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2020

## COVID-19: LESSONS LEARNED IN PUBLIC PROCUREMENT. TIME FOR A NEW NORMAL?

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## **“Covid 19: Lessons learned in public procurement. Time for a new Normal?”**

**By Laurence Folliot Lalliot & Christopher Yukins**

### **DRAFT**

In a crisis folded within the broader COVID-19 pandemic, public procurement during the pandemic suddenly seemed incapable of satisfying its *raison d'être*, namely to provide public institutions with the supplies they needed -- the masks, personal protective equipment and respirators desperately needed by medical personnel, patients and ordinary citizens all over the world. This crisis of confidence in public procurement deepened as hundreds of press articles<sup>1</sup>, specialized magazines and blogs<sup>2</sup> (the reaction on the internet has been almost as rapid as the pandemic) exposed the dark corners of public purchasing of medical supplies, revealing countless failures in this obscure corner of public administration.

On a legal level, the COVID-19 crisis, decidedly unlike any other, called into question many pillars of public procurement law, including the longstanding assumption that direct negotiation between public buyers and sellers should be avoided if at all possible<sup>3</sup>. The crisis overturned the traditional order of the public procurement market: with the sudden spike in public demand, suppliers and intermediaries took over the somnolent markets traditionally dominated by public buyers. The pandemic, like Pandora opening her legendary box, released many evils as well as hope – hope that stems from the new perspectives lent by the pandemic.

With this article we wish to review some of the most important elements of this purchasing crisis, specifically the key disruptive forces which stand in stark contrast to traditional approaches to public procurement. Several disruptions warrant attention: 1. The temporal disruption, with the unprecedented and forced acceleration of purchasing procedures; 2. The competition disruption, which caused an inversion of the characteristics of the public purchasing market; 3. The epistemological disruption, i.e., the destruction of assumptions grounded in a monopsonist's market with sudden competition between public buyers; 4. The geographic disruption due to the global dimension of the voracious public demand; 5. And finally, the protectionist disruption – the way the pandemic paradoxically both fed and made nonsense of the nationalism that normally surrounds public procurement markets.

After these observations, we will propose possible solutions, while mindful that the pandemic's extraordinary disruptions, though novel and jarring, were linked to an exceptional situation of shortage across a limited range of supplies. The pandemic's lessons should not be generalized

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<sup>1</sup> L. Folliot Lalliot, « La concurrence entre Etats aggrave la crise sanitaire », *Le Monde* 30 mars 2020.

<sup>2</sup> Christopher Yukins, Blog: [Publicprocurementinternational.com](https://publicprocurementinternational.com), with a special entry for the procurement issues related to the COVID crisis. <https://publicprocurementinternational.com/resources-on-covid-19-and-public-procurement/>.

<sup>3</sup> The COVID-19 crisis also affected the procurement rules covering contract performance, which are addressed in more detail in Christopher R. Yukins, *U.S. Procurement and the COVID-19 Pandemic*, 2020 *Pub. Proc. L. Rev.* (Sweet & Maxwell, forthcoming). In the United States, the COVID-19 crisis also spawned an important experiment in using procurement contracts to ensure economic stability, under the \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act signed by President Trump on March 27, 2020. See Christopher R. Yukins, *Feature Comment: Maximizing Recovery: Contractor Reimbursement for COVID-19 Paid Leave Under §3610 of the CARES Act*, 62 *Gov. Contractor* ¶ 156 (June 10, 2020).

beyond reason to dismantle the entire public procurement regime. But if the pandemic has laid bare the need to rethink emergency public purchasing procedures, the crisis should also trigger other improvements to traditional public purchasing mechanisms, while remaining true to fundamental principles. As the discussion below reflects, the lessons from the pandemic reinforce procurement's traditional principles, for the pandemic showed why it is necessary for public purchasers to: 1. Restore transparency and integrity even in emergencies; 2. Learn to buy through an international supply chain; 3. Learn to buy collectively; and, 4. Regulate from a holistic perspective that can adjust to rapid changes in public markets..

## I. Opening Pandora's Box: The Pandemic's Disruptions

### 1. The temporal disruption: the rapid obsolescence of the so-called "emergency" purchasing procedures in the context of the Coronavirus crisis

One of the abiding assumptions in public procurement is that time flows like water – time is considered a bountiful resource, one that can be freely allocated to resolve inefficiencies in a system built around the agent – the purchasing official – rather than the principal (the government and its users).<sup>4</sup> Leisurely timelines are set by statutes and regulations, not by user's needs or market exigencies. Thus, for example, in important part because a purchasing official may not have done sufficient market outreach, the U.S. system requires that a competition be held open for 30 days after notice of the solicitation is published,<sup>5</sup> to allow the market to respond; after award, the European rules call for a 10-day “standstill”<sup>6</sup> period to give disappointed bidders a chance to challenge officials' mistakes (themselves often the product of officials' indifference); and the U.S. system allows another 100 days for a bid challenge to be resolved.<sup>7</sup> Time allows the purchaser's (the agent's) mistakes and indifference to be corrected, and the opportunity costs caused by long delays are typically borne by the user and the contractor – not the agent/official. Where the opportunity costs of delay are acute and unbearable, when there is a real emergency, then the rules allow expedition by short-cutting the normal notice and competition requirements, but even then the rules anticipate an orderly process and at least some measure of transparency.<sup>8</sup> All of that, however, collapsed in many places relatively early in the pandemic.

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<sup>4</sup> See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. (1976), <https://ssrn.com/abstract=94043>; Ohad Soudry, *A Principal-Agent Analysis of Accountability in Public Procurement* (2007), <https://www.semanticscholar.org/paper/A-Principal-Agent-Analysis-of-Accountability-in-Soudry/f3e10f90dcf7606e67db88ed0a0eafce1ca82234>; Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63 (2010), <https://ssrn.com/abstract=1776295>.

<sup>5</sup> Federal Acquisition Regulation (FAR) 5.203, 48 Code of Federal Regulations (CFR) § 5.203, available at [www.acquisition.gov](http://www.acquisition.gov).

<sup>6</sup> E.g., European Directive 2007/66/EC, art. 2A (2007) (on standstill period).

<sup>7</sup> U.S. Government Accountability Office (GAO), *GAO Bid Protests: A Descriptive Guide*, Timetable, <https://www.gao.gov/decisions/bidpro/bid/timetable.html>.

<sup>8</sup> E.g., United Nations Commission on International Trade Law (UNCITRAL), *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, at 36-37 (2014) (explaining how traditional open tendering gives way to emergency procurement procedures).

To cope with the swelling medical needs during the pandemic, public purchasing procedures loosened through successive phases over the course of a few weeks. Even if some purchasing authorities expected in February 2020 (as the pandemic emerged) to launch open bidding processes (that is to say, to follow traditional procedures), this first recourse to traditional bidding procedures quickly reached its limits because the deadlines for filing and examining offers were simply incompatible with the rapidly rising medical demands.

Then, from mid-March 2020, at least for France, the so-called "emergency" procedures with shortened advertising deadlines (fewer than 15 days instead of 35 days) seemed the right solution under the European Procurement Directives. To this end, the French Government published an interpretation note of March 18 to encourage public buyers to reduce the usual deadlines<sup>9</sup>.

However, this approach also quickly showed its limitations, because an even less restrictive third procedure, the negotiated procedure without prior publicity under the European directives, was much more flexible and seemed better adapted to the runaway situation of the COVID-19 market. After all, the purchases needed to deal with the brutal emergence of the epidemic perfectly met the regulatory definition of urgency, and even of extreme urgency under the European rules, that is to say a situation which is unpredictable, irresistible and external. As a result, the European Commission recommended the negotiated procedure without prior publication or direct agreement for use by the European Member States on April 1, 2020<sup>10</sup>.

But, with the pandemic's escalation at the end of March, and the unbridled demand in the market for personal protective equipment desperately sought after by major world players, the expedited procedures under traditional rules, though exceptional, were themselves abandoned by many public buyers in favor of direct orders, without transparency or open competition, in clear violation of long-established procurement rules and rules. Market players were explicit: if available supplies could not be purchased and paid for quickly – sometimes within minutes – those supplies could go to another buyer<sup>11</sup>.

With the rise of these purchasing techniques without any supervision, the traditional pillars of public purchasing collapsed. Some nations, such as the Algeria, the Central African Republic, China, Mexico, Poland, Senegal and Zimbabwe adopted laws specifically allowing contracting authorities to derogate from their public procurement laws in making contract awards and administering public contracts during the COVID-19 emergency<sup>12</sup>. Faced with the rising tide

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<sup>9</sup> Ministère de l'Économie et des Finances, Direction des Affaires Juridiques, « La passation et l'exécution des marchés publics en situation de crise sanitaire », 18 mars 2020.

<sup>10</sup> Commission Européenne, Communication de la Commission, « Orientations de la Commission européenne sur l'utilisation des marchés publics dans la situation d'urgence liée à la crise de la COVID-19 », (2020/C 108 I/01), accessible [https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52020XC0401\(05\)&from=EN#ntr11-CI2020108FR.01000101-E0011](https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52020XC0401(05)&from=EN#ntr11-CI2020108FR.01000101-E0011). The English-language version of the Commission Instruction is available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN).

<sup>11</sup> For a contemporaneous discussion of the unfolding situation in world markets, see *Webinar -- Straight Talk: Emergency Procurement in the COVID-19 Pandemic* (Apr. 2, 2020), <https://publicprocurementinternational.com/2020/03/27/emergency-procurement-in-the-covid-19-pandemic-april-2-2020/>.

<sup>12</sup> International Monetary Fund (IMF), *Policy Responses to COVID-19*, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#P>; Michal Kania (University of Silesia in Katowice), *Public Procurement and COVID-19 in Poland* (2020), <https://publicprocurementinternational.com/wp-content/uploads/2020/04/Public-Procurement-and-COVID-19-in-Poland.-Michal-Kania.-31-March-2020.docx>;

of a pandemic, public buyers found themselves caught between the opportunistic demands of suppliers and the urgency to meet needs -- to the point that the traditional bulwarks, the principles of transparency and competition that undergird public procurement – gave way. The COVID-19 crisis thus up-ended the traditional assumptions that shape public procurement.

## 2. The competition disruption: a supplier market

Another abiding assumption in public procurement has long been that, because of governments' massive purchasing power, public procurement is a "buyer's" market – indeed, the government is often the *only* buyer, in a monopsony. This explained why public purchasers could afford to underinvest in market engagement: suppliers focused on the public market, to survive, would accommodate government delays and transaction costs. The problem was magnified in a way not fully understood before the pandemic, because public markets were *literally* buyers' markets, structured around contracting officials who serve as purchasing intermediaries. All of that turned upside-down in the crush of the pandemic, as sellers of critical suppliers took the upper hand. While public markets in principle allow public buyers to take advantage of a dominant position (even a monopsony in certain sectors, such as armaments), in a market normally characterized by a multitude of suppliers who compete for the public bonanza, the situation was completely reversed in the context of the health crisis. Taking advantage of the surging demand from governments that suddenly became competitors in purchasing the same products, suppliers and sometimes unscrupulous intermediaries not only set prices far above previous prices but also demanded conditions normally prohibited by public procurement rules (such as advance payment). Worse still, as suppliers abandoned commitments to public purchasers to take advantage of new, more attractive prices, certain contracts were not honored.

Across the globe, direct buying on vendor terms replaced orthodox public procurement techniques that traditionally require scrupulous checks on company guarantees and a tightly framed system of advance payments. On March 24, for example, a cross-section of front-line purchasers from Europe and the Americas explained during an international webinar how buyers' and sellers' relative power had reversed in the pandemic.<sup>13</sup> Obligated to find vital supplies as quickly as possible, Italian procuring entities had been authorized by a succession of exceptional regulatory provisions<sup>14</sup> to accept vendors' demands for advance payments which are normally prohibited in Italian public procurement law.

To understand the scope of this supply crisis, it is necessary to segment the analysis according to the types of markets, between industrialized and developing economies. Not only has public demand grown exponentially during the pandemic, but for certain off-the-shelf commercial products such as masks or hydroalcoholic gels, private demand has helped multiply needs and exacerbate competition among potential buyers. This imbalance in the market for health supplies first struck the most developed countries, which were better able to cope with the resulting rising prices. On the other hand, the delayed spread of the pandemic in the poorest countries raised other questions, in particular whether the international community would

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Open Contracting Partnership & ONG 3D, *When Covid-19 Confirms the Need for Open Contracting in Senegal* (2020), <https://www.developmentgateway.org/OC-Senegal>.

<sup>13</sup> Webinar – Public Contracts and the Coronavirus – Online Colloquium (Mar. 24, 2020), <https://publicprocurementinternational.com/2020/03/16/public-contracts-and-the-coronavirus-online-colloquium-march-24-2020/>

<sup>14</sup> Dentons Files: « COVID-19 and derogations from the procurement code in Italy », 16 mars 2020, available at <https://www.jdsupra.com/legalnews/covid-19-and-derogations-from-the-52116/>

provide necessary support as those poorer nations confronted radically higher prices. This growing rift in the market, exacerbated by competition between buyers, was finally addressed by the World Bank in early May 2020, when it proposed to assist its beneficiary nations through a new means of assistance, by presenting vendors to interested governments<sup>15</sup>.

### 3. The epistemological disruption: competition between public buyers

As was noted above, the pandemic uprooted classic means of procurement because scarcity of critical supplies gave suppliers control in the market. The global and savage competition for scarce supplies had another disruptive effect: it pitted governments against one another, turning complacent monopsonists into aggressively competing buyers. This disruption might be termed an epistemological one – one that threatened to destroy the premises for the discipline of public procurement – because it raised serious questions as to whether procurement should be left to corps of public procurement officials governed by a commonly recognized set of norms and rules. This disruption thus ran much deeper, for when governments competed openly against other governments, and governments were held publicly accountable for their failures to procure essential supplies, stakeholders asked aloud whether the public procurement system might not be replaced by another logistical arrangement better able to users' needs. The crisis in the market, in other words, led to a crisis in confidence, and opened the door to a fundamental shift in the way we think about public procurement.

Thanks to a rush for common medical supplies, as noted the logic of public purchasing was reversed, and vendors found themselves in a dominant position to raise prices; at the same time, because the pandemic caused the same health calamity in many nations simultaneously, governments competed with each other fiercely for supplies, even within the same country. As the pandemic unfolded over days and weeks, public reports revealed the intensity of competition between governments, some with considerable financial means -- China, the United States, Italy or France in particular -- against others much less fortunate, such as North African countries that were quickly affected by the pandemic and those of sub-Saharan Africa to a, so far, lesser extent.

But governments' competitive purchasing during the pandemic also devastated weaker public buyers *within* nations, such as local governments, public hospitals or retirement homes, which were trying to protect their workers and their patients. Here again, the competitive situation strongly disadvantaged small public buyers. The search for key equipment such as masks became a true race, such as through online auction sites in the United States on which both public central purchasing bodies and large public buyers positioned themselves for vital purchases.

This startling competition between public buyers reflected major shortcomings in coordination and collaboration, and unforeseen limits to decentralization or federalism, sometimes fueled by political concerns, as demonstrated by the situation in Spain. In the United States, the Trump administration's willingness to use federal powers<sup>16</sup> to usurp state governments' purchasing –

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<sup>15</sup> Enzo de Laurentis, "COVID-19: How the World Bank is helping countries procure critical medical supplies", [https://blogs.worldbank.org/voices/covid-19-how-world-bank-helping-countries-procure-critical-medical-supplies?cid=ECR\\_E\\_NewsletterWeekly\\_EN\\_EXT&deliveryName=DM63224](https://blogs.worldbank.org/voices/covid-19-how-world-bank-helping-countries-procure-critical-medical-supplies?cid=ECR_E_NewsletterWeekly_EN_EXT&deliveryName=DM63224).

<sup>16</sup> L. Folliot Lalliot, « Comment Trump instrumentalise l'approvisionnement », Website of the French weekly news L'Express, April 20, 2020, available at [https://www.lexpress.fr/actualite/idees-et-debats/comment-trump-instrumentalise-l-approvisionnement-en-masques-aux-etats-unis\\_2124131.html](https://www.lexpress.fr/actualite/idees-et-debats/comment-trump-instrumentalise-l-approvisionnement-en-masques-aux-etats-unis_2124131.html)

literally, to seize supplies which had been bought by state governments, even though state governments constitutionally have first responsibility for public health -- even led some state governors to threaten the use of force to block federal requisitions of medical devices. This would have resulted in a direct confrontation between federal and state armed forces, essentially unknown since the U.S. Civil War ended in 1865<sup>17</sup>. This was clearly a market in collapse, a dystopian marketplace.

To understand the depth of this disruption, and the scope of the potential remedies, it is important to stress that this was a crisis of *legitimacy*: the governments that could not procure vital goods in a time of natural disaster risked losing their mandate to govern. The assumption that has always informed critical thinking about public procurement is that, however inefficient it may be, the established system of public procurement is preferable to the chaotic and corrupt buying that would otherwise undermine governments' legitimacy. The pandemic in many ways destroyed that assumption, and as the discussion below will show, this conceptual revolution – this destruction of the epistemological foundations of public procurement – may lead to radically different pathways for reform.

#### 4. The geographic disruption

International trade instruments which address public procurement, such as the World Trade Organization (WTO) Government Procurement Agreement (GPA), were gradually built after World War II to facilitate access for foreign vendors by removing non-tariff barriers to public procurement markets<sup>18</sup>. By way of illustration, at the European level, the legal framework of the EU Public Procurement Directives was designed to encourage European public contracting authorities to broaden their base of suppliers beyond preferred local vendors: per the GPA, above certain monetary thresholds, not only European companies but also vendors from other members of the GPA (such as Japan and South Korea) are eligible to compete without discrimination.

Acting as an accelerator, the pandemic has driven open public procurement markets, forcing Western contracting authorities (even the most reluctant<sup>19</sup>) to turn to Asian suppliers to fill domestic gaps in supply. In fact, production of key COVID-19 medical supplies was highly concentrated in China<sup>20</sup> a country which is not (for the moment) party to the GPA, and which does not have a trade agreement governing procurement trade with the European Union or the United States.

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<sup>17</sup> See, e.g. Zolan Kanno-Youngs & Jack Nicas, 'Swept Up by FEMA': *Complicated Medical Supply System Sows Confusion*, N.Y. Times, Apr. 6, 2020 (noting that the "Trump administration's new method for distributing medical supplies has led to charges of confiscation"), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>.

<sup>18</sup> See, e.g., Robert A. Anderson & Anna Caroline Muller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development* (2017), WTO Staff Working Papers ERSD-2017-04, World Trade Organization (WTO), Economic Research and Statistics Division, <https://ideas.repec.org/p/zbw/wtowps/ersd201704.html>.

<sup>19</sup> Senior members of the Trump administration have indicated that the United States is considering withdrawing from the Government Procurement Agreement. E.g., Robert D. Anderson & Christopher R. Yukins, *Withdrawing the United States from the WTO Government Procurement Agreement (GPA): Assessing Potential Damage to the U.S. and Its Contracting Community*, 62 Gov. Contr. ¶ 35 (Thomson Reuters, Feb. 12, 2020), GWU Legal Studies Research Paper No. 2020-08; Jean Heilman Grier, *Significance of Access to Sub-central Procurement under GPA*, 6 May 2020, available at <https://trade.djaghe.com/>.

<sup>20</sup> See Simon Evenett et al., Global Trade Alert, *Tackling COVID-19 Together* (Mar. 23, 2020), <https://www.globaltradealert.org/reports/51>.

Consequently, this episode of massive international public procurement took place largely outside the trade instruments that were designed to facilitate public procurement trade. This apparent paradox arose because these instruments were designed to redirect trade in a stable global public procurement market, and those who framed the agreements did not foresee such a catastrophic situation. Certainly the trade negotiators envisaged the possibility of a public health crisis<sup>21</sup>, but then only to allow a State party to refuse access to foreign companies, and to purchase solely from domestic companies.

In the COVID-19 upheaval, nations found themselves in the precisely opposite situation, in which they hoped to *increase* their purchases from foreign suppliers<sup>22</sup>. In one prominent example of this conundrum, the United States lifted restrictions on the sale of certain key supplies which would normally be subject to the Buy American Act<sup>23</sup>.

The COVID-19 crisis thus revealed a bias deeply embedded in international public procurement trade instruments: in order to facilitate access for foreign companies, these instruments (such as the GPA) focus on a relatively narrow band of trade barriers – overtly discriminatory measures such as “buy national” laws and crabbed procurement procedures devised to exclude foreign vendors. By focusing on *ex ante* requirements in order to stimulate competition, these trade instruments have largely overlooked the upstream controls and certifications which this pandemic showed can be much more important to cross-border trade in public procurement markets. Even within the framework of the European Public Procurement Directives, which *do* address certifications and restrictive labels in European procurement markets, the gaps in the regulatory structure became clear when governments purchased Chinese supplies incompatible with European standards<sup>24</sup>, and goods with fraudulent certifications with counterfeit labels used by malicious suppliers. The pandemic showed, in sum, that while trade negotiators had long sought to open international procurement markets, *how* those transborder procurements would work in practice too often had been ignored.

#### 5. The protectionist disruption – emergency trade controls on essential supplies

Just as too little attention had been paid to how to control cross-border trade, the pandemic showed that there are far too few controls in place to keep trade channels open when they are essential to save lives. Protectionism – both import and export controls – ran riot in the pandemic, as governments responded to popular pressures to close their borders. Those trade restraints included efforts to “on-shore” production of essential supplies by discouraging foreign competition, and export controls to keep critical supplies from flowing abroad. Because of the uneven spread of the pandemic, and the need to respond flexibly to new outbreaks in new populations, these clumsy trade barriers threatened to increase the death toll from the pandemic.

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<sup>21</sup> Robert A. Anderson, *Keeping markets open while ensuring due flexibility for governments in a time of economic and public health crisis: the role of the WTO Agreement on Government Procurement (GPA)*, 2020 Pub. Proc. L. Rev. (forthcoming).

<sup>22</sup> However, we can advance the idea that this exception could play in the future, if the countries which launched mass productions of sanitary products and equipment found themselves in a situation of surplus: they would then be tempted to invoke this exception of public health to favor local suppliers.

<sup>23</sup> <https://interact.gsa.gov/document/gsa-fas-temporarily-allows-award-non-taa-compliant-products-under-mas-program-respond-covid>

<sup>24</sup> Pour faire face à cette situation dans l’urgence de la crise du COVID, la Commission Européenne et le CEN (Comité européen de normalisation) ont rendu gratuit l’accès aux standards européens pour les produits manquants afin de faciliter leur mise en production ([https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_502](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_502))?



The phenomenon a speculative market with a sharp rise in demand is a well-known economic situation, which is especially common in petroleum markets. But it is very rare in public procurement markets for many countries to seek large quantities of the same supplies around the world. It should be noted that this sudden surge in demand did not come from all countries together, since the epidemic struck successively at different times and to varying degrees; peak demand was reached when there was convergence of demand from countries which had particularly high purchasing power (United States, Europe). These countries therefore found themselves in competition to buy the same products which came primarily from domestic sources and China (since Chinese production was predominant in masks and personal protective equipment (PPE)).

The case of China is particularly interesting because, as the first country to fall victim to the pandemic, and a primary source of essential medical supplies, China's reaction had a major collateral impact on international public purchasing operations<sup>25</sup>. The Chinese government quickly opted for strong collaboration between the public and private sectors by combining both the purchasing and production functions in a structure dedicated to the fight against COVID-19. The Chinese firms were thus able to benefit from fiscal support measures to embark on the massive production, the State having undertaken to buy any surplus.<sup>26</sup>

Many other countries resorted to aggressive import and export controls in an attempt to maximize access to essential supplies and materials. To husband their available supplies, for example, some nations in Europe imposed new controls on exports, which the European Union quickly moved to channel – but not abolish – by asserting its prerogative to control transborder trade.<sup>27</sup> In the United States, President Trump triggered the federal government's powers (though after a widely criticized delay<sup>28</sup>) the Defense Production Act of 1950,<sup>29</sup> a Cold War-era statute which gave Trump broad authority to control production and distribution of key supplies. Trump used that authority under the Defense Production Act in a number of emergency measures, including one to block exports of certain personal protective equipment.<sup>30</sup> The Trump administration also started the process of “on-shoring” key manufacturing of

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<sup>25</sup> Explanations shared at the Webinar “Emergency procurement in the Covid 19 pandemic” du 2 avril 2020 by CAO Fuguo, Professor at the Law School of the Central University of Finance and Economics (Director, China Procurement Research Center) (Beijing, China), available at: <https://publicprocurementinternational.com/2020/03/27/emergency-procurement-in-the-covid-19-pandemic-april-2-2020/>

<sup>26</sup> In the United States, the federal government bears a similar risk of surplus production through standard termination for convenience clauses, which provide that if contracts are terminated prematurely for the government's convenience, the government will reimburse the contractor its sunk costs. *See, e.g.*, Federal Acquisition Regulation (FAR) 52.249-2, 48 C.F.R. § 52.249-2, Termination for Convenience of the Government. For a broader discussion of the standard clauses and their role in the U.S. government's allocation of risks in the pandemic, see Christopher R. Yukins, *U.S. Procurement and the COVID-19 Pandemic*, 2020 Pub. Proc. L. Rev. (Sweet & Maxwell, forthcoming).

<sup>27</sup> Thus the European Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization, that is COVID related supplies <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0402>

<sup>28</sup> Christopher R. Yukins, *Trump's Procurement Mistake May Cost American Lives*, 20 mars 2020, Blog PublicProcurementInternational available at <https://publicprocurementinternational.com/2020/03/20/trumps-procurement-mistake-may-cost-american-lives/>

<sup>29</sup> [50 U.S.C. App. § 2061 et se. Available at [https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final\\_defense\\_production\\_act\\_091030.pdf](https://www.fema.gov/media-library-data/20130726-1650-20490-5258/final_defense_production_act_091030.pdf)

<sup>30</sup> On April 10, 2020 the Federal Emergency Management Agency imposed export controls under the Defense Production Act on personal protection equipment, including certain masks and gloves.

medical supplies,<sup>31</sup> a long-term, multi-faceted initiative which (among other things) is expected to use domestic preferences in procurement to encourage U.S.-based manufacturing, to secure supply chains for future crises but also to further the Trump administration’s “economic nationalism” and create U.S. manufacturing jobs to bolster Trump’s political base. (The European Union notably eschewed this “on-shoring” strategy, recognizing the deeply established international supply chains for medical supplies.<sup>32</sup>).

These were just some of the many trade controls that countries around the world imposed, in aggressive efforts to garner a larger share of scarce international supplies<sup>33</sup> -- protectionist measures which, it should be noted, followed years of mounting protectionism during a period of rising nationalism in many nations.<sup>34</sup> Those trade restrictions magnified the global economic disparities between rich and poor nations – disparities which were highlighted even more harshly when press stories emerged of the buying power of wealthier nations, such as reports of agents carrying suitcases full of cash to preempt other buyers for critical supplies.<sup>35</sup>

These trade measures limiting the import and export of critical medical supplies had secondary effects which were only dimly understood during the pandemic. Because of the slow and uneven spread of the pandemic around the globe, demand for life-saving supplies surged in different countries at different times. These trade measures remained in place, however, even as the pandemic receded and demand declined in the nations which had imposed these controls. As a result, it was more difficult to shift essential supplies to those countries which needed them most, as the pandemic continued its march across the world – a largely unforeseen and deadly effect of many nations’ emergency protectionist measures. Notably, international organizations such as the United Nations remained exempt from these trade controls, which meant that they could fulfill the humanitarian mission of distributing supplies while bypassing national trade controls.<sup>36</sup>

## II. Solving the equation: revolution and improvements

As the discussion above reflected, the COVID-19 pandemic overwhelmed the traditional, often complacent systems and norms of public procurement around the world. The life-or-death demand for immediate supplies made it impossible to tolerate the delays normally part of public

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<sup>31</sup> See, e.g., Ann Samson, *Coronavirus Spurs U.S. Efforts to End China’s Chokehold on Drugs*, N.Y. Times, Mar. 11, 2020, <https://www.nytimes.com/2020/03/11/business/economy/coronavirus-china-trump-drugs.html>.

<sup>32</sup> Alan Beattie & Jim Brunsten, *EU should ‘not aim for self-sufficiency’ after coronavirus, trade chief says*, Financial Times, Apr. 23, 2020, available at [www.ft.com](http://www.ft.com).

<sup>33</sup> It was reported that 93 countries have adopted more than 120 measures on trade in medical products since the beginning of 2020: European University Institute, Global Trade Alert & World Bank Initiative “21st Century Tracking of Pandemic-Era Trade Policies in Food and Medical Products”, 4 May 2020, available at <https://www.globaltradealert.org/reports>.

<sup>34</sup> Zornitsa Kutlina-Dimitrova, “Government Procurement: Data, trends and protectionist tendencies, EU Chief Economist Note, Issue 3, Sept. 2018, available at [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157319.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157319.pdf)

<sup>35</sup> See, e.g., Noam N. Levey & Noah Bierman, *As Trump lets private sector supply the coronavirus fight, the well-connected often get first dibs*, L.A. Times, Apr. 1, 2020, <https://www.latimes.com/politics/story/2020-04-01/coronavirus-medical-equipment-goes-to-well-connected>; Shuki Sadeh, *In Israel’s Race to Get Medical Gear, Suitcases Full of Cash Win the Day*, Haaretz, Apr. 23, 2020, <https://www.haaretz.com/israel-news/business/.premium-in-israel-s-race-to-get-medical-gear-cash-in-suitcases-wins-the-day-1.8794877>.

<sup>36</sup> See Benedetta Audia, *UNOPS – United Nations Purchasing Consortium – COVID-19, in Webinar – Recovering from the Pandemic: European Initiatives, U.S. Perspectives* (May 14, 2020), <https://publicprocurementinternational.com/2020/05/06/eu-us-perspectives/>.

procurement; this highlighted the “agency” issues (contracting officials’ inefficiency in achieving outcomes) which have long dogged public procurement. The crush of the pandemic also transformed a buyers’ public procurement market into a sellers’ market, and forced those government buyers to compete bitterly with one another – disruptions which shook fundamental assumptions that traditionally shaped the norms and rules of public procurement. Finally, the pandemic made plain shortcomings in cross-border trade, at a time when access to global supply chains was critically needed.

The questions, then, is what lessons can be learned from the COVID-19 crisis? Public procurement law, much like other areas of public action touched by the pandemic, must reinvent itself, but to what extent? To cope with the health emergencies that other disasters could bring, and the demands of a globalized, technologically sophisticated market, a revolution is necessary. Although purchases of medical supplies represent only a small part of the trillions of dollars in annual public purchases, the lessons from the current crisis could hasten improvements that reach across public procurement, and transcend borders.

#### 1. Restore transparency and integrity even in emergencies

Too many governments used the COVID-19 emergency as a ready excuse to free themselves from compliance with the standards of public procurement that are today internationally recognized: transparency and integrity, equal competitive access and equal treatment of businesses, best value and efficiency. The pandemic saw direct orders, sometimes simply placed over the phone, the use of unknown intermediaries or unverified suppliers, and other derogations dictated by urgency but which could lead to serious breaches of the principles of transparency and integrity which must inform all public purchases. Not only do these rushed practices open the door to favoritism or corruption<sup>37</sup>, but they can also foster embezzlement and fraud, the consequences of which can be particularly dramatic in the field of health<sup>38</sup>.

A first lesson of the pandemic, therefore, is that it is necessary to insist that even during an emergency, procedures must remain transparent and traceable, at least *ex post* with the obligation to publish post-award notices containing the main information on the contract. Although a durably transparency and accountable process may be required by the European Directives, even during an emergency, those norms are not always honored by EU Member States’ laws on procurements below the European monetary thresholds, and transparency and accountability sometimes disappeared entirely in other countries which hastily exempted COVID-19 contracting from their normal public procurement rules.

As more public purchasing procedures move online, the publication of award notices on the internet should take place quickly, and the data should be readily identifiable (on a regularly

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<sup>37</sup> The necessary hindsight is still lacking in order to have an overview of the integrity problems posed by COVID contracts. For a first approach: see the complaint submitted by Dr. Rick Bright to the US Office of Special Counsel, published May 5, 2020 on the CNN website <https://edition.cnn.com/2020/05/05/politics/rick-bright-full-complaint/index.html>. Protesting the way in which he was removed from his post as Director of the Biomedical Advanced Research and Development Authority (BARDA), Dr. R. Bright asserted that, since 2017, several contracts had been wrongly awarded to firms with political connections in the Trump administration. With the COVID-19 crisis, Congress appropriated additional billions of dollars for BARDA, Dr. Bright alleged, and pressures had intensified, in particular to award contracts for the production of drugs still in their exploratory phases, in violation of the rules of federal government contracts.

<sup>38</sup> Webinar -- OECD Anti-corruption and integrity: safeguards for a resilient COVID-19 response and recovery, Webinar, 13 May 2020, <https://www.oecd.org/corruption-integrity/forum/agenda/>.

used public website, for example), and accessible and machine-readable in keeping with standard principles of open contracting.<sup>39</sup> To focus accountability, the data related to emergency contracting may be gathered on a governmental online repository dedicated to the crisis, which allows for easy accounting of contracts awarded to deal with the disaster. Lithuania has set up such a platform for the COVID-19 pandemic<sup>40</sup>. In terms of governance and transparency, civil society thus benefits from a more facile understanding of public action, which helps to thwart rumors and restore confidence in the public buyer's legitimacy.

Transparency has another incidental benefit when supplies must be reallocated as a disaster advances across the globe: transparent procurement will allow other buyers insights into where critically needed supplies may be stockpiled. This lesson of the COVID-19 pandemic reinforced an emerging principle in public contracting: as the transaction costs of transparency drop through advances in information technology, and market players grow increasingly accustomed to transparency and accountability, because the positive externalities of transparency are almost impossible to predict, public policy tends presumptively to tilt towards transparency.

Restoring integrity – taking the functional and reputational measures necessary to bolster the legitimacy and efficiency of a government procurement system<sup>41</sup> -- also required effective sanctions mechanisms in the pandemic: sanctions against unjustified cartels or price-gouging imposed by competition authorities, sanctions against corruption imposed by criminal courts or by anti-corruption authorities, and criminal sanctions against fraud.

While some nations already have an extensive arsenal of laws to combat fraud and corruption in public procurement, other nations have not yet adopted such mechanisms or do not have the effective means to implement them. The False Claims Act<sup>42</sup> in the United States, for example, allows a whistleblower to bring a fraud claim in the government's name, and ultimately to share in the government's recovery for defective products or other forms fraud (recoveries which can be massive, because of draconian penalties under the law). These types of fraud remedies are relatively rare in other countries, and reports of widespread fraud during the pandemic pointed up the need to assimilate anti-fraud measures into other procurement systems.

Vendors' often unreliable performance during the pandemic also pointed up the need for governments to share information about dubious vendors more efficiently, and the need to exclude from public markets those vendors that pose unacceptable reputational and performance risks.<sup>43</sup> Reports emerged during the pandemic of public purchasers sharing

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<sup>39</sup> Open Contracting Partnership, *Open Contracting Data Standard: Documentation* (May 2017), <https://standard.open-contracting.org/latest/en/#open-contracting-data-standard-documentation>.

<sup>40</sup> <https://vpt.lrv.lt/sudarytos-sutartys-kovai-su-covid-19>.

<sup>41</sup> For a discussion of the options for ensuring the integrity of public procurement, apart from the exceptional situation of the epidemic: Robert D. Anderson, Alison Jones & William E. Kovacic, "Preventing Corruption, Supplier Collusion, and the Corrosion of Civic Trusts: A procompetitive Program to improve the effectiveness and Legitimacy of Public Procurement", *G. Mason Law Review* 2019, Vol.26-4.

<sup>42</sup> U.S. Department of Justice, *The False Claims Act: A Primer*, [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)

<sup>43</sup> For a discussion of how the U.S. procurement system excludes contractors that pose unacceptable reputational and performance risks, see John Pachter, Christopher Yukins & Jessica Tillipman, *U.S. Debarment: An Introduction* (discussion draft 24 February 2019), *forthcoming in Cambridge Handbook of Compliance* (Cambridge University Press, Daniel Sokol & Benjamin van Rooij eds.), available at <http://publicprocurementinternational.com/wp-content/uploads/2019/02/2019-02-24-Draft-Debarment-Compliance-Handbook-Chapter-John-Pachter-Chris-Yukins-Jessica-Tillipman-1.pdf>.

information with public law enforcement authorities regarding new vendors, including information regarding criminal activity and defective manufacturing. This alliance between public officials indirectly affects a collateral question that arose from the pandemic: whether government supply chains should be diversified (and thus reinforced) by using public or private intermediaries. The pressures of the pandemic – especially the need for public officials to exchange confidential information on vendor qualification quickly – highlighted the benefits of publicly run supply chains, an issue discussed further below.

The pandemic highlighted a new issue with sanctions: the relative costs and benefits of different enforcement strategies in an extremely fragile market. While governments have long recognized that *excluding* vendors could reduce competition, few governments have assessed the competitive impacts of more serious sanctions, such as criminal penalties for fraud or price gouging. Governments, in other words, have often assumed that criminal behavior should be punished without considering the competitive effects of the punishment.<sup>44</sup> During the pandemic, however, it became clear that governments might want to choose their enforcement priorities carefully: while punishing fraudulent suppliers was a necessary part of ensuring integrity in the supply chain, punishing *overpriced* suppliers (“price-gougers”) could be disastrous in a rapidly rising market. Confronted with sanctions<sup>45</sup> or controls<sup>46</sup> for high prices, vendors could simply go elsewhere – potentially leaving the government with no available sources of supply. The pandemic showed, in other words, that not coordinating enforcement efforts with procurement goals could generate serious costs for the government in its dual role as buyer and enforcer.

The pandemic also showed that any criminal sanctions should be accompanied by a systematic exclusion of the companies concerned from public contracts, either because of corruption or fraud at the time of the award phase, or because of dishonest behavior during performance<sup>47</sup>. In many systems, these exclusions must be published online – what is, in effect, a way for public buyers to share qualification information across borders. However, the COVID-19 health crisis revealed a shortcoming in this system which will have to be remedied: because of procedural

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<sup>44</sup> This policy question – whether criminal punishment should be weighed against its economic impact – was at the heart of the Canadian debate over whether SNC Lavalin should be allowed to enter into a deferred prosecution agreement with the government. See Canadian Broadcasting Corporation, *What you need to know about the SNC-Lavalin affair* (Feb. 13, 2019), <https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>.

<sup>45</sup> See Christopher R. Yukins, *COVID-19: Contractors’ Road to Recovery – An Assessment* (May 2020), <https://publicprocurementinternational.com/covid-19-contractors-road-to-recovery-an-assessment/>.

<sup>46</sup> See, e.g., South Africa, National Treasury, *Media Statement: COVID 19 Instruction Note* (Mar. 19, 2020) (“To support the declaration by President Cyril Ramaphosa . . . regarding the COVID-19 virus, National Treasury has issued an Instruction Note 8 of 2019/20” applicable to covered national institutions and municipalities,” which called for centralized purchasing to ensure security of supply and concentrate purchasing power, and noted that agencies not members of the standing Transversal (framework) contracts could use those framework agreements in this emergency, but limited prices paid to those “in Transversal contracts subject to coordination by the National Treasury and using approved suppliers.”), available at <https://publicprocurementinternational.com/wp-content/uploads/2020/03/20200319-Media-statement-COVID-19-Procurement-Instruction-Note.pdf>.

<sup>47</sup> In this regard, Stéphane de la Rosa proposes to draw lessons from the COVID crisis in order to perfect the European Directives which only offer a restrictive definition of fraud. He suggests that the European public prosecutor’s office could conduct investigations into fraudulent behavior by a company noticed in several Member states. See « La crise sanitaire du Covid-19 et la transformation du droit de la commande publique. Une perspective européenne : l’évolution du cadre normatif », Blog du Club des Juristes – 29 avril 2020, <https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/la-crise-sanitaire-du-covid-19-et-la-transformation-du-droit-de-la-commande-publique-une-perspective-europeenne-levolution-du-cadre-normatif/>

protections afforded vendors which slow the exclusion process, often these sanctions (exclusions) came too late to mitigate risk effectively, either in the procuring government or in other governments that might rely upon that information for their own assessments of vendors' qualification..

The pandemic, by compressing the procurement cycle and reducing user tolerance for unqualified vendors (because shoddy goods could pose mortal danger), thus raised new questions about how to manage the risk presented by firms which have not yet been formally excluded but which seem unreliable. Certainly traditional checks on the supporting documents and certificates presented can reveal fraud, but how to manage suspicions regarding an unknown company – especially when surging demand presses buyers to consider any available supplier?

In the midst of the crisis, some buyers exchanged unofficial lists of companies that were suspicious or had not fulfilled previous contractual obligations, and the buyers avoided those suppliers. In other cases, buyers would trade only with suppliers that had been in the market before the pandemic. These informal measures on the fringes of the law (the European procurement directive contemplates only formal, transparent exclusion, for example) revealed a loophole in integrity mechanisms. Faced with this situation, the World Bank allows borrower nations to provisionally suspend vendors<sup>48</sup> (much like the United States allows temporary suspension, with notice and an opportunity to be heard<sup>49</sup>).

The question, then, is how to bridge between the informal (and perhaps illegal) exclusion measures taken by public buyers to mitigate risk during the pandemic, and the formal exclusions framed by law? One solution might be to automatically cross-exclude vendors<sup>50</sup> that pose unacceptable risk, much like the cross-debarment mechanism used by multilateral banks<sup>51</sup> since 2010, which gives automatic effect at all the participating banks to a ban imposed by one financial institution. That type of automatic, universal exclusion might be reserved for certain critical products, such as medical supplies in a pandemic, for which performance and reputational risks cannot be sustained. Alternatively, public buyers might consider better means of sharing information on vendor qualification, such as using diplomatic networks to monitor local suppliers in countries where production of essential supplies is concentrated? Again, this critical lesson of the pandemic – that buyers need ready access to vendor qualification information, and will form informal networks to gather intelligence on vendors when traditional means prove inadequate – suggests that public supply chains run by public purchasers will always hold a special advantage over the private suppliers that stand ready to take over the public purchasing function, as is discussed below.

All of these measures point to a central lesson from the pandemic: the “temporal” crisis in procurement (the procurement system’s inability to buy quickly enough to meet surging demand from the public) was only the tip of an iceberg of much larger “agency” problems in procurement – the inability of a purchasing officials, as agents/intermediaries in the supply

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<sup>48</sup> World Bank, *Sanctions Proceedings and Settlement in Bank Financed Projects* (July 2016), <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3872>.

<sup>49</sup> FAR 9.407, 48 CFR § 9.407.

<sup>50</sup> See Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219 (2013), [https://scholarship.law.gwu.edu/faculty\\_publications/1018/](https://scholarship.law.gwu.edu/faculty_publications/1018/).

<sup>51</sup> International Finance Corporation, *Frequently Asked Questions – Cross-Debarment*, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ac\\_home/faqsxb](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ac_home/faqsxb).

chain, to respond adequately to the needs of their principals, including their end-users. To solve that problem, the first instinct of many in the crisis was to abandon traditional requirements of transparency and integrity, and to open the door to “emergency” procurements outside the established rule systems. As the discussion above shows, however, a better answer would be to remain true to those core principles, to ensure that procurement in a disaster was done with transparency and integrity, but to do so in a thoughtful way that adapted to the extraordinary impacts of the COVID-19 disease.

## 2. Learn how to buy abroad

While the globalized economy has been blamed for the spread of the health crisis, with China at the epicenter, the inability of most public contracting authorities to manage global supply chains to mitigate the pandemic should also be taken into account. Buying from distant suppliers is a true job, a set of functions (market research, trade and customs rules, purchasing, logistics, transport, inventory management, etc.) which, even if they are well known to the private sector, too often are not well understood in the public sector<sup>52</sup>. Establishing trust in the manufacturing centers, regularly verifying the techniques implemented, controlling deliveries, are all steps that require time and special skills. Large private firms thus prefer to establish reliable supplier networks, monitored by subsidiaries or local correspondents, which meet their requirements or, failing that, rely on recognized testing, inspection and certification services bodies. In France, the announcement that protective masks were available for sale in mass-market stores even as public authorities struggled to stock the minimum numbers required by exposed public workers illustrated this contrasting control of supply chains.

While sourcing techniques are in fashion, especially in Europe, they should now be given an international dimension to improve knowledge of overseas markets, with creativity and focus. For example, why not use diplomatic networks -- usually mobilized to promote their national businesses -- to monitor local manufacturers in countries where critical suppliers are concentrated? Or leverage local government oversight, as the United States traditionally has used contract administration resources in the Canadian government to monitor Canadian suppliers which are an extended part of the defense industrial base in the United States?<sup>53</sup> Or use online certification mechanisms, supported by digital “blockchain” solutions, to reinforce transnational supply chains?

In the United States, notably, the federal government’s response to failures in the international supply chain during the pandemic has been almost precisely the opposite – as noted, a protectionist call to “on-shore” manufacturing of key medical supplies, including pharmaceuticals, despite repeated warnings from industry that the supply chain is deeply transnational. The U.S. Department of Defense has played a leading role in assessing what manufacturing might be brought back to the United States.<sup>54</sup> The move to abandon international

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<sup>52</sup> For a renewed approach to the study of supply chains, see: Lisa M. Ellram, Christine M. Harland, Arjan van Weele, Michael Essig, Thomas Johnsen, Guido Nassimbeni, Mark Pagell, Erik van Raaij, Frank Rozemeijer, Wendy L. Tate, Finn Wynstra, « Purchasing and supply management's identity: Crisis? What crisis? », in *Journal of Purchasing and Supply Management*, Elsevier, January 2020, available at <https://doi.org/10.1016/j.pursup.2019.100583>

<sup>53</sup> U.S. Defense Federal Acquisition Regulation Supplement (DFARS) 225.870, 48 CFR § 225.870.

<sup>54</sup> See, e.g., Jon Harper, *Coronavirus News: Pentagon Wants Defense Factories to Make Medical Supplies*, Mar. 26, 2020, <https://www.nationaldefensemagazine.org/articles/2020/3/26/pentagon-aiming-to-convert-defense-production-lines-to-make-medical-supplies>.

supply chains is driven in part by national security concerns (China, a main supplier, is increasingly viewed by the United States as a rival and antagonist), but the “on-shoring” initiative is also driven by a protectionist and politically driven impulse to use public procurement to expand manufacturing jobs in the United States. Much of Trump’s political base is in workers displaced by a globalized economy; rebuilding the manufacturing sector in the United States is a key political goal of his administration. Whether the Trump administration’s “on-shoring” initiative will succeed will take years to assess; what is clear, however, is that the Trump administration’s response to procurement failures in the pandemic confirm that political pressures amplify the “agency” issues in procurement, by exposing supply chain decisions to political goals.

The pandemic has revealed shortcomings in nations’ security of supply – in their ability to access essential supplies in a time of crisis. That insecurity of supply can be traced in part to public purchasers’ failure to understand and manage international supply chains effectively. Some nations (such as the United States), encouraged by political and social pressures, have responded to those procurement failures by shortening the supply chains, and moving to manufacture in their home markets; others have not. Those failures in procurement across international supply chains were not surprising, as from an operational perspective, buying abroad puts a good deal of pressure on the public procurement workforce, which was already in need for strengthening. That is why another solution – combining forces to buy cooperatively -- could be a better approach for streamlining and optimizing the way to buy and stock essential goods.

### 3. Learn how to buy together

As the discussion above noted, the COVID-19 pandemic turned public procurement markets upside-down: the balance of power in markets for critical medical supplies shifted decidedly from the public buyers (who traditionally dominate public procurement markets) to the sellers, and the buyers began to compete aggressively among themselves. The public procurement functions were clearly broken; the question, then, was to fix them. As many observed during the crisis, one logical response would be for public purchasers to combine their market power and expertise, to buy together. This section reviews how that coordinated purchasing solution has been implemented in both the United States and Europe, and then, focusing on the U.S. experience, assesses two radically different initiatives to extend coordinated purchasing in the wake of the pandemic.

From the perspective of public procurement alone, questions abound, both nationally and internationally. How to strengthen the coordination of purchases within nations? How to organize the national centralization of purchases in order to build on the power of state negotiation, with effective mechanisms of local orders and redistributions even when there is a strong political decentralization? There are solutions to these problems, already recognized in U.S. and EU law: joint procurement (known a “cooperative purchasing” in the United States) across borders. The mechanisms for cooperative procurement are already in place.

The cooperative purchasing mechanisms worked -- if imperfectly -- in the United States, under the Multiple Award Schedule (MAS) contracts sponsored by the federal General Services Administration (GSA) (the federal government’s main centralized purchasing agency), and at the state and local level most prominently under the National Association of State Procurement



Officials (NASPO) “ValuePoint” contracts<sup>55</sup>. The GSA contracts allowed federal, state, local and tribal officials to purchase emergency supplies from common federal contracts.<sup>56</sup> The NASPO ValuePoint contracts allowed state and local governments to do the same from standing contracts, and NASPO played a coordinating role between state and local purchasers in the pandemic.

Cooperation among U.S. governments was marred, as noted, by the federal government’s aggressive use of its powers under the Defense Production Act to arrogate critical supplies to the national stockpile, even if that meant diverting supplies already purchased by state governments. This meant that the federal government had ultimate control over the supply chain for critical supplies, even though state governments have first constitutional responsibility for public health in their respective jurisdictions.<sup>57</sup> This also meant, in practice, that decisions regarding medical supplies were being made at the federal level, at least two steps removed from the users who actually needed the supplies – the medical personnel and patients on the front lines of the pandemic, who normally were overseen directly by state (not federal) officials.

The experience in Europe was different, less robust and less fluid than in the United States, but also a very public step forward in joint procurement undertaken cooperatively among the European states. The European initiative was undertaken in response to a severe shortage of necessary medical supplies among the European nations.<sup>58</sup>

On the basis of a voluntary joint procurement agreement concluded with the European Member States (as well as with the United Kingdom and Norway) which allowed the joint purchase of equipment, the European Commission launched four calls for tender different offers for medical equipment: February 28 (surgical gloves and gowns), March 17 (personal protective equipment to protect the eyes and respiratory tract, and respirators and other ventilation equipment) and March 19 (medical laboratory equipment, including test kits), in which up to 25 Member States participated<sup>59</sup>. The European response seemed to falter, because the procedures chosen resulted in delays in expected deliveries and the quantities ordered could be insufficient to meet needs. However, these group purchases marked real progress in coordination, which should be further improved in the future. Under the Treaty on the Functioning of the European Union (TFEU) article 168, public health is the first responsibility of each Member State, while the Union has complementary competence to support coordination among Member States and to combat “major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.” The voluntary joint procurement agreement initiative activated in 2020 was created in 2013, following the SARS epidemic, when the

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<sup>55</sup> Justin Kaufman, *Cooperative Purchasing: A U.S. Perspective*, in *Joint Public Procurement and Innovation: Lessons Across Borders* (G. Racca & C. Yukins, eds., Bruylant 2019), draft available at <https://publicprocurementinternational.com/joint-public-procurement-lessons-across-borders/>.

<sup>56</sup> <https://www.gsa.gov/governmentwide-initiatives/emergency-response/covid19-coronavirus>.

<sup>57</sup> See, e.g., National Conference of State Legislatures, *Responsibilities in a Public Health Emergency* (Oct. 29, 2014), [https://www.ncsl.org/Portals/1/Documents/statefed/Public\\_Health\\_Chart1027.pdf](https://www.ncsl.org/Portals/1/Documents/statefed/Public_Health_Chart1027.pdf).

<sup>58</sup> Francesco Guarascio, *Exclusive: EU States Need 10 Times More Coronavirus Equipment – Internal Document*, Reuters, Mar. 25, 2020, <https://www.reuters.com/article/us-health-coronavirus-eu-supplies-exclus/exclusive-eu-states-need-10-times-more-coronavirus-equipment-internal-document-idUSKBN21C1JC>.

<sup>59</sup> [https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/public-health\\_fr](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/public-health_fr); European Commission, *Coronavirus: Commission Bid to Ensure Supply of Personal Protective Equipment for the EU Proves Successful* (Mar. 24, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_523](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523).

European Parliament<sup>60</sup> advocated for a "global and concerted approach by the Member States". This concern dates back to the European Parliament resolution of 8 March 2011, and to the Council conclusions of 13 September 2010, after the H1N1 epidemic, which had already stressed "the need to set up a common procedure for joint procurement relating to medical countermeasures, in particular pandemic vaccines (in order to allow) more equitable access to vaccines for the States concerned"<sup>61</sup>. These mechanisms are based on "framework agreements," essentially catalog contracts set up between commercial suppliers and governments. Agencies can then order from the catalogs as needed, in a second stage. These are thus called "two-stage framework agreements." Multiple framework agreements are awarded to mitigate supply and price risks, which can be further reduced by encouraging efficient and transparent competition (Internet-based) in the second stage amongst the catalog contractors. On a European scale, it is estimated<sup>62</sup> that 20% of the markets in all fields combined are signed by framework agreements (55% in Great Britain); they are equally popular in the United States, and the GSA MAS and the NASPO ValuePoint contracts used in the pandemic and referenced above are framework agreements.<sup>63</sup>

These framework agreements allow central purchasing agencies (CPAs) to pool purchases. National agencies such as CONSIP in Italy or UGAP in France, federal agencies such as GSA in the United States, or regional central purchasing bodies have played an essential role in supply management because they have optimized the strength of public acquisition. In France, some CPAs (in the south and in Ile-de-France) have even accepted orders from private companies which had to quickly equip themselves with disinfection products to be able to resume their activities during the pandemic<sup>64</sup>. On the other hand, perhaps still too numerous and poorly coordinated, the CPAs sometimes exacerbate competition between public buyers, as shown by the example of the regional Italian CPAs of Milan (Lombardi) and Turin (Piemonte) which competed for the same virus control devices. It should be noted that in India, to avoid this risk, centralization has been taken to the extreme since the Indian government has designated a single CPA (HLL Lifecare Limited) in charge of supplies for all public hospitals in the whole country<sup>65</sup>.

Joint procurement under two-stage framework agreements allows for concentration of demand while leaving purchasing decisions at the local level; precisely what is needed in an emergency. It also allows ready transparency and a means for governments to reallocate supplies quickly. Joint procurement "levels" the governments (they are all equals in the framework arrangement),

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<sup>60</sup> Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:293:0001:0015:FR:PDF>

<sup>61</sup> EU materials related to the joint procurement initiative accessible at [https://ec.europa.eu/health/preparedness\\_response/key\\_documents\\_en#anchor0](https://ec.europa.eu/health/preparedness_response/key_documents_en#anchor0)

<sup>62</sup> Figures given by Ivo Locatelli, « Process Innovation Under the New Public Procurement Directives », in G. Racca and Ch. Yukins (Eds), *Joint public procurement and Innovation : Lessons across borders*, Bruylant 2019.

<sup>63</sup> That term is not commonly used in the United States, where framework agreements are instead often referred to as "indefinite-delivery/indefinite-quantity" contracts.

<sup>64</sup> V. Stephane de La Rosa, « La crise sanitaire du Covid-19 et la transformation du droit de la commande publique. Une perspective européenne : s'adapter à l'urgence », Newsletter du 29 avril 2020, <https://www.leclubdesjuristes.com/blog-du-coronavirus>

<sup>65</sup> Sandeep Verma, "Schadenfreude during Public Health Emergencies: Professionalising Public Procurement during Coronavirus Outbreak and Beyond..." 24 March 2020, available at <https://publicprocurementinternational.com/wp-content/uploads/2020/03/SV-2020-Ver-3-Proc-in-CoronaTimes.pdf>.

and makes it easier to exempt critical supplies from tariff barriers and export controls that can cost lives. In an emergency such as the situation created by the epidemic, it is important that these framework agreements can accept new public buyers, as was the case in South Africa<sup>66</sup>, or can evolve to adapt to the needs as designed by the United Kingdom<sup>67</sup>.

Finally, and perhaps most importantly, joint procurement across a network of governments allows for "virtual stockpiles" when governments (as almost always occurs) lack the resources or the political will to stockpile for the future. This is a critical "carrot" to attract large countries (such as the United States) that would otherwise avoid joint procurement (much as the United Kingdom failed to join the EU's joint procurement initiative). A "virtual stockpile" reduces costs and political risks for the future, and is a ready "win" to point to, for besieged politicians. In Europe, decisions n ° 1313/2013 / EU of the European Parliament and of the Council of 17 December 2013 had resulted in the creation of a civil protection mechanism (RescUE<sup>68</sup>) endowed with aerial firefighting capabilities, air evacuation capabilities and emergency medical team capabilities. With the COVID-19 crisis it was urgently necessary to provide it with medical materials and equipment by Commission Decision (EU) 2020/414 of March 19, 2020<sup>69</sup>. In parallel, the European Medical Agency (EMA) is closely monitoring the supply and stocks of medicines with national authorities, and the EU pharmaceutical industry to prevent any shortage.

To put the joint purchasing initiatives in perspective, it is worthwhile considering two U.S. initiatives which are just beginning and which are intended to make the government's supply chains more resilient and responsive. The first is the federal government's initiative to consolidate and coordinate demand – what is called “an aggregated demand signal” – to provision the National Strategic Stockpile to prepare for future pandemics.<sup>70</sup> The government has asked for recommendations from industry, and one industry group has called on the government “to provide a clear, aggregated demand signal to manufactures and distributors [of critical medical supplies], to include a demand plan, supply plan, and reconciliation review” – an approach which, if adopted, would yield a highly centralized planning and purchasing scheme for demand aggregation. The second initiative is a pending GSA procurement which would allow federal officials (any federal users -- not necessarily contracting officials) to make “micro-purchases” (up to \$10,000) directly from online electronic marketplaces such as Amazon.com. This initiative would profoundly decentralize purchasing authority, and would allow users to bypass the normal cumbersome procurement process to fulfill their needs directly (including, presumably, demands for emergency supplies).

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<sup>66</sup> South Africa COVID 19 Instruction Note 8 (Mar. 19, 2020) <https://publicprocurementinternational.com/wp-content/uploads/2020/03/National-Treasury-Instruction-08-2019-2020.pdf>

<sup>67</sup> UK Cabinet Office, “Procurement Policy Note - Responding to COVID-19” Information Note PPN 01/20 March 2020 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/873521/PPN\\_01-20\\_-\\_Responding\\_to\\_COVID19.v5\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5__1_.pdf)

<sup>68</sup> Financed at 90% by the EU Commission, the stockpile of will be hosted by one or several Member States. The hosting State will be responsible for procuring the intensive care medical equipment such as ventilators, personal protective equipment, vaccines and therapeutics, and laboratory supplies. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_476](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476)

<sup>69</sup> Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling RescEU capacities (notified under document C(2020) 1827).

<sup>70</sup> See U.S. Department of Health & Human Services, Request for Information No. 75A50120NEXTGENSNS, available on [beta.sam.gov](https://beta.sam.gov).

These two radically divergent U.S. approaches illustrate very different supply chain strategies. The first may result in a “top-down” closely planned supply stockpile, which would ensure the planned-for supplies are readily available but would increase risks of failures in planning and execution – the same risks that haunted the national stockpile in the current pandemic. The second initiative, by dispersing demand decisions to individual government users and leaving fulfillment entirely to private parties, would allow available supply to meet public users’ demands much more efficiently but would run significant risk in execution because of the purchasers’ weak tactical skills in purchasing.

As these examples and those from Europe have shown, solutions to coordinate purchasing in a disaster mean taking risk -- tapping into private market and exposing emergency procurement to market forces -- but the COVID-19 crisis demonstrated that this will happen anyway, and governments need to prepare better for the ferocity of competition in a catastrophe. The means are at hand.

## Conclusion

For centuries, economists have assumed that public procurement markets are fundamentally efficient – auction-type markets that need to be adjusted only at the margins to meet special government needs, such as military defense. As the COVID crisis made clear to all, public procurement systems and the supply chains they manage are anything but efficient; they are buffeted by political, natural and economic forces that originate outside the public procurement systems themselves, and the procurement systems are shaped by rules requiring competition, transparency and integrity in order to overcome the inertia inherent in any public function run by intermediaries, not users. At the crossroads between public procurement law, organizational theory, competition law, international commercial law, international law and health law, supply management to respond to the COVID-19 crisis raised serious questions about whether the laws that frame current purchasing practices should be revamped.

The COVID-19 emergency lasted relatively briefly, allowing time only for surprise and quick reactions. As countries learn to manage in a new post-COVID era, they must also rethink emergency purchasing procedures which are no longer justified in the face of a situation which is admittedly difficult to control but which is no longer unpredictable. The return to normal purchasing procedures is also now becoming an issue: while many countries have enacted exceptional time-bound legislation, others have not set any terminal dates for their “emergency” contracting rules which avoid traditional procurement norms.

The COVID-19 crisis has set a “new normal” in public procurement, by forcing a reassessment of the old order. Old timelines and procedures were up-ended, and the established order of the public marketplace collapsed as sellers took control and public agencies were no longer monopsonists, but rather bitter competitors in a global market to save lives and maintain governments’ legitimacy with their populations. The international trade regime which had shaped the old order began to fall away too, and protectionism took on a new and potentially deadly cast.

To make sense of all this, and to prepare for the gloomy prospect of a recurrence of the pandemic or another disaster, new approaches are needed – though ones grounded in traditional norms of transparency, competition and integrity. Public policy should rest on digital tools that allow governments to respond to the exigencies of a crisis and the immediate needs of users,

while ensuring transparency and reliability of purchases, and the publicity of operations. The challenge will be to deploy these tools, some public and some private, in way that preserves public health policies, the challenges of efficient cross-border trade, and individual rights and freedoms.

A rapidly globalizing procurement order will need to tolerate very different local perspectives on what role, if any, an open and competitive public procurement system should play in a vital commercial economy. The new order will need to assess the role of international law and public international institutions, and of private purchasers supporting public purchasers. A post-COVID order will need to assimilate potentially very disparate goals in opening international trade by lifting tariffs and non-tariff barriers, accommodating export controls and sectoral aid for national substitution (for supplies deemed critical), and forced requisitions under what had traditionally been considered wartime powers. Given the complexity and inherent tensions of this “new normal,” in practice a systemic and holistic response will need to be defined by regulation and bound by the rule of law, through rules and enforcement mechanisms calling for upstream compliance and downstream sanctions. The alternative – a Hobbesian dystopia in public procurement markets, which persisted beyond the pandemic – would leave scars deeper than the disease.

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