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# Publishing Government Contracts: Addressing Concerns and Easing Implementation (Brief)

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Charles Kenny

## Summary

Government contracts regarding the use of public property and finances should be published by default. Many jurisdictions already require that contracts be made public in response to requests for the information; some now publish contracts proactively. Doing so helps new entrants compete in the market for public contracts, helps governments model their projects on other successful examples, and allows citizens greater insight into how their taxes are being spent. This brief, summarizing the conclusions of the Working Group on Government Contract Publication, provides a practical outline for reaping the benefits of open contracts while addressing legitimate concerns about costs, collusion, privacy, commercial secrecy, and national security.

Government procurement worldwide is worth around \$9.5 trillion a year. Oil, gas, and mining rents (the gap between the price of the goods produced and the cost of production) amount to around \$5 trillion, which is 4.8 percent of global GDP. Governments routinely sign multibillion-dollar contracts regarding the use of public property including those natural resources. The resulting contracts are public documents, for which default practice should be in favor of publication.

There are concerns, however, about the costs of the publication process, the risk that publication would support collusion, and the benefits of a stand-alone contract publication initiative. Commercial, national-security, and privacy concerns also exist. This report of the Center for Global Development provides guidance about contract publication and, in particular, recommendations around secrecy and security issues.

## Benefits of Publication

Publication of the contract text itself is part of a broader open-contracting agenda to increase transparency and monitoring capacity throughout the selection, operational, and review phases of contracting. Many countries and sub-national jurisdictions already require by law that the content of contracts be published in response to a Freedom of Information request. Some countries now publish contracts proactively, including the federal governments of Colombia, the United Kingdom, Slovakia, and Georgia. This small additional step in favor of transparency could have significant benefits: for companies, new entrants can have a far better idea of the goods and services they will bid to provide if they have easy access to existing contracts; the increased quality and extent of competition fostered by contract publication would benefit governments, which could also model new tenders on successful contracts from elsewhere; and contract publication would allow beneficiaries and civil society to monitor value for money and service delivery. Evidence from Slovakia suggests procurement transparency reforms in the country that included contract publication were associated with an increase in competition on the average government tender: from 2.3 bids in 2009 to 3.6 bids in 2013.

## Addressing Concerns

Evidence suggests that commercial concerns and those about costs, collusion, privacy, and national security deserve consideration, but they can be addressed without undue burden:

- **Costs of publication** are apparently low, focused on the minority of contracts where a redaction process is likely to be necessary. Australia's federal contract database flags contracts if they have specific confidentiality clauses. Of the contracts in the database for 2012, only 2.2 percent were flagged with such clauses. But costs are reduced and benefits considerably increased if contract transparency is part of a broader procurement transparency and civil-society capacity-building initiative.
- **Collusion** involves monitoring the bids of competitors, and increased transparency might theoretically make such monitoring easier, but fears that transparency would aid collusion are concentrated on the upstream end of the procurement process (during the tendering round) rather than the downstream end (after the bid is awarded), when contracts would be published.

- While there are legitimate **commercial, national-security, and privacy concerns**, they involve a small minority of contracts and can be addressed using a principles-based redaction policy.

The list of potential commercial interests that might be legitimately confidential in some circumstances includes novel designs and technologies, financial information, and strategic plans, among certain other information. Such information should not be present in the majority of contracts. As part of the tendering process, when submitting their bids, suppliers should be given the opportunity to identify which pieces of information in a contract they regard as being commercially sensitive and would not want published and the reasons why that is the case. Government departments should assess the information that the winning supplier has identified as being sensitive against the exemptions set out by the Freedom of Information Act (FOIA) or other supporting regulation and redact information where that is in the public interest.

Even if a number of contracts simply will not appear in a contract database under a national-security exclusion, many defense contracts could be (at least partially) published, and information should be excluded using existing rules for classification.

Existing experience with contract publication suggests a number of legitimate privacy concerns, in particular regarding information on third parties that might receive services under a contract but are not signatories to it. Again, this affects a minority of contracts and should involve only partial (principles-based) redaction.

## The Recommendations of the Working Group

As part of the broad consensus in favor of government transparency, publishing government contracts has a number of potential benefits that justify its limited cost. These include improved design, tendering and price forecasting, increased quality and extent of competition, and improved monitoring of value for money and service delivery.

### Be Proactive

Proactive publication is better than reactive publication because it levels the playing field among bidders, maximizes the information in the public domain, and reduces the transaction costs involved in obtaining (and providing) information under FOIA or similar requests.

### Be Comprehensive

The presumption should be in favor of publishing all contracts, including licenses, concessions, permits, and grants; any other document exchanging public goods, assets, or resources (including all annexes, schedules, and documents incorporated by reference); and any amendments or side agreements thereto at all levels of government. This will help level the playing field among competitors, maximize the information in the public domain, and avoid displacement of information from contracts to side agreements.

## Be Timely

The presumption should be in favor of current, routine, and timely (within days of signature) publication of full contracts, with exceptions or limitations narrowly defined by law. This will increase the information in the public domain at a time of its maximum utility and reduce burdens on decision-makers regarding what to publish.

## Be Clear

There should be clear rules about timing and incentives to publish, including a specific deadline after signature. This will reduce burdens on decision-makers, aid compliance, and ensure a level playing field among firms.

## Be Principles-Based

Rules regarding publication, redaction, and exclusion should be principle-based as opposed to mechanical and exhaustive. The level of (legitimate) concern regarding unredacted publication is likely to vary between contracting and procurement models and the goods and services being contracted. That legitimate concerns are likely to be so different suggests the advantage of a principles-based approach. In countries with Freedom of Information legislation, the principles should follow naturally from the exemptions laid out in that law.

## Be Transparent about Redaction

It should be clearly visible which purchases or which aspects of a contract are not disclosed and why and which contracts have not been published and why except in rare cases involving national security. This will aid compliance and the appearance of compliance regarding redaction procedures.

Commercial confidentiality is a valid concern for a small part of a small number of contracts, and countries should establish appropriate procedures that delineate and allow redaction for those instances. Given the existence of patent and copyright protections and the voluntary nature of participation in a contract, broader protections are rarely justified. While there may be contracts that contain commercial secrets that are in the public interest to maintain, that public interest should be clearly demonstrated and minimal redaction should apply.

There are legitimate privacy and national-security concerns with full publication that should be managed, in particular regarding information about third parties that might receive services under a contract but are not signatories to it. Similarly, there are technologies, approaches, and other information that might be described in contracts touching on national security that it is in the public interest to redact. But these concerns involve only sections of a small proportion of all contracts.

The onus should be on firms to delineate which sections of a contract they consider commercial in confidence, and governments should review that request on the basis of Freedom of Information legislation (which should favor maximum disclosure). Commercial secrecy is the primary concern of contractors, not the government, so firms should suggest what information they believe might be

commercially sensitive. The role of the government should be to review the redaction request through the lens of the public interest.

Governments have the primary responsibility to ensure that national-security and privacy concerns are addressed in the redaction process. As the public body in the contracting relationship, it is clear that government should take the lead in addressing these public-good issues. Confidentiality on the grounds of national security should operate using standard classification regimes (which will create a legal liability for the release of such information).

The disclosable nature of the contract and related documents should be clarified within the contract itself. This will ensure all parties are aware of responsibilities and the standing of contracts.

## Dispute Resolution and Open Data Principles

There should be a clear dispute-resolution mechanism. If there is a dispute about disclosure, the case should be rapidly reviewed by an independent information commissioner who has security clearance or another specified impartial body with the capacity to respond rapidly (potentially the court system), preferably following standard Freedom of Information procedures. This will increase both the efficacy of and trust in the publication regime.

Documents should be open (without copyright) and machine readable, while metadata (including price, date, contracting parties, descriptions of goods and services provided) should be developed and data should be published in a user-friendly format. This will maximize the utility of information contained in contracts to all stakeholders. There is no tradeoff between publishing the full text of contracts and metadata about those contracts—the activities are complementary.

Contract publication should not stand alone, and countries should follow broader open-contracting standards. Publication will and should be pursued as part of a broader open-contracting agenda covering planning through procurement and execution, as well as budget, disbursement, and corporate transparency, and involving capacity building for legislators and civil society. Without these additional steps, the utility of information released by contract publication will be significantly diminished.

As part of the effort to increase contract transparency, countries should make commitments to publication as part of Open Government Partnership National Action Plans and negotiate for greater disclosure through the United Nations Commission on International Trade Law (UNCITRAL) and the World Trade Organization Government Procurement Agreement, building on the principle of transparency enshrined in these documents. Suitable private and public-private organizations including the World Economic Forum, chambers of commerce, and the UN Global Compact could help advance the agenda by creating registries of companies declaring support for contract publication as part of a nondiscriminatory system with suitable protections—preferably alongside governments committing to contract transparency.

Citizens pay for government contracts. It is time they knew what they are paying for.

This brief is based on *Publishing Government Contracts: Addressing Concerns and Easing Implementation*, the report of the CGD Working Group on Contract Publication (CGD, 2014).

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