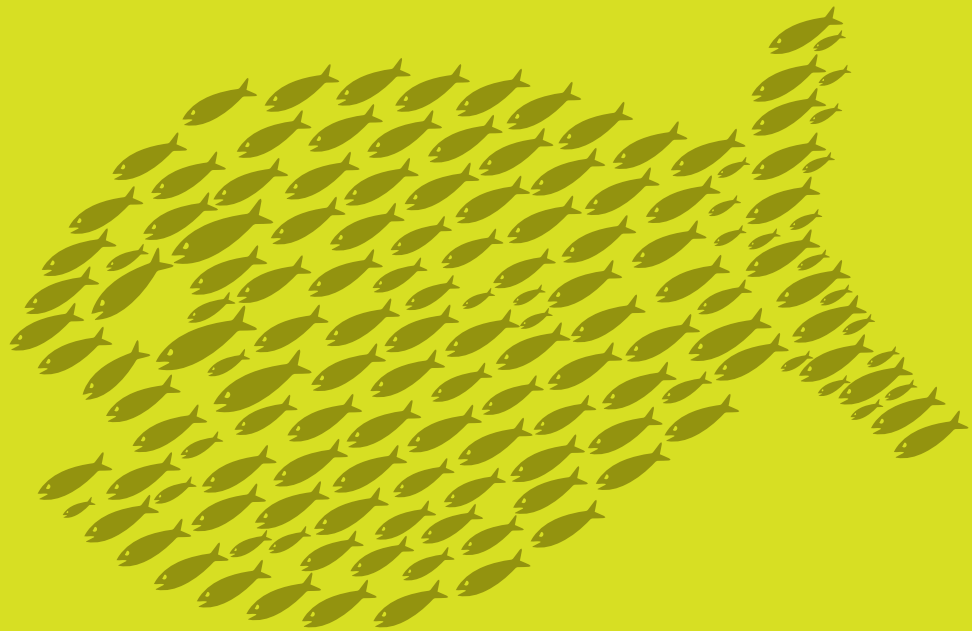


Open Contracting

A guide for practitioners by practitioners



Open Contracting Partnership

Open Contracting

The Open Contracting Partnership and the authors of this guide would like to thank Felipe Heusser and the team at Fundación Ciudadano Inteligente for providing the inspiration for the concept featured on our book cover. We are grateful for the opportunity to share a concept that illustrates so well the impact of collaborative action

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Introduction And Framing

Introduction

Introduction

Seriously, how often do you read the 'terms and conditions' before you agree to something online? How closely do you read the 'legalese' before signing on the dotted line?

Probably, most of us don't - there are certainly numerous contracts out there that we simply don't read. Public contracts are also your contracts, just signed by the government on your behalf! You are bound by these contracts, and you often don't get to read them - let alone participate in shaping them. At the stroke of a pen, millions of dollars are committed to a road project or for the hiring of a thousand public school teachers. Do you know about these contracts? And after they are signed, do you know if the contracts' commitments ever materialise?

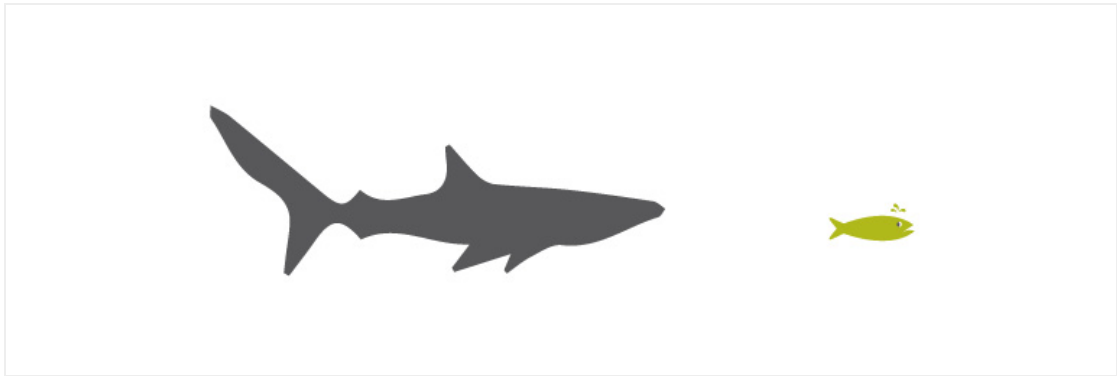
Why does contracting matter?

Governments spend an estimated amount of US\$9.5 trillion on contracts, and developing countries spend about 70% of their budgets through contracts for the delivery of basic goods and services. Unfortunately, most information related to such contracts is hidden from the public eye, many contracts are poorly managed, and often citizens do not derive the benefits of these huge investments. Ultimately, contracting that is not open undermines development for all.

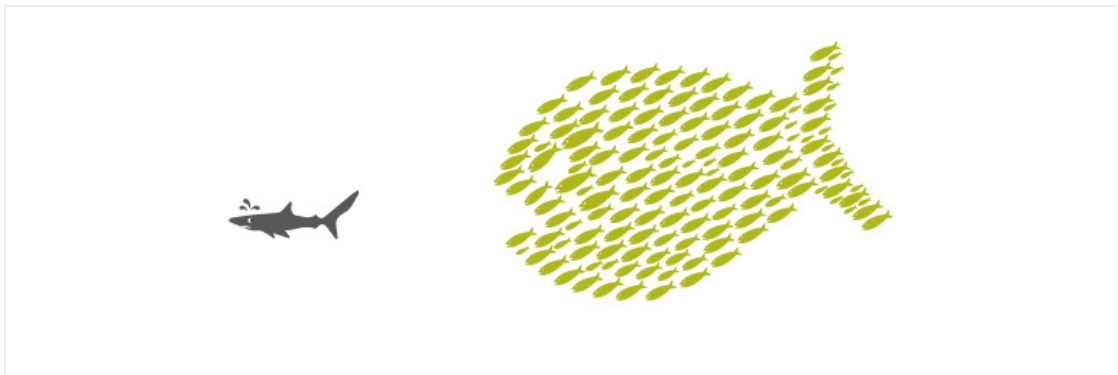
Open Contracting

In order to avoid such erosion, it is both necessary and possible to achieve a new normal in which public contracting benefits from effective disclosure and participation. Now, that needs emphasis: disclosure + participation. These two concepts encompass what open contracting is all about. When applied to the entire contracting process - from planning to execution and contract closure - open contracting aims to strengthen accountability and trust among the various actors in the process and ultimately contribute to better contract performance and improved development outcomes for all of us.

In the past, isolated practitioners from the government, private sector, and civil society in many countries have been working on opening up contracting. But it is difficult to fight the shark of poor contracting alone.



Only together can we make open contracting a reality!



Recently, open contracting practitioners have come together, like a school of fish, in an emerging global movement to foster a culture and enabling environment of contract disclosure and broad participation. As a community we aim to strengthen each others' capacities to do so.

Sixteen of us gathered to share our insights from doing open contracting, coming from all different continents and backgrounds but with a common passion for improving the outcomes of public contracting.

The Book

The result of this gathering is the book you see before you, written *by* practitioners *for* practitioners. The book was written in a five-day Book Sprint to collaboratively publish a guide to open contracting. The participatory approach adopted in developing this book is a living testimony to the collaborative participation that is an integral part of the open contracting process.

The aim of the book is to guide and inspire others in their own open contracting activities, and to support the emerging global community of practitioners around open contracting.

INSIGHTS AND LESSONS

Our guidance is based on what we have learned as representatives of governments, companies from the private sector, and civil society, working through various entry points to promote disclosure and participation in public contracting.

What have we learned? Here are some of our overarching insights.

- ▶ Open contracting matters for everyone! Contracts are a public good that the government signs on your behalf. All of us should care about contracting.
- ▶ We need to shift from a focus on improving the contracting process as a goal in itself, to improving the performance of contracts. More people care about results - about, for example, the quality of the road that was built rather than what the contract says. It will be easier to bring the different people to the table when the focus is on building better roads.
- ▶ Capacity, capacity, capacity. We need to increase capacities of all actors to ensure that contracts can deliver. In the past we used to focus narrowly on corruption. Open contracting focuses on capacity development - how we can strengthen our abilities to drive change.
- ▶ Information is power, and is powerful no matter which environment you work in - whether you have access to contracts or not. There are many ways to get information, even through more informal means, that will empower your open contracting efforts.
- ▶ Open contracting is about more than contracts. It is about building trust across people who often have divergent interests. Reach out to your stakeholders early on, invest in the relationship, build trust, and work collaboratively throughout the process.
- ▶ Monitoring and reporting is not enough! We may invest a lot of time in monitoring but that must lead to concrete actions that address the problems identified during monitoring. We have to close the loop!

Throughout this book, you will find one insight from each of us who joined the Sprint. Our lessons only begin to scratch the surface of the vast knowledge that exists around open contracting. We hope you will be inspired to add to it.

TARGET AUDIENCE

We wrote this book for anyone interested in procurement and contracting. These practitioners - found in public entities or civil society, public oversight institutions such as supreme audit institutions, parliaments or the judiciary, private companies and industry or professional associations, and others - will get a clearer understanding of how they can engage with open contracting activities in different countries, settings and environments, and what elements to take into account when engaging in this type of work.

INVITATION TO JOIN OPEN CONTRACTING

In this spirit, we invite you to join us. Inspired by our insights and supported by our community, we hope that you will use this book, do open contracting and help spread the practice of open contracting. Come swim with us!

How To Do It?

Overview

Understanding The Basics

Context Analysis

Constructive Engagement

Monitoring, Analysis And Reporting

Closing The Loop

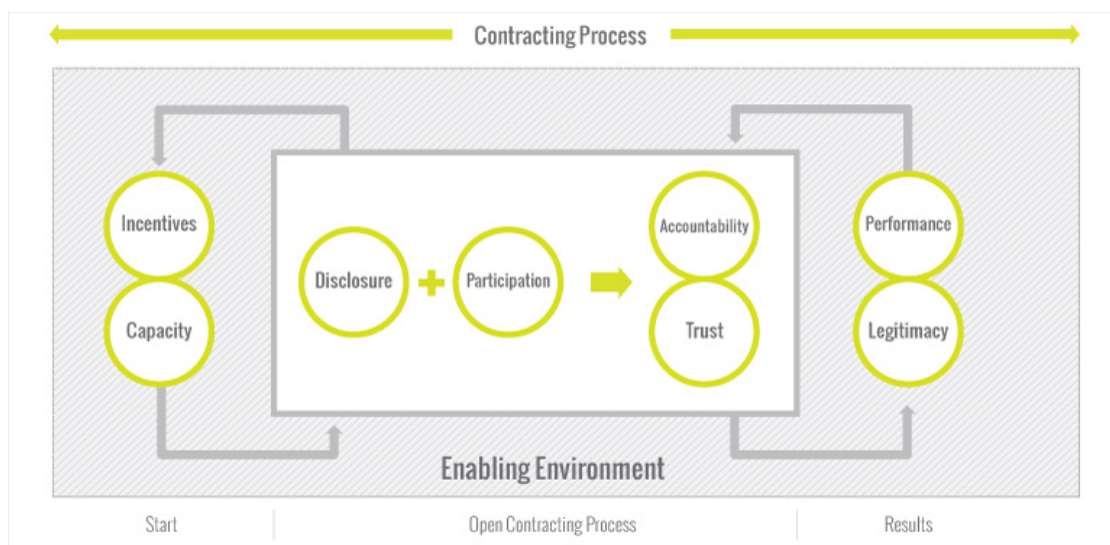
How Do We Know We Are Making A Difference?

How to do it?

Overview

Let's get started.

It's time to discuss the ways in which practitioners can engage in open contracting at community and country level. First, let's reflect for one minute on the open contracting 'theory of change', which is the vision of how disclosure and participation in public contracting trigger better contract performance and improved development outcomes. This figure illustrates those dynamics:



In any situation, a starting point for an open contracting intervention will be based on the existing **capacity** of the different stakeholders, in addition to the **incentives** they have to participate.

By promoting contracting information **disclosure** and creating opportunities for stakeholder **participation**, the open contracting process fosters a collaborative engagement between public, private and civil society actors that serves to enhance **accountability** and **trust**.

Through this engagement, the expectation is that practical problems in the contracting process will be identified and acted upon by the responsible parties, which will reduce mismanagement and inefficiencies and give rise to improved contract **performance** whereby better outcomes materialise in the form of better services to citizens. This leads to greater satisfaction among citizens with public and private providers. This satisfaction, in turn, contributes to the **legitimacy** of the whole process and, as a consequence,

reinforced the incentives for responsible stakeholders to further invest in their own capacity to continue engaging in open contracting.

In this way, open contracting is intended to set up two virtuous cycles that contribute to improved performance over time. Whether this happens in practice depends very much on the **enabling environment** - the policies, laws, regulations, institutional arrangements, and other factors through which the contracting process unfolds, but which may not be under direct stakeholder control. As a higher level objective, open contracting seeks to influence the development of that enabling environment.

Open contracting reinforces mechanisms to improve accountability through inclusion and disclosure and to build trust among stakeholders through participation - **Hamish**



How Do We Go About It?

The "how to" of open contracting is a map to navigate the above theory of change. While there is a suggested starting point and a likely sequencing, it's critical to interpret the layers of circles as processes that happen in parallel. Each of the components is discussed in detail along this section, so it proves convenient to 'zoom in' to one element, find the discussion below. To understand this map and how it all works, check out the figure and continue reading...



A first time user will begin with **context analysis** to get a sense of the playing field. Getting to know the environment involves some **constructive engagement**, or strategically reaching out to other actors whose work and interests will show up on the playing field. In other words, be prepared to literally and figuratively 'introduce yourself' to your context.

Context analysis is also the time to begin identifying **risks**. Not all risks will be directly relevant to your intervention, but they should be surfaced as part of a complete context analysis. As you begin to design your own intervention, the most relevant risks will be featured in your **tracking progress and impact** plan. Note that this is a cycle within the

cycle, requiring your regular attention.

Now, you probably noticed that there are two types of monitoring - this is intentional. And you need to be able to distinguish between them both. The **monitoring, analysis and reporting** is the 'heart' of the cycle, or your particular intervention in a public contracting situation. Separately, the internal circle of tracking progress and impact is just that, internal, and is the way you track your own progress. The learning from your tracking occupies an important space in the circle, and will inform everything else.

The circle advances clockwise towards **closing the loop** and **advocacy** for two simple reasons. Firstly, closing the loop, or securing the adequate responses to directly improve contracting performance, relies on the prior steps of the cycle. For example, without credible reporting to the Ministry of Education, the relevant official will not address a complaint related to teacher absenteeism. Advocacy is ongoing strategic communication that sustains your open contracting effort. Both of these become inputs to your context analysis and strengthen your constructive engagement. Repeat!

Regardless of your experience level, don't forget how relevant the basics are -
Carey



Understanding The Basics

What do we need to know before you get started with open contracting? One of the first things to do is to understand the basics. What is a contract? How does the contracting process work? What do we mean by value for money? Are there quality elements to look for in a contract? May a contract contain confidential parts? What should you keep in mind regarding data?

These questions should apply to every context and constitute the first step for an open contracting practitioner. Once we understand this, we're ready to go!

The contract is a point of leverage, giving the opportunity for civil society to position itself as a legitimate actor to monitor the work being done by a company, and for this reason it needs to be accessible - **Lorenzo**



What Is A Contract?

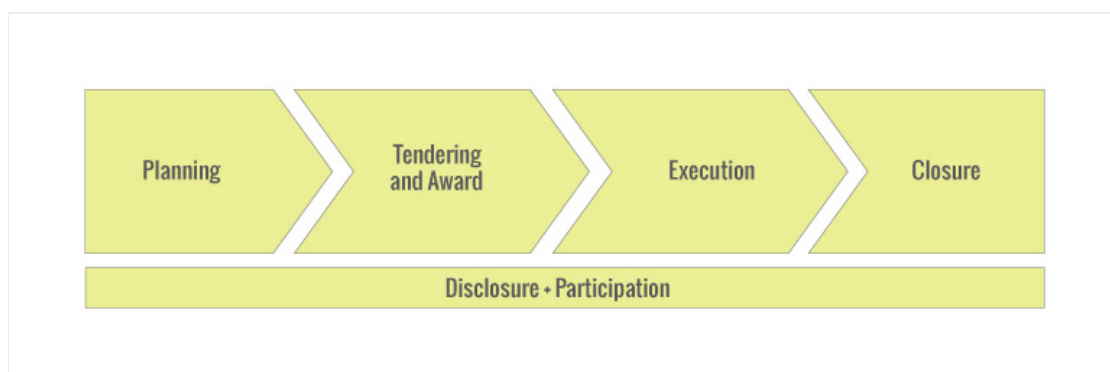
Most people would agree that a contract is a legally enforceable agreement between two (or more) parties, in which the parties agree to do (or not do) certain things (*purpose*) in exchange for something (*considerations*). Contracts are often thought of as a single document - that which is signed by the parties involved. However, in many cases, a contract can be made up of multiple documents containing additional terms, specifications, provisions, standard forms or other information (known as *addenda*, *annexes*, *appendices*, *schedules*, *riders*, etc.). A contract should also be understood to include any later agreements of the parties that change the terms of the initial contract (*amendments*). As a legal document, the law (*statutes*, *regulations*, *case law*) may also impose additional terms or conditions or otherwise affect a contract.

What are the related documents? Which documents are not part of the contract, yet closely related to the contract so that they should be disseminated as part of open contracting? Related documents could include procurement documents that are not otherwise incorporated into the contract, such as *bidding documents* or *requests for proposals*, *evaluation reports* and *award notices*, documents related to the project such as social and environmental impact assessments, and documents reporting on contract execution such as monitoring documents or auditing documents. The particular list of related documents will vary depending on the type of contract, the sector to which it pertains, and the circumstances under which it was negotiated.



The Contracting Process

To effectively engage in an open contracting process, we must constantly remind ourselves of the reason why public contracts are undertaken. The government, through its public entities, serves as a custodian of public resources. Public entities have therefore a duty to identify unfulfilled public needs and develop a strategy to meet those needs in a way that makes the most efficient use of available or potentially available resources.



The contracting process would generally and broadly take place according to the following stages:

PLANNING

The planning stage must ensure that the contract is in line with the government's action plan and with the mission of the public entity that will oversee it. In the planning stage the need must be identified and narrowed down, along with the associated risks and the budget must be allocated. Documents such as annual procurement plans are mandatory in several countries and mark the beginning of the planning stage. Citizens can review different documents associated to the planning stage. They should also advocate for consultations so that decisions are made on the basis of needs effectively expressed by potential beneficiaries and they have a say on the options available.

Several countries have developed provisions in their laws to establish the role of citizens in the planning stage. For instance, infrastructure and extraction projects in many Latin American countries must be subject to hearings and agreements with the indigenous communities that will be affected with these projects. Failure to reach an agreement means cancelling or at least modifying the contract to deal with the issues raised during the hearings.

In the specific case of a PPP, not only should the purpose of the project be assessed, but the citizen should also ask why the government is engaging in a PPP rather than in a public work. There are certain characteristics that make this type of contract preferable in certain situations, where risks can be shared between the public and private parties involved. These contracts usually have longer timeframes and larger budget dimensions, which makes them an important consideration of open contracting.

TENDERING

Once the contract has been planned, the entity is ready to open the tendering process. This is usually done by inviting interested suppliers to submit bids that will be evaluated according to specific procedures and evaluation criteria set in the bidding documents. In general, citizens should be allowed to comment on the requirements and procedures before the bids are submitted. Once the "winner" is chosen and before the contract is signed, the losing bidders should be allowed to file complaints if they find that the process has not properly followed the established rules. Citizens also have a key role once the evaluation decision is announced and can ask for detailed explanations.

What are the different types of tendering? In some cases, public contracting follows a direct contracting scheme, such as when only one company has the specific expertise for the work, or when urgency does not allow for the complete open tendering process. Nonetheless, the reasons for such a decision should be clearly stated. Beyond direct contracting there are several modes of tendering from shopping (known as three quotations method), open competitive bidding, inverse auctions, framework contracts to more complex contractual arrangements as public-private partnerships, licenses and concessions.

CONTRACT EXECUTION

After the contract is awarded, the contract is signed, and the necessary guarantees are in place, the execution of the contract starts. During the execution stage, the contractor must comply with the legal requirements as well as with what was stated in the contract. The public entity is accountable to ensure that the contract is being executed in a proper and timely manner and must also comply with what was agreed, particularly in what regards payments.

At this stage proper contract management procedures must be in place and citizens should ask whether the milestones are being met regarding costs and times. Are the parties meeting the commitments that were put in the contract? If there are amendments, why are they happening? Are they justified? Quality of deliverables is also a key factor to be evaluated at this stage.

CLOSING

The contract must be closed once the obligations have been fulfilled. Nevertheless, it is important to state that it is possible for contract obligations to exceed the contract term. For example, guarantees may be enforced even after the last payment has occurred. For instance, if a road that is built and paid for but is ruined several months later, citizens should have a say on this.

Likewise, post-consumption obligations may be present, such as disposal schemes for polluting materials. The contract should answer the questions: Is the contractor obliged to pick up the polluting packaging? Was the community affected as a result of the contract's completion? What were the impacts of the project or procurement? Answers to questions like these can drive positive changes, making a contractor assume responsibility and establishing a fresh ground for government to improve future contract planning.

Citizens have the ability to participate in the whole contracting process, from the initial stages of the planning to the final monitoring of the contract -

Nicolas



Preparing To Engage

Now that we have a basic understanding of the contracting process, framing our expectations, being able to determine what to expect from a contract and knowing what documents to look to for informed engagement may add flavor and depth to our engagement. Lets read on!

WHAT COULD WE EXPECT FROM THE CONTRACTING PROCESS?

The main thing we should demand from a contract is **value for money**. Governments have a mandate to deliver goods and services for their citizens. Public resources collected from the taxpayers must be used by governments in a way that guarantees the best return for the money spent, in terms of effectiveness, efficiency and economy.

► Effectiveness

Public contracting should be effective. This means that the specified need is satisfied or solved through the contract. In several situations, mainly due to poor planning, government institutions can end up with contracts that do not meet expectations. How many times have we seen roads that lead to nowhere, or electronic devices bought for

places with no electric power? This has a direct effect on the population, as goods and services are not well delivered. Citizens should ask whether the result of the contracting process has been achieved.

► **Efficiency**

Efficient contracting means that the government has minimized the resources it has used during the contracting process. That is, incurring the lowest costs possible while still obtaining a good result, in terms of time, money invested, paper and energy used. Citizens should analyze the amount of resources spent and compare it with the results achieved to assess whether the process was efficient. Proper monitoring can lead to reduced contract management costs, thus increasing overall efficiency.

► **Economy**

Economy relates to obtaining a proper price, taking into account every cost throughout the lifespan of the good or service procured or the project undertaken. Measures such as return on investment and cost-benefit analysis can help to check for this aspect. This is especially the case in a PPP, where a proper comparison with alternative public works should be carried out, considering that at the end of the contract, the contractor should revert the asset to the state.

In certain cases public contracts specify characteristics that exclude the use of materials that might be readily available; in these cases economy may not be achieved. For example, this was the case for several infrastructure contracts in Afghanistan which banned Iranian raw material, despite its being cheap and easily available.

In addition, time and cost should be closely monitored against initial budgets and project milestones as they also have an impact on the economy of contracts.

Open contracting is all about knowing what is being done with our own money
- **Claudio**



The next element to consider is **contract quality**. A contract serves as a tool to establish the obligations of the different parties agreeing on it. There are issues related to unintended consequences that should be clearly stated within the contract; if not, contracts may fail to guarantee the interests of the parties. Citizens should check how the contract provides the means of addressing these issues.

The contract should have a number of clauses directed to the long-term or unintended problems resulting from the implementation of the contract. These clauses should include insurance in case of social, environmental or other types of damage. Depending on the contract, maintenance responsibilities, conditions for the contract renegotiation, obligations in term of time and delivery, and warranty should be present.

In addition to those long-term responsibilities, detailed quality standards and technical specifications should be explained in the contract annexes and checked by citizens.

There should also be mechanisms in place to detect and address problems regarding the contract execution. Often problems in the execution of a contract are not addressed even when detected, simply because there are no clearly defined mechanisms. The contract should define the ways problems can be addressed or at least pave the way for this. These mechanisms should be accessible for different actors: parties of the contract, citizens, oversight bodies and media.

Means of **dealing with grievances** or complaints should also be well-defined in the contract, or by the institutions or parties involved in its implementation. Clear responsibility lines should be identified. Measurement tools should allow for the monitoring of problem-solving according to the source and the nature of the grievance. The performance of these mechanisms should be closely analysed and disclosed if they are present but not working.

A strong emphasis should be given to dialogue and for a process to resolve grievances. Public shaming should not be the first option as it might lead to conflict, and may be counterproductive or dangerous - especially in post conflict settings or where palpable tensions already exist in a community.

WHAT INFORMATION CAN YOU EXPECT TO HAVE ACCESS TO?

Depending on the legal framework of each country different levels of information on the contracting process would be publicly available. They will also be available in different kinds of formats.

Open contracting principles advocates for proactive disclosure of information on the formation, award and execution of the contract as far as it doesn't affect legitimate commercially sensitive information that is proprietary of the private sector. Accordingly, at least the following contracting information should be disclosed in an ideal situation:

- ▶ Contracts, including licenses, concessions, permits, grants or any other document exchanging public goods, assets, or resources (including all annexes, schedules and documents incorporated by reference) and any amendments thereto;

- ▶ Related pre-studies, bid documents, performance evaluations, guarantees, and auditing reports.
- ▶ Information concerning contract formation, including:
 - ▶ The planning process of the procurement, including needs assessment
 - ▶ The method of procurement or award and the justification thereof;
 - ▶ The scope and specifications for each contract;
 - ▶ The criteria for evaluation and selection;
 - ▶ The bidders or participants in the process, their validation documents, and any procedural exemptions for which they qualify;
 - ▶ Any conflicts of interest uncovered or debarment issued;
 - ▶ 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;
- ▶ Information related to performance and completion of public contracts, including information regarding subcontracted arrangements, such as:
 - ▶ General schedules, including major milestones in execution, and any changes thereto;
 - ▶ Status of implementation against milestones;
 - ▶ Dates and amounts of stage payments made or received (against total amount) and the source of those payments;
 - ▶ Service delivery and pricing;
 - ▶ Arrangements for ending contracts;
 - ▶ Final settlements and responsibilities;
 - ▶ Risk assessments, including environmental and social impact assessments;
 - ▶ Assessments of assets and liabilities of government related to the contract;
 - ▶ Provisions in place to ensure appropriate management of ongoing risks and liabilities; and
 - ▶ Appropriate financial information regarding revenues and expenditures, such as time and cost overruns, if any.

Again, on an ideal world, this information would be available in formats that would make life easier for interested stakeholders as civil society, the media, academics, the private sector itself who wants to learn about the public contracting market and, believe it or not, the public sector itself who wants to learn about how other agencies contract so they can better perform their administrative or oversight functions.

There are developments that can help that information be more generally available and in friendlier user formats. Part of open contracting advocacy should be directed to strive for the adoption of data standards associated to open formats and quality assurance methods. Let's see what all this is:

DATA STANDARDS

Data standards serve as a means of comparing contracts across different sectors, regions, countries or entities. Data should be structured in such a way that the necessary information is visible and searchable. The data fields need to be universal and standardized, allowing for universal reports and minimizing the chances of mistakes.

Several initiatives have already developed detailed standards. The Open Contracting Partnership (OCP) has begun to analyze data already published by many countries and international institutions to establish standards in the future. Amongst others, this work is building on efforts already developed by other sector-specific initiatives, including the Construction Sector Transparency Initiative (CoST) and the International Aid Transparency Initiative (IATI), who have already developed disclosure standards and information data sets that constitute the essence of their disclosure efforts.

If you want to learn more about the progress of OCP in developing the open contract data standard have a look at Tim Davies' blog in the following link:

<http://www.timdavies.org.uk/2013/04/04/developing-data-standards-for-open-contracting/>

FORMATS AND STORAGE OF DATA

The format of the data can facilitate further analysis of the contract. Access to searchable text or database data is much more useful for monitoring than a scanned image of the contract. Governments should strive to provide data in a way that is open to anyone that wants to analyze it. Thus, formats are essential for open contracting.

Common formats for disclosing information are PDF, texts and spreadsheet files in searchable formats such as XML and CSV files. Information should ideally be presented in a way to allow users to visualize data simply and to export reports that can be further analyzed using spreadsheet or statistical software. Although image files and image PDF

files are useful for reading the entire content of contracts, information should also be presented in a way that allows stakeholders to easily extract basic information from its contents.

The government is also accountable for safeguarding the data and for overall security of the information. Technical questions of system infrastructure and architecture should be addressed in the contract to provide a safe environment for information disclosure and analysis.

QUALITY ASSURANCE OF DATA

A complete and secure data system where all the basic information is disclosed is of no use if poor-quality data is uploaded. Ideally, disclosed data is a perfect reflection of the reality of the contract. For this to happen, data quality must be assured.

There are several means of ensuring that data maintains proper quality throughout the process. The most thorough but also the most expensive way to do this is to develop a complete e-procurement system that enables contractual transactions to happen online, keeping track of every document and all data related to the process.

In many countries, this is not the case, and authorities have to upload certain contract information directly to one or several webpages. This can lead to duplication of information and to possible typing mistakes. It is therefore important to verify with all possible sources of information to cross-check information and see if there are inconsistencies. This must also be the procedure in situations where there is a lack of information technology, and where data must be found and cross-checked using paper-based formats.

Be Aware Of Confidentiality Issues

As we have said, open contracting advocates for disclosure as a default. However, be aware that there are pieces of information that need to be kept undisclosed for legitimate reasons at all or specific times of the process. What is important, as stated in the open contracting principles is that contracting information made available to the public shall be as complete as possible, with any exceptions or limitations narrowly defined by law.

For example, specific bid data might be kept confidential until at least the bids have been evaluated. Under certain circumstances, citizens may have access to the complete bid history once this stage has been completed. Special contract types may also contain specific confidentiality clauses. For example, the Colombian PPP regulation allows for unsolicited private initiative projects to be presented. If the contacted public entity wants to

go on with the project, it must disclose the project details as they were presented except for the financial model, which is the core of the project. This is done to maintain a proper level of innovation and competition. If these details were disclosed, contractors would not feel safe proposing projects that might not be awarded, and that might be copied by other competitors. Nevertheless, even in these situations, citizens should be involved in monitoring the contract in all its phases.

The typical reason why information is kept confidential is because it is defined as "commercially sensitive" which means that - if disclosed - this will arguably affect the competitive advantages of the private companies who own that information. This is true but this argument should not be used to keep everything undisclosed. This is why it is important to advocate for laws and regulations to determine explicitly what is the type of information that can be considered commercially sensitive and that this definition is as narrow as possible.

Another area where confidentiality issues have traditionally existed is the defense sector. Agencies that contract using confidential budget will typically not disclose details such as specifications and plans of facilities, weapons or machines. While this information is secret because of security reasons, the citizen has a right to know at least some of the basic information including contractor name and value of the contract.

Handle information with care, the way you handle it can affect relationships -
Don



All these situations emphasize the fact that citizens' oversight is important even when the complete data is not available because of confidentiality issues. Regulation regarding these subjects is country-specific and it is thus vital to understand which information should always be made available. This would allow the practitioner to determine if the information is not being disclosed because of a regulatory restriction or if it is because some of the parties don't want to give access to the data. For confidential data, citizens might be able to obtain information regarding these aspects after some time, when it is unclassified.

How to do it?

Context Analysis

One of the first things to do is to analyze your environment - the forces that will influence your activities, such as laws, institutions and people.



This chapter will help you to conduct a context analysis. It is divided into three parts:

- ▶ What is the legal environment (for contract disclosure and participation)?
- ▶ Who are your key stakeholders?
- ▶ What are other issues to consider?

And remember, it is difficult to really get to know your environment by sitting in an office. Doing a context analysis means talking to people and asking questions. Context analysis thus already involves some strategic outreach to other actors whose work and interests will influence your open contracting activities.

Also, once you begin your open contracting intervention you will continuously need to reflect on your 'operating environment'. The context that you work in is not static. It changes all the time. Keep analyzing these changes and how they impact your open contracting interventions.

Open contracting is an evolving process as it involves disclosure and participation. Be creative, innovate, and try different strategies to deal with new situations. - **Felipe**



What Is The Legal Environment?

Laws, regulations and standards can make contract disclosure and participation easier or difficult. Most countries do not yet have strong provisions for open contracting. Practitioners often have to become very resourceful and creative in accessing information and in participating in contracting processes.

LAWS AND REGULATIONS

The first aspect to keep in mind is the legal framework in which you will conduct your open contracting intervention. More details on the legal framework will be covered in later sections of this book.

The first laws that you want to look at, if your country has them, are the procurement, access to information and citizens participation laws. They will include key provisions on what has to be disclosed, how, to whom and when. They also determine what your right is in terms of participation - when, where and how you can participate in general in public interest issues. These laws will affect how you can engage in procurement planning and evaluations or contracts implementation.

There might be other laws that contain helpful information, such as regulations for public private partnerships, concessions, electronic data or sector specific issues. Remember to check if there are regulations or guides pertaining to these laws. These regulations often

specify requirements and commitments in more detail than the laws.

Also have a look at local and subnational level regulations. They might have different requirements from the national level.

In any case bear in mind that the mere existence of laws and regulation does not ensure that they are being implemented in practice.

STANDARDS AND VOLUNTARY COMMITMENTS

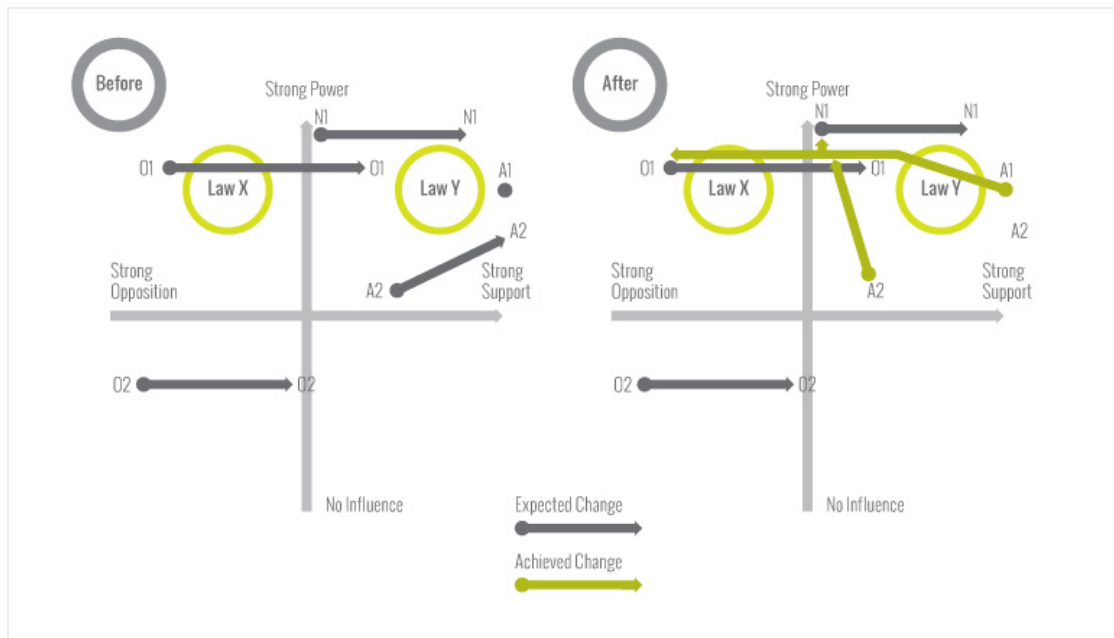
In reality, countries often do not have access to information laws or these laws are not being implemented in the way they should. This makes accessing contracting information and participating in the different phases of contracting more difficult, but not impossible. If there are no laws, you can look at international, regional or local standards as well as voluntary commitments, such as international transparency initiatives.

Contract disclosure and monitoring can be a question of image. Some companies or government institutions might be interested in publishing contracts or in contract monitoring on a case-to-case basis. For your context analysis, check the websites of the government agencies and the contractor company.

Who Are The Key Stakeholders?

A stakeholder is a person, group of people or institution who has an interest in or is affected by open contracting. Earlier chapters introduced the open contracting family.

A stakeholder analysis is conducted in order to identify the roles of the various stakeholders vis-à-vis your open contracting intervention. It helps to identify the lines of accountability and power dynamics. In this way the stakeholder analysis exercises can later become an important tool for advocacy activities, so that the findings and recommendations actually reach the relevant stakeholders.



In the above representation, the different key stakeholders and the contextual elements are placed in a chart. Their positions will depend on their degree of influence and their degree of support for the position you are advocating for. In the first chart the stakeholders are just positioned and their ideal positions as a result of the advocacy have been defined. In the second chart the priorities and the strategy to reach the results defined by the first draft are identified and the actors relation and interaction are also identified.

What Are Other Issues To Consider?

There are some other issues to think about when you analyze your playing field:

► Risks

We already mentioned risks in several occasions and the book has a dedicated section on risk. You need to analyze very closely what the potential risks are related to your open contracting interventions and how you can manage them so that they don't jeopardize your possibilities of success.

► Capacities

Capacity in terms of technical knowledge, availability of tools and available funding is key when you begin to design your open contracting interventions. You might want to map out your own capacity and the capacity of your partners before you get started so that you manage your own expectations and those of others.

How to do it?

Constructive Engagement

Setting the proper tone of engagement is key to starting the whole open contracting process. No matter what kind of environment exists, engagement between and among the interested stakeholders can happen if approached in a constructive manner. Informed by the insights from the context analysis, we can pursue the open contracting agenda and let the game plan proceed by creating the space for all interested stakeholders to come together.

We can no longer think in stakeholder boxes. It's exciting to redefine partnerships and constructive engagement! - **Claire**



Coming Together

The initial effort to reach out to every important stakeholder should already convey sincerity to constructively engage in open contracting. The kick-off meeting should make everyone feel welcome and establish the rapport. The dominant spirit in the room should be one of urgent collaboration based on trust and mutual effort to help each other. However, we should still keep in mind that everyone has their material interest and selfish motivations for being present. As this is the very first meeting, practitioners should not be asking for information and documents right away.

The agenda of the first meeting should level off on the following:

- ▶ What current issues on contracting confront the stakeholders?
- ▶ How are these affecting the stakeholders, the communities and the country as a whole?
- ▶ Why should the stakeholders be involved in addressing the issues?
- ▶ Can stakeholders come together to address them? If so, how?
- ▶ What capacities are needed to address them?
- ▶ What capacities can stakeholders actually bring into the process?
- ▶ Are the stakeholders willing to contribute these capacities?

These are crucial questions that need to be openly discussed and they will lay the ground for moving forward with the open contracting advocacy. They will help to lay out what to expect from the collaboration, make each stakeholder comfortable with the process, and convince them to continue on with the engagement.

The kick-off meeting need not be a one-time meeting. Not all the questions will necessarily be answered in just one sitting and the process should provide sufficient time for the stakeholders to think and reflect on them. However, there should also be a designated time when everyone has to make a decision.

Meeting Of Minds

When the decision has been made and the stakeholders have converged on a clear mission and objectives, some operational aspects of the collaboration should be set. This will ensure that the common interest is clearly and explicitly articulated, for this will bond stakeholders together to commit time, capacities and resources to effect the needed change.

When this meeting of the minds takes place, the government, private sector and civil society actors should take note of the following:

► Will it be a loose or formal setup?

The stakeholders will have to decide what kind of setup it will be. The three sectors - government, private sector and civil society - may not automatically see collective work as part of their core responsibility. Formalizing such tripartite arrangement may not come instantly. This may, however, be considered when they have worked together and started accruing the incentives and their capacity built. It entails providing a structure with leadership and secretariat roles established to keep the collaboration together. Issues related to the running of the group should be captured in minutes of meetings and can be binding as and when needed.

Consider the special case of setting up the engagement between government and civil society. Two scenarios need to be considered here, namely one that has an existing policy framework for citizen participation in the process, and another with none. In the latter case, civil society may need to innovate to formalise or legitimise its engagement and action. Experiences in various countries showcase the use of the Memorandum of Understanding (MoU) as a useful tool to make the engagement between civil society and government legally binding. The MoU could define the responsibilities of each party as well as the terms, conditions and coordination structure of the partnership.

If there is an existing policy framework for participation, then civil society will simply have to invoke it. The option to enter into an MoU may, however, still be considered

if the policy has limited or no provision on necessary logistical requirements for collaboration.

In either of these scenarios, it is key to include any 'missing voices' who may not have been identified by the context analysis. Constructive engagement also means the engagement should be open enough to accommodate new, unorthodox, and even some opposing groups.

► **What will be the internal accountability mechanisms?**

Establishing clear and open accountability mechanisms is key to building and maintaining trust, as well as ensuring that the collaboration lives up to the principles of engagement. A clear line of reporting and accountability will enhance collaboration and reduce the risks of weak parties.

► **How do we get resources to work?**

The main purpose of the engagement of the stakeholders is to promote open contracting. This can only be done effectively if the needed human and financial resources are available for the engagement to yield its objectives. It is therefore very useful if the group agrees on the method and ways of accessing the resources needed to engage in open contracting.

Open contracting is opening up to work with others and contribute individual efforts to make them collective to make things happen - **Gilbert**



Examples Of Constructive Engagement

The following are some real world examples of Constructive Engagement.

G-WATCH TEXTBOOK COUNT

The Affiliated Network for Social Accountability in East Asia and the Pacific (ANSA-EAP) is a regional non-profit organisation based in the Philippines. It aims to help improve governance by mainstreaming the social accountability approach. A project it has documented features the Textbook Count: nationwide monitoring of textbook procurement and delivery. It is a partnership project between the Department of the Education and a civil society consortium. Governed by an MoU, the department welcomed the civil society monitors to observe the contracting process, visit the warehouses to inspect textbook production, deploy community volunteers to check textbook deliveries at the school level, and report observations. The partnership has gone into several iterations now and is now considered institutionalised within the department. (www.ansa-eap.net/ansa-eap-videos/tales-tools-and-techniques-of-social-accountability/)

GLOBAL INFRASTRUCTURE ANTI-CORRUPTION CENTRE

The Global Infrastructure Anti-Corruption Centre is an alliance of international, regional and national organisations, set up to work together to promote the implementation of anti-corruption measures as an integral part of government, corporate and project management. It also agrees, on a case-by-case basis, on projects on which they can cooperate in order to achieve the objective. The alliance is informal. (www.giacentre.org/alliances)

UGANDA CONTRACT MONITORING COALITION

The Ugandan Contract Monitoring Coalition comprises 21 members, including engineers and contractors. It actively collaborates with the Ministry of Education, Energy, Agriculture and Uganda Industrial Research Institute, working on promoting transparency and accountability issues in public contracting. Initial discussions on the collaboration surfaced the difficulty of the public agencies in signing an official MoU as a condition for the collaboration. However, the needed structure was put in place, and the government agreed to collaborate with the CSOs and private sector on the basis of a loose network, until they have begun implementing the monitoring of projects under which they will have a formal relationship with the particular sector ministry involved. (www.ucmc.ug)

UK ANTI-CORRUPTION FORUM

The UK Anti-Corruption Forum is an alliance of UK business associations, professional institutions, civil society organisations and companies with interest in domestic and internal infrastructure, construction and engineering sectors. The forum's objective is to help create a business environment that is free of corruption. (www.anticorruption.org.uk)

WEST AFRICA CONTRACT MONITORING NETWORK - WACMN

The West Africa Regional Contract Monitoring Network is a network of national multi-stakeholder coalitions in Ghana, Liberia, Nigeria and Sierra Leone. Its aim is to build capacity and provide learning and sharing platforms to effectively monitor and improve governance in public procurement and contracting processes in the participating countries. Each of the participating countries works through a coalition bonded by simple formal structures catering to country-specific needs. As and when needed, country coalitions sign MoUs and contracts with the regional coordinating institution for implementing projects. (www.wacmn.gacc.gh.org)

How to do it?

Monitoring, Analysis And Reporting

"It is in the interest of Government that citizens can verify its performance. There is no better way to mobilize citizens behind a government program than to give them access to participate in public expenditure decision-making and monitoring."

- Chibuzo Ekwewuo of the Public Private Development Center in Nigeria

Regardless of the stakeholder group to which you belong, we all have a collective stake in open contracting; a stake which confers on us a responsibility to monitor public contract performance. With our exposure to constructive engagement among ourselves, this bit of the book sheds light on how to actually monitor.

Given the diversity of practitioners in the contracting process, the reality of the contract monitoring experiences are likely to be quite varied and may take place across a variety of scenarios. Some practitioners may focus more on a particular stage. Or the enabling environment for monitoring may differ across contexts, likewise making the monitoring methods differ. However, because we agree on the principles of open contracting, the aims of the tools are the same and can be widely or narrowly adapted to fit our realities.

The first tip is to read on and find out what works best given your levels of energy to engage, capacity, access to contract monitoring partnerships, and, among other things, the kind of information to which we have access. It is quite possible to monitor according to the contracting process, so we shall provide insights into monitoring at various stages, as well as consider monitoring where we may or may not have access to information. Bear in mind that this is a guide, not a 'silver bullet' prescription - a genuine appreciation of your context will be essential as you start. Heads up everyone!

Monitoring At The Contract Planning Stage

From our basic understanding of the contracting process, we know that *planning* is key to public service delivery. It is therefore a key area for practitioners to monitor and report on. Whatever tool you decide to use at this stage, your monitoring tool should be designed to respond to whether adequate planning was undertaken for the contract process in question. Possible questions that your monitoring should address include:

- ▶ Was an assessment of public needs undertaken?
- ▶ Were the identified public needs prioritized?
- ▶ Was there an identification of resources required to meet the identified public needs?

- ▶ Were costs analysed with relation to the benefit?
- ▶ Were there any environmental or social impact assessments conducted?
- ▶ Was the decision to fulfill a particular public need justified in relation to other competing public needs?
- ▶ Did the public body estimate the time it would take to deliver the project?
- ▶ Did the public body determine any risks associated with the project?
- ▶ Were the priorities and suggestions of the community taken into account in prioritizing the relevant project and/or contract?

It seems obvious that monitoring at the stage of planning is a rigorous process and requires access to a lot of information.

ACCESS TO INFORMATION TIPS

In order to access contract planning information, consider the following tips:

- ▶ Secure access to the approved budget as soon as it is published (usually in an official gazette, increasingly available online). This would provide preliminary information on the plans for which public entities have budgeted.
- ▶ Where possible, get involved in public hearings for the budget and for social projects or develop a partnership with other practitioners that participate in the public hearings for the budget or for social project. This would help you harvest information that would inform budget plans even before they are official.
- ▶ Proactively seek updates from the public body responsible for the contracting process; you can ask them for the project plans for the coming year. Often, a Need Assessment may be found in such plans.
- ▶ Join or maintain close links with grassroots development groups who may have information on planned project plans.

Conduct regular information harvests from websites, newspapers, notice boards, the radio and television. The "regular" part is critical given that such information appears for limited amounts of time before being removed or displaced by new content.

REALITY CHECK IN ACCESSING CONTRACT INFORMATION FOR MONITORING

Some public entities have good records management systems so, in theory, it should be relatively easy to access information in a timely fashion! However, this is seldom the case even where public records management is sound, for a host of human engineered obstacles. It is, therefore, your responsibility as a practitioner to be on the constant look out for information and to act quickly and efficiently with your requests at contract planning stage if you wish to engage before plans turn into implementation...

Where you have an access to information law or you have laws that allow citizens participation in one way or the other, it is good to leverage such rights at the contract planning stage.

In the absence of access to information laws, it would be very helpful for your monitoring to have a great media information harvesting plan so that information that is routinely circulated in mass media can be leveraged.

POSSIBLE TOOLS FOR MONITORING CONTRACT PLANS

The tools to be used at the stage of contract planning would depend on factors such as the purpose of the monitoring and the depth of monitoring data analysis to be conducted. The planning stage often requires participation of citizens, making **social audit tools** especially helpful. Checklists are simple and elegant tools for this stage as well.

FURTHER CONSIDERATIONS FOR MONITORING AT THE CONTRACT PLANNING STAGE

You may also wish to consider the following questions that may affect your ability to monitor the contract planning stage:

- ▶ Has the public entity called CSOs, local communities and other groups who will be directly or indirectly impacted by this investment to discuss the project design?
- ▶ Was sufficient time and visibility given to the consultative process?
- ▶ Bear in mind that the more complex a procurement (e.g. an interstate highway comprising multiple contracts and subcontractors), the greater the number of public hearings or meetings a public entity should hold. Sometimes a contractor will host these consultations as part of the contract, so be mindful that there are different arrangements for public outreach and consultation.

Monitoring the planning stage for public contracts is important in two ways: from society's perspective, participation creates a sense of empowerment and engagement on the matters of public goods. For example, in a multi-year national roads project undertaken in India, the Public Affairs Center engaged in citizen monitoring in 2008 for and learned that 76% of beneficiaries believed community monitoring is needed whilst 64% would want to volunteer for such monitoring. This case reflects one of the open contracting principles, which states the public's right to participate in public contracting. It also reflects the open contracting principles from the perspective of public entities: the broader the array of stakeholders participating in planning, the more effective these investments become in terms of adequate service delivery, legitimacy and performance.

Monitoring At The Stage Of Tendering Through Contract Award

During the tendering phase, one fundamental question is: *what kind of procurement method is being used?* The most common types of procurement are open, selected or invited tendering. But governments are constantly trying to innovate around this point. Electronic auctions are one example. Regardless, governments should disclose a justification as to why a specific procurement method is selected. This decision has to be based on a combination of factors such as urgency (is it to build temporary housing in an area devastated by a cyclone?), necessity (is it for national security, food provision, transport?), and impact (will the project displace citizens from their land?). Procurement method has everything to do with these life-changing activities. And the chosen procurement method influences the type and amount of information you would get regarding the contracting process.

TYPE	WHEN IS IT USED?	HOW?
Open / Competitive: Post-qualification	Many contractors meet the qualification requirements	Any company can bid for the contract, though only those meeting disclosed eligibility requirements will be considered
Restricted / Competitive: Selected, Invited, or Pre-qualification	Only a limited group of contractors can provide this service	Invitations to bid are sent only to those have the necessary expertise. If necessary the number of such bidders is limited through a pre-qualification process
Competitive, then Negotiated	Following competitive bidding, if final prices are still over the public budget	Government negotiates with successful bidders in order to lower costs, possibly by reducing scope
Single Source / Direct: Negotiated	In cases of emergency or when a single contractor is particularly well placed in terms of available resources or experience	Government publicly justifies this option and establishes a direct contract with the company if negotiations are successful
Request for quotations/ Shopping	When contract purpose is similar to several past ones and government has already a previous registry of companies	Government specifies its requirement and requests quotations from multiple registered companies, selecting the lowest price

Key questions to ask at this stage include:

- ▶ Was the tendering process advertised?
- ▶ Were the advertisements conducted through multiple channels?
- ▶ Did the advert contain clear criteria for contractor selection?
- ▶ Did the advertisement contain clear information on bid submission procedures?
- ▶ Were the bids opened in public?
- ▶ Was the winning bidder among the original pool of bidders?
- ▶ Was the final selection justified?

You would also need to determine the professional and technical experience of bidders. This would include years of experience, evidence of completed projects, evidence of financial capacity, evidence of conducting similar projects, evidence of human resource capacity, evidence of sufficient equipment, prices quoted with relation to standard prices, responsiveness of contractors application to the proposed project, verification of physical address.

Tools recommended for monitoring the tendering process include important tools such as Integrity Pacts as developed by Transparency International. An example of the successful use of Integrity Pacts arrangements is the case of Colombia, where an anti-corruption agreement in the pipe manufacturing sector was signed. Following a methodology created by Transparency International, companies managed to significantly reduce the level of bribes throughout the bidding process. Today, the Colombian government pays, on average, 20% less for basic sanitation works contracts than they did prior to the agreement. Companies in the sector have also increased sales for infrastructure works by 25%.

Remember to examine the prices - this is taxpayer money, your money! Wouldn't you want to know how much of your money your son or daughter has spent on shopping? In practice, this means checking whether prices are considered fair and competitive, especially if there are other suppliers who are making offers. Start with a simple historical comparison: check past processes in terms of size and type of service, being mindful of inflation or rising prices over time. Although different conditions may apply to each case, in general, there is a trend in terms of size, final price and tender qualifications. Some countries stipulate official price lists for each kind of material that is purchased by government, so it is important to look for those on the relevant website or in the archives of the relevant agency.

Reality check - participation is emerging in some of the most unlikely places! And this is thanks to patience and persistence by civil society that did not originally start with an environment open to participation. For example, In Mexico, the 2009 Amendment to the Procurement Law included the adoption of the "Social Witnesses" program, crafted by the NGO Transparencia Mexicana. Social witnesses, independent civil society observers, are legally required to observe significantly large procurements as specified by the law. In the first year of introduction, social witnesses participated in 67 procurements valued at a total of 109.651 billion pesos (about US\$8.87 billion). Initial reporting suggests that the program has reduced public contracting costs while increasing competition. Similarly the Nigerian Procurement Law allows for participation by CSOs and professional body participation in every procurement process. In some countries such as Columbia and Brazil, there are other legal basis that allow citizens to participate in projects of public interest and these could be relied upon to monitor the tendering process and to access the information required to monitor.

Contract Execution

During this phase, one basic question to ask is whether the contract is available.

In order to get this information, you would need to:

- ▶ Find out which public entity is responsible for awarding the contract.
- ▶ Check the website of the public entity for contract information.
- ▶ Make a formal request to the public entity for the contract document.
- ▶ As much as possible, get other people involved; collective action is likely to be more effective.
- ▶ Where you have an access to information legislation or a legislation that provides for citizen participation, rely on such legislation to request for information.
- ▶ Where you have not found a legal basis to make a formal request for the contract document, make a request anyway! Caution, it is advisable to do it with other people and create some buzz around the request in the media; leveraging the public's interest and connection to public contracting processes.
- ▶ Where you have signed an MOU with the public entity as part of a constructive engagement, use that avenue to try to access information on the contract.
- ▶ Where access to the contract documentation is limited, you and other practitioners within your community should mobilize to perform social audits among beneficiaries.

The Resources section of this book has helpful resources that contain guidelines for accessing information in a number of scenarios and templates on how to make a request for information.

Possible Scenarios For Monitoring Contracts

CONTRACT IS NOT AVAILABLE

In the absence of a contract, checklists containing standardized questions can be your best friend. These are the most common tools developed by stakeholders involved in the contracting process to assist with comparative analysis. The basic utility of checklists is that they serve as a guide to the user. They can reveal the level of compliance, performance or effectiveness.

Unless designed to collect responses on reasons why specifics in the contracting process have succeeded or failed, checklists are often very basic, requiring the users to tick "yes" or "no" in response to what has been observed. In practice, it would seem that existing practitioners in the civil society sector manually analyse the contracting information they gather using checklists. Manual analysis is carried out by comparing the responses in the checklist to the expected standard at that particular stage of the contracting process.

For instance, a law requires public entities to advertise for bids in two national newspapers for a period of six weeks before bid submission. The checklist would have questions like: Was the contracting process advertised? Was the contracting process advertised for a period of at least six weeks? The monitor would compare the facts obtained from the actual advertisement to the requirements of the law manually and note if they are any gaps or discrepancies.

As a bonus, using the same checklists over time in Excel spreadsheets and/or using IT solutions such as online databases, allows you to compare different contracts more systematically and you will easily expand your operation to reveal trends across a sector, region, agency or among contractors! How powerful! See more under "Analysis".

Field observations also play a key role. Through objective measurements of quality, it is possible to monitor contract execution. Let's say that in your city a bridge was supposed to be built, and after a local observation, you realize that it is not there. Clearly there is something wrong with the contract, be it on the public side, or the contractor side, or both. Photographs should be taken to register and corroborate the claim. If at least one contractor's reports are being produced, it is possible to use this as reference to compare with the observations on the ground.

Another possible starting point is a preliminary version of a contract. Sometimes the final one is not available, but previous ones are. This can be also useful, but keep in mind that this should not be the only source, since it is not official data.

In the cases of countries or multinational companies that apply to international standards, this could definitely be an option for contract disclosure. Equator Principles and OECD Guidelines are two good examples of commitments that should be reinforced in an absence of the contract. If it does not work at national level, contacts should be made to headquarters in the case of a company or an international multilateral organization for countries. Most international development banks - including the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, and the World Bank - have access to information and corruption investigative policies and programs that empower you to conduct your monitoring and report any findings. See each Bank for instructions on how to use these mechanisms to improve open contracting in the projects that they finance.

A useful approach for monitoring in the absence of a contract is social audits. The methodology for social audits was pioneered by the Mazdoor Kisan Shakti Sangathan (MKSS), the Association for the Empowerment of Workers and Peasants in India and has been replicated in various settings, including Kenya and Palestine. The seven steps used in the MKSS social audits include: defining the scope of the social audit, establishing an understanding of the management of the project or program to be audited, collection of information on the project audited, organizing all data collected and putting it in a summarized format easily understood by the average citizen, distribution of the data findings, interviewing citizens in the community regarding the information provided, and holding public hearings and follow-up of the public hearings.

Let's say you want to do a social audit of a school. Even without the contract, you can gather documents, such as the project budget, plans and the bill of quantity, visit the physical site of the school to check the specifications, materials used and execution, and survey the affected community to see if the project is effective. Technical experts, such as engineers and survey practitioners, can help with the physical assessment at the site and the sampling for the beneficiary survey. The monitors can then compare the project documents with evidence from the site visit, including photos, videos and technical assessments, and the community feedback to determine the project's effectiveness.

A variation of the approach is to hold a joint working group or convene a monitoring committee, rather than a public hearing which may be more confrontational or intimidating. The working group or multi-stakeholder committee can review the findings and jointly develop solutions to address identified concerns.

CONTRACT AND CONTRACTING INFORMATION IS AVAILABLE

So you have the document, what to do with it? A first option would be to actually monitor contract compliance. You need to know whether the contracting parties are meeting their expectations and commitments stated in the contract, mainly in terms of costs, time and work. The main source of information to compare with would be interim reports made by the public entity, the contractor and/or the government audit body.

There are certain aspects that should always be checked. Regarding the purpose of the contract, it should be clearly stated what the contract is about. The purpose should be as specific as possible and should not leave room for ambiguous interpretation. Codes such as UNSPSC can be very useful for this purpose. The object must be linked with the mission and plans of the entity. Furthermore, the scope and specifications for each contract must be clear and must comply with the corresponding specific standards. It is important to check whether competition was assured or whether a specific contractor was favored because of technical details put in the tender.

Regarding the parties, one should establish details regarding the public entity involved. Is it operating at the central level and if so, does it have any jurisdiction at state or local levels? Is it a local authority? Different public entities may have different contracting regimes. The identification of the entity responsible for the contract is also important to serve as a first point of contact within the government to ask for more information about the contract. Conversely, if the public entity responsible does not cooperate, you might contact the central procurement agency to facilitate your monitoring - oftentimes they serve as a regulatory authority who conducts no procurement, but rather oversees the country's procurement practices and is therefore a critical point of accountability.

Next up, who is the contractor? Is it an SME, an international supplier or even a state-owned enterprise? Is the contractor part of some registry of suppliers? Is it blacklisted? Is it legally registered?

Do not underestimate the importance of being patient as well as seizing the moment, especially when collaborating with politicians that need to navigate a web of interests and often have narrow windows of opportunity to introduce reform - **Sara**



Aspects relative to the selection method, the time and the place are also important. How was the contractor selected? Was there a competitive and transparent process that led to the award of the contract? When was the contract signed and how long will it take to be completed? Are there incentives to either complete the contract on time (or even before the established term), or risks associated with delays? Where is the contract to be carried out? Does it involve several municipalities, which communities will it affect?

Continuing with the analysis, a key element is the exact amount of public resources that will be allocated for the contract. In addition, it is important to establish exactly how these resources are to be invested, where the money is coming from, if multilateral agencies and organisms are involved, how payments are to be made and if payments in advance have been agreed. It is also vital to know whether budget for future years has been committed, as usually happens with certain public works and PPPs because of their complexity.

The actual contract implementation is hardly ever a straightforward story. Expect it to be messy. A lot of unpredictable events transpire - think about bad weather conditions or political unrest or a sudden rise in the price of oil that impacts transport. Public entities endeavor to prepare for these situations. For instance, some countries stipulate cost limits to contract renegotiation, let's say 25%. In others, these conditions have to be stipulated in the contract itself. The point is that you need to be prepared for changes along the way, keeping in mind that limits should and do exist as part of normal, healthy contracting practices.

Field observation templates, which are often more descriptive than checklists, provide the opportunity for the user to describe what is happening on the ground. Observation templates also require guiding questions often drafted based on expected standards within the process, such as the procurement law. Like the checklists, these are also often analysed manually and would be difficult to automate. They may, however, provide more context to a scenario than checklists which often just answer basic questions.

For example, a law says the procuring entity shall maintain records of all procurement proceedings after the award of contracts and made available to the public on request at the cost of photocopying. A field observer requests the procurement plan, the minutes of evaluation meetings and memo recommending winners. None of this information is granted to the observer. Upon request from the relevant public entity for the procurement plans, the observer is informed that the records requested were not prepared on account of application of special proceedings. The observer notices that this justification is hollow and reports an issue of non-compliance with provisions of the law.

As previously discussed, a good contract should contain information about the scope and specifications of the work, including the necessary materials. A professional association could take a look and analyse it as a quality check. There might exist invoices for services that were not necessary for the project. The reverse can also happen: 1,000 meters of cable that the contractor claimed to have spent on a facility may be, in reality, only 500 - suggesting that the contractor committed fraud to pocket additional money. The same observation could be applied for the committed schedule. If a work was supposed to be delivered in one year and it is on track to finish in 3 years, monitoring should evaluate the factors that led to the delays to determine if they were reasonable under the specific conditions.

For access to various contract monitoring tools, please see the Resources section at the end of the book.

Reporting

"...It's no longer just reporting the headlines of the day, but trying to put the headlines into some context and to add some perspective into what they mean"

- Bob Schieffer

Now that we have dedicated considerable effort to monitoring, strategically channeling your findings towards an agent that could affect change cannot be neglected.

As you would have noticed, the open contracting community subscribes to a default methodology of working collaboratively. That means reaching out to those change agents closest to the action before moving outward to exert pressure. This section offers tips on how to report findings. As you read along, you may notice that several of these tips are elements of each other, but have been presented in this sequence for better coherence.

COORDINATE YOUR INTERNAL REPORTING MECHANISM

Before you can think about communicating results of your efforts to your target external change agents, your internal communication must be sound. Have you set up a sustainable system for collecting your monitoring information? Have you mined your data and converted it into digestible and easily understood information? Is there a person or people responsible for collating and disseminating the data collected?

For example in Nigeria, the Public and Private Development Centre (PPDC) operates an online portal that automatically collates and analyses reports submitted by CSOs monitoring contract processes. The analysis from contract monitoring when generated however, could be up to 500 pages and counting. Clearly, providing this bulk of graphs, tables and illustrations to other practitioners in this form is likely to yield little or no intervention because it would be difficult for the practitioner to whom the report has been submitted to sift through this tome to pick out what is relevant! PPDC would need to organize within themselves what part of the findings to send to relevant practitioners, group the analyses accordingly, make recommendations to suit the grouped findings, plan how the information would be disseminated and to whom the report will be disseminated to, along with a plan to follow-up on desired actions proposed by the report.

A word of caution - practitioners are often excited when they develop and deploy data collation or analytic mechanisms that churn out analyses from their monitoring exercises. It is easy to overlook the need for these findings to be broken down, tied to recommendations and disseminated in a way that makes them relevant and user-friendly to the stakeholder to whom the report is being sent. Make a pledge to be more strategic in reporting.

A key lesson to keep in mind - if you leave the reporting process to technology, it will be left undone.

DEVELOP A REPORTING STRATEGY

In developing a reporting strategy, several factors come to bear and it may be impossible to provide a finite number of factors worth considering. Some helpful tips include:

- ▶ Consider what you would like your report to achieve.
- ▶ Consider the channels through which the purpose of your report can be achieved.
- ▶ Develop a timing or reporting sequence.
- ▶ Bear in mind that sometimes, you may need to create opportunities and at other times, you would need to take advantage of unexpected opportunities.
- ▶ Put yourself in the shoes of the stakeholder to whom the report would be sent and anticipate the reaction(s) that may follow after the report is received. This would help you to be prepared for further strategic engagement.

- ▶ Bearing in mind the values of open contracting for the purpose of the public good, It is essential to maintain objectivity, impartiality and fairness in communicating the results of reporting as this is essential to building a system that can be trusted.

TIE YOUR FINDINGS TO A REPORTING PURPOSE

As you develop your reports, the basic question to ask is *why does this need to be reported?* Reports often serve various purposes, including:

- ▶ To increase awareness or update stakeholders around a certain contracting process; For example, *Public Body A* may send out a media report updating the public on a public meeting held in *Bodesa* community concerning the prospective land acquisition by Apeco Oil for oil exploration in the community.
- ▶ An independent report aimed at presenting another view; For example, *Bodesa Community Youth Group* (BCYG) may issue an independent report presenting the position taken by the community regarding prospective oil exploration by Apeco Oil which BCYG felt was not sufficiently covered in the report by *Public Body A*.
- ▶ To present findings, recommend and solicit the action of a relevant contracting stakeholder; for example, a social audit being carried out by an NGO called OpenLaosia, for an ongoing contract for the supply of water reveals that some of the pipes are leaking and therefore recommends that the Local Government Council verify the quality of materials being used by the contractor because clearly it is not the intention for newly installed pipes to be leaking.
- ▶ To provide another stakeholder the opportunity to defend or rebut a certain finding, etc.
- ▶ To provide information to stakeholders for purposes of advocacy and policy engagement.

The purpose and other factors that could make your reporting most effective could be considered and developed within the framework of a reporting strategy.

CHANNEL YOUR REPORT WHERE IT MATTERS

- ▶ Document the observations and findings from your analysis and where gaps exist, write down recommendations to address those gaps.
- ▶ Group similar issues within your report together; in other words, find themes within your report and structure the report according to those themes.
- ▶ Look within your coalition or network or within the wider community and link the themes identified in your report to stakeholder groups according to areas of expertise, experience, interest, practical engagement and their capacity to intervene in bringing about the expected change. It is quite possible that one theme would be of interest to different stakeholders in various ways. It is important to identify these so that your report is effectively channeled towards producing change.
- ▶ Draw up a simple communication strategy that links each theme in the report to these identified stakeholder group(s).
- ▶ Break down your report into mini-reports according to the identified themes and relevant stakeholder groups. For several stakeholders, it is likely to be the case that they cannot go through the entire report so that is why it is important to immediately bring out what is relevant to them and recommend the action that you would like from them in the light of their functions and skills.

SEND OUT YOUR REPORTS IN GOOD TIME

Strike the iron when it is hot! Part of a good reporting strategy is making sure your reports are disseminated to identified practitioners in a timely manner. This requires a level of planning and also watchful eyes that take advantage of arising opportunities to advance the ideals of open contracting. Sometimes, you may have the opportunity to make your reports available within a period of time, other times, a one-off opportunity may arise to have your report shared and favorably acted upon. The latter scenario may be unexpected but also has the possibility of being high impact.

In Brazil, for example, local elections were a great opportunity to enhance disclosure of government contracts. Ethos Institute had the idea to invite candidates from host cities of the FIFA World Cup to sign a public commitment regarding disclosure of contracts of the event. All elected mayors signed the pact and it became valid on 2013, at the beginning of their mandate. Some improvements can already be seen and the commitments will be monitored during the 4 years.

COLLABORATE WITH OTHER STAKEHOLDERS

The various skill sets among open contracting practitioners makes collaboration profitable for report findings to be effectively acted upon. It is difficult for one practitioner to take up too much because you could very easily experience burn out. The Nigerian Contract Monitoring Coalition is a good example of a scenario where reports indicating the inability of CSOs and engineers to access contract information was taken up by legal practitioners within the coalition and through this process, a favorable judgement from the court was received and immediately enforced. The Nigerian Contract Monitoring Coalition also made effective use of their media focused members to organize a media campaign informing the public of progress with the entire process. Similarly, through collaboration with public bodies, the African Freedom of Information Centre in Uganda successfully secured the cooperation of the Public Procurement Disposal of Assets Authority.

A word of caution - although collaboration in open contracting does bring results, it is often a long and arduous process and needs a consistent engagement with the process. This is why you need to leverage on the strengths of various practitioners to act within their areas of expertise, experience, interests and fields of influence.

A key lesson to keep in mind - practitioners should help each other by collaborating within the open contracting process.

FOLLOW UP ON DISSEMINATED REPORTS

The reporting process is most effective when you follow-up and track your reports. A few useful tips include:

- ▶ When you send out your reports to the relevant practitioners, specifically request to be provided feedback on any plans of action.
- ▶ Follow up, Follow up, Follow up!!! Accept the fact that the report serves the purpose of providing information without requiring any action, meaning that consistent follow-up with the practitioners is key and key to advancing the ideal of multi-stakeholder participation in open contracting.

MAINTAIN CREDIBILITY THROUGH STRATEGIC REPORTING

Trust between open contracting practitioners is an essential part of the continuous contracting process. Sometimes, the burden of building trust within the contracting process is contingent on the feedback mechanisms developed within reporting. A situation may arise where your report contained a misrepresentation of facts and even when you are not necessarily at fault, it is important to provide feedback and correct false impressions.

A whistleblower informs you that an influential public body has sold a large number of its public assets in breach of the contracting practice and without regard to the "public good-public resources-public disclosure" test. Considering that the public body is likely to ignore any request for information regarding this process, you nevertheless write to the public body but you also send out a press release informing the public that you have made a request for information concerning the sale of certain public assets. As a result of the media coverage, it becomes public knowledge that Public body X may have carried out a sale of public assets. In the meantime, Public body X receives your letter and responds providing evidence that the sale of public assets went through the open contracting process. At that point, it is important that you show your objectivity and go through all the media channels to make known the feedback you receive was done in the first instance. A fair and balanced action such as this would demonstrate that your interest in the contracting process is for the public good; making you a credible and reliable source.

SOCIAL MEDIA ALERT: CONTENT AND CONTEXT ALWAYS MATTERS

Social media has changed our lives; suddenly information is viral. Clearly this presents a huge opportunity to share reports from the contracting process with others. A word of caution; make sure that the context of your message is not lost. For example; social media networks such as twitter have an alphabet count of 140 characters. In your quest to make your message fit, you could miscommunicate. Some tips to avoid this are:

- ▶ Plan your tweet (or other social media) messages beforehand and make sure that the context is not lost.
- ▶ If you are monitoring and reporting from a live event; for example a bid opening process or a community consultation for prospective oil licensing, cross check your message carefully before sending out. Social media are fluid and misrepresented information could go viral in a matter of seconds.

MAINTAIN ETHICAL MEDIA REPORTING STANDARDS

As recognized nation builders and freedom of expression advocates, the media is an important open contracting stakeholder. As such, media reporting needs to be free from bias. It is considered unethical for media practitioners within the open contracting community to carry out any practice that would compromise the independence of the media. Therefore the media is generally not supposed to accept fees (or special favors) and other practitioners are not expected to pay fees in exchange for media coverage.

How to do it?

Closing The Loop

All too often, practitioners stop at reporting - we collect evidence through research or monitoring, produce a report and assume it will make a difference. We may invest a lot of time and effort in developing feedback mechanisms, but to be effective these must lead to concrete actions that address the identified problems. Closing the loop means that problems are resolved to the satisfaction of affected stakeholders.

Let's say we are monitoring a road project. After accessing information on the contract, assessing performance against the contract and particular standards, and conducting beneficiary surveys, we have produced a report with recommendations. This report includes evidence of the use of substandard materials, as well as recommendations to change the materials. As part of our collaborative approach, we engage government officials, the contractor and community members in a committee to address the findings of the monitoring. Together the participants review these findings and recommendations, and the contractor explains that he was unable to source better materials. The participants agree to jointly mobilise better quality materials, the contractor replaces the materials at the company's expense but benefits from reduced maintenance costs - and a better, more sustainable road is built.

This example shows how the problem - substandard materials in a road project - was addressed through collaborative engagement and ultimately resolved to the satisfaction of affected stakeholders. The feedback mechanism - reporting and multi-stakeholder problem solving - has worked and the loop has been closed.

As with constructive engagement, closing the loop requires an understanding of the incentives and capacity of the stakeholders involved. Building relationships of trust at the early stages of intervention, such as inviting participants from different sectors (government, private sector and civil society) to needs assessments and capacity development workshops, can help further down the line when problems are identified and need to be resolved.

In addition to ensuring the resolution of particular problems, engagement or advocacy for policy changes can improve standards for greater development outcomes.

Change can only happen through collaborative work and acting against all odds - change through open contracting - **Florence**



Advocacy For Changes In Policy

Advocacy refers to the encouragement, promotion or lobbying for political, economic or social change in institutions and structures towards a particular goal, such as open contracting for the public good.

Various methods or communication channels can be used to achieve advocacy objectives, including meetings with target audiences, press releases, press conferences and campaigns. For an example of a press release that highlights good practice and risks, please see the Resources section.

The communication channels and products should be tailored to the context and appropriately sequenced or carried out. For example, it is helpful to involve the target audience - say, a particular ministry - in validating your findings and recommendations before launching a mass media campaign.

It is also important to understand the opportunities and constraints of the target audience in order not to raise expectations beyond the achievable. For instance, not all contracts across all sectors may be disclosed if public entities do not have systems in place to manage such disclosure.

Finally, we should not bombard our target audience, but ensure a strategic intervention that optimizes relationships, including with journalists and advocacy allies, and presents our message in a clear, consistent manner.

Successful advocacy starts with a strategy, which involves the following:

CONTEXT ANALYSIS

- ▶ What is the issue at hand?
- ▶ How does this issue fit within the wider dynamics (conflict, power relations, poverty) in your society?
- ▶ What information is available (research findings, etc.)?
- ▶ What are the lessons learned from what has been tried before?

DEFINITION OF OBJECTIVES

- ▶ What needs to change?
- ▶ Why?
- ▶ How can change be achieved?
- ▶ Who can affect this change?
- ▶ What is the timeline for the change to take place?

DEFINITION OF TARGET AUDIENCES AND STAKEHOLDERS (STAKEHOLDER MAPPING OF INTEREST AND INFLUENCE)

- ▶ Who are we targeting with our advocacy?
- ▶ Who would be affected by or interested in our advocacy?
- ▶ Who could support us?
- ▶ Who could oppose us?
- ▶ Who is neutral or undecided?

DESIGN OF MESSAGES - CLARITY IS KEY!

- ▶ What is our core message?
- ▶ Which key messages can be developed to support our core message?
- ▶ How should we tailor them to best reach our target audience? (Packaging)
- ▶ What channels and messengers should we use? (Delivery)

DEVELOP A PLAN

- ▶ What should be done?
- ▶ What resources do we have?
- ▶ What is the timeframe?

EVALUATION OF IMPACT AND ADAPTATION

- ▶ How do we know if we have achieved our desired results?
- ▶ What indicators should be developed?
- ▶ How should we go about monitoring progress?
- ▶ What are our lessons learned?
- ▶ How can we adapt the strategy?

Once completing this strategy, we've spread the word! Any success?

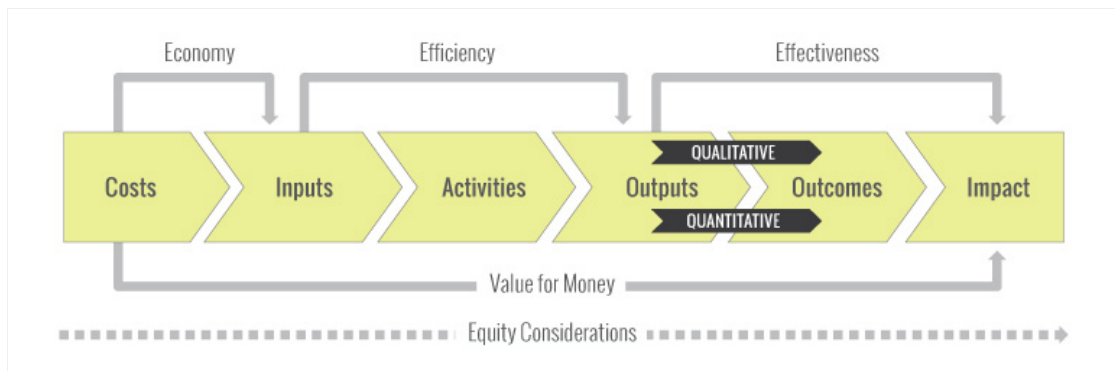
As there are many drivers of policy reform, attribution - inferring the cause of behaviour or ascribing credit to a particular source - is difficult. 'Success' will likely be the result of collective action with like-minded agents of change. We will have a sense of whether we have achieved results if public debate changes to reflect the advocacy aims and if there are references made in the change in policy and practice.

In order to facilitate the access of contract information, it could be interesting to advocate for 'contracts for the people' where citizens or CSOs are able to easily understand the content of the contract and its consequences on their lives. It would also be interesting to promote initiatives to centralise contract information for industries such as mining, which would allow for a comparison of the contents of various contracts and would facilitate better access for all interested parties.

How Do We Know We Are Making A Difference?

It is important to establish a framework that reflects the collective goals and objectives of our open contracting activities. We refer to the process of tracking our own progress and impact as Monitoring and Evaluation (M&E).

The generic context for such an evaluation is a results chain, as presented below. Though the precise terminology can vary between countries and contexts, it is considered good practice to monitor the cost of inputs, whether or not the inputs led to outputs (i.e. deliverables), and whether or not those outputs contributed to the intended outcomes and long-term impacts. Such an approach provides the basic information needed to assess the economy and efficiency, and ultimately the effectiveness and value for money, of the open contracting activity.



A baseline helps us establish the context and define the elements that we want to influence or change. Those elements will typically relate to the different pieces of the open contracting theory of change graphic, which is described at the beginning of this section - namely, issues related to capacity, incentives, disclosure, participation, accountability, trust, performance, and legitimacy. We may set specific objectives within the broader enabling environment (macro), within the contracting process or even within a particular contract (more micro). Understanding the existing standards, accountability dynamics, current quality of contracts, actual costs and performance, and existing grievance mechanisms or problem solving channels will let us establish our results framework.

The baseline is often not conducted for a variety of reasons - financial, capacity or just because it is not considered as a priority. In certain cases, the baseline can show that open contracting is not necessarily bringing positive consequences, or can distort competition. The indicators used to measure a baseline should remain measurable over time. In addition the constitution of a baseline, data might require the use of a control group - one that is not affected by the contract - in order to measure some of the socio-

economic changes that result directly from the contract. This type of measurement is complex.

Open contracting is the best way to increase accountability for the end result for the end-user - **Otgoo**



Determining A Results Framework

A well-designed results framework will allow us to determine not only whether the desired changes have been achieved, but also whether those changes can reasonably be attributed to our open contracting activities. When defining such a framework we should collectively determine or review our objectives and set indicators (measures of change) that are SMART - specific, measurable, achievable, relevant and time bound.

We therefore need to be clear about the target agents of change (who should take the action), the target level (e.g. district, country, or multiple countries) and the change we want to see within a certain timeframe.

Qualitative indicators (e.g. quality of contracts) are particularly challenging to measure. We need to be clear from the beginning about what we mean by 'quality'. For example, there should be clarity around the terms and conditions of existing contracts, and the change we want to see.

The results framework (sometimes referred to as a logical framework), as presented in generic form below, provides a valuable summary of the desired outcomes and how they are expected to be achieved by the proposed activity. This framework is an important document that should reflect a collective vision and be populated in a participatory manner, so that it is owned by the change agents contributing to its implementation.

The objectives and indicators we set for the results framework should reflect what we are capable of delivering within a certain period of time. There should be a logical flow that enables us to say 'if this happens - then that will happen' until we achieve our ultimate goal. We need to consider the following factors: baseline levels, past trends, needs and gaps, and the capacity and logistics to achieve targets.

This framework should include our inputs (resources required), actions or activities, outputs (short-term deliverables), outcomes (medium-term changes) and impact (long-term goal).

FRAMEWORK ELEMENTS	KEY PERFORMANCE INDICATORS	MEANS OF VERIFICATION	RISKS AND ASSUMPTIONS
Objectives: These are the desired outcomes.	What are the conditions that suggest the intermediate results have been achieved - These measures of change are used to assess results.	Baseline data. Sources of data.	This section should state underlying assumptions that have been made in the design process, and any of the risks or factors that may influence the process.
Outputs: What will be achieved in terms of products, services and skills delivered to the beneficiaries. Outputs are the tangible results of applying inputs and undertaking activities - they are the deliverable products stated as results.	For each output there must be indicators that can be monitored. These must measure what is important, must be plausible and must be targeted in terms of quantity, quality and time.	The points contained in this column answer the question, "How will we be able to measure our indicators?" The value of an indicator is limited by the means available to verify it. Verification in some instances may simply be through effective recordkeeping, in other instances it may require specific data collection. Means of verification must be realistic and achievable.	This section should state underlying assumptions that have been made regarding implementation and management, and any of the risks that may need to be managed in an ongoing fashion.
Inputs: Activities and the resources required to achieve them. List the activities, followed by the resources that will be required. Activities and resources applied effectively will lead to the outputs in the section immediately above.	These indicators should be SMART - S - Specific, M - Measurable, A - Achievable - R - Relevant and T - Time-bound.	This column captures the source of the information that will tell us whether or not our indicators are being achieved.	This section should state underlying assumptions that have been made regarding implementation and management, and any of the risks that may need to be managed in an ongoing fashion.

As an example of preparing a results framework, let us say that we are working with particular public entities to disclose contracts, while working with community-based organisations, journalists and parliamentarians to monitor or oversee these contracts.

We may go through the following process to determine our results framework:

- ▶ Ensure stakeholder consultation and participation - ensure engagement of and orientation to intended users.
- ▶ Translate problem statement, program goals and objectives into results framework.
- ▶ Establish scope of the M&E plan.
- ▶ Develop results framework.
- ▶ Determine elements to be monitored and evaluated.
- ▶ Define indicators and identify data sources.
- ▶ Determine M&E methods for data and information collection.
- ▶ Develop data collection plan and responsibilities.
- ▶ Set targets and collect baseline data.
- ▶ Define reporting system, use and dissemination of results.
- ▶ Plan for mid-course adjustments and adaptation of strategy.

Setting Objectives And Making Them SMART

As a community of practice committed to open contracting, our overall objectives pertain to:

- ▶ Strengthened capacity for disclosure and participation, including oversight.
- ▶ Greater quality and disclosure of public contracts to promote accountability.
- ▶ Enhanced opportunities for participation and oversight throughout the contracting process.
- ▶ Improved performance of contracting.

If we agree on these objectives, how can we make them SMART? How can we make them more measurable? The following examples may be useful SMART indicators:

- ▶ At least X functioning online and offline information systems facilitating regular disclosure and oversight in Y district or country by 2015.
- ▶ Increase by X% in the number of contracts disclosed by Y (public entity) in Z districts or countries by 2015.
- ▶ Increase by X% of opportunities and mechanisms for participation of both citizens and oversight bodies in Y (district or country) throughout all stages of contracting by 2015.
- ▶ Reduction by X% in time and cost overruns in Y sector or responsible body by 2015.
- ▶ Increase by X% in satisfaction levels of communities affected by Y contract.

It is important that we are clear about our means of verification, the sources of data that will be used for the indicators. These may include public entity records, financial management reports, minutes of meetings, assurance reports, evaluations and stakeholder surveys.

We also need to be clear about risks and assumptions, the external factors that can influence the process. For example, security conditions may dictate whether monitoring is feasible, or we may assume incorrectly that the contract exists in order to be able to disclose and oversee it.

Quantitative And Qualitative Methods

We should use both quantitative and qualitative methods to demonstrate our learning and impact, as discussed below. Whether qualitative or quantitative, our methods should be rigorous in order for results to be credible.

When we can count the number of people trained, tools applied, cost and time overruns, percentage of problems solved, and change in reported satisfaction levels, quantitative methods can thus be applied.

The change in the quality of the contract may require more qualitative methods, such as peer reviews or assessments. Understanding the process of change may require more granular case studies that help us to fully appreciate the incentives and dynamics behind particular results.

We should capture successes and failures. If our M&E reveals negative results or unintended consequences (e.g. increase in cost and time overruns), we should try to understand these results and adapt our strategy and methodology.

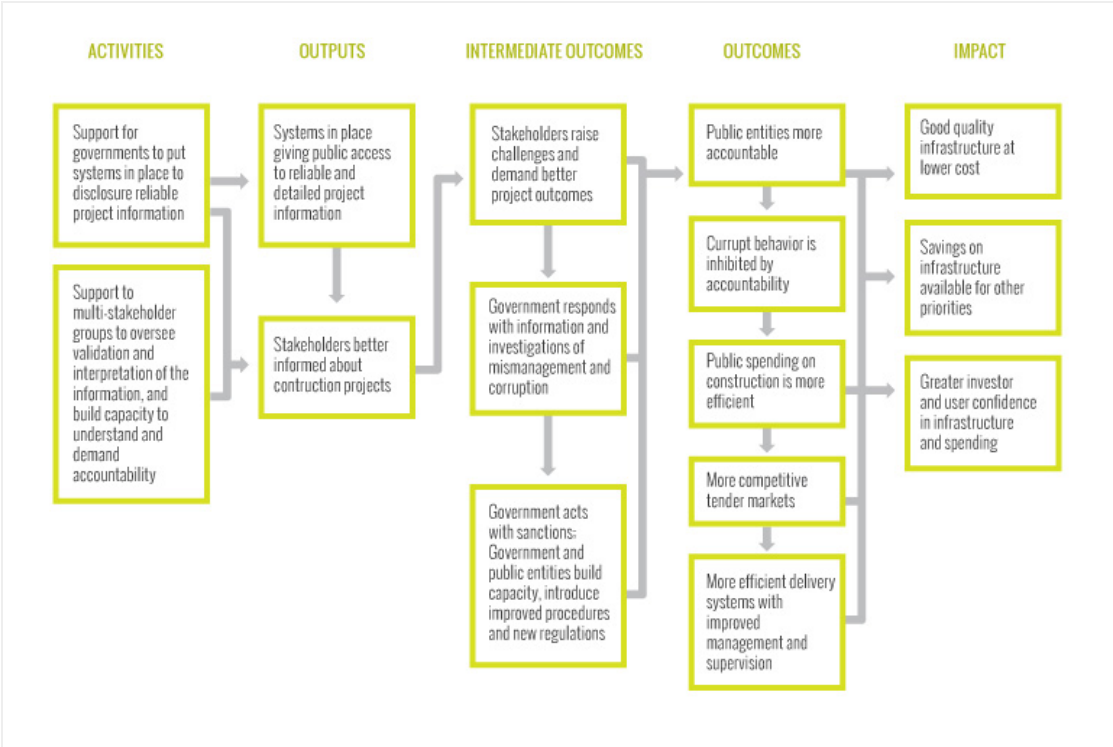
Ultimately, we will know we have made a difference if we see a change compared to our baseline data. This means we will have adequately captured the baseline data, that we are clear about the methodology and the actors involved, and understand the incentives and dynamics that determine the process of change.

Practical Challenges

One of the most common practical challenges in conducting M&E is to strike an appropriate balance between simplicity and rigour. At one extreme, there is very limited value in an M&E framework where the objectives are improved participation and disclosure, if there is no associated assessment of whether these have, or are likely to, lead to any improvement in performance. At the other extreme, a totally rigorous M&E framework may be sound in theory, but impossible to use in practice due to unrealistic expectations of the availability of, and ability to manage, the data related to a large number of indicators.

For transparency and accountability initiatives such as open contracting, it may be necessary to consider the causal chain in more detail than a standard results framework offers. The Construction Sector Transparency (CoST) initiative, for instance, recognises that disclosure and transparency do not necessarily lead to more accountable public entities. In order to present more clearly what the initiative is seeking to achieve, and identify suitable associated indicators, the following causal chain is used. This is fully consistent with, but goes into more detail than, the results framework above.

Further information on the CoST M&E framework, including details of associated indicators, can be found at <http://www.constructiontransparency.org>.



Reflections - Risks, Sustainability And Lessons

Overview

Reality + Risks

Open Contracting Dynamics

Enabling Environment

How Do We Keep It Going?

What's Next?

Overview

In the last section we have shared many of our experiences, tools and insights on how to design and implement open contracting activities and how to track our progress. We hope that you have found all this information useful! We decided on purpose to put all this practical information up front so that you could learn from our experiences and be inspired by how others have done this work elsewhere.

In the following chapters we will take a step back to reflect on additional elements that have impacted our open contracting activities. We will go through some of the main risks that affect open contracting activities. We will also share our reflections on the theory of change behind open contracting. And because it matters so much, we reflect more on the enabling environment. Finally, we raise some important questions with regards to sustainability. The overarching goal is to keep open contracting going, and at the end of this section we reflect how we can best do that.

Reality + Risks

Stakeholder intentions (among both supporters and non-supporters of open contracting) are not always clear, conflicting interests are not always expressed and the roles of the different actors are not always clear-cut. This requires critical thinking to develop a strategy to handle the situation, and risks may evolve where you least expect them. A thorough identification process along with possible ways to mitigate those risks are key aspects for consideration when engaging in open contracting activities.

Stakeholders

GOVERNMENT

Building political will of government actors requires an understanding of their constituents and of internal political realities. There are 'power games' within governments that may drive different types of response, even in cases where the top government officials (presidents, ministers, governors, city mayors) express explicit interest in open contracting. If these actors are not involved in the original decisions, they may feel that a new policy or strategy is being imposed without them having been party to the discussions of its aims and benefits. This can lead to resentment.

There are many government officials who defend transparency with passion and are always willing to go that extra mile to make things work as they should. Finding these agents and encouraging them to recruit others will create a positive force for open contracting.

PRIVATE SECTOR

Private sector actors, from contractors to sub-contractors to associations, will require a clear business case to engage in open contracting. Often, this "business case" relies on profits - though not always, as with players who are motivated by tax benefits or otherwise to have a presence in a specific market or country. We should remember that all kinds of interests are present in business, from local zoning issues to labour supply to policy changes that impact export ambitions. Many business actors are interested in more information and institutional norms so they can make decisions with certainty - this is only one of many arguments for transparency!

Private sector actors take signals from the market in which they operate. In many places where corruption is systemic, it is much easier to continue paying bribes than to pioneer 'walking away'. In fact, the latter could even be considered irrational! Yet, this vicious cycle

can and has been broken in contexts where communities and leaders begin disclosing practices and amending regulations to make corrupt behavior more costly and inconvenient. There have also been cases of industry agreements of clean behavior, due to the fact that corruption has made operating in those environments so expensive and unsustainable.

It takes a combination of pioneers and collective action. There are plenty of structured and serious contractors or companies that will be interested in open contracting in order to improve operating conditions in the market and to deliver value for the public money. These are the companies we need to identify and involve, engaging them to drive the others by example and peer pressure to promote open contracting.

CIVIL SOCIETY

In order to advance open contracting, civil society groups need to gather around a common cause, which often requires removing obstacles and overcoming mistrust. Traditionally many of these groups are used to working individually, competing for resources and exposure, not recognizing or giving value to efforts made by peers in the same thematic space. In many cases, civil society groups have become implementors of government policies or programmes, which blurs the lines of differentiated roles, and in some cases may pose challenges to independence or raise conflicts of interest.

Indeed, civil society is a very broad concept and includes many kinds of organisations supported by a variety of differentiated interests. These organisations are often criticized for close associations to politicians, political parties or campaigns. This undermines the credibility of their argument that they are defending the public good.

In some countries the media is totally controlled by government or private sector groups that use it to pursue only their personal interests, not allowing journalists to play their legitimate role in overseeing and reporting on misbehavior by government or the private sector. Elsewhere, organisations may demand accountability from governments and private sector, but are not willing to disclose their internal governance arrangements or how they ensure their own accountability in pursuing their mission.

However, we increasingly find cases of civil society groups benefiting from collective action. By constituting coalitions or networks to work together they are able to increase their impact, making transparency and accountability part of their own network practices. These are the types of groups that we should approach, convene and join in order to successfully engage in open contracting.

What Could Go Wrong?

While open contracting brings about many good things, its practitioners and advocates must pay close attention to certain risks. Monitoring of public contracts, after all, is not a simple undertaking. It involves a complex web of interests, which requires critical and strategic thinking to manage. It may also create unrealistic public expectations.

This chapter brings to fore four types of risks, namely operational, relational, political, and guess what, the 'ultimate' risk! Ways of addressing them are likewise discussed.

Persevere! In the most complex and corrupt environments we can always find enthusiastic partners to champion the quest for money well spent in building a better future - **Marcela**



OPERATIONAL RISKS

Operational risks refer to factors that may affect the work of practitioners as they conduct open contracting activities. These could include threats to the personal safety of a practitioner, exposure to legal cases, or a lack of resources to continue operations.

Safety of practitioners. Practitioners could become overzealous in advocating open contracting, even to the point of endangering their lives. No one can blame them for that, but they can at least be forewarned of the consequences.

One threat to safety could resemble the plot of a crime movie where practitioners find themselves unknowingly implicating a corrupt government official or syndicate in an anomalous transaction. This could potentially happen in the course of scrutinizing contracts. It's common, for instance, for whistleblowers to have pertinent documents, including copies of signed contracts, which are parts of the paper trail and constitute solid proof of criminal activity. The 'bad guys', of course, would go after them to get these documents back, suppress their content or other try outright to prevent their coming out. Practitioners may be confronted with this situation if they do not know how to handle sensitive contract information properly.

Another type of threat to safety is posed by difficult or dangerous sites that practitioners may have to visit for the monitoring of contracts that are being implemented. For some who really take monitoring seriously, they would be willing to cross the rivers and climb the mountains to find the contract's project site. Who says open contracting is boring?! Safety,

however, should not give way to adventure. The objective of monitoring through actual site visits is still the best option, but appropriate safety and security measures should always be taken before proceeding.

Court cases. Contracts are governed by laws and statutes, and often contain contentious aspects that are subject to legal interpretation. Practitioners may find themselves in a legal battle at some point during their monitoring. This could occur when affected parties decide to challenge a report or a finding on the performance of contract provisions. For instance, losing bidders may accuse the third-party monitors of failing to point out an error in the review of the eligibility documents. The government supervisor may find the civil society monitors' status report unfair or inaccurate. And the practitioners may actually commit mistakes in their report, which could result in the withholding of payments, or worse, blacklisting, of contractors.

Some aggrieved parties may pursue legal cases in the courts, unwilling to let these reports pass without a challenge. This happens rarely, but could cause a lot of hassle. For example, who will pay for the legal services? Traditionally, it is the individual rather his host institution that pays, as project funds do not cover this kind of cost. Aside from the cost, there is often frustration over long legal battles. Time intended for advocacy is instead spent in court, and a legal conclusion is not always forthcoming. This could sap the energy of practitioners and divert their focus from what really matters to their cause, but there is no real choice but to comply. In this sense, a well-oiled mechanism protecting one group's interest could paralyze the open contracting advocacy with even a trivial court case. Some competency in the legal aspect of contracting will strengthen the practitioners' position and help them guard against personal recklessness, on the one hand, and possible intimidation from an offended group, on the other.

Running out of resources. Resources are finite and always insufficient. While open contracting advocacy should be driven by its mission, and not by funds for its operations, the risk of slowing down and eventually halting operations due to drained resources is real. To paraphrase the philosopher Immanuel Kant: a mission without resources is blind, but resources without mission is empty.

Resource problems could arise during open contracting when the scope and scale of the challenge unexpectedly exceeds what was expected. Especially when it gains traction, important work such as this could increase the demand from the public. Practitioners could be swayed easily by such demand and it is tempting to succumb when such a clamor persists because it indicates the effectiveness of the activities. Incorrect prioritization or the failure to appreciate the strategic use of resources could expose the work to unnecessary risks.

Needless to say, it is basically and ultimately a function of management to optimize the use of available resources.

RELATIONAL RISKS

Relational risks involve serious compromises related to the identities and roles of the key players, which negatively affect the overall credibility of the open contracting activities. These include conflict of interest, collusion and co-option, and network collapse.

Conflict of interest. There are circumstances in which practitioners, whether government, civil society or private sector, could potentially influence or have clouded judgement on a contract at hand. These circumstances are linked to one's special or vested interest in the contract. This link alone establishes the conflict of interest, and need not be consummated.

Blood relations are usually cited as a source of conflict of interest. When a relative or a family member has an interest in a particular contract, one's favorable judgment of it is immediately suspect. Organisational or company affiliation has a similar effect. Whether in government, business or civil society, practitioners should refrain from engaging in contracting processes involving family members.

Collusion and co-option. Collaboration for open contracting sounds nice and friendly, but breeds familiarity in the long run. Over the course of the process this may prove unhealthy if the practitioners lose their sense of autonomy. They may become uncritical and complacent towards the focus of the contract monitoring. In other words, it renders the entire exercise useless. Practitioners should be aware of this possibility and periodically revise their processes to prevent or address it.

Network collapse. Only a network of groups of practitioners can effectively do open contracting, due to the sheer volume of contracts that must be monitored, the intricacies of the contracting process requiring different kinds of expertise to check it, and the broad spectrum of stakeholders who will be affected. This poses the challenge of managing the network, keeping it intact, and getting everyone on the same page as far as the open contracting mission is concerned. The network could be intra-sectoral - i.e., a network within the civil society sector, within the private sector, or perhaps within the government. It could also be inter-sectoral, which casts a wide net to cover all of these sectors. It is often extremely difficult to get all three sectors together under one umbrella network, and even more difficult to maintain it.

POLITICAL RISKS

Political risks happen when the ability to push for change is stalled or weakened. These may be encountered during elections or when the leader demonstrates no political will to push for the open contracting agenda.

Elections. Political transitions have the ability to affect change in negative ways. Often, in the midst of electoral processes or regime transitions, the enabling environment for open contracting activities can dramatically change. Typically in electoral periods, attention will be taken off accountability efforts and all focus will be put in the campaign, making it very difficult to engage in new activities that require political leadership. This can also happen if incumbent leaders are in practical terms "lame ducks". Similarly, if practitioners have had good support from incumbent leaders and there is a change of regime, there is high risk of losing space because the new ones will not want to be associated with flagship programs from the previous government. All these elements should be taken into account when designing your strategies.

However, political transitions can also be used to strengthen open contracting activities and boost political will if managed in a strategic way. For example in Colombia, at the time of local government elections or presidential elections, networks of CSOs have challenged candidates to commit themselves to ensure disclosure of contracting information once they are elected and have managed to include such commitments in the political agendas of many candidates. When the candidates have been successfully elected, these commitments have allowed civil society to demand compliance from the leaders and strengthen the platforms for open contracting. Consider using these situations in your favor as well!

Political will. Under the framework of constructive engagement, the role and support of government champions is crucial. To a certain extent, the leader or the top executive could 'make or break' the open contracting agenda, though he or she is not the sole determinant of its success. Such political support, however, may not always come about, may slowly wither, or may all of a sudden be denied. This is quite common in the world of politics. Open advocacy may garner good favor now from political leaders, but that could quickly change if it begins to hurt their political ambitions. The interests within which open contracting operates makes it susceptible to different attacks, including those from unknown fronts. This makes political decision-making highly volatile.

THE ULTIMATE RISK

Perhaps the scariest of all risks is the risk of failure or not achieving the purpose of the open contracting activities. While we also learn from failures, such conditions may cause people to question the point of doing it.

Another problem is frantic activism that does not drive effective change after engaging in monitoring activities. Many examples exist of civil society activities and reports that have been produced but expressly ignored by decision makers who have the power to take corrective action.

Often, the decision makers are not been included in the process from the beginning, and coordination and feedback mechanisms have not been agreed in advance. Because of this, civil society monitoring efforts and corresponding findings may 'fall on deaf ears' and create no impact whatsoever on the situations to which they refer. Engaging all the relevant parties from the outset and defining the methods of collaboration in advance are critical steps that will help increase the possibilities of the activities' success. The last thing we want is to have a collection of glossy reports that nobody has actually used to create positive change!

Open Contracting Dynamics

What are the dynamics behind open contracting? If you recall the theory of change diagram from 'Understanding the Basics', there are eight key elements that underpin the process: incentives, capacity, disclosure, participation, accountability, trust, legitimacy and performance. Let's talk more about each of them now.

Incentives

There are many reasons why different stakeholders take an interest in open contracting. Typical reasons may include:

- ▶ **Financial**

A procuring entity may consider it to provide a means, over time, of improving the value for money for public projects.

- ▶ **Commercial**

A responsible private company wishing to compete on a level playing field may see it as a means of ensuring that the market rewards good performance.

- ▶ **Political**

Political representatives or prospective candidates may consider it to be part of a popular agenda that will enhance their legitimacy in the eyes of the public.

- ▶ **Economic**

A country with a demonstrable commitment to a progressive open contracting policy may have access to more favorable lending conditions or aid programmes.

Together with a basic level of capacity, such incentives form the starting point for an open contracting initiative in any country, across sectors. They can exist even in difficult operating environments such as conflict-affected or fragile states. Whatever the context, those advocating open contracting should consider what incentives are likely to prove most relevant for each specific stakeholder.

Capacity

Capacity is a key performance driver. For any stakeholder in the process, capacity-building consists of one or several of the following:

- ▶ Increasing the available human or material resources.
- ▶ Improving the management systems, procedures and associated tools.

- ▶ Providing practical training in the use of those management systems, procedures and tools. Such training should be tailored to meet specific needs expressed in terms of the knowledge, skills and attitudes needed by those responsible for specific functions.

Along with incentives, capacity is necessary for appropriate disclosure, oversight and participation in the contracting process, for the implementation of accountability mechanisms, and to allow all open contracting stakeholders to make optimum use of the prevailing legislative environment.

Disclosure

Disclosure refers to the official release of key information related to a specific contracting process, which can either be:

- ▶ *Proactive*, when a procuring entity makes such information available in the public domain at various stages of the contract chain; or
- ▶ *Reactive*, when additional information is provided on request.

Alongside participation, disclosure is one of the core features of open contracting. It helps to enhance levels of accountability and trust by allowing CSOs and citizens to access and use information and ask appropriate questions.

The extent, timeliness and relevance of disclosure typically depends on:

- ▶ Applicable laws and regulations that either require, or constrain, the disclosure of certain information.
- ▶ The capacity of procuring entities to manage their information records.
- ▶ The existence of defined processes to facilitate any mandated disclosure and dissemination.
- ▶ The extent to which the public entity and contractors providing goods and services are confident that disclosed information will be used in a responsible and constructive manner.

Open contracting does not necessarily require that contracts are disclosed in full. It is generally accepted that some elements of contracts may be commercially sensitive and so should not be disclosed. But the basic principle remains one of disclosure being the default, and confidentiality the exception.

Participation

Together with disclosure, participation is a core element of open contracting and ideally covers all stages of the contracting process. It typically occurs at two levels:

- ▶ At the **official oversight** level, where dedicated institutions are legally responsible for generating and in some cases disclosing information related to the creation, management and fulfillment of contracts. In such cases, suitably qualified (and trained) representatives from civil society may have a mandate or permission to participate, either as observers or active participants, in specific functions such as bid evaluation or progress reviews. Such engagement would seek to be constructive, but may in some cases, after other avenues have been exhausted, result in public airing of potential concerns.
- ▶ At the **public level**, where individual citizens can participate in all contracting stages, from planning to closure.
 - ▶ Planning - engagement in the needs assessment, feasibility study and project design, to meet expressed needs.
 - ▶ Tendering and award - third-party checking of the selection process.
 - ▶ Contract execution - presenting contract features in an accessible way, monitoring contract delivery and asking questions or raising concerns.
 - ▶ Closure - following-up to ensure problems are resolved.

Such participation can constitute an important source of scrutiny and information about the contract implementation. The civil society participation aspects of open contracting are dependent on disclosure of contract data that are available, and that this data are reliable and readily understood. It is also essential that appropriate channels exist for concerns or grievances to be expressed.

Accountability

While capacity is needed to make performance *possible*, accountability is needed to ensure *legitimate* performance. It occurs when an individual or organisation is answerable for its actions, or the lack of them. Being accountable means accepting responsibility and being prepared if necessary to provide evidence of appropriate conduct. Should such evidence be lacking, then sanction mechanisms may be applied by the relevant authority. For instance, at the most basic level, sanctioning of a contractor constitutes withholding of payment.

At both the individual and organisational level, and at the formal and informal level, each of the stakeholders involved in open contracting is subject to a set of accountability mechanisms. Some are internally applied, for example by codes of ethics, and others are externally imposed, including through contracts and the application of laws and regulations. Within organisations, staff members are accountable to their management, to their operating standards, to financial reporting norms, and relevant environment regulations.

- ▶ **Public officials** are held accountable through elections, and internal and external control mechanisms which ultimately constitute accountability to taxpayers.
- ▶ **Civil society organizations** are held accountable by their governing bodies, financial supporters, and ultimately by their beneficiaries or members.
- ▶ **Private companies** are held accountable by their clients, boards of directors, shareholders and affected communities.
- ▶ **Individual professionals** are held accountable to their professions. Codes of professional conduct typically include mandatory requirements to serve the public interest and to avoid bringing the profession into disrepute.

Open contracting should seek to reinforce accountability mechanisms. It is particularly important in this regard for civil society and whistleblowers to understand and work with the specific relevant accountability mechanisms in their context. By mapping and understanding them, it may be possible to initiate corrective actions through established institutions, rather than in isolation.

Trust

Trust is what allows performance to *flourish*, as each party to a contract has confidence in the integrity and abilities of those with whom they are working.

By contrast, a lack of trust is one of the most common, yet most neglected, causes of poor performance and associated corruption risks in public contracting. Such poor performance is typically manifested as time delays and cost over-runs. The effects of trust deficits are corrosive and progressively adverse.

As a driver of good performance, trust is not blind, but is associated with accountability and legitimacy. Disclosure and participation facilitate trust as information and opportunities for constructive engagement increase to inform and improve the contracting process. As a result, consistent trustworthy performance incentivizes future contracts, both financial and social.

Believe it or not, trust can be measured, and appropriate corrective action readily taken. Though more commonly used in the private rather than public sector, trust metrics is an established practice. Simple trust audits can readily be designed and undertaken to reliably, objectively and consistently assess overall levels of trust, either within an organisation, or between key stakeholders. The same audits can pinpoint the key causes of any trust deficits, so that they can then be systematically addressed.

Legitimacy

Performance can be enhanced in a legitimate manner when all stakeholders are acting in accordance with agreed protocols and applicable contractual or regulatory provisions. Any grievances that arise are addressed in a carefully considered manner maintaining accountability and trust in the process, while the sources of the improved performance are clearly identified and closely monitored.

By contrast, any lack of legitimacy that distorts the proper functioning of an open contracting process can lead to alienation of the public and the loss of leverage of monitoring actions. Should that occur, the whole process risks collapse. It is therefore important to maintain a high level of legitimacy and to manage stakeholder expectations of what can realistically be achieved.

Performance

Performance is typically expressed in terms of achieving the intended contract outputs to specified quantity, quality, responsiveness, timeliness and cost. More broadly, it aims to do so in a manner that provides sustainable social and economic benefits.

Disclosure of a contract, or key parts of it, provides access to detailed data on the expected performance of the contractor. Open contracting thus provides the basis for legitimate civil society assessment of performance.

Performance should be defined by a set of measurable indicators related directly or indirectly to contract execution. Such indicators are used to assess multiple aspects of the contract such as:

- ▶ Completion of prior studies and other mandatory actions.
- ▶ The source and quality of materials used.
- ▶ Physical dimensions of infrastructure.
- ▶ Compliance with contract agreements concerning the engagement of local labour.
- ▶ Timing and programming of implementation.

- ▶ Social and environmental considerations as specified in the contracts.
- ▶ Compliance with applicable international or national standards.

Demonstrable improvements in performance are of central importance in building the legitimacy necessary for the open contracting work to develop. So too is the trust that is established among stakeholders by demonstrating that all actors involved in the contracting process are properly trained, behave responsibly, and are themselves held accountable for their actions.

Enabling Environment

The enabling environment relates to the institutional, legal, technical and cultural context in which goods or services are procured. That context can either enhance or inhibit open contracting. It provides the means by which public contracts are increasingly identified as contributing to the public good.

The sum of experience of multiple contracts subjected to disclosure itself enriches the enabling environment. This allows high level comparisons to be made of the contract performance, leading to an understanding of potential improvements to the contracting chain. Such an exercise would depend on the development and maintenance of a robust contracts database.

In individual cases, contracts that are particularly well formulated or managed can succeed despite the absence of a suitable enabling environment. Over time, however, such successes are unlikely to be sustained in the face of legal, procedural or other obstacles. By contrast, an enabling environment that is conducive to good practice will, over time, have an overall positive effect on public contracting.

I am a party of contracts being made on my behalf. And I didn't even know. -
Adam



Enabling Environment

The institutional, legal, technical and cultural contexts within which open contracting activities take place has a significant immediate effect on its prospects for success, and on the degree to which it can realistically be sustained and developed over time. That is why open contracting encourages policies, laws, and institutional arrangements that promote, facilitate or reinforce the broader adoption and better implementation of basic principles of accountable and responsive government.

Key Dimensions

What does an enabling environment look like, and how can it be developed over time? To answer this question we can consider this in terms of three dimensions, representing:

- ▶ The legal and regulatory context;
- ▶ The institutional and collaborative context; and
- ▶ The data management and disclosure context.

LEGAL AND REGULATORY CONTEXT

This has a bearing on, and in some cases control over, the extent to which data on public procurement may or may not be disclosed. It also governs the extent to which civil society has a mandate to participate in or contribute to oversight functions.

Even when there is no law specifically permitting or requiring such disclosure or participation, it can sometimes be inferred through organic law in the form of general principles of a national constitution, or specific guidelines or protocols associated with particular sectors. Where the political will and CSO capacity exists, this may be sufficient to allow for a Memorandum of Understanding (MoU) between a representative CSO and government. This would set out underlying principles, objectives, and responsibilities of each party - effectively creating a space to act, but with certain limitations. Because of its limited scope and duration, and its unenforceable nature, an MoU is not an ideal arrangement. Nevertheless it represents an important first step.

Much better is the creation of a concise legal and regulatory framework for third-party monitoring. Such provisions need to be carefully formulated to reflect the fundamental features of transparency, verifiability, integrity and accountability, including enforcement provisions.

Even when associated regulations are in place, the fact that laws have been passed does not in itself mean that civil servants have the capacity to implement them. For this to happen, we may need the allocation of financial and human resources, and necessarily entails the development of detailed procedures and associated guidelines with practical training.

INSTITUTIONAL AND COLLABORATIVE CONTEXT

This relates to the commitment, cohesion and capacity of civil society to promote open contracting within the broader national context.

The starting point is that a small civil society group develops a commitment to the principles of open contracting, and pursues activities that it is capable of handling within the limited sectoral and geographic context in which it operates.

When a sufficient number of such initiatives exist, they group members learn from each others' experience, sharing ideas and growing in experience, confidence, and reputation. If such collaboration is successful it may develop over time into an informal network, and eventually a more formal structure.

Even when a formal structure is developed in the form of an umbrella organisation for large numbers of interested CSOs, there are likely to be severe capacity constraints that limit its members' ability to undertake effective monitoring. For that capacity to be enhanced it is necessary to develop, test, refine, provide training in and apply a growing library of simple tools and procedures. As civil society monitoring depends heavily on volunteers, this process should not be rushed. Expectations should to be carefully managed to ensure that high standards are maintained, thereby further enhancing the reputation of open contracting and potentially generating more interest and demand.

In the long-term this could lead to a highly organised collaborative structure with considerable capacity.

It is not enough to disclose contracting information, open contracting takes it a step further and advocates for that contract data to be published in a user-friendly way for citizens to engage and participate in closing the loop - **Norma**



DATA MANAGEMENT AND DISCLOSURE CONTEXT

Effective collection, storage and use of data lies at the heart of performance management and related monitoring. Information cannot be disclosed if it cannot be found, or if it was never collected in the first place. And to be useful in informing decisions it has to be accurate, reliable, and consistent over time. Obstacles to disclosure may include capacity constraints within government, as well as any reluctance by officials to part with information. Simply by promoting improved data management within government, open contracting is thus also contributing more generally to improved performance management, creating a virtuous cycle.

In terms of availability of information, the starting point is that every country has a budget process and related procedures for detailing planned expenditures and recording actual disbursements at the national, regional and local level. This provides an array of possible initial entry points for modest open contracting activities under which some limited information may be made available to third parties.

The next stage is the more formal disclosure of such data. Where data disclosure is mandated by law, those requesting information are not necessarily under any obligation to explain the reason for or ultimate purpose of the request. However, in keeping with the objective of trust-building it is good to explain how such disclosure would help to improve the quality of public procurement.

In practice such data can be problematic in terms of its completeness, robustness and clarity. The next stage of data availability is therefore a Management Information System with underlying databases that, if well designed and implemented, ensure higher levels of consistency, reliability and timeliness of accurate information.

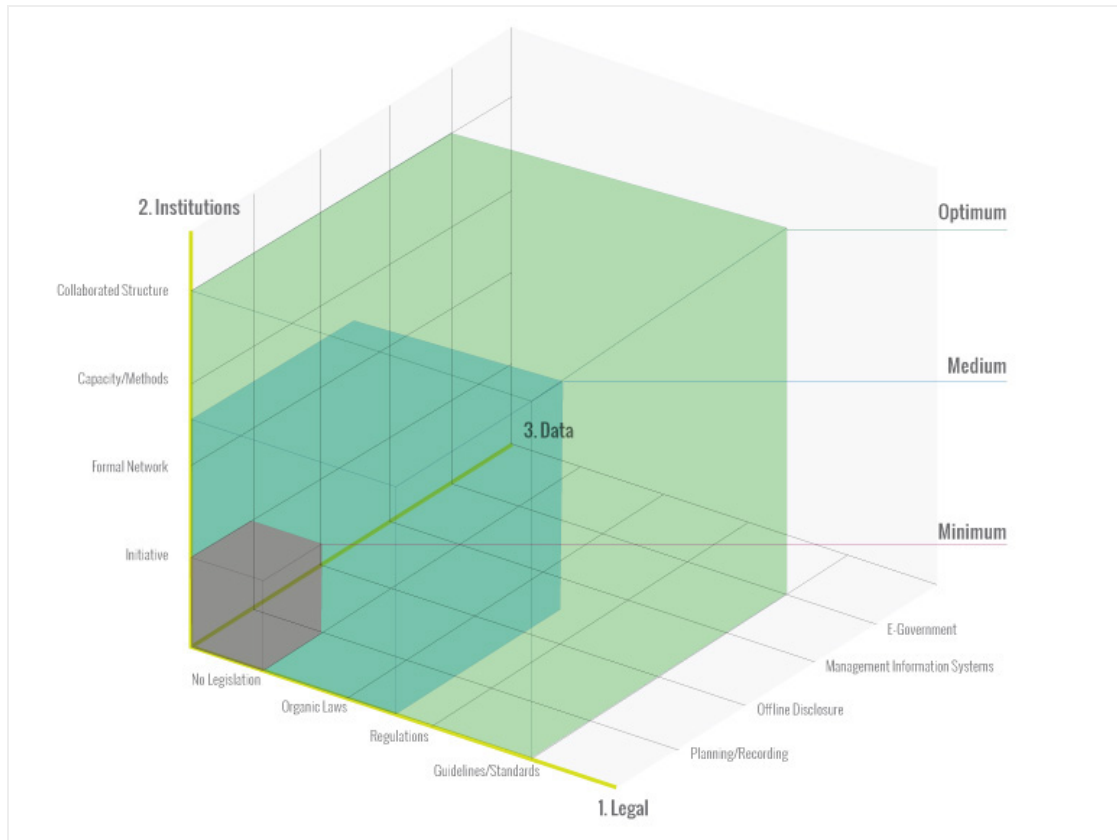
The ultimate expression of data availability is achieved through e-government, which entails real-time digital interactions internally within government, between government and its civil servants, and externally between government and the private sector or the citizens.

Mapping The Enabling Environment

These three dimensions or contexts can readily be mapped. On the figure below progress along each of the three axes corresponds to the progressive development of an enabling environment as described above. The small, intermediate and large cubes represent minimum, intermediate and optimum states of the enabling environment.

Mapping the enabling environment of a country or community in this way serves to clarify its current profile, as well as the next steps required in terms of progressively strengthening each of the three dimensions. This may entail piloting new monitoring activities as part of a process of demonstrating the effectiveness of open contracting in building trust and strengthening accountability.

More detailed guidance is provided elsewhere in this book on strengthening the collaborative context of the institutional dimension.



How Do We Keep It Going?

Now what? What happens after open contracting activities are completed? How do we maintain momentum and make sure that open contracting becomes the norm?

This chapter looks at what is needed for practioners to sustain open contracting in their communities, countries, and on the global level. There are many ingredients that contribute to deepening and expanding open contracting, but here we will focus on institutionalization and funding. We believe that these two issues can make or break the future of open contracting.

You never know where an idea can go, give it a try and maybe a new social movement can come out of it - **Kathrin**



Institutionalizing Open Contracting

Open contracting is not yet the normal or accepted way of doing business. As described in earlier chapters, contract disclosure and participation are still too often sporadic efforts, driven by single champions and with limited or no follow-up action to monitoring.

This lack of institutionalization threatens the sustainability of open contracting. For example, it makes open contracting vulnerable to changes in political will, and also creates a risk that a lack of results may lessen interest in promoting open contracting.

What To Do?

While no country has fully institutionalized open contracting, there are a variety of ways to make disclosure and participation in public contracting more mainstream. Some of these approaches require legal action, such as including formal requirements for open contracting in the law or policies. Other means of institutionalizing open contracting aim more at building a social movement, changing peoples' values or increasing capacities of key stakeholders to engage.

There are several examples across the world of how open contracting has been institutionalized through various legal measures:

- The Mongolian Public Procurement Law includes a formal role for civil society and professional organisations in bid evaluations and contract monitoring.

- ▶ The Philippines Procurement Law mandates civil society and private sector participation at all stages of the procurement process.
- ▶ Mexico has a legally mandated 'social witness' program to allow CSO participation in procurement. In 2010 social witnesses participated in over 120 public procurement processes valued at US\$ 14 billion.
- ▶ The Indian Right to Information Act (2005) specifies that contracts are disclosable (subject to some limitations.)
- ▶ In Afghanistan, Presidential Decree 45 requires the Ministry of Economy to publish all contracts signed in the preceding three years.
- ▶ Global initiatives, including the Open Government Partnership, the Extractive Industries Transparency Initiative or the Construction Sector Transparency Initiative, also require the release of certain contracting information.

There are also non-legal means that contribute to institutionalizing open contracting. They aim to recruit more people to the cause of open contracting, building their capacities and changing beliefs and behaviors around public contracting. Examples include:

- ▶ In several countries, including Uganda and Kenya, networks of CSOs have signed Memoranda of Understanding and other forms of cooperation agreements with various government agencies. These memoranda help to formalize cooperation across stakeholders. These agreements are not legally binding but signal a commitment from all sides to work together.
- ▶ Training and education programs for groups wishing to engage in the monitoring of contracting activities can help to build more capacity. The Government Procurement Policy Board in the Philippines is an example of a government agency that organizes trainings for monitors seeking a better understanding of the procurement process, and the related laws and regulations.
- ▶ A newer approach looks to a new generation of open contracting practitioners for whom disclosure and participation are deeply rooted values. In this spirit, several organisations are working to build the capacity of students to engage in open contracting. For example, the Teacher Creativity Center in Palestine works with teachers and students on social audits of projects of public concern, including hospitals and waste management; in Kenya, some elementary schools have established Integrity Clubs to educate children about ethics, anti-corruption, and in some instances open contracting itself.
- ▶ Campaigning can be a powerful way to change perceptions and attitudes. Civil society organisations pushing for improved transparency in extractive industries successfully campaigned to make contract disclosure a requirement in the IFC performance standards.

- ▶ To be truly sustainable open contracting needs to become a social movement that involves more and more people. There is already an emerging community of practitioners of open contracting that we are trying to rapidly grow. Find out more about this expanding community at www.open-contracting.org.

Financing Open Contracting

One of the biggest challenges to the sustainability of open contracting is securing resources in the long-term. Many organisations struggle with limited funding that is often dependent on donors or available only for relatively short time frames. As open contracting grows, more innovative financing solutions are needed to ensure the sustainability of the effort. Possible ways forward may include:

- ▶ The creation of a coalition related to open contracting to gain leverage in obtaining funding and sharing resources. A coalition also has a greater leverage and strength to obtain collective results, which is attractive to donors.
- ▶ Working with volunteer monitors committed to public service helps to keep overhead costs low and can allow the creation of large networks of local monitors.
- ▶ Depending on the quality of data provided by civil society, the state might be interested in financing the data collection and analysis. This approach requires very high quality output and design, and should represent a real benefit for the parties using that service.
- ▶ CSOs could also create tools that are used by the state or other entities to manage and coordinate their contracting management. The state or the company would then pay a user fee or give a subscription to use the tools.
- ▶ Civil society could lobby for a tax (e.g. <1%) on public contracting dedicated to funding third-party monitoring. In order to maintain independence, the tax should not be administered by the state but by a trust fund or an entity that would guarantee its impartial disbursement.
- ▶ Another emerging idea is to engage additional self-funded organisations in open contracting, such as professional associations or membership clubs. Organisations, including boy scouts, Rotary clubs or professional engineers, generate their own revenues through membership fees and are thus independent of donors.
- ▶ Some countries are supporting new donor funding mechanisms: Mongolia recently opted into the Global Partnership for Social Accountability (GPSA), a donor-funded grant system that will allow civil society groups to apply for core funding for monitoring activities for multiple years. While the GPSA is still donor funded, it addresses the problem of short-term funding.

The Philippines is one of the more advanced open contracting countries as it has formal legal requirements for CSO participation in procurement. Until now, most procurement monitoring has been funded by donors, but they are beginning to allocate fewer funds to this type of work. The government does provide some funding for CSOs, mainly to cover allowances for monitors, but it is not sufficient. In addition, many CSOs are reluctant to accept money from the government, striving to preserve their role as independent watchdogs and avoid any conflicts of interest. As a form of innovative financing, a group of companies known as the Makati Business Club contributed to a fund to provide small grants to local CSOs and communities for procurement training and monitoring.

These are just a few examples of how open contracting is or could be resourced. More experimenting and testing is necessary to establish creative and sustainable solutions to financing open contracting.

What's Next?

Seriously, how often do you read the 'terms and conditions' before you agree to something online? How closely do you read the 'legalese' before signing on the dotted line?

After reading this book, we hope that you at least take a time for reflection before signing, understanding how contracting matters. If you take only one message away from this book, let it be this: Contracts involving taxpayers' money are a public good, and you can make a difference by taking part in open contracting processes.

The next time you see this book, think about the school in your neighborhood, think about the priorities that you would like your government to address and how you can participate in the process - **Seember**

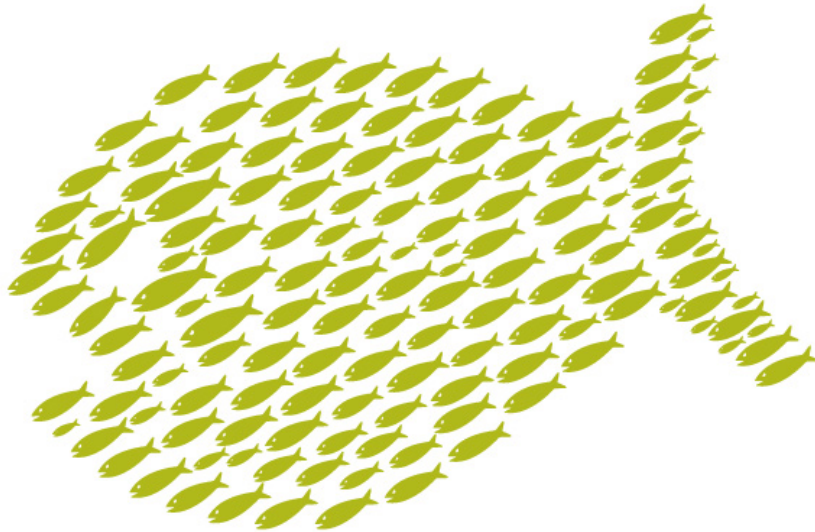


This book is just the beginning. We are committed to continuing to grow and continuously strengthen our community of open contracting practitioners.

We will:

- ▶ Make this book publicly available for download and social sharing. You can play a role in sharing it with your friends through our website and online Community of Practice: www.open-contracting.org and www.pro-act.org.
- ▶ Continue to share our knowledge, develop new tools and collect existing open contracting experiences. We will also try to offer additional training and capacity development opportunities for practitioners. This might include complementary book sprints such as this one. In particular, we would like to experiment with ground breaking online applications based on this book. Think about an app that lets you map your environment and design your advocacy strategy to engage citizens and governments to promote accountability.
- ▶ Grow the community of practitioners. Open contracting is on its way to becoming a forceful social movement. To coordinate, fund and scale up our initial efforts, we need to demonstrate the benefits of open contracting to more people, and to engage them in the movement.

Most importantly, we hope that you join our open contracting school of fish. Together we can make open contracting a reality.



Join us at www.open-contracting.org. You can also follow us on Twitter by using [#OpenContracting](#) and like our [Open Contracting Facebook page](#) (www.facebook.com/OpenContracting).

Conclusion

Sprinters

Glossary

Resources

Sprinters

This book would not have been possible without the tireless contributions of a very special group. Coming together from countries across the world, the **Open Contracting** Sprinters dedicated five full days to the production of this work, sharing their knowledge, experiences, energy, and patience to create a book - from title to conclusion - from June 10th through June 14th, 2013.

The result is truly a collaborative effort, in terms of process and content- including perspectives from representatives of government, civil society, private sector, academia, and others - and we look forward to seeing its continued evolution. A huge thank you, gracias, merci, obrigado, bayarlalaa, tapadh leat, tashakkur, asante, tika hoki, webale, barka, medase, oshe, rahmat, grazie, danke, and salamat to all those who joined!

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Glossary

Accountability is the responsibility for something an actor or group of actors have done or are expected to do, usually defined by mandate or public expectations. It includes when an individual or organisation is answerable for its actions, or the lack of them. Being accountable means accepting responsibility and being prepared, if necessary, to provide evidence of appropriate conduct. Should such evidence be lacking, then sanction mechanisms may be applied by the relevant authority.

Advocacy is any action meant to diffuse a message or a position with the goal of influencing policy. It can be a single intervention or continuous activity with short, medium and long-term objectives. It encompasses a variety of activities, such as press conferences, closed meetings, article publication, public debates, town hall meetings and training. In many contexts, advocacy differs from lobbying in that lobbying is a very specific type of advocacy directed at influencing specific legislation. In many contexts, lobbying entities must be registered, while advocacy activities need not be.

Baseline is the starting point of an observable variable, prior to a specific intervention that is meant to be measured for change over time.

Beneficiary is an individual who is the ultimate target and recipient of a public good.

Bill of Quantity (BoQ) is a document used in tendering in the construction industry in which material parts and labor (and their costs) are itemized. A BoQ can be un-priced and indicate required quantities of each item, or priced by individual bidder, although the latter might be confidential.

Book Sprint is an intense collaborative book production process that produces a book in 3 to 5 days. A Sprint is strongly facilitated.

Capacity is the availability of resources, and the efficiency and effectiveness with which societies deploy these resources to identify and pursue their development goals on a sustainable basis.

Capacity Development is a locally driven process of learning by change agents that lead to changes in local ownership, policy, and organisational factors that affect institutional capacity for better development goals.

Civil Society refers to the wide array of non-governmental and not-for-profit organisations and activists that have a presence in public life, expressing the interests and values of their members.

Civil Society Organisations (CSOs) refer to a wide of array of organisations: community groups, non-governmental organisations (NGOs), labour unions, indigenous groups, charitable organisations, faith-based organisations, professional associations, and foundations.

Coalition Building is a process of engagement among key stakeholders, with a common view to achieve shared objectives and play a transformational role for a particular set of issues.

Coalitions refer to the coming together of individuals, groups, organisations, or even nations, to achieve a common purpose.

Collusion is a secret agreement between two or more parties for a fraudulent, illegal, or deceitful purpose.

Community Building refers to the activities of public mobilisation through information sharing, elections, organisation of public fora or any other activities, with the goal of the organisation of communities so they can play a collaborative role to pressure or have their voice taken into account in a decision-making process. The community building process should aim at becoming self-maintained and sustainable.

Community of Practice is a group of people who share a common interest or experience and support each other through learning and sharing.

Conflict of Interest is a situation that has the potential to undermine the impartiality of a person due to the possibility of a clash between the person's self-interest and professional or public interest.

Constructive Engagement is a range of processes that bring stakeholders together to achieve positive change and reforms in governance. Constructive engagement involves dialogue between and among all stakeholders. Approaches can differ among groups, so it is important that trust is established between and among all stakeholders.

Contract is understood in this book as a formal agreement involving a public entity.

Contracting Process is the sequence of events related to the lifespan of a contract, beginning with planning and culminating in contract closure. It is contested whether this is a chain or in fact a cycle, as the results reported throughout the process should be used to inform subsequent contracting practices.

Contractor is an organisation or individual that contracts with another organisation or individual (the owner of the contract) for the construction of a building, road or other facility or the delivery of services. When an individual or business that signs a contract to

perform part or all of the obligations of another's contract, we use the term of Subcontractor.

Corruption is the abuse of office for private gain.

CoST stands for the Construction Sector Transparency Initiative.

Demand Side refers to non-governmental actors in the context of governance.

Disclosure refers to the official release of a limited amount of key information related to a specific contracting process.

Effectiveness is the degree to which objectives are achieved, and the extent to which targeted problems are solved.

Efficiency describes the extent to which time, effort or cost is well used for the intended task or purpose.

EITI stands for Extractive Industries Transparency Initiative.

Enabling Environment refers to the policies, laws, regulations, external institutional arrangements, and other factors that establish the broader setting within which procurement is undertaken, and over which it has no direct control.

Equity Consideration usually refers to fairness for all parties involved in a process.

Governance encompasses the role of public authorities in establishing the environment in which economic operators function and in determining the distribution of benefits as well as the relationship between the ruler and the ruled.

Incentives are the reasons for different stakeholders to take an interest in open contracting. These are many and varied, but typically are composed of financial, commercial, political, legal and economical dimensions.

Legitimacy exists when all stakeholders are acting in accordance with agreed protocols and applicable contractual or regulatory provisions, and gives rise to trust.

Lobbying is the act of attempting to influence specific legislation or decisions made by officials in the government, most often legislators or members of regulatory agencies.

Memorandum of Understanding (MoU) is a document describing a bilateral or multilateral agreement between two or more parties. It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the

parties cannot create a legally enforceable agreement.

Monitoring is the process of comparing what is happening with what should be happening.

Multi-Stakeholder Approach refers to a process allowing multiple actors to provide legitimate inputs and to exert a leverage in taking decisions.

Non-State Actor refers to all the actors different and independent from the state structures. These include representatives of CSOs, private companies, individual citizens, media, etc.

Open Budgets refers to more transparent, participatory and accountable budgeting.

Open Contracting refers to norms and practices for increased disclosure and participation in public contracting. It covers the entire contracting process from planning to fulfillment of contract obligations, including tendering, performance and asset disposal. It includes the variety of contract types, from more basic contracts for the procurement of goods to complex contracts, joint venture agreements, licenses and production sharing agreements. Open contracting encompasses all public contracting, including contracts funded by combinations of public, private and donor sources.

Open Government refers to transparent, effective and accountable governments with institutions that empower citizens and are responsive to citizen's aspiration.

Oversight refers to the review, monitoring, and supervision of agencies, programmes, activities, and policy implementation.

Oversight Authority is a government organisation, sometimes independent, that oversees and regulates agencies, programs, activities, and policy implementation.

Participation ideally covers all stages of the contracting cycle and typically occurs at two levels: 1) at the official oversight level where dedicated institutions are legally responsible for generating and in some cases disclosing information and 2) at the public level where individual citizens have access to details on contracts involving public money. Such participation can constitute an important source for third-party monitoring.

Participatory Engagement refers to the measures ensuring all stakeholders are able to intervene at various degrees in the decision-making process.

Performance is typically expressed in terms of achieving the intended contract outputs to the specified quantity, quality, responsiveness, timeliness, economic and social spillover, and cost. More broadly it aims to do so in a manner that provides sustainable social and

economic benefits.

Planning, in terms of contracting, refers to an early stage of preparation. More broadly it means looking ahead and getting ready for an activity.

Practitioner is a person actively engaged in open contracting, governance, or related efforts.

Procurement is the process which creates, manages and fulfills contracts.

Public-Private Partnership (PPP) is a government service or private business venture which is funded and operated through a partnership of government and one or more private sector companies.

Risk is the potential that a given activity or action (including the choice of inaction) will lead to a loss (an undesirable outcome).

Result is a consequence, effect, or outcome of an activity or intervention.

SMART stands for Specific, Measurable, Achievable, Relevant and Time-bound, and is a mnemotechnic way to define an indicator.

Stakeholders refers to all the actors (institutional or individuals) involved directly or indirectly in a given process. Stakeholders and their interactions with one another can be mapped.

Supply Side refers to requests emanating from government actors in the context of governance.

Survey is a tool and a methodology to collect quantitative data on a given subject. For example, it can be applied to measure the degree of citizen's participation in a given consultation process.

Theory of Change is a proposition containing the sequence of events and change agents that lead to a defined end.

Third Party Monitoring refers to the monitoring of given elements along the contracting process by an actor or a group of actors (the 'third party') not related to the parties involved in the implementation of the contract.

Transparency is operating in such a way that it is easy for others to see what actions are performed.

Trust is what allows each party of a contract to have confidence in the integrity and abilities of those with whom they are working to make it perform.

Value for Money is a utility derived from a contract where resources are spent. Value of money is the optimal balance of economy, efficiency and effectiveness of the purchase.

Resources

The resources below have been compiled throughout our Sprint, and are intended to be useful tools and references for further open contracting activities. We acknowledge that this is certainly not a comprehensive list, and look forward to its continued expansion as open contracting efforts continue to move forward.

Resource Compendia

The Affiliated Network for Social Accountability in East Asia and Pacific website, which provides a library of [resources](http://www.ansa-eap.net/resources) "www.ansa-eap.net/resources" that apply throughout the contracting process and to many different sectors.

The Open Contracting online [Community of Practice](http://www.pro-act.org) "www.pro-act.org", which includes a [Resources Page](http://www.pro-act.org/page/monitoring-tools) "www.pro-act.org/page/monitoring-tools" with links to a variety of resources.

International Budget Partnership website, which includes a [library](http://www.internationalbudget.org/library) "www.internationalbudget.org/library" of useful tools relevant to public financial management in general.

The Public Private Development Centre website, which includes a [library](http://www.library.procurementmonitor.org) "www.library.procurementmonitor.org" of useful tools.

The [Global Infrastructure Anti-Corruption Center website](http://www.giaccentre.org) "www.giaccentre.org" contains tools and resources relevant to the infrastructure sector in particular.

The U4 anti-corruption resource center provides all sorts of cases studies and methodologies. [U4](http://www.u4.no) "www.u4.no".

The Transparency International website has resources on Integrity Pacts, a tool to promote transparency and integrity in public contracting processes. See http://www.transparency.org/whatwedo/tools/resources_about_integrity_pacts

Individual Resources

[Community-Based Monitoring Toolkit](http://www.communitymonitoring.org) "www.communitymonitoring.org" developed by Integrity Watch Afghanistan.

Construction Sector Transparency Initiative's [M&E framework](http://www.constructiontransparency.org) "www.constructiontransparency.org", included details of associated indicators.

Contract Monitoring Roadmap "www.contractroadmap.org" developed by the World Bank Institute is particularly relevant for extractive industries.

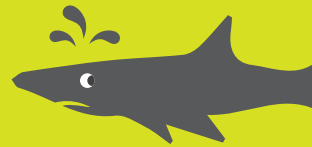
Development Check "www.developmentcheck.org" and its **User Guide** "www.developmentcheck.org/kb/node/1", developed by Integrity Action.

The Fix-Rate: A Key Metric for Transparency and Accountability
"www.integrityaction.org/sites/www.integrityaction.org/files/TheFixRate_Report_May%202013.pdf".

ICT for Open Contracting in Fragile States Report "www.bit.ly/ICT4OpenContractinginFCS".

Integrity Watch Afghansitan "www.iwaweb.org/reports.html" contains research material.

Integrity Manual for Practitioners "www.iwaweb.org/Reports/PDF/IntegrityManual.pdf ", developed by Integrity Watch Afghanistan.



Open Contracting Partnership