

# Open Contracting: A New Frontier for Transparency and Accountability

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Partnership

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## Executive Summary

This report provides an overview of emerging practices and methodologies of disclosure and participation in public contracting (collectively referred to as ‘open contracting’). It begins by introducing the importance of public contracting, its vulnerabilities, and the nascent proposition that increased disclosure and participation practices in public contracting support improved value-for-money for governments, a level playing field for the private sector, improved development outcomes for international donors, and high quality delivery of goods, works and services for citizens.

The subsections of this report then outline the practical actions that are already being taken by governments, civil society, private sector, and donors to support open contracting with reference to concrete examples from around the world as well as the rationales behind them. These sections also detail some of the core challenges to the implementation of successful open contracting and the constraints related to capacity, political economy, and sustainability. The report then explores how open contracting practices and principles complement existing sector-specific transparency and open government initiatives.

Finally, the report concludes with a discussion of some of the needs to overcome existing challenges and the role for the recently launched Open Contracting Partnership in realizing the potential impact of open contracting.



# Open Contracting: A New Frontier for Transparency and Accountability

## I. Toward More Accountable Use of Public Resources

Public contracting is an integral part of the public financial management cycle. Public contracts generate revenues through the issuance of licenses to operate public or quasi-public services, concessions for the extraction of natural resources, and the sale of public property. When it comes time to spend budget allocations, all levels of government enter into contracts to deliver goods, works, and services to citizens. These public contracts cover all economic sectors and types of agreements, ranging from the small procurement of goods to large capital spending for development of major infrastructure projects (which also require budget commitments for future years).

It has been estimated that public contracts procuring goods, works, and services alone are worth approximately US\$9.5 trillion per year.<sup>1</sup> For the private sector, public contracting is a significant source of economic activity. Corporations are competing for and negotiating public contracts, and are responsible for their performance—generating jobs, supply chains, and tax revenue in the process.

Public contracts also play a vital role in the lives of citizens. They enable the construction and maintenance of roads, schools, and hospitals; the generation of electricity; the exploitation of natural resources; the delivery of textbooks and medicine; and all of the other goods, works, and services governments seek to deliver to their citizens in order to obtain development outcomes. It is therefore widely recognized that public contracts should be awarded fairly and offer good value-for-money.

However, in both wealthy and developing countries around the world, public contracting has been identified as the government activity most vulnerable to wastefulness, mismanagement, inefficiency, and corruption.<sup>2</sup> Frequently, there is limited information in the public record about (a) the planning of public contracts, (b) how public contracts are formed (e.g. whether by negotiation or through a

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<sup>1</sup> Kenny (2012).

<sup>2</sup> World Bank (2011), OECD (2007). For example, a 2006 U.S. congressional publication reported significant overcharges, wasteful spending, and mismanagement in federal contracts in the amount of US\$745 billion (Kenny, 2012, p. 5); in 2011, India's State Auditor found significant contracting irregularities in the country's telecommunications sector and in the preparation of the 2010 Commonwealth Games amounting to billions of dollars (de Simone and Shah 2012, p. 42); and in the 2010s, the Democratic Republic of Congo, lost an estimated \$1.3 billion across five mining deals alone due to failings related to the contracting process—an amount twice the annual budget on education and health) (Africa Progress Panel, 2013).

competitive tender process); (c) the content of the agreements; (d) the progress of their performance or (e) the relevant government oversight mechanisms. This lack of information can make it difficult for civil society—and sometimes even for auditors and parliaments—to assess whether the government is getting good value for money or whether the parties to the contract are fully complying with their obligations. It also creates an uneven playing field for private sector actors seeking to compete for and fulfill public contracts. At the same time, there is typically limited opportunity for civil society groups and communities to participate and monitor public contracts or for the private sector to give feedback on public contracting processes.

Perhaps due to growing recognition of these issues, as well as emerging norms related to access to information and collaborative governance, there has been a recent uptake of increased disclosure and participation practices in public contracting around the world. The proposition underlying these practices is that disclosure and participation are mutually reinforcing drivers of accountability. In non-transparent environments with low disclosure of contracting information, civil society and the media (and, in some cases, parliaments and auditors) cannot adequately monitor the use of public resources. If given sufficient information, however, they can meaningfully participate in public contracting processes and work collaboratively with government, donors, and the private sector. This participation can reinforce contracting processes to achieve better deals for governments, a level playing field for the private sector, and a high quality of goods, works, and services for citizens around the world. The Inter-American Court of Human Rights in *Reyes v. Chile* made this point when it ordered Chile to provide contractual information to a coalition of civil society organizations concerning a US\$180 million Patagonia forestry concession (or give justifiable reasons for refusal), concluding that the right of “access to information held by the State permits participation in public governance.”<sup>3</sup>

Drawing on concrete examples from around the world, the following sections outline the frontier efforts of governments, civil society, donors, and the private sector to support open contracting. These sections also detail some of the core challenges to the implementation of successful open contracting and the likely limitations to its effectiveness related to capacity, political economy, and sustainability. The report then explores how open contracting practices and principles relate to the objectives of sector-specific transparency and open government initiatives. The report concludes with a discussion of some of the needs to overcome existing challenges and how the recently launched Open Contracting Partnership could help realize the potential impact of open contracting.

## II. Government Commitment to Open Contracting

In recent years, governments around the world have begun taking action to enhance disclosure and participation in public contracting. These efforts are taking place at all stages of public contracting (from planning through to completion of contractual obligations) and are being implemented at the national, subnational, sector and agency levels. Such open contracting efforts include:

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<sup>3</sup> Reyes et. al. v. Chile (2006).



- *Developing a framework* for a transparent and equitable contracting process;
- *Recognizing the right* of the public to access public contracting information;
- *Routinely disclosing* core classes of documents and data about public contracting;
- *Creating mechanisms for participation* at all stages of contracting; and
- *Building and sustaining capacity* of stakeholders to disclose, understand, monitor and act upon contracting information.

The following sub-sections outline the characteristics of each of the above policies, the rationale behind their adoption, and the challenges facing their implementation.

### **A. Developing a Transparent and Equitable Contracting Framework**

Clear, transparent and fair frameworks for public contracting are widely promoted as best practice by international treaties, model laws, principles,<sup>4</sup> and donor requirements.<sup>5</sup> Many countries are therefore implementing public contracting frameworks (under both centralized and decentralized models) that possess one or more of following characteristics:<sup>6</sup>

1. Well-defined, concise, and comprehensible regulations, guidelines and procedures that are enforceable and open to public scrutiny;<sup>7</sup>
2. Competitive processes whenever possible, with reasons given for non-competitive processes;
3. Transparent advertising of opportunities;
4. Clear and standardized tender documents and guidelines;<sup>8</sup>
5. Clear and public selection and award criteria;
6. Disclosure of awards and the rationale behind awards;
7. Conflict of interest policies for officials; and
8. Mechanisms for appeal or redress.

<sup>4</sup> See United Nations Convention Against Corruption (2003, art. 9); African Union Convention on Preventing and Combating Corruption (2003, arts 2-3); Inter-American Convention Against Corruption (1996, art. 3); MERCOSUR Protocol on Government Procurement (2003, art 1); South African Development Community (SADC) Protocol Against Corruption (2001, art. 4); International Organization of Supreme Audit Institutions Lima Declaration (1977, s. 21); UNCITRAL Model Law on Public Procurement (2011); UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003); UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000); UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994); OECD Principles for Integrity in Public Procurement (2009); ADB-OECD Anti-Corruption Action Plan for Asia and the Pacific (2001).

<sup>5</sup> World Bank Procurement Guidelines (2011, paras 2.7 and 2.31) and World Bank Consultant Guidelines (2011, paras 2.5 and 2.59), which require World Bank borrowers to advertise consulting/bidding opportunities and awards. The Asian Development Bank Procurement Guidelines, African Development Bank Procurement Rules, and Inter-American Development Bank Procurement Policies contain similar requirements.

<sup>6</sup> Kaspar and Puddephatt (2012, p. 13).

<sup>7</sup> While transparent and accessible rules may seem straight forward, there are places where access to the rules themselves is, itself, a challenge for civil society, journalists, citizens, and prospective bidders. Even where the rules are technically available, they may not be easily comprehensible. In Timor-Leste, for instance, there are 10 separate pieces (several times amended) of legislation that govern public procurement, confounding both procuring entities and small and medium sized enterprises seeking to participate in public contracting.

<sup>8</sup> Use of standardized contracting documents is a helpful way to both ease of understanding of the information by limiting the variability.

Examples of such frameworks for public procurement include those of the European Union, Mexico, and the Philippines, to name a few.<sup>9</sup> In South Africa and Mexico, the importance transparent and competitive public contracting is enshrined in the constitution.<sup>10</sup> And, the OECD has developed a tool to chart progress in implementing transparent procurement frameworks.<sup>11</sup>

However, there remain significant challenges and obstacles to implementation of transparent contracting processes in many places. Such challenges include insufficient technical knowledge and capacity of government to initiate and manage reforms to the system, and of staff to implement and manage the contracting process. Diffuse responsibility for public contracting within government can also result in the lack of predictability in application of existing rules and weak enforcement. For example, a recent study of procurement and service delivery in South Asia found that procurement rules were not being fully adhered to by officials due to unavailability of copies of laws and rules as well as lack of knowledge among officials dealing with procurement management.<sup>12</sup> In addition, there may not be sufficient political will to enact reforms or enforce existing rules due to the vested interests of those that may benefit from the opportunities for misuse of the contract award process.

For those governments that have enacted legal frameworks supportive of transparent public contracting, several rationales have been cited of their benefits. There is evidence that these frameworks serve as safeguards against corruption, have been shown to save time, increase value for money, and improve access to public contracting opportunities for small and medium sized enterprises.<sup>13</sup> For example, in Russia, “regional government procurement systems that are more transparent are associated with a lower average ‘kickback tax’ that firms report paying to officials.”<sup>14</sup> In Mexico, “the Mexican federal government has put particular emphasis on enhancing transparency in public procurement to promote a level playing field for suppliers and achieving value for money in government operations.”<sup>15</sup> And, in the UK, with reference to the Contracts Finder website, “the government has taken action to ensure that small firms and organizations, which it considers to be vital to the economy and promoting growth, are no longer shut out of procurement processes because of excessive bureaucracy and petty regulation.”<sup>16</sup>

In sectors involving licenses and concessions, such as extractive industries and land, the competitive award of licenses has been shown to offset some of the information asymmetry that tends

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9 European Union Directives (Directive 2004/17/EC and Directive 2004/18/EC); Mexico’s Law on Procurement, Leases and Services by the Public Sector (LAASSP) and Law on Public Works and Related Services (LOPSRM); Philippine Procurement law and its Implementing Rules and Regulations.

10 Section 217(1) of the South African Constitution: When an organ of state contracts for goods and services it must do so in a manner which is fair, equitable, transparent, competitive and cost effective. Article 134 of the Mexican Constitution stipulates that the management and use of federal resources must take place in accordance with principles of efficiency, effectiveness, economic soundness, transparency, and integrity; and that, unless otherwise provided in law, purchase and lease of all types of goods and services, and the contracting of public works, must be conducted using the public tender mechanism to ensure the best possible terms as far as price, quality, timeliness, and other relevant factors.

11 OECD Methodology for Assessing Procurement Systems (MAPS) (2010). See also the APEC Transparency Standards on Government Procurement (2004).

12 World Bank (2012).

13 See Kaspar and Puddephatt (2012) for more information about documented benefits of transparent procurement frameworks.

14 World Bank, Policy Note-Russian Federation (2013).

15 OECD (2013).

16 UK Cabinet Office (2011).

to disadvantage governments in negotiating with companies.<sup>17</sup> As a country example, the Sierra Leone Petroleum Exploration and Production Act, revised in 2011, includes a requirement that oil contracts be awarded only through competitive auctions and be disclosed.<sup>18</sup> And, in the context of land, Peru presents an example of transparent divestitures.<sup>19</sup>

## B. Recognizing the Right to Access Contracting Information

*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. (The Supreme Court of Appeal of South Africa)*<sup>20</sup>

Over 100 countries have enacted access to information laws or regulations,<sup>21</sup> reflecting the growing recognition of the right of citizens to access State-held information. This right has been interpreted as imposing a positive obligation on States to proactively disclose information of public interest, including contracts and related documents.

*What are contracts?* A contract is a legally enforceable agreement between two (or more) parties, in which the parties agree to do (or not do) certain things in exchange for something (consideration). Often times, contracts are thought of as a single document, the document that is signed by the parties. However, in many cases, a contract can be made up of multiple documents containing additional terms, specifications, provisions, standard forms or other information (known as addendums, annexes, appendices, schedules, riders, etc.) A contract should also be understood to include any later agreements of the parties that change the terms of the contract (amendments). As a legal document,

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17 As explained by the Extractive Industries Source Book (2013) “[g]ood practice calls for a transparent competitive bidding process that can be accomplished by ensuring access to all qualified bidders and having standardized bidding documents that include: (1) all available geological information; (2) confirmation that the land is unlicensed; (3) details of the applicable legal regime and procedures; and (4) full details of the rights that will be granted to the winning bidder.”

18 Revenue Watch (2013).

19 Where a government entity wishes to divest public land, the intention to divest the land is published, along with the minimum investment required and the minimum bid price for the land, in the official gazette, local and international newspapers, and a government Web site for a minimum of 90 days. Likewise, if an investor approaches the government, the evaluated proposal is published for a minimum of 90 days to allow other potential investors to present offers (Deininger et al., 2011).

20 *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* (2006). The Court went on, stating “I therefore fail to see how the confidentiality clause could validly protect the successful tenderer’s tender price from disclosure after the contract has been awarded. Accepting a need for confidentiality in the pre-award phase, it seems to me that the intention of the drafter of the notice was no more than that a tenderer should not be able to know a competing tenderer’s price in that period... It follows that once the contract was awarded the confidentiality clause, certainly in so far as the successful tenderer is concerned, was a spent force and offered the contractor no further protection from disclosure as regards its tender price.”

21 Including most countries in Europe and Central Asia, more than half of the countries in Latin America, more than a dozen in Asia and the Pacific, ten countries in Africa, and three in the Middle East. See also Universal Declaration of Human Rights, American Convention on Human Rights, International Covenant on Civil and Political Rights; African Charter on Human Rights; and EU Charter of Fundamental Rights.

the law (statutes, regulations, case law) may also impose additional terms or conditions or otherwise affect a contract.

*What are related documents?* Documents that are not part of the contract, yet related enough to the contract that they should be disseminated as part of open contracting. Related documents could include procurement documents that are not otherwise incorporated by reference into the contract, documents related to the project to which the contract pertains (e.g. environmental impact assessments), and documents reporting on contract execution such as monitoring documents or auditing documents. The particular list of related documents will vary depending on the type of contract, the sector to which it pertains, and the circumstances under which it was negotiated.

For example, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of Media and the OAS Special Rapporteur on Freedom Expression in 2004 jointly declared that (“[p]ublic authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest” and that “[s]ystems should be put in place to increase, over time, the amount of information subject to such routine disclosure.”<sup>22</sup> Similarly, the Principles on Right of Access to Information of the Inter-American Judicial Committee state that “[p]ublic bodies should disseminate information about their functions and activities—including, but not limited to, their ... contracts—on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.”<sup>23</sup>

Therefore, many countries are already making contracts, related documents and data subject to proactive disclosure. These requirements are being institutionalized in access to information laws,<sup>24</sup> procurement or public contracting laws,<sup>25</sup> public-private partnership laws,<sup>26</sup> and laws governing the natural resources sectors.<sup>27</sup> In the Philippines, the principle of disclosure is enshrined in Section 28 of the Constitution, which states, “subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.” Sixteen national, sub-national, and sector examples of proactive disclosure requirements for contracts and related documents are outlined in Annex 1.

While more research is needed to measure the impact of proactive disclosure of contracts and related documents, general research on the benefits of proactive disclosure suggest that it can reduce

22 UN-OSCE-OAS Joint Declaration (2004).

23 Inter-American Juridical Committee (2008, para 4). Additionally, the UN Human Rights Committee asserts that “State parties should proactively put in the public domain Government information of public interest,” and that “State parties should make every effort to ensure easy, prompt, effective and practical access to information.” (Human Rights Committee (2011, para 19)).

24 See e.g. New South Wales, Australia Government Information (Public Access) Act (2009); the Brazilian Law on Access to Information (2011), the Chilean law Concerning Access to Public Information (2009), the Guidelines on Proactive Disclosure of Information under the Indian Right to Information Act (2005), the Mexican Federal Transparency and Access to Public Government Information law (2003), and the Mongolian Law on Information, Transparency, Right and Freedom to Access Information (2011).

25 See eg Colombia Law 80 of 1993 and 1150 of 2007, the Mexican Law on Procurement, Leases and Services by the Public Sector and Law on Public Works and Related Services (2009), Philippine Procurement Law (2003), Pakistan Public Procurement Rules (2004).

26 See eg PPP Law, Minas Gerais, Brazil (2003) and associated decrees.

27 See eg Article 150 of the Niger Constitution (2010), the Liberian Extractive Industries Transparency Initiative Act (2009), the Timor-Leste Petroleum Act (2005), and the South Sudan Petroleum Act (2012).

the discretion of decision makers and can ensure that stakeholders have the information necessary to meaningfully participate in contracting policy and decision-making. Making disclosure a matter of routine also has the effect of improving records management systems. In addition, availability of low-cost online tools has made the large-scale availability of contracting information affordable (and possibly cheaper than dedicating staff time to search for documents and evaluate every access to information request). Furthermore, with close to real-time disclosure, it is more difficult for the existence of information to be denied or manipulated.<sup>28</sup>

Where proactive disclosure requirements are not in place, contracting information remains accessible upon request in many jurisdictions.<sup>29</sup> Information requests are time consuming, however, and it often takes months for the requester to receive the information, if at all. Also, requiring citizens to make this request assumes that they know about the existence of a contract in the first place. In addition, since documents must be requested individually, passive disclosure inhibits the holistic analysis of public contracting trends and practices. Finally, in many systems of passive disclosure, the relevant legislation either does not explicitly treat contracting information as disclosable or frequently contains exemptions to the disclosure of information held by or affecting the commercial interests of third parties.<sup>30</sup> Such blanket exemptions have been interpreted to restrict access to contracts and related information. In some contexts, even government agencies and oversight authorities face challenges in accessing contracting documents.<sup>31</sup> Where contracting information is exempted from disclosure by government, determined information seekers may be able to challenge the refusal in the courts or another impartial review mechanism—with mixed chances of success (see box 1).

Although several governments are already publishing un-redacted contracts and related documents,<sup>32</sup> the majority of governments exempt or redact some contracting information from disclosure. The most common grounds invoked are to protect confidential information, commercial information, trade secrets, or information affecting the interests of third parties.

Where un-redacted publication is not feasible due to the presence of justifiably confidential information, a policy or guidance can be developed on what can be justifiably exempted as commercially sensitive or a trade secret, and require reasons to be given for exemption. For example, in the UK, tenderers for public contracts are advised to consider the “Guidance on Contract Information that is Exempt from the Freedom of Information Act” to evaluate whether information in the tender can be exempted under a non-disclosure agreement. Contracts are then redacted in accordance with

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28 Darbshire (2010).

29 In the US, for example, competitors for government contracts regularly request previous versions of similar contracts to help prepare bids (Kenny, 2012, note 21-22).

30 In the Nepalese forestry sector, for example, various laws give the public the right to access forestry contracts, concession agreements, and permits. Paradoxically, under the 2007 Rights of Information Act, government agencies are also empowered to withhold such information as confidential (Paudel, 2011). See also Siraj (2010) and Rosenblum and Maples (2009) for more information about disclosure of contracting information and confidentiality exemptions. As counter examples, the Indian Right to Information Act (2005) includes “contracts” within the definition of information and the South African Promotion of Access to Information Act (2000) permits access to records held by private bodies carrying out public functions.

31 In the Philippines, for example, local governments opposed the issuance of new mining licenses in part because environmental assessments have been kept confidential between mining companies and the national government, making their monitoring duties untenable (Darbshire, 2010, p. 23).

32 See e.g., Colombia Compra Eficiente (<http://colombiacompra.gov.co>), Liberia EITI ([leiti.org](http://leiti.org)), Nicaragua Compra (<http://nicaraguacompra.gob.ni/siscae/portal>), Philippine Government Electronic Procurement System (<http://www.philgeps.gov.ph>), Slovak Republic, Centrálny Register Dokumentov Verejného Obstarávania (<http://crdvo.uvo.gov.sk>).

the Freedom of Information Act and official guidance.<sup>33</sup> In Australia, exemptions for confidentiality are recorded along with the reasons.<sup>34</sup> In the United States, some contractors bidding on public contracts mark the commercially sensitive information and trade secrets provided as part of the contracting process with confidentiality legends.<sup>35</sup> Another practice is to state the disclosable nature of the contract and related documents within the contract itself. Examples include the Model Mining Agreement of the International Bar Association and Denmark's Model Hydrocarbons License.<sup>36</sup>

### Box 1. Contracting Information and the Courts—Bulgaria, Uganda, and Nigeria

In *Bosev v. Bulgaria*, a journalist challenged the refusal of a government agency to release information related to a US\$28 million software license contract. Article 37(2) of the Bulgarian access to information law exempts information from disclosure if it affects a third party's interest without their written consent unless there is *overriding public interest* in favor of disclosure. The Court had to determine whether disclosure of contractual information required the consent of the private sector party to the contract. The Court ruled that protection of commercial secrets and prevention of unfair competition are legitimate grounds for non-disclosure. Thus, when a member of the public requests access to a public contract, the government agency is required to seek consent of the third party to disclosure; mere assertion that disclosure would harm commercial interests does not suffice. The Court ordered the government agency to reconsider the information request and further held that in the event that consent was refused, the government agency would still be obliged to provide information in the form and extent that would not cause harm to the company.\*

In *Mpagi v. Uganda*, the applicants, Charles Mwanguhya Mpagi and Izama Angelo, requested access to public contracts relating to the petroleum sector. They argued that the public benefit of disclosure outweighed the potential harm to the oil company because Uganda's oil is the property of its people. The government, on the other hand, argued that such disclosure would violate the confidentiality clauses in the contracts. The Court refused the request, noting that the keeping of certain documents secret is necessary for the proper functioning of government. The case is now on appeal.\*\*

In 2012, in *Nigerian Contract Monitoring Coalition v. Power Holding Company of Nigeria (PHCN)*, a civil society group successfully appealed to the Courts (pursuant to the 2011 Freedom of Information Law) to order the PHCN to disclose information related to a contract for the supply and installation of High Voltage Distribution systems in Abuja, Lagos and Ibadan that had been withheld under a confidentiality exemption. In its judgment, the Court ordered disclosure, ruling that "since negotiations have been concluded and the contract awarded, the disclosure of the information sought cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of the contractor" and issued an order for the release of contract documents sought by the coalition. PHCN complied on April 2, 2013.†

\* *Rosen Bosev v. Director of the Government Information Service* (2007).

\*\* *Mpagi and Angelo v. Attorney General* (2010). Subsequently, Uganda passed a new petroleum law stating that: (1) The Minister may, in accordance with the Access to Information Act, 2005, make available to the public (a) details of all agreements, licences and any amendments to the licences or agreements whether or not terminated or valid; (b) details of exemptions from, or variations or suspensions of, the conditions of a licence; (c) approved field development plan; and (d) all assignments and other approved arrangements in respect of a licence upon payment of a prescribed fee.

† PPDC (2012), PPDC (2013). The requested documents included: the procurement plan for the Nigerian Electricity and Gas Project; documentation on design and specification of the project; the issued bidding documents also containing the scope of the procurement and the contract sum, conditions of the contract and payment terms and schedule; a list of all the contractors that submitted bids; a web link to the needs assessment as contained in the project appraisal document; an approval of award in the form of "no-objection" issued by the task team leader; an online publication of the award of contract; the name and addresses of the distribution companies on whose behalf the procurement was carried out; the bid evaluation report containing all annexes; and the signed contract document (including the contact sum, the conditions of contract, and payment terms).

33 See UK Contracts Finder (<http://online.contractsfinder.businesslink.gov.uk>)

34 Historical Australian Government Contract Data (2013)

35 Kenny (2012, p. 9).

36 Denmark Model Hydrocarbon License (2005) states that information can be disclosed if "no legitimate interest of the Licensee requires the information to be kept confidential; essential public interests outweigh Licensee's interest in maintaining confidentiality; information of a general nature is furnished in connection with issuance of public statements." The Angolan government's model Production Sharing Agreement allows disclosure pursuant to securities regulations, and Cameroon's Model Oil Contract also permits disclosure (Oxfam Brief, 2013)

### *C. Routine Disclosure of Documents and Data*

Once the scope of proactive disclosure is mandated, its practical application presents a challenge. To fully implement open contracting, a country (including all agencies at all levels of government) discloses hundreds of thousands (or even millions) of core documents and data per year. This disclosure necessitates the development of systems to collect and publish contracting data regarding the formation, award, execution, and performance of public contracts, including full texts of documents, simplified summaries, and useful metadata.<sup>37</sup> It is also a significant challenge to ensure that all procuring entities comply with disclosure requirements. To develop such disclosure systems therefore implicates overcoming significant challenges related to technology and capacity.

Many governments are shifting to e-procurement<sup>38</sup> and standardized contracting documents to provide a simple, secure and efficient means to manage the entire procurement process online. E-procurement portals, though not usually designed explicitly for transparency purposes, often disclose contract amounts, names of companies, contractors and vendors, purpose of contract including location and deliverables, and names of debarred firms. For example, Korea's public procurement agency publishes information on all of the contracts it administers on its online public portal, KONEPS (estimated to be worth US\$75 billion in 2010).<sup>39</sup> E-procurement has been shown to be a cost-effective way of implementing transparency, and has improved value for money and participation of small and medium sized enterprises in public contracting.<sup>40</sup> This digitization also reduces the potential disclosure obstacles as documents are already in digital form and are organized with metadata. Where e-procurement and other portals do exist, however, few provide open access to raw contracting data,<sup>41</sup> and some are password protected for contractors.

In addition, publicly available data in e-procurement systems is concentrated in the upstream processes of the procurement cycle. A 2010 survey of OECD countries illustrated that countries are more likely to disclose information about the planning and procurement phases of the contracting cycle, including laws and policies (always publicly available in 34 countries), and selection and evaluation criteria (21 countries). In comparison, fewer countries publish information about events that occur post-award, such as tracking disbursements (10 countries), or sub-contracting

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37 For example, the new Indian guidelines call for each government website to be updated automatically and common standards to be developed for all websites across government focusing on making them more user friendly (Ministry of Personnel, Government of India, 2013).

38 E-procurement is the use of integrated information technology for part or all of the procurement functions, from the beginning to the end, i.e., from searching, sourcing, negotiating, ordering, and receipt to post-purchase review (Kaspar and Puddephatt, 2012).

39 Choi (2011)

40 In Ecuador, for example, the introduction of an e-reverse auction in which vendors transparently bid their lowest prices for the sale of medicines significantly reduced the overall cost of obtaining information on contracts and simplified the bidding process, and achieved an expenditure reduction of US\$327 million (Pro-Act, 2012). Georgia introduced an e-procurement and e-auction platform enabling any interested party to follow the bidding process that resulted in savings of public money resulting in 14% of the procurement budget (OGP, Georgia).

41 All data published on the UK Contracts Finder, for example, is published under an Open Government License. As of September 2013, nearly 18,000 contracts had been published. Key metadata for each contract is available to the general public in the form of machine-readable CSV files.

arrangements.<sup>42</sup> A 2013 investigation by the Sunlight Foundation illustrated a similar finding.<sup>43</sup> Links to sources of public contracts and contracting data can be found in Annex 2.

In many situations, procurement data and performance data (such as amendments and disbursements) are kept in different systems (both of which may not be public) and levels of interoperability are low. For example, while the UK does publish performance data for major contracts, it is published through a different portal than its Contracts Finder website.<sup>44</sup> New York City, however, has linked procurement and financial management system data in order to allow users to compare financial disbursements with contract award values.<sup>45</sup>

In some places, contracting documents are scanned and put on a website.<sup>46</sup> However, scanned PDFs are not the most accessible form of information. Users in remote locations may be unable to open a large PDF document due to slow Internet connections. In addition, software cannot easily extract information, such as a data table, from PDFs for analysis.<sup>47</sup> And (unlike a document that was “converted” to PDF from a format like MS Word), it is not possible to search the text of a scanned document. In some cases, disseminating information in difficult to access formats is deliberate act of obfuscation. For example, in 2011 the Kurdistan Regional Government published its petroleum contracts, but the documents were only available following a lengthy process of downloading flash files. Inquiring researchers were informed by a government spokesperson that the choice of format was intentional.<sup>48</sup> The government of Guinea has sought to overcome some of the challenges related to format by uploading its mining contracts to a platform that allows users to view PDFs page by page, without needing to download and without a standard PDF reader. The Guinea site also organizes all contract files in searchable categories and provides embedded web links to specific sections and comments for all documents.<sup>49</sup>

Where factors, such as technology, infrastructure, and capacity, act as constraints to Internet access, it will take time for these other necessary inputs to be in place before online portals can be fully effective. For example, in Uganda in the mid-2000s, e-procurement was not a viable solution due to inadequate supply of electricity and slow Internet.<sup>50</sup> In order to reach audiences without reliable access to Internet, low-tech options, such as radio, newspaper,<sup>51</sup> and the signposts close to project sites

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42 OECD (2011). In the UK, where the supply chain has already been established, typically the contract will contain details of the key subcontractors. Also, key suppliers to Government have also been encouraged to post subcontracting opportunities on Contracts Finder. To date, over 160 subcontracting opportunities have been published in support of the delivery of Government contracts.

43 Keseru (2013). Even where systems are equipped to capture data on performance, its paucity can result from other factors. In the United States, for example, some of the lack of performance data is due to the reluctance of contract managers to record negative performance. Small businesses, which rely on glowing past-performance reviews to beat out the larger companies, have been negatively affected as a result (Washington Business Journal, 2013).

44 See UK Contracts Finder website and UK Cabinet Office Major Projects Authority (2013)

45 See [checkbooknyc.com](http://checkbooknyc.com).

46 See, e.g., Liberia's EITI website, [leiti.org](http://leiti.org).

47 Miller (2013).

48 Wallwork (2012).

49 See <http://www.contractsminiersguinee.org>.

50 Kaspar and Puddephatt (2012).

51 World Bank (2013). “Perceptions of state capture and frequency of administrative bribery are also lower in regions with higher newspaper circulation.”



with details of contract (technical, financial & timelines) and contact details for more information are currently practiced alternatives.<sup>52</sup>

#### D. Creating Mechanisms for Participation

Public oversight authorities and implementing agencies, including line ministries, supreme audit institutions, and anti-corruption commissions, often lack the staff, money, capacity, and time to exhaustively inspect, audit and review all planning and award processes, or performance of contracts.<sup>53</sup> Governments are therefore beginning to mobilize citizen participation in public contracting as a means to complement government oversight and redress mechanisms. Figure 1 illustrates some of the entry points for citizens in the contracting cycle.

Governments are already actively inviting civil society to participate in public contracting through consultation and monitoring efforts in many countries. In the planning and pre-bidding phase, public hearings or consultations in needs assessments, feasibility studies and environmental and social impact assessments have been found to be particularly relevant for contracts affecting significant land use or delivery of services, so that the contracting process ultimately delivers to public concerns.<sup>54</sup> With regard to monitoring, OECD member countries, for example, increasingly recognize that they must invest in lowering barriers to engage the “willing but unable,” and make engagement attractive to the “able but unwilling”:

**Figure 1. Entry Points for Participation in Public Contracting**



52 For example, in the United States, signs are being used, in addition to a fully dedicated website with a reporting mechanism, to inform citizens about projects being funded under the American Recovery and Reinvestment Act of 2009.

53 See eg World Economic Forum (2010), which surveyed 13 countries in three regions and found that “lack of government capacity to ensure compliance through contract monitoring and implementation/enforcement is a frequently cited problem.” For example, while a recent mineral-backed infrastructure agreement between the Democratic Republic of Congo and a consortium of Chinese companies contained a commitment to hire external monitoring of the performance of the contract, insufficient funds were allocated (Smith, 2011, p.16).

54 Human Rights Watch (2013).

Governments should disclose public information on the key terms of major contracts to civil society organizations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organizations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.<sup>55</sup>

There are a growing number of country-level examples of successful multi-stakeholder public contracting cooperation (See Annex 3 Part D). Colombia, Mexico, Mongolia and the Philippines have institutionalized civil society monitoring of public contracting in their legal frameworks (see box 2).

In the absence of legislation, individual government agencies can enter into cooperation with civil society organizations to support the monitoring of public contracts. For example, in India, the National Rural Roads Development Agency has partnered with the Public Affairs Centre NGO to pilot a citizen-monitoring program to monitor the quality of construction of rural roads.<sup>56</sup> Civil society contract monitoring has also been employed successfully by the Mongolian Local Government Agency, the Mongolian Ministry of Finance, the Philippine Department of the Interior and Local Government, and the Philippine Department of Social Welfare and Development, each of which have entered into memoranda of understanding with civil society organizations for contract monitoring.<sup>57</sup>

Governments can also ensure that oversight authorities (including parliaments, audit institutions, and implementing agencies) acknowledge and act upon citizen feedback, and encourage consultations between contracting parties and civil society. For example, the UK 'mystery shopper' service investigates complaints related to public contracting and publishes the results of their investigations.<sup>58</sup> Without this assurance, monitors may observe irregularities, but have no redress mechanism to have them resolved.<sup>59</sup>

There are, however, many challenges to engaging civil society participation in contract monitoring, including overcoming mistrust among stakeholders to cooperate and ensuring that civil society organizations have sufficient technical capacity and resources to effectively participate. For example, the findings of the Indian roads monitoring pilot has demonstrated the feasibility and utility of citizen monitoring for roads quality, but scaling up requires gaining the buy-in of state-level counterparts of the national roads agency and local intermediary civil society organizations. In addition the cost of funding the trainers and monitors, the trainings themselves, travel, toolkits, and coordination is not insignificant. Further, mechanisms must be established for citizen feedback to be incorporated into the management of the contracts.<sup>60</sup> Yet, as the examples in Annex 2 suggests, the potential benefits may

55 OECD (2009, p. 46).

56 Public Affairs Centre (2011).

57 See CSC Khvsgul Aimag Mongolia - Contract of Cooperation with Local Government Agency (2012); Procurement Partnership Mongolia—Memorandum of Understanding with the Ministry of Finance (2012); Coalition Against Corruption Philippines—Memorandum of Understanding with the Department of the Interior and Local Government (2005); CCAGG Philippines—Memorandum of Agreement with Department of Social Welfare and Development (2011).

58 UK Cabinet Office (2013).

59 In Kenya, for example, if CSOs uncover a procurement irregularity, they are precluded from applying for an administrative remedy by law (this remedy is only available to bidders) Okello (2012).

60 Public Affairs Centre (2011).

## Box 2. Examples of Legal Measures for Citizen Participation in Public Contracting

**Colombia:** Law 850 of 2003 allows citizens' oversight organizations to supervise public management, especially in relation to awarding and implementing a public contract. Such organizations have the opportunity to follow the whole contractual process, from resource allocation to the oversight of the implementation and technical quality of the contracted good or service. Once the invitation to bid is published, any person may make comments about the documents related to the requirements that the bidders must fulfill, the description of the need that the entity wants to satisfy, the structure of the process, and in general, every aspect related to the future contract. The public entity must answer these comments and publish the answers in SECOP (the information system run by Colombia Compra Eficiente where documents regarding public contracts are to be disclosed.)

**Mexico:** The Law on Procurement, Leases and Services by the Public Sector (LAASSP) and the Law on Public Works and Related Services (LOPSRM) require the involvement of 'social witnesses' in public bidding exceeding certain value thresholds. The function of 'social witnesses' is to propose strategies for improving transparency, impartiality and compliance with the legal framework in the contracting process and to denounce any improper or illegal acts they observe. Pursuant to the guidelines, at the conclusion of their participation, social witnesses are to issue a publicly available statement regarding the procurement proceedings to be posted on Compranet ([www.compranet.gob.mx](http://www.compranet.gob.mx)). In addition, during the procurement process, the social witnesses are required to issue an alert if they detect any alleged irregularities.

**Mongolia:** In Mongolia, the Public Procurement Law was amended in June 2011, to include a new formal role for civil society and professional organizations in bid evaluation and contract monitoring, stating that "Private and specialized non government organizations can be selected ... to perform monitoring, evaluation and auditing of customer's activity, contract performance and quality progress and execution." In 2013, the Ministry of Finance requested the Mongolian Public Procurement Partnership's support in coordinating CSO procurement monitoring efforts that are required under the amended procurement law.

**Philippines:** The 2003 Philippines Procurement Law allows citizen participation in all stages of the procurement process, from pre-bid conference, opening of bids, bid evaluation, post-qualification and award of contract. Observers may also observe contract implementation. And, in the extractives sector, although there is currently a moratorium on new mining operations, the Philippines Mining Law requires a "multi-partite monitoring team" to be operational before the mining project can receive an environmental compliance certificate. This body is to be composed of representatives of the national government, affected communities, indigenous communities, an environmental civil society organization, and the project proponent.

outweigh the costs and challenges. The next subsection discusses some of the efforts underway to build and sustain the capacity of stakeholders to participate in public contracting.

### *E. Building & Sustaining Capacity of Stakeholders*

As mentioned above, capacity and sustainability are major challenges facing implementation for stakeholders to effectively disclose, understand, monitor and act upon contracting information. For example, government representatives may need training to collect and disclose contracting information. Civil society may also lack the necessary skills, such as the technical, legal, and financial expertise, to determine whether the conditions in the contracts are being met. For this reason, OECD member countries in 2008 collectively recognized the need to "empower civil society organizations, media and the wide public to scrutinize public procurement."<sup>61</sup> In the Philippines, the Procurement

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61 OECD (2009).

Policy Board holds trainings for monitors wishing to understand more about the procurement process and related laws and regulations.

Experiences of monitoring to date suggest that civil society organizations too often lack a sustainable source of funding to monitor public contracting, and there is often competition for limited resources. For the executive branch of the Mexican government at the federal level, the Social Witness Program is publicly funded.<sup>62</sup> In other cases, direct transfers from the government to fund such activities may undermine the independence of civil society organizations and create potential conflicts of interest. In order to preserve this independence, innovative sustainable funding solutions must be found. One potential model to be explored is that of the newly operational Global Partnership for Social Accountability (GPSA). The GPSA was created by donors to enable the World Bank to provide strategic and sustained support to beneficiary groups and civil society organizations working with their governments to achieve greater transparency and accountability.<sup>63</sup> If governments opt-in to the GPSA, this funding source would allow civil society organizations to apply for core funding to support contracting monitoring activities.

### III. The Role of Civil Society in Open Contracting

Multi-stakeholder initiatives are bringing government, private sector, and civil society together to address monitoring needs and challenges in many countries. The Affiliated Network for Social Accountability in East Asia and Pacific (ANSA-EAP),<sup>64</sup> the Construction Sector Transparency Initiative (CoST), the Medicines Transparency Alliance, the Network for Integrity in Reconstruction,<sup>65</sup> and Transparency International (TI)<sup>66</sup> are examples. In addition, and perhaps more significantly, thousands of local civil society organizations are forming coalitions and multi-stakeholder partnerships to improve public contracting by:

1. Conducting research and advocacy in support of Open Contracting;
2. Enhancing accessibility of disclosed information;
3. Building the capacity of other stakeholders through training; and
4. Monitoring public contracting, even in the absence of a formal legal mandate.

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<sup>62</sup> TI USA (2011), Law on Procurement, Leases and Services by the Public Sector art. 66.

<sup>63</sup> This initiative can support the capacity building and sustainability of funding challenges facing civil society organizations wishing to monitor public contracting. The GPSA's funding component only operates in countries where the government agrees to 'opt-in' to the GPSA.

<sup>64</sup> ANSA-EAP is a regional network of citizen groups, non-government organizations, civic associations, the business sector, and government institutions promoting the monitoring by citizens of government performance, specifically, the quality of public service delivery and the transparency of public transactions.

<sup>65</sup> OCP Steering Group member Integrity Action's Network for Integrity in Reconstruction (NIR) is a coalition of organizations across conflict-affected countries that empower communities to promote accountability and effectiveness in aid and the post-war state.

<sup>66</sup> Transparency International is a global CSO of over 100 national chapters dedicated to fighting corruption, including contract-monitoring work frequently with regard to PPP/Infrastructure projects, such as roads, bridges, schools, housing, water, and power supply.

### Box 3. Citizen Contract Monitoring without Enabling Environment\*

Some civil society organizations have developed monitoring strategies that focus on the delivery of goods and the completion of works at the local level. These monitoring strategies require little information, compared to more comprehensive monitoring activities, and can be effective in environments with low levels of access to information. As an example, monitoring the delivery of goods requires access to technical specifications and contracts (to verify quality), but not to documents from the bidding and evaluation phases. Furthermore, when no information at all is available, monitoring can be limited even further, to documenting (for instance taking pictures) works that are blatantly incomplete or defective, thus reducing virtually to zero the amount of information needed from the procuring agency.

In countries where access to information laws exist but are not implemented, civil society organizations or private citizens that monitor procurement and face a lack of relevant information can file Freedom of Information requests with the information commission (if one exists) or with the relevant regulatory entity. [And, A2I refusals can be challenged in the courts.]

Civil society organizations may also consider signing memoranda of understanding with the government agencies they intend to monitor, to ensure appropriate access to project cycle documentation. Such a strategy has been successfully adopted by Procurement Watch Inc. (PWI) in the Philippines and Transparency International Pakistan. Its main weakness is that it relies on the government agency's willingness to share information and be open to monitoring.

When projects are funded by multi- or bilateral donors, civil society organizations can rely on their disclosure policies to obtain access to relevant information. For example, the World Bank Policy on Access to Information dictates that certain documents, such as procurement plans, are provided to the Bank by the borrowing government "with the understanding that the Bank will make them available to the public." All the main development banks have similar disclosure policies. Additionally, some development banks have procurement portals that store procurement plans, contract awards notices and other relevant information.

When institutions do not respond to requests, and access to a particular set of documents is considered vital, civil society organizations may consider reaching out to the media to exert pressure on the procuring entity to ensure that the relevant information is made public. This strategy would be most effective for procurement processes that are likely to attract the attention of the general public, such as large infrastructure projects, concessions or purchases of medicines.

\* Quoted directly from de Simone and Shah, (2012, p. 44-5)

For example, in Ghana, in the extractives sector, CSO advocacy resulted in the creation by the government of the Public Interest and Accountability Committee (PIAC), a multi-stakeholder body statutorily charged with monitoring petroleum revenue management. In preparing its 2012 report, the Committee compared the actual crude oil liftings and income tax allowances against contractual requirements. The fact that contracts were available enabled the PIAC to find that the government's revenue projections for 2012 did not accurately reflect the contract provisions on surface rental payments, and it issued recommendations on how these funds should be collected and accounted for going forward.<sup>67</sup> Additional detailed examples of successful civil society participation efforts and their impacts can be found in Annex 3.

<sup>67</sup> Striking Poverty (2012).

Yet, civil society groups seeking to participate in public contracting face many challenges. These challenges include building trust among stakeholders in the private sector and government, and overcoming challenges related to:

- Lack of access to contracting information;
- Weak legal framework for public contracting;
- Lack of political will to engage with civil society on matters related to public contracting;
- Lack of whistle blower protection;
- Lack of integrity of stakeholders; and
- Lack of capacity of civil society to undertake monitoring activities.<sup>68</sup>

In jurisdictions where the right of access to information is not protected or citizens are denied access to contracting information, media and civil society monitoring groups are overcoming these challenges by making use of whatever information is available to monitor public contracting (see box 3).

They are also sharing experiences through online communities of practice like the Open Contracting Community of Practice website,<sup>69</sup> the GOXI website (focused on governance of extractive industries),<sup>70</sup> and the Electronic Network for Procurement Practitioners website (focused on procurement in the health sector).<sup>71</sup> Furthermore, numerous contract monitoring tools<sup>72</sup> are being developed to support this work. A catalogue of these tools is indexed by sector in Annex 4 of this report.

#### **IV. Private Sector Engagement in Open Contracting**

The private sector is beginning to engage in open contracting in several ways. First, companies are collaborating within industry groups to promote transparency and responsible contracting. For example, the U.N. Global Compact, “the world’s largest corporate citizenship and sustainability initiative,” supports protection of human rights and anti-corruption in its core principles.<sup>73</sup> The International Association of Oil and Gas Producers, an industry group, acknowledges and supports the benefits of competitive bidding and transparency in contracting.<sup>74</sup> The International Council on Mining and Metals, an industry group, in their Principles, also commits to collaborative engagement and open consultation.<sup>75</sup> And, a group of investors came together in 2011 to endorse the work of Professor John Ruggie, UN Secretary-General’s Special Representative on Business & Human Rights,<sup>76</sup> which has produced Principles for Responsible Contracts that call for both community engagement and contract transparency.<sup>77</sup>

<sup>68</sup> World Bank (2011).

<sup>69</sup> Pro-act.org

<sup>70</sup> Goxi.org

<sup>71</sup> Enepp.net

<sup>72</sup> Additional tools are described in Schouten (2013).

<sup>73</sup> UN Global Compact Principles (2004).

<sup>74</sup> International Association of Oil and Gas Producers Position on Transparency.

<sup>75</sup> International Council on Mining and Metals, (2003).

<sup>76</sup> Investor Statement (2011).

<sup>77</sup> Ruggie (2011).

Individual companies are also working with governments and civil society to support disclosure of contracts and related documents. A representative of Newmont Mining Corporation explained, “If you’re a long-term investor, you want to build trust. I cannot see one reason why investment agreements are kept confidential.”<sup>78</sup> Thus, Newmont not only agreed, but “insisted,” that its comprehensive investment agreement with the Ghanaian government not only be made public but that it be put before Parliament for discussion and ratification. As a result, the enhanced transparency “helped build trust and credibility on all sides for working constructively to mutual benefit and social harmony.”<sup>79</sup> Tullow Oil published its petroleum agreements in May 2011, at the request of, and with the approval of, the Government of Ghana.<sup>80</sup> Similarly, in South Africa, where the Mineral and Petroleum Resources and Development Act requires companies to report annually on their social obligations, AngloGold Ashanti decided to disclose these otherwise confidential reports, to the benefit of citizen monitoring groups.<sup>81</sup>

Individual companies are also proactively consulting and cooperating with civil society organizations and communities, encouraging them to monitor the performance of the contract, and acting on their feedback. In Ghana, for example, Newmont Mining has collaborated with local communities in the disbursement of a sustainable development fund set up pursuant mining agreements.<sup>82</sup> Citizen monitoring of projects is also helping to build trust between companies and communities. For example, in Burkina Faso, the Kalsaka and IamGold Essakane SA mining companies recently collaborated with a coalition of civil society organizations<sup>83</sup> on a contract monitoring effort. The coalition monitored the companies’ compliance with the contractual targets for local employment, finding that both companies were complying with contractual requirements, and employing over 90% local staff. Representatives from the mining companies welcomed the objectivity of the monitors, stating “the private sector needs this kind of recognition to be more willing to participate on critical discussions on open contracting.”<sup>84</sup>

Individual companies are also benefiting from increased participation and disclosure in public contracting in several ways. Companies have perceived transparent frameworks for public contracting as leveling the playing field, and there is some evidence to suggest that they have resulted in more participation by small and medium sized enterprises in public contracting.<sup>85</sup> Companies are also able to better tailor bids when they can access previous contracts and bid evaluations for similar goods,

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78 Pellegrini, (2011, p.3).

79 Striking Poverty (2012).

80 Tullow’s website states that while, “most commonly, petroleum agreements (or production sharing agreements) between a company and a host government remain confidential at the request of the host government for commercial reasons, [Tullow Oil takes] the position that should a government wish to make these agreements public, we would fully support them in doing so.”

81 Smith (2011, p.16).

82 Newmong Ahafo Development Foundation website. For more information about Community Agreements, see Rio Tinto (2012).

83 Organisation pour le Renforcement des Capacités de Développement (ORCADE), the Réseau Africain de Journalistes pour l’Intégrité et la Transparence (RAJIT-Burkina Faso) and the Coalition Min’Alerte.

84 Deme and Klutz (2013).

85 World Bank (2013), Kaspar (2012). This may be due, in part, to the fact that small and medium sized enterprises are disproportionately impacted by corruption in public contracting (United Nations, 2007).

works, and services.<sup>86</sup> Some companies are even utilizing open contracting data to create alert and market analytic services for firms wishing to contract with governments.<sup>87</sup>

Finally, private sector actors are collaborating with government and donors to convene, or contribute to, funds from which civil society organizations can apply for funds to undertake monitoring activities. In the Philippines, for example, the private sector Makati Business Club collaborated with a civil society coalition to fund procurement training.<sup>88</sup>

However, there are significant challenges to engaging the private sector in open contracting. These challenges relate to the need to build trust between stakeholders and the need to grow private sector confidence in the capacity of government and civil society to collaborate responsibly in open contracting. In addition, the private sector concern for the protection of commercially sensitive information will need to be reconciled with principles of disclosure under access to information requirements of the relevant legal frameworks (as discussed in section II(E)). Finally, there will be those in the private sector that oppose increased disclosure and participation in public contracting because of vested interests in the status quo.

## V. Donor Participation in Open Contracting

Many multilateral and bilateral donor funded projects are implemented through publicly awarded contracts (whether the contract is awarded by the donor organization or the government agency executing the project). Wastefulness, mismanagement, inefficiency, and corruption can affect these public contracts as well.<sup>89</sup>

Donors are therefore taking action to increase transparency and accountability by revising access to information policies, standard contracting documents, procurement policies, and seeking client consent to make more contracting information associated with projects publically available. For example, the World Bank has disclosed a data set related to major contracts on the WB Finances website and app.<sup>90</sup> Donors are also making client disclosure of procurement information a condition of funded projects.<sup>91</sup>

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<sup>86</sup> Kenny (2012).

<sup>87</sup> See e.g. Govini, <http://www.govini.com>.

<sup>88</sup> Makati Business Club (2011).

<sup>89</sup> World Bank (2011).

<sup>90</sup> WBG Finances (2013). The dataset of procurement contract awards on this site provides information on commitments against major Bank-funded contracts prior-reviewed by the Bank and awarded under investment projects and related Trust Funds (from 2007 to date). The World Bank has also announced that it will begin to disclose data related to its own corporate procurement quarterly beginning in October 2013.

<sup>91</sup> World Bank Procurement Guidelines (2011, paras 2.7 and 2.31) and World Bank Consultant Guidelines (2011, paras 2.5 and 2.59) require World Bank borrowers to advertise consulting/bidding opportunities and awards. Asian Development Bank Procurement Guidelines; African Development Bank Procurement Rules; Inter-American Development Bank Procurement Policies have similar requirements. IFC Policy on Environmental and Social Sustainability (2012, s.V paras. 49-50) requires governments and corporations to publish extractive industry contracts and/or a summary of key terms and provisions including significant amendments and material payments to host countries. MIGA Policy on Environmental and Social Sustainability (2007, para. 23) requires that clients publish the relevant terms of key agreements of public concern, such as host government agreements and intergovernmental agreements, as well as material payments to governments. In December 2012, the IMF canceled a loan program to the Democratic Republic of Congo after the country failed to disclose contractual details in accordance with the IMF Guide on Resource Revenue Transparency (2007, p.6) ("Contractual arrangements between government and public or private entities, including resource companies and concession operators,



At the country level, donors are beginning to encourage and provide support for client partners to implement more transparent public contracting processes and supporting multi-stakeholder cooperation and participation in the monitoring of project contracting processes. For example, in Bangladesh, a World Bank Public Procurement Reform Project has combined capacity development, performance monitoring, electronic procurement, and social accountability targeting. Thus far, the project has resulted in:

- Improved efficiency and effectiveness of procurement with reduced procurement delays;
- Enhanced transparency: About 60% of contracts awards in 2012 were published at the Central Procurement Technical Unit website, up from only 15% in 2007. Invitation for bids published in newspaper has increased to almost 100% in 2012 from 70% in 2005. Furthermore, all policy related documents are available on online including laws, rules, bidding documents, guidance notes;
- Increased competitiveness: The reform has resulted in more competition among bidders as demonstrated by increased number of bidders;
- Improved capacity development: The project developed a core group of about 35 national trainers and provided three-week procurement training to over 2900 officials; and
- Increased stakeholder participation: The social accountability and communication campaign “used media campaigns, capacity building, and advocacy interventions. About 2700 participants from 64 districts joined advocacy related activities; mass media was used to create awareness and to popularize reform agenda using TV and radio commercials, popular songs, music videos, newspaper cartoon series and a 6-episode reality show where the bidders and procuring agencies competed.”<sup>92</sup>

As another example, in 2013, Development Gateway, the Open Aid Partnership, and the Government of Nepal worked on a pilot exercise to collect and code contracting data. Partnering with the World Bank, the Asian Development Bank, and Nepal’s Department of Local Infrastructure Development and Agricultural Roads, the pilot looked at 38 projects in the Water and Sanitation, Transportation, Energy, and Education sectors. Hundreds of documents were analyzed and converted into geocoded data, yielding operationally relevant information on the patterns of development spending.<sup>93</sup>

The main challenge facing donor participation in open contracting will be related to mainstreaming open contracting within their operations. Investment would be needed to develop interoperability with client systems to promote the sharing and disclosure of information related to donor-funded projects.

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should be clear and publicly accessible”) and 7, 12, 13, 17 (recommending public disclosure of contractual arrangements; debt reports identifying any direct or indirect collateralization of future resource production and government contractual risks and obligations arising from such debt; and government contingent liabilities and the cost of resource company quasi-fiscal activities arising from resource-related contracts in budget accounts or other relevant documents in a form that helps assess fiscal risks and the full extent of fiscal activity).

92 World Bank (2013).

93 Homer and Scott (2013).

## VI. Complementarity with Global Transparency Initiatives

The increasing recognition of the right to information and the importance of social accountability, combined with the availability of low cost technological innovations, have contributed to a broad open government and open data movement aimed at making *all* government-held information accessible to the public. As part of this movement, open contracting concepts complement those enshrined in transparency initiatives and build upon established standards for access to information,<sup>94</sup> and participatory decision-making.<sup>95</sup>

Although many transparency initiatives exist to make governments more open and accountable—for example the Open Government Partnership (OGP),<sup>96</sup> the Global Initiative for Fiscal Transparency (GIFT),<sup>97</sup> the Extractive Industries Transparency Initiative (EITI),<sup>98</sup> the Construction Sector Transparency Initiative (CoST),<sup>99</sup> the Natural Resource Charter,<sup>100</sup> the International Budget Partnership (IBP),<sup>101</sup> and the Medicines Transparency Alliance (MeTA)<sup>102</sup>—they do not, either individually or collectively, currently cover the full disclosure of contracting information or citizen participation in public contracting.

Open contracting can be integrated into these other initiatives. For example, contracting data is complementary to other data sets, including budget data and revenue from extractive industries data—giving a more complete picture of public revenue and spending patterns—and enabling users, including policy makers, private sector, and citizens, to better ‘follow the money.’ Governments could also commit to further open contracting in the context of transparency and open government initiatives. For example, governments could integrate open contracting commitments into their OGP action plans<sup>103</sup> or their disclosure requirements under EITI.<sup>104</sup> For example, the draft 2013 OGP action plan of the UK states ‘the UK government should endorse and implement a system of ‘Open

94 Nearly 100 countries have enacted access to information legislation. See also the Universal Declaration of Human Rights, American Convention on Human Rights, International Covenant on Civil and Political Rights; African Charter on Human Rights; and EU Charter of Fundamental Rights.

95 See Aarhus Convention (1998, arts 6, 9); United Nations (2013); Ruggie Principles (2011); and Constitution of South Africa (1996, s. 195) which states that “the public must be encouraged to participate in policy-making...Public administration must be accountable.”

96 The OGP is a multilateral initiative that secures commitments from governments to promote transparency, empower citizens, fight corruption, and strengthen governance.

97 GIFT is a multi-stakeholder network working to advance and institutionalize global norms improvements on fiscal transparency, participation, and accountability.

98 EITI is a multi-stakeholder initiative in which member countries disclose certain information regarding licenses in the extractive industries, most particularly payments made to governments. The EITI standard recommends disclosure of contracts and beneficial ownership of companies.

99 CoST is a multi-stakeholder initiative dedicated to improved monitoring of construction projects, from planning through procurement and performance until their conclusion and to promote the disclosure of all material project information found in the contracts and related documents. CoST is a member of the OCP steering group.

100 The Natural Resource Charter is a global initiative to assist governments with governance of natural resources. Precepts 2, 3, 4, and 12 outline the importance of transparency in decision making and contracting; open and fair competition in process of awarding contracts; disclosure prior to award as well as post award; the importance of an informed public; and disclosed beneficial ownership of license.

101 The IBP’s Open Budget Initiative is a global research and advocacy program to promote public access to budget information and the adoption of accountable budget systems.

102 In each of seven MeTA countries, representatives of government, private sector and civil society are working to improve the medicines supply chain, from manufacturer to patient.

103 The OGP is a platform for governments to make open contracting commitments and for non-governmental actors to advocate for and monitor the implementation of those commitments.

104 In 2013, a survey of EITI governments found that the majority supported requiring disclosure of contracts (EITI, 2013).

Contracting,' which would ensure public disclosure and monitoring of contracting, from procurement to the close of projects."<sup>105</sup>

## VII. The Way Forward

There is growing uptake and enthusiasm for open contracting. During the last G8 summit in June 2013, the G8 leaders directly highlighted the importance of disclosing contract information to enhance accountability.<sup>106</sup> Open contracting is also gaining momentum with multilateral agencies. World Bank Managing Director Caroline Anstey recently announced the World Bank Group's commitment to open contracting.<sup>107</sup>

The examples presented in this paper illustrate the positive efforts being made to leverage open contracting for greater accountability and better outcomes. While no government is currently practicing every aspect of open contracting from full disclosure to participation, the supply of contracting information and the demand for participation are increasing, and some governments have already institutionalized civil society participation in public contracting. In other places, constructive ad hoc collaboration is taking place between government, private sector, and civil society. Even in the absence of an enabling environment, civil society and the media are developing tools and overcoming obstacles to monitor contract implementation.

To date, however, there has not been adequate coherence to these efforts or any platform for knowledge sharing, learning, and distillation of good practices across sectors. As a result, an opportunity exists for global practitioners to exchange knowledge, practical experiences, and success stories to contribute to the uptake of open contracting.

The Open Contracting Partnership (OCP) may help to fill these gaps. Launched in June 2013 to promote increased disclosure and participation in public contracting, the OCP is working at the global level to promote principles and standards of open contracting and is providing support to practitioners at the country level.<sup>108</sup>

The OCP has recently launched a set of Open Contracting Global Principles and an illustrative chapter on Public Contracting for the Transparency and Accountability Initiative-sponsored Guide to Opening Government.<sup>109</sup> The OCP is curating a community of practice to facilitate knowledge sharing among practitioners and the development of an evidence base for the impacts of open contracting.<sup>110</sup> And, the OCP has created an Open Contracting Practitioners' Guide as a resource for those engaged in or wishing to engage in open contracting activities.<sup>111</sup> Finally, the OCP is also

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105 Draft UK OGP Action Plan (2013).

106 Lough Erne Declaration (2013).

107 Anstey (2013).

108 The OCP steering group is comprised of the Construction Sector Transparency Initiative (CoST), Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ), Integrity Action, the governments of Colombia and the Philippines, Oxfam America, Transparency International, and the World Bank Institute.

109 These can be found at [www.open-contracting.org](http://www.open-contracting.org).

110 Pro-act.org (2013).

111 Open Contracting: A Guide for Practitioners by Practitioners (2013).

developing an Open Contracting Data Standard to make contracting information more open, more interoperable, and more useful.<sup>112</sup>

Success will depend on several factors. Governments, donors, and the private sector must be convinced of the benefits from adopting open contracting. These actors must be incentivized to disclose contracting information and to encourage stakeholder participation. It will also be important to document the strategies, methods, and lessons behind open contracting success stories to allow enabling environments for multi-stakeholder collaboration to be replicated elsewhere. Finally, it will be important to capitalize on advances in the collection and processing of ‘big data’, which will further erode the information gap between governments and citizens, and lead to more opportunities for engagement. Ultimately, based on the early results of the innovative work taking place in a variety of countries, there seems to be significant potential for governments, private sector, civil society, and donors to work together to ensure that public contracting delivers better deals for governments, a level playing field for the private sector, and high quality goods, works, and services for citizens.

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<sup>112</sup> Information about the first step in the process of creating an Open Contracting Data Standard, a rapid prototype and feasibility study, can be found at Davies (2013).

## Annex 1. Proactive Disclosure Requirements

The following are examples of National, Subnational, and Sector level proactive disclosure requirements.

**Afghanistan—National:**

*Ministry of Economy, Ministry of Mines:* Presidential Decree 45 requires the publication of signed contracts by the Ministry of Economy and the Ministry of Mines is required to finalize a specific plan to publicize all contract details (not contract summaries) online.<sup>113</sup>

**Australia—Subnational:**

*New South Wales:* The Government Information (Public Access) Act (GIPA) requires publication of government contracts over a certain value threshold as well as contract variations, audited contract summaries, and amended contract summaries with contract variations. GIPA exempts ‘commercial-in-confidence’ provisions that contain the contractor’s financing arrangements, cost structures, profit margins, full base case financial model, intellectual property, or any matter that would place the contractor at a substantial disadvantage, as well as clauses affecting public safety and security, and information for which there is an overriding public interest against disclosure. Reasons for not including these provisions and a statement whether the exempted information will be later published must also be noted in the contracts register<sup>114</sup>

**Brazil—National:**

*Access to Information:* The access to information law requires publication of information pertaining to bidding processes, signed contracts, and general data for the monitoring of programs, initiatives, projects and public works in open, structured and machine-readable formats.<sup>115</sup>

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113 Afghanistan Decree no. 45 (2012). Extractives contracts are available on the website of the Ministry of Mines, <http://www.mom.gov.af>.

114 NSW GIPA (2009). Contracts are posted on the New South Wales Register of Government Contracts.

115 Law 12527 enacted on 18 November, 2011, art 8.

*Subnational—Minas Gerais—PPPs:* The PPP Law mandates publication of preliminary project summary during a public consultation period, along with the bidding documents, including selection criteria, and the draft of the contract, technical background papers and feasibility studies. Once the tender process is completed, full versions of contract documents are published and the project summary is updated (describing, inter alia, guarantees provided by the government). If the contract is renegotiated or amended, such variations are published once agreement is reached. Monthly performance reports are also published. The law allows for redaction in order to protect the government's negotiating position and to foster fair competition among the bidders.<sup>116</sup>

#### **Democratic Republic of Congo—National**

*Extractive Industries:* Pursuant to a 2011 Decree, all contracts relating to natural resources, including any annexes thereto, are required to be published within 60 days of coming into effect.<sup>117</sup>

#### **Chile—National:**

*Access to Information, Procurement:* Law No. 20.285 Concerning Access to Public Information 2009, requires online publication of: Contracts for the supply of goods, for the provision of services to implement and support actions for carrying out works, and contracts for studies, advice and consultancy relating to investment projects, indicating contractors and identification of partners and major shareholders societies or companies providing, where appropriate; and, for procurement under the Public Procurement System, each institution must include in its institutional electronic medium, a link to the procurement portal, through which will redirect to the corresponding information to the respective department or agency.

#### **Colombia—National:**

*Law 80 of 1993 and Law 1150 of 2007 and associated decrees* require disclosure of public contracting information for all agencies, beginning with the preliminary studies, the contract itself, and performance information, be published, through the Public Procurement Electronic System (SECOP) (extractives contracts are presently excluded).

#### **India—National:**

*Access to Information, Procurement, PPPs:* The Ministry of Personnel recently enacted guidelines on the proactive disclosure of information under the 2005 Right to Information Act, which make certain specific disclosure requirements for PPPs and Procurement. As regards to PPPs, the guidance requires publication of the details of Special Purpose Vehicles (SPVs), concession agreements, detailed project reports, operational and maintenance manuals. As regards

116 PPP Law, Minas Gerais, Brazil (2003) and associated decrees. See also World Bank Institute (2013) (detailing the disclosure practices of PPPs in 8 countries: Australia, Brazil, Canada, Chile, India, Peru, South Africa, and the UK). Published contracts and related information at the PPP Unit website.

117 DRC Decree (2011). Contracts are available on the website of the Ministry for Energy and Mines (<http://mines-rdc.cd/fr>).

Procurement, the guidance requires publication of tender notices, details of bid awards (names of suppliers, goods or services being procured, and rates to be paid), and any other information available on the Central Government Procurement Portal. Departments are instructed to provide the weight, size, and other specifications of the goods that might reasonably be expected to be delivered by the public authority as well as information on which officials are responsible for delivery and supervision.<sup>118</sup>

#### **Liberia—National**

*Forestry:* the 2006 National Forest Reform Law requires free public access to all audits, all Forest Resources License fee invoices and fee payment information, business and forest management plans, strategies, resolutions from the Board of Directors, public comments, reports, inventories, regulations, manuals, databases, contract maps, and contracts.

*Extractive Industries:* The 2009 Extractive Industries Transparency Initiative Act requires public accessibility of material concessions/licenses and agreements related to natural resources sectors and the post-award review and/or audit of the process by and through which concessions, contracts, and licenses are awarded for exploration and/or exploitation of minerals, forests and other resources in order to ascertain that each award was made in compliance with applicable laws.<sup>119</sup>

#### **Mexico—National:**

*Access to Information:* The Federal Transparency and Access to Public Government Information Law requires that contract information be proactively disclosed to the public online in an accessible electronic format. Implementing regulations specify the following information related contracts for purchases, leases, services, public works and related services to be disclosed: the administrative unit that made the contract; the contracting procedure; the name of the individual or the official name or denomination of the corporation involved with the contract; the date, purpose, amount and completion terms of the contract; and contract modification agreements, if such is the case, detailing the elements mentioned in the previous paragraphs.

*Procurement, Leases, Public Works:* The Law on Procurement, Leases and Services by the Public Sector and the Law on Public Works and Related Services (2009 amended) require contracting entities to publish on the CompraNet website, the following information: Name of bidders awarded the contract, indicating the reasons for the award, according to the criteria specified in the notice, and the indication of which items, concepts and amounts allocated to each bidder; Date, time and place for signing the contract, the presentation of guarantees and, where applicable, the payment of advances, the name, title and signature of the issuing public servant, noting its powers in accordance with the legal systems governing the convener, and the name and position of those responsible for the evaluation of the proposals.<sup>120</sup>

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118 Ministry of Personnel, Government of India (2013).

119 Contracts are published on the LEITI website.

120 See also Amparan and Bookman (2009, p.44) for more information about access to contracting information in Mexico.

**Mongolia—National**

*Access to Information, Concessions, Procurement:* The Law on Information, Transparency, Right and Freedom to Access Information requires publication of concession contracts and amendments thereto and, with regard to procurement, requires publication “in an easily accessible manner” of bid documents, bid invitations and regulations concerning bid selection processes; criteria for the selection of bidders as well as of criteria under which a contractor was selected; brief information on successful or unsuccessful bidders as well as the detailed reasons, conditions and legal grounds for selections; reports on the procured goods and services, including procurement audit and reports, conclusions and other monitoring reports.

**Niger—National:**

*Extractive Industries:* Article 150 of the 2010 Niger Constitution requires the publication of all natural resources contracts in the national gazette.

**Philippines—National:**

*Constitution:* Section 28 states, “Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.”

*Procurement:* The 2003 Philippine Procurement law and its Implementing Rules and Regulations require the proactive publication of:

- Invitation to Bid/Request for Expression of Interest;<sup>121</sup>
- Bidding Documents;
- Supplemental/Bid Bulletin;
- Notice of Award;<sup>122</sup>
- Approved Contract; and
- Notice to Proceed

at the Philippine Government Electronic Procurement System (PhilGEPS), or at the website of the Procuring Entity.

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121 With regard to invitations to bid, PHILGEPS provides the following searchable data fields: Solicitation Number, Notice Type, Category, Procurement Mode/Method, Classification of Procurement (whether goods, works or consulting services), Publication Date, Closing Date and Time, Area/Place of Delivery, Delivery Period, Trade Agreement (If any), Funding Source (Government of the Philippines, Asian Development Bank, Japan International Cooperation Agency or World Bank), Funding Instrument, Pre-bid Conference (date, time and place), Name of Procuring Entity, Client Agency, Contact Person, and Approved Budget for the Contract.

122 For Notices of Award, PHILGEPS provides the following searchable data fields: Reference Number, Title of Procurement Activity, Category, Government Organization Name, Contact Name, Solicitation Number, Approved Budget for the Contract, Award Notice Number, Title of Award Notice, Supplier Information, Award Date, Publication Date, Associated Component, Award Type, Contract Amount, Proceed Date, Contract Start Date, Contract End Date and Reason for Award.



**Pakistan—National:**

*Procurement:* The Public Procurement Rules 2004 require contract documents and evaluation report (for contracts above certain value thresholds) to be made public on the website of the procuring agency.<sup>123</sup> There are also procurement related documents that are required by the regulations to be made available to the bidders or the public upon request, such as the Minutes of the Pre-Bid Conference and Minutes of the Bid Opening.

**Slovak Republic—National:**

A national law requires all public contracts, with certain exceptions, to be published online. To avoid secret contracts, any unpublished contracts are declared to be unenforceable.<sup>124</sup>

**South Sudan—National:**

*Extractive Industries:* the 2012 Petroleum Act requires the Petroleum Ministry to establish and maintain a public registry of petroleum agreements, licenses, authorizations and any changes in interests in those agreements.<sup>125</sup>

**Timor-Leste—National:**

*Extractive Industries:* Under the Timor-Leste Petroleum Act of 2005, all oil and gas contracts (signed since 2005) have to be publicly disclosed.<sup>126</sup>

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123 See Public Procurement Regulatory Website, which has published contracts.

124 Act No. 546/2010 Coll. supplementing Act No. 40/1964 Coll. of the Slovak Republic (as amended). See also Edwards (2011). Contracts are available at the Centrálny Register Dokumentov Verejného Obstarávania website and the NGO-run Open Contracts website.

125 Further, the Ministry is required to publish the key parameters of each agreement, to the extent that they differ from the model petroleum agreement, including the cost oil management and limits, the production-sharing formulas, any bonuses, taxes or fees, royalties, any exemptions, and any stability clauses.

126 Most of Timor-Leste's production-sharing agreements have been published on the website of the La'o Hamutuk NGO.

## Annex 2. Sources of Public Contracts and Contracting Data

### *Australia, Federal*

- <http://data.gov.au/dataset/historical-australian-government-contract-data/>
- <http://data.gov.au/dataset/austender-contract-notice-export/>
- <https://www.tenders.gov.au/>

### *State of Victoria, Australia*

- <https://www.tenders.vic.gov.au/tenders/home.do>

### *State of New South Wales, Australia*

- <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+52+2009+cd+0+N>

### *Chile*

- [Chilecompra.cl](http://Chilecompra.cl)
- <http://www.concesiones.cl>

### *Colombia*

- <http://colombiacompra.gov.co>

### *Guinea*

- <http://www.contratsminiersguinee.org/>

### *Korea, KONEPS*

- <http://www.g2b.go.kr/>

### *Mongolia*

- <http://www.e-procurement.mn>

*Nicaragua, Nicaragua Compra*

- <http://www.nicaraguacompra.gob.ni/siscaefportal>

*Philippines, Philippine Government Electronic Procurement System*

- <http://www.philgeps.gov.ph>

*Russia*

- <ftp://ftp.zakupki.gov.ru>

*Slovak Republic, Centrálny Register Dokumentov Verejného Obstarávania*

- <http://crdvo.uvo.gov.sk>
- <http://www.otvorenezmluvy.sk/> (NGO portal based on the government data)

*Timor-Leste*

- <http://www.transparency.gov.tl/english.html>

*United Kingdom*

- <https://online.contractsfinder.businesslink.gov.uk/>
- <https://engage.cabinetoffice.gov.uk/major-projects-authority/>

*United States, Federal*

- [www.usaspending.gov](http://www.usaspending.gov)
- <http://www.fapiis.gov/fapiis/govt/datareports.jsp>
- Directory of State's portals: [http://sunshinereview.org/index.php/Proactive\\_Disclosure](http://sunshinereview.org/index.php/Proactive_Disclosure)

*United States, New York City*

- [http://checkbooknyc.com/contracts\\_landing/status/A/yeartype/B/year/114](http://checkbooknyc.com/contracts_landing/status/A/yeartype/B/year/114)

*World Bank*

- Major contracts awards: <https://finances.worldbank.org/Procurement/Major-Contract-Awards-FY2010-FY2012-Beta-version/kdui-wcs3?>

## Annex 3—Civil Society Open Contracting Efforts and Outcomes

This Annex contains examples of civil society organizations (CSOs):

- a) Conducting advocacy in support of Open Contracting;
- b) Enhancing accessibility of disclosed information;
- c) Building the capacity of other stakeholders through training; and
- d) Multistakeholder monitoring of public contracting.

### A. Civil Society Advocacy in Support of Open Contracting

In *Afghanistan*, Integrity Watch Afghanistan, a partner of Integrity Action, supports networks of community contract monitors to engage with local government officials to discuss findings and implement practical solutions to ensure that contracts deliver to specification.

In the *DRC*, Integrity Action's community monitors in South Kivu ensured the replacement of pipes by the national water company, effective delivery of water pumps by Oxfam to communities, the replacement of faulty or stolen materials in abattoirs, and the proper construction of health centers.

In *Kazakhstan*, a CSO called Namys uncovered several irregularities in the procurement of goods and services for disabled persons. As a result of the poor quality of wheelchairs procured, Namys successfully persuaded the government to ensure that a disabled person serve on the board managing wheelchair procurement and the rules were changed to include quality as a criterion.<sup>127</sup>

In 2011, Transparency International (TI) *Lithuania* filed information requests to the Public Procurement Office and obtained information about unannounced public procurement and the share of such procurement in the total amount of all public procurements carried out by each ministry

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<sup>127</sup> New Tactics in Human Rights (2010). Additional information on Namys can be obtained from the organization's website.

annually. TI Lithuania then prepared an overview for practices of unannounced public procurement, including diagrams, comparative statistics and main insights. The analysis received wide media coverage in September 2011. As a result, the Prime Minister introduced amendments to the Law on Public Procurement to reduce the amount of unannounced public procurement.<sup>128</sup>

In *Mexico*, through the use of the access to information law, the CSO Fundar began monitoring the budget expenditures for HIV/AIDS prevention and uncovered a contract mis-allocating US\$3 million. Through use of the Access to Information Law, Fundar obtained the agreement and all associated invoices. An auditor was brought in to check all those documents, clarify questions and produce a joint report identifying three main sets of irregularities: conflict of interest, tax evasion, and luxurious expenses. 700 Mexican Civil society organizations backed the claim for transparency and sanctions, launched a targeted media campaign, and demanded the intervention of the Supreme Audit Institution. The coalition produced compact disks with a PowerPoint presentation explaining the case and illustrating each argument with scanned official documents. As a result, every reporter had access to the official documents to illustrate and build the case. The official investigation conducted by the Supreme Audit Institution corroborated Fundar's findings. As a result, the Ministry of Public Function fined the recipient's chairman US\$1.2 million and punished him with a 15-year ban on receiving public funds or serving as a public servant. Three other low-ranking public servants from the Ministry of Health were punished with administrative sanctions, as well. More significantly, the Ministry changed budgeting procedures, particularly those related to CSO funding, and created an agency focused on auditing such funding.<sup>129</sup>

In *Mongolia*, over the summer of 2012, the Public Procurement Partnership (a coalition of NGOs) engaged in a policy dialogue with the Mongolian Ministry of Finance on the Implementing Rules and Regulations of the newly amended Public Procurement law. As a result of the dialogue, in the fall of 2012 the Mongolian Ministry of Finance changed the Implementing Rules and Regulations of the newly amended Public Procurement law to incorporate several of the Public Procurement Partnership's requests, such as allowances for monitors and the use of specific reporting templates.

In *Tanzania*, in 2006, a CSO, Hakikazi Catalyst, applied the citizen report card methodology to monitor execution of primary education funds by the local local government of Mkonoo, a village near Arusha in northern Tanzania. They made the following discoveries:

- Of the Tshs. 9,300,000 (approximately US\$7,500) withdrawn from the village's bank account, no records were available to account for expenditures totaling Tshs. 1,100,000 (approximately US\$880).
- A physical verification of the schools constructed during the year under investigation revealed that the iron sheets used for roofing on the classrooms were thinner than those listed in the budget (and required by government standards). The thinner sheets that were used could easily blow off during a strong storm.

128 Mrazauskaite (2012).

129 World Bank (2009).

- The village government also had no explanation or accounts for Tshs. 1,124,700 (approximately US\$900) allocated for the construction of a teacher's house, even though this amount had been withdrawn from the village bank account.

The misuse of funds was brought to the attention of the village, ward, and district governments by the village monitoring committee and Hakikazi, resulting in investigations by the district government and the Prevention of Corruption Bureau.<sup>130</sup>

## B. Civil Society Enhancing Accessibility and Use of Contracting Information

In the extractives context, in *Ecuador*, Grupo Faro, a CSO, analyzed and published a citizen-friendly report on contracts signed by the Ecuadorian government with a Chinese mining company, the first large-scale mining project in the country. To make the terms and content of the contracts more accessible to the public, Faro staff used their website and Facebook to explain to followers what the contracts mean and how to read them.<sup>131</sup>

In *Mozambique*, the water authority, Direcção Nacional de Águas (DNA) partnered with WASHCost, a CSO, to collect data from water and sanitation sector contracts to create a database for the government to use for planning and budgeting. Since 2009, the organization has collected over 700 contracts. DNA hosts the database, and information is integrated into the National Information System for Water and Sanitation (SINAS), which national and regional agencies can use. In addition, this database is available to the public, allowing for greater transparency and accountability.<sup>132</sup>

In *Nigeria*, in 2012 the Nigerian Contract Monitoring Coalition, took to the Courts (pursuant to the 2011 Freedom of Information Law) to order the Power Holding Company of Nigeria (PHCN) to disclose information related to a contract for the supply and installation of High Voltage Distribution systems in Abuja, Lagos and Ibadan, including copies of:

- The procurement plan for the Nigerian Electricity and Gas Project;
- Documentation on design and specification of the project;
- The issued bidding documents also containing the scope of the procurement and the contract sum, conditions of the contract and payment terms and schedule;
- A list of all the contractors that submitted bids;
- A web link to the needs assessment as contained in the Project appraisal document;
- An approval of award in the form of “no-objection” issued by the task team leader;
- An online publication of the award of contract;

<sup>130</sup> Information on Hakikazi can be obtained from the organization's website.

<sup>131</sup> Striking Poverty (2012)

<sup>132</sup> WASHCost-Mozambique (2011).

- The name and addresses of the distribution companies on whose behalf the procurement was carried out;
- The Bid Evaluation Report containing all annexes; and
- The signed contract document (including the contract sum, the conditions of contract, and payment terms).

In a precedent-setting judgment, the Court dismissed PHCN’s arguments against disclosure, ruling that “since negotiations have been concluded and the contract awarded, the disclosure of the information sought cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of the contractor” and issued an order for the release of contract documents sought by the coalition. PHCN complied on April 2, 2013.<sup>133</sup>

In the *Slovak Republic*, the NGO Transparency Slovakia wanted to provide civil society, government and businesses decent, good quality public procurement data. They collaborated with a major daily newspaper, SME, to create Open Public Procurement in November 2011 as a single-stop shop for procurement data. The portal brings together a massive amount of publicly disclosed procurement data from disparate government sources dating back to 2005 on roughly 35,000 contracts worth almost €23 billion. Likewise, Transparency Slovakia and another organization, Fair Play Slovakia, have cooperated to create a consolidated public contracts portal using the data disclosed by different government sources called Open Contracts. Open Contracts enhances the accessibility of the contracts by providing full-text search ability and a notification system for users wishing to receive alerts for new contracts matching their search criteria.<sup>134</sup>

On an international level, OpenOil, an energy consultancy and publishing house based in Berlin, gathered a group of world-class oil experts and professionals to jointly write a book which explains how to read oil contracts in late October 2012. The product, “Oil Contracts- how to read and understand them” is now available for download under an open license by any person seeking to have a better understanding of how these contracts operate.<sup>135</sup>

Another popular practice of CSOs in the extractives sector is the development of interactive maps of geo-coded information related to concessions. This is also an example of how contracting data can be paired with other (geographical) data to create a useful tool. Such maps have been created through partnerships between government, donors and CSOs, for *Central African Republic, Democratic Republic of Congo, Ghana, Mongolia, Peru, Sierra Leone, Tanzania, and Uganda*.<sup>136</sup> For example, the World Bank Institute created the GIS-based map for Ghana as a pilot, building on a need identified from consultations with local stakeholders. The tool combines all publicly available extractive industries data for Ghana in one place, including mining and oil field locations, contracts, production and revenue data, corporate social

133 PPDC (2012) and PPDC (2013).

134 Kurian (2012).

135 OpenOil (2012)

136 For a directory of Mapping of Extractive Industries projects, see MOXI website.

responsibility projects, and underlying socio-economic indicators. In July 2012, the University of Ghana took on ownership and maintenance responsibilities for the map and it continues to be used by a range of stakeholders from government officials to parliamentarians to the Oil/Gas Platform of civil society groups.

*Revenue Watch*, *Columbia University* and the *World Bank Institute* have also piloted the development of an extractive industries contracts database that digitizes and annotates contracts from multiple countries as a tool to learn more about particular deals and to compare and contrast with others.<sup>137</sup>

### C. Building the Capacity of other Stakeholders

*ANSA-EAP* regularly conducts trainings in the region on observing public procurement and contract monitoring.<sup>138</sup>

In *Bolivia*, after the government disclosed the content of contracts related to hydrocarbons, *Fundación Jubileo*, a CSO, stepped in to carry out training workshops with national government officials as well as with local authorities in the region of Tarija to understand the contracts in order to undertake the oversight role assigned to them.<sup>139</sup>

In *Peru*, OCP Steering Group member Oxfam America supported a training program for local community representatives to help villages affected by a copper mine explain their concerns about land seizures and pollution, and develop a proposal for compensation. Oxfam America and Oxfam Australia encouraged the owner of the mine, BHP Billiton, to engage in negotiations with the communities. This resulted in a program of compensation including 7,000 hectares (17,000 acres) of new farm lands, assistance with infrastructure improvements like road construction, and a development fund to help relocated farmers restart their businesses.<sup>140</sup>

In *Nigeria*, the Public and Private Development Centre Ltd provides online and in-person training of citizens procurement monitors under the Public Procurement Act 2007. Another aspect of the program is targeted at CSOs, professional bodies, trade associations and relevant committees of the National Assembly. It is deploying direct procurement monitoring trainings which seek to improve skills for procurement monitoring, oversight and introduce stakeholders to use of ICT and other tools, and creates opportunity and capacity for stakeholders to replicate trainings and increase the number of trained procurement monitors.<sup>141</sup>

*Revenue Watch Institute* is a CSO with a global training program in Latin America, Eurasia and Anglophone and Francophone Africa. Through courses they present, citizen leaders, lawmakers and

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137 [Resourcecontracts.org](http://Resourcecontracts.org)

138 ANSA-EAP (2011).

139 Smith (*Revenue Watch*, 2011, p. 16).

140 Oxfam (2013).

141 Garza (2011).



journalists gain the knowledge and the skills they need to conduct their own analyses of oil, gas and mining contracting and to develop advocacy campaigns.<sup>142</sup>

#### **D. Multistakeholder Monitoring of Public Contracting**

In *Ghana*, in the health sector, the local chapter of the Medicines Transparency Alliance has collaborated with the Ghana Food and Drugs Board to test the quality of procured antibiotics and other medicines using minilabs at sentinel sites around the country. This work has contributed to swift intervention by the regulator through the identification and recall substandard antibiotics and withdrawal of unregistered medicines from the market.<sup>143</sup>

In *Ghana*, in the extractives sector, CSO advocacy resulted in the creation by the government of the Public Interest and Accountability Committee (PIAC), a multi-stakeholder body statutorily charged with monitoring petroleum revenue management. In preparing its 2012 report, the Committee compared the actual crude oil liftings and income tax allowances against contractual requirements. The fact that contracts were available enabled the PIAC to find that the government's revenue projections for 2012 did not accurately reflect the contract provisions on surface rental payments, and it issued recommendations on how these funds should be collected and accounted for going forward.<sup>144</sup>

In *Ethiopia*, the CoST multi-stakeholder assurance team found an exaggerated volume of retaining wall and of excavation in the project documents for a 33km rural road in Southern Ethiopia. The Ethiopian Roads Authority and the Supervising Engineer accepted the team's recommendation at an estimated cost saving of US\$2.3 million. As well as the cost saving, the designers for this project have been suspended for 2 years by the Ethiopian Roads Authority.<sup>145</sup>

In the *Kyrgyz Republic*, the local multi-stakeholder MeTA chapter cooperated with authorities to participate in the procurement of medicines and is now permanently included in the Ministry of Health Tender Committee for all medicines.<sup>146</sup>

In *Malawi*, CoST Malawi conducted a baseline study of construction projects that revealed average time overruns of 97 percent and average cost overruns of 6 percent. A review concluded that the Ministry of Transport and Public Infrastructure had capacity gaps in managing its contracts. Malawi's Parliament subsequently approved a reform package aimed at improving management capacity and ensuring more efficient delivery of public sector construction projects. In addition to this reform package, Malawi's Office of the Director of Public Procurement agreed to include

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142 Revenue Watch (2013).

143 MeTA (2011).

144 Striking Poverty (2012).

145 CoST (2013).

146 MeTA (2011).

a clause within the revisions to the Public Procurement Act to state that procuring entities must disclose information as recommended by CoST.<sup>147</sup>

In *Peru*, the MeTA local chapter developed a Price Observatory to give the public access to accurate information about medicine prices. Its specific contribution was in writing the draft legislation enacted by the Minister of Health in 2010 that required all medicine producers and sellers—both public and private—to publish their prices.<sup>148</sup>

In *Pakistan*, Transparency International partnered with the government in a US\$1 billion government water project in the early 2000s. They implemented an integrity pact that included the following features:

- The involvement of civil society in monitoring bid evaluation, the award decision process, and the implementation of the contract; and
- Public disclosure of the award decision, including the major elements of the evaluation and the reasons for the selection of the successful bidder

The project was completed ahead of schedule and under budget.<sup>149</sup>

In *the Philippines*, the Department of Education partnered with G-Watch, a procurement monitoring NGO to launch Textbook Count in 2002 with the purpose of monitoring textbook procurement. Millions of textbooks worth millions of dollars were successfully tracked to thousands of delivery points. Members of the community were actively involved in reviewing and delivering the textbooks. Girl and Boy Scouts, as well as other CSO monitors, counted textbooks and review their quality when the books are delivered. Coca-Cola and other private companies were also enlisted to help deliver textbooks. As a result, delivery times were substantially shortened, quality improved and ghost deliveries were eliminated.<sup>150</sup> Textbook Count was institutionalized with the passage of Department Order 5759 Series of 2007, which recognized CSO participation in all procurement processes of the Department of Education.<sup>151</sup>

Also in *the Philippines*, CSO NAMFREL has been monitoring procurement in the health sector since 2004. Throughout the 200s NAMFREL reported on hospitals publishing incomplete contracting information, uncovered unadvertised procurement and discovered irregularities that were reported to the Department of Health, prompting corrective measures, including an order to all hospitals and health care centers to comply with the Government Procurement Reform Act of 2003. In 2010, the Department of Health officially designated NAMFREL as one of two observers on the Department of Health Bids and Awards Committee as part of the Medicine Monitoring Project (MMP). As an

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147 CoST (2012).

148 MeTA (2011).

149 TI Pakistan (2003).

150 Philippines: Textbook Count.

151 Philippines Department of Education (2007).

observer, NAMFREL has the authority to monitor the Department of Health's procurement and delivery activities, as well as to interview all procurement personnel, to review relevant documents, and publish its findings.<sup>152</sup>

In *South Korea*, Transparency International has led efforts to increase transparency in the defense sector, which ultimately resulted in civil society participating in the monitoring of defense procurements by supplying one of three ombudsmen to the Defense Acquisition Process Administration (established in July 2006, as an independent national body for defense procurement, separate from the military). The ombudsmen receive complaints, investigate, make recommendations, and monitor the process of defense acquisition.<sup>153</sup>

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152 NAMFREL (2010).

153 ANSA-EAP (2009).

## Annex 4: Monitoring Tools—by Sector

The monitoring tools below have been collected by the Open Contracting Community of Practice. More details about each of these tools can be found at: <http://pro-act.org/page/monitoring-tools>.

### *Education Sector:*

- G-Watch Philippines - Bayanihan Eskwela Manual: A Guide to Citizen Monitoring of School Building Construction Projects
- G-Watch Philippines - Textbook Count
- Procurement Watch Inc Philippines - Bantay Eskuwela: Operational Guidelines, School Furniture
- Uganda Contracts Monitoring Coalition Classroom Construction Community Monitoring Tool

### *Extractives:*

- WBI - Contract Monitoring Road Map for the Extractive Industries Sector

### *Health Sector:*

- National Citizens' Movement for Free Elections Philippines - A Guide to Medicine Monitoring in Public Hospitals (Overview)
- WBI - Consolidated Social Accountability Tool

### *General Procurement/Government:*

- Asian Development Bank - Procurement Monitoring and Observing in Mongolia: A CSO Course on the Public Procurement Law of Mongolia
- Coalition Against Corruption Philippines - IRA Watch Manual
- CODE-NGO Philippines - PDAF Watch Report
- OECD - Procurement Toolbox
- Procurement Watch Inc Philippines - Bantay Eskuwela: Volunteer Monitoring Toolkit (Draft)

- Procurement Watch Inc Philippines - Facing the Challenges of Fighting Corruption in Procurement
- Public Procurement Partnership Mongolia - Tools and Templates
- SK Watch Philippines - Tracking SK Funds and Functionality
- Transparency International - Civil Society Procurement Monitoring (CSPM) Tool
- WBI East and Southern African Contract Monitoring Program - Action Planning Meeting Report
- World Bank Gambia - Operational Manual for Community Based Performance Monitoring

*Procurement Monitoring Resource Guides:*

- Integrity Watch Afghanistan - Community-Based Monitoring Toolkit
- Procurement Monitoring Guide: A Tool for Civil Society - Transparency International | USA
- Indonesia Country Specific Procurement Monitoring Guide - Transparency International | USA
- Philippines Country Specific Procurement Monitoring Guide - Transparency International | USA

*Roads Sector:*

- A Framework for Monitoring Performance-Based Road Maintenance Contracts
- Bantay Lansangan Philippines - Road Watch Procedures Manual
- Bantay Lansangan Philippines - Road Watch Sample Action Plan
- CCAGG Philippines - Monitoring Guide for Roads
- First Africa T2 Conference - Conference Proceedings
- First Africa T2 Conference - Road Transport Sector Reforms: The Tanzanian Experience
- Fix My Street UK
- Ghana Contracts Monitoring Group - Road Construction Works Citizen Monitoring Tool
- International Road Federation - Executive Seminars
- National Cooperative Highway Research Program USA - Maintenance QA Program Implementation Manual
- Public Affairs Centre India - Citizen Monitoring and Audit of PMGSY Roads
- Roads Authority Namibia - Road Sector Reform in Namibia
- Roads Management Initiative - SOURCE Project: Roads in Developing Countries, Management and Monitoring, a large-scale benchmark tool for road networks
- Sub-Saharan Africa Transport Policy Program - A Contrasting Approach to Road Reforms: The Case Study Experience of Uganda
- Uganda Road Sector Support Initiative - Enabling Sustainable Mobility in East Africa: Building Successful PPP for the Road Sub-Sector in Developing Countries
- World Bank South Asia Region - Efficiency in Public Procurement in Rural Roads Projects in Nepal
- World Bank Transport Papers - Monitoring Road Works Contracts and Unit Costs for Enhanced Governance in Europe and Central Asia

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