

Anti-Corruption Contract Framework^{1, 2}

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Introduction

Corruption is perhaps the single most important threat to stable societal frameworks today, and little is being done through investment contracts to stop it. While contracts can influence behavior³, they are not an end-all solution for illicit business dealings and transactions. The casual three-lined anti-corruption clauses that find themselves in almost all investments contracts are not effective; frameworks for open public contracting and other standards that have a wholesome approach (that is, focusing on external factors like the societies in such developing countries) are the best hope for combatting corruption⁴. The benefits of anti-corruption efforts are far-reaching and promote a level-playing field for smaller firms, higher quality products and services in affected countries, and yield higher values for money invested². This research seeks to convey the importance of combatting corruption and its lasting effects on societies and their people around the world, and the most effective ways of altering business operations and contracts to do so. Furthermore, it will focus on contracts procured either by public or private sector entities in the aim of investing in developing countries, be it in the form of new business or public goods such as infrastructure.

Keywords: Transparency / Open Contracts / Accountability / Public Benefits / Corruption / Bribery / Open Discourse / Fair Markets / Development

Statistically, public contracting is the single largest expenditure of governments around the world; it amounts to a whopping US\$9.5 trillion every year, 60% of which were won by bribes². In even larger terms, corruption costs the world economy roughly 5% of global Gross Domestic Product

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³ Cotula, L. (2010). *Investment Contracts and Sustainable Development*. Retrieved from International Institute for Environment and Development (IIED) website: <http://pubs.iied.org/pdfs/17507IIED.pdf>

⁴ Hayman, G. (2016). The Biggest Hope for Ending Corruption is Open Public Contracting. [blog] *Open Contracting Partnership*. Available at: <https://www.open-contracting.org/2016/05/11/biggest-hope-ending-corruption-open-public-contracting/>

(GDP), meaning corruption cost the world economy more than US\$4 trillion in 2017⁵. Furthermore, more than \$20-40 billion of international development aid funds sent overseas each year are laundered by high-level government personnel – this makes up nearly 40% of all international development funds³. These funds are desperately needed in developing countries where citizens rely on these funds to provide for public goods, such as schools, housing, transportation, hospitals, and so on.

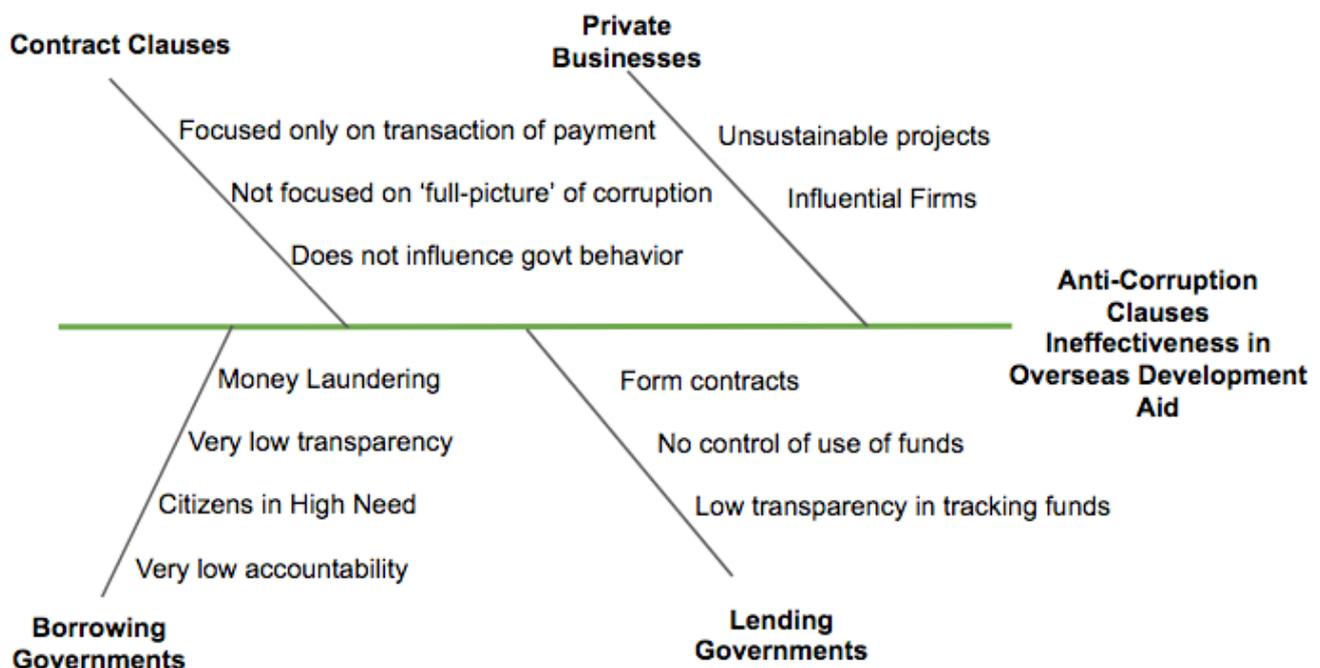
Corruption is not limited to bi- or multilateral government transactions, but also includes private sector business transactions. Countless international organizations, notably the OECD, World Bank, and the International Chamber of Commerce, have consistently placed upmost importance on addressing worldwide corruption and have produced internationally recognized standards and regulations, several of which are urged for inclusion within contracts. Key takeaways from these varying standards are: (i) fostering contract transparency between direct contract stakeholders and the public-at-large; (ii) structuring open contract processes; and (iii) the exclusion of third parties in monetary transactions. While notions like third party exclusion is important for ensuring that money does not fall into the wrong hands, it focuses on a single transaction; many external factors such as the societal needs, culture, and human capital to name a few are not within the scope of this single transaction.

Perhaps the most recognized organizational body pushing for open contracting and other means of combatting corruption is the Open Government Partnership (OGP). The OGP boasts 75 member countries and partnerships with frontline organizations such as the OECD, UN, among others⁴. Moreover, another organization by the name of the Open Contracting Partnership (OCP) is a strong advocate for open contracting processes and their benefits. According to the OOC, open contracting is a process that accounts for all direct and indirect stakeholders, and “pushes for open and accessible and timely information on government contracting to engage citizens and businesses in identifying problems.” Open contracting also requires its standards to implemented at every level of a project; the planning stage of a project, bidding and tendering process, as well as the project implementation process.⁶

⁵ Yermo, J. and Schroeder, H. (2014). *The Rationale for Fighting Corruption*. CleanGovBiz – Integrity in Practice. [online] Paris: OECD, pp.1-4. Available at: <https://www.oecd.org/cleangovbiz/49693613.pdf>

⁴ U.S. Department of Justice (2018). [online] *Foreign Corrupt Practices Act (FCPA)*. Available at: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

⁶ Open Contracting Partnership (2016). *The Biggest Hope for Ending Corruption is Open Public Contracting*. [blog] *Open Contracting Partnership*. Available at: <https://www.open-contracting.org/why-open-contracting/#what-is-open-contracting>



The standards set out by the OCP and OGP are heavily aligned, and we will therefore benchmark clauses and standards used in business contracts against standards recognized by both organizations.

Methodology

Step 1 – Analysis of OGP Standard

The basis of measurement, which will be benchmarked against all other gathered clauses, is a set of standards established by the Open Government Partnership (OGP).

The OGP standard is as follows:

- **“Increase the availability of information about governmental activities.**
- **Support civic participation**
- **Implement the highest standards of professional integrity throughout administrations**
- **Increase access to new technologies for openness and accountability”⁷**

This set of criteria offers a comprehensive view into what it means for a contract to promote an open framework. Here, both direct (internal administration) and indirect (civic) stakeholders are

⁷ U.S. Department of Justice (2018). [online] *Foreign Corrupt Practices Act (FCPA)*. Available at: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

addressed, the culture of both accountability and integrity amongst stakeholders, governmental transparency, and inclusion of technology. In order for this standard to be effective, it must be implemented at every level of a project.

Corrupt acts, their causes, and solutions extend beyond a broad range of topic areas, several of which are out of scope within this research paper. This analysis will focus on an overview of causes, examples, and solutions, but is by no means inclusive.

Increase availability of information, contract could demand for invoicing policies, exclusion of third parties, preventing transfer pricing, transparent tax revenue system

It is crucial that both the contract owner and contractor have a transparent bidding process. An example of a transparent bidding process for the contract owner, it is important that a sufficient number of bidders are evaluated and that the contract amounts are openly communicated. Furthermore, bidding contractors must provide a price breakdown of services provided. This is important because it discourages businesses from excluding tax payments, inspections, or other government-controlled cost, which are often deducted as part of a bribe.

Secondly, in managing direct stakeholders, it is important that the contractor does not have any close, personal ties to any official in that country. In developing economies, preference is often given to those businesses having strong influence by high-ranking officials, or those in which high-ranking officials have personal gains. In fact, several government officials may seek to promote businesses that promise a senior management position after leaving office. This revolving door practices often shut out small businesses and foster bribes between already powerful large businesses. Therefore, it is important to explicitly communicate that the business does not have any close ties to any official within the local government.

Thirdly, and perhaps most importantly, is the management of indirect stakeholders. Inclusion of the society within the country within the contracting process is the key to promoting anti-corruption efforts. Contractors and loaning organizations can engage in civic participation by providing pathways for inclusive debate, tools enabling people to hold the government accountable, among others. A hurdle here is that often in developing countries there is often a lack of human social capital, meaning that the people may lack the education or analytical skills to uphold such standards.

In establishing high levels of integrity within an organization, the inclusion of policies punishing corruptive acts and protecting those who report it, such as whistleblowing policies, are a great contribution to creating a culture of integrity and accountability. Furthermore, countries having developed anti-corruption frameworks can also help to encourage the development of such frameworks in developing countries. For example, the United States established the US Foreign Corrupt Practices Act in 1977⁸; this act pertains to any U.S. citizens, or those acting on behalf of an American business, operating business in a foreign country, and allows people from that foreign country to report and pursue that U.S. person for corruptive acts in the U.S. legal court system.

⁸ U.S. Department of Justice (2018). [online] *Foreign Corrupt Practices Act (FCPA)*. Available at: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

These acts are effective and allow for corruption to be punishable by those in the affected country, especially in countries where such legal proceedings may not exist. Moreover, organizations such as the World Bank's Governance and Anti-Corruption Implementation Plan (GAC) work alongside governments and contractors in developing countries to develop anti-corruption plans to minimize the risk of corruptive activities throughout the course of projects and programs.

Step 2 – Means of Measurement & Scoring

Clauses analyzed throughout this methodology will be scored and ranked according to the standards aforementioned; therefore, there will be four (4) attributes, each which will have a maximum score of three (3) based on how well the clauses address the points mentioned in the OGP standard.

The attributes are as follows:

Compliance: Measures whether or not contract clause addresses a specific set of standards or legislation, and clause is fully compliant to a set of recognized standards or legislation.

Risk: Clause includes some sort of target to measure the corruption risk throughout the project, be it in the form of evaluation reports, reaching and maintaining specified KPI's, among others.

Completeness: Contract must not only address those direct stakeholders or handling the first transaction, but must also have a mention of the quality of the organization's internal framework, mention society/civic participation, transparency, and other aforementioned criteria. Must be complete with criteria that it does address, but will also be taken into account for things left unaddressed.

Effectiveness: Contract states some sort of punishment for not abiding by standards (i.e. whistleblowing policy), creates and/or is supported by an attainable pathway for civic participation, transparent transactions, business processes, among others.

A score of one (0) shall indicate: Poor: Clause does not address points at all, not developed

A score of two (0.5) shall indicate: Fair. Clause somewhat addresses points, fairly developed

A score of three (1) shall indicate: Excellent. Clause addresses the point, very developed

Step 3 – Benchmarking Anti-Corruption Clauses Against OGP Standard

How are inefficient contract clauses and unsustainable internal management failing to address real corruption causes

Clause 1

Reference in APPENDIX 1.1. KfW Entwicklungsbank is a bank owned by the German government that offers loans for development project and programs. The corruption clause in

their development loan, and technical cooperation, contracts cover the following criteria⁹: third-party exclusion in regards to receiving the loan, that the contractor must provide a detailed report of all goods/services to be provided and their costs, threatens sanctions/punishment if not followed, and addresses the internal organization of the project executing agency, suppliers, and employees.

Clause 2

Reference in APPENDIX 1.2. The third clause for consideration is the standard set by the Open Contracting Partnership organization. This standard gives a comprehensive approach to anti-corruption; not only are corruptive acts addressed, but just as importantly the internal business processes are mentioned as well. Pre-contract phases such as iterative management, recording processes, making reports transparent at each phase of the project, user-centricity, and tracking product quality are all highlights¹⁰. These steps play a critical role in preventing corruption and address organizational structures and their employees. Additionally, by tracking progress and forming milestones, companies can greatly improve their risk register.

Additionally, by tracking the quality of the services/goods delivered holds the company accountable for providing exactly what was needed by the people (should be openly discussed with locals) and is likely to not change due to corruptive activities. The ‘open source tools’ in other development projects has often yielded user-friendly business analytics tools open to the public, allowing for a high-level of transparency.

Clause 3

Reference in APPENDIX 1.3. Key takeaways from the Asian Development Bank (ADB) addresses several layers of preventive corruption activities, such as supporting whistleblowing between stakeholders throughout all phases and cycles of a program. Furthermore, corrupt acts are confronted by a zero-tolerance policy. Because the idea of implementing anti-corruption activities throughout the entire project lifecycle and building integrity within the organization itself but does not mention specific details/milestones/pathways, we will rate this clause as fair¹¹.

Clause 4

Reference in APPENDIX 1.4. DANICA, a department of the Danish Ministry of Foreign Affairs, sets out to provide funding for international development aid⁹. The clause above is adapted from

⁹ Chene, M. (2011). *U4 Expert Answer Report*. Bergen: Transparency International and the Anticorruption Resource Center. Pp.1-10. Available at: <https://www.u4.no/publications/examples-of-anti-corruption-clauses-in-cooperation-agreements>

¹⁰ Hayman, G. (2016). The Biggest Hope for Ending Corruption is Open Public Contracting. [blog] *Open Contracting Partnership*. Available at: <https://www.open-contracting.org/2016/05/11/biggest-hope-ending-corruption-open-public-contracting/>

¹¹ Chene, M. (2011). *U4 Expert Answer Report*. Bergen: Transparency International and the Anticorruption Resource Center. Pp.1-10. Available at: <https://www.u4.no/publications/examples-of-anti-corruption-clauses-in-cooperation-agreements>

World Bank and is included in such a development aid contract to developing countries. As such, it addresses a planned course of action in the case that any recipient is taking part in corrupt acts and calls for transparency in the form of reports and audits. Additionally, it bans firms having been found guilty of committing corrupt acts from borrowing from DANICA again¹².

Step 3 – Scoring

Attributes	1. KfW	2. OCP	3. ADP	4. DANICA
Compliance	EXCELLENT	EXCELLENT	FAIR	EXCELLENT
Completeness	FAIR	EXCELLENT	FAIR	FAIR
Transparency	POOR	EXCELLENT	FAIR	EXCELLENT
Open Source Tools	POOR	EXCELLENT	POOR	POOR
Project Lifecycle Integration	POOR	EXCELLENT	EXCELLENT	EXCELLENT
Punishable	EXCELLENT	FAIR	EXCELLENT	EXCELLENT
Risk	FAIR	EXCELLENT	FAIR	EXCELLENT
Effectiveness	POOR	EXCELLENT	FAIR	FAIR

¹² Federal Ministry of Economic Cooperation and Development of Germany (2018). [online] Approaches – Financial Cooperation. Available at: http://www.bmz.de/en/ministry/approaches/bilateral_development_cooperation/approaches/financial_cooperation/index.html

Attributes	1. KfW	2. OCP	3. ADP	4. DANICA
Compliance	1	1	0.5	1
Completeness	0.5	1	0	0.5
Transparency	0	1	0.5	1
Open Source Tools	0	1	0	0
Project Lifecycle Integration	0	1	1	1
Punishable	1	0.5	1	1
Risk	0.5	1	0.5	1
Effectiveness	0	1	0.5	0.5
TOTAL	3	7.5	5	6

Pair Wise	Compliance	Completeness	Transparency	Open Source Tools	Project LC Integration	Punishable	Risk	Effectiveness	Ordinal Ranking
Compliance		0.5	0.5	0.5	0.5	0.5	1	0	3.5
Completeness	1		1	1	1	1	1	1	7
Transparency	1	1		1	1	0.5	1	1	6.5
Open Source Tools	1	1	1		0	0	1	1	5
Project Lifecycle Integration	1	1	0.5	1		0	1	1	5.5
Punishable	0.5	1	0.5	0	0.5		1	0.5	4
Risk	0	1	1	0	1	1		0.5	4.5
Effectiveness	1	1	1	0.5	1	1	1		6.5

The clause and/or standard having the highest score is the organization Open Contracting Partnership, followed by DANICA. The OCP standard is greatly aligned with OGP’s standard and both have similar aims. We will now look at the feasibility of implementing standards mentioned in OGP and OCP within a governmental organization or a private business through a weighted method.

Step 4 –Feasible Alternatives

Attributes will be rated as either being: (i) VERY related to the standard criteria; (ii) FAIRLY related to the standard criteria; or (iii) POORLY related to the standard criteria (tables on next page).

Attributes	Transparent Contracting Process	Civic Participation	International and Local Org. Partnerships	Public and Private Sector Discourse	Build culture of Accountability / Integrity	Maintaining End-Product Quality	Open Data Publication	Iterative Disclosure in Project Steps
Compliance	POORLY	FAIRLY	FAIRLY	FAIRLY	FAIRLY	VERY	FAIRLY	FAIRLY
Completeness	VERY	VERY	VERY	VERY	VERY	VERY	VERY	VERY
Transparency	VERY	VERY	VERY	VERY	FAIRLY	FAIRLY	VERY	VERY
Open Source Tools	VERY	VERY	VERY	FAIRLY	FAIRLY	POORLY	VERY	FAIRLY
Project Lifecycle Integration	FAIRLY	VERY	VERY	POORLY	VERY	VERY	VERY	VERY
Punishable	FAIRLY	VERY	VERY	FAIRLY	VERY	FAIRLY	FAIRLY	POORLY
Risk	FAIRLY	VERY	VERY	VERY	VERY	VERY	VERY	FAIRLY
Effectiveness	VERY	VERY	VERY	VERY	VERY	VERY	VERY	VERY

Attributes	Transparent Contracting Process	Civic Participation	International and Local Org. Partnerships	Public and Private Sector Discourse	Build culture of Accountability / Integrity	Maintaining End-Product Quality	Open Data Publication	Iterative Disclosure in Project Steps
Compliance	0	0.5	1	0.5	0.5	1	0.5	0.5
Completeness	1	1	1	1	1	1	1	1
Transparency	1	1	1	1	0.5	0.5	1	1
Open Source Tools	1	1	1	0.5	0.5	0	1	0.5
Project Lifecycle Integration	0.5	1	1	0	1	1	1	1
Punishable	0.5	1	1	0.5	1	0.5	0.5	0
Risk	0.5	1	1	1	1	1	1	0.5
Effectiveness	1	1	1	1	1	1	1	1
TOTAL	5.5	7.5	8	4.5	6.5	6	7	5.5

Due to the complex nature of corruption, no single action taken is an end-all solution; companies and governments alike may adopt best practices, grow a culture of integrity and accountability within internal structures, or even focus on incorporating more public and private dialogue throughout a procurement process. Furthermore, a successful anti-corruption program is not due to merely one stakeholder; rather, it necessitates the cooperation and mutual understanding of all stakeholders involved. Here, we will weight the possible alternatives using the prior scoring outcomes to select standards that are the most feasible and effective in fighting corruption.

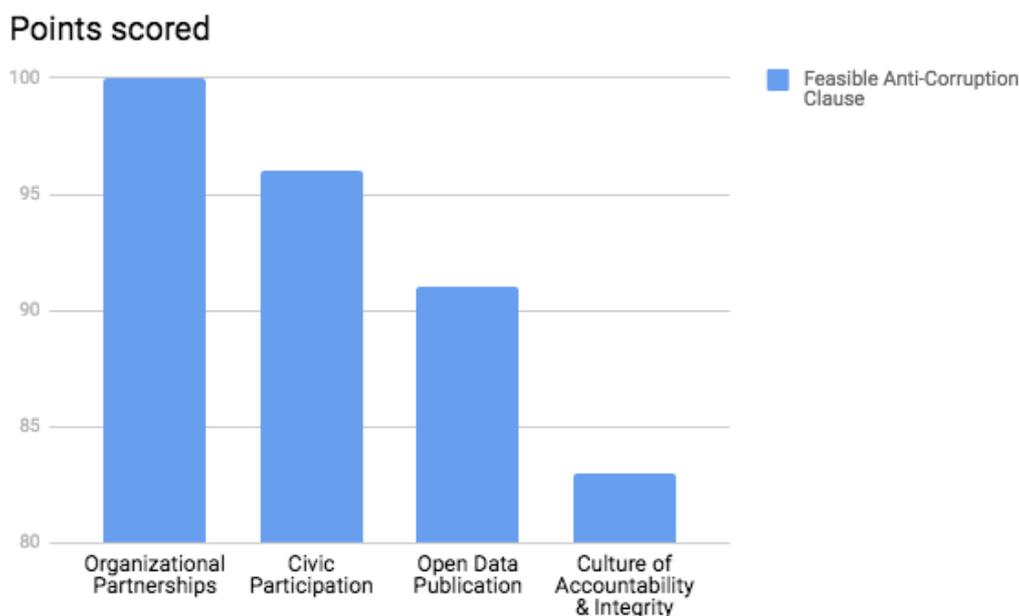
Findings

Step 5 – Additive Weighting Technique

Following the scoring process, the four top scoring attributes will be compared against the top four scoring standard criteria for the additive weighted decision making technique.

	Step 1	Step 2	International & Local Org. Partnerships		Civic Participation		Build Culture of Accountability / Integrity		Open Data Publication	
	Relative Weight	Normalized Weight (A)	B	(A)*(B)	(C)	(A)*(C)	(D)	(A)*(D)	(E)	(E)*(A)
Completeness	7	0.16	1	0.16	1	0.16	1	0.16	1	0.16
Transparency	6.5	0.15	1	0.15	1	0.15	0.5	0.075	1	0.15
Effectiveness	6.5	0.15	1	0.15	1	0.15	1	0.15	1	0.15
Project LC Integration	5.5	0.13	1	0.13	1	0.13	1	0.13	1	0.13
Open Source Tools	5	0.12	1	0.12	1	0.12	0.5	0.06	1	0.12
Risk	4.5	0.11	1	0.11	1	0.11	1	0.11	1	0.11
Punishable	4	0.10	1	0.10	1	0.10	1	0.10	0.5	0.05
Compliance	3.5	0.08	1	0.08	0.5	0.04	0.5	0.04	0.5	0.04
TOTAL	42.5	1.00	1.00		0.96		0.83		0.91	

Step 6 – Alternative Selection



After conducting the weighted decision-making technique, we can see that the action deemed the most feasible by the weighted criteria is ‘International & Local Organization Partnerships’, followed by civic participation. This is a great step for businesses and public sector entities to take in the fight against corruption and is the most feasible. While factors like creating a culture of accountability and facilitating civic participation are also key actions to be taken, those factors remain somewhat out of the control of the contractor. Furthermore, such actions outcomes are largely outside the control of a contract.

Reaching out to already existing international organizations, or even local grassroots organizations spark civic discourse but in a way that is very attainable for an outside business to achieve; it also reinforces civil society’s efforts and yields an opportunity to link these organizations together, creating more synergies¹³. As previously stated, there are existing international organizations such as Transparency International or the International Chamber of Commerce that have outreach programs to facilitate sustainable and open contract processes, notably for public procurement contracts. This is a different approach than many clauses employed in contracts today; by including a third party, independent organization throughout the process, the government in the country in which the transaction is being operated is held more accountable. Steps taken through these programs usually involve initiating a formal reporting process, creating a robust anti-corruption and anti-bribery programs and contracts specifically suited to the project, assurance programs and reports, quality assurance of project deliverables, among others¹⁴. Some countries may also have specific terms that refer to corrupt acts but may use wording like ‘business benefits’, which actually translates to *bribery*. Having an outside organization specializing in some of these factors may also hinder risks in analyzing contracts and conducting business.

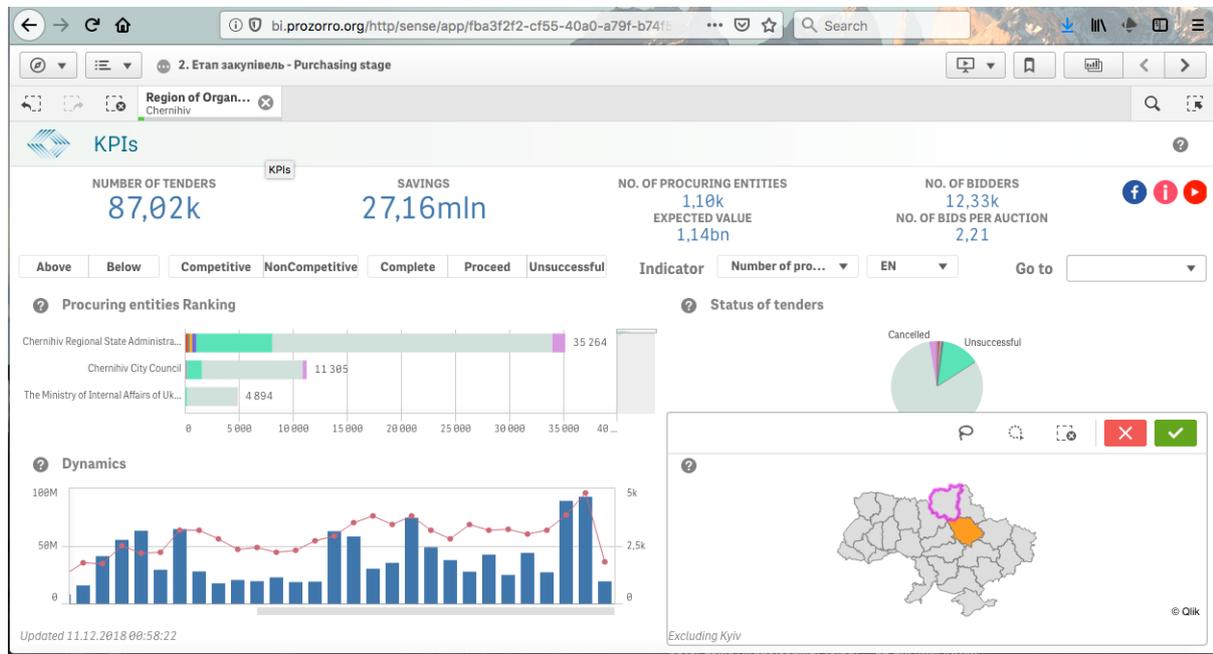
Open Data Publication scored last on the ranking, however it is a concept that is becoming more and more present in international project and contracts. Open data publication is a large part of implementing an open contracting approach and is a game changer for countries looking to revolutionize their bidding and tendering process. The poster-child example for this process is a use case from ProZorro in Ukraine.

In a country actively battling corruption, the Ukrainian government adopted a business analytics tool with a private company to create a transparent and accessible bidding process. This e-procurement system facilitates visibility between all stakeholders (government, private businesses, and society); anyone in the world can go to this designated website, view the number

¹³ OECD (2011). *The Private Sector’s Role in the Fight Against Corruption: Challenges and Remedies for the Egyptian Business Community*. OECD-MENA Investment Program. [online] Paris: Organization for Economic Cooperation and Development (OECD), pp.1-2. Available at: <https://www.oecd.org/mena/49381979.pdf>

¹⁴ Brooks, J., Cote-Freeman, S., and Wilkinson, P. (2012). *Assurance Framework for Corporate Anti-Bribery Programmes*. [online] Berlin: Transparency International, pp.20-30. Available at: http://issuu.com/transparencyinternational/docs/2012_assuranceframework_en?mode=window&backgroundColor=%23222222

of bids in each region of Ukraine, how many contractors are bidding on each project, the project worth, among others.¹⁵



The Ukrainian adoption of open contracting came from a need within their existing structure, as this process facilitates improved competition between businesses, encourages entrepreneurship, and ultimately raises tax revenues. Today, every public contract, as well as the corresponding bids, must be registered on this platform. The OCP website provides a thorough breakdown on how to implement a similar platform within other countries. While such an initiative must come from within a government, a great way to start is by communicating the potential benefits that this can bring to any economy¹⁶.

Step 7 – Risks of Alternative Solution

The risks imposed by undertaking such alternative solutions like partnering with international organizations is that these standards are not always recognized by international law. Some countries have no legislation against corruption and have little regard for its anti-corruption measures, like Indonesia¹⁷.

¹⁵ ProZorro (2017). *ProZorro – How a Dream Became Reality*. [online] Kiev: Transparency International, Ukraine, pp. 2-30. Available at: https://www.slideshare.net/ProZorro_slides/history-of-prozorro-73379060

¹⁶ ProZorro (2017). *ProZorro – How a Dream Became Reality*. [online] Kiev: Transparency International, Ukraine, pp. 2-30. Available at: https://www.slideshare.net/ProZorro_slides/history-of-prozorro-73379060

¹⁷ Cotula, L. (2010). *Investment Contracts and Sustainable Development*. [online] International Institute for Environment and Development (IIED): Available at: <http://pubs.iied.org/pdfs/17507IIED.pdf>

Moreover, ProZorro's online platform has no way of verifying registered businesses to unregistered ones when analyzing bids. Therefore, a business owner may also create other bids on the same tender to manipulate pricing, ultimately modeling the contracts in such a way where their intended proposal wins¹⁸. These are some loopholes that are due for attention when modeling this type of systems.

Conclusion

As a lending government or private contractor, we recommend that all parts of the business involved in the project are aware of corruption and that corrective/preventive action is taken at every project level. When creating a contract clause, focusing on a quality-rich anti-corruption clause rather than referencing a set of standards and detailing no more than the transaction itself is not effective, and has not been previously. This is an especially attractive option for countries needing an increase in revenues and foreign investment.

From the perspective of the private contractor, if operating within a developing country that does not have transparency systems in place, implementing iterative, anti-corruption business processes throughout the project. While some firms may see that by bidding a contract which may be higher in cost, having low tolerances for corrupt acts, among others, that they may lose advantage in a very competitive bidding and tendering environment. However, firms having a greater preference by more corrupt governments have a certain level of influence over the government; if influential firms all engaged in stronger anti-corruption efforts, the government would be swayed to change. Involving organizations in project planning and business development may add another layer of accountability to a project and help to ensure that anti-corruption milestones are met.

Lastly, **people** must remain at the forefront of contract negotiation and benefits realization. Therefore, the discourse between governments and their people must improve; this goes to say that *governments* must be more transparent, the *public* must hold the government accountable to communicated agreements, and *those within the government* must first and foremost hold each other accountable. This reality lies outside the control of an anti-corruption clause in a contract and must therefore be addressed in an open contracting way.

1. ¹⁸ Transparency International (2018). *DoZorro Artificial Intelligence Find Violations in ProZorro: How it Works*. [online] Berlin: Transparency International. Available at: <https://ti-ukraine.org/en/news/dozorro-artificial-intelligence-to-find-violations-in-prozorro-how-it-works/>

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