MYTH-BUSTING CONFIDENTIALITY IN PUBLIC CONTRACTING

Open Contracting Partnership

SUMMARY

Public contracting is a trillion dollar global marketplace run on public money to deliver goods, works and services to citizens.

Transparency and openness around this spending can help improve the competitiveness, integrity and efficiency of the contracting process. Yet information on what happens with that money is scarce and disconnected, and access to it is restricted in many countries.

Concerns around confidentiality of information in contracts are arguably the most significant barrier to more openness. Apprehension over what is and is not confidential hinders sharing information in more user-friendly and engaging ways with business and citizens. It obscures vital details from the public and inhibits monitoring of public spending.

This brief guide proposes five core principles to make contracting information open-by-design to avoid a lazy default of routinely classifying information as confidential unless proven otherwise.

They are:

- **Disclose public contracts with minimal redaction.**
- **Disclose all information that is not legitimately sensitive unredacted.**
- **Provide a clear and detailed justification for each redaction.**
- **State how long any redacted information will remain sensitive.**
- **Disclose withheld information the moment it ceases to be sensitive.**

Discussing these principles with more than 70 experts across government, business and civil society from more than 20 countries, we examined the ten most common arguments against making contracting information public.

As we looked into each of these, we found surprisingly little evidence that backed up the harm proposed by the arguments and quite a lot of evidence that does not support them. This is why we have – somewhat provocatively – chosen to label these arguments as "myths."

We hope that this handy brochure puts evidence-based arguments in your hands to help you counter the inertia, persiflage and vested interests that you will confront as you try to bring more light and insight into the business of government.

See our full report at http://mythbusting.open-contracting.org for more detailed arguments. Drop us a line if you need more advice and help.
Best of luck!

THE MYTHS

MYTH #1

Proactive disclosure of contracting information is not possible without a Freedom of Information (FOI) act

BUSTED

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

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

EVIDENCE

Citizens are entitled to know how their taxpayer dollars are spent, regardless of who ultimately delivers the goods, services, or infrastructure. In most countries, FOI acts and other legislation oblige public authorities to disclose this information in addition to giving citizens the right to request it. In many jurisdictions, this includes information held by private companies.

Even if FOI laws lack an explicit reference to public procurement and contracting information, this does not imply that this information must be withheld. In such cases, disclosure mostly depends on whether contracting authorities are willing to do so, and there are many examples of those that already do (such as Brazil or Ghana). Court cases around the world attest to the public interest and relevance of disclosing contracting information.

There is legal backing for disclosing contracting information, even in the absence of an FOI act. This can include laws and regulations related to public procurement (such as Colombia, Vietnam or Zambia), specific sectors (PPPs or extractive industries), public financial management (South Africa), the Constitution (Mexico or the Philippines) and/or regional legislation (EU).

MYTH #2

Confidentiality clauses prohibit the disclosure of contracting documents

BUSTED

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

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

EVIDENCE

The purpose of confidentiality must be to protect legitimate commercial interests, legitimate privacy interests, or legitimate security interests. Confidentiality clauses only protect truly sensitive information from disclosure, not all information. Non-sensitive information still needs to be disclosed.

Laws trump contracts. Disclosure required by any law to which the parties are subject, such as Freedom of Information acts or public procurement legislation, is a very common exception to confidentiality clauses. The UK Information Commissioner's Office advises authorities not to agree to blanket confidentiality clauses for this reason.

The parties to the contract may voluntarily decide to disclose contracting information, even if a confidentiality clause prevents it. There are good examples of this, including major oil contracts, around the world.

MYTH #3

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

BUSTED

Contracting documents containing commercially sensitive information *can* be disclosed

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

EVIDENCE

Unless there is an overriding public interest, commercial information that is legitimately sensitive should be exempt from disclosure.

But any assertion of commercial confidentiality has to be based on real evidence of harm. There is surprisingly little evidence of harm in the literature. Confidentiality does not appear to have prevented routine publication of public contracts in many countries around the world (from Australia to Georgia, Slovakia, the UK and Ukraine) and, if anything, the balance of evidence is that publication has improved public markets and competition (see Myth #7).

Government agencies should explain why information is commercially sensitive and needs to be redacted. Proactively disclosed contracts in the UK, for example, include a 'refusal notice' explaining redactions.

Most procurement information is only sensitive for a definable period of time, after which it should be disclosed. In most jurisdictions, financial and technical proposals, and proposed prices aren't disclosed until a contract is awarded, for instance.

Government authorities should consider whether commercial information is already in the public domain when determining whether it is legitimately sensitive. For example, potential suppliers sometimes list their services, rates, pricing, and terms and conditions on online databases to make it easier for government authorities to procure services. These databases are publicly accessible, so it is difficult to argue that this information is commercially sensitive.

In some countries, such as Australia, Canada, Ireland, New Zealand and the UK, a public interest test can override exemptions from disclosure for commercially sensitive information, if the public interest in favor of disclosure outweighs the potential harm caused.

Keeping contracts simple and avoiding including trade secrets or proprietary material in them also helps avoid unnecessary conflicts.

MYTH #4

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

BUSTED

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

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

EVIDENCE

Under most FOI legislation, information that would undermine national security if published is typically exempt from disclosure. This usually applies to defense contracts – a significant percentage of which are awarded through non-competitive procedures – and foreign relations matters.

Some countries have a policy to disclose non-sensitive defense contracting information, but in practice many documents are unjustifiably classified as sensitive for national security reasons. The Tshwane Principles were created to make sure that exemptions for national security are not abused and provide guidance on how to balance them with the public interest.

Blanket exemptions should be avoided for militaries or governments. A review of defense contracts in Australia's Federal Contracts database shows that only 2.7% of all such contracts are marked with a confidentiality flag, indicating that most defense contracts could be (partially) disclosed. In Colombia, the Ministry of Defense procures through framework agreements in which all contracting information is publicly disclosed.

Contracting authorities should publish the reason for redacting any information. This should indicate the legal basis for the exemption and a description of the harm that could result from disclosure, including its level of seriousness and degree of likelihood.

South Korea is a good example of a country trying to increase transparency in defense budgeting while mitigating the risk of exposing highly sensitive security information. The country's government categorizes defense budget items based on their degree of secrecy and customizes the audience for disclosure accordingly.

Defense contracting information becomes less sensitive over time and should be published when it no longer poses a threat to national security.

MYTH #5

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

BUSTED

Contracting documents that contain personal data *can* be disclosed

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

EVIDENCE

People are understandably nervous about sharing their personal data. While there is a tension between the right to know and the right to privacy, government agencies can take certain measures to ensure they are accountable to the public, while also protecting the privacy of individuals.

In most countries, there are exemptions to privacy laws that allow for the disclosure of certain personal data. For example, most countries make the names of company owners and directors part of the official public record to avoid fraud and corruption, and to ensure companies can be held accountable. Publishing an official company address ensures access to legal redress.

The potential harm of disclosing personal data can differ significantly per country and per sector. Potential harm can be assessed by conducting a privacy impact assessment (PIA; these are often done at the agency level). The PIA should evaluate alternatives to disclosing personal data that can be used to minimize privacy risks, while still allowing the government to be accountable to its citizens.

In cases where the law doesn't permit disclosure of certain personal data in contracting documents, alternatives should be explored, such as anonymizing or aggregating certain personal data. Once the data is non-identifiable, it can no longer be considered 'personal' (and therefore data protection acts do not apply). For example, the UK's Companies House does not disclose the full date of birth (only the month and year) of the directors of UK-registered companies.

High-level government employees, such as those in charge of major decisions and expenditures, and/or authorized to sign contracts with suppliers, are regarded as carrying a greater level of accountability, which should go hand-in-hand with higher levels of transparency and disclosure of personal information. The same is true for the private sector.

It is good practice to be open about what personal data is collected, how it is used, shared, and secured, following guidance such as the Open Data Institute's Openness Principles.

MYTH #6

Disclosing contracting information encourages and sustains collusion

BUSTED

Disclosing contracting information does *not* encourage nor sustain collusion

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

EVIDENCE

Collusion takes place in each and every country, whether or not that country discloses contracting information. Our study could not find any empirical evidence disclosing certain contracting information makes it easier to form cartels and for cartels to monitor the behavior of its members.

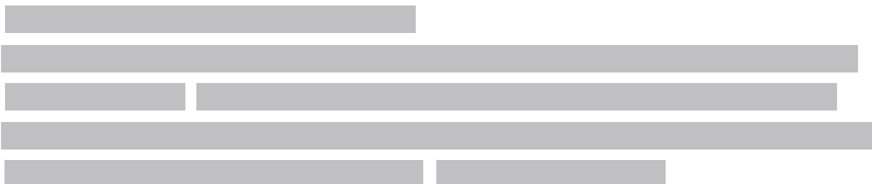
Evidence shows that disclosing contracting information decreases cartel duration, because the cartel can detect a cheating cartel member earlier than if it had to rely only on self-reported information. Cheating often results in the cartel being dissolved by its members.

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

Companies do not need publicly disclosed contracting information to identify potential cartel members anyway. They are well aware of who their competitors are, especially in highly concentrated markets.

Disclosing the estimated contract value during the tender stage avoids unrealistic bids. Because minimum prices make price wars less effective, they also make cartel formation more difficult.

An increasing number of governments routinely analyze contracting information to detect collusion. In some countries, civil society organizations analyze procurement data aimed at detecting collusive bidding to complement the government's analysis. For example, Transparency International Ukraine and the Corruption Research Centre Budapest have found patterns of collusion by researching contract awards and corresponding tenders. Open contracting data also helped detect and break a price-fixing scheme supplying fruit to schools in Bogota, Colombia.



MYTH #7

Disclosing contracting information decreases competition

BUSTED

Disclosing contracting information does *not* decrease competition

- Default publication of contracting information and contracts in some countries, or its widespread availability via FOIs in others, has not deterred companies from bidding for government contracts
- Evidence shows disclosing contracting information leads to an increase in the average number of bidders per tender and/or a reduction in single bid contracts
- Publishing contracting information leads to a decrease in bid prices, not an increase

EVIDENCE

Research shows disclosing contracting information increases, rather than decreases, competition.

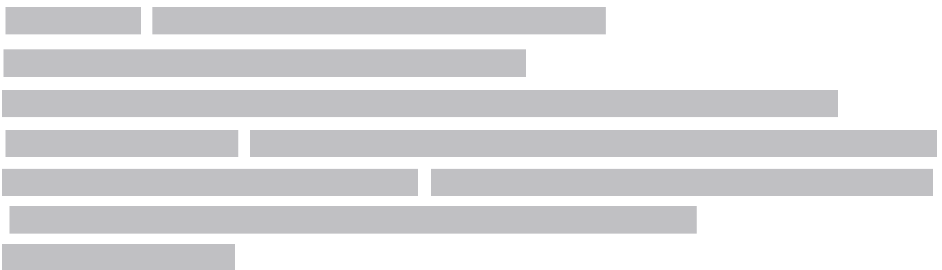
An academic study of over 4 million procurement records across Europe found a clear correlation between increased information published about tenders and a reduced likelihood of single bid contracts, which were universally more expensive. It estimated single bidding would drop by 2-3.5% across the EU if transparency increased by five items on average per tender, equivalent to savings of about €3.6-6.3 billion per year.

In Ukraine, the number of bids increased significantly and supplier diversification almost doubled after greater transparency, open data and a new open e-procurement system were introduced in 2015.

Competition for tenders has doubled after almost all government contracts were published in Slovakia in 2014.

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

Often, FOI requests related to public procurement are made by companies gathering information about their competitors and in understanding how to structure winning proposals. In the USA, more than 12,000 contracts have been released via FOI requests. Many government contracts are also available via a fee-based online database. This has not deterred companies from bidding for government contracts.



MYTH #8

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

BUSTED

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

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

Disclosing contracting information does *not* lead to more appeals

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

Disclosing contracting information does *not* lead to more contract renegotiations

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

EVIDENCE

Proactively and comprehensively disclosing contracting information does require some resources for: a) locating, retrieving and redacting information; b) developing and licensing e-procurement systems; and c) data entry and public engagement. That said, the costs seem small relative to the benefits. including significant savings and improved integrity and trust. Ukraine's Prozorro open e-procurement system cost less than US$5 million, while the savings (on budgeted spending) stand at over US$1 billion.

Proactive disclosure reduces transaction costs because it is done in a routine, systematic and structured manner, with the use of e-procurement systems. The more standardized and clearer the rules for redaction, and the less information is required to be redacted, the lower the administrative costs of disclosing contracting information. While not perfect, countries like Colombia, Georgia, Slovakia and Ukraine demonstrate the institutional feasibility of implementing comprehensive and proactive disclosure of contracting information using e-procurement systems.

In Colombia and Georgia, procuring entities are obliged to answer questions about procurement publicly, because it is seen as a way to engage with the community and to create a level playing field between competitors. It also increases trust in the system, and helps spot and correct mistakes earlier on in the tender process. Despite increasing the agencies' workload, it decreases time and costs later. There is evidence for this from countries such as Paraguay that publish open contracting data.

MYTH #8

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

EVIDENCE

Costs incurred by bidders typically include human resources for indicating which parts of the submitted information should be withheld from disclosure (if any), and submitting proposals. These costs can be incorporated into bid prices. Given the overall savings seen under proactive publication regimes, however, these redacting costs are insignificant.

The likelihood that unsuccessful bidders will challenge the government's decision to award a contract to their competitors appears to be rooted in culture and differences in legal systems and not in the disclosure level of contracting information.

The process for complaints under open e-procurement systems, like the one used in Ukraine, can be made deliberately easy and transparent. The complaints process is used to increase trust in the system and to ensure contracts are awarded to the right bidder; it can be a long-term investment rather than just a cost. Similar processes can also be employed without comprehensive e-procurement systems, such as in Greece, where every bidder is given access to the winning bidder's proposal.

Contract renegotiations can cause project delays and increase costs for both the government and contractors. Disclosing comprehensive contracting information, starting at the planning phase, allows all parties – including citizens, the media, and civil society – to gain an understanding of the background to the contract and mitigate negative social and environmental impacts. It also helps procuring entities to vet bidders early on.

Evidence from extractive industries suggests proactive disclosure of contracting information from the start of the contracting cycle probably contributes to more sustainable contracts in the long run. Some companies have actively pushed for the publication of their contracts to this end, such as Newmont Mining in Ghana.

MYTH #9

Disclosing contracting information does not expose or lower corruption

BUSTED

Disclosing contracting information *can* expose and reduce corruption

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

EVIDENCE

Contracting is a government's number one corruption risk as it is where money and government discretion collide. Some 57% of foreign bribery cases prosecuted under the OECD Anti-Bribery Convention involved bribes to obtain public contracts. Almost half of those involved payments to public officials in countries with high or very high levels of human development so this is not an issue just confined to developing countries.

Evidence shows disclosing contracting information has not only resulted in the uncovering of corruption but also contributed to prosecution and policy reforms.

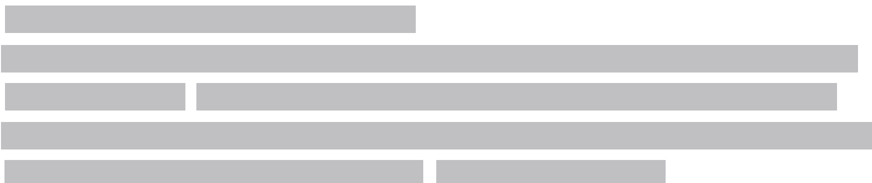
A World Bank survey of 34,000 companies in 88 countries shows that competition was higher and kickbacks were fewer and smaller in places where transparent procurement, independent complaints and external auditing are in place.

A major study of Europe's procurement data found that when transparency of information increased, there was a decrease in single bid contracts, which are innately more at risk of corruption and conflict of interest. The reduction was more marked with information published during, rather than after, the procurement process.

Specific case studies back up this correlation. In Slovakia, the media used the highly transparent e-procurement system in 2014 to reveal that a public hospital had purchased a very expensive CT scanner from a shell company linked to politicians. The scandal led to the firing of several high-ranking officials and legal reforms to prevent shell companies from engaging in public procurement.

Among entrepreneurs, perceptions of corruption in procurement have almost halved in Ukraine following the country's Prozorro open contracting reforms.

Experts and practitioners agree that malfeasance moves into the stages of the procurement process that are more obscure and less public. Thus, disclosing contracting information throughout the procurement cycle mitigates the risk of corruption and maximizes the likelihood of exposing corruption.



MYTH #10

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

BUSTED

There is abundant evidence of public engagement with contracting information; it increases as data improves

- Plenty of stakeholders, including the public, media, civil society, companies and other parts of government already regularly access contracting information
- Education on government projects and easily accessible data increase stakeholder involvement and data use in public contracting as well as contribute to public trust

Government can easily mitigate the risk of misunderstandings by explaining information and its context better; potential criticism is no reason to keep information confidential

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

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

EVIDENCE

Research shows that many stakeholders, such as journalists, civil society, businesspeople and civil servants, actively use public contracting information. Engagement increases when data is easily accessible via procurement systems in an open data format, and when it is accompanied by education and awareness-raising of public procurement and government projects.

Coverage of public procurement by Slovakia's media increased by 25% after the country introduced transparency reforms. Searches for procurement information in Ukraine increased massively (from 680 hits a month to 191,000 a month) once the government introduced its open contracting reforms. A 2015 study found 8% of Slovakians had viewed a government contract or invoice online in the previous year.

Access to contracting information, such as existing contract awards and winning proposals, allows companies to make better proposals. Many infomediary businesses already exist, connecting contracting information to other commercial data for this purpose. Better information would allow them to offer more value-added services.

Interviews conducted for this report show that the potential embarrassment contracting information might cause the government (unjustified or justified) is one of the main reasons government employees are apprehensive about disclosure.

Disclosed information can highlight incompetence and mismanagement, and generate negative feedback. But contracting information contributes to public debate, which helps inform government decision-making to improve policies and outcomes. Trust in the system is positively reinforced if feedback is acted on.

To reduce the risk of data being misinterpreted, governments can publish an explanation of the disclosed contracting information to make it easier for users to understand the content and context. For example, when reporting on contract performance, authorities can present the information in a format that helps the public understand its relevance and completeness. The data could be complemented by a narrative description of performance to ensure the public obtains a fair, accurate and, where possible, comparable view.

Civil society and the public can also be engaged and trained more directly on the technical, legal and financial aspects of contracting information. In the Philippines, the Procurement Policy Board offers training for civil society organizations that act as independent monitors. In Ukraine, Transparency International trains companies and government entities on using the e-procurement system and civil society on monitoring tenders. The Dozorro.org monitoring process in Ukraine has seen over 2500 complaints fully investigated so far, of which about half have seen alterations or changes to the contracting process as a result – including 22 criminal charges and 79 sanctions – attesting to the important and informed role that CSOs can play in monitoring procurement.

GET IN TOUCH

The Open Contracting Partnership connects governments, civil society and business to open up and transform public contracting so that it is smarter, better and fairer.

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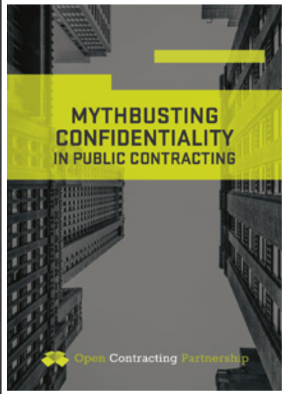

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