

REVIEW ARTICLE

Corruption and Vulnerable Employment in Relation to the Government Procurement Act during the Public Health Emergency

ABSTRACT

This research sought to establish how corruption has violated the regulations of the Ley de Contratación del Estado during the current crisis due to the COVID-19 pandemic. Thus, the aim was to learn how corruption and the current institutional deterioration influence existing regulations regarding public procurement, considering that this process takes place in a direct manner due to the public health emergency. A qualitative approach was used in this research, with explanatory-descriptive analysis. The unit of analysis was the purchase orders made by public entities. The sample was non-probabilistic and selected through simple random sampling. The data analysis led to the conclusion that it is necessary to strengthen both the regulation factors in the direct procurement (without a public tender) from the Government and public administration such as inspection. In addition, there should be greater emphasis and dedication from the Government to take action in the prevention of corruption.

Keywords: corruption; vulnerability; direct procurement; Government Procurement Act; COVID-19.

**Jeferson Jesús Ciriaco
Caqui**

jeferson.ciriaco@unmsm.edu.pe

ORCID: <https://orcid.org/0009-0005-1026-6173>

Universidad Nacional Mayor de San Marcos, Facultad de Derecho y Ciencia Política. Lima, Perú

Submitted: 01/04/2023 - Accepted: 03/15/2023 - Published: 06/29/2023

INTRODUCTION

The State is a community or government organization where a specific territory is based and depends on the stipulations of a government and its cabinet. To perform their functions correctly, states require an economy that enables them to carry out all actions that improve or guarantee a solution to their problems by means of goods and services offered for their nations. These economic resources have various sources, but the main objective of this analysis is to focus on the exclusive way in which these resources are distributed in the areas where they are required.

Due to the COVID-19 pandemic and the public health emergency resulting from it, direct procurement due to emergency status was enabled, under the framework of the National State of Emergency declared by Decreto Supremo N° 044-2020-PCM (2020) and its subsequent extensions. However, public procurement management has evidenced certain problems that should be analyzed because, instead of ensuring good procurement practices, public servants have taken advantage of the situation to raise prices and deliver goods that do not comply with the required safety standards. It is important to highlight that Ley N° 30225, Ley de Contrataciones del Estado (2014) is regulated following (Decreto Supremo N° 082-2019-EF (2019), Section 27, paragraph b, which states:

In emergencies resulting from catastrophic events, situations affecting national defense or security, situation involving a significant danger that any of the preceding situations may occur, or a public health emergency declared by the governing entity of the national healthcare system. (p. 527451)

Following the regulations governing this model for public procurement during emergency situations, compliance with the guidelines included in the regulations must be ensured, in order not to damage the effectiveness and regulations of public entities, let alone compromise the ethics and integrity of public officers through direct procurement not regulated as set forth in Ley N° 30225. For this reason, this study sought to discover how corruption has violated the regulations the Government Pro-

curement Act after the implementation of direct procurement due to the COVID-19 emergency.

PURPOSE

The aim of this article is to determine how corruption has violated the regulations of the Government Procurement Act after the implementation of direct procurement due to the COVID-19 emergency. To this end, a review of the existing literature has been conducted to establish the current status of research on this issue.

ARGUMENTATIVE REVIEW

Direct Procurement, Law and Corruption

For the Ministerio de Economía y Finanzas (MEF, 2020), direct procurement is conducted in accordance with Decreto Legislativo N° 1156 (2013) and the Regulations thereof, as well as the regulations declaring the public health emergency due to COVID-19. Said regulations establish the relationship between the entities that conduct direct procurement, and those which are only authorized to do so for goods and services as detailed by the entity governing healthcare issues. This type of procurement is primarily dependent on defining the requirement in order for it to be executed. The requirement should clearly, objectively, and concretely state the public need that supports it. It should also meet the requirements applicable to government procurement.

Direct procurement conducted by the Peruvian government, recognized internationally by the *above* regulation, is regulated by Ley N° 30225 o Ley de Contrataciones (2014), which establishes that this type of procurement can be conducted “in the event of emergency resulting from catastrophic events... or a Public Health Emergency declared by the governing entity of the national healthcare system” (art. 27, para. b), and Sections 100, 101 and 102 of the regulations thereof, approved by Decreto Supremo N° 344-3018-EF (2018), which defines the conditions and procedures for its execution and approval and establishes its immediate execution, as well as procedures for regularizing supporting documentation (Chocano, 2020).

Even so, corruption—understood as the criminal acts committed by public officers who

abuse the powers conferred upon them or intentionally use their powers or government resources for unlawful purposes—is a persisting obstacle that is even present during healthcare emergency periods, when ethics and commitment suggest a greater level of service vocation and integrity (Garavito, 2018). For this reason, it would be advisable to implement validation systems that ensure transparency of these processes, without neglecting any needs that may have emerged (Zambrano, 2017).

When discussing corruption, it is crucial to understand why it is being studied because this phenomenon has a great impact on the Peruvian state, on its legitimacy and credibility, on democracy, on economy, on the stability enjoyed by the population, among other elements that a State comprises. Given the complexity to propose a clear definition of corruption, that prepared by international NGO Transparencia Internacional can be analyzed, stating that it is “the abuse of public power for private benefit” (Tablante and Morales, 2018, p. 28).

Although this definition is simple, it does not mention all the parties involved in corruption, nor the behaviors that it involves. Moreover, another definition provided by Casar (2016) can be analyzed as well. It states that corruption is the abuse of power, both in public and private entities, aimed at obtaining unlawful benefits to the detriment of individual or collective welfare. It then refers to “the deviance from the sense that should govern a decision-maker’s behavior in exchange for a reward that is unlawful” (Casar, 2016, p. 11).

It follows that public corruption is understood as a complex phenomenon where a number of variables intervene, making it impossible to measure it—let alone define it. This is because, as of yet, there are no mechanisms that can describe it objectively. Regarding this definition, certain ideas and concepts are not included as these are located in a thin line between what is legal and what is not.

The study of mechanisms that help recognize corruption acts can make them evident if these are obvious and are revealed to the public. Moreover, these acts may have been perfected by those involved in them. For this reason, to

demonstrate corruption crimes, technical tests should be established, as well as the application of models or actions that make it possible to recognize such acts and punish those responsible for them.

Theoretical Models Applied to Corruption

Principal-agent Theory

When discussing corruption, one of the main elements to consider is the desire for personal benefit. It is understood to be the main reason behind corruption in the public sector. However, this is a forced simplification and does not consider the complexity of relationships between individuals and Government. Several theories help deconstruct these relationships, especially two very popular theories from the field of Economic Studies on corruption: the principal-agent model and the agency problem. The former states that public officers are responsible for protecting their principal’s interests, be it the public, parliament or supervisors, the latter states that agents choose to participate in corrupt transactions for their own benefit or to the principal’s detriment (Groenendijk 1997).

Collective Action Theory

The collective action theory goes beyond the traditional principal-agent relationship, and stresses the importance of various factors such as trust and the way in which subjects interpret the behavior of others. Persson *et al.* (2013) understand corruption as a systemic complex, a collective action problem, because individuals rationalize their behavior based on their perception, and assume that others would act in the same way under similar conditions. When corruption becomes a social norm, everyone involved start to assume it as normal and the typical way of doing things.

In addition, the regulation of an institutional or organizational culture of corruption in organizations and companies encourages the normalization of these practices in the social and individual spheres. This is how conditions are created for impunity after violating or ignoring formal anticorruption regulations (Appolloni and Nshombo 2014), hence the minimal likelihood of fighting corruption under these circumstances.

Institutional Theory

This theory examines the principles and procedures embedded in social structures, paradigms, regulations and routines defining the socially legitimated behavior guidelines (Scott 2004). To understand corruption crimes, this theory considers the social context and proposes a taxonomy to understand how corruption infiltrates so much into organizations and institutions as well as every social fabric, even when regulatory anticorruption frameworks are present (Luo 2005).

The institutional approach suggests that a study on corruption should focus on all distorting institutional practices and mechanisms that become evident, apart from focusing on individual unlawful behavior. This model introduces not only other mechanisms, but also other variables, to measure and define corruption and subsequently use the relevant corrective measures.

Peruvian National Government

The greatest number of procurement instances in each government tier, according to the object of said procurement, begins with the National Government. As previously mentioned, a total of 2,309 contracts were awarded: 1,837 for goods, 467 for services, and 5 for public infrastructure works. A total of 795 of contracts were for the purchasing of goods for the National Government, including entities such as the Policía Nacional del Perú, the Ejército Peruano, the Marina de Guerra del Perú, the Dirección de Redes Integradas de Salud, the Instituto Nacional de Salud, the Fuerza Aérea del Perú, the Fondo de Salud para el Personal Militar del Ejército (FOSPEME), the Villa El Salvador Emergency Hospital, among others. It can be noted that the direct procurement of the National Government, in the field of goods, focused on various sectors of great importance for the country, such as Environment, Culture, Defense, Development and Social Inclusion, Economy and Finance, Education, Interior, Justice, among others.

For the Housing, Construction and Sanitation sector, four contracts were awarded; five were awarded for Transport and Communications; only two each for Culture and Environment. Only one was awarded in Labor and

Employment Promotion, as was the case with Justice and Development and Social Inclusion. One of the sectors where the most direct procurement was established was Health, with a total of 830 contracts awarded, followed by Defense with 617. Next, the Interior sector, with a total of 223; the Presidency and Council of Ministers, with 30; and Education, with 59. The latter are very similar to the Economy and Finance sector, with 57, and five for other goods.

Regional Government

In a similar way to the national Government, most direct procurement contracts are for goods, with a total of 1,898, followed by services (67) and public infrastructure works (29). It becomes evident that most direct procurement by the Government is in the field of goods for most of the government entities examined, and distributed mostly in urgent sectors such as Health and Defense; it is also evident that some sectors requiring similar attention do not receive what is necessary for their correct development.

Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado (FONAFE)

Contracts awarded by FONAFE were for goods (276) and services (62). In this case, direct procurement was not used for public works. This was also the case with other entities with the power to use direct procurement, only using 167 direct contracts for goods and 25 for services.

It is worth stating that the analysis performed specifically for the year 2021 found a significant reduction in direct procurement compared to the previous year. This may be a key reflection of the public health emergency affecting all sectors of government in equal measure. That year, a total of 2,078 direct procurement contracts were awarded: 649 for the national government, 1,221 for the regional government, 163 for the local government, 27 for FONAFE, and only 18 for other regional governments.

It can be noted that, in 2021, the government with the most direct procurement contracts was the regional government. These purchases were distributed among entities and

organizations such as the Executing Unit of the Health sector, the Education sector, and Educational Management units in several regions, among others. The distribution of National Government contracts was as follows: Other services (232), medical material and equipment (195), medicines (58), temporary lodging and meals (56), other goods (47), followed by cleaning and fumigation, and cleaning products and services (both 19), public works, construction and consulting (17) and, finally, food (6).

The Regional Government was the government tier with the most direct procurement contracts awarded in 2021. Its distribution according to field was as follows: medical material and equipment (639), other services (152), other goods (139), medicines (75), cleaning products and services (56), cleaning and fumigation (50), food and public works, constructions and consulting (both 38), vehicle acquisition and rental (19), ending with temporary lodging and meals (15).

The Local Government was responsible for 163 contracts, distributed as follows: medical material and equipment (75), public works, constructions and consulting (22), other goods (16), vehicle acquisition and rental (15), other services (14), cleaning products and services (12), food (8), and cleaning and fumigation (1).

Other entities such as FONAFE also awarded direct procurement contracts that should be mentioned in this analysis. They were distributed as follows: medical material and equipment (12), other goods (5), other services and cleaning and fumigation (3 each), public works, constructions and consulting (2), food and medicines (1 each).

Lastly, at the government entity tier, Others are distributed as follows: medical material and equipment (11), cleaning and fumigation (3), other goods (2), medicines, and cleaning products and services (1 each).

In 2022, up to the closing month of April, 178 direct procurement contracts were awarded, distributed between the National Government (33), the Regional Government (140), the Local Government (3), and FONAFE (2). In this

case, the contract objects for 2022 are only distributed between two sectors: goods (134) and services (44).

Evidently, as this is an analysis of results based on the information on the open data website of the Organismo Supervisor de las Contrataciones del Estado (CONOSCE 2022) in a period of four months, the results are not annual figures; therefore, there is no information on direct procurement of public works, constructions and consulting. In general terms, according to the analysis of the information from CONOSCE (2022), it is noted that there was a considerable reduction in direct procurement from 2020 to 2022, going from 7,180 to 2,078 and ending in the above-mentioned 178 contracts.

However, the digital CONOSCE (2022) platform shows that, from March 16, 2020, to June 18, 2022, a total of 9,275 direct procurement contracts have been awarded. These are distributed as follows: the National Government (2,825), the Regional Government (3,794), the Local Government (2,095), FONAFE (356) and others (205).

Response to Corruption in the Public Sector

The findings explained above evidence the different ways in which the Government responds to corruption, and the elements used in anti-corruption policy. In the case of public procurement, it emphasizes that one of the main responses in the fight against corruption is the implementation of criminal law regulations that act upon and control this problem, whose efficiency may be guaranteed through sanctions and effective incentives.

Peru's legal instruments determine the consequences and anti-corruption legal measures applicable both in the public and the private contexts. As an example, crimes such as bribery and embezzlement, as well as related crimes such as concealment, money laundering and obstruction of justice.

In public procurement, another way to fight corruption is to exclude corrupt subjects from government contracts. This is known as disqualification or blacklisting. Basically, this mechanism prevents contractors who have

previously committed infractions against the law or ethics from being awarded government contracts for a specific period of time. This method is frequently used to fight corruption in public procurement and to maintain control over institutions. It is also used for private sector companies that provide goods and services to government offices.

Generally, the public sector has an anti-corruption agency whose aim is to address corruption within and outside it. Anti-corruption agencies have a wide range of functions and protocols designed to achieve their purpose. These range from detecting infractions in administrative issues to their subsequent investigation and sanction. In some offices, these agencies can also regulate, supervise, and develop policies.

The term “asset recovery” is used to describe the procedure used by the Government to confiscate and return public goods and funds which have been the object of corruption. There are several ways in which national authorities can trace stolen assets. These include criminal or non-conviction based forfeiture, foreign jurisdiction proceedings, or private civil proceedings.

CONCLUSIONS

As a conclusion, a highlight of this research is the importance and need for jurisdictional treatment to strengthen the protection of direct procurement and its procedures, and—without a doubt—to prevent activities involving corruption or collusion from being conducted. Some of the key aspects include strengthening the regulatory factors in direct public procurement processes, such as the public administration and its inspection, as well as pre-contract, contract and post-contract regulatory processes carried out by specialist officials. In addition, the law should be correctly applied in all specialties by the relevant and necessary bodies such as the Internal Control implementation in each entity, and external control by the National Control System.

Furthermore, more focus and dedication from the Government is required to take action on corruption prevention because these are the factors that are mainly affected or corrupted by

their own officers, generating a chain reaction where there are several individuals involved and ‘benefited’ from acting against the State. Public sector corruption can be characterized in terms of two factors: frequency and scope. In other words, corruption in this sector can be: sporadic or caused by a single agent; systematic, with generalized patterns of corrupt actions and practices sustained over long periods of time; and institutional. Therefore, its effects can vary depending on its nature and scope. Anti-corruption efforts should, to the extent practicable, contain several intrinsic and extrinsic elements from the entire public sector, as in external control (including laws and regulations) and widespread public participation.

REFERENCES

- Appolloni, A. and Nshombo, J. M. (2014). Public procurement and corruption in Africa: a literature review. In: Decarolis, F., and Fray, M. (eds). *Public Procurement Place in the World: The Charge towards Sustainability and Innovation*. Palgrave McMillan.
- Casar, M. (2016). *Anatomía de la corrupción*. Mexicanos contra la corrupción y la impunidad.
- Chocano, C. (2020). Integridad, competencia restringida y COVID-19: retos para la contratación pública peruana. *Revista Internacional de Derecho*, 1, 57-74. <https://doi.org/10.37768/unw.rid.01.01.004>
- Decreto Legislativo N° 1156, Decreto Legislativo que dicta medidas destinadas A garantizar el Servicio Público de Salud en los casos en que exista un riesgo elevado o daño a la salud y la vida de las poblaciones. (2013). <https://busquedas.elperuano.pe/normaslegales/decreto-legislativo-que-dicta-medidas-destinadas-a-garantiza-decreto-legislativo-n-1156-1024507-1/>
- Decreto Supremo N° 044-2020-PCM, Decreto Supremo que declara Estado de Emergencia Nacional por las graves circunstancias que afectan la vida de la Nación a consecuencia del brote del COVID-19. (2020). <https://www.gob.pe/institucion/pcm/normas-legales/460472-044-2020-pcm>
- Decreto Supremo N° 082-2019-EF, Texto Único Ordenado de la Ley N° 30225, Ley de Contrataciones del Estado: El Peruano. (2019). <https://diariooficial.elperuano.pe/pdf/0014/14-texto-unico-ordenado-de-la-ley-30225-ley-de-contrataciones-del-estado-1.pdf>

Decreto Supremo N° 344-3018-EF, Aprueban el Reglamento de la Ley N° 30225, Ley de Contrataciones del Estado. (2018, December 31). <https://www.gob.pe/institucion/mef/normas-legales/235964-344-2018-ef>

Garavito, P. (2018). *Influencia de la corrupción en los procesos de contratación y selección del Estado* [Doctoral Thesis, Universidad Nacional Federico Villareal]. <https://repositorio.unfv.edu.pe/handle/UNFV/2114>

Groenendijk, N. (1997). A principal-agent model of corruption. *Crime, Law and Social Change*, 27, issue 3-4, 207-229.

Ley N° 30225, Ley de Contrataciones del Estado. (2014, July 11). <https://portal.osce.gob.pe/osce/sites/default/files/Documentos/legislacion/ley/Ley%2030225%20Ley%20de%20contrataciones-julio2014.pdf>

Luo, Y. (2005). An Organizational Perspective of Corruption. *Management and Organisation Review*, 1(1), 119-154.

Ministerio de Economía y Finanzas (MEF). (2020). Guía de Orientación. Contratación directa bajo situación de emergencia. https://cdn.www.gob.pe/uploads/document/file/860968/Gu%C3%ADa_de_Contrataci%C3%B3n_directa_bajo_situaci%C3%B3n_de_emergencia.pdf

Persson, A., Rothstein, B. and Teorell, J. (2013). Why Anticorruption Reforms fail: Systemic corruption as a collective action problem. *Governance*, 26(3), 449-471.

Portal de datos abiertos del Organismo Supervisor de las Contrataciones del Estado - CONOSCE. (2022). Contrataciones ante la emergencia sanitaria por la existencia del COVID-19. https://public.tableau.com/app/profile/osce.bi/viz/COVID19_15859458012840/COVID-19

Scott, W. (2004). Institutional Theory. In: Ritzer, G. (ed.). *Encyclopedia of Social Theory*. SAGE Publishing.

Tablante, C. and Morales, M. (2018). *Impacto de la corrupción en los derechos humanos*. Instituto de Estudios Constitucionales del Estado de Querétaro. México. <https://www.corteidh.or.cr/tablas/r37786.pdf>

Zambrano, Y. (2017). El control a la gestión en la administración pública: una mirada a las legislaciones de Ecuador y Perú. *Revista San Gregorio*, 19, 154-167. <https://dialnet.unirioja.es/descarga/articulo/6236969.pdf>

Competing interests

The author declares that there is no conflict of interest.

Authors' Contribution

Jeferson Jesús Ciriaco Caqui (lead author): Conceptualization, research, supervision, writing (original draft, review and editing).