



MYTHBUSTING CONFIDENTIALITY IN PUBLIC CONTRACTING




Open Contracting Partnership



TABLE OF CONTENTS

3	Summary
5	The Myths Busted
8	Introduction
15	Methodology and Approach
16	Overview of Disclosure Practices
18	The Myths
66	Conclusion
67	Definitions and Abbreviations
68	References



SUMMARY

One in every three dollars that a government spends is on a contract with a company to deliver goods, works, and services to citizens.

There is growing evidence that transparency and openness around this spending can help improve the competitiveness, integrity and efficiency of the contracting process. This disclosure is not simply “transparency for transparency’s sake” but contains useable, actionable information that government itself would benefit from and that business and civic actors can also use if open channels for feedback exist.

Not everyone agrees. Concern around the confidentiality of information in the contracts themselves is arguably one of the greatest barriers to more openness. Apprehension over what is and is not confidential creates inertia. It hinders experimentation in how best to engage business and civil society in the contracting process and how to share information about the process in more user-friendly and accessible ways.

This report seeks to unpack and, where possible, unpick those concerns.

The main motivation of this report is to avoid a default where contracting information is routinely classified as confidential and made secret unless proven otherwise, especially in countries where other checks and balances on misuse of government or corporate power may be proportionately weaker.

Although the report is written by practitioners who believe in making information ‘open by design’ – because we believe that intentionally making information accessible and useable leads to better outcomes from public contracting – we accept that not all contracting information will be published all the time. There are occasions when information will be redacted in the public interest. This report also provides guidance on how and when to do that.

Compiling this report involved extensive consultation with over 70 experts across government, business and civil society from more than 20 countries. It also involved comparative legal research in seven countries (Chile, Colombia, France, India, Mexico, Nigeria, and Peru) and studying some recent public tenders in eight countries (Australia, Canada, Chile, Colombia, Georgia, New Zealand, Ukraine, and the UK).

We came across 10 separate arguments for keeping contracting information secret. These included concerns about:

- Perceived restrictions on disclosure related to legislation, confidentiality clauses in contracts and concerns over compromising commercial, privacy or national security interests;
- Whether transparency abets collusion and corruption and harms competition;
- The perceived costs of increasing disclosure, such as the financial, technical and human resources needed, as well as a potential increase in costly processes such as appeals and contract renegotiations; and
- Concerns that no one will use the information, or if they do, that they will misunderstand it or use it to embarrass officials. Either of these would harm public perceptions of government.

SUMMARY

As we looked into each of these assertions, we found surprisingly little evidence that backed up the harm proposed by the arguments and quite a lot of evidence that does not support them. This is why we have – somewhat provocatively – chosen to label these arguments as “myths.” For each myth, counter-arguments are outlined based on case studies, examples and literature. Where appropriate, we have juxtaposed the arguments with well-documented evidence that transparency improves competition, value for money and efficiency. A list of these myths and the reasons why we don’t believe them is available in Table 1 at the end of this summary. More systematic debunking, including evidence, is in each section on the relevant myth. We have also published a separate brochure giving the core of the evidence and our refutation if you prefer a redux version of this whole report that can fit in your pocket: <http://mythbusting.open-contracting.org>

In examining what best practices look like, we identified five principles that should be applied, if and when contracting authorities are deciding whether to withhold contracting information from public disclosure:

- 1/ Disclosure should involve minimal redaction;
- 2/ All information that is not legitimately sensitive should be disclosed unredacted;
- 3/ A clear and detailed justification for redaction should be provided;
- 4/ It should be stated how long/what period of time the information is considered sensitive; and
- 5/ Withheld information should be disclosed at the moment it ceases to be sensitive.

Table 2, in the introduction section of this report, contains a detailed overview of disclosure of contracting information that the OCP recommends across the procurement cycle.

We have refrained from offering step-by-step instructions on how to decide whether information is legitimately commercially sensitive, how to conduct a privacy impact assessment and/or how to develop confidentiality or transparency clauses in public contracting. Instead, we point to best practices and link to appropriate guidance. If demand is very strong, we could develop further guidance in the near future. That said, Table 3, in the mythbusting section, provides a breakdown of likely commercially sensitive and nonsensitive contracting information and our reasons for its categorisation. We hope that this will help to guide better distinction between the two in the future.

As always, we welcome feedback and suggestions to info@open-contracting.org. Happy reading!

TABLE 1:

THE MYTHS BUSTED

MYTH #1

Proactive disclosure of contracting information is not possible without an FOI act. Even with an FOI act, it may not be possible

You don't need an explicit reference to procurement information in FOI acts to proactively disclose it. You don't even need an FOI act.

- Disclosure of contracting information can be based on other legislation than FOI
- Most FOI acts require public authorities to proactively disclose information, which may include contracting information
- Contracting authorities may decide to disclose contracting information even if legislation (FOI or other) lacks detailed requirements for proactive disclosure
- Legislation pertaining to public information disclosure often also applies to private companies contracted by the government

BUSTED

MYTH #2

Confidentiality clauses prohibit the disclosure of contracting documents

Confidentiality clauses do *not* prohibit the disclosure of contracting documents.

- Confidentiality clauses can only protect information that is legitimately sensitive
- It's unlikely that all elements of a contracting document are legitimately sensitive
- Governments must disclose contracting information if required by legislation such as FOI or stock market disclosure requirements, even if the contract contains a confidentiality clause aimed at 'protecting' the information
- Confidentiality clauses can be overridden where parties agree to disclosure

BUSTED

MYTH #3

There is commercially sensitive information in contracting documents, so they can't be disclosed

Contracting documents containing commercially sensitive information *can* be disclosed.

- If information is legitimately sensitive, a clear case should be made as to how and why disclosure would cause harm; any redactions should be minimal
- Most commercially sensitive information is not legitimately sensitive forever
- Commercial information cannot be legitimately sensitive if it's already known to competitors
- In some jurisdictions, even commercially sensitive information may be disclosed based on a public interest test
- The 'commercially sensitive information' argument is over-used. Some countries publish their contracts by default without apparent harm

BUSTED

TABLE 1

MYTH #4

There is national security information in contracting documents, so they can't be disclosed

Defense contracting documents *can* be published without compromising national security.

- The national security argument is often applied to information that cannot legitimately be expected to undermine national security
- Only information that, if disclosed, would be likely to harm national security may be exempt from publication
- Non-sensitive parts of the contracting documents should be disclosed; redactions should be minimal and explained
- Classified defense contracting information cannot be withheld forever
- In some jurisdictions, even potentially harmful national security information may be disclosed based on a public interest test

BUSTED

MYTH #5

There are personal data in contracting documents, so they can't be disclosed

Contracting documents that contain personal data *can* be disclosed.

- Disclosing some personal data is important for transparency in the procurement process and to prevent fraud
- Certain personal data can be disclosed without endangering people's privacy and safety
- Anonymizing or aggregating certain personal data to make it non-identifiable can minimize harm
- Non-sensitive information can be disclosed unredacted; redactions should be minimal
- Privacy should operate in an inverse relationship to power
- It should be clear what personal data is collected, and how it is used, shared and secured

BUSTED

MYTH #6

Disclosing contracting information encourages and sustains collusion

Disclosing contracting information does *not* encourage nor sustain collusion.

- Research shows that disclosing contracting information decreases cartel duration
- Companies know who their competitors are; they do not depend on publicly disclosed contracting information for that knowledge
- A supplier's best strategy to win a contract is to tender at their best price, regardless of the estimated contract value
- The winning bidder's name, which is usually disclosed anyway, is enough for cartel members to begin to check whether a cartel agreement was honored
- Disclosed contracting information has been used to detect collusion and to bust cartels

BUSTED

MYTH #7

Disclosing contracting information decreases competition

Disclosing contracting information does *not* decrease competition.

- Evidence shows that disclosing contracting information leads to an increase in the average number of bidders per tender, not a decrease
- Publishing contracting information leads to a decrease in bid prices, not an increase
- The availability of contracting information via FOI requests does not deter companies from bidding for government contracts
- Bidders can factor the costs of transparency into their offers

BUSTED

TABLE 1

MYTH #8

Disclosing contracting information costs too much money and leads to costly appeals and renegotiations

Reactive disclosure is *more* expensive than systematic, proactive disclosure.

- With the right infrastructure, managing records and disclosing information can be an automated, low-cost process
- Disclosing contracting information leads to substantial public savings and other benefits
- Government spending on resources to engage with the public is an investment, not a pure cost
- Bidders can factor the costs of redacting and uploading information into their bids

BUSTED

Disclosing contracting information does *not* lead to more appeals.

- The frequency of appeals does not depend on the disclosure level of contracting information
- E-procurement systems can make appealing and resolving award decisions easier and faster
- Using e-procurement systems can keep the costs of appeal manageable
- Peer reviews and appeals are generally believed to contribute positively to trust in the system

Disclosing contracting information does *not* lead to more contract renegotiation.

- Disclosing contracting information from the start of, and throughout, the procurement cycle results in more sustainable contracts in the long run

MYTH #9

Disclosing contracting information does not expose or lower corruption

Disclosing contracting information can expose and reduce corruption.

- There is strong empirical and academic evidence that the chances of exposing and lowering corruption are highest when contracting information on all stages of the procurement process is disclosed

BUSTED

MYTH #10

No one actually reads contracting information and, if they do, they either misunderstand it or use it to embarrass officials

There is abundant evidence of public engagement with contracting information, and it increases as the data improves.

- Plenty of stakeholders, including the public, media, civil society, companies and governments, already regularly access contracting information
- Education on government projects and easily accessible data increase stakeholder involvement and data use in public contracting

BUSTED

The fact that information can be misunderstood or cause embarrassment is no reason to keep it confidential, especially given the public harm that may be involved. Government can easily mitigate the risk by explaining its information and context better.

- Contracting information should not be kept confidential simply because it could be misunderstood or lead to embarrassment and criticism
- To reduce misunderstandings and add context, governments should explain the information, and educate civil society, the media and citizens

INTRODUCTION

There has been a global trend in recent years towards increased transparency in public contracting information, with high level guidance on the topic coming from the OECD, the G20, the 2016 London Anti-Corruption Summit and the Open Government Partnership.¹

A growing number of governments not only disclose contracting information reactively (via Freedom of Information [FOI] requests), but also proactively. Some use the Open Contracting Data Standard (OCDS), an open data schema to order and share the documents and data across the entire cycle of public contracting, to proactively disclose information. As of late-2017, over 31 countries have committed to do that, from Argentina and Afghanistan, though Colombia, France, Mexico and Nigeria to the UK and Zambia. Some, like Ukraine, have integrated open contracting into wider procurement reforms and business processes and have seen notable savings, increased business competition and a reduction in the perception of corruption in procurement.²

However, not everyone is convinced of the merits of open contracting yet. Differences in levels of disclosure between countries are significant: while some pride themselves on making all information as accessible as possible, others hardly disclose any information. Even in countries that disclose contracting information, questions arise about what should and shouldn't be disclosed, when, and on what grounds. Some wonder what the benefits are of disclosing contracting information in the first place, and are apprehensive that they may incur costs as a result or be embarrassed if incompetence or inefficiency are revealed.

This report articulates the issues and concerns most commonly raised against disclosing contracting information. We explore the rhetoric and reality of the main arguments for not publishing information.

The Open Contracting Partnership (OCP) is a silo-busting collaboration across government, business, civil society and technologists to promote open contracting. In principle, we favor as much disclosure as possible. We believe that information should be open by design; that is governments should plan to share information actively unless there is a convincing public interest reason not to do so because sharing procurement information leads to better competition, value for money and quality.

1 — Such as the OECD Principles for Enhancing Integrity in Public Procurement (www.oecd.org/gov/ethics/48994520.pdf), the G20 Principles for Promoting Integrity in Public Procurement (www.seffaflik.org/wp-content/uploads/2015/02/G20-PRINCIPLES-FOR-PROMOTING-INTEGRITY-IN-PUBLIC-PROCUREMENT.pdf), the 2016 London Anti-Corruption Summit Communiqué (www.gov.uk/government/publications/anti-corruption-summit-communiqué) and the 2016 Paris Declaration of the Open Government Partnership (www.opengovpartnership.org/paris-declaration).

2 — See, for example, Open Contracting Partnership. 2016. Everyone Sees Everything. <https://medium.com/open-contracting-stories/everyone-sees-everything-fa6df0d00335>



INTRODUCTION

Table 2 (next page) contains a detailed overview of disclosure of contracting information that the OCP recommends across the procurement cycle.³

However, that does not mean that there aren't any valid exemptions to disclosure. In fact, this report shows that exemptions to disclosure are warranted for information that – if disclosed – is legitimately likely to harm a company's competitiveness, a person's privacy, or a country's national security. They are not as common as is proposed though and should not be lazily invoked to avoid routine public scrutiny. And the burden of proof, in most cases, should be on the party proposing the redaction.

The OCP does not advocate for all contracting information to be disclosed immediately (i.e. when available) either. As this report demonstrates, the timing of contracting information's disclosure is of great importance, and not all information should be immediately disclosed.

Read on to see our suggestions on how to balance these needs and how sharing more information results in a better procurement system for everyone involved.

3 — Table 2 includes references to detailed contracting information that allegedly aids collusion. Interestingly, the OECD claims that disclosing certain contracting information makes it easier to form, monitor and sustain cartels, but admits "[t]here is some uncertainty, however, as to what information can facilitate collusion, and so further research on this is desirable." OECD. 2009. Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money. www.oecd.org/competition/cartels/42851044.pdf. The OECD does not recommend formal best practice on what information should or shouldn't be disclosed during the procurement cycle, but is mainly concerned about information relating to the identity of the bidder and on the content of the bid i.e. the price offered and the terms and conditions of the offer. As for the timing of disclosure, it advocates for full disclosure of the bidding opportunity before the issuance of the tender, no transparency as to the bidder identity and proposals during the tender process/until award, and "necessary" transparency at contract award. In addition, the OECD advocates for contracting authorities to have discretion to adjust the degree of transparency to the market context.

TABLE 2: DETAILED DISCLOSURE THROUGHOUT PROCUREMENT CYCLE








Procurement phase (in chronological order)	Documents/ information (in chronological order)	Recommended level of disclosure of documents/ information	Exemptions and contested issues	Myth #	Comments
 <p>LEGAL FRAMEWORK</p>	<p>Applicable legislation (Freedom of Information Acts, Public Procurement Laws and Regulations, the Constitution, etc.)</p>	 Public	The scope of Freedom of Information Acts and other issues with regards to legal backing of disclosing contracting information	1	
	<p>Administrative rulings and directives</p>	 Public	The scope of Freedom of Information Acts and other issues with regards to legal backing of disclosing contracting information	1	
	<p>Departments or units responsible for procurement</p>	 Public	Exemption may apply regarding personal data	5	
 <p>PLANNING</p>	<p>Needs assessment/ rationale</p>	 Public	Exemption may apply regarding commercially sensitive information of the government authority	3	<i>Probably only the final version of the needs assessment/rationale should be made public. Working drafts and/or internal government drafts should be considered confidential, except when they require citizen participation/consultation for finalization.</i>
			Exemption may apply regarding national security	4	
			Information related to location and plans in relation to negative impacts such as land grabbing and inflation	8	
	<p>Feasibility study</p>	 Public	Exemption may apply regarding national security	4	
Information related to location and plans in relation to negative impacts such as land grabbing and inflation			8		

TABLE 2


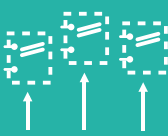
Procurement phase (in chronological order)	Documents/ information (in chronological order)	Recommended level of disclosure of documents/ information	Exemptions and contested issues	Myth #	Comments
 <p>PLANNING</p>	Notice and minutes of public hearings/ consultations	Public	Exemption may apply regarding national security	4	
			Information related to location and plans in relation to negative impacts such as land grabbing and inflation	8	
	Annual procurement plan and budget	Public	Exemption may apply regarding commercially sensitive information of the government authority	3	<i>Only the final version of the needs assessment/ rationale should be made public. Working drafts and/or internal government drafts should be considered confidential, except when they require citizen participation/ consultation for finalization.</i>
			Exemption may apply regarding national security	4	
		Information related to location and plans in relation to negative impacts such as land grabbing and inflation	8		
 <p>TENDER</p>	Announcement of tender	Public	Exemption may apply regarding national security	4	
	Invitation to tender/ Expression of interest/ Prequalification/Request for proposals	Public	Exemption may apply regarding national security	4	
	Tender documents (including description of works/services/goods, deadlines, terms and conditions, draft contract, qualification criteria, evaluation criteria, estimated price, procurement method, confidentiality/transparency clause, proposed publication scheme, and any amendments made to tender documents)	Public	Exemption may apply regarding personal data	4	<i>Disclosure of budget/ estimated price may allow suppliers to opt out if they think the procurement is beyond their abilities, or if they think they cannot compete. If the budget is inadequate, bidders can signal this in writing, or by not showing interest. If the budget information is withheld, bidders may not understand the value of the procurement and submit unrealistic bids, which wastes time and money for both the bidder submitting them and the government reviewing them. Being open about the procurement budget can demonstrate trust between the client and its suppliers and help to build relationships. Lastly, publicly disclosing estimated contract value/ budget removes any discretionary power from government authority staff that know the budget and could use this knowledge for corrupt practices.</i>
Estimated price/budget, in relation to getting the best value for money and collusion			6		

TABLE 2

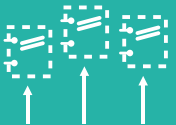







Procurement phase (in chronological order)	Documents/ information (in chronological order)	Recommended level of disclosure of documents/ information	Exemptions and contested issues	Myth #	Comments
 <p>TENDER</p>	Clarification questions and answers	 Public (but anonymized questions)	Exemption may apply regarding national security Identification of competitors in relation to collusion	4 6	Questions are public, but the name of the entity/person asking the question is not disclosed.
	Amendments to tender documents	 Public	Exemption may apply regarding national security	4	
	Pre-qualification report	 Public			
	Proposals/bids submitted (both financial and technical proposal)	 Confidential until bid opening, public after auction close	Exemption may apply regarding commercially sensitive information Exemption may apply regarding national security Exemption may apply regarding personal data Identification of competitors and their proposed prices in relation to collusion	3 4 5 6	
	Auction	 Public (but anonymized bidding)	Exemption may apply regarding national security Identification of competitors and their proposed prices in relation to collusion	4 6	During auctions, for example, the name of competing bidders is not disclosed. The number of competing bidders is disclosed. Bidders get a number, and the price offered by each number/bidder is publicly disclosed in real time.
	Bid opening (including name of bidders, proposed (adjusted) prices, full proposal of winning and losing bidders)	 Public	Exemption may apply regarding commercially sensitive information Exemption may apply regarding national security Exemption may apply regarding personal data Name of bidders (as opposed to number of bidders) in relation to identification of competitors and their proposed prices with regards to collusion	3 4 5 6	
	Bid evaluation report (including name of bidders, names of disqualified bidders and reason for disqualification, (adjusted) prices, evaluation and ranking of bids, explanations, minutes of bid evaluation meetings)	 Public	Exemption may apply regarding national security Name of bidders (as opposed to number of bidders) in relation to identification of competitors and their proposed prices with regards to collusion	4 6	

TABLE 2

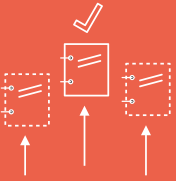
















Procurement phase (in chronological order)	Documents/ information (in chronological order)	Recommended level of disclosure of documents/ information	Exemptions and contested issues	Myth #	Comments
 <p>AWARD</p>	<p>Intent to award (including name of proposed winning bidder, winning price)</p>	 <p>Public (but anonymized bidding)</p>	<p>Exemption may apply regarding national security</p>	<p>4</p>	
			<p>Identification of competitors and their proposed prices in relation to collusion</p>	<p>6</p>	
	<p>Appeals</p>	 <p>Public (anyone, including members of the public, should be able to appeal)</p>	<p>Exemption may apply regarding national security</p>	<p>4</p>	
	<p>Appeals decision</p>	 <p>Public</p>	<p>Efficient appeals process</p>	<p>8</p>	
 <p>CONTRACT</p>	<p>Signed contract (including annexes, confidentiality/transparency clause, publication scheme, criteria for recovering sums, pricing mechanisms, dispute resolution procedures, sub-contractor details)</p>	 <p>Public</p>	<p>Exemption may apply regarding commercially sensitive information</p>	<p>3</p>	
<p>Renegotiated/ amended/changed contracts (including reason for renegotiation, annexes, confidentiality/transparency clause, criteria for recovering sums, pricing mechanisms, dispute resolution procedures, sub-contractor details)</p>	 <p>Public</p>	<p>Exemption may apply regarding national security</p>	<p>4</p>	<p><i>Publication of renegotiated contracts continues into implementation phase.</i></p>	
		<p>Exemption may apply regarding personal data</p>	<p>5</p>		

TABLE 2

Procurement phase (in chronological order)	Documents/ information (in chronological order)	Recommended level of disclosure of documents/ information	Exemptions and contested issues	Myth #	Comments
 <p>IMPLEMENTATION</p>	<p>Annual progress reports</p> <p>(including milestones achieved, funds transferred, performance against KPIs, sub-contractor details)</p>	 <p>Public</p>	Exemption may apply regarding national security	4	<i>Delays, etc. should be put in context.</i>
	<p>Performance measurement procedures</p>	 <p>Public</p>	Exemption may apply regarding national security	4	
	<p>Product/service verification procedures</p> <p>(Details of test documentation, e.g. strategy, procedures, acceptance plans, building acceptance/commissioning plans)</p>	 <p>Public</p>	Exemption may apply regarding commercially sensitive information	3	
	<p>Product/service verification results</p>	 <p>Public</p>	Exemption may apply regarding commercially sensitive information	3	
			Exemption may apply regarding national security	4	
<p>Complaints and disputes</p>	 <p>Confidential until dispute is resolved, public once resolved</p>	Exemption may apply regarding commercially sensitive information	3		
 <p>POST-TERMINATION/ EXPIRY OF CONTRACT</p>	<p>Performance report</p> <p>(including milestones achieved, funds transferred, performance against KPIs)</p>	 <p>Public</p>	Exemption may apply regarding commercially sensitive information	3	
	<p>Lessons learnt report</p>	 <p>Public</p>	Exemption may apply regarding national security	4	
			Exemption may apply regarding commercially sensitive information	3	
<p>Disclosure of information post-closure</p> <p>(such as price breakdown, project risk logs, other project management documentation)</p>	 <p>Public</p>	Exemption may apply regarding national security	4		
			Exemption may apply regarding commercially sensitive information	3	
			Exemption may apply regarding national security	4	



METHODOLOGY AND APPROACH

This report articulates the arguments used in favor of keeping contracting information secret. To gather information on these, we reviewed existing literature in the field of public procurement and conducted interviews with experts and practitioners from public, private, and civil society sectors in a range of countries. Based on this research, we found 10 arguments that are commonly used against disclosing contracting information.

We aimed to include a broad spectrum of views, for and against disclosure, to inform this report. When assessing the validity of these arguments through a review of literature and interviews with more than 70 experts and practitioners, we found ample evidence that does *not* support the “against” arguments. This is why, throughout this report, arguments used against disclosing contracting information are labelled as *myths*. For each myth, counter-arguments are outlined based on case studies, examples and literature.

To get an overview of the contracting information proactively disclosed in a number of jurisdictions, we conducted a review of 10 recent procurements in eight countries, across the defense, education, health, IT/software and infrastructure sectors, for both large and small dollar value contracts. With the generous support of local Transparency International chapters, the following countries were covered: Australia, Canada, Chile, Colombia, Georgia, New Zealand, Ukraine and the UK.

To better understand the legal frameworks for disclosure that exist across the world, we conducted a review of relevant legislation and jurisprudence in various countries. With the support of the Inter-American Network on Government Procurement and the Organization of American States, we analyzed legislation in Chile, Colombia, Mexico, and Peru. With the pro-bono support of A4ID we analyzed legislation in France, India, and Nigeria.

A first exposure draft of the report was sent around for comments amongst practitioners in February 2017, and was discussed at a multi-stakeholder roundtable held in London in March 2017. After conducting more interviews, gathering more data, and incorporating comments, an updated version was developed in May 2017, which went out for review by specific experts. This final version includes the experts’ comments.

This report specifically discusses the myths commonly used in disclosure of contracting information, and counter-arguments for each myth. To stick to the mythbusting scope, the report deliberately refrains from discussing certain issues in more detail, such as *how* it should be decided whether information is legitimately commercially sensitive, *how* a privacy impact assessment should be conducted, or *how* confidentiality/transparency clauses should be developed and what they should and shouldn’t cover. Additional guidance notes on these issues may be developed to accompany this report in due course.

OVERVIEW OF DISCLOSURE PRACTICES

Before we begin, we need to talk briefly about the terminology we will use discuss some of the historical reasons as to why information on public contracts is not yet open by design and explore some of the common fears about transparency. We briefly take stock of the significant differences that exist globally between different national and legal regimes, which set the context for some of the myths, as well as some of the evidence that ‘busts’ them.

Limitations of Our Study

Although we have surveyed legislation and disclosure practices in a number of jurisdictions, we cannot claim to base our results on statistically significant samples.

While we have tried to collect information from a range of jurisdictions across the world to paint a general picture as to how contracting information is approached in the context of FOI and other legislation, the legal framework of every country is different, and some of the arguments presented may not be valid in every jurisdiction.

The data presented in this report is only as good and comprehensive as the data collected by procurement agencies. The culture of measurement and data analysis is surprisingly absent in public procurement: something that we are working hard to change. Not all countries that have made significant changes to the disclosure of contracting information have measured their impacts. Other countries have monitored only certain, but not all, potential impacts.

Explanation of Terminology Used

Throughout this report, the following terminology is used in relation to the disclosure of contracting information.

- “Disclosure” means *public* disclosure, preferably posted online on a website accessible to everyone. It can also be disclosed in national newspapers or by other means.
- “Procurement” means *public* procurement, i.e. where the buyer is a public sector entity. Because taxpayers have a right to know how their tax money is spent, doing business with government comes with higher levels of disclosure compared to the private sector.
- “Disclosure” and “transparency” are used interchangeably.
- “Contracting information” versus “contracting documents”: contracting documents contain contracting information. Contracting information encompasses information pertaining to procurement throughout the procurement cycle. With regards to certain myths, the precise type of contracting information is important. In those cases, the type of contracting information is specifically mentioned.
- “Proactive” versus “reactive” disclosure: the OCP advocates for information that would be disclosed by FOI request to be made available proactively and routinely. This means that information proactively disclosed should undergo the same level of scrutiny before disclosure as reactively disclosed. However, proactive disclosure is not meant to replace reactive disclosure – in countries with comprehensive proactive disclosure of contracting information, citizens should still be able to request information (that was withheld from disclosure, for example) via FOI.

Differences in Disclosure by Country

Research conducted for this report shows there are large differences in the level of disclosure of contracting information between countries. The countries that disclose the most information are in Eastern Europe (Georgia, Slovakia and Ukraine) and in Latin America (Chile and Colombia). In those countries, the general rule is that contracting information is public information by default (although exemptions on grounds of commercial sensitivity etc. apply). Besides tender documents and contract award notices, these countries also disclose signed contracts, bid evaluation reports, and planning reports.

In comparison, disclosure levels in Western Europe and in large Commonwealth countries are much lower and attitudes regarding disclosure are much more conservative. Typically, these countries only disclose tender documents and contract award notices.

The reason for these differences should, at least partially, be sought in history. The traces of the deep-rooted corruption and uncompetitive environment of the Soviet era meant that public transparency is seen as mandatory in contemporary Eastern Europe. To reconstitute trust, tackle corruption, and increase competition, leadership within government procurement authorities in countries like Ukraine and Georgia deliberately made the decision to radically increase levels of transparency. In Latin America, some countries significantly increased disclosure levels in response to corruption scandals in public procurement, in which government or political figures embezzled large sums of public money for private gain. In Western and Northern Europe, on the other hand, it appears that the conservative approach to disclosure of contracting information is partly driven by the fear of enabling collusion as a result of public cases that came to light over a decade ago.⁴

Reasons for Non-Disclosure in Practice

Research conducted for this report shows that in many countries, government procurement authority staff still believe the default should be closed, not open. In addition, disclosure of contracting information is often inconsistent across government entities in the same country.

This attitude appears to be caused by one or more of the following:

- There is often a lack of awareness and understanding among government procurement staff of the importance and benefits of disclosing contracting information, even if there is no particular objection against disclosure;
- Government procurement staff responsible for the disclosure of contracting information do not always know the law requiring or enabling such disclosure;
- A lack of confidence in how to address the issue of commercially sensitive information;
- Skewed incentive structures where disclosing information that should not have been disclosed may lead to (fear of) losing one's job. Conversely, failing to implement a government transparency agenda does not carry any such consequence;
- Lack of leadership, ownership, and responsibility in promoting and implementing the disclosure agenda at the public procurement authority level;
- Fear of embarrassment if incompetence and mismanagement comes to light;
- Fear of creating perceptions of corruption in the procurement process; and
- Fear of exposing actual corruption in the procurement process.

⁴ — For example, the 'bouwfraude' case in the Netherlands (see Openbaar Ministerie. Hoe zit het met de zogeheten 'bouwfraude'? www.om.nl/vaste-onderdelen/zoeken/@23643/zit-zogeheten/) and the Seine-Maritime Asphalt Case (see OECD. 2010. Collusion and Corruption in Public Procurement. Policy Roundtable. www.oecd.org/competition/cartels/46235884.pdf)

THE MYTHS

Each chapter that follows explains one myth that seems to have emerged without much evidence to support it. We then debunk each myth by outlining practical examples, case studies, and other evidence to the contrary. We also discuss how specific concerns can be mitigated.

A summary of all the contested issues throughout the procurement cycle is provided in Table 1 (p.5) for easy reference.

MYTH #1: Proactive disclosure of contracting information is not possible without an FOI act. Even with an FOI act, it may not be possible

Introduction

The public's right to government-held information has been recognized by international human rights courts, including the European and the Inter-American Human Rights Courts. In over 100 countries,⁵ the right to information is implemented via FOI laws, which give citizens the right to request information held by public authorities. Disclosing information via FOI request is "reactive" disclosure, as opposed to "proactive" disclosure, in which authorities publicly disclose information without having received an FOI request (see [Box 1](#)).

Upon receipt of an FOI request, the public authority may approve the request and provide the information, or it may deny the request based on exemptions for disclosure stated in the FOI law. In most countries, categories of exemptions for disclosure most relevant to public contracting include commercially sensitive information, information related to personal privacy and national security.

The myths related to FOI are as follows:

- Where an FOI act is lacking, there isn't any legal backing for disclosing contracting information;
- Even where FOI legislation is in place, it may not allow for disclosure of contracting information, because FOI laws typically don't explicitly refer to public procurement and contracting information;
- FOI acts only allow for reactive disclosure, but do not allow the government to proactively disclose contracting information; and
- Disclosure of public contracting information doesn't apply to contractors because these are private companies.

5 — T. McIntosh. 2014. "Paraguay is 100th nation to pass FOI law, but struggle for openness goes on", The Guardian. www.theguardian.com/public-leaders-network/2014/sep/19/paraguay-freedom-information-law-transparency

The Myth Uncovered

The OCP has tried to collect information from a range of jurisdictions across the world to paint a general picture of how contracting information is approached in the context of FOI and other legislation. Legal frameworks differ significantly and we offer a composite response below which may not be valid in every jurisdiction.

In many cases, disclosure of contracting information is based on, or required by, other legislation than FOI, for example in:

- Public procurement laws and regulations. Vietnam⁶ and Zambia,⁷ for example, don't have an FOI law, but their public procurement laws require the government to publish contracting information. Similarly, Colombia's public procurement laws and the Mexican Law on Procurement, Leases and Services by the Public Sector (LAASSP) and Law on Public Works and Related Services (LOPSRM)⁸ provide similar requirements for disclosing contracting information.
- Sector-specific laws and regulations. In Brazil, the Public-Private Partnerships (PPPs) Law and associated decrees provide legal backing for disclosing contracting information on PPPs. The Liberia Extractive Industries Transparency Initiative Act, the Petroleum Act of Timor Leste, and the Petroleum Act of South Sudan provide legal backing for disclosing contracting information related to the extractive industries sector.⁹
- Public financial management laws and regulations. In South Africa, the Municipal Finance Management Act (No. 56 of 2003) requires disclosure of certain government contracts.¹⁰ In Kenya, the County Governments Act legislates disclosure of procurement information.¹¹
- The constitution. In the Philippines, Mexico and South Africa, for example, transparency in public contracting is enshrined in the constitution.¹² In Ghana, the right to information is constitutionally guaranteed, and civil society groups successfully used this constitutional right to gain access to contracting information via the court system.¹³
- Regional legislation. EU procurement legislation, for example, requires EU Member States to disclose certain contracting information in the Official Journal of the European Union.¹⁴ Similarly, the EU Directive on Reuse of Public Sector Information requires EU Member States to have a process through which citizens can request public sector information, and limits exemptions for disclosure.

6 — The Vietnamese National Assembly voted in favor of an Access to Information Law in April 2016. The law is expected to go into effect in 2018. See Right2INFO. 2016. Vietnam passes access to information law - link on our laws page. www.right2info.org/recent/vietnam-passes-access-to-information-law-link-on-our-laws-page

7 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

8 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

9 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

10 — Section 33 states: "1 A municipality may enter into a contract [that] will impose financial obligations on the municipality beyond ... three years ... if— a the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved— i has... made public the draft contract and an information statement summarizing the municipality's obligations in terms of the proposed contract; and bb invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; [and] b the municipal council has taken into account...iii any comments or representations on the proposed contract received from the local community and other interested persons; 2[prescribed categories of goods or prescribed low financial obligation may be exempted] 3a All contracts referred to in subsection 1 and all other contracts that impose a financial obligation on a municipality...ii may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 Act No. 2 of 2000"

11 — The County Governments Act 2012 is progressive in its provisions for access to information, especially in Part VIII and Part IX of the act. Section 87 recognizes that timely access to information, data, documents, and other information relevant or related to policy formulation and implementation is one of the main principles influencing citizen participation. Section 96 1 gives any Kenyan citizen the right to information held by any county government in accordance with Article 35 of the constitution. The record for release has to be prepared in a way that does not allow disclosure of proprietary commercial information.

12 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

13 — Seven individuals acting on behalf of a group called the CitizenGhana Movement approached the courts to gain access to contracting records. These records contained allegedly inflated contracts that may also have been single sourced without justification. The courts granted access to some of these records. However, the absence of legislation regulating the cost of access meant that the citizens were charged exorbitantly to access the records. The case sparked public debates on the prevalence of single-source contracts. The controversy led to the resignation of the Minister of Transport, under whose watch the contract was awarded. The case is still being investigated. See GhanaWeb. 2016. Smarttys bus branding: Sole sourcing approval sought after contract award www.ghanaweb.com/GhanaHomePage/NewsArchive/Smarttys-bus-branding-Sole-sourcing-approval-sought-after-contract-award-437188, K. Kpodo. 2015. Ghana transport minister resigns over bus branding. Reuters. <http://af.reuters.com/article/topNews/idAFKBN0U70CL20151224>, and interviews with the acting executive secretary of the Ghana Anti-Corruption Coalition.

14 — See Official Journal of the European Union. What is the OJEU. www.ojeu.eu/whatistheojeu.aspx

Even if legislation lacks detailed requirements for proactive disclosure, the contracting authority may decide to disclose contracting information.

While most applicable legislation supports the principles of transparency in government in general, and, sometimes, in public procurement in particular, such legislation may not prescribe in detail which information is to be disclosed, when, how, and to whom.

Several case studies show that it is possible for contracting authorities to disclose contracting information in the absence of specific requirements.

For example, in Ghana, the Public Procurement Act of 2003 requires all procuring entities to forward their procurement plans for the following year to the relevant tender board no later than a month to the end of the financial year.¹⁵ There is no legal requirement that these procurement plans be publicly disclosed. However, in practice, they are forwarded electronically to the Public Procurement Authority¹⁶ and published on its website. In Brazil's state of Minas Gerais, the government disclosed contracts and other contracting information, even though supporting legislation does not specifically require such disclosure. In India, no specific procurement legislation is currently in place, and while there is no statutory requirement for disclosure of tender information, the Ministry of Finance requires all ministries and central government departments to disclose certain contracting information online.¹⁷

The absence of specific requirements does not imply that contracting information cannot be disclosed. In such cases, disclosure mostly depends on whether contracting authorities are willing to disclose information.

Most FOI acts require public authorities to proactively disclose information, which may include contracting information.

In most countries, FOI acts not only give citizens the right to request information, they also oblige public authorities to disclose information.

In the UK¹⁸ and Australia,¹⁹ for example, public authorities proactively publish information based on model publication schemes,²⁰ which commit authorities to make information available to the public as part of its normal business activities. Such publication schemes include financial information relating to projected and actual income and expenditure, and tendering.

The Right to Information Act in Bangladesh requires government procurement entities to proactively disclose information regarding procurement planning, processes and decisions (i.e. award notification, implementation, etc.) and to provide information about these upon requests from citizens.²¹ Similarly, Indonesia's FOI act obliges state institutions to provide public information, including information related to public procurement.²² In India, the FOI law requires public authorities to disclose information regularly and

15 — Section 212 of the Public Procurement Act 2003.

16 — Interviews with heads of budget and procurement at the audit service.

17 — See Central Public Procurement Portal at www.eprocure.gov.in

18 — Information Commissioner's Office. 2015. Model Publication Scheme. Version 1.2. <https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf>

19 — Australia's information publication scheme mandates certain kinds of information but doesn't require the disclosure of contracting information. See Office of the Australian Information Commissioner. 2011. The information publication scheme for Australian Government agencies. FOI fact sheet. www.oaic.gov.au/freedom-of-information/foi-resources/foi-fact-sheets/foi-fact-sheet-4-information-publication-scheme

20 — See Information Commissioner's Office. 2015. Model Publication Scheme. Version 1.2. <https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf>

21 — Hivos. 2016. Open Contracting in Bangladesh at a Glance. https://southern-africa.hivos.org/sites/default/files/bangladesh_0.pdf

22 — Indonesia's Law No. 14/2008 on the Transparency of Public Information, in Article 11, obliges public agencies to respond to information requests regarding certain public information at any time. The law states that public agencies must supply the following information:

- a. list of all of the Public Information to which it is authorized, excluding information that is classified;
- b. the result of the decisions of the Public Agency and its considerations;
- c. all of the existing policies, along with their supporting documents;
- d. the project working plan, including the estimated annual expense of the Public Agency;
- e. agreements between the Public Agency and a third party; etc.

proactively at their own initiative. Most government departments disclose contracting information, such as tender notices and contract award notices, online.

Proactively disclosed information should not replace the ability to request reactively disclosed information. The public should always be able to request, via FOI, information the contracting authority has decided, for whatever reason, not to disclose proactively. And, of course, reactive FOI requests should encourage contracting authorities to disclose more information proactively.

Legislation pertaining to public information disclosure applies to companies contracted by the government to provide public services or goods with public money.

Citizens are entitled to know how their taxpayers' money is spent, regardless of which type of entity (public, private, or not-for-profit) ultimately delivers the goods, services, or infrastructure in question.²³ This point was reiterated by a resolution on "the Right of Access to Information and Accountability of Public Services" at 10th International Conference of Information Commissioners in Manchester in 2017. "Noting the challenge of scrutinising public expenditure and the performance of services provided by outsourced contractors", the resolution calls upon states to "encourage initiatives and programmes to improve access to information legislation in relation to contracted out services and service delivered by non-public organisations" and "promote global initiatives that provide standards for open contracting".²⁴

Court cases around the world show that legislation pertaining to the disclosure of contracting information applies to contractors, i.e. companies contracted by the government to deliver public goods, services, or infrastructure using taxpayers' money.

The majority of FOI acts specifically state that they cover state-owned enterprises.²⁵ In most jurisdictions, where private companies provide public goods, services, or infrastructure, information held by those companies *with regard to those* public goods, services, or infrastructure is subject to FOI legislation (and other legislation requiring disclosure of public contracting information).²⁶

In some countries, private entities that receive public funds are also covered by FOI legislation, whether or not they perform public functions.²⁷ The South African Promotion of Access to Information Act specifically permits access to records held by private bodies carrying out public functions, and the Supreme Court of Appeal ruled that requirements for transparency and disclosure apply to any entities that enter into commercial agreements of a public character with the state.²⁸ In India, the Central Information Commission said that the FOI act should extend to PPPs in which the government holds a substantial stake.²⁹

23 — P. Rosenblum & S. Maples. 2009. *Contracts Confidential: Ending secret deals in the extractive industries*. Revenue Watch Institute.

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

24 — <https://icic2017open.files.wordpress.com/2017/09/icic-2017-resolution.pdf>

25 — SOEs are covered by most ATI regimes in Europe, the Americas and Africa including Angola, South Africa and Uganda, by several in Asia notably India, Japan, Nepal, the Philippines, South Korea and Thailand, and by Israel, Jamaica and New Zealand. However, China's Disclosure of Government Information Regulations do not apply to SOEs, and Indonesia's Law on Public Information Transparency applies to SOEs only to a limited extent. Right2INFO. 2013. *Private Bodies and Public Corporations*.

www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations

26 — The laws of several countries, such as Canada, the Czech Republic, Hungary, Iceland, India, the Netherlands, Peru and Slovakia, specify that only information related to public functions is subject to disclosure. Hungary's law extends coverage so as to include matters related to the entities' financial management, which is implicit in most of the other laws. Right2INFO. 2013. *Private Bodies and Public Corporations*.

www.right2info.org/archived-content/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations

27 — Information Commissioner's Office. 2015. *Transparency in outsourcing: a roadmap*. <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

28 — The Supreme Court of Appeal of South Africa ruled that: "An organ of state is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue disclosure of the details of which does not involve any risk, for example, to state security or the safety of the public the imperative of transparency and accountability entitles members of the public, in whose interest an organ of state operates, to know what expenditure such an agreement entails." L. Marchessault. 2013. *Open Contracting: A New Frontier for Transparency and Accountability*.

The World Bank Institute. www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

29 — The World Bank Group. 2017. *Freedom of Information Acts and Disclosure in Public-Private Partnerships*. Webinar.

<https://olc.worldbank.org/content/freedom-information-acts-and-disclosure-public-private-partnerships>

BOX 1: Proactive versus reactive disclosure

Disclosing information via an FOI request is “reactive” disclosure, as opposed to “proactive” disclosure, in which public authorities publish information without having received a request. Proactive disclosure should not replace reactive disclosure: even if public authorities disclose contracting information proactively, citizens should still be able to submit FOI requests for contracting information that is not disclosed proactively.

Information disclosed via an FOI request is more likely to be selective and piecemeal, since it may only be disclosed to the requester and not to the public, while proactively disclosed information levels the playing field as it is accessible to everyone.

Several international organizations, including the United Nations and the Organization of American States, have said public authorities should be required to routinely publish information proactively, and that systems should be put in place to facilitate such disclosure. The OECD and G20 specifically recommend this for public contracting information. The OCP supports this, and has developed an Open Contracting Data Standard (OCDS) to facilitate the proactive disclosure of contracting information in an accessible, machine-readable format.

THE MYTHS

MYTH #2: Confidentiality clauses prohibit the disclosure of contracting documents

Introduction

Government procurement agencies and companies sometimes argue that confidentiality clauses in the contract (or in other contracting documents), prevent the disclosure of all contracting documents (“The contract, and the lawyers, won’t let me”...).

The Myth Uncovered

Confidentiality clauses can only protect information that is legitimately sensitive.

Only truly sensitive information should be excluded from disclosure. In the UK, the Information Commissioner’s Office advises public authorities not to agree to blanket confidentiality clauses on the grounds that confidentiality clauses cannot protect information from disclosure if it is not legitimately sensitive.³⁰

It is unlikely that all elements of a contracting document are legitimately sensitive.

Even though some confidentiality clauses may seek to prevent disclosure of entire contracting documents, it is very unlikely that the entire contracting document is legitimately sensitive.³¹

The purpose of confidentiality must be to protect legitimate commercial interests, legitimate privacy interests, or legitimate security interests.³² Information that can be considered legitimately sensitive may include certain personal data (which, if disclosed, will harm someone’s privacy), certain national security information (which, if disclosed, will endanger the national security of a country), and certain commercial information (which, if disclosed, will harm the competitiveness of the company). However, even in these cases, there may be an overriding public interest for disclosing the information.

To exempt information from disclosure, authorities have to determine (a) that information is indeed legitimately sensitive, and (b) that there is not an overriding public interest for disclosure.

In the UK, the Information Rights Tribunal ruled that the contract for a large Public Private Partnership project to build a waste incinerator in Gloucestershire should be disclosed.³³ The ruling was made on the appeal by Gloucestershire County Council against an earlier ruling by the Information Commissioner. The Tribunal evaluated each of the redactions sought by the County Council, and tested whether these served to protect truly sensitive information. As per best practice, both parties had agreed to a list of information

30 — Information Commissioner’s Office. 2013. Public Contract Regulations.

<https://ico.org.uk/media/for-organisations/documents/1212/public-contract-regulations-foi-eir.pdf>

31 — Exceptions may include, for example, certain defense contracts. See also Myth #4.

32 — See also Information Commissioner’s Office. 2017. Commercial Interests.

https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

33 — See the Information Rights Tribunal ruling EA/2015/0254-6 <https://drive.google.com/file/d/0B5qzjROt-jZ0ek04SmkyaklqbDdOaloyaU9fNkM0LVlISXVR/view>

contained in the contract that should be kept confidential. The Tribunal looked at whether each item on the list, which formed part of the contract, would be detrimental to the company if disclosed, and whether there was a public interest in disclosing the information. The proponents for disclosure of the contract had expressed concerns about potential harmful emissions and toxic waste, and concerns about the financing of the incinerator, including bad value for money, opacity, and the tendency to load expenditure on future generations. This led the Tribunal to believe that there was significant public interest in disclosing the entire contract, and upheld only minimal redactions in instances where there was no substantial public interest to disclose the information.³⁴

The timing of disclosure should also be taken into account. While some contracting information may have been legitimately confidential at the time of signing the contract, this might change over time,³⁵ enabling the disclosure of contracting information at the moment it ceases to be sensitive.³⁶ In general, it isn't reasonable to designate all contracting information as confidential forever.³⁷ That is why, in the UK, the Information Commissioner's Office advises government authorities to agree with the contractor on a schedule for disclosing contracting information over time.³⁸

Confidentiality clauses specifying the protection of sensitive information from disclosure in no way prevent the disclosure of non-sensitive information.

Sometimes contracts contain confidentiality clauses that stipulate that specific, sensitive information is to be kept confidential. Such confidentiality clauses do not prevent disclosure of other, non-sensitive information.³⁹

Governments must disclose contracting information if required by law, even if the contract has a confidentiality clause aimed at protecting the information.

Disclosure required by any law to which the parties are subject, such as Freedom of Information acts or public procurement legislation, is a very common exception to confidentiality clauses.⁴⁰

In the UK, application of the Freedom of Information Act is the reason the Information Commissioner's Office advises government authorities not to agree to blanket confidentiality clauses, because circumstances (such as an FOI request or a court order) requiring disclosure may arise that are outside the procurement authority's control.

Confidentiality clauses can be overridden where both parties to the contract agree to disclose it.

The parties to the contract may voluntarily decide to disclose contracting information, even if a confidentiality clause would otherwise seek to prevent disclosure of this information.⁴¹

34 — Instances in which there was no substantial public interest to disclose information and where redaction was applied included: a provision mentioning a requirement that the contractor include the council in third party waste and 'take-off' contracts over a certain size; the definition of the project's internal rate of return; the definition of the project's threshold equity internal rate of return; technical details of work delivery plans; details of companies that may be the final destination for recycling items; storage capacity of the waste bunker; details regarding the operation of the incinerator itself; provisions which the contractor is required to insert in contracts with third parties; the assets required by the contractor to operate the waste facility; and the base case equity internal rate of return.

35 — For example, information that was once secret may have become public knowledge, see Myth #4

36 — Information Commissioner's Office. 2016. How exceptions and the public interest test work in the Environmental Information Regulations. https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf and 2017. Commercial interests. https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf

37 — Information Commissioner's Office. 2016. The Public Interest Test. https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf and 2017. Commercial interests. https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

38 — Information Commissioner's Office. 2017. Commercial interests. https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf

39 — Information Commissioner's Office. 2017. Information provided in confidence. <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf> and 2017. Commercial interests. https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf

40 — Including disclosure required by stock exchanges and arbitration cases. P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

41 — P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

THE MYTHS

MYTH #3: There is commercially sensitive information in contracting documents, so they cannot be disclosed

Introduction

If commercially sensitive information of a company is disclosed, it will damage the company's commercial interests and undermine competitiveness. This is based on the thinking that in competitive markets, innovation will only occur with some protection of information: if a company spends time and money developing something new, the details of which are then made public, then its competitors can easily copy it without having to invest the same resources. This results in undue loss for the company, and undue gains for its competitors.⁴²

Therefore, disclosure of commercially sensitive information can create an environment that stifles innovation and competition. This is why commercially sensitive information is generally exempt from disclosure under Freedom of Information acts and public procurement laws.

The commercial interests of a public authority are typically also covered by such exemptions. This is relevant where authorities have a revenue-earning or commercial arm, which leaves them subject to prejudices similar to those that apply to private sector suppliers. In addition, the role of the authority as a purchaser could be compromised, as disclosing certain information could reduce the authority's ability to negotiate current and/or future contracts effectively to secure best value for money.

Commercial information that could legitimately be commercially sensitive information is mostly found in proposals, and, in some cases, in contracts. In some countries, the winning bidder's proposal is part of the contract as an annex.

The Myth Uncovered

Legitimate commercially sensitive information in contracting documents should be exempted from disclosure.

If there is indeed legitimate commercially sensitive information in contracting documents, and *there is not an overriding public interest in disclosure*, then this information should be exempted from disclosure by redacting it. All non-sensitive information should be disclosed.

Legitimate commercially sensitive information is that which can cause harm to the company whose information will be disclosed. For this to be true, there must be a clear cause and effect relationship between the disclosure and the alleged harm, the harm must be more than trivial, and the likelihood of harm must be genuine and conceivable.⁴³

42 — See also: Max Planck Institute for Innovation and Competition: www.mpg.de/19404/Innovation_entrepreneurship

43 — Office of the Information and Privacy Commissioner, Canada. 2016. Business Interests of a Third Party. www.oipc.ni.ca/pdfs/Section_39_Revised_Guidance_Document.pdf

However, the commercial sensitivity argument is often exaggerated and applied to information that is not legitimately commercially sensitive.

A recent inquiry by the UK House of Commons' Public Accounts Committee found that private companies contracted by the government would be willing to disclose more information than was typically made available and that they would comply with many of the FOI requests that are made in relation to their contracts. Resistance to disclosure, in their view, came mainly from government departments.⁴⁴

The UK Public Accounts Committee says government departments should not "routinely use commercial confidentiality as a reason for withholding information about contracts with private providers" and they should have "transparency, not commercial sensitivity, as their default position."⁴⁵

In Slovakia, the justice minister has argued that the procurement law permits commercially sensitive information to be exempt from disclosure, but that in practice this exemption is used as an excuse to withhold information that is not legitimately sensitive.⁴⁶

It should be clearly demonstrated that the information is indeed legitimately commercially sensitive, that disclosure is likely to cause harm, and that minimal redaction applies.

The government agency must demonstrate why information is redacted and why it is deemed to be commercially sensitive. In Australia, government agencies need to indicate why information has been redacted from documents.⁴⁷ In contracts disclosed in the UK, a refusal notice document is included providing reasons for redactions made.⁴⁸

However, what is legitimate commercially sensitive information may be difficult to determine.

In most countries, competition law or commercial law defines what is considered to be commercially sensitive information. In general, commercially sensitive information is understood to be "company-specific information which, if exchanged, could influence a competitor's future conduct"⁴⁹ and "information that has economic value or could cause economic harm if known."⁵⁰

Hence it could cover anything that a supplier does in the course of trade that is unique to them, gives them a competitive edge, and is not already commonly known or easily deducible.

Trade secrets are a form of commercially sensitive information, defined, in the US, as follows: "a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [the holder] an opportunity to obtain an advantage over competitors who do not know or use it."⁵¹ Most countries apply similar definitions. No registration procedures are involved for protection of a trade secret, and there is no specified time limit within which the secret may be protected. When a trade secret is leaked, this breach of confidence may be taken in court.

44 — House of Commons Committee of Public Accounts Contracting out public services to the private sector Forty-seventh Report of Session 2013–14

www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf

It should be noted that if government authorities disclose information accepted as confidential, this may result in contractual and/or common law challenges, while wrongly accepting information as confidential may result in sanctions being applied under the FOI Act. www.cirruspurchasing.co.uk/FOI_guide.pdf

45 — House of Commons Committee of Public Accounts. 2014. Contracting out public services to the private sector. Forty-seventh report of session 2013 - 2014.

www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf

46 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

47 — "Where a document is released with deletions, the grounds on which the deletions have been made should be provided. The notice of decision should set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based." Part 8 of the FOI Guidelines

www.oaic.gov.au/resources/freedom-of-information/foi-guidelines/FOI_Guidelines_-_new_compilation_-_Oct_2014.pdf

48 — For example, see Open Barnet. 2016. Traffic CCTV contract. <https://open.barnet.gov.uk/dataset/traffic-cctv-contract>

49 — The Consumer Goods Forum. Competition Law Compliance Guideline.

www.theconsumergoodsforum.com/files/TCGF_Competition_Law_Compliance_Guideline.pdf

50 — P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

51 — United States Department of Labor, Occupational Safety and Health Administration. See: www.osha.gov/dsg/hazcom/appendix_e.pdf

This is different from patents.⁵² The owner of an invention can file an application to patent it, in which the innovation must be described in detail. If the relevant authority grants the patent, the owner receives a certificate which states that the owner's exclusive rights exist from the date of registration for a certain period of time. Use of the patent is protected, but its details are public: once the authority issues the patent, details about the innovation and owner will be publicly disclosed. It is not possible to maintain a patent for an invention and ensure non-disclosure of confidential information about it. In other words, a patent offers its owner protection from competition in the form of exclusive usage rights for a period of time, in exchange for transparency about the details of the patented material. Once the period of exclusivity is over, everyone can use the invention.

Trade secrets may concern inventions or manufacturing processes that do not meet patentability criteria and therefore can only be protected as trade secrets. This would typically be the case for customer lists or manufacturing processes that are not sufficiently inventive to be granted a patent. Companies may also choose not to patent a patentable invention because of the disclosure requirement, and decide to keep it a trade secret instead. An example is the Coca Cola recipe.

Confidential information with copyrightable material will be protected by both copyright law and the law regarding confidential information. For example, an individual who develops a computer software program will be able to commercialize it but still keep confidential the underlying architecture, algorithm and source code.

All trade secrets are commercially *sensitive* information, but not all commercially sensitive information is a trade secret. To determine whether commercial information is also commercially *sensitive* information, one would have to successfully argue that the release of the information is likely to harm the company's interests or competitiveness. In some countries, sufficient evidence of potential damage (called "harm" or "prejudice") is required to prevent the disclosure of commercial information.

In Ukraine, the Public Procurement Law (2015, Article 27) is reasonably specific in terms of what cannot be deemed commercially sensitive information.⁵³ After the auction closes, it says, "*information that is reasonably classified by the tenderer as confidential*⁵⁴ shall not be subject to disclosure. Confidential information shall not include information on proposed price, other evaluation criteria, technical conditions, technical specifications and documents confirming compliance with the qualification criteria [...]."

So, it is not always easy or straightforward to determine whether information is indeed legitimately commercially sensitive or not. This may well be the reason that government procurement staff in some countries resort to non-disclosure of contracting information as a default position. If government authorities disclose information accepted as confidential, this may result in contractual and/or common law challenges. On the other hand, wrongly accepting information as confidential may result in sanctions being applied under FOI legislation.⁵⁵

In public contracting, for example, most disputes in court or other recourse mechanisms in the UK⁵⁶ are about whether or not the following information should be considered commercially sensitive: line item pricing, financial models, detailed costing, profit margins, product designs, pricing structures, technical specifications, overhead rates, rates of return, details about insurance and liability regimes, manufacturing

52 — Patents and trade secrets are both intellectual property (IP). IP is a blanket term that describes a number of distinct types of intangible assets to which one can claim exclusive rights. There are several forms of intellectual property. The main ones are: patents, copyrights, trademarks and trade secrets, each of which have very different legal implications.

53 — A review of contracting information in Ukraine conducted for this report shows commercially sensitive information is withheld from public disclosure in 85 percent of open tenders. Ukraine Public Procurement Department, Ministry of Economic Development and Trade, 2017.

54 — Typically, contractors are asked to indicate on their proposals which information they consider to be commercially sensitive and exempt from disclosure. Depending on the country, the government procurement authority then assesses whether it follows the recommendation of the contractor or not.

55 — Office of Government Commerce. FOI (Civil Procurement) Policy and Guideline. Version 1.1. www.cirruspurchasing.co.uk/FOI_guide.pdf

56 — Interviews conducted for this report.

processes, lists of customers, lists of suppliers, lists of clients, sales methods, distribution methods, subcontracting information, detailed explanations as to how the company will meet the tender requirements, and details about warranties and financial guarantees.

Table 3, at the end of this section, attempts to characterise the sort of information that is typically sensitive and that which is not.

What can be considered commercially sensitive information depends on the circumstances..

What is or isn't commercially sensitive information often depends on the specific situation. The same piece of information can be considered commercially sensitive in one situation, but not in another. Or, in the words of Ireland's information commissioner: *"No tender-related records are subject to either release or exemption as a class. Therefore each record must be examined on its own merits in light of the relevant circumstances."*⁵⁷

For example, if a current project is truly unique, then future contracts of the supplier (and public authority) will invariably be different in nature, requiring a new, distinct analysis of costs and resources (which also fluctuate with ever-changing market conditions). It may be difficult, then, to say that the disclosure of contracting information about the current project, such as costs, will harm the commercial interests of the contractor.

According to the Information Commissioner's Office in Canada,⁵⁸ knowing the details of the successful bid may give a competitor some insight with respect to competitive pricing, but it does not automatically ensure that a competitor will be successful at the next tender. Pricing is influenced by several factors, which may vary from company to company. These factors are not static and can change from year to year. As a result, on numerous occasions, the Information Commissioner's Office in Canada disclosed copies of full bids after determining that prices (such as aggregate contract price and unit prices) found in bids, proposals and contracts are not commercially sensitive information.

What is considered commercially sensitive information is also subject to change as case law in a country develops.

Most commercially sensitive information is not legitimately sensitive forever.

Most procurement information is only sensitive for a definable period of time, after which it should be disclosed. This interval will vary widely depending on the type of contracting information, the nature of the agreement, and the sector or project. In most countries, bidders need to indicate which information in their proposals and contract they consider to be commercially sensitive information, for what reason, and for what period of time.^{59,60}

A review of contracting documents conducted for this report shows that most contracting information is kept secret for the period of the contract, or for a (rather arbitrary) period of 36 months. Trade secrets and detailed costing information, however, may be sensitive for much longer.

57 — Office of the Information Commissioner. 2016. Guidance Note: Freedom of Information Act 2014 Section 36 - Commercially Sensitive Information. www.oic.gov.ie/en/publications/guidance/section-36.pdf

58 — Business Interests of a Third Party, Office of the Information and Privacy Commissioner, Canada www.oipc.nl.ca/pdfs/Section_39_Revised_Guidance_Document.pdf

59 — See Information Commissioner's Office. 2015. Transparency in outsourcing: a roadmap. <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

60 — In some countries like the UK and Australia the information indicated as commercially sensitive by the supplier is still subject to a public interest test, and the government authority may disagree with the designation and disclose the information anyway. In other countries, like Spain and Colombia, the government authority cannot challenge the designation of the supplier and is obliged to keep the indicated information confidential.

During the tender process, before the contract is awarded, the disclosure of bidding information would harm the contractor's competitiveness. For this reason, financial and technical proposals and proposed prices are often not disclosed until contract award.⁶¹

Contracting information that was once considered legitimately commercially sensitive may eventually become public knowledge. This could apply, for example, to planned mergers and acquisitions that were negotiated in secret while contract negotiations were taking place, but became public knowledge when finalized. The moment such information becomes public knowledge, it is no longer commercially sensitive.

Government authorities should consider whether commercial information is already known to the contractor's competitors when determining whether it is legitimately commercially sensitive.

Information that is already in the public domain – for example, that which companies publicly disclose about their products, finances, and management via securities filings (in the case of listed companies), annual reports, and audits – cannot be considered commercially sensitive.⁶²

Research shows that despite a lot of rhetorical concern, the financial terms of contracts and competitors margins are often known within the oil and mining industry,⁶³ which implies that no "harm" will be caused if such information were to be disclosed as part of public contracting documents.

More generally, there are a number of online databases where potential suppliers list their services along with their rates, pricing, and terms and conditions with the aim of making it easier for government authorities to procure services. These databases are publicly accessible, so it is difficult to argue that this information is commercially sensitive. G-Cloud is an example in the UK, targeted at easing public procurement of IT services that use cloud computing.⁶⁴ It includes details about services and pricing of multinationals like Google and Amazon, but also many UK small and medium-sized enterprises. In the US, the General Services Administration and its digital agency, 18F, have developed an online, publicly available tool that allows contracting officers to conduct market research and price analysis for professional labor categories.⁶⁵ It lists the names of suppliers, and their price per hour across various labor categories and levels.

However, interviews conducted for this report indicate that, when joint ventures (JVs) or special purpose vehicles are formed between companies to deliver a public sector project, overall costings and prices are shared between JV partners, but detailed costings are not, so these remain unknown to the partners/competitors.

In addition, cost structures may vary depending on the project. For example, in engineering services, rates for short term projects may be higher than for long term projects, and firms may decide to strategically price certain projects with the objective of entering into a new market or increasing the chances of winning future work. Therefore, interviewees argued, one cannot be sure what price competing firms will submit in their bids even if a past price for a similar project is known.

61 — For example, the Information Commissioner of Ireland states: "First, public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded. Second, tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances, would historic prices remain trade secrets." Office of the Information Commissioner. 2016. Guidance Note: Freedom of Information Act 2014 Section 36 - Commercially Sensitive Information. www.oic.gov.ie/en/publications/guidance/section-36.pdf

62 — P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries.

Revenue Watch Institute <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

63 — P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf> and House of Commons Committee of Public Accounts. 2014.

Contracting out public services to the private sector. Forty-seventh report of session 2013 - 2014.

[www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf](http://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf)

64 — See the Digital Marketplace website www.digitalmarketplace.service.gov.uk/g-cloud/search?q=amazon

65 — See the Contract-Awarded Labor Category website <https://calc.gsa.gov/>

Commercially sensitive information may be disclosed, depending on the outcomes of a public interest test.

In some countries, such as Denmark, France and Germany, it's enough to establish that information is indeed commercially sensitive (i.e. is likely to cause harm) in order to prevent disclosure. In other countries, however, such as Australia, Canada, India, Ireland, New Zealand, and the UK, disclosure depends on the results of a subsequent public interest test.⁶⁶

For example, in India, in the matter of *State of Jharkhand and Anr. vs Navin Kumar Sinha and Anr.*, the High Court of Jharkhand opined on whether disclosure of various documents submitted by the bidders would be commercially sensitive. The court was of the view that *«once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which the decision has been taken. If tenders are invited by the public authority and on the basis of tender documents, the eligibility of a tender or a bidder is decided, then those tender documents cannot be kept secret, that too, after the tender is decided and work order is issued on the ground that it will amount to disclosure of trade secret or commercial confidence. If the authorities of Government refuse to disclose the document, the very purpose of the Act will be frustrated. Moreover, disclosure of such information shall be in public interest, inasmuch as it will show the transparency in the activities of the Government»* (emphasis added).

By conducting a public interest test, the government authority assesses whether the benefits of disclosing information (such as, for example, increased accountability and ability to evaluate value for money with regards to how tax money is spent) outweigh the benefits of not disclosing the information (i.e. the prevention of causing harm). If the public interest in favor of disclosure outweighs the potential harm caused, then the information will be disclosed, even though it is commercially sensitive information and is thus likely to cause harm.⁶⁷ This means that the same piece of commercially sensitive information may in one situation be disclosed but kept confidential in another.

How to qualify and/or quantify the public interest on the one hand, and harm on the other hand is not an exact science. It depends on the specific circumstances of the case and a best educated guess of potential impacts to determine whether commercially sensitive information will be disclosed.

It is worth emphasizing that we were unable to find examples of harm occurring to a contractor due to the disclosure of unredacted contracting information that was deemed commercially sensitive by the contractor but not by the public authority.

Where the law is clear that information on prices, contract terms and the like will be published, the bidders consent through their participation in the market. In our interviews, several partners told us that "if the company is not interested in transparency, they do not need to bid."

Table 3 (next page) provides an overview of contracting information that should typically be considered sensitive or nonsensitive.

It should be noted that there can always be exceptions depending on the circumstances (hence the word "typically"), and the public interest test could override non-disclosure depending on the details of the case.

It should also be noted that disclosure of contracting information is always subject to a period of time, i.e. none of the information listed as commercially sensitive can remain sensitive forever. For simplification, the table assesses commercial sensitivity at the moment of contract award.

66 — Information Commissioner's Office. 2016. The Public Interest Test. https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

67 — Information Commissioner's Office. 2016. How exceptions and the public interest test work in the Environmental Information Regulations https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

TABLE 3:

COMMERCIALLY SENSITIVE AND NONSENSITIVE CONTRACTING INFORMATION

Type of contracting information	Typically sensitive	Typically not sensitive	Comments
NUMERICAL FIGURES CONCERNING NEGOTIATED TERMS	✓		<i>These may include escalation rates, underperformance rates, insurance and indemnification amounts, etc. The key is that the rates need to have been negotiated. Disclosing such rates can give away sensitive information about the risk both the government authority and the contractor are willing to take, and it can prejudice future negotiations of both parties.</i>
DETAILS OF FINANCIAL MODELS	✓		<i>This is mainly relevant to large infrastructure projects and PPPs. Such financial models are required for the purpose of evaluation and due diligence, and typically include sophisticated pricing breakdowns, giving insight into the way in which revenue is generated and how the project is financed. The actual model (or parts of it), including formulas and inputs, is typically considered commercially sensitive.</i>
OUTCOMES OF FINANCIAL MODELS		✓	<i>The results or outcomes of financial models should be disclosed so that the public knows how much the government is paying and how much it will receive in relation to a project.</i>
NON-NEGOTIATED INDEMNIFICATION AMOUNTS		✓	<i>In some projects indemnification amounts are standardized terms based on the size of the project. Typically, pre-qualification or evaluation criteria include a pass/fail at required minimum levels of indemnification amounts.</i>
INDEMNIFICATION CONTRACT CLAUSES		✓	<i>Indemnification clauses in the contract are not commercially sensitive.</i>
RECORDS OF NEGOTIATIONS	✓		<i>Records of contract negotiations between the contracting authority and the contractor are typically commercially sensitive.</i>
RECORDS OF NEGOTIATIONS WITH THIRD PARTIES	✓		<i>Records of negotiations between the contractor and third parties (such as subcontractors) are typically commercially sensitive.</i>
NON-NEGOTIATED INSURANCE TYPES AND THRESHOLDS		✓	<i>In some projects required insurance amounts are standardized terms based on the size of the project. Typically, pre-qualification or evaluation criteria include a pass/fail at required types and minimum levels of insurance.</i>
DETAILED COSTING/ PRICING STRUCTURE	✓		<i>This does not refer to the market price (which is typically public knowledge and therefore not commercially sensitive), but it refers to a breakdown of what it costs for the contractor to make a product or supply a service. It includes profit margins, detailed line-item pricing, and overhead rates.</i>
UNIT PRICES		✓	<i>Where a contract is made up of a combination of different goods or services, the price of each of the goods or services is typically not considered commercially sensitive.</i>
TOTAL PRICE/COST OF CONTRACT		✓	<i>The total price/cost of a contract is not commercially sensitive.</i>

TABLE 3:

Type of contracting information	Typically sensitive	Typically not sensitive	Comments
PROFIT MARGINS	✓		<i>Profit margins is one of the elements of a cost breakdown of the product or service. Where a service or product price is made up of a combination of different elements, then the individual elements are typically commercially sensitive information.</i>
OVERHEAD RATES	✓		<i>Overhead rates are one element of a cost breakdown of the product or service. Where a service or product price is made up of a combination of different elements, then the individual elements are typically commercially sensitive information.</i>
METHODOLOGY AND APPROACH		✓	<i>These may include a detailed description of product or service innovation or a detailed description as to how the company will meet tender requirements. In complex IT or infrastructure projects, for example, contracting authorities need to know in detail how the contractor is proposing to efficiently and cost-effectively deliver the project. This may include information about how certain software is used, how the company is going to apply lessons learned from past and similar projects, etc. Typically, some, but not all, of this information is commercially sensitive. For example, some information about the method or approach of delivery can be commercially sensitive information as it may compromise the contractor's future tender negotiations, but not all of this information typically is. Some information about past projects is typically commercially sensitive information (depending on the project details), but not all.</i>
SUBCONTRACTING ARRANGEMENTS AND SUBCONTRACTOR NAMES		✓	<i>Contractors are typically required to indicate which companies they are going to be subcontracting in order to deliver the project. This is important for the contracting authority to know, in particular where significant contract value rests with subcontractors. Contracting authorities may clarify subcontracting arrangements and supply chain management capabilities of the contractor to ensure the project will be delivered on time and within budget. Only in exceptional circumstances are subcontracting arrangements considered commercially sensitive information. Note that recent supply chain disclosure initiatives and legislation aimed at tackling modern slavery (in California, France and the UK, for example) have made subcontracting arrangements publicly available information. Some companies in the garment sector (including Nike, Timberland, and Puma) have voluntarily disclosed their supply chain, without any commercial harm, while previously these companies argued that their supply chain was commercially sensitive information. In Australia, under the Commonwealth Procurement Rules 2014, contractors are required to disclose the names of subcontractors.</i>
PRICING IN THE SUPPLY CHAIN	✓		<i>Information on how much a contractor pays to obtain the goods or services they sell, or how they decide what price(s) to bid is typically considered commercially sensitive information.</i>
INFORMATION ABOUT ONGOING LITIGATION THAT IS NOT IN THE PUBLIC DOMAIN	✓		<i>Pre-qualification or evaluation criteria may require the bidder to indicate whether they are currently involved in court cases or litigation in relation to non-performance or other contract-related issues. The bidder is required to provide details about the circumstances of such cases. Information concerning ongoing litigation not in the public domain is confidential and sensitive. Disclosing such details may prejudice ongoing investigations.</i>
PAST COURT CASES IN THE PUBLIC DOMAIN		✓	<i>Pre-qualification or evaluation criteria may require the bidder to indicate whether they have been in the past involved in court cases or litigation in relation to non-performance or other contract-related issues. The bidder is required to provide details about the circumstances and outcomes of such cases. Details of past court cases and litigation are public knowledge, and provide useful information to the government and the taxpayer. Therefore, past court cases that are in the public domain are not commercially sensitive information.</i>
PLANNED MERGERS AND/OR ACQUISITIONS THAT ARE NOT YET IN THE PUBLIC DOMAIN	✓		<i>Bidders are sometimes required to indicate whether there are plans for mergers and acquisitions that might affect them, or a planned merger or acquisition might be an essential part of the solution the bidder is proposing for delivery of the project. In any case, plans for mergers and acquisitions that are not in the public domain are commercially sensitive information.</i>
TRADE SECRETS	✓		<i>Trade secrets are commercially sensitive information.</i>
ANY INFORMATION THAT IS IN THE PUBLIC DOMAIN		✓	<i>Information in the public domain is never commercially sensitive information.</i>

TABLE 3:

Type of contracting information	Typically sensitive	Typically not sensitive	Comments
PERFORMANCE INFORMATION UNDER CURRENT CONTRACT		✓	<i>Performance information is not commercially sensitive information.</i>
PAST PERFORMANCE INFORMATION		✓	<i>Past performance information is not commercially sensitive information.</i>
BUSINESS AND INVESTMENT PLANS	✓		<i>These plans typically detail how the contractor expects to generate a financial return from the project. Such details can be considered commercially sensitive information.</i>
WINNING BIDDER'S PROPOSAL		✓	<i>Except for the commercially sensitive parts in proposals, the winning bidder's proposal is not commercially sensitive information once the tender period has closed. Most contracts include the winning bidder's proposal as an annex to the contract.</i>
UNSUCCESSFUL BIDDER'S PROPOSAL		✓	<i>Except for the commercially sensitive parts in proposals, unsuccessful proposals are not commercially sensitive information once the tender period has closed.</i>
PERFORMANCE AND FINANCIAL GUARANTEES		✓	<i>Performance and financial guarantees are not commercially sensitive information.</i>
KEY PERFORMANCE INDICATORS / PERFORMANCE METRICS		✓	<i>Key performance indicators and performance metrics for measuring project performance are not commercially sensitive information.</i>
CLAUSES THAT DESCRIBE HOW INTELLECTUAL PROPERTY RIGHTS ARE TO BE DEALT WITH		✓	<i>Clauses that describe how intellectual property rights are to be dealt with are not commercially sensitive information.</i>
PAYMENT ARRANGEMENTS		✓	<i>Payment arrangements under the contract are not commercially sensitive information.</i>
LIQUIDATED DAMAGES		✓	<i>Contracts generally include a provision for the contractor to pay liquidated damages to the contracting authority in the event that the contract is breached, for example when the contractor fails to complete the works by the date set out in the contract. Liquidated damages are not penalties, they are predetermined damages set when a contract is entered into, based on a calculation of the actual loss the client is likely to incur if the contractor fails to meet the completion date. They are generally set as a fixed daily or weekly sum. Liquidated damages are not commercially sensitive information.</i>
INCENTIVE MECHANISMS		✓	<i>This can include plans for managing underperformance, the structure of rewards for early delivery, etc. Incentive mechanisms are typically not commercially sensitive, except for any negotiated financial amounts they may contain.</i>
THE CONTRACT		✓	<i>Except for information in the contract that is agreed between contractor and government authority to be commercially sensitive, the contract is not commercially sensitive information. The government authority and the bidder cannot agree to keep the whole contract confidential based on commercially sensitive grounds.</i>
RISK OF SIGNIFICANT HARM TO THE ENVIRONMENT OR TO THE HEALTH AND SAFETY OF PEOPLE		✓	<i>The contracting agency should disclose any risk of significant harm to the environment or to the health and safety of people in relation to a project, as this information is in the public interest.</i>

THE MYTHS

MYTH #4: There is national security information in contracting documents, so they cannot be disclosed

Introduction

Under most FOI legislation, one of the exemptions for disclosure is related to national security; i.e. if the disclosure of certain contracting information is expected to undermine national security, then the information is typically exempt from disclosure.

In the US, the national security exemption applies to defense and foreign relations matters. The Tshwane Principles on National Security and the Right to Information also adopt that concept.⁶⁸ The Principles were specifically created to advise on how to balance the competing interest of the public's right to know with national security. In some other countries, FOI laws have separate exemptions for national security, defense and international relations. In this chapter, national security encompasses defense and foreign relations matters.

Typically, a defense procurement act is applied when procuring military equipment. The equipment list can differ per country, should be publicly available, and typically includes weapons, ammunition, tanks, warships, warplanes, chemical or biological agents, certain software and military technologies. The transparency requirements in defense procurement acts are typically limited compared to those in general public procurement legislation.

Defense ministries can also procure non-military equipment. Such equipment is considered sensitive if it has a security classification level of secret or top secret. In such cases, the defense procurement legislation will apply.⁶⁹ Security classification levels are applied on a case-by-case basis by a defense agency. Every country has its own legislation and system for classifying information. Classification levels should correspond to the levels and likelihood of harm caused by disclosing the information. While the legislation and process for classification should be publicly available,⁷⁰ the outcomes of the process and a list of classified information are not publicly disclosed. For non-sensitive defense procurement, general procurement legislation applies.

There are significant differences between countries. In Nigeria, for example, the Public Procurement Act and the Freedom of Information Act exclude the military, giving a blanket exemption on disclosure for all

68 — The Global Principles on National Security and the Right to Information (The Tshwane Principles) were issued in June 2013 by 22 organizations and academic centers around the world. Based on more than two years of consultation with government actors, the security sector and civil society, they set out detailed guidelines on the appropriate limits of secrecy, the role of whistleblowers, and other issues. They address the question of how to ensure public access to government information without jeopardizing legitimate efforts to protect people from national security threats. The Principles are based on international and national law and practices. They were developed in order to provide guidance to those engaged in drafting, revising, or implementing relevant laws or policies. Open Society Foundations. 2013. The Tshwane Principles on National Security and the Right to Information: An Overview in 15 points. Fact Sheet. www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points

69 — Classified information requires specific measures to be applied to the public procurement process. The Ministry of defense typically adds a special annex to the tender documents, stating that bidders and their employees need to have a certain level of security clearance/accreditation to be able to receive classified tender information.

70 — See, for example, Cabinet Office. 2014. Government Security Classifications. Version 1.0.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/251480/Government-Security-Classifications-April-2014.pdf

defense spending, even for non-sensitive items.⁷¹ In Ukraine, on the other hand, where armed conflict is ongoing in the Donbass region at the time of writing, the Ministry of Defense uses open tenders on the ProZorro system to procure food and clothing for soldiers, computers, facilities for personal hygiene, and petrol.

A review of defense contracts in Australia's Federal Contracts database shows that only 2.7 percent of all such contracts are marked with a confidentiality flag, indicating that most defense contracts could be (partially) disclosed.⁷² And in Colombia, the Ministry of Defense procures through framework agreements in which all contracting information is publicly disclosed.⁷³ In other countries, a significant percentage of defense contracts are single-sourced or awarded by negotiated procedure, and that contracting information is typically not disclosed.⁷⁴

The Myth Uncovered

The national security argument is often exaggerated and applied to information that cannot legitimately be expected to undermine national security.

The national security argument is often used as a blanket reason for not disclosing any defense contracting information,⁷⁵ and information is often over-classified.⁷⁶ While some countries have a policy to disclose non-sensitive defense contracting information, research shows that many contracting documents are unjustifiably classified as sensitive.⁷⁷

In South Africa too, the police service does not disclose any defense contracting information for national security reasons.⁷⁸ This includes the purchase of office equipment for police stations, which is unlikely to harm national security. In Uganda, any contracting information related to the extractive industries sector is considered of interest to national security and therefore exempt from disclosure,⁷⁹ even though it is unlikely that disclosing most information of this kind would harm national security.

Only information that, if disclosed, is likely to harm national security should be exempt from public disclosure.

In practice, any information can be (abusively) classified as sensitive or secret. For information to be exempt from disclosure, there has to be a real possibility that disclosure would undermine national security – there has to be a legitimate national security interest.

71 — Transparency International. 2017. Weaponising Transparency: Defence Procurement Reform as a Counterterrorism Strategy in Nigeria. <http://ti-defence.org/publications/weaponising-transparency>

72 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation and AusTender. Contract Notice by Confidentiality. Department of Finance. <https://www.tenders.gov.au/>

73 — Interviews conducted for this report.

74 — E. Anderson. 2016. Evaluation of the functioning and impact of the EU Defence and Security Public Procurement Directive (2009/81/EC) across 20 EU states, Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/07/160728-EU-Commission-defence-Directive-Evaluation-Paper.pdf> and A. Foldes. 2014. Classified Information. A review of current legislation across 14 countries & the EU. Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

75 — *Ibid.*

76 — See, for example, Project on Government Oversight. 2016. Testimony of Scott Amey about the Burdens of Overclassification and Government Secrecy. www.pogo.org/our-work/testimony/2016/testimony-of-scott-amey-about-the-burdens-of-overclassification.html, National Security Archive. 2009. Systematic Overclassification of Defense Information Poses Challenge for President Obama's Secrecy Review. George Washington University. <http://nsarchive.gwu.edu/nukevault/ebb281>, and US Congress House of Representatives. 2004. Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing. <https://fas.org/sgp/congress/2004/082404transcript.html>

77 — E. Anderson. 2016. Evaluation of the functioning and impact of the EU Defence and Security Public Procurement Directive (2009/81/EC) across 20 EU states, Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/07/160728-EU-Commission-defence-Directive-Evaluation-Paper.pdf>

78 — Interviews conducted for this report.

79 — South African Institute for International Affairs. 2011. Governance of Africa's Resources Programme. Policy Briefing 28. www.saiia.org.za/policy-briefings/206-is-uganda-ready-for-oil-revenues/file

According to the Tshwane Principles, a national security interest is *not* legitimate if its real purpose is to protect an interest unrelated to national security.⁸⁰ Information that may legitimately be withheld from disclosure is:⁸¹

- Information about ongoing defense plans, operations, and capabilities for the length of time that the information is of operational utility;⁸²
- Information about the production, capabilities, or use of weapons systems and other military systems, including communications systems.⁸³ Typically, details about military equipment such as arms, munitions, and war material for the armed forces is considered sensitive information;⁸⁴
- Information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or sabotage, the effectiveness of which depend upon secrecy.⁸⁵ Sometimes certain information about border protection and police activities is withheld, as well as certain information about crisis management activities and the prison sector;⁸⁶
- Information pertaining to, or derived from, the operations, sources, and methods of intelligence services, insofar as they concern national security matters; and
- Information concerning national security matters that was supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications insofar as they concern national security matters.

Contracting information should be disclosed with minimal redaction, and non-sensitive parts of the contracting documents should be disclosed. The reason for redaction should be provided.

The contracting authority should disclose the reason for redaction, and clearly demonstrate that the redacted information will likely harm national security if disclosed. The reasons should indicate the legal basis for withholding information, and a description of the harm that could result from disclosure, including its level of seriousness and degree of likelihood.⁸⁷

South Korea is a good example of a country trying to increase transparency in defense budgeting while mitigating the risk of exposing highly sensitive security-related information. The country's government separates the defense budget into categories (according to the degree of secrecy), and customizes the audience for disclosure accordingly. As a result, certain budget items are presented for discussion to the entire National Assembly in an aggregated form; other budget items are only disclosed to members of a designated National Assembly Committee of National Defence in a disaggregated and detailed form; and certain budget items are further disaggregated and presented only to the Committee of National Defence.⁸⁸

80 — Such as, for example, the protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests. The Global Principles on National Security and the Right to Information (Tshwane Principles). www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

81 — The Tshwane Principles. Each country should clearly define these principles or other similar principles in its FOI and procurement legislation.

82 — The phrase “for the length of time that the information is of operational utility” is meant to require disclosure of information once the information no longer reveals anything that could be used by enemies to understand the state's readiness, capacity, or plans. The Tshwane Principles.

www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

83 — Such information includes technological data and inventions, and information about production, capabilities, or use. Information about budget lines concerning weapons and other military systems should be made available to the public. It is good practice for states to maintain and publish a control list of weapons, as encouraged by the Arms Trade Treaty as to conventional weapons. It is also good practice to publish information about weapons, equipment, and troop numbers. The Tshwane Principles. www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

84 — Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

85 — “Critical infrastructure” refers to strategic resources, assets, and systems, whether physical or virtual, so vital to the state that destruction or incapacity of such resources, assets, or systems would have a debilitating impact on national security. The Tshwane Principles.

www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

86 — Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

87 — The Tshwane Principles: www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

88 — A. Foldes. 2014. Classified Information. A review of current legislation across 14 countries & the EU. Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

Classified defense contracting information cannot be withheld perpetually.

Sensitivities regarding defense contracting information will reduce with the passage of time. Information may be withheld for national security reasons only for as long as necessary, i.e. as long as it is likely to cause harm.⁸⁹ No information may remain classified indefinitely.

Decisions to withhold information and the classification given should be reviewed periodically.⁹⁰ In addition, legislation should specify the maximum time for which information can be classified.^{91,92} Even though the problem of overclassification is severe in the US, the country does show good practice regarding automatic declassification procedures, prohibited classifications, and time limits for classification.⁹³

In some jurisdictions, potentially harmful national security information may be disclosed, depending on the outcomes of a public interest test.

In some countries, and for certain information,⁹⁴ it is enough to establish that the information will harm national security to prevent disclosure.⁹⁵

In other countries, however, such as Australia, Canada, Ireland, New Zealand and the UK, disclosure of certain information⁹⁶ relevant to national security depends on the results of a subsequent public interest test.⁹⁷ In these jurisdictions, if the public interest in favor of disclosure outweighs the potential harm caused, then the information will be disclosed, even though it is national security information that is likely to cause harm.⁹⁸

The classification of information is not decisive in determining whether to disclose it.⁹⁹ The public authority that holds the information should always consider disclosure in line with FOI legislation to see if the exemption applies. If the information is classified, but not exempted under FOI legislation, then it could be a case of illegal or obsolete classification, and the public interest test may override the non-disclosure argument.

89 — The classifier should specify the date, conditions, or event on which the classification shall lapse. The Tshwane Principles

www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

90 — It is good practice for review to be required by statute at least every five years. Several countries require review after shorter periods. The Tshwane Principles.

www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

91 — National legislation should identify fixed periods for automatic declassification for different categories of classified information. To minimize the burden of declassification, records should be automatically declassified without review wherever possible. The Tshwane Principles.

www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf

92 — Transparency International finds that classification periods vary quite significantly between jurisdictions. The shortest is in Mexico, where 12 years is the maximum, which can be extended only in exceptional cases. In the United States the default is 10 years and initially information cannot be classified for a period longer than 25 years. The Australian rules follow the US, the default is 10 years and the maximum is defined by the Archives Act. A. Foldes, 2014. Classified Information. A review of current legislation across 14 countries & the EU. Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

93 — A. Foldes, 2014. Classified Information. A review of current legislation across 14 countries & the EU. Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

<http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

94 — For example, information that is an absolute exemption from disclosure, as opposed to “qualified” exemptions, which have to be subjected to a public interest test.

95 — Classification levels, if used, should correspond to the levels and likelihood of harm identified in the justification.

96 — That is, information that falls under “qualified” exemptions, not information that is absolutely exempt from disclosure.

97 — Information Commissioner's Office. 2016. The Public Interest Test. https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

98 — ‘Harm’ in this context refers to information that would make the country in question or its citizens more vulnerable to a national security threat. Information Commissioner's Office. 2012. Safeguarding National Security Section 24 https://ico.org.uk/media/1174/safeguarding_national_security_section_24_foi.pdf

99 — For example, New Zealand law states: “Classifications alone do not justify withholding official information. All requests for information, regardless of classification, must be considered using the criteria in the Official Information Act 1982.” According to the Australian law “the classification markings on a document such as ‘secret’ or ‘confidential’ are not of themselves conclusive of whether the exemption applies.” A. Foldes, 2014. Classified Information. A review of current legislation across 14 countries & the EU. Transparency International UK. <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>

THE MYTHS

MYTH #5: There are personal data in contracting documents, so they cannot be disclosed

Introduction

Privacy is a fundamental human right recognized in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Most countries recognize a right of privacy explicitly in their constitution. Recently-written constitutions such as those of South Africa and Hungary include specific rights to access and control one's personal information.¹⁰⁰

In most countries where it is not explicitly recognized in the constitution, the right to privacy is legislated separately, for example by adopting international agreements that recognize privacy rights, such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights, or by adopting privacy acts or data protection acts. Throughout the world, there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection, which includes the protection of personal data.

Personal data are generally defined as information relating to an individual who is or can be identified either from the data directly or in conjunction with other information. An individual may become identifiable directly (by a person's full name) or indirectly (by combining different information, such as address, occupation and physical characteristics).¹⁰¹

Personal data typically¹⁰² found in public contracting documents include:

- Details of the person representing the bidder (typically a director, owner, or an executive manager, depending on the type of company). Such personal data can include full name, passport/ID number, date of birth, physical address, email address, phone number, bank account, signature, etc. For large companies contact and bank details are typically the company's, while for small companies or individual consultants these may be personal details. This information is sometimes included in the bidder's proposal, the contract, invoices, the register of suppliers and contractors etc.
- Details of the bidding company's beneficial owners. Such personal data can include full name, date of birth, nationality, etc. This information is sometimes included in the register of suppliers and contractors.¹⁰³

100 — Privacy International. 2006. Privacy and Human Rights. An International Survey of Privacy Laws and Practice. <http://gijc.org/privacy/survey/intro.html>

101 — Data Protection Commissioner. What is Personal Data? www.dataprotection.ie/docs/What-is-Personal-Data-210.htm

102 — Personal information typically found in public contracting documents does not that we know of include so-called "sensitive personal data", which, according to most data protection acts, privacy acts, and personal data protection acts must be treated with greater care than other personal data because it can be used in a discriminatory way. Sensitive personal data includes, for example, racial or ethnic origin, political opinions, religious beliefs, mental health, and sexual life, which in the context of public procurement are irrelevant. Information Commissioner's Office. Key definitions of the Data Protection Act. <https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/>

103 — In the UK, for example, beneficial ownership data is included in the UK companies register. Contracting authorities need this information to check whether the company should be excluded from bidding due to relevant convictions or indicators of anti-competitive behaviour. Department for Business Innovation & Skills. 2016. Enhancing transparency of beneficial ownership information of foreign companies.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/512333/bis-16-161-beneficial-ownership-transparency.pdf

- Details of employees working for the bidder. Such personal data can include CVs, salaries, day rates, benefits, etc. This information is sometimes included in the bidder's proposal.
- Details of third parties.¹⁰⁴ Such personal data may include the names of solicitors, auditors, subcontractors, independent engineers having certified a process or product, and names of adjudicators. This information is sometimes included in proposals, contracts, invoices, etc.

Disclosing personal data is perceived by many as an intrusion into people's lives and it makes people uncomfortable. People are increasingly nervous about sharing their personal data, concerned that companies and governments might abuse it.¹⁰⁵

If made public, some of this data (date of birth, signature, home address, nationality, for example) can be used in spear phishing campaigns, cyber attacks, identity theft, and other forms of fraud. Other personal data (such as home address, salary, day rates, but also the knowledge that a person works on controversial issues, for example) can be used for intimidation, violence, extortion, blackmail, and other threats.

There are examples in public procurement in which disclosure of information has impacted on the safety of individuals. For example, in New Orleans, the supplier contracted to remove a range of Confederate monuments was subject to harassment and death threats from white supremacists.¹⁰⁶ In Colombia, anecdotal evidence suggests that, during the intense political violence of the 1990s, leaked personal tax returns were used by criminal groups to target victims to kidnap for ransom.¹⁰⁷ In Afghanistan, companies have feared for the safety of their employees after disclosing information about the winning bidder of government contracts.¹⁰⁸ In the UK, staff of animal testing companies are often the subject of harassment and intimidation. As an example of fraud, an international crime network stole more than GBP 1 million pounds from the National Health Service in the UK by falsely informing the organization of a change in their contractor's bank details (using falsified contractor logos, signatories, and reference numbers from contracting documents available online) and channeling the money to a bank account owned by the criminals.¹⁰⁹

Therefore, it is sometimes argued that contracting documents containing personal data should not be disclosed.

The Myth Uncovered

Public authorities are accountable for the public money they spend. Governments need to show that citizens get value for money, and that there is no corruption or fraud involved in the procurement process. This can be done by disclosing information that shows the procurement process has been conducted fairly, the contract has been awarded to the right bidder, and the contract is being implemented correctly, within budget and on schedule.

104 — Third parties are those parties that are not a signatory to the contract, but whose personal data are included in the document.

105 — T. Morey, T. Forbath, and A. Schoop. 2015. Customer Data: Designing for Transparency and Trust. Harvard Business Review.

<https://hbr.org/2015/05/customer-data-designing-for-transparency-and-trust>

106 — E.Y.H. Lee. 2017. Workers don bulletproof vests while taking down New Orleans' Confederate monuments in middle of night. ThinkProgress.

<https://thinkprogress.org/new-orleans-confederate-statues-removal-750a1829fb6b>

107 — F. Alvarado and J. Londono Velez. 2013. High Incomes and Personal Taxation in a Developing Economy: Colombia 1993-2010. Commitment to Equity. CEQ Working Paper No. 12. www.commitmenttoequity.org/publications_files/CEQWPNo12%20HighTaxationDevEconColombia1993-2010_19March2013.pdf

108 — See also: <http://cost.af/about-cost-in-afghanistan/>

109 — N. Fletcher. 2017. International crime network stole £1.28 million from Lincolnshire NHS trust. Lincolnshire Live.

www.lincolnshirelive.co.uk/news/lincoln-news/international-crime-network-stole-128-140120

Disclosure of certain personal data is important to ensure transparency of the procurement process and prevent fraud.

For example, most countries make the names of company owners and directors part of the official public record in order to avoid fraud and corruption, and to ensure that companies can be held accountable. An official company address is needed to ensure that legal redress can be obtained if contracted goods and services are not delivered.¹¹⁰

For the same reason, most countries that disclose procurement contracts disclose the name of the person that signed on behalf of the government.¹¹¹

Colombia, Georgia, and Ukraine deliberately made the policy decision to disclose such personal data in public contracting documents in an effort to combat deeply rooted corruption and re-establish trust in society.¹¹²

While there is a tension between the right to know and the right to privacy, disclosing certain personal data can be done without endangering the privacy and safety of individuals.

Where the balance is drawn between these two rights varies from country to country and can even be situation-specific, as risks and realities depend on the circumstances. In Colombia, for example, procurement entities disclose CVs and salary information as part of the bidders' minimum requirements. In the UK, such information is typically redacted.

In any case, government agencies can take certain measures to ensure they are accountable to the public, and, at the same time, protect the privacy of individuals while minimizing the risk of fraud. Some measures to help strike that balance and prevent negative impacts from disclosure are outlined below.

Personal data can only be disclosed if the law permits or requires it.

Privacy laws (or data protection acts or personal data protection acts, as they are sometimes called) regulate the use of personal data and the way personal data should be handled, while giving legal rights to people who have information stored about them.

Privacy laws differ from country to country,¹¹³ and there are large differences in terms of requirements for handling personal data. In most countries, there are exemptions to privacy laws, allowing for the disclosure of certain personal data. These exemptions also differ by country. A typical exemption refers to information which has to be disclosed under other laws.

In Norway, in an effort to combat tax evasion, the government makes personal data about taxpayers available online,¹¹⁴ which includes names, ID number, and information about wealth, income, and taxes paid.

Procurement legislation may also touch upon disclosure of certain personal data. In Chile, for example, the Government Procurement Act establishes the public nature of certain procurement documents containing personal data. This information is disclosed at the proposal stage.¹¹⁵

110 — See OpenCorporates' Principles at <https://opencorporates.com/info/principles>

111 — Research conducted for this report.

112 — Research conducted for this report.

113 — See Norton Rose Fulbright. 2014. Global Data Privacy Directory. www.nortonrosefulbright.com/files/global-data-privacy-directory-52687.pdf

114 — Erlend E. Bø, Joel Slemrod and Thor O. Thoresen. 2014. Taxes on the Internet. Deterrence effects of public disclosure. Statistics Norway. Discussion Paper No. 770. www.ssb.no/en/forskning/discussion-papers/attachment/161120?ts=143e822ee80

115 — Research conducted for this report.

Note that in some countries disclosure of personal data is subject to the public interest test.

Existing government disclosure regimes may already require the disclosure of personal data.

For example, in the UK, alongside the Data Protection Act, the Companies Act (2006) requires disclosure of certain information on all companies registered in the UK, including the full name of the company director, his/her nationality, his/her country of residence, his/her date of birth, and his/her correspondence address, which is all available online.¹¹⁶ It also includes a People With Significant Control register (i.e. beneficial owners), whose full names, dates of birth, and nationalities are disclosed.¹¹⁷

Where the law permits (but doesn't require) disclosure of personal data, the risks of fraud and of harm to affected individuals should be assessed.

Where the law permits disclosure of personal data in contracting documents, the government authority responsible for disclosing such documents should assess what the potential impacts of disclosure on the affected individual could be. Even if the law permits disclosure, in practice such disclosure can still harm the affected individual.

Assessing potential harm can be done by conducting a so-called privacy impact assessment (PIA). A PIA is a tool for identifying and assessing privacy risks of a project, or, in this case, disclosing contracting documents throughout the procurement cycle (see Box 2).

The potential harm of disclosing personal data is context dependent and can differ significantly by country and sometimes even by sector. While in some countries there are legitimate risks in some situations (see the examples provided in the introduction of this chapter), in other countries disclosure of certain personal data is commonplace and without repercussion.

To minimize harm, certain personal data can be anonymized or aggregated to make them non-identifiable.

To be accountable to citizens, it may not be strictly necessary¹¹⁸ to disclose personal contact information, passport/ID information, personal bank details, and full dates of birth of people involved in government contracts. What is relevant information, for example, is company and organizational contact information and the job title of the signatories to the contract so that these can be held accountable. Other personal data could be redacted, with a justification for redaction provided.

For example, Companies House in the UK does not disclose the full date of birth of directors of UK-registered companies, because the agency believed it could negatively impact the privacy and safety of those individuals. As a mitigation measure, only the month and year of birth are disclosed.

Instead of disclosing detailed individual invoices (which may include detailed information about day rates linked directly to the names of persons working on the project, for example), contracting authorities may opt to aggregate the amounts spent on the implementation of a contract and disclose a separate list of people working on the project.

116 — See Companies House register at <https://beta.companieshouse.gov.uk/>

117 — G. Lloyd. 2016. The new 'people with significant control' register. Companies House. <https://companieshouse.blog.gov.uk/2016/04/13/the-new-people-with-significant-control-register/>

118 — Out-Law. 2012. ICO issues guidance on disclosing employee personal data under FOI. www.out-law.com/en/articles/2012/august/ico-issues-guidance-on-disclosing-employee-personal-data-under-foi/

Anonymizing personal data may be another option. For example, when disclosing employee information, the UK government uses the number of Full Time Equivalents (FTE) against a certain pay scale and generic job titles.¹¹⁹ A person's full name and salary information are only disclosed for director level and higher positions.¹²⁰

Measures to minimize harm can be project-specific. In the UK, exemptions to disclosing company ownership data apply based on likely impacts on personal safety. For example, details of animal testing company directors and owners are redacted, as are those of people who own or manage safe houses. Residential addresses are also redacted.

In the example of the removal of Confederate monuments in New Orleans, the authorities took a range of precautions to protect the safety of the supplier's personnel involved in the operation. For example, it decided not to disclose the names of bidding contractors as well as other details about the procurement. When removing the monuments, the supplier's personnel wore bullet proof vests and helmets, obscured their faces with scarves, had police protection, and started working at 1.30AM in order to avoid protesters.¹²¹

To avoid theft like that in the UK National Health Service case, contracting agencies will need to put in place certain measures to prevent fraud, such as appropriate security structures, due diligence and checks over payments, building red flags into management systems, raising awareness of fraud amongst employees, and other controls. These should be in place anyway to prevent internal mismanagement in government so are not just related to public contracting disclosures.

The principle that privacy operates in an inverse relationship to power should be applied.

The UK government example reflects the notion that government employees with a high level of seniority and responsibility – such as those who are responsible for major decisions and expenditures, and are authorized to sign contracts with suppliers – are regarded as carrying a greater level of accountability,¹²² which should go hand-in-hand with higher levels of transparency and disclosure of personal data and information.

The same is true for the private sector, which is why persons authorized to represent and sign contracts on behalf of a company should expect a higher level of disclosure of their personal data. In another example, in order to improve corporate trust and deter money laundering,¹²³ the UK requires public disclosure of the name, date of birth, nationality, country of residence, address, and level of shares and voting rights of People with Significant Control¹²⁴ over UK-registered companies. This disclosure makes it clear who ultimately owns and controls UK companies.

It is good practice to be open about what personal data are collected, how they are used, shared and secured.

Organizations handling personal data should follow guidance such as the Open Data Institute's Openness Principles,¹²⁵ which require organizations to be open about what personal data they collect and how data are used, shared and secured.

119 — Department for Digital, Culture, Media & Sports. 2015. Senior salaries and staff posts dataset, 31st March 2015.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/480743/Senior_salaries_and_staff_posts_dataset_31st_March_2015.csv/preview

120 — Ibid.

121 — E.Y.H. Lee. 2017. Workers don bulletproof vests while taking down New Orleans' Confederate monuments in middle of night. ThinkProgress.

<https://thinkprogress.org/new-orleans-confederate-statues-removal-750a1829fb6b>

122 — Information Commissioner's Office. 2013. Requests for personal data about public authority employees.

https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf

123 — 1st Formations. 2016. An introduction to the register of People with Significant Control.

www.1stformations.co.uk/blog/the-register-of-people-with-significant-control/

124 — G. Lloyd. 2016. The new 'people with significant control' register. Companies House.

<https://companieshouse.blog.gov.uk/2016/04/13/the-new-people-with-significant-control-register/>

125 — Open Data Institute. Openness principles for organisations handling personal data.

<https://theodi.org/guides/openness-principles-for-organisations-handling-personal-data>

This also applies to companies bidding for public contracts that use personal data of their employees. Language about the collection, use, sharing, and securing of personal data could be incorporated in employment contracts or policies, for example.

It also applies to government procurement entities, which should explicitly state in the tender documents which personal data will be disclosed, and how other personal data will be stored and used in the various procurement phases. One of the seven steps recommended to implement open contracting and the OCDS is drawing up a publication policy which should consider how to handle both private and commercially sensitive information to this end.¹²⁶

Disclosure should involve minimal redaction and non-sensitive information should be disclosed unredacted.

Governments, as the authorities disclosing public contracting information,¹²⁷ are responsible to ensure that sensitive personal data are redacted. A justification for redaction should be provided, and all non-sensitive information should be disclosed.

BOX 2: Privacy Impact Assessments

PIAs have been used by the government in Canada, Hong Kong, New Zealand, and the UK and are now required under the EU General Data Protection Regulation, which requires that an assessment be performed before citizens' personal data are processed.

Rather than conducting a privacy impact assessment for every procurement, procurement agencies should conduct a strategic privacy impact assessment to cover their public procurement at a national level, unless there is a specific reason for conducting sector- or region-specific PIAs.

Besides assessing potential risks and impacts of disclosing personal data, conducting a PIA can help the procurement authority to:

- Identify what personal data are collected, and explain how they will be maintained, protected, shared, and disclosed; and
- Ensure conformance with applicable legal, regulatory, and policy requirements for dealing with personal data.

The PIA should assess alternatives to disclosing personal data that can be used to minimize privacy risks, while still allowing the government to be accountable to its citizens. Equally, in case the law doesn't permit disclosure of certain personal data in contracting documents, alternatives should be assessed.

Such alternatives could include anonymizing or aggregating certain personal data so that it becomes non-identifiable to the individual. Once non-identifiable, it can no longer be considered personal data (and therefore data protection acts do not apply). The PIA would also determine the privacy risks associated with disclosing non-identifiable personal information, such as re-identification.

126 — See www.open-contracting.org/implement/#/4

127 — Also called the "data controller".

THE MYTHS

MYTH #6: Disclosing contracting information encourages and sustains collusion

Introduction

This myth is about collusion, or cartel forming, which is an illegal practice in which competing bidders conspire in an attempt to win a bid. Bidders informally agree on the strategy for one of its members to win the bid, fixing bid prices (sometimes above competitive levels),¹²⁸ and dividing benefits amongst cartel members.

Cartels are not typically formed for one single tender but to rig multiple tenders in the same sector. Sometimes cartel members refrain from bidding to allow other members to win the bid or deliberately submit uncompetitive 'sham' bids. They may divide up the market geographically or by market segments. "Losing" members are then compensated by the winning member in the form of side payments, subcontracting arrangements, or the promise to win subsequent bids.

Cartels are typically formed in highly concentrated markets, i.e. in markets or sectors in which few companies compete, because it is easier to monitor and control the behavior of a small number of firms.¹²⁹

To form a cartel, one would have to know exactly which companies operate in the sector and would therefore be likely to submit a proposal. These companies can then be approached to participate in the cartel.

It would be easy for a cartel member to cheat and break the cartel agreement by submitting a winning proposal when he/she is not supposed to, since the agreed upon winning price/proposal is already known. All he/she has to do is submit a proposal with a more competitive price, or, depending on the procurement method, a better quality proposal. The cartel will find out whether one of its members has cheated when the winning bidder is officially announced by the government procurement entity.

The reasoning behind this myth is that disclosing certain contracting information makes it easier to form cartels and for cartels to monitor the behavior of their members. For example, when potential bidders can publicly and not anonymously ask clarifying questions about the project via an online system, or when a list of bidders is disclosed before contract award, competitors can be identified so that they can be approached to form or join a cartel for current and future bids. When the amount the government agency budgeted for the project is disclosed, cartel members can use it to fix uncompetitive prices. When the winning bidder and winning price/proposal are publicly announced, the cartel can verify whether its members stuck to the cartel agreement.

128 — J. Wells. 2014. Corruption and collusion in construction: a view from the industry. In T. Søreide and A. Williams (Eds.). *Corruption, Grabbing and Development: Real world challenges*. www.engineersagainstopoverty.org/documentdownload.axd?documentresourceid=27

129 — OECD. 2009. *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money*. www.oecd.org/competition/cartels/42851044.pdf

The myth asserts that the more information is available, the easier it may be for cartels to police their members. So open data is not only unhelpful, it may actually be harmful. As mentioned earlier, concern over cartelization in the 1980s and 1990s has shaped the public contracting disclosure regimes in some jurisdictions, notably in Western Europe.

The Myth Uncovered

Companies know who their competitors are and do not depend on publicly disclosed contracting information for that knowledge.

Cartels mainly exist in highly concentrated markets, because it is easiest to sustain a cartel with just a few members. Most companies are well aware of who their competitors are (and thus, their potential cartel partners).¹³⁰ Especially in highly concentrated markets, companies have access to industry associations,¹³¹ informal networks, and the internet. They participate in private market tenders, and employees frequently move between competitors.¹³²

One of the strategies to prevent and disrupt collusion is to decrease market concentration by increasing competition¹³³ (i.e. increasing the number of bidders), as a cartel with a large number of firms is more difficult to sustain. This can be done by increasing awareness of tender opportunities, reducing the cost of bidding, allowing both local, national, and foreign companies to participate, and allowing smaller firms to form a consortium to be able to tender for bigger projects, for example.¹³⁴ Most of these solutions call for more transparency of opportunities and contracting data, rather than less.

If a supplier can do the work at a lower price than the estimated contract value, their best strategy to win the contract is to tender at their best price.

Disclosing the estimated contract value during the tender stage avoids wasting time and money on both the bidder and government side by submitting and reviewing unrealistic bids. It also removes discretionary power from government staff who know the budget and might use this knowledge illicitly.

A study¹³⁵ based on procurement data from Japan shows that disclosing minimum prices of procurement lowers the risk of collusion. Because minimum prices make price wars less effective, they also make cartel enforcement more difficult.

To know whether its members stuck to the cartel agreement, one only needs to know the name of the winning bidder, which is already covered in good disclosure practices anyway.

International best practice on disclosure of contracting information already requires the public sector to be transparent about the winning bidder, which is the only piece of information required by cartels to know whether its members adhered to the agreement made.

130 — Interviews conducted for this report, and UK Public Accounts Committee - Minutes of Evidence HC 777, Session 2013 - 2014, which says: "Everyone knows everyone else in the industry and people have a rough idea of each other's margins, and anyway people are circulating around from company to company every few years." www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/131120.htm

131 — J. Harrington, Jr. 2006. How Do Cartels Operate? Foundations and Trends in Microeconomics Vol. 2, No 1 2006 1-105 <http://assets.wharton.upenn.edu/~harrij/pdf/fnt06.pdf>

132 — UK Public Accounts Committee - Minutes of Evidence HC 777, Session 2013 - 2014 www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/131120.htm

133 — J. Harrington, Jr. 2006. How Do Cartels Operate? Foundations and Trends in Microeconomics Vol. 2, No 1 2006 1-105 <http://assets.wharton.upenn.edu/~harrij/pdf/fnt06.pdf>

134 — OECD. 2010. Collusion and Corruption in Public Procurement. Policy Roundtable. www.oecd.org/competition/cartels/46235884.pdf

135 — S. Chassang and J. Ortner. 2015. Collusion in Auctions with Constrained Bids: Theory and Evidence from Public Procurement. Princeton University William S. Dietrich II Economic Theory Center Research Paper No. 072_2015. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683505

Research shows that disclosing contracting information decreases cartel duration.

Not one person interviewed for this report, nor our own extensive literature search, produced any *empirical* evidence supporting the assertion that more information assists cartel formation and duration. Collusion takes place across the board, in each and every country, whether or not that country discloses contracting information.

The only evidence we could find – empirical research¹³⁶ on a sample of firms indicted by the European Commission for forming illegal cartels – contradicts the myth. The study found that disclosing contracting information¹³⁷ actually decreases cartel duration, because it allows the cartel to detect a cheating member earlier than if it had to rely only on self-reported information.¹³⁸ When cheating is detected, cartels are dissolved by their members.¹³⁹

Disclosed contracting information has been used to detect collusion.

In Colombia, the entire contracting process underpinning Bogota's school lunch program, delivering 700,000 meals a day, were made fully transparent using open contracting data by Colombia Compra Eficiente and the city's Ministry of Education. Analysis of the information revealed that a group of firms colluded to drive up the price of fruit and vegetables by 45 percent.¹⁴⁰ Investigations also led to improvements in the ordering process and opening up opportunities to new suppliers, expanding the supplier base from 14 to 46 companies.¹⁴¹

An increasing number of governments routinely analyze the contracting information stored in their e-procurement system to detect collusion;¹⁴² i.e. they scan the data for certain patterns that could indicate cartel forming, with the goal of further investigating suspicions and, where justified, prosecuting cartel members.

In some countries, however, government procurement agencies do not conduct such analysis because they lack sufficient funding and/or capacity, among other reasons. In such cases, there is a need for civil society organizations to analyze procurement data aimed at detecting collusive bidding. Civil society monitoring also offers an independent third-party analysis to complement the government's analysis.

However, this is only possible if contracting information is publicly disclosed. For example, Transparency International Ukraine¹⁴³ and the Government Transparency Institute in Hungary¹⁴⁴ have researched contract awards and corresponding tenders and found patterns of collusion. Only when cartels are detected can the most effective instrument for reducing bid rigging be applied: enforcing severe penalties on cartel members.¹⁴⁵

136 — I. Goncharov and P. Caspar. 2016. Does reporting transparency affect industry coordination? Evidence from the duration of international cartels. LUMS Department of Accounting and Finance Working Paper Series AF2014/15WP04 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530385

137 — In this case sales for a given product or region, which can be used to compare agreed-upon market shares in the cartel. The disclosure of this information was required by certain accounting standards.

138 — To check whether its members stuck to the cartel agreement, cartels rely mainly on sophisticated systems of self-reporting, and they can use publicly disclosed contracting information, such as the winning bidder and submitted tender prices, to verify that information. J. Harrington, Jr. 2006. How Do Cartels Operate? Foundations and Trends in Microeconomics Vol. 2, No 1 2006 1–105 <http://assets.wharton.upenn.edu/~harrij/pdf/fnt06.pdf>, which also provides evidence of ways in which cartels members get independent auditors to audit each other's submitted information.

139 — A similar story was uncovered in an interview conducted for this report, although it involved the collapse of a cartel in private procurement. When a large oil and gas company in the United States was in the process of procuring containers, it suspected a cartel was active in the sector. The firm changed the procurement method, selecting the runner-up to the highest bidder instead of the highest bidder, which angered the cartel members as it disrupted their cartel agreement. When the winning bidder was publicly announced, cartel members discovered that the "wrong" contractor won, and the cartel fell apart.

140 — See, for example, El Tiempo. 2017. Formulan cargos a 'cartel' de frutas en alimentación escolar en Bogotá.

www.eltiempo.com/colombia/otras-ciudades/investigacion-cartel-de-las-frutas-en-alimentacion-escolar-126314

141 — Open Contracting Partnership. April 2018. The deals behind the meals. How open contracting helped fix Colombia's biggest school meal program. <https://medium.com/open-contracting-stories/the-deals-behind-the-meals-c4592e9466a2>

142 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation, and OECD. 2012. Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement. www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf

143 — Interviews conducted for this report.

144 — B. Toth, M. Fazekas, A. Czibik, and IJ. Toth. 2015. Toolkit for detecting collusive bidding in public procurement, with examples from Hungary. Working Paper series: GTI-WP/2014:02, Budapest: Government Transparency Institute.

www.govtransparency.eu/index.php/2015/11/13/toolkit-for-detecting-collusive-bidding-in-public-procurement/

145 — OECD. 2010. Collusion and Corruption in Public Procurement. Policy Roundtable. www.oecd.org/competition/cartels/46235884.pdf

THE MYTHS

MYTH #7: Disclosing contracting information decreases competition

Introduction

The reasoning behind this myth is that if contracting information is publicly disclosed, companies are less likely to participate in a bid because they do not want such information to be publicly known. If companies do bid, some argue, they will charge more for their services because of the inconvenience of increased disclosure.

The Myth Uncovered

Public contracting information disclosed should not contain legitimately sensitive information (from a personal, commercial, and/or national security perspective). But this myth doesn't refer to such data (which if disclosed, should rightfully discourage companies from bidding). Rather, it concerns the disclosure of tender documents, evaluation criteria, requirements and conditions, technical specifications, contracts (with appropriate redactions applied), name of winning bidder, contract value and key progress indicators.

There is no evidence that disclosing contracting information decreases competition. Nor is there any evidence that companies abstain from bidding due to high disclosure levels. In fact, the evidence points to the contrary.

Evidence shows that disclosing contracting information leads to an increase in the average number of bidders per tender, not a decrease.

An academic analysis of 3.5 million procurement records across Europe between 2006 and 2015 found that the risk of single bid contracts decreases by 0.4 percent to 0.7 percent for each additional information item published about the contracting process.¹⁴⁶ This matters as single bid contracts were on average about 7 percent more expensive than contracts with two or more bidders. As a rough calculation, if transparency is increased by five items on average across Europe, single bidding would drop by 2-3.5 percent, equivalent to savings of about €3.6-6.3 billion per year across the EU.¹⁴⁷

In Slovakia, the average number of bidders per tender increased from 1.6 in 2010 to 3.7 in 2014 after procurement reforms, which included a significant increase in disclosure of contracting information and the use of e-procurement systems to disseminate such information and submit bids.¹⁴⁸

146 — M. Bauhr, C. Agnes, M. Fazekas, J. de Fine Licht. August 2017. Lights on the Shadows of Public Procurement. Transparency in government contracting as an antidote to corruption?

<http://digiwhist.eu/publications/lights-on-the-shadows-of-public-procurement-transparency-in-government-contracting-as-an-antidote-to-corruption/>

147 — See www.open-contracting.org/2017/12/06/greater-transparency-calls-tenders-save-europe-billions/

148 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

In Ukraine, following the introduction of greater transparency and an e-procurement system based on the Open Contracting Data Standard, the number of bids rose by 15 percent. Even more notable, the government is now procuring from more and more diverse suppliers, with the average number of unique suppliers growing by 45 percent for each procuring entity.¹⁴⁹

In Colombia, 50 percent of contractors that won government bids under the new, more open procurement system in 2015 had never participated in public contracting before.¹⁵⁰

In Mexico, the implementation of new contracting information disclosure and competitiveness measures saw the average number of bidders increase from 1.9 in 2012 to 5.6 in 2016.¹⁵¹

A World Bank survey of 34,000 companies in 88 countries shows that competition was higher and kickbacks were fewer and smaller in places where transparent procurement, independent complaint and external auditing are in place.¹⁵²

There is also robust evidence that releasing information like cost estimates for works encourages bidders to compete more aggressively and lowers prices, especially when there is widespread uncertainty about the project's likely cost.¹⁵³ Countries like Ghana, Guinea, Liberia and Mexico have all received significant investments from major international resource extraction companies despite a policy of proactively disclosing resource contracts.¹⁵⁴

Evidence shows that disclosing contracting information leads to an increase in the average number

Among the many examples of transparency resulting in better value for money are:¹⁵⁵

- When the city government of Buenos Aires started publishing data on the amount state hospitals paid for medical supplies, the average price dropped;¹⁵⁶
- In Slovakia, when the government started publishing comprehensive contracting information, considerable inefficiencies in hospital procurement were discovered, including the purchase of identical CT scanners for prices that varied by 100 percent;¹⁵⁷
- When social housing contracts in Paris were publicly disclosed, bid prices dropped by 26 percent on average, and bid renegotiations became less common, analysis shows;¹⁵⁸
- In Martin, a town in Slovakia, after the launch of an e-procurement system that disclosed contracting information, the prices of winning bids declined dramatically, with cost savings of around 25 percent in the first year of operation;¹⁵⁹ and
- In Ukraine, the average reduction in price has been about 9.1 percent per contract since the procurement reforms came into effect, and over 30 percent in contracts with more than 5 bidders.¹⁶⁰

149 — Open Contracting Partnership. 2017. Learning Insights: Measuring results from open contracting in Ukraine.

www.open-contracting.org/2017/04/19/learning-insights-measuring-results-ukraine/

150 — Colombia Compra Eficiente. 2015. Resultados del sistema de indicadores.

www.colombiacompra.gov.co/indicadores/resultados-del-sistema-de-indicadores

151 — Research conducted for this report.

152 — S. Knack, N. Biletska and K. Kacker. 2017. Deterring Kickbacks and Encouraging Entry in Public Procurement Markets Evidence from Firm Surveys in 88 Developing Countries. Policy Research Working Paper 8078, World Bank Group.

<http://documents.worldbank.org/curated/en/817871496169519447/Deterring-kickbacks-and-encouraging-entry-in-public-procurement-markets-evidence-from-firm-surveys-in-88-developing-countries>

153 — D. De Silva, T. Dunne, A. Kankanamge and G. Kosmopolou. 2008. The impact of public information on bidding in highway procurement auctions. *European Economic Review* 52(1): 150-181. www.sciencedirect.com/science/article/pii/S0014292107001067

154 — Natural Resource Governance Institute, Open Contracting Partnership et al. 2016. Promises are vanity, contracts are reality, transparency is sanity.

www.resourcegovernance.org/sites/default/files/documents/nrgi_eiti_brief20160219.pdf

155 — The World Bank Group. 2016. A Framework For Disclosure in Public-Private Partnerships.

<http://pubdocs.worldbank.org/en/143671469558797229/FrameworkPPPDisclosure-071416.pdf>

156 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

157 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia.

www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

158 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

159 — United Nations Office on Drugs and Crime. 2013. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption

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

160 — Interviews conducted for this report.

Potential reasons for this include:

- Reviewing past contracts and tender information allows companies to submit higher-quality or lower-cost bids;¹⁶¹
- Disclosure of contracting information may give companies confidence that their bids will be evaluated justly,¹⁶² which makes them more likely to submit a bid.¹⁶³ For example, a survey in Colombia in 2006 (before the new e-procurement system was implemented) showed that 84 percent of companies consulted did not compete for public contracts because they didn't think the process was conducted fairly.¹⁶⁴ Research conducted for this report indicates that companies there still want greater disclosure of contracting information due to concerns over government corruption. Similarly, in Ukraine, the majority of businesses in a recent survey of the country's new, transparent ProZorro procurement process believe that it significantly (27 percent) or partially (53 percent) reduces corruption in procurement. Only 29 percent of respondents said that they encountered corruption with ProZorro, compared to 54 percent with the traditional system;¹⁶⁵
- Accessing procurement opportunities is easier with e-procurement and open data. The more procurement opportunities companies are aware of, the more likely they are to submit a proposal;¹⁶⁶ and
- E-procurement systems can make it easier and less costly for firms to submit a proposal.

The availability of contracting information via FOI request has not deterred companies from bidding for government contracts.

FOI requests related to public procurement are often submitted by companies to collect information about their competitors, and to gather information about structuring winning proposals.

In the USA, for example, more than 12,000 contracts have been released through FOI requests and an online database of government contracts can be purchased for US\$99.55. Neither seems to have deterred companies from bidding for government contracts.¹⁶⁷

In Brazil, PPP contracts have been disclosed in unredacted form through FOI requests. This has not led to a decrease in the number of companies bidding for government contracts either, according to a former head of government procurement interviewed for this report.¹⁶⁸

Bidders can factor the costs of transparency into their offers.

All the available evidence points to cost savings under proactive publication regimes, so the costs of transparency are clearly not significant.¹⁶⁹

161 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

162 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation and OECD. 2012. Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf. A study by the European Commission shows that suppliers claim a lack of trust is one of the main barriers to participating in public procurement European Commission. 2015. "Economic efficiency and legal effectiveness of review and remedies procedures for public contracts", MARKT/2013/072/C <https://bookshop.europa.eu/en/economic-efficiency-and-legal-effectiveness-of-review-and-remedies-procedures-for-public-contracts-pbKM0414223/>

163 — Interviews conducted for this report.

164 — CoST Initiative. 2011. Transparency and corruption in public contracting in Colombia. www.constructiontransparency.org/documentdownload.axd?documentresourceid=38

165 — In addition, respondents believe that the key measures that should help reduce corruption are openness, accessibility and clarity of information about the competition, clear and justifiable criteria for selecting winners, and simplicity of paperwork in competitions. A significant percentage of respondents (80 percent) indicated that ProZorro provides simplicity of paperwork for competitions by enabling the electronic submission of tender documents. Also, the system largely solves the problem of openness, accessibility and clarity of information about the competition (68 percent) and the selection of the winner (57 percent). Other problems remain unresolved, including the criteria for selecting the winner.

http://11qswp72wn11q9smtq15ccbuo.wpengine.netdna-cdn.com/wp-content/uploads/Ukraine-Corruption_MSI-eTender-D3-Survey-Report-En-FINAL-1.pdf

166 — CoST Initiative. 2009. A Study of Anti-Corruption Initiatives in the Philippines' Construction Sector.

<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047823.pdf>

167 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

168 — Interviews conducted for this report.

169 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

THE MYTHS

MYTH #8: Disclosing contracting information costs too much money and leads to costly appeals and more contract renegotiations, causing further delays and costs

Introduction

This myth covers a general objection to disclosing more information as it will cost money to do so and also increases costly processes like appeals and renegotiations, adding further delays and costs.

The notion that disclosing information incurs costs is not new. After all, the FOI acts in several countries allow public authorities to refuse to adhere to a request for information where the cost of compliance is estimated to exceed a certain limit. In the UK, for example, the time it takes to determine whether the information is held by the authority, and locate, retrieve and redact it where necessary, may not exceed 24 hours.¹⁷⁰

In Slovakia, new procurement legislation with extensive disclosure requirements was opposed by both companies¹⁷¹ and local governments¹⁷² because they feared costs would increase, and that assembling and sharing information would create a huge bureaucratic cost. They argued that these costs would outweigh any public benefit.

Other costs the government may incur related to disclosing contracting information (beyond location, retrieval and redaction) include:

- the development and licensing of an e-procurement system;
- human resources related to public engagement (such as responding to tender questions¹⁷³ and developing summary statements and explanatory notes¹⁷⁴ to encourage public understanding of contracting information); and
- human resources needed for data entry and to scan and upload contracting information.

Costs incurred by bidders typically include human resources for indicating which parts of the submitted information should be withheld from disclosure (if any) and submitting proposals.

170 — 24 hours is the limit for central government, legislative bodies and the armed forces. The maximum for all other public authorities is 18 hours. Information Commissioner's Office. 2015. Requests where the cost of compliance exceeds the appropriate limit.

https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

171 — A. Furnas. 2013. Transparency Case Study: Public Procurement in the Slovak Republic. Sunlight Foundation.

<http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/>

172 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf and M. Kamenik et al. 2011. Transparency of the public procurement system in the Czech Republic. www.bezkorupce.cz/wp-content/uploads/2011/10/Transparentnost_VZ-EN.pdf

173 — In Colombia, for some tenders, more than 1500 enquiries were received. The procurement agency committed to respond to every single enquiry, which took more time and staff resources than expected. Interviews conducted for this report.

174 — In Brazil's state of Minas Gerais, the PPP department customized information for different audiences such as media, service providers, etc., updated project information regularly, and made summaries of documents. Interviews conducted for this report.

This myth also assumes that unsuccessful bidders are more likely to challenge an award decision when they have access to contracting information such as the winning bidder's proposal and contract. In turn, this costs time and money, and can lead to project delays.

There is also concern in some industries, especially in the oil and mining business, that disclosing contracts encourages contract renegotiations.¹⁷⁵ These may cause project delays, raising costs for both government and the contractor.

The Myth Uncovered

The issue is not whether proactively and comprehensively disclosing contracting information requires resources. It will. Rather, the question is how much it will require and whether implementation is feasible in relation to the benefits of improved disclosure.

If the right infrastructure is in place, managing records and disclosing information can be an automated, low-cost processes.

With the piles and piles of documents involved in procurement processes, having good record management systems in place is best practice in and of itself. Good record management is key for the government's own efficiency. It also means that the costs of increased disclosure are likely to be outweighed by the benefits.

Comprehensive e-procurement systems provide and store general procurement information, tender notices, bidding documents, minutes/records of bidding conferences, submission of bids, bids received, evaluation reports, contracts, price comparisons, payments submitted, payments received, receipts, project reports, etc. E-procurement systems have shown to reduce costs and increase efficiencies as they ensure that documents are already in digital form and organized with metadata.¹⁷⁶

Proactively disclosing contracting information can be made routine and automated using an e-procurement system. Evidence suggests the costs of e-procurement systems are manageable, and cost savings are substantial. Estimated cost savings using e-procurement systems are between five and 20 percent compared to traditional procurement.¹⁷⁷

Examples include:

- In Ukraine, before the e-procurement system was developed, bidding documents had to be printed, each page had to be stamped, and the documents had to be delivered to the procurement agency.¹⁷⁸ In Georgia, about 20 million copies of documents were submitted to procuring entities annually, which were delivered in person. Records were managed and kept in physical archives, which was a significant expense for the government procurement agency.¹⁷⁹ In Colombia, the new e-procurement system SECOP II allows bidders to upload their bids directly onto the online platform, instead of having to print them and send them to the government authority,¹⁸⁰

175 — P. Rosenblum & S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

176 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

177 — European Bank for Reconstruction and Development. 2015. "Are you ready for e-procurement? Guide to electronic procurement reform".

www.ebrd.com/documents/legal-reform/guide-to-e-procurement-reform.pdf

178 — Interviews conducted for this report.

179 — Interviews conducted for this report.

180 — OECD. 2016. Towards Efficient Public Procurement in Colombia. Public Governance Reviews.

www.oecd-ilibrary.org/governance/towards-efficient-public-procurement-in-colombia_9789264252103-en

- In Slovakia, when the new procurement legislation was enacted, municipal government staff manually scanned hard-copy contracting documents and uploaded them onto the government website. Overwhelmed with the new administrative burden, they invested in an e-procurement system that cost just EUR 10,500 and a couple of new computers. The new system featured search and sort functions, and the option to export data and metadata. Now, the human resource costs of uploading contracting documents is negligible.¹⁸¹ The central government register of contracting information costs EUR 20,000 to build, EUR 4,500 to update, and EUR 3,000 per year to maintain;¹⁸²
- The Georgian e-procurement system, which is used by central and local levels of government, was developed for less than US\$1 million,¹⁸³ while digitizing the archives cost US\$60,000;¹⁸⁴
- Ukraine's e-procurement system cost less than US\$5 million, counting volunteer time, training of government procurement officials and a broad national communications program, especially with small business.¹⁸⁵ To date, it has saved the country over US\$1 billion since 2015, measured as the final price paid to procure goods and services compared to the budgeted amount (of course, some of these contracts could then over-run or increase in value but the savings are still likely to be significant);¹⁸⁶
- In Colombia, value for money indicators improved significantly within one year of implementing the new e-procurement system, as the number of days it took to award contracts improved by 16 days on average;¹⁸⁷
- South Korea reports savings of US\$8 billion per year due to its e-procurement system, solely based on savings in administrative costs; the majority of these accrued to business. The time taken to process contracts by the government went from over 30 hours to just two.¹⁸⁸

In short, e-procurement systems provide the opportunity to easily store, manage, and upload contracting documents and information that had to be developed and collected anyway, in a digital and more accessible format for both government, contractors and the public.

While not perfect, countries like Georgia, Slovakia and Ukraine demonstrate the institutional feasibility of implementing comprehensive and proactive disclosure of contracting information using e-procurement systems.

With national governments and thousands of local governments managing and disclosing millions of contracting documents using inexpensive e-procurement systems, it is difficult to argue that comprehensive disclosure isn't feasible due to costs or institutional issues.

In the Czech Republic, a significant number of contracting authorities voluntarily publish small contracts using the e-procurement system, which shows that proactive disclosure isn't necessarily a large additional administrative burden.¹⁸⁹

181 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia.

www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

182 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia.

www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

183 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

184 — Interviews conducted for this report.

185 — Interviews conducted for this report. The code of Ukraine's Prozorro system is open source, free for everyone to copy and use.

186 — As reported live at bi.prozorro.org.

187 — Colombia Compra Eficiente. 2015. Resultados del sistema de indicadores. www.colombiacompra.gov.co/indicadores/resultados-del-sistema-de-indicadores

188 — OECD. 2016. The Korean Public Procurement Service. Public Governance Reviews.

www.keepeek.com/Digital-Asset-Management/oe.cd/governance/the-korean-public-procurement-service_9789264249431-en#page4

189 — M. Kamenik et al. 2011. Transparency of the public procurement system in the Czech Republic.

www.bezkorupce.cz/wp-content/uploads/2011/10/Transparentnost_VZ-EN.pdf

Reactive disclosure is often more expensive than systematic, proactive disclosure.

Reactively disclosing information is often more burdensome than systematic, proactive disclosure. Proactive disclosure reduces transaction costs¹⁹⁰ because it is done in a routine, systematic and structured manner, with the use of e-procurement systems, while reactive disclosure typically takes place on an *ad hoc* basis without having easily accessible procurement information management systems in place.¹⁹¹

Interviews conducted for this report showed that in various countries, local governments started proactively disclosing contracting information because they kept getting FOI requests about the same issues. It was more efficient for them to start disclosing the information proactively than respond to each individual FOI request.

Redaction of documents should be minimized, the process for redaction standardized, and the rules for exceptions for disclosure should be clear.

If managed poorly, time spent redacting documents can be significant. The more standardized and clear the rules for redaction, and the less information is required to be redacted, the lower the administrative costs of disclosing contracting information.¹⁹² For example, the states of Victoria and New South Wales in Australia and British Columbia in Canada have an efficient and regulated disclosure process that restricts the reasons for redaction.¹⁹³

Where possible, disclosing documents in their entirety not only removes discretionary powers from officials to determine which information should be redacted, it also minimizes the administrative burden of redacting. For example, of the contracts in Australia's federal contract database in 2012, only 2.2 percent were redacted due to confidentiality issues,¹⁹⁴ which suggests the majority of contracts can be published without redaction.

Benefits and public savings of disclosing contracting information are substantial.

The costs of disclosing information are minimal in the face of its benefits, which have proven to include significant savings and a reduction in corruption. For example:

- World Bank research into corruption and bribery in road projects shows that the average cost in low bribery countries was US\$30/m2 whereas it was half as much again, at US\$46/m2, in high bribery countries.¹⁹⁵
- Projects prepared in secrecy, or with limited stakeholder engagement and information dissemination, typically run into public resistance and have a higher chance of being tainted by corruption. As a result, they are sometimes held up for years.¹⁹⁶ The projected cost of local disruption and conflict over a US\$3-5 billion dollar mining investment is roughly US\$20 million a week,

190 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation and Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia.

www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf and The World Bank Group. 2016. Framework for Disclosure in Public-Private Partnerships PPPs Public Consultations: Matrix of Feedback and Responses

<http://pubdocs.worldbank.org/en/616131464363398212/Final-Website-Matrix-of-comments-and-responses-Version-Disclosure-Framework.pdf>

191 — Interviews conducted for this report.

192 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

193 — Interviews conducted for this report.

194 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

195 — C. Kenny. 2010. Publish Construction Contracts and Outcome Details. World Bank Policy Research Working Paper 5247.

<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-5247>, p. 3.

196 — M. Bin Wan Abdullah, M. Bin Deris, M. Haji Mohamad and M. Binti Tarmidi. 2012. Perception of government officials towards the government procurement system: Evidence from the Eastern Region of Malaysia. African Journal of Business Management Vol. 6(23): 6853-6859.

www.academicjournals.org/journal/AJBM/article-full-text-pdf/3AD0D2A37171

largely due to lost sales.¹⁹⁷ Holding public hearings or consultations for needs assessments, feasibility studies and environmental and social impact assessments in the planning and pre-bidding phase can ensure the contracting process addresses public concerns. This is particularly relevant for contracts affecting significant land use, infrastructure or delivery of services.¹⁹⁸

- Disclosing contracting information leads to lower average tender prices. As noted previously, when the city government of Buenos Aires started publishing data on what state hospitals paid for medical supplies, the average price dropped.¹⁹⁹
- In Slovakia, when the government started publishing comprehensive contracting information, considerable inefficiencies in hospital procurement were discovered, including the purchase of identical CT scanners for prices that varied by 100 percent.²⁰⁰
- Analysis of social housing contracts from Paris indicate that bid prices declined by 26 percent on average, and bid renegotiations became less common, when contracts were publicly disclosed.²⁰¹
- Disclosing contracting information allows civil society and media to monitor value for money and service delivery, which benefits government and citizens. For example, in the Philippines, school textbook delivery was successfully monitored by civil society groups. Other civil society groups in the Philippines used project and payroll information disclosed by the government to monitor the construction of 600 infrastructure projects. As a result, 11 engineers were found guilty of negligence and a number of projects were completed that otherwise would have been neglected. Slum dwellers in Mumbai used water supply design specifications to show that pipes were being installed to the wrong specifications.²⁰² In the UK, Spend Network developed a tool to identify the correct tender price using publicly disclosed contracting information.²⁰³

Government spending on resources to engage with the public is an investment, not a pure cost.

In Colombia, Georgia and Ukraine, public entities conducting procurements must answer each and every question that citizens, companies, or civil society ask about these purchases, via an e-procurement system. The questions and answers are publicly disclosed. While responding to those queries increases the workload of government procurement agency staff, it is seen as a way to engage with the public, to increase trust in the system, and to spot and correct mistakes early on in the tender process.²⁰⁴ OCP's research with the Kiev School of Economics shows a link between responsiveness by agencies to questions and successful tenders without amendments or cancellations. Tenders with a 100 percent response rate to feedback have a 66 percent success rate, while those with no response only succeeded 52 percent of the time.²⁰⁵

Bidders can factor the costs of redacting and uploading into their offers.

As the examples of cost savings under proactive publication regimes show, these costs are not significant.²⁰⁶

197 — R. Davis and D. Franks. 2014. Costs of Company-Community Conflict in the Extractive Sector. Corporate Social Responsibility Initiative Report No. 66. Harvard Kennedy School, Cambridge, MA. https://sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf

198 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute. www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

199 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

200 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

201 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

202 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute. www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf and Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

203 — Institute for Government and Spend Network. 2013. Government Contracting: public data, private providers www.instituteforgovernment.org.uk/sites/default/files/whitehall-monitor/WM_GovernmentContracting_ProvisionalData.pdf

204 — Interviews conducted for this report.

205 — Open Contracting Partnership. 2017. Learning Insights: Measuring results from open contracting in Ukraine www.open-contracting.org/2017/04/19/learning-insights-measuring-results-ukraine/

206 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

The frequency of appeals does not depend on the disclosure level of contracting information.

From interviews conducted for this report, the frequency of appeals appears to differ significantly across jurisdictions. In some countries, appeals are commonplace; in others, they only occur in exceptional circumstances. The cause appears to be rooted in culture and differences in legal systems, but not in the level of disclosure of contracting information.

For example, according to anecdotal evidence, in Brazil's state of Minas Gerais, almost every PPP project was challenged in court, before and after the practice of proactively disclosing contracting information.²⁰⁷ In the UK, suppliers do not challenge contract awards as frequently as in Ireland, although more information is published in the UK.²⁰⁸

In jurisdictions without comprehensive and proactive disclosure, the contracting information needed to evaluate contract awards is often obtained via FOI request.²⁰⁹

E-procurement systems can make it easier to appeal award decisions (as part of a deliberate monitoring strategy).

In Georgia, the appeals process is one of the cornerstones of the new e-procurement system. Before the e-procurement system was in place, there were about eight to 12 appeals per year. After the system was implemented, the number of appeals rose to 1000, which is about three to four percent of all tenders.²¹⁰

This is because the new system makes it easy to submit a complaint. Similar to a peer review, suppliers can now easily check each other's bids, including the winning bid, and assess the quality of goods or services offered by the winning bidder.²¹¹ Any citizen or company can appeal any decision via the e-procurement system by filling out a short form.

Similarly, in Ukraine, the process for complaints is made deliberately easy and transparent, via the new e-procurement system. Anyone can see the appeals and decisions made, and can participate in a claim review online.²¹²

Examples show that the use of e-procurement systems can keep the costs of appeal manageable.

In Georgia, each appeal is reviewed within 10 business days by a dispute review board comprised of three members elected by civil society, and three government procurement agency staff.

In Ukraine, a review committee examines appeals submitted online, at a flat fee of about US\$200.²¹³ The committee's decision is binding.

Government procedures require procurement staff to maintain an audit trail of the decision-making process, in case of appeal.²¹⁴ Such audit trails are more easily maintained using a comprehensive e-procurement system.

207 — Interviews conducted for this report.

208 — For a broader overview of the number of complaints, average duration, and outcome of appeals in the European Union, please see: European Commission. 2015. "Economic efficiency and legal effectiveness of review and remedies procedures for public contracts", MARKET/2013/072/C <https://bookshop.europa.eu/en/economic-efficiency-and-legal-effectiveness-of-review-and-remedies-procedures-for-public-contracts-pbKM0414223/>

209 — McDermott Will & Emery. 2008. Confidentiality or disclosure—who is a better mate for competition and fair play? www.lexology.com/library/detail.aspx?g=469b2c4c-5093-4047-9112-387866f131f3 and Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

210 — Interviews conducted for this report.

211 — Ibid.

212 — It should be noted that no data could be obtained about the outcomes of the appeals before and after the new e-procurement systems of countries like Georgia, Ukraine, Colombia, etc

213 — Interviews conducted for this report.

214 — Practical Law - Evaluation of Tenders: <http://uk.practicallaw.com/2-386-8761?service=fs>

In general, peer reviews and appeals are considered to contribute positively to trust in the system.

In some jurisdictions, a similar review system is applied without a comprehensive e-procurement system. In Greece, upon completion of the tender stage, every bidder is given access to the winning bidder's proposal and contract to assess whether the award decision was fair.²¹⁵ This is intended to increase trust in the system and ensure the contract is awarded to the right bidder. Similar arguments were used for the new appeals processes in Ukraine and Georgia.²¹⁶ Appeals might also help uncover botched tenders and malfeasance that could, otherwise, be much more costly if the contract fails later.

There is little evidence that disclosing contracting information actually results in more contract renegotiations.

Detailed evidence from industries like oil and gas suggests that when contracting information is disclosed proactively from the start of the contracting cycle, it probably contributes to more sustainable contracts in the long run.²¹⁷

Some companies have insisted that their contracts are made public for this reason, especially when they will cover long-term, multi-billion dollar investments. Mining company Newmont insisted that the investment agreement for its Ahafo mine in Ghana was not only made public, but also debated and approved by parliament in order to build trust and credibility to this end²¹⁸ and to reduce the chances of the contract being renegotiated after a change in government.²¹⁹

Better sharing of contracting information in Paraguay, including the publishing of open contracting data, correlates with a decrease in adjustments and amendments to contracting processes, from 19 percent of all contracts in 2013 to just 3 percent in 2016.

Analysis of social housing contracts in Paris also suggests that greater transparency leads to fewer bid renegotiations.²²⁰

With comprehensive information disclosure, both parties have an incentive to agree to the right terms and price, especially when an easy appeals system and public consultation are involved, as these issues are likely to arise anyway if not proactively addressed.

Deals can be met with suspicion and calls for renegotiation if the decision-making process is conducted privately – without the involvement of citizens, the media, and civil society – and contracts are only disclosed when they are already signed. They become an easy target for populist politicians. Disclosing comprehensive contracting information (including any renegotiated contracts), allows all parties to gain an understanding of the background to the contract and the circumstances under which it was signed.²²¹ It also helps procuring entities to vet bidders early on.

215 — Interviews conducted for this report.

216 — Interviews conducted for this report.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

217 — P. Rosenblum and S. Maples. 2009. Contracts Confidential: Ending secret deals in the extractive industries. Revenue Watch Institute <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>

218 — A.K. Bjorklund. 2015. Yearbook on International Investment Law & Policy, 2013-2014. Oxford University Press

219 — Interviews conducted for this report.

220 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation.

www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

221 — Interviews conducted for this report.

BOX 3: Public consultation in the planning phase

International standards such as the Equator Principles and, in many countries, national legislation, require project representatives to conduct impact assessments and extensive community consultations.

Such assessments and consultations seek to minimize and mitigate any environmental and social impact at the local and the community level, and to prevent illegal land grabbing and wrongful eviction. In certain cases, free prior informed consent from affected communities may be required (for example, if there are impacts on indigenous peoples).

Typically, these assessments include an appraisal of alternative sites. Sometimes, consultations result in the selection of an alternative (and better) project location, or alteration of the project.

If it turns out that projects have not been well thought through, they may be withdrawn or even cancelled pending further consultations. This is not so much a negative outcome as a consequence of re-evaluating who will benefit and who will lose from any given development based on better information.

Disclosing government procurement plans and bidding documents for large infrastructure projects is sometimes perceived to have adverse consequences, such as in-migration and an increase in land prices, as citizens – hoping to benefit from a project – move into and/or buy land at the proposed project site. These individuals may hope that the government will have to buy back the land at an inflated price in order for the project to go ahead.

In reality, most government plans for infrastructure projects are discussed in the (national or local) assembly in order to obtain budget approval. Citizens affected by government infrastructure development plans typically learn about them through these discussions rather than from more detailed disclosures.

Nevertheless, careful consideration of the timing and scope of consultation needs, especially at the early planning stage, may help to minimize the risk of speculation.

Most, if not all, planning and discussions will take place internally, within government (and, in some cases, with the contractor hired to conduct the studies) during the scoping, pre-feasibility study and bankable feasibility study stages of a project. The impact assessment and community consultations take place, once the feasibility of the project is confirmed.

Certain information disclosed in the early planning phase (such as documents showing where land acquisition is planned) should be carefully managed to avoid expensive speculation about compensation for land, crops, and infrastructure. For example, local authorities can declare a cut-off date for compensation for newly built infrastructure, newly planted crops, and recently purchased land, in order to freeze development and limit speculation early in the project cycle.

In short, it pays to carefully and considerately consult on projects that will impact on hugely emotive topics such as lands and livelihoods.

THE MYTHS

MYTH #9: Disclosing contracting information does not expose or lower corruption

Introduction

Every year, governments spend huge sums of money through contracts: global public procurement spending amounts to over US\$9.5 trillion annually, equivalent to 15 percent of global GDP. Contracting is a government's number one corruption risk as it is where money and government discretion collide. Some 57 percent of foreign bribery cases prosecuted under the OECD Anti-Bribery Convention involved bribes to obtain public contracts.²²² OECD analysis found that almost half (43 percent) of the cases studied involved payments to public officials in countries with high or very high levels of human development, so this is not an issue just confined to developing countries.²²³

According to a 2017 Eurobarometer survey carried out by the European Commission, nearly a third of European companies feel that they have missed out on winning a public contract because of corruption.²²⁴ Even in countries that score well in Transparency International's Corruption Perception Index have a large proportion of companies that feel they have experienced corruption in competing for public contracts: in Denmark, it is 14 percent of companies and in Sweden, it is 26 percent of companies.

Every stage of the procurement process is prone to corruption: from skewing tender specifications, to rigging evaluation criteria, and inflating invoices in contract execution.²²⁵ A World Bank study suggests that the same road reconstruction project is one and a half times more expensive in more corrupt countries.²²⁶

Everyone agrees that corruption in public procurement is a severe problem that should be eliminated, but opinions differ on how to best achieve that. Some say that disclosing contracting information will not expose or lower corruption because corrupt practices supposedly take place outside the official system, making it invisible in the official contracting process, and therefore impossible to catch by publicly disclosing contracting information.²²⁷ And if disclosed contracting information doesn't lead to the exposure and lowering of corruption, why do it in the first place?

222 — OECD. December 2014. The OECD Foreign Bribery Report. An Analysis of the Crime of Bribery of Foreign Public Officials. www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm, p.8.

223 — OECD. December 2014. Scale of international bribery laid bare by new OECD report. www.oecd.org/newsroom/scale-of-international-bribery-laid-bare-by-new-oecd-report.htm

224 — European Commission. December 2017. Businesses' attitudes towards corruption in the EU.

<http://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/ELASH/surveyKy/2177>

225 — OECD. 2007. Bribery in Public Procurement. Methods, Actors, and Counter-Measures. www.oecd.org/daf/anti-bribery/anti-briberyconvention/44956834.pdf

226 — C. Kenny. 2010. Publish Construction Contracts and Outcome Details. World Bank Policy Research Working Paper 5247. <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-5247>

227 — A. Furnas. 2013. Transparency Case Study: Public Procurement in the Slovak Republic. Sunlight Foundation. <http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/>

The Myth Uncovered

Fewer and small kickbacks were found in countries with transparent procurement systems and independent complaints mechanisms.

A World Bank study found that in countries with more transparent procurement systems, where exceptions to open competition in tendering must be explicitly justified, firms are more likely to participate in public procurement markets.²²⁸ Moreover, fewer and smaller kickbacks were paid in countries with more transparent procurement systems, effective and independent complaint mechanisms, and more effective external auditing systems.

There is robust evidence that improved transparency around public procurement lowers the risk of corruption.

As mentioned in Myth #7, a recent academic paper analyzing over 3.5 million tenders in the EU from 2006 to 2015 found strong evidence that increasing transparency of disclosures lowers the risk of corruption (measured as the risk of single bid tenders), especially where there is proactive disclosure of information before or during the process rather than afterwards.²²⁹

In many countries, disclosed contracting information has been used to expose corruption.

In addition to uncovering corruption, disclosing contracting information has also contributed to prosecutions and policy reforms.²³⁰ Examples include:

- Disclosure of contracts led to the exposure of significant political party funding by sole-source contract winners in Georgia.²³¹ By analyzing 430,000 sole-sourced government procurements and cross-referencing that data with the company registry, asset declarations of public officials, and party donations registries, Transparency International Georgia found that at least US\$150 million in purchases went to companies owned by Members of Parliament and public officials or their spouses. In addition, 60 percent of donations to the ruling party came from persons associated with companies that won sole-source procurements.²³² The new e-procurement system, aimed at disclosing contracting information and making it easier to submit bids, has resulted in a decrease in the level of corruption, and in 2012, the United Nations recognized it as one of the best tools in “preventing and combating corruption in public service” worldwide.²³³
- In 2007, Slovakia’s Ministry of Development published a tender notice for construction services totaling EUR 119.5 million on a small notice board in the hallway inside the ministry building, which is not open to the public, so only firms with existing relationships with the ministry could see the tender notice. A firm that was known to have close ties to the head of the ruling party won the contract. Once exposed, the tender became one of the most visible symbols of abuse of power, and it was

228 — S. Knack, N. Biletska and K. Kacker. 2017. Deterring Kickbacks and Encouraging Entry in Public Procurement Markets Evidence from Firm Surveys in 88 Developing Countries. Policy Research Working Paper 8078, World Bank Group. <http://documents.worldbank.org/curated/en/817871496169519447/Deterring-kickbacks-and-encouraging-entry-in-public-procurement-markets-evidence-from-firm-surveys-in-88-developing-countries>

229 — M. Bauhr, A. Czibik, M. Fazekas and J. de Fine Licht. 2017. Lights on the Shadows of Public Procurement. Transparency in government contracting as an antidote to corruption? <http://digiwhist.eu/publications/lights-on-the-shadows-of-public-procurement-transparency-in-government-contracting-as-an-antidote-to-corruption/>

230 — United Nations Office on Drugs and Crime. 2013. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf, and OECD. 2007 Bribery in Public Procurement. Methods, Actors, and Counter-Measures. www.oecd.org/daf/anti-bribery/anti-briberyconvention/44956834.pdf, and Transparency International. 2014. Curbing Corruption in Public Procurement. A Practical Guide. www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf

231 — Center for Global Development. 2014. Publishing Government Contracts: Addressing Concerns and Easing Implementation. www.cgdev.org/publication/ft/publishing-government-contracts-addressing-concerns-and-easing-implementation

232 — Transparency International Georgia. 2013. Simplified procurement - Corruption risks in non-competitive government contracts. www.transparency.ge/sites/default/files/post_attachments/Simplified%20procurement%20-%20Eng%20%E2%80%93%20Dec%202013.pdf

233 — United Nations Office on Drugs and Crime. 2013. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf

one of the drivers for major public procurement reforms in 2010, which included the introduction of a comprehensive online e-procurement system in which all government tenders and tender documents are publicly disclosed.²³⁴

- In 2014, a state hospital in Slovakia published a EUR 1.6 million contract for the purchase of CT scanners. By consulting contracting information on the online e-procurement system, the media found out that similar CT scanners were bought for less than half the price by a different hospital in the country. It turned out that the supplier of the expensive CT scanners was a shell company based in Belize, and its ownership was connected to the ruling party. Civil society subsequently discovered other contracts linked to shell companies with ties to political parties, as well as hospitals ordering more services than they needed and significantly overpaying for their purchases. As a result, the Minister of Health and three hospital directors were fired, and the Parliament passed legislation preventing shell companies from engaging in public procurement.
- Transparency International Ukraine²³⁵ and the Corruption Research Centre Budapest²³⁶ have researched publicly available information on contract awards and corresponding tenders and found patterns of collusion. In one memorable example, Transparency International Ukraine found that one regional oncology center purchased US\$100 mops from a single bid contract using the vague description “a device with a nozzle and a holder.” The purchase was subsequently investigated and cancelled.²³⁷
- After publishing reusable open data on public contracting in OCDS, journalists in Paraguay started analyzing hugely inflated costs for standard products such as office chairs, food and beverages. Investigations into some of these discrepancies were instrumental in mobilizing public protests that led to the ousting of the education minister. The public procurement agency also adopted a new government-wide policy specifying the maximum price range permitted when purchasing goods, after which measurable efficiency savings (1.5 percent) were observed.²³⁸

The chances of exposing and lowering corruption are greatest when information disclosure covers all stages of the procurement process.

Experts and practitioners agree that malfeasance moves into the stages of the procurement process that are more obscure and that require less public disclosure than others.²³⁹

For example, if a country publicly discloses contracts but nothing else, then the chances are high that corruption will prevail in the bidding process or in the contract execution stage. If a country publicly discloses the initial contract but no amendments or renegotiations, then this increases the likelihood of aggressive bids aimed at renegotiation, and corruption in the renegotiation stage.

In short, the risk of corruption is mitigated, and the likelihood of exposing corruption is maximized, when contracting information is disclosed throughout the procurement cycle.

234 — Transparency International. 2014 Curbing Corruption in Public Procurement. A Practical Guide. www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf and A. Furnas. August 12, 2013. Transparency Case Study: Public Procurement in the Slovak Republic. Sunlight Foundation. <http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/>
235 — Interviews conducted for this report.
236 — Interviews conducted for this report.
237 — See Open Contracting Partnership. 2016. Everyone Sees Everything. <https://medium.com/open-contracting-stories/everyone-sees-everything-fa6df0d00335>.
238 — See Open Contracting Partnership. 2017. Paraguay's Transparency Alchemists. <https://medium.com/@opencontracting/paraguays-transparency-alechemists-623c8e3c538f>
239 — Interviews conducted for this report, and Transparency International. 2014. Curbing Corruption in Public Procurement. A Practical Guide. www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf and M. Kamenik et al. 2011. Transparency of the public procurement system in the Czech Republic. www.bezkorupce.cz/wp-content/uploads/2011/10/Transparentnost_VZ-EN.pdf

THE MYTHS

MYTH #10: No one actually reads contracting information and, if they do, they either misunderstand it or use it to embarrass officials

Introduction

This myth is something of a double header, stemming from a concern that the right sort of people will not find the information helpful, whereas others will simply misunderstand or misuse it. Wrapped up in this concern is an overwhelming fear of potential embarrassment if inefficiencies are uncovered.

It assumes that for certain stakeholders (the general public, civil society, and the media, for example), the technical and complex nature of contracting information discourages its use. Other stakeholders, such as governments, already have access to the contracting information anyway, so there is, in theory, no need for them to download it. And if no one reads the information why bother disclosing it?

The complexity of the information also makes it prone to misinterpretation. Interviews conducted for this report suggest the real problem is that government authorities are afraid that this misinterpretation will lead to (unjustified or justified) criticism of the government. To avoid this, the reasoning goes, it is best not to disclose it in the first place.

As an example, in the state of Minas Gerais in Brazil, the PPP unit publicly disclosed all contracts in their entirety, as well as other contracting information such as key performance indicators (KPIs) for measuring and evaluating contract execution. When a journalist examined the KPIs for a certain project, he concluded that “only” 80 percent of the work had been completed, and wrote an article in which he heavily criticized the government for not delivering. The figure had been misinterpreted; in reality, the project was on schedule.²⁴⁰

The Myth Uncovered

It goes without saying that not everyone is interested in reading contracting information, nor do they have the time to do so. It cannot be expected that the majority of the population reads contracting documents in their spare time. But this is not a reason to avoid disclosing information. The information needs to be there for those who are interested and do have the time to review it, and evidence shows that there are plenty of stakeholders who regularly access contracting information, especially businesses hoping to enter into contracts with government (see Myth #7). The need to share information openly to improve competition has a transparency dividend for other users too, even if they are not the primary audience.

240 — The World Bank Group. 2017. Disclosure Practices in Public-Private Partnerships in Minas Gerais, Brazil. Webinar <https://olc.worldbank.org/content/disclosure-practices-public-private-partnerships-minas-gerais-brazil>

Our research interviews showed that the potential embarrassment for the government is one of, if not the main reason that government employees are apprehensive about disclosing information, as disclosed information can highlight incompetence and mismanagement, and generate negative feedback. In a worst case scenario, it can lead to government employees being sued and losing their jobs.

While project and contract management practices might not necessarily be worse in the public sector than the private sector, the government is subject to greater public scrutiny. And public debate helps inform government decision making to improve policies and societies.

Therefore, the fact that information can be misunderstood or cause embarrassment is no reason to keep it confidential, especially given the public harm that may be involved. Rather, the government should explain the information and educate civil society, the media, and the public.

Contracting information is regularly accessed by the public.

A 2015 study found 8 percent of Slovaks had viewed a government contract or invoice online in the previous year. In comparison, in the decade prior to the public procurement reforms introduced in 2011, only four percent of the population had filed an FOI request.^{241,242}

In Paraguay, visits to the public procurement portal website have risen by 32 percent from 2.5 million in 2015 to 3.4 million in 2016 since the government started sharing user-friendly open contracting data and provided a series of dashboards and apps to users, especially small businesses.²⁴³

In Ukraine, Google searches tracking 43 keywords related to public procurement grew from 680 in the month of January 2015 to more than 191,000 in the month of February 2017 after the country's Prozorro open contracting reforms, showing the demand for accessible information on the topic.²⁴⁴

Contracting information is regularly accessed by civil society.

Civil society can be an effective and important user of contracting information, especially with support and training. In Ukraine, civil society's Dozorro.org public procurement monitoring project unites 22 CSOs that are actively monitoring the government's open procurement data. In less than a year since its launch in 2017, it has had more than 122,000 visits and 14,000 submissions.²⁴⁵ Some 5000 procurements were flagged as needing further investigation with the authorities. Around half of these have been resolved so far, including over 1,200 cases where tenders were changed as a result of the feedback. This gives a fix rate of approximately 48% of resolved cases or 25% of all cases. In addition, 22 criminal charges and 79 sanctions have also been issued. In Colombia, civil society accessed and downloaded the new public procurement system data more than 480 times per month.²⁴⁶

Not only does civil society use the available data to detect corruption and collusion, it also monitors project delivery: in Afghanistan and the Philippines, civil society members have monitored hundreds of projects to deliver roads, schools and clinics. In Afghanistan, the teams were able to resolve 80 percent of the problems

241 — Furnas, Alexander. August 12, 2013. Transparency Case Study: Public Procurement in the Slovak Republic. Sunlight Foundation. <http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/>

242 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

243 — See Open Contracting Partnership. 2017. Paraguay's transparency alchemists. <https://medium.com/@opencontracting/paraguays-transparency-alchemists-623c8e3c538f>

244 — See Open Contracting Partnership. 2017. Learning Insights: Measuring results from open contracting in Ukraine. www.open-contracting.org/2017/04/19/learning-insights-measuring-results-ukraine/

245 — Open Contracting Partnership. January 2018. Learning insights: The latest impacts emerging from Ukraine's Prozorro reforms. www.open-contracting.org/2018/01/12/learning-insights-latest-impacts-emerging-ukraines-prozorro-reforms/

246 — According to Colombia's official open data website, civil society has consulted the datasets of the public procurement system more than 480 times between January and February of 2017.

uncovered.²⁴⁷ In the Philippines, the price of delivering textbooks to children has halved. Indonesia Corruption Watch has developed an online platform to monitor and flag government procurement at risk of corruption and fraud. Similar initiatives exist in Uganda and Nigeria.

A whole, detailed discipline of contract monitoring and beneficiary feedback has been developed by expert groups such as Integrity Action's Development Check methodology.²⁴⁸

Contracting information is regularly accessed by the media.

In many countries, including Colombia, Georgia, Slovakia and Ukraine²⁴⁹, media coverage of public procurement increased significantly with the availability of contracting information via e-procurement systems.

In Slovakia, for example, coverage of public procurement by the media increased by 25 percent. Journalists confirmed that oversight in real time was now possible, and that time spent conducting investigations was reduced by several months.²⁵⁰

Contracting information is regularly accessed by companies.

There is a large demand from companies to access contracting information. They want to know, for example, what previously awarded contracts look like and what winning proposals look like, so that they can use this information in bidding for work (or use it to decide not to bid, if they think they can't compete).

A large number of FOI requests come from companies wanting information about previous tenders.²⁵¹ In the United States, a company called DelTek processes FOI requests for government contracts to help its private sector clients to win more government work. Private databases for oil, gas and mining contracts exist, and companies pay a fee to access the information.²⁵²

In the UK, a government official alluded to the fact that disclosing contracting information would increase competition: "I have two providers for my own constituency and the geographic area around it. Each tells me that it is doing particularly well and has given me its own figures, but they would each love to know how the other is doing. That would encourage a competitive atmosphere in this market, so I can see it only as a positive."²⁵³

Several companies make a business of using open procurement data. For example, OpenOpps.com²⁵⁴ in the UK collates the contract data disclosed by over 300 different public sector bodies across Europe and the US as OCDS data and makes it available. Against a fee, it also provides market insights and helps bidders make informed decisions. A related open data business, SpendNetwork.com, helps government procurement agencies use the data to analyze where savings can be made.

247 — See Open Contracting Partnership. 2015. The More the Merrier? How much information on government contracts should be published and who should use it? www.open-contracting.org/2015/08/21/the_more_the_merrier/

248 — See www.developmentcheck.org/

249 — Interviews conducted for this report.

250 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

251 — Interviews conducted for this report

252 — See Open Contracting Partnership. 2015. The More the Merrier? How much information on government contracts should be published and who should use it? www.open-contracting.org/2015/08/21/the_more_the_merrier/

253 — House of Commons Committee of Public Accounts. 2014. Contracting out public services to the private sector. Forty-seventh report of session 2013 - 2014. www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf

254 — See Spend Network website www.spendnetwork.com/about/

Contracting information is regularly accessed by governments.

It's in the interest of governments to access contracting information from different regions or countries to negotiate better terms. For example, when negotiating contracts in the extractive industries, information asymmetries exist between oil, gas, and mining companies and the host-country government: while companies have access to expensive contract databases and lawyers, governments typically only have their own contracts as a guide in the negotiations. Access to contracts in other countries reduces these asymmetries and enables governments to negotiate better terms.²⁵⁵ Evidence from Peru suggests that open contracting led to an increased fiscal 'take' in subsequent deals as the average royalty rate increased from 5 percent to 26 percent.²⁵⁶

In 2013, in a hearing about managing government suppliers, the UK government's chief operating officer said that it would be useful to compare contracting information of a UK supplier that also operates in another country (in this case, the US), in order to negotiate a better deal for the government.²⁵⁷

In Slovakia, a geography teacher exposed several cases of lavish spending (such as luxury bottles of cognac and the rental of a top class Audi) by the ministry of education after checking the ministry's contracts and receipts online. He used the information to successfully negotiate higher pay for teachers across the country – a demand that the education minister had previously refused because the budget coffers were, allegedly, empty.²⁵⁸

Engagement increases when data are easily available via e-procurement systems, in open data format, and when education and awareness raising are provided.

In Brazil, for example, the number of clicks on the website for PPP projects in the state of Minas Gerais quadrupled after the government started updating information and making summary statements and project explanations available online. Evidence from Ukraine and Paraguay, as mentioned earlier, suggest likewise.

To increase engagement and awareness of public contracting information, some government authorities (in Colombia and Ukraine, for example) organize trainings and workshops for civil society and the media on where to find and how to interpret contracting information. In Colombia, the ministry of defense added a chat-box to its website so that users can directly ask questions, including about defense procurement. In Paraguay, the government organized a hackathon in order to increase the use of procurement data. One of the results was the development of an app that alerts companies to new tenders.²⁵⁹

Lastly, it is easier for companies, civil society and the media to engage with datasets, analyze trends and spot abnormalities when the data is disclosed in an open data format. At the Open Contracting Partnership, we support multi-stakeholder collaboration and a rigorous focus on user needs when planning to disclose information to increase the chances that it will be analyzed and acted on.²⁶⁰

255 — See Open Contracting Partnership. 2015. *The More the Merrier? How much information on government contracts should be published and who should use it?* www.open-contracting.org/2015/08/21/the-more-the-merrier/, and Contracts Confidential report.

256 — Peru Petro. Contracting in Peru Evolution.

www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/Investors/Contracting/Contracting%20in%20Peru%20Evolution

257 — House of Commons Committee of Public Accounts. 2014. Contracting out public services to the private sector. Forty-seventh report of session 2013 - 2014. www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf

258 — Transparency International Slovakia. 2015. Not in force until published online: What the radical transparency regime of public contracts achieved in Slovakia. www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf

259 — Contrataciones PY <http://www.codium.com.py/portfolio/contrataciones-py/> The app can be downloaded here:

<https://play.google.com/store/apps/details?id=py.gov.dncp.sicp.android>

260 — See, for example, OCP's 2016 Open Contracting Step-by-Step. www.open-contracting.org/wp-content/uploads/2017/01/7-steps-guidance.pdf

There is no case to keep information confidential just because it might be misunderstood or cause embarrassment, especially given the public harm that may be involved.

For example, the governments of Australia and the UK explicitly state that even though information requested under the FOI act may be technical, complex, misunderstood, and cause embarrassment or confusion, this in itself is not an argument for withholding the information.²⁶¹

In any case, the information may enter the public domain from other routes, from FOI requests to journalistic investigations to whistleblowers, and cause even more embarrassment if it looks like there was a cover-up.

Rather, the government should explain the information and educate civil society, the media, and the public.

The government authority should publish an explanation of the disclosed contracting information to make it easier for users to understand the content and context.²⁶² The more proactively the government does that the better. Being proactive is one of the key rules for managing negative PR.²⁶³

For example, when reporting on contract performance the government authority could provide the public with a contextual view of performance. Information could be presented in a format that helps members of the public to understand the relevance and completeness of the information being published. The data could be complemented by a narrative description of performance to ensure that the public obtain a fair, accurate and, where possible, comparable view of contract performance.²⁶⁴

In the case of Minas Gerais, the PPP unit started publishing background information as well as summaries and explanatory statements about its projects to avoid future misinterpretation of contracting information. It also began to engage with the public by responding to comments and inquiries. Civic engagement in public procurement increased because of these efforts.²⁶⁵ Much of this work is considered an essential part of contract management and should be performed by the government procurement agency anyway.²⁶⁶

Sometimes projects are discussed in a local political assembly, for example, during budget and planning sessions, which can be used as an opportunity to inform the public. The same is true for public hearings, which in some countries are a mandatory step in the procurement cycle.

Another way of educating civil society and the public is by providing training about the technical, legal and financial aspects of contracting information. In the Philippines, for example, the Procurement Policy Board holds trainings about the procurement process and related laws and regulations for civil society organizations that act as independent monitors in the procurement process.²⁶⁷ In Ukraine, Transparency International trains companies and government entities on using the e-procurement system, and to civil society on monitoring tenders.²⁶⁸

261 — Information Commissioner's Office. 2016. The Public Interest Test.

https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf, and Section 11B of the Australia FOI Act www.austlii.edu.au/au/legis/cth/consol_act/foia198222/s11b.html

262 — Information Commissioner's Office. 2016. The Public Interest Test. https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

263 — See, for example, Forbes' 13 Golden Rules for PR Crisis Management.

www.forbes.com/sites/forbesagencycouncil/2017/06/20/13-golden-rules-of-pr-crisis-management/#b886e9b1bcf3

264 — Institute for Government www.instituteforgovernment.org.uk/sites/default/files/publications/Contracting%20for%20Transparency%20-%20Final.pdf

265 — The number of website clicks quadrupled. Interviews conducted for this report.

266 — The World Bank Group. 2016. A Framework for Disclosure in Public-Private Partnerships.

<http://pubdocs.worldbank.org/en/143671469558797229/FrameworkPPPDisclosure-071416.pdf>

267 — L. Marchessault. 2013. Open Contracting: A New Frontier for Transparency and Accountability. The World Bank Institute.

www.open-contracting.org/wp-content/uploads/2016/02/OCP2013_Paper-NewFrontierforTransparency.pdf

268 — Interviews conducted for this report.



CONCLUSION

Opening up and sharing data on public contracting and publishing public contracts sounds radical: it is understandable that the idea is still met with caution, especially in the risk-adverse world of public contracting. We hope that this mythbusting report will build the confidence of reformers worldwide. Throughout it, we have tried to show the compelling evidence that change and better results are possible if nervousness, inertia and vested interests can be overcome.

We believe better, more open processes are possible and open contracting unlocks more value for government, business and citizens especially when reforms are embedded in wider systemic changes and designed by collaboration amongst the different stakeholders.

Perhaps our most surprising finding is how little evidence there was that supports the current status quo: we found remarkably little evidence of harm from disclosure, especially around the three Cs of collusion, confidentiality and competition. Where we have found sticking points, we have pointed to processes that can allow requests for redaction to be assessed in the public interest and resolved quickly and efficiently.

We think that the future will be open but, as ever, you all get the final word. We would love to hear your feedback at info@open-contracting.org. Send us your ideas, suggestions for new myths, and new evidence that supports or refutes our mythbusting.

And, if you are arguing for open contracting and want more tailored advice and support, we are only an email away. Thank you and good luck!

DEFINITIONS AND ABBREVIATIONS

TERM	DEFINITION
Cartel	An unofficial association of bidders with the purpose of maintaining prices at a high level and restricting competition.
Classification	The process by which records that contain sensitive information are reviewed and given a mark to indicate who may have access and how the record is to be handled.
Collusion	Combinations, conspiracies or agreements among bidders to raise or fix prices and to reduce output in order to increase profits.
Commercially sensitive information	Information of a commercial nature that is not in the public domain and that, if known, could benefit a competitor and cause harm/prejudice to the “owner” of the information.
Commercially sensitive information	Commercial information that can be demonstrated to be likely to cause harm to the company's interests or competitiveness if released.
Contracting documents	Documents containing contracting information pertaining to all stages of the public procurement cycle, including impact assessments, budgets, expressions of interest, proposals, contracts, evaluations, etc.
Contracting information	Data pertaining to all stages of the public procurement cycle
Contracts register	E-procurement system
Corruption	The misuse of entrusted power for private gain.
CT scanner	Computerized tomography, or CAT scanner
E-procurement	Electronic procurement
E-procurement system	Sometimes called a contracts register
EU	European Union
EUR	Euro, the currency
FOI	Freedom of Information
FOIA	Freedom of Information Act
GDP	Gross Domestic Product
Harm	Damage. In most countries, sufficient evidence of potential damage (called “harm” or “prejudice” in legal language) is required to prevent commercial information as an exemption for disclosure.
ICO	Information Commissioner's Office
Model Publication Scheme	A standardized scheme of publication of information, which commits authorities to make information available to the public as part of its normal business activities. Such publication schemes may include financial information relating to projected and actual income and expenditure, tendering, procurement and contracts.
OECD	Organisation for Economic Co-operation and Development
PPP	Public-private partnership
Prejudice	See <i>Harm</i>
Procurement cycle	The key stages of the procurement process, including planning, tender, award, contract, and implementation.
Public interest test	In some jurisdictions, when deciding whether to release contracting information, government procurement staff must apply the public interest test. This means, they must weigh the public interest factors in favor of disclosure against the factors against disclosure.
Public procurement	The acquisition of consumption or investment goods or services by the government.
UK	United Kingdom
UN	United Nations
US	United States

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