, Article 513 Para. 1 (d) of the Canadian Free Trade Agreement (CFTA) states “if strictly necessary, and for reasons of urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering.”⁶ Similarly, Article 13.9: Limited Tendering of the United States, Mexico, and Canada Agreement (USMCA) states that an entity may use limited tendering procedures “in so far as is strictly necessary if, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the good or service could not be obtained in time by means of open or selective tendering.”⁷ Lastly, Article XIII of the World Trade Organization Agreement on Government Procurement (WTO AGP) reads “insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering.”⁸

When this exception to competition has been triggered for a procurement that would otherwise have been subject to trade agreements, Contracting Policy Notice 2007-4 - Non-Competitive Contracting states that contracting authorities are “required to document in their contract file the specific reference for each of the applicable free trade agreements that supports the non-competitive action that is being proposed.”⁴ What this policy notice makes clear is that the contracting authority must ensure the procurement file is appropriately documented to support decisions made and establish an audit trail.

Related to the exception to competition provided for in the GCRs, TBCP and trade agreements are the emergency contract entry limits established in Part III of the Appendix C - Contracts Directive of the TBCP. This section allows any federal department or agency to enter into and amend a contract up to a total value of \$1 million (including amendments and all applicable taxes) and up to \$15 million for the Minister of Public Works and Government Services Canada, now the department of Public Services and Procurement Canada (PSPC), in response to a pressing emergency requirement.⁹ It also provides for exceptional delegations of financial authority for certain departments in instances of a pressing emergency when all of the following criteria are met:⁹

- the Minister invokes the National Security or Extreme Urgency provisions of the applicable trade agreements;
- the requirement cannot be satisfied by normal contracting procedures due to the urgency of the situation; and
- the applicable departmental Minister approves the use of these special authorities.⁹

Furthermore, the use of these exceptions must be reported to the TBS “within 60 days of the authorization or beginning of the work.”⁹

Beyond the provisions identified above, PSPC’s Supply Manual, which is a tool used by PSPC procurement officers and explains how PSPC carries out its procurement activities, identifies additional considerations for contracting authorities on managing emergency requirements.¹⁰ This includes 14 considerations such as collaborating with other departments and levels of government as well as establishing a process to fast track approvals.¹⁰ These recommendations are intended to be considered before an emergency occurs to “help mitigate risk and loss during what may be a very stressful time, and to facilitate procurement when it is critical to be quick, calm and flexible.”¹⁰

3. Common approaches to emergency procurement

During periods of pressing emergencies, the procurement function plays a crucial role in response efforts by sourcing essential goods and services. Some of the common challenges associated with emergency procurement include time constraints, disrupted supply chains, reduced resources and increased demand for certain goods. As a result of the emergency, the procurement function may also be facing internal challenges such as working from home without full access to resources or tools, and lower morale or increased stress.^{Error! Bookmark not defined.} These challenges provide the foundation for common approaches to emergency procurement.

A review of previous responses to disaster and emergency procurements revealed that there are some common approaches to emergency procurement practices. As an organization that frequently operates in high-risk and uncertain environments, the United Nations (UN), which facilitates international cooperation, has developed detailed guidelines to support procurement activity during emergency situations. These emergency procurement practices enable the UN to respond quickly and transparently to extraordinary requirements through “increased levels of delegation of authority, piggybacking on any contracts established by other Secretariat offices or other UN entities while remaining in full compliance with Regulations and Rules of the Organization.”¹¹ These and several other approaches are explored in

further detail below, including Canada's on-going and evolving measures to procure goods and services related to the COVID-19 pandemic.

3.1 Increased delegation of procurement authority

A common approach to emergency procurement is the increased delegation of procurement authority. This approach has been utilized in Canada, as the previous discussion of the GCRs and the TBCP illustrated. This section will demonstrate the utility of this method in both state and non-state responses to emergencies. The principal benefit of this strategy is that it enables procurement officers to source much needed goods and services in a timely manner by increasing the contract entry limits that would trigger additional levels of approval under normal circumstances. This is evidenced by the UN response in West Africa, the Canadian response to the Alberta wildfires, and Canada's response to the COVID-19 pandemic.

The UN's procurement manual contains an allowance for increased delegations of authority for procurement in emergency situations. These provisions allow for increased financial delegation to the Director of the Procurement Division, who is responsible for the overall strategic management of the procurement function within a region, to the amount of US \$10 million.¹¹ Requests to activate this increased delegation are required to contain background information and justification for its use, including the approximate value, quantity, and requirements of the estimated procurement needs.¹¹ Approval requests must also provide justification that the discretionary authority in place will not achieve the procurement needs of the emergency operation.¹¹ The approach adopted by Canada requires that an emergency contracting report be provided to the Treasury Board Secretariat within 60 calendar days of the authorization or beginning of the work.⁹ For Canada, this report should provide "detailed information about the circumstances of the emergency situation; the type and total value of the awarded contract; the reason(s) why the bidding requirements were not practical or permissible; and the department or agency's delegated contracting authority level at which the emergency contract entry was approved."⁹

There are two important areas of divergence between the UN and Canadian approaches. Firstly, concerning the UN, the activation of the Emergency Procurement Procedures (EPP) is limited to a specific operation, and may even be limited to the acquisition of specific products.¹¹ Furthermore, upon activation of the emergency procurement procedures, the Director of the Procurement Division is required to submit a weekly report of all procurement conducted under the emergency delegation of authority.¹¹ The second difference concerns how reporting figures into the procurement process. In the case of the UN, this reporting is a part of the process, whereas in Canada it is after the fact.

An example of this emergency delegation is the United Nations Mission for Ebola Emergency Response (UNMEER). UNMEER was an emergency mission that was established in September 2014 to manage the outbreak of Ebola in West Africa.¹² "Special measures in the areas of recruitment, procurement and property management were granted to facilitate the Mission's start-up and operations."¹² Among these measures was an increase to the Director of the Procurement Division's financial authority to enter into individual contracts for amounts up to an "initial cumulative value of \$10 million (which was subsequently increased to \$50 million)," thereby triggering the requirement to submit a report every 3 days to the Assistant Secretary General on the use of this delegation.¹² An audit of UNMEER conducted by the UN's Office of Internal Oversight Services (OIOS) found that the additional controls related to increased reporting were adhered to and effective in ensuring that the special delegation was used only when required.¹²

Another example of the importance of emergency financial delegations occurred in May 2011 when a series of wildfires broke out in the Lesser Slave Lake region of Alberta, resulting in the largest disaster in the history of the province.¹³ An external review of the province's response was conducted by KPMG. One of the lessons learned was the need to have pre-established spending thresholds in place for future emergencies.¹³ At the time of the wildfires, emergency financial delegations were not established. While

the province moved quickly to grant additional flexibilities, there was a lack of clarity regarding who was authorized to spend what amounts. “[T]he large sums of money being allocated with minimal constraints put a number of these Government of Alberta representatives outside their comfort zone.”¹³ KPMG concluded that bringing more flexibility in spending and minimizing layers of approval is a “positive and even necessary factor” for the success of emergency procurement practices.¹³

Canada’s response to the COVID-19 emergency is another example of this common approach. However, the global nature of the COVID-19 pandemic presented additional challenges for procuring authorities as they faced global competition for scarce resources, and the absence of a timeline surrounding the pandemic’s progress or end date. In an effort to facilitate a coordinated and efficient response to the COVID-19 pandemic, on March 23, 2020, TBS issued Contracting Policy Notice 2020-1: Response to COVID-19, which sets forth a number of temporary amendments to the TBCP in order to execute a rapid and effective government response to the COVID-19 pandemic.¹⁴ This policy notice was created to assist departments in using the TBCP Emergency Contract Entry Limits and provide guidance regarding the Government of Canada’s approach to procurement in response to COVID-19.¹⁴

Effective March 20, 2020, the Treasury Board approved temporary increases to emergency contracting limits. These delegations allow ministers, or their delegates, to approve contracts whose value would have previously required Treasury Board approval.¹⁴ With these increased temporary delegations, department heads are responsible for ensuring that emergency contract entry limits are only used in instances of a pressing emergency, where delay in contract award would be injurious to the public interest.¹⁴ The temporary emergency contract entry limits include:

- Until September 30, 2020, the Minister of PSPC’s emergency contracting limit is increased from \$15 million to \$500 million;
- Until September 30, 2020 the emergency contracting limit for all other ministers is increased from \$1 million to \$3 million; and
- Until March 31, 2021, the Minister of PSPC will have an unlimited emergency contracting limit for the research, development, acquisition and deployment of vaccines related to COVID-19.¹⁴

Despite contract entry thresholds being increased, “departments are reminded to continue to follow applicable provisions of the Government Contracts Regulations, the Contracting Policy, and the Proactive Disclosure of Contract reporting requirements, with respect to awarding contracts using emergency contracting limits.”¹⁴

3.2 Non-competitive contracting

The flexibility to set aside the requirement to solicit bids under emergency circumstances is established in the GCRs, the TBCP, as well as trade agreements such as the USMCA and the CFTA. For example, the CFTA contains provisions enabling procuring authorities to engage in non-competitive contracting when it is “strictly necessary, and for reasons of urgency brought about by events unforeseeable by the procuring entity.”⁶ However, determining what constitutes “strictly necessary” is not always straightforward, especially in instances of a pressing emergency where the operating environment can be unstable.

The UN’s procurement manual offers guidance on the topic. The guidelines for engaging in non-competitive contracting state that “priority should be given to vendors experienced in supplying the UN system in emergency operations in order to reduce lead-times and the risk of contract failure.”¹¹ While there is no requirement to prepare a shortlist for solicitations issued under a Request for Quotation(RFQ), the UN’s procurement manual requires that “the procurement file must contain a brief explanation as to which vendors were considered and why.”¹¹ It also notes that while financial regulations and rules allow exceptions to competition where the operational requirements in emergency situations do not permit procurement to be undertaken through formal methods of

solicitation, “reasonable efforts should be made during an emergency situation to still follow a process wherein several offers are compared to ensure Best Value for Money for the UN.”¹¹ While the flexibility to engage in non-competitive contracting is available, there may be circumstances in which a competitive process will yield value, even during an emergency. Furthermore, when a competitive process is initiated, it is important to keep in mind that procuring authorities are bound by the same duties of fairness, integrity, and transparency, all of which are the foundation of UN procurement.¹¹ The existence of a pressing emergency does not exempt procuring authorities from the principle of fairness, which means that bidders should be provided with the same information at the same time to support the development of a compliant bid.¹¹

The Federal Emergency Management Agency (FEMA) in the United States offers another source of guidance on the acceptable use of non-competitive proposals under emergency circumstances. FEMA provides financial assistance to procure goods and services before, during and after a disaster in the United States.¹⁵ The financial assistance can be supplied to both state-funded institutions and non-state entities, which are privately operated outside of state control.¹⁵ Despite not being affiliated with the states, non-state entities participating in procurement must follow federal regulations, or risk ineligibility for reimbursement.¹⁵ “FEMA approval is not required for use of non-competitive procurements under the emergency or exigency exception; however, the non-state entity must document its justification for using non-competitive procurements and must still comply with other procurement requirements and ensure that costs are reasonable.”¹⁵ The justification must be included in the procurement records “for each FEMA award, sub(-)award, or project.”¹⁵ FEMA recommends that the following elements be included as part of the written justification:¹⁵

- List which of the 4 circumstances (that can be used to justify entering in a non-competitive process);
 1. The item is available only from a single source;
 2. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 3. The Federal awarding agency or pass-through entity expressly authorizes non[-]competitive proposals in response to a written request from the non-Federal entity; or
 4. After solicitation of a number of sources, competition is determined inadequate
- Description of the product or service being procured including the expected amount of the procurement;
- An explanation to the need to enter into a non-competitive procurement process;
- The duration of the contract for the defined scope of work and the impact on the scope of work should the duration of the contract not be sufficient;
- The steps undertaken to determine that a full and open competition could not have been used, or was not used, for the scope of work;
- A list of any known conflicts of interest and any effort that were made to identify possible conflicts of interest prior to undertaking the procurement
- Any other pertinent information justifying for the use of non-competitive procurement.

3.3 Decentralizing versus centralizing the procurement function

A common approach to procurement in emergency situations involves delegating the responsibility for purchasing to regions or functional units that are closer to the emergency. Decentralizing the procurement function can be helpful in reducing the overall procurement lead-time by enabling those ‘on the ground’ to source critical goods and services directly. Furthermore, access to localized

knowledge allows procurements to be catered to the needs of a particular region.¹⁶ However, two possible risks that can occur with decentralization of the procurement function are the risk of corruption, which will be discussed in the next section, and higher prices, which is illustrated by the emergency response in Bangladesh explored below.

An audit of UNHCR's emergency response in Bangladesh highlights some of the considerations that should be taken into account when deciding whether to delegate the procurement function to actors 'on the ground.' In September 2017, the large number of refugees fleeing Myanmar led the UNHCR to "entrust procurement worth \$10.7 million and \$12.6 million to 21 partners in 2017 and in the first half of 2018."¹⁷ The audit of the response efforts revealed that UNHCR failed to conduct an assessment of the comparative advantage of decentralizing procurements to partners, and that the partners procured items at higher costs as compared to the UNHCR's own procurement, who also benefits from a 10 to 15 percent tax reimbursement that is not available to partners.¹⁷ The auditors observed that "a retroactive assessment defeated the purpose of the control, to ensure that procurement is conducted by partners only after a determination has been made that it is financially and operationally more advantageous than UNHCR conducting the same procurement directly."¹⁷

However, the choice to centralize or decentralize procurement may involve a situation where the best of both methods are sought. Canada's response to the COVID-19 pandemic is an example of this balance. When an emergency is geographically localized, decentralizing purchasing can enable those on the ground to source goods and services more rapidly. However, when an emergency occurs across multiple regions, or globally, as was the case with the COVID-19 pandemic, de-centralization may no longer be an efficient procurement strategy. The global nature of the COVID-19 pandemic presented a unique challenge in that the emergency situation unfolded on a global scale almost simultaneously. This resulted in unprecedented global competition for the same, finite resources. This situation necessitated further centralization of the procurement function in order to mitigate the challenges brought about by the increased global demand for scarce goods.

In response to this situation, Canada's federal government empowered PSPC to work with provinces and territories to lead a coordinated approach to purchasing critical medical supplies, such as personal protective equipment (PPE).¹⁴ This involved ordering critical supplies in bulk on behalf of provinces and territories, and supplementing these orders by purchasing everything immediately available that meets requirements.¹⁸ Deputy Heads must ensure that one-off procurements of these commodities are not taking place and to seek confirmation from PSPC that a coordinated procurement is not underway prior to sourcing a particular commodity.¹⁴ To meet these requirements, PSPC announced the creation of a Supply Council to "provide advice on building innovative and agile supply chains for goods in wide use such as masks, gloves and disinfectants, including production, sourcing, shipping and distribution strategies as the situation surrounding COVID-19 continues to evolve."¹⁹

While greater centralization of procurement was used to source certain goods, particularly those that faced scarcity from global demand, Canada also decentralized procurement activity with the increase in contract entry limits for departments and agencies. This strategy has been executed with measures to ensure that a high degree of communication and coordination is maintained across levels of government and with vendors who may not be experienced at selling to the government.²⁰

3.4 Utilizing existing vendor lists or standing offers

In periods of a pressing emergency, the ability to mobilize resources and respond quickly is often critical to the success of response efforts. One strategy used to reduce procurement lead-time and ensure the timely delivery of goods and services is the establishment of vendor lists or standing offers.

A standing offer is "an offer from a potential supplier to provide goods and/or services at pre-arranged prices, under set terms and conditions, when and if required."²¹ It is recognized as an efficient means of

acquiring goods and services as call ups against standing offers tend to be “processed faster, involve less paperwork and have pre-arranged prices and terms and conditions already set.”²¹ During a pressing emergency, relying upon already established standing offers not only minimizes the time and cost associated with issuing a solicitation, the pre-arranged prices may also protect the purchasing body from price gouging that can sometimes occur during a pressing emergency. By working with pre-qualified established vendors, the method introduces some stability in a potentially unstable time.

The following two examples from post-disaster audits highlight the importance of pre-established agreements. In a review of the Slave Lake Regional Wildfires which erupted in Alberta in 2011, the province and local governments were criticized for failing to have in place pre-established agreements with vendors that could be activated quickly to mobilize services and supplies. Even where such arrangements existed, as in the case of Service Alberta, they did not contain some of the items deemed critical of the relief effort and “the procurement process was seen as far too slow to be effective in responding to a disaster.”¹³ In a similar audit of the UN’s response to the crisis in Nigeria, the UN Mission was criticized for failing to enter into agreements with vendors to supply frequently purchased goods which would have saved critical warehouse space as goods could be ordered on an as-needed basis for pre-established costs.²²

A related strategy that can be employed to expedite the acquisition of critical goods and services in an emergency involves amending or triggering options in existing contracts. Although amending an existing contract may be seen as unfair to other potential vendors, it carries the benefits of saving time and working with a vendor that is already known to the procuring authority, and presumably trustworthy. For example, a key recommendation coming out of the audit of the response to Hurricane Katrina was that procuring authorities should have leveraged pre-existing contracts to meet immediate needs.²³ The auditors concluded that had the contracting officers had the ability to order from the pre-existing contracts, the overall procurement lead time would have been reduced by avoiding the need to conduct a determination of contractor responsibility or a price reasonableness determination.²³

4. Challenges and risks of emergency procurement

4.1 Corruption and increased risk of fraud

In responding to a pressing emergency, the ability to source critical goods and services quickly and efficiently often takes priority over typical buying considerations, such as best value. As noted above, emergency procurement often involves increased financial delegations, improvised processes and relaxed control frameworks. PSPC’s Supply Manual provides the following consideration for procurement officers in managing emergency requirements: “[i]t is important to understand that one should not be too restrictive during an emergency and should let the requirement and timeline dictate the process to some degree.”¹⁰ Emergency procurement practices thereby create a space, where, given relaxed protocols and increased flexibilities, there is an increased opportunity for corruption and fraud.¹⁶

Corruption is broadly defined as “the abuse of public office for private gain” and occurs on the buying side of the transaction.²⁴ In their study on the topic of corruption in emergency procurement, Schultz and Søreide identify two types of corruption that are typically witnessed in emergency procurement: bribery and favouritism.¹⁶ Some situations that are more prone to these factors include on-the-spot procurement carried out locally and outside the centralized hub; cheap goods where delivery is difficult to monitor; and limited invitation of qualified suppliers.¹⁶ According to the authors, these situations can occur more frequently in emergency situations as procurement officers have more discretion and freedom to procure required goods and services, which has implications on the fairness and transparency of the process.²⁵

Fraud is defined as “an act or course of deception, an intentional concealment, omission, or perversion of truth, to (1) gain unlawful or unfair advantage, (2) induce another to part with some valuable item or surrender a legal right, or (3) inflict injury in some manner.”²⁶ Fraud is more likely to occur on the supply side of transaction and this risk is elevated in an emergency. In a 2020 webinar conducted by Supply Chain Canada in response to the COVID-19 pandemic, fraud was identified as the top risk during an emergency. An unfortunate consequence of an emergency is that opportunists may seek to exploit the reduced controls on the buying side to make a profit.²⁷ Fraud can occur through any number of means, such as misrepresenting the quality or quantity of the goods on offer. However, the defining factor is the intentional misrepresentation of the vendor’s ability to meet the requirement. The immediate costs can be higher prices and the procurement of inadequate or unneeded products.²⁸

This type of fraud was potentially on display in Canada’s procurement of N95 masks in response to the COVID-19 pandemic. The N95 mask is a critical piece of protective equipment required by frontline health professionals. As such, the masks have to meet the quality standards established by Health Canada in order to be deemed acceptable for use.²⁹ In early May 2020, PSPC received a shipment of 11 million masks of which roughly 8 million failed to meet pre-defined quality standards.²⁹ The masks, supplied by a Canadian company, were produced in China. The incident sparked an outpouring of mislabeled masks that sought to pass for the high-quality standards of the N95.³⁰ In this example, the possible fraudulent activity involved the misrepresentation of goods that did not meet the required specifications.

Hurricane Katrina offers a strong example of the dangers and costs of fraud during an emergency. Fraud not only affected procurements, but other areas such as the influx of false charities and benefits claims.³¹ The cumulative cost of the fraudulent activity stemming from the disaster is estimated in the billions.³² In response, the federal government in the United States established the Hurricane Katrina Fraud Task Force which was charged with “deterring, detecting, and prosecuting individuals who try to take advantage of the disasters related to Hurricanes Katrina, Rita, Wilma, Gustav, and Ike, as well as other natural disasters.”³³ Between 2005 and 2008, the task force brought federal charges against 907 individuals in 43 federal judicial districts across the country.³³

The Katrina response not only highlighted the consequences of failing to prepare for an emergency but also the resulting hesitation and confusion in the bureaucracy.³⁴ There are 3 factors that characterize effective bureaucracy: “well-established procedures, effective leadership, and clear objectives.”³⁴ Studies on the government’s response to Hurricane Katrina found “that problems associated with all three of these bureaucratic characteristics weakened governmental efforts to respond quickly and effectively.”³⁴ This claim is also supported by the Government Accountability Office (GAO), which concluded in their review of the government’s response efforts that there was inadequate planning and preparation.²⁸ A failure to adequately plan for an emergency can exacerbate the risks of corruption and fraud as procurement officers are left to exercise discretion amidst a relaxed control environment without a coordinated strategy or adequate oversight. These same problems are not unique to states, but also intergovernmental organizations, as the UNHCR’s response to the emergency in Bangladesh shows.

In September 2017 UNHCR declared a state of emergency in Bangladesh as a result of the large number of refugees fleeing Myanmar. UNHCR’s field presence mobilized quickly in response to the emergency, expanding from 57 to 264 staff.³⁵ In 2019, the OIOS conducted an audit of this response to assess “whether the UNHCR Representation in Bangladesh was responding to the emergency in the country in a cost effective manner and in accordance with UNHCR’s policy requirements, with due regard to the risks that it was exposed to in the context in which it was operating.”³⁵ OIOS found that there was an overall lack of transparency in procurements.³⁵ Specifically, OIOS found that there was a lack of segregation of duties, with the same committee performing both the evaluation of tenders and the approval of awards; furthermore, final payments for “construction works were made without certifying

the value of the work done.”³⁵ Upon review of several procurement files, OIOS found that “the tendering documents for four different vendors were in the same format and font, which suggested that they may have been prepared by the same vendor.”³⁵ OIOS concluded that the weaknesses identified occurred as the UNHCR “did not identify and prioritize the controls and due diligence measures required to address the risks inherent in partnerships in the emergency context.”³⁵ As a result, the UNHCR “was exposed to the risk of failure to achieve the intended project objectives. The risk of fraud also increased.”³⁵

The risk of fraud and corruption can be mitigated to some degree through increased awareness and adequate preparation. In the case of fraud, maintaining an awareness of the elevated risk is an important consideration when conducting due diligence on a prospective vendor. While fraud can occur at any point in the procurement process, including pre-contracting, contract award, contract implementation, and contract administration, it typically materializes in the contract implementation stage with the failure of the vendor to deliver the goods or service.³⁶ At this stage, the vendor may submit an invoice for work that is not yet complete, may exaggerate hours and/or materials not purchased, or may submit a duplicate invoice.³⁷

To mitigate these challenges, the Organization of Economic Cooperation and Development (OECD), an intergovernmental organization like the UN, identifies 4 pillars that support procurement integrity. They are: “1) transparency, 2) good management, 3) prevention of misconduct, compliance and monitoring, and 4) accountability and control.”³⁸ Both transparency and accountability can be accomplished through documentation of the procurement file, to establish an audit trail that can be verified after the emergency situation subsides.³⁸ The implementation of standardized process can also support increased accountability by making it easier to detect deviations that may be indicative of corruption.³⁸ In the discussion of corruption, the increase in discretion was pointed to as a soft spot where unscrupulous activity has an opportunity to flourish. However, more discretion does not necessarily mean the complete abandonment of process and due diligence.

4.2 Determining best value

Determining best value during a crisis involves striking the difficult balance between price and quality, which is present in all procurements, with the added variable of time sensitivity.¹⁶ Experts have recommended that procurement agencies should consider these factors while maximizing competition and transparency.²⁵

One strategy for achieving best value while ensuring the timely delivery of goods is to anchor procurements, where possible, to standard products that have an established price and quality.¹⁶ The UN’s procurement model provides the following direction for procuring authorities in defining the requirement: “The use of brand names in requirement specifications, which is generally not allowed under the regular procedures, may be used in emergency procurement if it aids description of the required product.”¹¹

This can also involve proactively establishing standing offers for goods and services that are likely to be required in an emergency. Organizations that are frequently involved in relief efforts, such as Médecins Sans Frontières, Oxfam, and the United Nations Children’s Fund (UNICEF) have reference manuals that contain prices for goods and services that are commonly needed in emergencies.¹⁶ These resources provide a metric of comparison, which can serve to mitigate price gouging. This strategy was witnessed in Alberta’s response to the Slave Lake Regional Wildfires in 2011 where the Emergency Operations Centre created a cost list and pay schedule for rates relating to equipment.¹³

Another strategy that is frequently used to achieve best value is the bundling of requirements, which can help to achieve some economy of scale while saving time that might be spent running numerous procurement processes. To confront the COVID-19 emergency, this strategy was adopted by PSPC,

which coordinated the purchasing of certain commodities on behalf of provinces and territories.¹⁴ However, the benefit of saving time can come at a higher monetary cost, as the UN's emergency response in Nigeria has shown.

Findings from an audit of the UN's emergency response in Nigeria caution that bundling requirements may not always achieve the best monetary value.²² In this instance, the procuring authority bundled items for emergency shelter kits and sourced them from a single supplier.²² While this strategy proved to be the most efficient for the procuring entity, as it reduced the number of solicitations and overall lead time, the auditors found that sourcing the items separately would have achieved greater savings.²² Furthermore, the components making up the shelter kits were not delivered or stored together, despite being sourced under the same contract.²² This created challenges for the individuals on the ground to verify that all of the required components had been delivered as per the terms of the contract.²²

However, price is ultimately a function of market forces (supply and demand), which may be impacted by the emergency, leading to higher than usual prices. Furthermore, in a period of a pressing emergency, factors such as timely or reliable delivery may be given greater weight over achieving the lowest price. In instances where a pressing emergency requires contracting officials to pay above normal prices, due to the urgent need to obtain specific goods or services, it is suggested that they clearly document the contract file with the reasons for doing so.

4.3 Oversight and accountability

A review of the emergency procurement practices adopted across jurisdictions reveals that these approaches are often characterized by improvised processes designed to facilitate rapid response during an emergency situation. These approaches frequently involve necessary deviations from established oversight practices, as well as relaxed and/or fewer controls. For example, the Slave Lake Regional Wildfires in Alberta illustrate how a cumbersome procurement process can impact the effectiveness of the control framework, as well as the achievement of the overall procurement objectives. KPMG found that "when encountering procurement processes that were not suitable for the situation, responders seem to have circumvented them, engaging contractors through personal relationships and other channels."¹³

Ensuring adequate oversight and accountability in emergency procurement can be a challenging task in an environment characterized by increased operational complexity and relaxed controls.¹⁶ However, it is crucial to managing the increased risk of corruption and fraud in these environments, as monitoring under emergency circumstances is often cursory and ad-hoc at best.¹⁶ This has the effect of making emergency-related projects attractive to individuals who seek to use the situation to their advantage.¹⁶ As previously mentioned, fraud can include the delivery of sub-par goods and materials that go undetected. The certification of goods received is an important step in mitigating the risk of fraud and ensuring that critical goods can meet their intended purpose in supporting the emergency response efforts. This is particularly important in emergency procurement as due diligence during the procurement process will most likely have been carried out with less scrutiny than under normal circumstances.

Monitoring should be prioritized during and after the emergency procurement process.¹⁶ One strategy that has been used to bring some measure of oversight to the procurement process is the conduct of real-time evaluations by a group of experts and procurement officers.¹⁶ This method is often paired with peer-reviews where formal oversight is not possible.¹⁶ Another option that has been effective in increasing oversight in emergency operations is to establish a temporary review committee. For example, in response to the large number of refugees fleeing Myanmar the United Nations High Commissioner for Refugees established a Vendor Review Committee and a Local Committee on Contracts (LCC) "to provide oversight over the procurement and vendor management processes."¹⁷ Contracts deemed higher risk were subject to review by the committees prior to award.

While oversight during the emergency situation may be limited by the time constraints, these procurements will almost surely be the subject of an audit and review following the conclusion of the emergency, evidenced by the many audits and post-disaster reviews discussed in this paper. As a result, the importance of adequately documenting the procurement file cannot be overstated. Several audits of responses to emergency situations have revealed the necessity of ensuring adequate documentation exists to support the decision to invoke any exception to competition. For example, in an audit of the emergency response in Bangladesh for the UNHCR, the procurement function came under scrutiny for the use of shorter deadlines for RFP open periods that averaged 15 days for the submission of offers compared to the recommended 4-8 weeks.¹⁷ Ultimately, UNHCR was able to justify that due to the emergency, “many requirements were urgent and its Supply Unit exercised professional judgement on the market response to the tenders with shorter deadlines.”¹⁷ As this audit finding reveals, where procuring authorities are required to exercise professional judgement, ensuring that the procurement file is adequately documented is crucial to establishing the grounds for invoking the flexibilities afforded during emergency situations. The emphasis on proper documentation is noted in UN’s Procurement Manual which states that the increased flexibility in the procurement process under emergency circumstances “increases the responsibility of Procurement Officials, as well as involved managers, to document that the procurement has been conducted consistent with the procurement principles and in accordance with the Financial Regulations and Rules.”¹¹

The UN’s procurement manual contains the following words of caution: “Procurement Officials are reminded that proper filing also protects the individual undertaking the procurement activity from undue suspicion and ensures that actions can be justified to auditors.”¹¹

4.4 Supply chain disruption

A key strategy used by supply chain management professionals to mitigate risk during emergency situations and ensure continuity of supply is to ensure that there is sufficient diversity in the supply chain.³⁹ Sourcing inputs from multiple suppliers and from multiple regions creates redundancy in the supply chain that serves to mitigate the impact of a sudden and unexpected emergency. In this sense, a global supply chain can be beneficial in enabling well-prepared organizations to cope with the impact of an emergency on their supply chain.

In order to mitigate the risk of supply chain disruption, the UN’s Procurement Manual recommends that procuring authorities consider making split orders under emergency circumstances. “Split orders can ensure availability of all requested items and safeguard economy by placing a partial order with the vendor offering the lowest price for the respective item. In cases where the full quantity requested cannot be provided by one vendor, an additional order can be placed with the vendor offering the second-lowest priced.”¹¹ In order to ensure the transparency of the process, this consideration and option must be stated in the solicitation.

The global nature of the COVID-19 pandemic has presented a unique challenge for procuring authorities who have been tasked with sourcing increasingly scarce goods amidst unprecedented global competition. During the emergency, a survey by Supply Chain Canada indicated that 70% of respondents had experienced supply chain disruptions.⁴⁰ The traditional method of mitigating the impact of an emergency through diversity in the supply chain has proven challenging in the face of global demand for the same scarce goods. According to David A Johnston, Director of the Master of Supply Chain Management Program of the Schulich School of Business, this has led some to think critically about the strategy of outsourcing production, and especially global outsourcing.³⁹ As nations move quickly to respond to the COVID-19 pandemic, leaders have looked to strengthen domestic supply chains, while others have threatened to close their borders and restrict exports of certain goods.⁴¹

On March 19, 2020, the United States government invoked the *Defense Production Act* (DPA) in an effort to address supply shortages and economic development impacts.⁴² The DPA provides the President with

the “authorities to expedite and expand the supply of resources from the U.S. industrial base to support military, energy, space, and homeland security programs,” as well as emergency preparedness activities.⁴³ However, PSPC has clarified that “US law has no force or effect outside of the US with regards to industries operating in Canada.”⁴² Furthermore, Canada does have its own *Defense Production Act (DPA)*, which gives the Minister of PSPC the responsibility to administer the DPA and the exclusive authority to buy or otherwise acquire defense supplies and construct defense projects required by the Department of National Defense, subject to exceptions.⁴⁴ It further gives the Minister the power to “mobilize, conserve and coordinate all economic and industrial facilities.”⁴⁴ However, the DPA has not been used outside war times.⁴⁴

As part of Canada’s coordinated approach, Innovation, Science and Economic Development Canada (ISED) is leading a program that is intended to ramp up domestic manufacturing capacity, through the Plan to Mobilize Industry to fight COVID-19.⁴⁵ This plan provides support for businesses to rapidly scale up production or re-tool their manufacturing lines to develop products domestically that will help Canada’s response to the COVID-19 pandemic.⁴⁵ The plan also includes the promise of “[ensuring] procurement flexibility to support innovation and build domestic manufacturing capacity to supply critical health supplies to Canadians.”⁴⁵

The COVID-19 pandemic has exposed the vulnerabilities in several other common practices within the field of supply chain management, including ‘just-in-time’ inventory management. Just-in-time inventory management is a strategy that involves aligning orders of raw materials with production schedules, such that inputs are received only as they are needed.⁴⁶ This practice decreases the overall cost of production by establishing direct and simple flows of goods and services, and in doing so reduces or eliminates the cost associated with storing inputs to production. Its effectiveness, however, relies on accurately forecasting demand so that inputs are available when they are needed and production does not sit idle.⁴⁶ The sudden and unexpected increase in demand has impacted the resiliency of the supply chain, which has caused David A Johnston to observe that we need to shift our focus from “relentless efficiency’ to building greater resiliency in our supply chains.³⁹ This involves not only maintaining the appropriate safety stock to guard against unexpected production halts, but also improving transparency in the supply chain.³⁹ Transparency is critical because it contributes to the knowledge and awareness of the possible weak points in the supply chain that are susceptible to shocks. Transparency also facilitates information sharing, both within the supply chain and among the different actors working to procure the same goods or services.

4.5 Strategic planning of emergency procurement

Emergency situations generally arise from unforeseen events that significantly threaten or disrupt normal operations. By virtue of the circumstances, needs may be difficult to anticipate due to a rapidly changing environment. Taking proactive measures to build an agile procurement function is central to ensuring that the organization is prepared to respond during an emergency situation. The UN procurement manual identifies a number of activities that procurement authorities can take in to account to ensure they are prepared to respond to an emergency. These include:

- Advance identification and registration of suitable vendors of products frequently requested in emergency operations, including confirmation by vendors of willingness to respond to solicitations on short notice;
- Development of standard specifications/ Terms of References/ Statement of Work for goods, services, or works typically requested in emergency operations;
- Establishment of long-term agreements or standing offers with vendors of products typically requested in emergency operations, and specifying in these standing offers the need for stock availability and emergency preparedness; and
- Identification of relevant standing offers from other organizations.¹¹

Since it is not possible to foresee every type of emergency, having a pre-defined framework in place can bring some measure of consistency and order to what has the potential to be a chaotic environment.

5. Conclusion

This study was undertaken with the purpose of identifying how emergency procurement practices have been utilized in response to past disasters, and what, if any, lessons learned could be drawn from these experiences for use in future situations involving emergency procurement. There are a number of important findings discovered in the research:

1. There are several common approaches to procurement that are typically adopted in instances of a pressing emergency. These include increased financial delegation of authority, engaging in non-competitive contracting, decentralizing and/or centralizing the procurement function so that actors closer to the emergency can efficiently source goods and services, and making use of tools that are already in place, such as vendor lists or standing offers and exercising options in existing contracts, to reduce procurement lead-time.
2. There are risks and challenges that can be encountered when engaging in procurement under emergency circumstances. These include the elevated risks of fraud and corruption, striking a delicate balance between price and quality amidst critical time constraints to determine best value, the challenges of ensuring adequate oversight and accountability in light of improvised processes and increased flexibilities, and managing supply chain disruptions.
3. The success of a particular strategy for engaging in emergency procurement may be dependent on the nature of the emergency situation; for example, whether it is geographically localized or country wide affects the procurement methodology. Strategic planning to create a pre-defined framework can bring some measure of consistency and order to what has the potential to be a chaotic environment.
4. The creation of an interim emergency contracting oversight committee was shown to be an effective strategy for managing the increased risk of fraud and corruption by bringing another level of oversight to high-risk procurements in a relaxed control environment.
5. Emergency procurement will require individuals to exercise some degree of professional judgement, as it is not possible to foresee all emergencies, and this should be done with the utmost care and clear documentation and justification on file to support decision making.
6. While a pressing emergency is consistently regarded as an event that can justify some exceptions to the rules and regulations that govern procurement, it does not in itself provide a blanket justification to set aside due process. When a competitive process is initiated during an emergency situation, procuring authorities remain bound by the same duties of fairness and transparency that exist in non-emergency situations.
7. There may continue to be circumstances in a period characterized by a pressing emergency where a requirement should be subject to a competitive process, or where additional levels of approval should be sought. Professional judgement should be used in making these determinations and appropriate justification should always be on file.

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