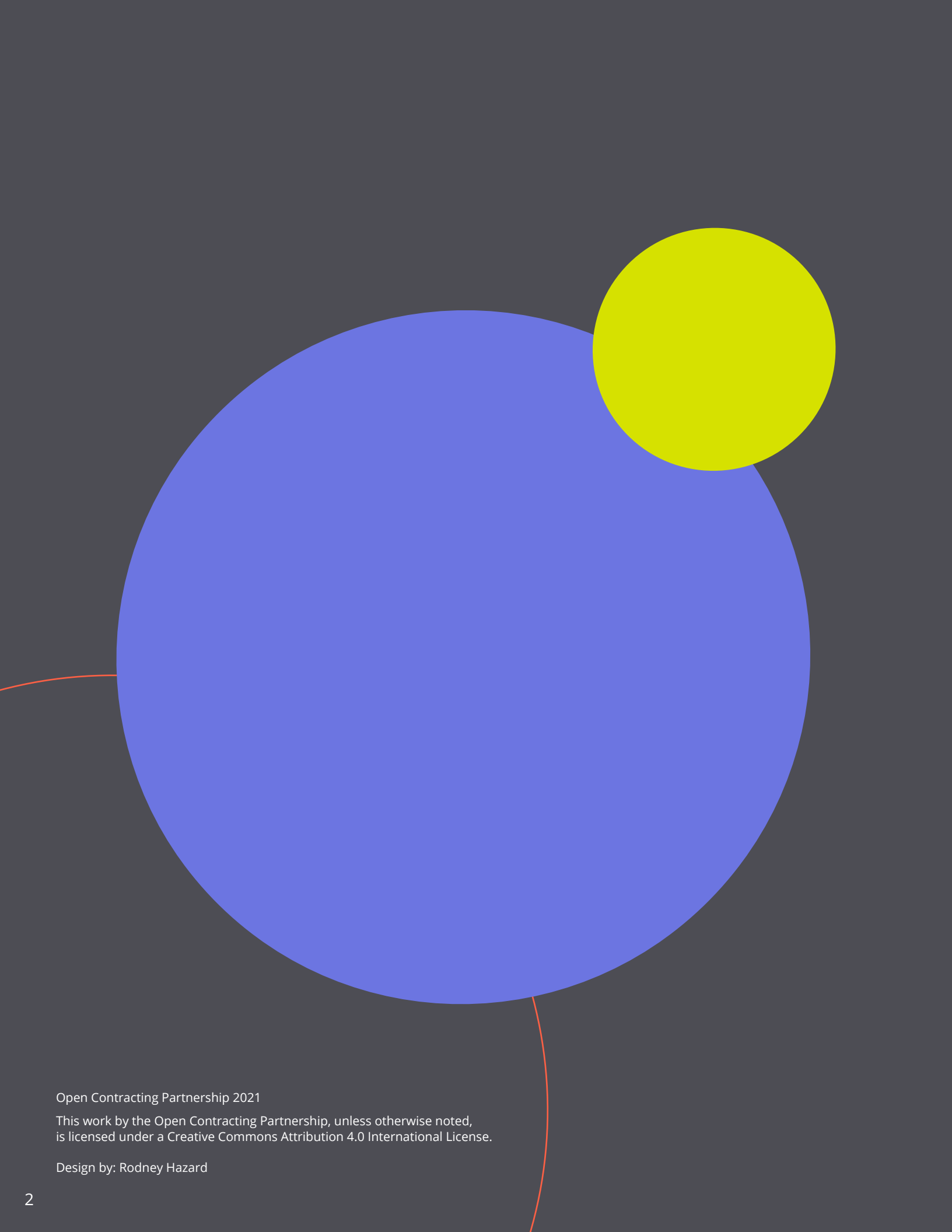


Guide

How can we legislate for open contracting?

OPEN
CONTRACTING
PARTNERSHIP


THOMSON REUTERS
FOUNDATION



Open Contracting Partnership 2021

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Introduction

US\$13 trillion. That's how much is spent on public procurement every single year, making it the world's biggest marketplace and dwarfing the GDP of every single country on earth apart from the US and China. When public procurement is guided by strong and transparent laws and regulations, it is an effective way to provide goods, services, and public works, while also acting as a powerful lever to rebuild economies and trust in government, and a foundation for healthy inclusive economies.

But the COVID-19 pandemic has highlighted the faults and cracks in our current procurement models. As the need for rapid emergency procurement grew to meet the demands of the pandemic, so increased the number of media stories bringing attention to allegations of widespread abuse, cronyism, and corruption. These stories are often spectacular, corrosive to public trust, and, in some cases, bizarre: a raspberry farm was given a multi-million dollar contract to supply ICU ventilators; poorly washed mini soda bottles were passed off as tubes for testing kits; emergency powers were used to procure camels for a Three Magic Kings parade in Spain. Instead of making contracts available online for anyone to vet and bid for, it's mostly done behind closed doors.

There is increasing consensus among policymakers and experts on the need for open contracting reforms that put transparency, efficiency, fairness, and equity at their core. New tools and digital technologies have made it possible to reimagine and modernize procurement from the ground up. But due to the complexity of procurement laws and regulations, national and local governments around the world often lack expert guidance on how best to

frame open contracting and embed open contracting principles and commitments into national laws and regulations.

To meet this demand, the Open Contracting Partnership (OCP) has partnered with TrustLaw, the Thomson Reuters Foundation's global pro bono service¹, to review procurement legislation and regulations from eight public procurement leaders — Chile, Colombia, Paraguay, Portugal, South Korea, Ukraine, the United Kingdom and the United States — to distill best practices and guidance. In addition, we reviewed two supranational legal frameworks: the World Trade Organization's Revised Government Procurement Agreement (GPA), covering 48 WTO members, and the European Union's Public Procurement Directive, which covers 27 Member States.

These countries and regimes were chosen because they reflect a diverse group of countries where open contracting and use of data for procurement monitoring is taking hold.


In this report, we summarize what we found and share some of the best examples for those who wish to develop or strengthen their own legislative requirements, incorporating open contracting concepts such as data-driven monitoring, public oversight, and participation by all relevant stakeholders.

We lead with our top 10 recommendations that rule-makers should consider in the legislative process. We then unpack these with relevant examples in the rest of the report. Links to more detailed individual country and supranational reports can be found in the Annex.

10

recommendations

We have identified ten specific steps legislative drafters and rule-makers can take to embed open contracting approaches, encouraging transparency, accountability, and fairer competition in their laws and regulations:

- 
- 1 Set out clear principles for all public procurement procedures in a single piece of overarching legislation.** Establish clear legal principles behind public procurement in a single piece of regulation to enhance clarity, enable consistent application and harmonization, and minimize the risk of conflict with other laws or regulations. Avoid regulatory ‘dark matter’ (memos, guidance, circular notes, etc.) that affect public procurement markets, often outside the scope of strict regulation and oversight. Legal simplicity and clarity also has a strong impact on trust, competition, and a functioning redress mechanism.
 - 2 Establish strong anti-corruption and conflict of interest provisions.**
 - 3 Promote competition and provide clear safeguards in non-competitive procedures,** such as those used in emergency procurement.
 - 4 Ensure clear requirements to publish information at all stages of the procurement process,** and maintain a complete record in one location.
 - 5 Use digital platforms and open data standards** to foster and increase transparency and accessibility to information about public procurement procedures. Existing paper-based contracting methods shouldn’t be taken online; the entire process should be redesigned as a user-friendly digital service, where transparency is integrated into the normal workflow of procurement decisions so, for example, an award is not enforceable until it is published.
 - 6 Enforce publication requirements, deadlines, and clearly manage exemptions.** This should involve both carrots (making it easy to publish through automated workflows and digital platforms) and sticks (penalties and sanctions for non-compliance). Specific exceptions to normal publication requirements should be clearly defined and include a public interest test (i.e. is the public interest in open and competitive markets better served by publishing a piece of information or redacting it?).²
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- 7 Create procedures for public participation and monitoring across the entire procurement cycle.**
- 8 Support an accessible and effective complaints procedure.** Ensure accountability through accessible and clear procedures regarding complaints and available remedies. Where possible this should focus on addressing issues as part of the procurement process as opposed to seeking legal remedies after the event.
- 9 Empower oversight authorities.**
- 10 Provide effective guidance and guidelines** to make procurement processes accessible and user-friendly to government, private sector, and civic users or observers of the system.

Lastly, the following two considerations will help you respond to new developments in the field of public procurement:

- **Review public procurement rules regularly** in order to comply with the best available practices and keep pace with new digital technologies.
- **Communicate and exchange experiences** with public procurement authorities beyond your national jurisdiction. More than 40 countries are currently implementing open contracting reforms.

If you are embarking on your own legislative drafting process, we recommend you first review the Open Contracting Global Principles. These provide a good point of departure, as they cover many of the above recommendations, as well as the importance of publication formats and licenses. Our Quickstart Guide provides 15 practical strategies for open, fairer, and better public procurement.

Recommendation 1:

Set out clear principles for all public procurement procedures in one place

Procurement legislation tends to be complex, and the rules governing transparency and accountability in public procurement are often scattered across many different legislative instruments: procurement laws, access to information laws, anti-corruption laws, criminal laws, and multiple types of regulations, circulars, decrees, acts, and policy notes. For example, we found 17 procurement-related legal instruments in the US alone.³

Moreover, the performance of procurement systems is often affected by a large number of regulations that are seemingly unrelated

to public procurement law. Such regulatory “dark matter” (including legal instruments such as memoranda, circular notes, and expert proclamations by the control authorities) creates incentives that shape the behavior of agents participating in the public procurement market, with little scrutiny or awareness from key stakeholders. Public procurement bylaws often fail to capture these regulations effectively, creating gaps between legal instruments regulating the public procurement market and key market institutions (such as antitrust, trade, and commercial practices).

This multitude of legal instruments can be very confusing: for procurement officials to implement; for businesses to navigate; and for citizens to understand. We therefore recommend streamlining relevant provisions, where possible, into a single procurement law and supporting regulations. Ukraine, for example, has only one general procurement law: the Law of Ukraine on Public Procurement (PPL)⁴ and an additional Law on Defence Procurement (adopted in 2020). The PPL applies at the national level to all state and municipal bodies, as well as state- and municipal-owned companies, while the Defence Procurement Law regulates quite specific, narrow procurements of military and security-related nature. The UK's 2020 Green Paper on Transforming Procurement similarly seeks to combine a patchwork of laws and regulations into a single coherent piece of legislation.⁵

Regardless of the approach, it is vital to ensure that other laws are not in contradiction with the provisions of procurement laws. In particular, we recommend checking the access to information law, anti-corruption laws, and criminal laws to identify provisions that are either not aligned with or do not reinforce the recommendations in this report, and to take steps to bring these into alignment.

Depending on the legal system, more detailed publication requirements may be found in the secondary legislation (i.e. procurement regulations) rather than in the primary legislation. Secondary regulations can include more specific requirements about the use of open data standards, formats of information such as eforms, and specific publication workflows. These are often improved upon iteratively over time, so the principles governing their use should go into the primary legislation, whereas the form, standard, or workflow should be described in the secondary rule-making or implementing guidance following the legislation.

Examples of the legal principles for procurement

It is important to go beyond the technicalities of how procurement will be conducted to set out the principles that should underpin any procurement, and under which any future actions should be interpreted.

The Preamble of the 2011 UNCITRAL Model Law on Public Procurement⁶ define these best practice principles as:

- 1 Achieving economy and efficiency;
- 2 Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- 3 Maximizing competition;
- 4 Ensuring fair, equal and equitable treatment of suppliers;
- 5 Assuring integrity, fairness and public confidence in the procurement process; and
- 6 Promoting transparency.

The US Federal Acquisition Regulations System's (FAR) Guiding Principles are "to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives". The FAR is required to:

- 1** Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example:
 - Maximizing the use of commercial products and services;
 - Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and
 - Promoting competition;
- 2** Minimize administrative operating costs;
- 3** Conduct business with integrity, fairness, and openness; and
- 4** Fulfill public policy objectives.⁷

The UK's Green Paper⁸ lays out the government's proposed new legal principles as:

- 1** Public good — procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental, and public safety;
 - 2** Value for money — procurement should enable the optimal whole-life blend of economy, efficiency, and effectiveness that achieves the intended outcome of the business case;
 - 3** Transparency — openness that underpins accountability for public money, anti-corruption, and the effectiveness of procurements;
 - 4** Integrity — good management, prevention of misconduct, and control in order to prevent fraud and corruption;
 - 5** Fair treatment of suppliers — decision-making by contracting authorities should be impartial and without conflict of interest;
 - 6** Non-discrimination — decision-making by contracting authorities should not be discriminatory.
- These principles should be followed by a national policy statement to set out (and update) policy priorities for public procurement thereafter.



Aligning with supranational legal frameworks

In addition to national laws, some countries are subject to supranational frameworks that can impose requirements for procurement transparency and accountability, such as bilateral and multilateral trade agreements. Two such multilateral frameworks are the World Trade Organization's (WTO) Agreement of Government Procurement (GPA) and the European Union's (EU) Public Procurement Directive.

Currently, the GPA has 20 Parties, comprising 48 WTO Members, on which it imposes minimum standards, such as a general requirement to publish laws, regulations, judicial decisions, administrative rulings, and standard clauses relating to their public procurements in an officially designated electronic or paper medium. The GPA also imposes an obligation to publish procurement notices of upcoming procurement procedures. Award notices must be published within 72 days following the award. The GPA also provides for impartial administrative or judicial procedure as oversight.

The EU Public Procurement Directive likewise requires Member States to publish contract notices and contract award notices (although prior information notices are optional).

It is important to check your trade agreements to ensure that you comply with the requirements that they set out.

But it is also important to remember that they are minimum requirements, and that you can go further in your national legislation to guarantee transparency, fairness, and effectiveness in your public procurement.

Recommendation 2:

Establish strong anti-corruption and conflict of interest provisions

Because of the heightened risk of corruption and conflicts of interest in public procurement, it is important to include rules to preserve the integrity of the procurement process, as well as penalties for non-compliance.

In **the US**, anti-corruption and conflict of interest laws state that no government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value, with strong enforcement mechanisms in place to ensure accountability. Specifically, federal procurement regulations provide for the voiding or rescinding of contracts,⁹ contracting officer disqualification,¹⁰ and for criminal and civil penalties.¹¹ Moreover, severe criminal penalties exist for procurement integrity violations, acceptance of bribes, gratuities, or kickbacks, violation of post-employment restrictions, and for personal conflicts of interest.¹²

In certain countries, bidders must expressly declare that they do not have any conflict of interest related to the procedure in question (**Portugal**),¹³ or sign an agreement promising not to offer or receive money, goods, entertainment, or any other benefit directly or indirectly in the course of the procurement process (**South Korea**).¹⁴ A similar approach is practiced by some international financial

institutions. For example, in tenders for contracts to be financed by the European Investment Bank (EIB), all bidders are required to submit a signed Covenant of Integrity as part of their bids (see Annex 3 in EIB's Guide to Procurement). The Covenant of Integrity provides an undertaking that the bidder will not engage in Prohibited Conduct (defined in the EIB's Anti-Fraud Policy as including fraud, corruption, and collusion). The policy and the Covenant also requires bidders to disclose sanctions by other Multilateral Development Banks (MDBs) or the EU, and gives the EIB access to the company's relevant books and records.

In **Paraguay**, the public procurement law references a specific centralized list of people who cannot submit offers in procurement procedures. If an excluded person enters into a procurement agreement in violation of the prohibition, they are barred from participating in public procurement for up to three years.¹⁵ The public procurement law also authorizes the relevant authorities to void and rescind contracts in the event of fraudulent acts or administrative sanctions.

In **the UK**, the law requires the contracting authority to take proactive steps to identify, prevent, and remedy any conflicts of interest which may come to light during the procurement procedure.¹⁶

Recommendation 3:

Promote competition and provide clear safeguards in non-competitive procedures

Competitive procedures should be the norm in most public procurement. Clear and open solicitation for proposals should be the default approach, and the best proposal should win. However, there may be instances where an exception to this rule is warranted. The UNCITRAL Model Law has extensive guidance on how to operationalize this principle in Chapter II of its provisions.

In fact, the UNCITRAL Model Law offers a range of approaches that can be tailored to specific circumstances, including: (a) open tendering; (b) restricted tendering; (c) request for quotations; (d) request for proposals without negotiation; (e) two-stage tendering; (f) request for proposals with dialogue; (g) request for proposals with consecutive negotiations; (h) competitive negotiations; (i) electronic reverse auction; and (j) single-source procurement.¹⁷

All of these are covered by the caveat that “If the procuring entity uses a method of procurement other than open tendering, it shall include in the record ... a statement of the reasons and circumstances upon which it relied to justify the use of that method.”¹⁸

Likewise, **Colombia** enshrines principles such as transparency, economy, and responsibility in the public procurement system, while establishing proper planning and objective selection of providers as duties. Direct awards using non-competitive processes are limited to: (a) instances where there is evidence of urgency; (b) credit contracting; and (c) inter-administrative agreements.¹⁹

Law 1150 [2007] mandates that every contracting process funded with public resources is to be disclosed in the electronic public procurement platform (SECOPI),²⁰ regardless of its value or procurement method. All information is disclosed in open data formats, including the Open Contracting Data Standard, and accessible through an Application Programming Interface (API).²¹

In **Paraguay**, Law 2051 [2003] mandates that direct awards are only allowed in some exceptional cases, including natural disasters that endanger or alter social order, health, the environment, etc. In these cases, the highest authority of the body, entity, or municipality, via resolution, must prove that the case is exceptional. During the COVID-19 outbreak, Law 6524 of 2020, which declared a state of emergency, served as the justification to resort to direct awards. Despite making use of direct awards as a last resort, the law also enabled simplified open procurement methods to award contracts, ensuring a measure of public transparency and disclosure of emergency contracts. This openness and availability of data placed Paraguay on a good footing to coordinate buyers and suppliers during the early days of the pandemic.

The use of emergency procedures, sole sourcing, and direct awards needs to be carefully regulated. A well designed system can help national coordination during an emergency response, especially when there is huge disruption in the marketplace as we witnessed during the early days of the pandemic.

It is important to set out a clear test for when sole sourcing and direct awards should be used. The UK's Public Procurement Note PPN 01/20²² provides a good overview of some of the basic public interest tests for use of sole sourcing and emergency procedures.²³ These include a:

- 1 Direct award due to extreme urgency (regulation 32(2)(c));
- 2 Direct award due to absence of competition or protection of exclusive rights;
- 3 Call off from an existing framework agreement or dynamic purchasing system;
- 4 Call for competition using a standard procedure with accelerated timescales;
- 5 Extending or modifying a contract during its term.

It also establishes a set of tests to verify the need for these procedures:

- 1 There are genuine reasons for extreme urgency;
- 2 The events that have led to the need for extreme urgency were unforeseeable;
- 3 It is impossible to comply with the usual timescales (ie. there is no time to run an accelerated procurement etc);
- 4 The situation is not attributable to the contracting authority.

Finally, it requires that the contracting authorities keep a written justification that satisfies these tests and notes that normal approaches should be used as soon as possible: "as time goes on, what might amount to unforeseeable now, may not do so in future".²⁴

As a final example, **Ukraine** adopted Law #530-IX [2020]²⁵ to tackle the pandemic, which illustrates one way to implement a simplified procurement procedure that provides some degree of transparency.

Based on the law, the Government adopted Regulation #225-2020-н²⁶ providing guidance on how and what to procure. Emergency contracts to tackle COVID-19 were excluded from the general procurement law and the tenders were exempted from going through ProZorro, Ukraine's e-procurement system. Normally Ukraine allows for negotiations with prior publication which can be appealed for up to 10 days following the award notice, but the option to make a complaint during a standstill period was removed for pandemic-related procurement. An ex-post announcement for the concluded contract was made instead. This approach was taken because, when the pandemic started, many healthcare-related tenders in the system were failing due to the absence of bids, or suppliers refusing to deliver urgently needed items after the contract was concluded.

One day after the emergency contract has concluded, the procuring entity must submit a structured report to ProZorro detailing the main information about the contract such as the list of items, the price per item, terms, awarded supplier, etc. There is a list of goods, works, and services with specific Common Procurement Vocabulary (CPV) codes, medicine International Nonproprietary Names (INNs), and Global Medical Device Nomenclature (GMDN) codes which can be procured using this mechanism — from essential medicines and medical supplies and equipment to catering and transportation services for patients and staff.

Prozorro also has a business intelligence tool,²⁷ developed and operated in partnership with Transparency International Ukraine, which has a separate application for all healthcare procurements in the country. This tool shows all COVID-19-related contracts,²⁸ allowing any citizen to monitor them, enhancing public oversight, and reducing the risk of malfeasance in emergency contracts.

Recommendation 4:

Ensure clear requirements to publish information across the contracting process

Open contracting principles call for information to be published in a timely manner at all stages of the public contracting process, from planning, tender, award, and contract through to implementation. Laws and regulations should clearly identify publication requirements at each stage, ideally through an online information system, including in contracts that are awarded through non-competitive processes.

There should also be clear deadlines for disclosure at each stage, and an obligation to maintain a complete record in one location

What to publish at each stage of the contracting process

At a minimum, the required information should include:

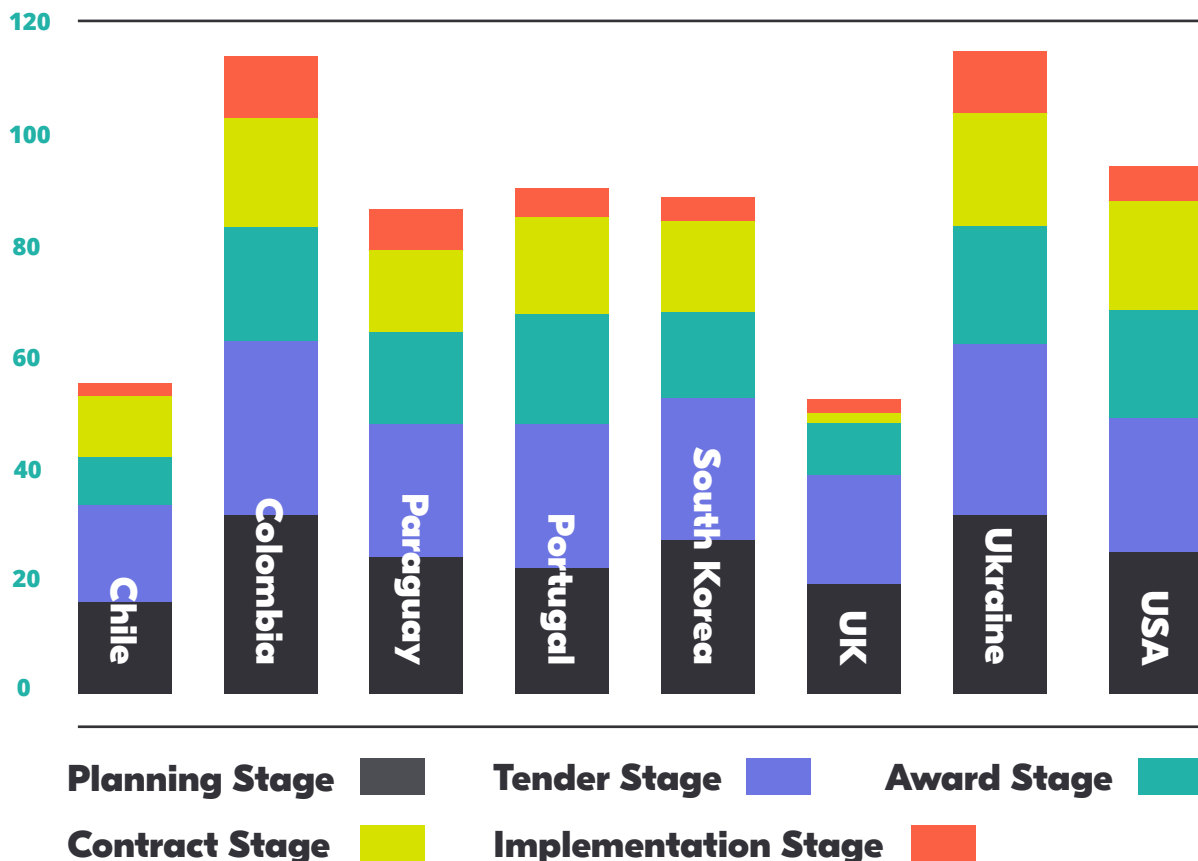
- 1 Procurement plans;
- 2 Tender notices in full detail, including links to bidding documents;
- 3 Award notices, including prices and reasoning (bid evaluation reports);
- 4 Implementation progress (physical and financial) and contract variations;
- 5 Feedback/complaints and decisions; and
- 6 Sanctioned or restricted companies.

Beyond these, procurement authorities should consider expanding publication requirements to include publication of draft specifications before tendering, publication of bid evaluation reports, publication of non-competitive award data, contract data, changes to the contract after signing, details of implementation, implementation progress, and contractor performance. This is particularly important for high-value procurement (including high-value non-competitive procurement). The law

should also include incentives to comply with requirements, such as invalidation of the contract in the absence of publication.

Below is an overview of the information requirements for each stage of the procurement process across the eight reviewed national jurisdictions. While all jurisdictions require some information to be published at each stage of the contracting process, there are considerably fewer requirements for post-award publication.

Number of categories of information (data points) required to be published at each stage of the procurement process.²⁹



From these requirements, we have distilled some specific examples of good practice for publication requirements at each stage of the contracting process across the different jurisdictions.

STAGE

GOOD PRACTICE

Planning

Most of the countries have adopted a process of annual planning for public procurement, thus limiting publication to a single annual contracting program.

Colombia provides the best example of comprehensive publication requirements at the planning stage, which includes (i) advance notice of a public announcement of the project; (ii) the draft Request for Proposals (RFP); (iii) previous studies and documents on the project; (iv) observations on the draft of the RFP by interested parties; (v) response to the observations; (vi) and the administrative act of opening the selection process.³⁰

Tender

All countries have comprehensive publication requirements during the tender stage.

Ukraine has the most comprehensive approach by requiring the disclosure of: (i) procurement announcement and tender documentation; (ii) changes to the tender documentation and explanations thereto; (iii) minutes of disclosure of tender offers; (iv) notification on intention to enter into a procurement contract; (v) notification of rejection of the participant's offer.³¹

Award

All countries have introduced a general requirement to publish award notices.

Paraguay has the largest scope for award publication, including: (i) minutes of the opening of the offers; (ii) copy of the requests for clarifications and their responses; (iii) comparison between the offers in the basic requirements and their compliance; (iv) comparison of the prices offered; (v) comparison of the requirements complied by each offeror; (vi) award recommendation; (vii) date and place of the evaluation; (viii) name, signature and title of the members of the evaluation committee; and (ix) information about the offeror awarded.

STAGE

GOOD PRACTICE

Contract

All countries require at least the publication of essential contract information, such as the general contract description, contract period, contract values, etc.

Chile,³² **Colombia**,³³ **Portugal**,³⁴ **Paraguay**,³⁵ and **Ukraine**³⁶ all meet best practice by requiring publication of the full text of the signed contract. In addition, Ukrainian procurement law requires procuring entities to publish a notice of amendments to the contract and addendum with the amendments themselves. It also requires the publication of reports on the performance of the contract.

Imple- mentation

South Korea³⁷ provides an example of strong publication requirements at the implementation stage. Within 30 days after execution, amendment, or completion of the contract, the following information must be disclosed: (i) the quarterly plan for awarding a contract – including objective, quantity or scale, and budget amount of each contract; (ii) specifications for the subject matter of contracts subject to tendering procedures; (iii) execution of contracts – including objective, tender, estimated prices/budget prices, method of execution, name of other party, quantity/scale, contract prices, grounds for selective tendering procedures (if applicable), and grounds for determining successful tenderer and tender price (in construction projects); (iv) amendments of contracts – including objectives, amended terms and conditions, and grounds for amending the contract; (iv) performance of contracts — including results of inspections and tallies and date of completion.

Establishing clear contract records

In addition to publishing all of the information relevant to each stage of the contracting process, it is also important that there is at least one designated location where the complete record can be found, ideally as a public online register.

In **Colombia**, the Transparency and Access to Information Law 1712 from 2014 mandates that all public procurement procedures, including information about execution, should be published as open data. The Single Regulatory Decree 1082 of 2015 mandates that information and documents about all stages of the procurement process (including penalties) are published in the country's electronic procurement system, SECOP, which is composed of:

- SECOP 1: a platform for the publication of process documents by public entities, from the planning of the contract to its completion;
- SECOP 2: a transactional e-procurement platform;³⁸ and
- TVEC: a transactional e-commerce platform through which purchasing entities perform transactions in public procurement processes.

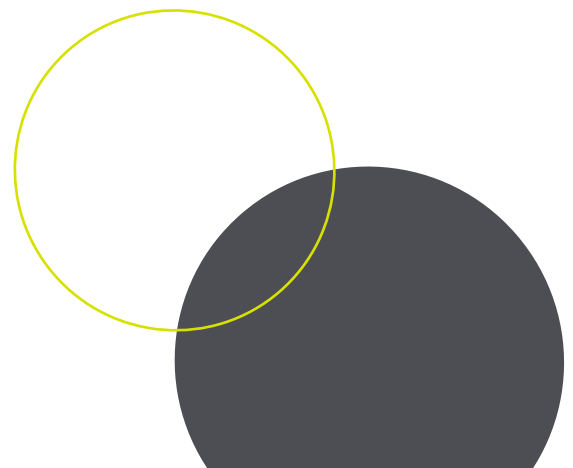
The information captured through SECOP is available through the country's open data portal and in the Open Contracting Data Standard.

In **Portugal**, the complete record of each public procurement can be found on the Base Gov website.

In **Chile**, complete records can be found on the digital platform through which public procurement processes are managed, as established by law.³⁹

In **South Korea**, complete records can be found on the Korea ON-Line E-Procurement System (KONEPS), an information system established and operated by the Public Procurement System administrator to electronically process procurement services.⁴⁰ The bid documents may be electronically submitted through KONEPS,⁴¹ and are stored electronically. The documents do not need to be stored in a separate printed form.⁴² These documents are: (i) made available to the public; (ii) kept in the same form as when prepared, transmitted, or received or in a reproducible form; and (iii) include in the documents themselves, information about who drafted the electronic documents, who received the documents, and the time and dates when the documents were transmitted and/or received, if such information was included in the documents at the time of their transmission or receipt.

In **Paraguay**, it is mandatory to publish all information related to all state contracts, including payments made.⁴³ Under these rules, Paraguay has created an e-procurement platform, the "Sistema de Información de las Contrataciones Públicas" (SICP), where all information related to bidders, suppliers, consultants, and contractors is uploaded and regularly updated.⁴⁴



Recommendation 5:

Use digital platforms and open data standards to make information accessible

Digital platforms and open data standards can make a huge difference to the accessibility and usefulness of procurement information, as the sheer volume of information means that it needs to be available in machine-readable formats for any large scale analysis and monitoring. When done well through intelligent, user-centred design, huge efficiencies of scale can be achieved by using digital tools to introduce suppliers to prospective buyers, transact and manage contracts, as well as automating information disclosure and sharing in accessible open formats to foster public trust and integrate smart digital monitoring.

Existing paper-based contracting methods shouldn't be taken online; the entire process should be redesigned as a user-friendly digital service.

Perhaps the standout example is **Ukraine's** Prozorro public procurement system, which won the World Procurement Award in 2016. Prozorro's motto is "everyone sees everything", and transparency and open data are used to foster trust (in a previously highly corrupt environment). At a cost of around US\$5 million, it has saved the government well over \$2 billion and counting (for the latest data, see here).

South Korea's transparent e-procurement system KONEPS has saved the public sector US\$1.4 billion in costs.⁴⁵ It also saved businesses US\$6.6 billion. After implementation, the time it takes to process bids has dropped from 30 hours to just two. **Chile, Paraguay, and Colombia** all support end-to-end transactional eGPs which both manage transactions and enable information to be accessed and published.

Other jurisdictions such as the **UK, US** and the **EU** offer more of a 'dead drop' system that serves primarily as a transparent register at the end of the procurement process which links to information like static digitized documents such as PDFs. These aren't always well supported or enforced, so information quality tends to vary radically across different authorities under them and according to how much they choose to share.

Below is a quick overview of the digital platforms used across the various jurisdictions.

INTEGRATED DIGITIZED TRANSACTIONAL E-GP SOLUTIONS

Chile

All procurement procedures are regulated by Law 19.886 and must be carried out through the Dirección de Compras' e-procurement platform, Mercado Publico, a trading platform bringing together buyers and suppliers in one place. The platform does not include public works, state enterprises, and defence spending.

Colombia

All publicly funded contracts must be published in Colombia's electronic procurement system SECOP as mandated by the Single Regulatory Decree 1082 of 2015, which includes multiple digital platforms depending on the type of entity or procurement method:

- SECOP I: where contracting state entities publish process documents;
- SECOP II: a transactional platform to manage all public procurement online, which can be accessed by any third party interested in the public procurement; and
- Online Store of the Colombian State (TVEC): a transactional e-commerce platform through which purchasing entities perform transactions in public procurement processes.

Data from all systems is available through the country's open data portal and in the Open Contracting Data Standard (OCDS).

Paraguay

All procurement records are published on the government's e-procurement platform, the "Sistema de Información de las Contrataciones Públicas" (SICP).

The procurement agency website also hosts a Virtual Store where products available for purchase are displayed.

JURISDICTION

DIGITAL PLATFORM

Portugal

There are five licensed e-tendering platforms in Portugal: Acingov, Anogov, ComprasPT, Saphetygov and Vortalgov. The majority of bidders are registered on all five platforms.

South Korea

Korea's ON-Line E-Procurement System (KONEPS) is the government e-procurement system, used for all stages of the procurement process from invitations for bids, bidding, contracting, through to contractor payment online.

Ukraine

All public tender information is published on Prozorro, Ukraine's electronic open source government e-procurement system, either in Ukrainian or in English if it exceeds certain price thresholds

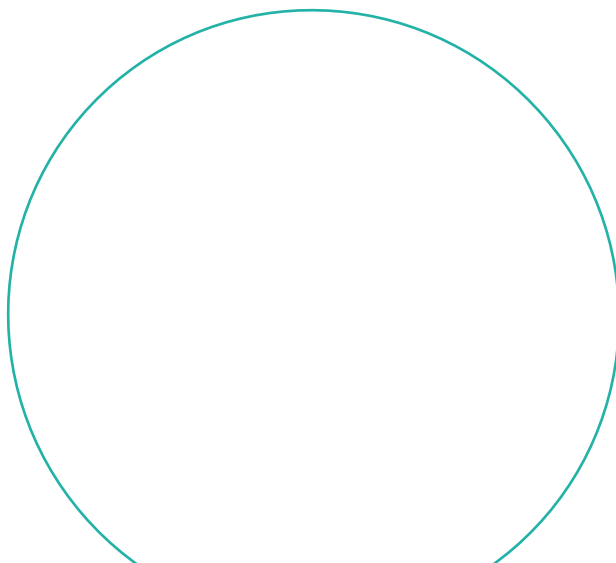
CONTRACT REGISTERS (AKA 'DEAD DROPS')

United Kingdom

UK public contracts are advertised on Contracts Finder, which lists contracts over £10,000, and the EU's Tenders Electronic Daily (TED). As of January 1, 2021, the end of the Transition Period for the UK's exit from the European Union, notices for new procurements are required to be published via Find a Tender (FTS), the new UK e-notification service in place of TED. Scotland, Wales and Northern Ireland each have their own tendering platforms for public contracts.

United States

All solicitations are uploaded and managed by the Government Point of Entry (GPE). Information on contracts following their award is aggregated across several platforms including www.fbo.gov, www.fdps.gov, and www.usaspending.gov.



JURISDICTION

EU

DIGITAL PLATFORM

The Système d'information pour les marchés publics (SIMAP) is the EU's own e-procurement portal. The EU has several other digital tools and platforms, including:

- 1 Tenders Electronic Daily (TED) which publishes procurement notices, including calls for tenders;
- 2 e-Certis, listing the eligibility criteria and documentary evidence needed in each EEA country to take part in public procurement;
- 3 The European single procurement document (ESPD), a self-declaration form used in public procurement procedures;
- 4 eForms, used by public buyers to publish notices on Tenders Electronic Daily; and
- 5 The eInvoicing standard, which helps to ensure the timely and automatic processing of companies' eInvoices and payments.

GPA

The WTO maintains an e-GPA portal, which allows anyone access to all documents related to the parties' GPA-related commitments and documents.

Supporting open data standards

The legal framework (whether the law or supporting regulations) should clearly state that information regarding public procurement processes are to be published for free and under an open license. This ensures that the information can be re-used by others, who can then also contribute value-added analysis and insight.

Governments can then perform smarter data analytics, detecting red flags or assessing value for money. Businesses can better evaluate prior contracts and identify opportunities. The more governments automate the publication of information on planning, procurement, and implementation of contracts, the easier it is for the market to consume, analyse, and innovate around it.

This license can take the form of a Public Domain Dedication or Certification which transfers a dataset into the public domain, or re-asserts that there are no existing copyrights or database rights inherent in the dataset. Alternatively, it could take the form of an attribution only license that allows for use and re-use, with the only restriction being that attribution be given (such as a Creative Commons Attribution license 4.0).⁴⁶

In **Ukraine**, an open contracting license is explicitly mandated by law:

“Access to the information published on the procurement system is free and open. Procurement information specified in this Law shall be published on the electronic procurement system free of charge via the authorized e-platforms. Procurement information specified in paragraph 1 of this Article shall be published in accordance with the requirements set by the Law of Ukraine “On Access to Public Information”, including in the form of open data”.⁴⁷

With regard to the format of the data, using a data standard is preferable because it requires information to be published in a consistent way, enabling machine reading which maximizes the potential for analysis.

To that end, OCP supports an Open Contracting Data Standard (OCDS), which is a free, non-proprietary open data standard for public contracting, which describes how to publish data and documents at all stages of the contracting process. The OCDS is being used by over 40 countries, cities, and regions around the world and has been endorsed by the G20, the G7, and major international organizations. It provides:

- 1 A set of recommended data fields and documents to publish;
- 2 A common structured data model;
- 3 Guidance and tools to support implementation and data use;
- 4 Profiles for public private partnerships, infrastructure projects, the European Union, and the World Trade Organization's Agreement on Government Procurement;
- 5 Toolkits such as the Open Contracting for Infrastructure Data Standard (OC4IDS) to connect contracts to project-level information and publish standardized data on infrastructure projects;
- 6 An extension mechanism to add additional key information to your OCDS data; and
- 7 A free global helpdesk.

Although not written into law, the OCDS has been adopted in Colombia, Chile, Paraguay, Ukraine and the UK. It is worth noting that the OCDS will undergo version upgrades from time to time (i.e. from version 1.1 to 1.2), so it would not be advisable to codify a specific version of the OCDS into the main law. However, a provision in a regulation stating that the information required to be published shall be published under an open license that enables free re-use in accordance with the Open Contracting Data Standard could be a good option.

The UK's Green Paper is now looking at how to legislate to mandate publication in this way, likely placing the principle of publishing contract records as standardised open data in the primary legislation and the format for publication by all authorities into the secondary legislation or legislative guidance.

Recommendation 6:

Enforce publication requirements, deadlines, and clearly manage exemptions

Strong publication requirements are of little use unless they can be effectively enforced to help ensure data quality. At the same time, we recommend governments try to minimize the risk of non-compliance by implementing digital procedures with pre-defined processes and checks that automate the publication of information as part of the workflow.

The following examples provide a snapshot of the enforceability of requirements from the jurisdictions covered. In this context, we assess enforceability based on the mechanisms in place to enable the requirements to be enforced, rather than the actual level of enforcement in practice.

Chile's Law on Access to Public Information confers a penalty of between 20% to 50% of the remuneration of the contract to the respective agency if the purchase is not published on the entity's website.⁴⁸ In **Colombia**, failure to respond to a request for public information will lead to disciplinary sanctions against the authority concerned. Fundamental and constitutional rights, such as access to public information, may be challenged by means of a special and preferential legal action called "*Acción de Tutela*".⁴⁹ The public information law has been cited in a court ruling that mandated the disclosure of the COVID vaccine contracts.⁵⁰ In **Portugal**, failure to publish the procedure notice (when publication is required) results in the contract being voided until this information is published.⁵¹

Enforceability is much more restrictive in the US. Protests and complaints, including addressing inherent issues with the procurement process itself, are only available to "Interested Parties" (i.e. an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract).

In the EU, an above-threshold contract is considered ineffective in case the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union (OJEU) and without justified exemption from this obligation. Yet enforcement is highly variable.

Managing (and mythbusting around) exemptions from publication

The most common types of exemptions seek to protect national security, the national interest, law enforcement and court proceedings, fair competition, or the privacy of individuals. In **the US**, for example, confidentiality of the offeror/contractor information is very common. However, general provisions enabling confidentiality to protect “the commercial interests of suppliers” or “fair competition” present a significant loophole to transparency requirements in modern procurement legislation.

Therefore, we recommend legislative drafters be as specific as possible about the types of information that will be kept confidential, and the types of information that are to be disclosed in the public interest. It is important that these are defined as narrowly as possible.

For example, the publication of prices, the results of the evaluation, including the justification for the award, and the identity of the contract recipient, and any statements of beneficial ownership provided should be explicitly required. We also recommend explicitly stating when information should be kept confidential and when it should be

disclosed (for example, communications may be kept confidential during the deliberation process but should then be disclosed after award).

Vague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust. The Open Contracting Partnership’s Mythbusting Confidentiality in Public Contracting⁵² consulted with over 70 experts across government, business, and civil society from more than 20 countries, included comparative legal research in seven countries (**Chile, Colombia, France, India, Mexico, Nigeria, and Peru**) in addition to studies of recent public tenders in eight countries (**Australia, Canada, Chile, Colombia, Georgia, New Zealand, Ukraine, and the UK**). The research found almost no examples of commercial harm to companies from disclosing contracting information and a multitude of benefits, including improved competition and public probity.

The report proposed that:

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

A good way to operationalize this approach is to ask bidders to identify the specific categories of information that they would request to be kept confidential. The procuring entity would then have to agree to that confidentiality (in accordance with a legal justification). There should also be a requirement to publish as much as possible about the process and narrowly withholding any information deemed confidential. The public record should indicate that the information has been withheld, the justification for doing so, and the recourse or procedure available to request a review of the decision to withhold the information.

Ukraine offers a good example, keeping the scope of potentially confidential information narrow by specifying that some information (including offered price and evaluation criteria) may never be deemed confidential.⁵³ Furthermore, all of the documents submitted by a bidder are made publicly available by default. The legislation gives the bidder the option to mark part of their submission as confidential but if it does not meet the legal requirements to justify the confidentiality, that bid must be disqualified.

In addition, citizens should have effective access to recourse in situations where information is unjustifiably exempted from publication (see Section 5 below on the enforceability of publication requirements).

In **South Korea**, citizens or organizations who find that information is unjustifiably exempted from publication may submit a written or oral request for disclosure of information containing:

- 1** Name, date of birth, address and contact information (phone number or email address, etc.) for individuals; or company name, name of its representative, business registration number or equivalent, business address and contact information for a business entity;
- 2** Resident registration number – limited to the information needed to verify the identity of the person requesting the information to determine whether or not to disclose the information; and
- 3** Details of the information being requested and methods for disclosure to any public institution that holds or manages the information being requested.⁵⁴

A public institution has 10 days upon receiving a request to disclose information to determine whether or not to do so.⁵⁵ If the public institution decides not to disclose the requested information, it has to promptly notify in writing the person who made the request and explain in detail: (i) the ground for refusing to disclose the requested information, and whether the information is deemed to be subject to non-disclosure under Article 9(1) of the Official Information Disclosure Act; and (ii) the existing methods and procedures to contest the decision.⁵⁶

Recommendation 7:

Create procedures for public participation and monitoring

Open contracting principles call on governments to recognize the right of relevant stakeholders to gain access to information that enables oversight into the formation, award, execution, performance, and completion of public contracts. This includes opportunities for public consultation and monitoring of public contracting. **Chile, Colombia, Portugal, Ukraine and the US** have all passed provisions for public consultation and monitoring.

The Public Procurement Law in **Colombia**⁵⁷ requires that any contract entered into by state entities be subject to citizen oversight. Civil society and citizens may report to the competent authorities any acts, facts, or omissions that constitute criminal offences or faults regarding state contracting. Authorities are required to actively support citizen oversight of public contracting and provide, in a timely manner, the documentation and information that they require to perform such tasks.

Colombian citizens may also review, monitor and actively participate in public procurement processes through formalized citizen oversight mechanisms known as “Veedurías Ciudadanas”.⁵⁸ Veedurías are legally protected by Law 850 [2003] and tasked with monitoring the public administration. When initiating a selection process, the relevant purchasing entity must inform the Veedurías Ciudadanas, which may then choose to actively participate in that process. Veedurías can also present complaints through the country’s electronic procurement system SECOP. These control initiatives have improved the reporting

done by control institutions. To this end, Colombia’s Public Procurement Agency established a Procurement Observatory to review the design of Request for Proposal templates across different sectors, promote competition, and deter collusion. Additionally, the presidential secretary of transparency coordinates a network of citizen oversight committees to analyze procurement data along with other information with anti-corruption goals. The Secretary of Transparency has also created the anti-corruption portal “PACO” which identifies corruption risks and allows stakeholders to report malfeasance.

In **Ukraine**, citizens have unrestricted access to all information concerning a tender on the ProZorro platform, including the results of analyses and monitoring of information published. Members of the public may also report violations of public procurement laws and deficiencies through the electronic procurement system. The public also has unrestricted access to the complaints hearings held at the complaint body, including complaints on the grounds of violation of publication requirements.⁵⁹ Civil society organizations play an important monitoring role, and the most prominent of these organizations is Transparency International Ukraine, the initial formal owner of the ProZorro IT-system (which was later transferred to the Government of Ukraine on a free-of-charge basis). TI Ukraine still owns analytical business intelligence tools as well as a civil society citizen monitoring and feedback online portal, Dozorro.

Article 7, part 5 of PPL states:

“Civic control over public procurement is provided through open and free access to all information about public procurement that has to be disclosed according to this Law, in particular through its analysis, monitoring of information published in the electronic procurement system, and through informing controlling authorities through the electronic procurement system or in written form about identified procurement legislation violations (or signs of violations)”.

This provision makes civic control a powerful tool to support accountability and the integrity of public procurement in Ukraine. As of September 2020, Dozorro had uncovered violations in over 30,000 tenders with an estimated total value of US\$4 billion. Monitors helped fix violations in 4215 tenders with an estimated value of \$500 million. In 19,574 tenders, worth collectively around \$3 billion, they initiated official audits, investigations, or other actions. More than 100,000 people use their procurement monitoring system each month.⁶⁰

Done well, a dispute mechanism contributes to public trust as businesses and other stakeholders can challenge authorities to enforce fair play and non-discrimination. But, done poorly, disputes and challenges, especially reactively, can result in significant delays and costs for the taxpayer and to service delivery for citizens. It can also deter innovation, as authorities worry that new approaches will be subject to challenges.

We recommend carefully designing the remedial process to make it simple and user-friendly, with an emphasis on remedy and resolving potential conflicts in the procurement processes before they go awry, rather than focussing on punitive measures after the fact.

It is beneficial to have a specialized review system as opposed to relying on the general legal system or non-specialist courts. An emphasis on proactively disclosing information during a procurement process will also minimize the risk that plaintiffs will ‘fish’ for information during the discovery phase of a potential litigation.

All 10 jurisdictions have some type of formal complaints and feedback procedures but there are important variations in the level of access these provide.

In **Colombia**, members of the public may present observations or objections to a procurement selection process, according to the terms detailed in the Request for Proposals.⁶¹ Award Resolutions are not subject to appeal.⁶² Actions taken to annul the award of a contract must be filed in the relevant courts within four months of the contract being awarded.⁶³ Contractual disputes, on the other hand, may be challenged through appeals, but only by a party to the state contract or a party that can prove a direct interest.⁶⁴ Nevertheless, members of the public can submit a petition to the Inspector General of Colombia to raise issues or concerns regarding a state contract. Members of the public may also initiate an “unconstitutionality claim” against a procurement regulation, but this procedure may take years to be resolved.⁶⁵

Recommendation 8:

Support an accessible and effective complaints procedure

In **Chile**, the procurement agency, Chile Compra, has an anonymous complaints channel through which any member of the public can report alleged integrity violations related to contracting processes carried out by public bodies.⁶⁶ However, formal challenges to a particular procurement process are open only to participants in that process who can file a complaint before the Public Procurement Court.

In **the UK** access to complaints and feedback mechanisms are limited to suppliers and suppliers' trade bodies, while in **the US** the general public has only limited access to these procedures.

EU Member States must ensure quick and effective reviews of decisions taken by contracting authorities in the context of the EU public procurement.⁶⁷ Review procedures must be available to any interested person who has been, or risks being, harmed by an alleged infringement but the procedures vary in practice. A 2013 OECD paper also provides guidance on establishing procurement review bodies, including a description of the main institutional models implemented in Member States of the European Union and the key requirements provided in the European Union Directives and relevant case law of the Court of Justice of the European Union.⁶⁸

Decisions by non-judicial review bodies must be subject to judicial review.⁶⁹ Interestingly, any party that has concerns about the validity of a contracting authority's decision has a right to complain to the European Commission (EC), regardless of whether or not it has standing to bring a challenge under procurement legislation. If the EC decides to pursue that complaint further, this may ultimately lead to infraction proceedings against the Member State.⁷⁰

Establishing effective remedies

All 10 jurisdictions provide for some form of remedial action following a complaint. Remedies typically include the allocation of damages, contractual ineffectiveness, setting aside or amending an unlawful or discriminatory decision, or declaring null the act or the entire procurement procedure.

The **GPA** requires parties to adopt or maintain procedures that provide for rapid interim measures to preserve the supplier's opportunity to participate in a given procurement as well as corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.⁷¹

In **the EU**, remedies depend on whether a challenge is made before or after the contract (or framework agreement) has been concluded. In proceedings initiated *during* the tender process, an unsuccessful tenderer can request the competent review body to: (a) set aside any unlawful decision taken; (b) amend a discriminatory specification or unlawful selection or award criteria; or (c) make an award in damages for loss or damage suffered in consequence of the breach. When challenged, the contract (or framework agreement) must be automatically suspended. In the event of non-compliance with this rule, available remedies are invalidating the contract and fines. In proceedings initiated *after* the tender process, the remedies are limited to: (a) damages for loss or damage suffered because of the breach; and (b) having the contract declared ineffective.⁷²

A contract or framework agreement can be rendered ineffective only where it has been awarded in serious breach of the relevant rules. It is up to Member States to decide whether the consequences of an ineffective contract should result in the retrospective or future cancellation of obligations under the contract. If the latter, it should also be accompanied by a fine that is effective, proportionate, and dissuasive.

As mentioned, remedies in **the US** are available for protests and disputes. Protests require that a complainant be an “Interested Party” (i.e. an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract), while disputes require a complainant to be a party to the contract in question. In the case of protests filed with an agency contracting department, an awardee may be required to reimburse the Government’s costs where a post-award protest is sustained as the result of an awardee’s intentional or negligent misstatement, misrepresentation, or mis-certification. Upon receipt of a protest before award, the contract must not be awarded pending resolution of the protest, unless it is justified in writing for urgent and compelling reasons or is determined to be in the best interest of the Government.

If a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation and is subject to a bid protest, the Government Accountability Office (GAO) may recommend any combination of the following remedies: (i) refrain from exercising options under the contract; (ii) terminate the contract; (iii) recompetes the contract; (iv) issue a new solicitation; (v) award a contract consistent with statute and regulation; or (vi) other recommendation(s) determined necessary to promote compliance.

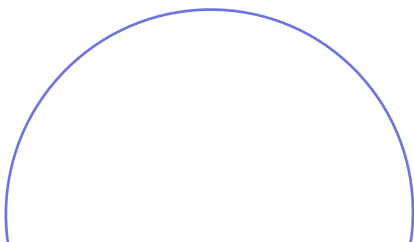
In case of disputes, an agency board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims,⁷³ which include financial damages and declaratory relief.

Recommendation 9:

Empower oversight authorities

Open contracting principles also call on governments to ensure that oversight authorities (including parliaments and audit institutions) can access and utilize procurement information to monitor government and company actions and hold them accountable.

In **the US**, while Congress remains the ultimate body responsible for regulating and overseeing the procurement process, oversight and auditing at the agency level plays an important role in ensuring transparency and accountability. For example, federal government contractors are required to comply with government contract cost accounting standards and are subject to periodic audits by agency officials.⁷⁴ The use of cost accounting standards reinforces transparency by creating objective benchmarks to assess the adequacy of contractor accounting practices, and enhances contractor accountability by requiring contractors to demonstrate continued compliance with, or provide justifications for departures from, compliant practices.



In **Ukraine**, the oversight function is divided between two control bodies. The State Audit Service carries out planned and ad hoc audits to ensure compliance with the legislation governing the contracting authorities' operations. All monitoring activities are done exclusively through the ProZorro e-procurement system, using risk and data-driven approaches, and providing a clear, digital audit trail. All correspondence and records for each monitoring activity are available online as structured open contracting data. The mandate for this data-driven approach to accountable

monitoring is defined in article 8-1 of the PPL, while the detailed methodology for risk-indicators including weights and formulas is adopted through the secondary legislation. The second control body is the Accounting Chamber, Ukraine's Supreme Audit Institution, that exercises parliamentary control over the use of public funds, the efficiency of public institutions in the implementation of budgetary programs, and the effectiveness of public procurement as a component of public finance management and parliamentary accountability.

Recommendation 10:

Provide effective guidance and guidelines

Everyone benefits from competition and public trust in procurement, yet it often seems an intimidating and compliance-based set of rules, so we recommend using simple guides and guidelines to help explain the rules and regulations to citizens and users of government procurement systems. While guides are generally not legally binding, they can help the wider public make sense of legal concepts.

For example, **South Korea** provides useful guidance and updates, including versions for international suppliers who wish to enter into procurement contracts with Korean government agencies. The Public Procurement Service provides instructions and guidelines on how to register as a bidder to participate in tender procedures

for procurement contracts, a user guide to the e-procurement system (KONEPS), etc. Information is updated as soon as there is a change in the applicable laws or regulations.

Colombia also issues many guidelines on its procurement system. For example, Colombia Compra Eficiente has designed a range of tools to support procurement processes according to the type of work, goods, or service to be contracted. Additionally, purchasing entities must develop a contracting manual which complies with the Colombia Compra Eficiente's procurement guidelines and update this as necessary. In addition, Colombia Compra Eficiente has developed the "Relatoría" tool, which contains the applicable regulations as well as court and arbitration decisions.

Annex

If you want to learn more about the procurement legislation in the countries described in this guidance note, please see the full country reports.

Chile	www.open-contracting.org/Legislative-Guide-Chile
Colombia	www.open-contracting.org/Legislative-Guide-Colombia
European Union	www.open-contracting.org/Legislative-Guide-EU
Paraguay	www.open-contracting.org/Legislative-Guide-Paraguay
Portugal	www.open-contracting.org/Legislative-Guide-Portugal
South Korea	www.open-contracting.org/Legislative-Guide-SouthKorea
UK	www.open-contracting.org/Legislative-Guide-UK
Ukraine	www.open-contracting.org/Legislative-Guide-Ukraine
USA	www.open-contracting.org/Legislative-Guide-USA
WTO	www.open-contracting.org/Legislative-Guide-WTO

Footnotes

¹ Open Contracting Partnership and Thomson Reuters Foundation are very grateful to the law firms that carried out the legal research and analysis informing this report on a pro bono basis: Dentons, Philippi Prietocarriozza Ferrero DU & Uría Colombia, Estudio Jurídico Gross Brown, and Cariola Diez Perez-Cotapos & Cia. Ltda.

² I.e. The public interest served in redacting information versus the private company's interest in having the information redacted.

³ See USA country report in the annex.

⁴ Law of Ukraine on Public Procurement, dated 25.12.2015, № 922-VIII <https://zakon.rada.gov.ua/laws/show/922-19>

⁵ UK Cabinet Office. December 2020. Transforming Public Procurement. CP 353. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf

⁶ UN Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement 2011, preamble. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>

⁷ US Federal Acquisition Regulations, FAR 1.012 Guiding Principles. <https://www.acquisition.gov/far/1.102#:~:text=%E2%80%B9%20PreviousNext%20%C2%BB-,1.102%20Statement%20of%20guiding%20principles%20for%20the%20Federal%20Acquisition%20System,and%20fulfilling%20public%20policy%20objectives.>

⁸ UK Cabinet Office. December 2020. Transforming Public Procurement. CP 353. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf

⁹ Federal Acquisition Regulations (FAR) 3.7 <https://www.acquisition.gov/far/subpart-3.7>

¹⁰ FAR 3.104-5 <https://www.acquisition.gov/far/3.104-5>

¹¹ FAR 3.104-8 <https://www.acquisition.gov/far/3.104-8>; FAR 3.807 <https://www.acquisition.gov/far/3.807>

¹² 18 U.S.C. §§201-227 www.law.cornell.edu/uscode/text/18/227

¹³ Decree-Law no. 18/2018, from 29th of January, currently in force (Portuguese Public Contracts Code) - article 57.º, no. 1, paragraph (a), and further detailed in no. 4 of Annex 1. http://www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP-DL_111-B.pdf

¹⁴ Article 5-2 of the Act on Contracts to which the State is a Party https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=28879&type=new&key=

¹⁵ Articles. 40 and 59 of Law No. 2051/2003 on “Public Procurement” www.bacn.gov.py/leyes-paraguayas/159/ley-n-2051--de-contrataciones-publicas

¹⁶ Article 24 of the Public Contracts Regulations 2015
www.legislation.gov.uk/uksi/2015/102/contents/made

¹⁷ UN Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement 2011, preamble.
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>, p.28

¹⁸ Ibid, p. 29.

¹⁹ Although the latter has been subject to much debate in the country over concerns that it is a common loophole that allows for patronage and favouritism.

²⁰ Colombia Compra Eficiente SECOP
www.colombiacompra.gov.co/colombia-compra/secop

²¹ Open Data page
www.colombiacompra.gov.co/transparencia/gestion-documental/datos-abiertos

²² UK Cabinet Office Procurement Policy Note, PPN 01/20 March 2020, Responding to COVID-19.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5__1_.pdf.

²³ It is worth flagging that not all authorities followed this approach during the pandemic and publication of information lagged substantially, with the average time for publication of awards exceeding 100 days as opposed to the 30 days required by regulations.

²⁴ Ibid.

²⁵ Law of Ukraine Amending Legislative Acts of Ukraine to Prevent the Occurrence and Spread of Coronavirus Disease (COVID-19)
<https://zakon.rada.gov.ua/laws/show/530-20/ed20200402>

²⁶ Cabinet of Ministers of Ukraine Resolution March 20, 2020 № 225
<https://zakon.rada.gov.ua/laws/show/225-2020-n>

²⁷ Prozorro Business Intelligence portal
bi.prozorro.org

²⁸ OCP website - "Data & transparency of emergency COVID19 procurement: an example from Ukraine"
<https://bit.ly/2J8HyCm>

²⁹ Information compiled from spreadsheets submitted by research partners for each reviewed country

³⁰ Law 80 of 1993
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=304;
Law 1150 of 2007
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=25678
and Single Regulatory Decree 1082 of 2015
www.dnp.gov.co/Paginas/Normativa/Decreto-1082-de-2015.aspx ,
contractors must be selected through a Public Bidding Process.

³¹ Law of Ukraine On public procurements dated 25.12.2015 № 922-VIII, Article 10
<https://zakon.rada.gov.ua/laws/show/922-19>

³² Decree N°250 of 2004 of the Ministry of Finance, Article 64
www.bcn.cl/leychile/navegar?idNorma=230608&idVersion=2020-01-21&idParte=

³³ Section 2.2.1.1.1.7.1. and 2.2.1.1.1.3.1 of Single Regulatory Decree 1082 of 2015
www.dnp.gov.co/Paginas/Normativa/Decreto-1082-de-2015.aspx

³⁴ Ministerial Order no. 57/2018, from the 26th of February - article 4.o, paragraph (c), subparagraph (vi) Ministerial Order no. 57/2018

³⁵ Art. 4(c) of Law No. 2051/2003 "Public Procurement"
www.bacn.gov.py/leyes-paraguayas/159/ley-n-2051--de-contrataciones-publicas

³⁶ Law of Ukraine On public procurements dated 25.12.2015 № 922-VIII, Article 10
<https://zakon.rada.gov.ua/laws/show/922-19>

³⁷ Article 93 of the Enforcement Decree of the Act on Contracts to which the State is a Party
<https://www.law.go.kr/LSW/eng/engLsSc.do?y=33&x=22&menuId=1&query=contract#liBgcolor22;>
and Article 82 of the Enforcement Rule on the same Act.

³⁸ Currently, all central government agencies, including the judicial and legislative branches, as well as all capital cities and departmental governments, are legally obligated to use SECOP 2.

³⁹ Law No. 19886
<https://www.bcn.cl/leychile/navegar?idNorma=213004&buscar=19886>

⁴⁰ Article 2(4) of the Electronic Procurement Utilization and Promotion Act
https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=37734&type=part&key=19

⁴¹ Article 2(14) of the Terms and Conditions of Korea ON-Line E-Procurement System.

⁴² Article 5(4) of the Guidelines on Contract Management Using Korea ON-Line E-Procurement System.

⁴³ Executive Decree No. 2992/19
<http://baselegal.com.py/docs/9bd3e517-1eb0-11eb-82fb-525400c761ca>

⁴⁴ Executive Decree No. 2992/2019
<http://baselegal.com.py/docs/9bd3e517-1eb0-11eb-82fb-525400c761ca>

⁴⁵ <http://oecdinsights.org/2015/03/27/transparency-in-public-procurement-moving-away-from-the-abstract/>

⁴⁶ <https://standard.open-contracting.org/latest/en/guidance/publish/#license-your-data>

⁴⁷ Law of Ukraine on Public Procurement, dated 25.12.2015, № 922-VIII, Article 10, para. 6,
<https://zakon.rada.gov.ua/laws/show/922-19>

⁴⁸ Law No. 20285
www.bcn.cl/leychile/navegar?idNorma=276363

⁴⁹ Section 31 of Law 1755 of 2015
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=65334,
Section 29 of Law 1712 of 2014

www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=56882
and Colombian Constitution
<http://es.presidencia.gov.co/normativa/constitucion-politica>.

⁵⁰ See

www.estudiosanticorrupcion.org/wp-content/uploads/2021/05/RI-2021-00240-INSTITUTO-ANTICORRUPCIOi%CC%80N-vs-UNIDAD-GESTIOi%CC%80N-RIESGO-Vacunas-COVID-Sentencia-accede-parcialmente-a-entrega-de-informacioi%CC%80n-V2F.pdf

⁵¹ Decree-Law no. 18/2018, from 29 January, currently in force (Portuguese Public Contracts Code) - article. 287.o, no. 1

⁵² <http://mythbusting.open-contracting.org>

⁵³ Article 28, para. 2, the Law of Ukraine on public procurements
<https://zakon.rada.gov.ua/laws/show/922-19>

⁵⁴ Article 10(1) of the Official Information Disclosure Act
https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29982&lang=ENG#

⁵⁵ Article 11 of the Official Information Disclosure Act
https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29982&lang=ENG#

⁵⁶ Article 13 of the Official Information Disclosure Act
https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29982&lang=ENG#

⁵⁷ Section 66 of Law 80 of 1993
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=304
and Section 2.2.1.1.2.1.5. of Single Regulatory Decree 1082 of 2015
www.dnp.gov.co/Paginas/Normativa/Decreto-1082-de-2015.aspx

⁵⁸ Single Regulatory Decree 1082 of 2015
www.dnp.gov.co/Paginas/Normativa/Decreto-1082-de-2015.aspx

⁵⁹ Article 7, Law on Public Procurements, dated 25 December 2015 N° 922-VIII
<https://zakon.rada.gov.ua/laws/show/922-19>

⁶⁰ For further information, see OCP's summary of the Dozorro approach at
<https://www.open-contracting.org/2020/09/14/dozorro-a-network-of-citizen-corruption-fighters/>

⁶¹ Section 2.2.1.1.2.1.4. of Single Regulatory Decree 1082 of 2015
www.dnp.gov.co/Paginas/Normativa/Decreto-1082-de-2015.aspx

⁶² Section 77 of Law 80 of 1993
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=304

⁶³ Section 138 of Law 1437 of 2011
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=41249

⁶⁴ Section 141 of Law 1437 of 2011
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=41249

⁶⁵ Section 135 of Law 1437 of 2011
www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=41249

⁶⁶ www.chilecompra.cl/conoce-el-canal-de-denuncia-anonima/ ; however this complaints channel does not have a specific legal foundation. It was established under the general powers of administration of Chile Compra.

⁶⁷ Remedies Directives (as amended)
https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en

⁶⁸ OECD, 2013, “Establishing Procurement Review Bodies”, SIGMA Public Procurement Briefs, No. 25, OECD Publishing, Paris.
<https://doi.org/10.1787/5js4vmn47gzs-en>.

⁶⁹ or review by another body that is a court or tribunal within the meaning of Article 267 TFEU and independent of both the contracting authority and the review body

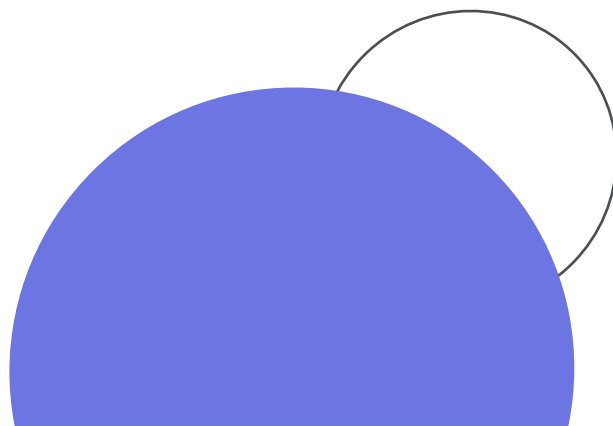
⁷⁰ Article 258 TFEU
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

⁷¹ Article XVIII:7 of the RGPA
www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm

⁷² Directive 89/665/EEC
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31989L0665> ,
as amended by Directive 2007/66/EC
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007L0066>
and Directive 2014/23/EU
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014L0023>

⁷³ 41 U.S.C. Chapter 71.05(e))
<https://uscode.house.gov/view.xhtml?path=/prelim@title41/subtitle3/chapter71&edition=prelim>

⁷⁴ The Federal Acquisition Regulation (FAR) 30.202-7
<https://www.acquisition.gov/far/30.202-7>



About the report

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The Open Contracting Partnership is a silo-busting collaboration across governments, businesses, civil society, and technologists to open up and transform government contracting worldwide. We bring open data and open government together to ensure public money is spent openly, fairly and effectively. We focus on public contracts as they are the single biggest item of spending by most governments. They are a government's number one corruption risk and they are vital to ensuring citizens get the services that they deserve. We are an independent not-for-profit working in over 50 countries. We drive massively improved value for money, public integrity and service delivery by shifting public contracting from closed processes and masses of paperwork to digital services that are fairer and better.

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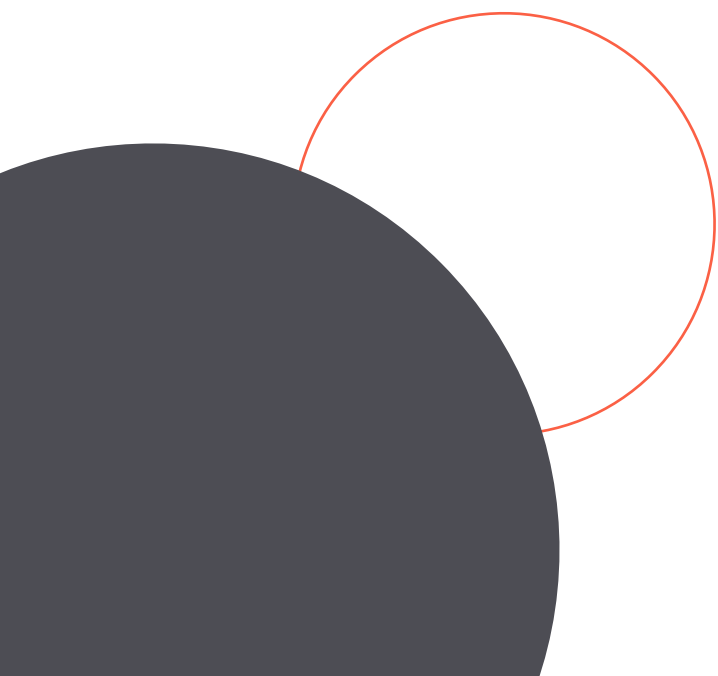
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