

Principles on Commercial Transparency in Public Contracts

The Commercial Transparency in Public Contracts Working Group

There is a public interest in the tender, bidding, and contracting process being open, transparent, and clear when government entities and public bodies enter into deals and agreements with external partners to buy, sell, or manage assets, goods, or services. This increases trust, competition, value for money, and quality in government services, with benefits to government, private sector, and citizens alike.

The Principles below concern one aspect of the contracting process: the publication of the contract itself, once signed. They seek to address the question of whether and what information can be exempted from publication for reasons of commercial sensitivity.

Contract documents set out the legally binding terms agreed between a public agency and a partner (the contractor). Enabling access to the full text of these documents, including all annexes and amendments, is important for building trust, supporting competition, and allowing people to monitor performance of government contracts and assess the value for money delivered over their lifetime. While freedom of information laws can be used in many jurisdictions to request access to information held by public bodies, there is a strong case for proactive and routine publication of the full text of public contracts both for clarity and efficiency.

Specific pieces of information included in a contract should only be withheld where it is in the public interest to do so. Public interest reasons for withholding information also include **if the information would harm national security or reveal personal information but these reasons are not covered by the principles below**. In addition, it can sometimes be in the public interest for information to be withheld for reasons of **commercial sensitivity**, but lack of clear rules, guidance and processes for determining what information should be withheld leads to confusion, uncertainty and, on occasion, overly broad use of this exemption.

These Principles on commercial transparency in public contracts have been developed by a working group of professionals from the public and private sectors, as well as information users from civil society. They are a guide to the development and implementation of policy on commercial transparency in all kinds of government contracts, including procurement, sales, concessioning, leases, insurance, loans, and grants. The 10 Principles cover **transparency by design, exceptions in the public interest**, and the need for a **clear and robust process**:

- i. Transparency by design:** Transparency should be the norm for all government contracts, particularly regarding information on what is being exchanged and for what price. Contracting systems should be designed to support proactive publication of contracts as open data.
- ii. Exceptions in the public interest:** Redactions on the basis of commercial sensitivity should only be justified where the public interest in withholding information is greater than the public interest in having that information published. This should take into account both any commercial harms to the contractor and the broader benefits of transparency to markets and public trust.
- iii. Clear and robust process:** Governments should issue detailed guidance on commercial sensitivity principles and exemptions, put in place systems to support publication, ensure redaction is time-limited, and use other oversight mechanisms to compensate for information withheld from publication.

Because these Principles are broad in their coverage, they allow both for publication regimes where individual pieces of information may be considered for redaction, and those where there is a clear up-front policy of full text publication without exemptions, applied across a jurisdiction, sector, or area of contracting. What they do not envisage is blanket use of commercial confidentiality as a means to hold back information without regard to the public interest.

These Principles are aimed at creating a level playing field for transparency in public contracting. In practice different countries and sectors will move towards transparency at different rates. The more universally the Principles are applied, the larger the gains.

THE PRINCIPLES

TRANSPARENCY BY DESIGN

- 1. Public contracting should be designed for transparency and efficiency.** The design of procurement and other contracting systems and model contracts should aim to reduce the need for redaction and uncertainty about publication. Bidders should be aware of transparency requirements from the outset of a bidding process.
- 2. Full contract publication should be the norm.** Governments should undertake full, proactive contract publication. Information should only be redacted on the grounds of commercial sensitivity where a clear case has been made that it is in the public interest to redact more than the public interest to publish information. Ideally contract information should be published in an open data, machine readable format with a clear data schema to facilitate sharing and use.
- 3. Information needed to judge value for money should be disclosed.** The fundamental aim of transparency is to ensure government resources are well used. This requires citizens and competing firms being able to access information on what has been bought, sold, leased, or otherwise exchanged, and at what price. Procurement policies may mandate publication of information on price, evaluation criteria, technical conditions, technical specifications, performance obligations, and documents confirming compliance with the qualification criteria. If information needed to judge the value for money of the contract over its lifetime is requested for redaction, it should pass the public interest case.

EXCEPTIONS IN THE PUBLIC INTEREST

The application of exceptions to publication can depend on factors including contract types, and levels of trust in public institutions (where there is less trust in institutions the case for full publication is stronger). For example, in the extractive sectors the ownership of natural resources by citizens, the irreversible sale of non-renewable public goods, the often-significant revenue generation potential, the associated corruption risks, and the information asymmetries between government and companies in the sector combined suggest that a general policy of full disclosure is likely to be in the public interest.

Where exceptions to publication are considered:

- 4. Information should only be redacted for reasons of commercial sensitivity when the public interest in withholding information is greater than the public interest for disclosure.** The potential for harm to the contractor and (so) to the public interest that may result from disclosure of commercially sensitive information should be weighed against the public interest in disclosure. A public interest test should robustly weigh these two cases and explain the decision made. The burden of proof of harm to the public interest from publication should be on those seeking to withhold information from the public.
- 5. The public interest test should take into account the wider economic benefits of the sharing of commercial information, as well as the case for accountability and the public's right to know.** There is a public benefit in increasing competition in bidding rounds for future public contracts. Exemption to disclosure on the basis of public interest test requires demonstrating (i) evidence of significant potential financial harm to the contractor or the public agency; (ii) the harm to the contractor or the public agency will harm the public interest; (iii) that it is reasonable to believe this harm could be avoided through redaction of contract text (including that it is unlikely this information could be accessed through other channels); and (iv) this negative impact clearly outweighs the benefits of access to the information for government, market, and citizens through enhanced competition, market information, and scrutiny.
- 6. All redactions should be clearly marked with the reason for redaction.** Where the reason given for redaction is commercial sensitivity, a link to the public interest justification should be provided. Redactions should include an indication of how long the information will be withheld for, and what appeals process is available. Agencies designing information systems or data standards for contracting and contract publication should include redactions and related information within the data system and metadata (so that cases of redacted information can easily be searched, patterns of redaction monitored, and redactions automatically flagged where the exemption to publication has expired).

A CLEAR AND ROBUST PROCESS

- 7. Governments should issue clear guidance to public entities, agencies, and firms on contract publication and when information may be exempted from publication for commercial sensitivity reasons.** This can include model contracts which specify publication, guidelines specifying classes of information that will never be allowed to be exempt from disclosure in signed contracts, and/or inclusive lists of possible information types that may be considered for redaction. Guidelines from information regulators on the public interest case for redaction should be principles-based rather than mechanical and exhaustive.
- 8. Where redaction is potentially allowed, there should be a clear process for determining what is redacted, why, for how long, and with what appeals process.** For example, a good-practice process could begin with the party that claims potential direct financial harm delineating the information they are seeking to redact at the time of bid submission or as soon as practicable thereafter before the contract is agreed (this party is usually the contractor, but can be the public agency). The party alleging harm provides an argument as to why they think it meets the public interest test. If the contractor is making the request, the public agency in the first instance applies the public interest test. If it is the public agency seeking redaction, a separate government body (potentially the Freedom of Information authority) acts as arbiter of the legitimacy of that claim. The request for redaction, and the granting of the exemption to publication, includes a time limit on how long the exemption from publication is granted. This could be until the end of the contract or for some specified period afterwards. Members of the public should also be able to appeal redactions if they believe that the public interest test has not been satisfied.
- 9. There should be a system for ensuring that contracts and contract information are in fact disclosed in practice.** Publication might be required for contracts to be legally valid (and thus enforceable). E-procurement systems might automatically publish contracts or deny payment if contracts are not available, or procurement committees might be instructed to deny final approval until publication. Dispute and complaints mechanisms on contract awards are other important safeguards.
- 10. Where exemption to disclosure of information is granted for commercial sensitivity reasons, this should be grounds for increased scrutiny through other oversight mechanisms.** In cases where the public's ability to assess value for money is limited by redaction, there is an enhanced role for oversight mechanisms (such as a supreme auditing institution or ombudsman, or additional judicial or parliamentary oversight) that can access the redacted information while ensuring its ongoing confidentiality.

READ THE FULL REPORT AT [CGDEV.ORG/TRANSPARENT-CONTRACTS](https://www.cgdev.org/transparent-contracts).



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