



# OPEN CONTRACTING AND INCLUSION

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Photo cover: Community leader of the Tagbanuas, a community living in Narra, the Philippines, shares information. Bantay Kita, Hivos' partner organization in the Open Up Contracting program, works with indigenous communities in the Philippines to improve their understanding and use of data in mining contracts.

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# 1 INTRODUCTION

In a context of declining trust in public institutions, transparency and accountability are two interlinked elements for evaluating and assessing how well public institutions govern and are governed. New technologies and the opportunities these afford enable new ways of accessing, analyzing and contextualizing data published by public institutions. Access to relevant data and information, as well as freedom of expression, not only make possible the monitoring of governance in the public sector, but also has the potential to empower citizens to make informed decisions and to participate in decision-making processes that affect their daily lives and the development of their communities.

Open government data is an active focus in advocating for greater transparency and accountability in public sector contracting. In the course of conducting their routine administrative tasks, governments at all levels, their agencies and various contractors generate and collect vast quantities of data. The arguments put forward by advocates is that if governments open up their contracting processes and data, they can save taxpayers' money, make better use of national resources, deliver better goods and services, prevent corruption and fraud, create a better business environment, and stimulate innovation. Open contracting is a process in which governments work together with a variety of stakeholders, including civil society, journalists and the private sector, to make public procurement processes deliver these benefits.

Open contracting has been adopted by more than 35 governments worldwide<sup>1</sup> and has received significant attention from advocates and researchers alike. According to the organization Open Contracting Partnership, open contracting has become “a new global norm, recommended and endorsed by global bodies such as the G7, the G20, OECD, the European Commission, the World Bank, and the European Bank of Reconstruction and Development”.<sup>2</sup> However, evidence of the concrete benefits that open contracting delivers derives from a limited sample of case studies or single-country research pilots. There remains a need for more robust evidence on cases where open contracting initiatives have translated into increased uses of data and have resulted in actions that have led to beneficial outcomes. For example, increase access to quality public services delivery, increase value for money, increase efficiency of procurement processes, decrease corruption, increase fair competition and a level playing field, etc. Seldom is evidence used to test or develop theory, that is, our understanding of how, why and under what conditions open contracting succeeds or fails to live up to expectations. Furthermore, little is known about the outcomes of open contracting such as greater equality, inclusion and gender in public contracting processes and whether open contracting reforms can be used to advance these aspects.

The research aims to identify and assess ways in which key aspects of open contracting reforms did or did not lead to increased equality and inclusion in public contracting processes.

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<sup>1</sup> According to the Open Government Partnership, 70 of its members have made open contracting commitments and as at March 2019, [37 members were implementing open contracting commitments](https://www.open-contracting.org/what-is-open-contracting/).

<sup>2</sup> <https://www.open-contracting.org/what-is-open-contracting/>

The research has the following objectives:

1. Develop insights and **understanding of factors and circumstances** where open contracting leads to **specific benefits/impacts** for both primary and secondary beneficiaries from marginalized groups. These marginalized groups and their associated benefits from open contracting include:
  - a. Private sector companies representative of (i) women, (ii) youth [18-25 year-olds], and (iii) minorities or previously disadvantaged groups [context-specific] as primary beneficiaries in the form of: increased ability to enter the public procurement market; increased number of bids from companies representative of marginalized communities; increased number of successful tender applications from companies representative of marginalized communities; increases in the use of feedback mechanisms by the contracting party; action by the offering party based on feedback received from companies representative of marginalized communities; and increases in the successful investigation of fraud and corruption cases.
  - b. Communities or groups of (i) women, (ii) youth [18-25 year-olds], and (iii) minorities or previously disadvantaged groups [context-specific] as secondary beneficiaries in the form of: increased equal access to public services; increased participation in public consultations in the planning phases; increased availability and use of data for advocacy related to inclusion and gender equality; and decreases stigma and discrimination in access to public services.
2. Produce research outputs **documenting benefits** useful to different target audiences.
3. Gather insights regarding **context and programmatic factors** to inform future program design.

## 2 RESEARCH QUESTIONS

Based on the context and objectives outlined above, this report poses the following three research questions:

1. Are public procurement reforms such as open contracting and the concomitant increase in the availability of contracting data realizing expected results in relation to the inclusion of marginalized groups as beneficiaries of government contracts?
2. What contextual and programmatic aspects in open contracting contribute to achieving meaningful results and benefits for marginalized groups?
3. What do specific marginalized stakeholders experience as significant barriers or impediments to achieving their hoped-for outcomes and benefits?



### 3 CONCEPTUAL FRAMEWORK

The development of a conceptual framework is a critical step because it situates the research findings within a more 'meaningful heuristic', as it aligns the research with existing theoretical constructs in the research field, and it ensures a greater level of generalizability of the research findings, noting all the limitations that this entails. The conceptual framework also provides both direction and impetus to the research inquiry (Adom et al. 2018).

The conceptual framework used in this study provides a 'meaningful heuristic' for understanding the factors that condition the outcomes of open contracting initiatives in relation to the inclusion of marginalized stakeholder groups as beneficiaries of government contracts. The conceptual framework builds on an existing framework developed to assess 28 open government data projects and their impact on the inclusion of marginalized communities in the Global South ([Van Schalkwyk & Canares 2020](#)). It is proposed that the conceptual framework can be applied productively in the context of public procurement reforms, particularly where such reforms are framed as open contracting initiatives, with some adjustments.

The conceptual framework proposes that there are several interrelated factors that condition whether an open initiative is likely to include historically marginalized communities so that they may benefit more equitably in the allocation and distribution of resources. These factors include (1) the disruption of existing data flows; (2) the presentation of opportune niches and the interventions of intermediaries in a data ecosystem; (3) the creation of data with value in the system (or network); and (4) the transfer of valuable data to those best placed to challenge existing power relations. These factors provide the basis of the conceptual framework for this study, and further clarification is provided, including the separating out from the four factors two additional factors (value activation and switching), to account for the relationship between public procurement reforms in the form of open contracting and inclusion.

The selection of this particular conceptual framework developed by Van Schalkwyk and Canares (2020) is supported by three factors. First, the researchers of this project conceptualized and applied the framework in the context of open data initiatives and inclusion and are therefore both familiar with the framework and interested in its development. Second, the selection of the framework aligns with the need to reapply existing theories on openness in order to develop more robust theories on openness and its actual outcomes. Third, the conceptual framework situates the relationship between openness and inclusion within the power dynamics that shape social life.

A conceptual framework that does not account for the exercise and disruption of power is unlikely to produce insights that are grounded in the realities facing marginalized communities in their struggles to be included in the decisions that shape the quality of their lives. It cannot be assumed that by making contracting data and processes more open that there will be any real, lasting impact, unless there is also a change in the power dynamics that created the situation in the first place.

Taking into account power dynamics also deals with the shortcomings of approaches to public contracting reforms that may work in more developed contexts but that are unlikely to succeed in contexts of endemic or systemic corruption. As Sope (2018: 143) argues,

This means that the usual approaches, such as improving enforcement, limiting discretion and increasing accountability mechanisms may not yield much fruit, as the officials and politicians responsible for enforcing these frameworks are themselves part of the problem. This is one reason why this paper advocates for non-state-centric approaches, relying on citizens and civil society to address corruption in public procurement. [They] are expected to provide pressure and impetus required for the state to respond to demands for more accountability in the procurement space.

In Castellan terms, Sope (2018) is effectively arguing for change by challenging existing power structures rather than relying on power to self-correct. This approach to understanding change is explored further below after providing a description of the factors that condition inclusion as an outcome of reforms aimed at creating more open public contracting processes.

### Factors conditioning social inclusion<sup>3</sup>

Castells (2017, 72) states that “there has been no economy and no society in the world in which wealth and power do not depend on information and knowledge. It has always been the absolutely critical matter for wealth generation and power generation.” Data are the building blocks of information and knowledge. Open data is differentiable from other data in that it is universally accessible and, as such, it is not (in theory at least) exclusive to any particular actor or group of actors who may hold positions of power within networks by virtue of their exclusive access. By implication, open data, therefore, has the potential to change the distribution of power within networks by making possible new flows of data within and between networks. This, in turn, makes new power arrangements possible by disrupting previously closed information flows as well as by democratizing the monitoring of powerful actors. The **disruption of existing data flows** is therefore seen as a factor in determining the extent to which excluded communities are likely to participate in previously closed networks.

If openness is the primary condition, then a secondary condition is that the open data must be of value to both those in positions of power as well as those who seek to participate in the network if the open data is to be disruptive. Janssen et al. (2012) state that “[t]he main challenge is that open data has no value in itself; it only becomes valuable when used.” In this sense, use of open data is a proxy for its value in a network.

The implication is that not all open data will disrupt existing flows in networks; its disruptive property is a factor of its openness and its value or currency to those social actors who occupy the central nodes of power in networks. If this is the case, non-central nodes and those outside of a network will be in a position to (re)use data to challenge the program of the network. The publication of open data without value is most apparent in the case of so-called ‘open washing’, that is, when governments or other powerful actors pay lip service to openness by publishing government data but only that data which is of little value to those outside of government.

The disruption of flows does not take place in a vacuum but in specific socio-technical contexts, each with their own unique configuration of networked capabilities, resources and power. Disruption of data flows in networks as described in the section above may take place in contexts

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<sup>3</sup> This section draws heavily on the work of Castells (2010) as described in Stalder (2006).



that create **opportune niches**, that is, spaces that attract new social actors with the requisite capitals into existing networks. It is also conceivable that, in addition to the actual availability of data, the 'convening power' of open data (Van Schalkwyk & Canares 2020) (resulting in dialogue and new connections between actors in socio-technical systems) may lead to the opening up and/or identification of opportune niches.

Access to opportune niches is not universal and is dependent, in part, on the configurations of material and nonmaterial capitals of social actors (Van Schalkwyk et al. 2016). The ability of actors to enter into or reposition themselves close to emerging niches in networks will depend on their constellations of capital, the situated material and nonmaterial advantages that they bring to the network or to those who occupy central nodes.

The importance of specific properties required by social actors to exploit opportune niches, and their effects once they establish themselves, points to the unique position of social actors located between those who occupy positions of power and those who are excluded from networks: open data intermediaries (Van Schalkwyk et al. 2015, 2016). Intermediaries create data of value for specific communities and they can make new connections within networks and between those within and those external to existing networks. **Infomediarles** such as data journalists and data visualization experts, are a special type of intermediary, adept at converting data into meaningful and usable information for particular communities.

While infomediarles play important roles in terms of adding value to open data and other intermediaries create connections within and between networks (see the section on switchers below), intermediaries should not be seen as panacea in ensuring open data's positive impact on social inclusion. Intermediaries have their own vested interests and are not ideologically neutral (Schrock & Shaffer 2017). Furthermore, it cannot be assumed that the usual suspects, i.e., the most visible or vocal of the civil society organizations represent those constituencies they claim to represent (Neubert 2011).

The niche in a particular network often presents itself as a social problem and/or economic opportunity exploitable by social actors because of: (1) a simultaneous opportunity or set of enabling conditions that create a demand for data; (2) the availability, accessibility and usefulness of data; and (3) their particular constellation of capitals, the value and relevance of which are determined by the network in which the problem presents itself.

Because networks function according to different programs (or logics), it is unlikely that one network where value is created will share the same programmatic logic as other networks where the power for effecting change is located. The network determines what is of value and that value will differ across networks because networks function according to different programs. The implication is that data that is of value to one network may have little value to another network. It is therefore only when value is shared between networks, that the transfer of data can occur, and that the data has the propensity to reprogram a network such that actors may participate more equitably. This means **that value must be activated** in networks where power resides. The 'classic' case illustrating the point of value and the importance of activation in the network where power resides is climate change. Scientific data shows unequivocally that the planet is warming. Within the global network of science, the available data has been interpreted within the programmatic logic of that network and accepted as evidence of rising temperatures. However,

in the global networks of politics (and of finance), the data does not (yet) have sufficient value to drive a wholesale change in policy and resourcing to reduce emissions.

Value must be transferred by someone or something from one network to another. **Switchers** connect between different networks and allow for value transfer. Switchers are powerful actors in networks because they have the “ability to connect and ensure the cooperation of different networks by sharing common goals and combining resources” (Castells 2009: 45). If a value is not shared or if there are no switchers in place to activate value, then networks remain disconnected. The inability of open data initiatives to connect the value of open data between or across networks was found to be the most significant reason hampering the potential contribution of open data to greater social inclusion. In particular, switching between development aid networks, the open data movement and government networks where decisions on the distribution of public resources are concentrated, was found to be lacking (Van Schalkwyk & Canares 2020).

## Power

The proposed conceptual framework not only accounts for power dynamics and how they shape the inclusion (or exclusion) of historically marginalized groups, but it takes account of different types of power in a society that is increasingly shaped by global communication networks (Castells 2009).

Castells (2009) identifies four types of power in the network society. **Networking power** is the power of social actors in global networks over those who are not included in these global networks. It operates along the binary conditions of exclusion and inclusion. **Network power** is the power exercised by social actors in networks (and typically those at the source of the network’s formation) who prescribe the standards or protocols that determine the rules of acceptance. In this sense, those who execute network power coordinate social interaction in the networks according to rules for inclusion. **Networked power** is the relative power of social actors over other social actors in the same network; and the forms and processes of networked power are specific to each network. **Network-making power** is the power to program specific networks according to the interests and values of the programmers, and the ability to connect and ensure the cooperation of different networks, while defending the network from competition from other networks. It is network-making power that is at the crux of social inclusion initiatives for only by reprogramming the network according to different sets of values and objectives will rules for inclusion in global networks change to accommodate new and different social actors.

Programmers hold the power to program/reprogram networks; switchers hold the power to control the connecting points between networks. Crucially, within this formulation, people, collectives and organizations are understood as social actors who have the ability to disrupt the dominant power switches, and/or to push for change through what Castells calls counter power (Castells 2007, 2009). Counter power in the network society is exerted when social actors attempt to change the programs of specific networks, and/or disrupt the switches that represent the dominant programmatic logic of the network. These social actors are change agents agitating for new programs to shape decision-making in networks.

The social dynamics of networks draws attention to a critical missing element in the assumed revolutionary potential of openness. If openness is to have meaningful outcomes, habitually and systematically excluded actors must be able to access and participate in networks bringing something of value to powerful established nodes in networks where decision-making is concentrated and the program of the network is determined. This shaping is unavoidably a struggle for power (Gurumurthy & Singh 2016).

## Types of inclusion

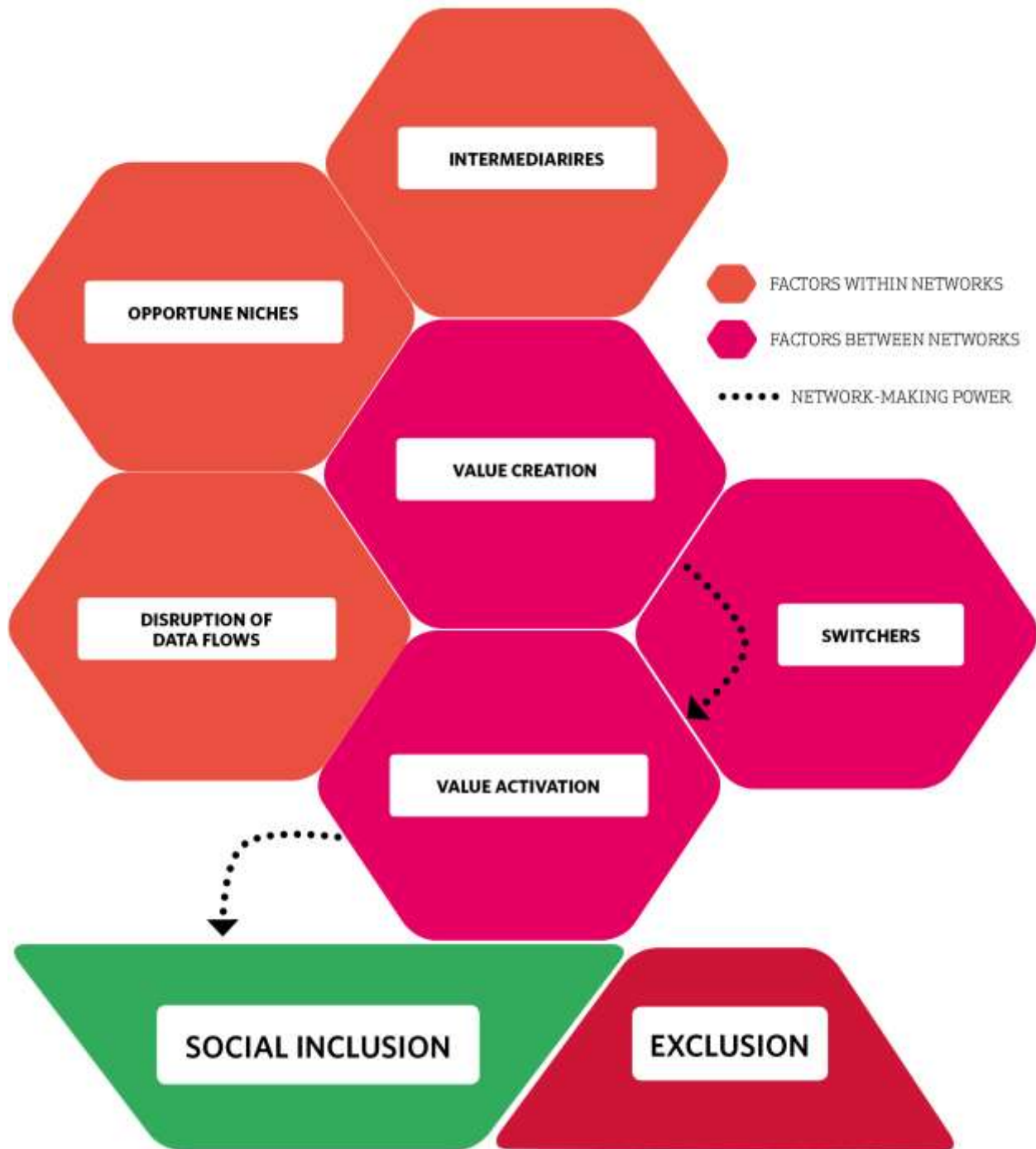
On the one hand, inclusion can be defined as the incorporation and participation in networks by those habitually excluded; on the other hand, inclusion could also be defined as an improvement in the position of those already in networks relative to central nodes where decision-making is concentrated. An improvement in a networked position or being closer to more central nodes in networks means having more information to contest decision-making according to the logic of the network. This broader understanding of inclusion resonates with Castells' definition of one of the four forms of power in networks: networked power, "the power of social actors over other social actors in the network" (Castells 2007, 28). In other words, not all social actors share power equally in networks leaving some social actors excluded from centralized power nodes. Bringing those actors within the same network closer to central nodes is therefore also a form of inclusion.

This type of inclusion may not sit well with those who are completely excluded from information networks as they may see network inclusion as the social progression of those already privileged towards the network elites. For them, it is networking power and network-making that must be disrupted for true social inclusion to take place. However, it is possible that some social actors, particularly intermediaries, who are included in information networks may represent the interests of those who are excluded. By improving their position in networks, and in so doing improving their ability to challenge the programmatic logic of the network, these actors could disrupt power in the network, thereby creating new network nodes that allow the excluded to participate in a reprogrammed network. Such a route to inclusion does, however, depend on the propensity of those already in the network to act on behalf of those excluded from the network. For example, Van Schalkwyk and Canares (2020) found a redistribution of networked power but little disruption to the programs of existing networks. In other words, improvements in the position of some social actors already within networks could be attributed to open data but open data did not result in a reprogramming of networks.

Our interest is in the kind of inclusion where networks have been reprogrammed to the extent that they allow for the meaningful participation of new and previously excluded actors in the network.

Figure 1 depicts graphically the various conditions seen as important if open contracting is to be inclusive in its outcomes.

Figure 1. Conditions for social inclusion in open contracting



## Open contracting

We apply the conceptual framework (Van Schalkwyk and Canares 2020) in a very particular domain of the broader open government movement: open contracting. This domain presents its own challenges in terms of the limits set on what qualifies as open contracting. For example, it is not a straight-forward exercise to draw a clear distinction between transparent public procurement and open contracting. And the distinction is not immaterial because it will determine which activities or initiatives are to be included in our analysis.

Open contracting concerns the publication of data related to public tenders or contracts across five stages (planning, initiation, award, contract, and implementation), with data published openly according to a set of (data) standards defined by the first-movers in the global open contracting network. Strictly speaking, publishing public contracting information does therefore not qualify as open contracting; it can only be defined as open contracting when the publication of the data adheres to a set of standards. Standards themselves can be exclusionary (as discussed above as a form of networking power; see also Lampland and Star [2009]).

We therefore extend the strict definition of open contracting to include reform processes in public contracting -- including disclosure and data publication, but also processes such as public procurement participation and monitoring in public contracting -- even in cases in which open contracting standards may not have been applied. This approach is in-line with that adopted recently by the Open Contracting Partnership which places emphasizes on both disclosure and participation: ["#OpenContracting means more than opening up data on government purchases. It's about transforming the world's largest marketplace"](#) and "We will go beyond our initial focus on making the data 'open-by-default' to encouraging the entire ecosystem of contracting policy, data, and practices to be 'open-by-design'" (Open Contracting Partnership 2019-2023 Strategy: 7).

## 4 RESEARCH DESIGN

The diversity of contexts and conditions in which open contracting initiatives are implemented, along with the sparsity of existing data, invites a case study design as a useful approach to investigate the conditions and outcomes of open contracting in multiple contexts.

A case study approach grounds empirical research in complex social conditions (Babbie & Mouton 2001). The case study offers a means of investigating complex social units consisting of multiple variables of potential importance in understanding a phenomenon, and results in a rich and holistic account of the phenomenon. Insights gained from case studies can be construed as tentative hypotheses to inform research; hence, the case study plays an important role in advancing a field's knowledge base (Reis n.d.).

Shields (2007: 12) argues for the strengths of qualitative case studies:

The strength of qualitative approaches is that they account for and include difference -- ideologically, epistemologically, methodologically -- and most importantly, humanly. They do not attempt to eliminate what cannot be discounted. They do not attempt to simplify what cannot be simplified. Thus, it is precisely because case study includes

paradoxes and acknowledges that there are no simple answers, that it can and should qualify as the gold standard.

Cross-context analysis between case studies will be undertaken to identify any patterns or key differences regarding context conditions, programmatic aspects, and barriers towards implementation.

## Selection of case studies

To maximize the opportunity to learn (Stake 1995), the research team set out to select at least four open contracting projects as case studies.

Following a meeting between the research team and the manager of the Hivos Open Contracting program, four projects were self-selected. The selection was limited to projects from the developing world because this is where it is assumed the exclusion of marginalized communities is most acute. However, following a preliminary assessment of the four pre-selected projects in terms of the information available on each project; each project's level of maturity;<sup>4</sup> consultations with various stakeholders, invitations posted on social media to suggest open contracting initiatives, and a scan of the literature; as well as the fact similar research had been commissioned by Hivos in Latin America, the decision was taken to include the following five cases:

1. **Bandung, Indonesia:** an open contracting pilot project implemented the City of Bandung with the support of the World Bank and the National Procurement Agency. The citizen engagement component of the project was implemented by World Wide Web Foundation's Open Data Lab Jakarta, the aim of which is to cultivate use of published contracting data by the city government of Bandung, Indonesia.
2. **Bantay Kita, Philippines:** Open mining governance to increase access, understanding and use of mining contract data in Cebu and Palawan provinces in the Philippines.
3. **Budeshi, Nigeria** aims to ensure that public service delivery in Nigeria is opened to public scrutiny. Budeshi also requires that data across the budget and procurement processes are structured enough to enable various stages to be linked to each other and, eventually, to public services.
4. **Preferential Procurement, South Africa:** Public procurement regulations introduced by the national government in 2017 stipulating that at least 30% of the value of all government contracts of ZAR30 million or more must be subcontracted to specified disadvantaged groups, including youth and women.
5. **Access to Government Procurement Opportunities, Kenya:** Public procurement regulations introduced by the national government in 2013 stipulating that at least 30% of all government contracts must be subcontracted to specified disadvantaged groups, including youth and women.

The South African and Kenyan cases are somewhat unique in that their selection was purposively different from the other three cases. They were selected on the basis that there had been a

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<sup>4</sup> Maturity is an important selection criteria as it increases the likelihood of collecting sufficient and rich data required to answer the research questions.



legislative intervention by the respective national governments in the public procurement process with the explicit intention of making contracting more inclusive. Therefore, these two cases proceed from an intervention to consider what the outcomes in terms of social inclusion have been in parallel to any open contracting initiatives in South Africa and Kenya. The cases from the Philippines and South Africa differ from the other two in that they focus on specific sections -- mining and construction respectively. The sector focus in these two cases is the product of the outcomes that emerged following legislative interventions that directly impacted public procurement and should not be seen as being indicative of a preference or an ascribed level of importance for certain sectors over others.

While the number of projects and initiatives limits the generalizability of the findings, the depth of the investigation into each case meet the objective of producing relevant and applicable learnings and insights for both Hivos and other stakeholders active in open contracting.

## Data collection and analysis

This research was mindful of both the technical and social aspects of open contracting initiatives. Technical aspects include data quality, timeliness, accessibility, etc., while social aspects may include preferential access, lack of political will, contracting requirements insensitive to challenges faced by marginalized groups; etc. In order to evaluate both the technical and social aspects of open contracting as a driver of change, the research project relied on qualitative research methods and instruments which comprised the following:

- Desk research to review and analyze any available reports, presentations, blog posts and other materials compiled and/or published by the projects.
- Interviews with key informants who have implemented or participated in the open contracting initiative. The purpose of the interviews is to enrich the early insights from the document review and to:
  - gather evidence for assumptions, preconditions, and benefits/impact of open contracting,
  - explore barriers towards implementation, and
  - develop insights into specific open contracting reforms (e.g. context, timeline, content, etc.).

Our approach to analyzing the five open contracting initiatives relies on a conceptual framework based on the proposition that for open contracting data's contribution to greater inclusion to be meaningful in the sense that it supports equitable development, it should: (1) take into account both the processes and outcomes of the supply and use of open contracting data, and (2) be placed within the context-specific distribution of power in the network society. To analyze these projects in a methodical and systematic manner according to these propositions, the research team developed a questionnaire to guide each of the researchers when conducting the desk research and the semi-structured interviews with key informants. The questionnaire is presented in the Appendix to this document.

The questionnaire was tested on one case and subsequently revised before being used to collect data on the other four cases.

The data generated by completing the questionnaire were analyzed according to the conditions regarded as necessary for the inclusion of new and previously marginalized social actors in public procurement processes and outcomes. In other words, textual analysis of the questionnaire answers was done to identify evidence in support of any of the conditions for social inclusion having been met.

Interviews were recorded only if permission was granted by those interviewed. Where audio recordings were available, transcripts of the interviews were produced to aid coding and analysis. Where no audio recording of an interview was available, the researcher conducting the interview took notes in a coherent document. All interview notes and transcripts were shared with interviewees for verification and corrections (if required).

## Limitations

Case study research faces limitations related to reliability, validity, and generalizability if not designed with great care and awareness of the pitfalls of case study research. The current number of case studies can certainly be considered to constitute a systematic review (i.e. of the entire evidence base, and for every context). This required the researchers to be thoughtful about case study selection, and about which findings could be considered generalizable to other contexts.

The study considers the possible benefits of open contracting for marginalized communities. Therefore, the smallest unit of analysis in this study is the community. It is acknowledged that there are additional power dynamics and asymmetrical distributions of power within communities. Caution should therefore be exercised when assuming that any beneficence from open contracting to marginalized communities will benefit all members of a community equally.

It is further acknowledged that a focus on a single case in each context does not necessarily consider adequately other initiatives or actions which may influence directly or indirectly the outcomes observed. In addition to serving as a reminder of the impossibilities of ascribing impact to single cases in complex social-technical contexts, the absence of other initiatives and actions is a reminder of the importance of larger, systematic and longitudinal studies of the kind that were beyond the scope of this research project.

## 5 FINDINGS

### 5.1 Bandung Open Contracting Project, Indonesia

The Open Contracting Pilot Project<sup>5</sup> in the City of Bandung, Indonesia, aims to improve the availability, accessibility and use of data, information and statistics related to public contracting in Bandung City. At the same time, the project seeks to enhance government, civil society and private sector capacities to use this data for public procurement and contract monitoring. This case study focuses on the manner in which the project was able to include, involve and engage potential users in open contracting data as part of its efforts to promote transparency and accountability in public procurement.

#### Context

The procurement of goods and services on behalf of government agencies in Indonesia accounts for approximately a quarter of Indonesia's national budget ([Ntep 2018](#)). Yet the public procurement system in Indonesia is often marred by inefficiencies as well as a lack of transparency and accountability, resulting in massive state losses ([Wicaksono et al. 2016](#)).

Several reforms have been conducted by the Indonesian government to address these problems. In 2012, the procurement service units at both national and sub-national levels were required to adopt an electronic procurement system (Sistem Pengadaan Barang dan Jasa Elektronik or SPSE) for the processing of bids and e-tendering. The adoption of SPSE was an important step in increasing government contracting efficiency, because it reduced processing time and opportunities for collusive behavior.

To push towards greater transparency and efficiency, and to expedite government procurement of goods/services, an e-catalogue system was launched in 2013. Indonesia was among the few countries to use such a system for its procurement activities. As of now, more than 66 000 procurement items are registered in the e-catalogue system. The e-catalogue was heralded by the National Public Procurement Agency for its efficiency and effectiveness by allowing the direct purchase of items (if available) in the system.

Presidential Regulation No. 4/2015 also introduced a vendor management system to expedite the implementation of e-tendering by reducing the requirements for qualification, administration and technical evaluation, among others. These were all done with the aim of expediting the government procurement process through the use of information technology.

However, Indonesian procurement law is fragmented and access to contracting data is limited ([IDFI 2018](#)). Access to contracts, documentation of decision-making processes in procurement, and information about subcontractors is not available, limiting the capacity of civil society organizations working on transparency to conduct effective monitoring ([Canares et al. 2016](#)). This becomes more problematic in the context of local governments where conflicts of interest, access to data, lack of integration of e-government processes and poor monitoring of procurement activities are considered to be the key challenges ([Hidayat 2015](#)).

Since becoming a member of the Open Government Partnership (OGP) in 2013, Indonesia has seen several transparency and accountability initiatives, either as a genuine desire and interest to

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<sup>5</sup> A joint effort of Indonesian National Procurement Agency (LKPP), Bandung City, and the World Bank.

be transparent, or as part of political campaign promises or in compliance with its international commitments, including the OGP. At the same time, citizens have made increasing use of information technology, especially social media (WhatsApp, Twitter), to provide feedback on public services, monitor election results, among others, prompting a rise in the number of civic technologists.

These developments have trickled down to the local level, including to Bandung, but are also prompted by different push factors, including: (1) national government interventions (e.g. the inclusion of subnational governments in OGP commitments, and launching the national complaints platform LAPOR!); (2) donor agencies (e.g. Asia Development Bank's work in Banda Aceh, USAID's work on Kinerja for FOI, and the World Bank's work in Bandung for open contracting); (3) the work of NGOs and other stakeholders (e.g. Hivos training in data journalism); and (4) bottom-up approaches where people clamor for change.

Because of the above mentioned initiatives, there is a growing awareness among Bandung city residents on the importance of citizen participation in governance, and the responsibility of governments to be responsive and transparent.

There are several reputable technology schools in Bandung, thus creating a young and vibrant tech community. Past initiatives have included (1) Code for Bandung's initiatives on open data; (2) Bandung Institute of Technology's open data mapping platform; and (3) the development of mobile applications (from business registration to monitoring of government performance). The Bandung city government does not want to be left behind. It has launched several initiatives, including the active implementation of the E-musrenbang, a participatory planning system that generates direct input from citizens, and its Smart Cities project supported by different multilateral and bilateral organizations such as the Asian Development Bank, the World Bank, the Japan International Cooperation Agency and other funding agencies.

### **The open contracting initiative: From publication to use**

The Open Contracting Pilot Project is being implemented by the City Government of Bandung and the National Public Procurement Agency of the government of Indonesia with technical and financial support of the World Bank. Launched in 2015, the project seeks to increase (1) the availability and accessibility of public contracting data in Bandung as well as (2) the capacity of users to access and use published data for their own purposes. Through three components, the project supports the local government of Bandung to (1) publish its public contracting data and information in open data formats (component 1); (2) develop key performance indicators on public procurement and related data visualizations (component 2); and (3) facilitate citizen engagement and practical use of the data and statistics through the provision of ICT tools and targeted capacity building to stakeholders from government, civil society and the private sector (component 3). To achieve the objectives of components 1 and 2, the World Bank commissioned Development Gateway; to facilitate component 3, the World Bank engaged the Open Data Lab Jakarta.

As a result of project components 1 and 2, the city of Bandung was able to publish more than 40 000 procurement records from 2015 to 2018,<sup>6</sup> publish visualizations of contracting data online,

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<sup>6</sup> This was as of November 2018 as reported by Development Gateway.

and engage with different user departments within the city government to hasten more transparent and accountable procurement systems. Data published on the portal (see Figure 2) included data on new and advertised tenders with sufficient details such as user department, sources of funds, deadline for applications, upper limits, terms of reference, start date, eligibility, supporting documents, among others. What the portal lacked, however, was data on the award contracts, including the company details of awardees, expected deliverables, and contracted amounts.

**Figure 2:** Bandung City procurement open data portal



For component 3, the Open Data Lab Jakarta implemented a three-phased approach: (1) use case research, (2) user engagement activities, and (3) public launch. The use case research began with an online survey to identify the potential user groups, their characteristics, motivations for engaging with contracting data, and their data needs. Users were then invited to a workshop to develop use cases that are relevant in addressing the key priority issues faced by Bandung City. Use cases were developed around specific challenges or benefits that open contracting data could positively impact.

Phase 2 started off with the design of engagement strategies. The choice of audience and engagement strategies were based on the following results of the research:

1. There was a low level of understanding of contracting processes and contracting data, even among stakeholders whose nature of work or advocacy were affected by public contracting practices.
2. There was a strong interest in public contracting, especially with data related to health, city planning, social development/poverty reduction, communication and informatics, and environment.

3. There was, however, a low level of awareness of the different public contracting systems used by the Bandung city government including BIRMS, SIRUP, SPSE and others.

The philosophy behind the choice of engagement strategy was the work of several authors who argue that awareness, interest and understanding are critical elements for citizens to engage with data and information for active citizenship (Lieberman et al. 2014; Canares et al. 2015). If people are not aware of the existence of data and of the systems that produce data, and if they are not interested in the data and do not have the requisite understanding to engage meaningfully with it, then active citizenship is unlikely. The engagement strategies and corresponding results are summarized in Table 1.

**Table 1:** Engagement strategies and results of the City of Bandung's Open Contracting Pilot Project

Engagement type	Target group	Objective	Outputs
Visualthon	University students across 10 design and IT universities in Bandung	Increase awareness among city constituents about the existence and importance of open contracting data disclosed by the city government (with specific audience in mind - business community, transparency advocates, media, etc.)	Visualization and communication materials based on available open contracting systems and data
Journalist training	Local journalists from print and broadcast media	Strengthen capacity of infomediaries in using open contracting data to provide evidence-based reportage on contracting issues	3-minute-read contracting stories published
Incubation of projects	Local civic groups, activists and civic-minded technology experts	Demonstrate the value of open contracting data in longer-term engagements that have the potential for sustained positive social impact	3 apps developed: (1) Push notification for contracting opportunities aimed towards businesses; (2) Analytics dashboard on the procurement of disposable medical devices; (3) Android-based mobile app on procurement activities in the transport sector

## Outcomes

The project did not target specific communities but considered the following as the key stakeholders in open contracting -- the National Public Procurement Agency; the city government and a few select local government agencies, including the procurement unit and sector agencies (e.g. health, education, infrastructure); local civic tech community (including front-end developers, data scientists); local CSOs/active community groups working on open data, anti-corruption, procurement monitoring, access to information issues; journalists and researchers; local businesses/business groups, particularly bidders/contractors.



While the “inclusive” approach (that is, “casting the net wide and inviting all”), was not targeted at marginalized communities, it did result in the participation of marginalized communities, in particular women’s groups, such as the IWAPI Bandung (Ikatan Wanita Pengusaha Indonesia / Indonesian Business Women Association). The non-purposive inclusive approach also meant that some organizations were unintentionally excluded such as the Bandung chapter of ASPEKINDO (Asosiasi Pengusaha Konstruksi Nasional Indonesia / Indonesian National Construction Entrepreneurs Association) and HIPMI Bandung (Himpunan Pengusaha Muda Indonesia / Indonesia Young Entrepreneurs Association).

Non-participation may be caused by several factors: historical bias (e.g. some communities or organizations do not necessarily see any use of engaging with the government because of past negative experiences), lack of incentives (e.g. direct engagement with government may not be the best option for certain communities), and negative attitudes towards change (e.g. maintaining the status quo works better for certain communities or organization, for example, businesses who benefit from the lack of transparency), among others.

Nevertheless, the project has had a positive effect in involving different stakeholder groups that are habitually excluded from procurement processes. For example, in the past, journalists did not have access to procurement data. As a result of the project, at least four were able to publish and question government about their procurement decisions. App developers have been battling with getting an API for the data, and eventually hacked the system instead to gain access to the data. Now with the data publicly available, journalists no longer have to hack their way into systems. Given these outcomes, there is a certain degree of empowerment that took place following the relatively small step of disclosing data.

### **Case analysis**

Less than a year after the engagement activities ended, the sustainability of the initiatives were in question. Among the journalists who were trained and of the four who were able to publish stories, only one continued to write about contracting activities. But the WhatsApp group created by the journalists to share contracting information and related open data news remains active.

None of the visualizations developed by the students were used by the government for its awareness activities, and the apps that were developed into prototypes never saw completion. This was a fear expressed early on by the Open Data Lab Jakarta team -- the so-called ‘vaporware syndrome’ which describes the phenomenon when apps are developed but do not see deployment for several reasons, largely due to the lack of an enabling environment (Coater, 2014).

The Bandung case also points to the insufficiency of inclusion by design, and even inclusion through implementation. Inclusive processes do not necessarily bring about sustainable inclusive gains, especially when the underlying power dynamics do not change. While it is true that the project, with the support of the city government, attempted to engage different user communities, the publication process was marred by inefficiencies, more particularly by the reluctance of the city government to share the API. City government officials were afraid that sharing the API would expose the city government to certain risks. And yet, without the API, and without the resourcefulness of the civic tech activists to bypass authorization procedures, the mobile app prototypes could not have been produced.

Further, due to the lack of economic capital of the civic tech activists, the initiatives remained as prototypes because they could not fund the development of their applications or market them effectively. The support provided by the project in its initial stages was insufficient. Despite the fact that the prototypes could have helped the city government to further strengthen the open contracting initiative, the necessary support was discontinued.

This finding raises an important point in terms of inclusion: inclusion is not an end-goal but a process; a reiterative process of nurturing the sustainability of intermediaries and their efforts to create value out of data. While indeed, in the case of Bandung, disruption of data flows was brought about by the disclosure of contracting data by the city government of Bandung and opportune niches were created by development partners, the initiative failed to lead to value creation. This was due to an absence of sustained support for the newly-engaged intermediaries who were tackling the difficult topic of open contracting and public procurement. Had the intermediaries been established organizations or well-funded private companies and tech start-ups and/or individuals, the conversion of the opportunities they had identified and developed into actual value products could have been sustained and the development process pursued after the initial incubation stage.

It is also conceivable that value creation from procurement data and empowerment of intermediaries and marginalized communities was suppressed due to highly relevant data on company ownership, deliverables and tender value not being published on the portal. The use of this data by intermediaries and marginalized communities could more effectively have challenged existing power structures in local procurement.

## 5.2 Bantay Kita, Philippines

Bantay Kita,<sup>7</sup> with the support of Hivos, implements the Open Mining Governance Project in the Philippines. Its aim is to facilitate knowledge sharing and to provide lobbying and advocacy, both at the national and local level, to influence the duty bearers and support the identified community initiatives to improve mining governance. Bantay Kita intends to contribute to three outcomes: (1) increase the appreciation of mining-affected communities on how to use disclosed mining data; (2) establish an enabling environment for public access to mining data; and (3) enhance the capacity of civil society organizations to use disclosed mining data.

### Context

The Philippines is considered to be one of the most mineral-rich countries in the world (Chavez 2012; Philippine Statistics Authority 2016). Based on Philippine Statistics Authority estimates, the country's mineral resources are estimated to be 57 billion metric tons (Philippine Statistics Authority 2016). At the same time, the country is also considered a biodiversity hotspot (UN Environment Programme 2014) and its ecosystems face a high risk of extinction due to man-made destruction resulting in habitat degradation (Foundation for the Philippine Environment n.d.).

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<sup>7</sup>Bantay Kita, which means "watch your revenue", is the Philippine equivalent of Publish What You Pay.

Based on the Philippine Constitution, the ownership of minerals is vested in the Philippine state. The Philippine Mining Act of 1995 is based on the premise “that all mineral lands are owned by the state but are open to contractors on the basis of revenue sharing” (Clemente 2019: 1). Revenue sharing is governed by the provisions of the Local Government Code of 1991 -- where local governments are entitled to a 40% share from the gross collections of the preceding year. In the case of mining activities occurring on the ancestral lands of indigenous people, a minimum of 1% of the market value of gross output is to be paid by the mining companies as royalties to indigenous peoples (IP).

Indigenous people number between 14 and 17 million, roughly 10% of the Philippine population and belong to 110 ethno-linguistic groups.<sup>8</sup> The National Commission on Indigenous Peoples, the agency mandated to protect and promote the well-being of indigenous people in the country, reports that most of the indigenous communities are located in northern Luzon, the Visayas area and southern Mindanao.<sup>9</sup> Indigenous communities happen to be located in the same areas where mineral deposits are found or natural resources abound, resulting to tenurial insecurities (De Vera 2007) and even gross violation of human rights, making the country “one of the most dangerous places for land and environmental defenders” (Aytin 2015: 1).

Legally, indigenous communities are given protection under law and their welfare is looked after, especially in the context of mining activities. For example, IP communities’ rights over their land is legislated in the Indigenous People’s Rights Act (IPRA). IPRA also protects IP rights to govern themselves using customary laws, penalizes discrimination, protection of indigenous culture and traditions, and exemption from taxation in the case of ancestral land and domains, among others.

With regard to mining activities on ancestral lands, the Philippine Mining Act provides that no mining permit will be granted unless “free and informed prior consent” (FPIC) has been granted by the affected indigenous community. Ideally, the proposal from the mining company needs to be in line with the indigenous community’s Ancestral Domain Sustainable Development Program Plan (ADSDPP). Furthermore, under the Social Development Management Program provision in the Philippine Mining Act, companies are required to:<sup>10</sup>

- a) assist in the development of the host and neighboring communities in accordance with its Social Development and Management Program approved by the Mines and Geosciences Bureau to promote the general welfare of the inhabitants living within the area;
- b) develop mining technology and geosciences as well as manpower training and development;
- c) allot a minimum of one percent (1%) of the direct mining and milling costs annually to implement the activities above (90% to implement (a) and 10% to implement (b)).

The royalties to be paid to indigenous communities mentioned above (1% of the market value of gross output) may be reduced after the costs of implementing the activities mentioned in (a) and (b) above are deducted.<sup>11</sup>

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<sup>8</sup> [https://www.ph.undp.org/content/philippines/en/home/library/democratic\\_governance/FastFacts-IPs.html](https://www.ph.undp.org/content/philippines/en/home/library/democratic_governance/FastFacts-IPs.html)

<sup>9</sup> <http://www.ncip.gov.ph/asset/pdf/annual/infkot.pdf>

<sup>10</sup> [http://www.mgb.gov.ph/images/stories/DAO\\_2000-99.pdf](http://www.mgb.gov.ph/images/stories/DAO_2000-99.pdf)

<sup>11</sup> [http://www.mgb.gov.ph/images/stories/MIN\\_DAO\\_1996-40.pdf](http://www.mgb.gov.ph/images/stories/MIN_DAO_1996-40.pdf)

The intention of these protective provisions are laudable, but their implementation has been found wanting. The marginalisation of indigenous people in the Philippines in political discourse, economic development and social progress has been extensively documented especially in the context of mining ([Holden et al. 2011](#)), illegal logging and deforestation ([Eder 1990](#)), access to water ([Capistrano 2009](#)) and by aggressive economic policies of the Philippine government (Dalabajan 2014). This is further aggravated by the fact that legal provisions, contracts and official documents are written in English, while indigenous communities, on average, have low literacy levels and numeracy skills, and low levels of educational attainment.

### **The 'open contracting' initiative**

Bantay Kita (BK) is a national coalition of civil society organizations that aims to empower communities so that they can meaningfully participate in natural resource governance. The coalition, headquartered in Manila, implements activities to engage with mining companies, national government agencies and local government units to improve transparency and accountability in the mining sector, build the capacities of individual member organizations and contribute to strengthening their various advocacies, and advocate for enabling legislation that improves the transparency and accountability in the sector. Bantay Kita is currently the civil society representative of the Philippine Extractive Industry Transparency Initiative (PH-EITI).

With support from Hivos, Bantay Kita implemented Project OMG (Open Mining Governance) in 2015. The project aims to increase access, understanding and use of mining contracts data. BK identified this opportunity because of the large amount of data on the mining sector that had been published by the Philippine government after the country institutionalized the PH-EITI and became one of the pioneering members of the Open Government Partnership (OGP). However, BK has also seen that capacity among civil society organizations and communities to access, understand and use the published data remains a challenge.

In the early stages of the project, BK partnered with grassroots organizations, legal action groups and academic institutions based in the provinces of Cebu and Palawan to conduct training and to analyze relevant mining contracts data. The aim was for these stakeholders at the local level to use the data for the management of their natural resources. When data awareness and, in some cases, data literacy was achieved, the stakeholders began to demand specific types of data. Civil society organizations in Cebu wanted access to data on the effects of mining activities on the environment while the communities in Palawan wanted access to the underlying data on the computation of royalty payments owed to indigenous communities.

Access to data regarding the effects of mining on the environment is relatively difficult to obtain while data on royalties is easier to access. With this in mind, BK proceeded to work in Palawan to avoid a situation where data unavailability and quality would bog down the implementation process. In 2018, BK continued its work in Palawan and began to focus on the community of Bataraza where Rio Tuba Mining operates on indigenous people's ancestral lands.

The project aims to assist the indigenous community of Bataraza in Palawan to understand publicly accessible mining data so that it may be used for evidence-based resource management. The project expects two outcomes: (1) improved understanding of disclosed mining data by the indigenous community through co-creation of knowledge products, capacity building and orientation sessions; and (2) an established enabling environment for public access

to mining data by advocating for the institutionalization of Philippine Extractive Industries Transparency Initiative (PH-EITI) by law.

BK then organized data literacy training with its local partner, the Indigenous Peoples Development Office (IPDO), with the support of the Palawan State University. BK also facilitated the preparation of knowledge products that explain how royalty payments are computed, including the legal basis for the computation, and. BK used these knowledge products to explain to IPDO the entitlements that they can rightfully expect to receive. Realizing that what IPDO received from Rio Tuba Nickel Mining Corporation (RTNMC) was lower than what the independent computation suggested, a meeting was facilitated between IPDO and RTNMC to discuss the discrepancies in the royalty payments.

It became clear from these engagements that the EITI data disclosed on the PH-EITI website uses accrual accounting while the IPDO records are based on quarterly payments. The significant variance in the royalty payments was found to be the 20% withholding tax deducted by the mining company from the royalties due. It was confirmed by the Bureau of Internal Revenue in a roundtable discussion that indeed royalty payments are not tax exempt. In the case of indigenous peoples' royalty payments, the mining companies are responsible for filing such taxes and are mandated by law to do so.

After the findings had been agreed upon by both the IPDO and the mining company, feedback was sent to the PH-EITI National Coordinator. One of the lessons for BK was to refocus its advocacy towards the exemption of royalty payments from withholding taxes so that more benefits may accrue to indigenous communities. This is an ambitious undertaking as it requires revisions to the tax code and a loss of revenue to the state.

## Outcomes

IPDO's ability to access and understand mining data has been instrumental in its ability to engage and negotiate with mining companies. As BK reported, the different value-creation activities that enabled IPDO to access and understand mining data, led them to raise questions and engage successfully with mining companies regarding how much they are owed in the form of royalties due to them for the use of their ancestral land.

With the assistance of BK, the indigenous community was able to engage in dialogue with the National Commission on Indigenous Peoples and to push for a tax exemption on indigenous communities' royalties. But, more importantly, the different activities facilitated by BK empowered the IPDO as evidenced by their ability to ask sharp questions, clarify their understanding of the royalty payments, and dig deeper into how mining companies fulfill their responsibilities under the law. This realization cascaded to other local NGOs working with indigenous communities who learned about the royalty payments. They reported that they found it informative and useful for their own context-specific advocacy efforts (e.g. the conservation of the Mt Bulanjao ecosystem by using data to conduct their own cost-benefit analysis of environmental services).

While the process did not actually result in an increase in royalty income for the indigenous community, it did establish a degree of trust between the various stakeholders responsible for ensuring that indigenous communities are benefiting from mining activities within their ancestral domain. Further, the process allowed dialogue between the IPDO and the mining company, to clarify royalty computations as well as get assurance that royalty payments are correctly

computed. At the same time, the process also provided a venue for a collaborative discussion among IPDO, the mining companies, and oversight national government agencies, about indigenous people's rights and future tax policy agenda related to mining royalty payments.

## Case analysis

There are significant enabling mechanisms that made possible the outcomes described above. First, the Philippines' membership of the Extractive Industries Transparency Initiative (EITI) provided the overarching framework for the disclosure of data and information related to the mining sector. This was supported by relevant laws that safeguard indigenous peoples' rights to a share of mining revenues. Second, Bantay Kita's role as the civil society representative of the EITI leadership places it in a relatively influential position, in terms of ensuring that transparency of mining revenues remains high on EITI's agenda. Third, given the stagnant nature of open data initiatives in the country, the push for the EITI data portal as the primary data source for those interested in dissecting mining-related information without having to resort to filing a Freedom of Information (FOI) request, became more critical. Finally, the need to show use cases for published data became urgent in order to convince stakeholders from within government that there is value in data publication. These different push factors hastened the disruptive nature of the data publication.

The "disruptiveness" of the data was further boosted by the fact that the intent to publish on the part of government, as required by EITI commitments, was matched by demand, as indicated by the desire of indigenous communities affected by mining activities on their land to understand the nature of royalty payments. For the many datasets that were published in the EITI portal, royalty payments was the single most interesting dataset to this historically marginalized community. This reinforces previous studies that indicate that without real demand for data, its use will not be meaningful, and the data will be underutilized. Real, problem-driven demand for data makes data use sustainable.

What is critical though in this data value chain is the role of Bantay Kita in facilitating processes of awareness, access, capacity building and stakeholder consultations. Bantay Kita played an important role in both value creation and value activation as a switcher between the community and capital networks. It made use of its position in its network, and also established connections to new networks, in order to maximize different resources and assets (relationships included) to promote data access, analysis and use. It engaged trusted local intermediaries such as the state university to assist in building the capacity of IPDO to understand the data and to translate complex datasets into accessible information via the infographics. It facilitated meetings with the mining company and other agencies to discuss the implications of the data that was analyzed.

Instead of partnering with national (and Manila-based) organizations to undertake capacity building and data-related tasks for IPDO, Bantay Kita's inclusion of subnational intermediaries such as the Palawan-based university mandated to conduct community extension activities illustrates its approach to ensuring local ownership. Bantay Kita also facilitated processes rather than taking the lead in meetings it set up with mining companies and other stakeholders. This facilitation effort did not only make the processes more inclusive and empowering, but also more sustainable.



It is important to point out that while processes may appear to be inclusive, and at a certain level they may well be more inclusive, this does not necessarily mean that exclusionary processes did not take place. The Bantay Kita case was successful in including the indigenous people in a discussion of mining royalty revenues and in making their voices heard. However, this does not necessarily mean that the views of every member of the IDPO were heard. Power structures embedded in contextual, personal, professional, institutional and social structures impact on inclusionary and exclusionary processes (Chambers 2017), and some suggest are inevitable in social networks (Castells 2009).

### 5.3 Budeshi, Nigeria

#### Context<sup>12</sup>

The introduction of Public Procurement Reforms in Nigeria followed a World Bank Country Procurement Assessment survey conducted in 1999, which drew attention to the relationship between poor public procurement procedures and corruption, and the detrimental consequences on the country's development. The assessment revealed that an average of 10 billion US Dollars was being lost annually due to fraudulent practices in the award and execution of public contracts. Inflation of contract costs, lack of procurement plans, poor project prioritization, poor budgeting processes, lack of competition and value for money were identified alongside other manipulations of the public procurement processes.

To address the issue, the Federal Government initiated the Public Procurement Reform as part of its Economic Reform agenda designed to restore due process in the award and execution of federal government contracts. This led to the setting up of the Budget Monitoring and Price Intelligence Unit (BMPIU) in 2001 to implement the Federal Government's Public Procurement Reform Policy aimed at minimizing open abuses in the award and execution of public sector contracts in Nigeria.

Following the growing public demand for the reforms to become law, a Public Procurement Bill was drafted in 2003/2004 by the BMPIU and presented to the National Assembly. The Public Procurement Bill was passed by the National Assembly on 30 May 2007 and subsequently signed into law as the Public Procurement Act (PPA) on 4 June 2007.

The PPA created two procurement bodies: the National Council on Public Procurement (NCPP), a high level multi-stakeholder body set up to approve all procurement operational policies, and the Bureau of Public Procurement (BPP) to oversee procurement policy formulation and implementation across the public sector. The NCPP is yet to be inaugurated while the BPP is operational and fulfills a variety of functions.<sup>13</sup>

More recent international commitments to combating corruption and institutionalizing open contracting in the public sector include formal statements made at the 2016 London Anti-Corruption Summit and membership of the Open Government Partnership (OGP), including

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<sup>12</sup> See Development Gateway (2017) for a more detailed overview of the Nigerian context.

<sup>13</sup> <https://sahelstandard.com/2019/11/24/stakeholders-to-presidency-inaugurate-national-council-on-public-procurement-now/>

membership commitments in relation to open contracting as articulated in the country's OGP Action Plans.

Furthermore, Nigeria's Open Contracting Portal (NOCOPO),<sup>14</sup> conceived by the Bureau of Public Procurement (BPP) in line with Section 5(r) of the Public Procurement Act, 2007, was co-created in 2017 with civil society organizations in fulfillment of Commitment 2 of Nigeria's National Action Plan of the Open Government Partnership, that is, "Full implementation of Open Contracting and adoption of Open Contracting Data Standard in the public sector". NOCOPO aims to open up "public procurement in Nigeria through increased disclosure of procurement information to all stakeholders with a view to ensuring improved transparency and accountability, improve competition, prevent corruption, enhance active citizen participation towards achieving better service delivery and improved ease of doing business in Nigeria".<sup>15</sup> Details of contracts awarded within a certain threshold are accessible on the portal while for smaller projects (in terms of their monetary value), public institutions are only required to provide information if requested under the Freedom of Information (FOI) Act.

Despite legislation and initiatives to stem corruption in public procurement, the systemic nature of corruption in Nigeria persists as reflected in the country's consistently low scores in the Corruption Perceptions Index and in the results of the Global Corruption Barometer (Sope 2018). In addition to the indicators that point to high levels of corruption in Nigeria, there is an increasing awareness of the political cost. Nigeria's President, Muhammadu Buhari, who in 2015 was elected on an anti-corruption platform acknowledged that 'if Nigeria does not kill corruption, corruption will kill Nigeria' (Buhari 2015).

Nevertheless, according to the Public Private Development Centre (PPDC), if procurement data are 'available and publicly accessible, then it becomes harder for a public contract to be inflated. If Nigeria is truly committed to eliminating graft, then we need to put such systems in place where comparisons can be made across planned and actual government spending' (Nyager 2015).

The experiences of CSOs monitoring public procurement in Nigeria have highlighted a problem that goes beyond the publication and accessibility of contracting data: 'even with these various datasets, linking them together is a challenge. This in turn, affects all attempts to verify that these contracts have delivered value for money' (Nyager 2016). Nyager points out that it is almost 'impossible to use contracting data to verify the performance of public services if the data is presented differently at each stage'. Without 'clear specifications and specific locations for each project in both the budget and procurement data, it becomes difficult to know what data represents a certain contract, and what specifications each project ought to have. It then becomes difficult to verify the performance of each contract since it is unclear what specifications apply to each contract.' These are some of the challenges that the open contracting initiative Budeshi, a project of Public Private Development Centre (PPDC), seek to address.

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<sup>14</sup> <http://nocopo.bpp.gov.ng/OpenData.aspx>

<sup>15</sup> <http://nocopo.bpp.gov.ng/Home.aspx>

## The open contracting initiative

Budeshi means “open it” in Hausa language. Budeshi is a dedicated web platform that links budget and procurement data to various public services with the intention of using the Open Contracting Data Standard (OCDS) to do so. The Budeshi platform has two objectives. The first is to institutionalize the use of OCDS by organs of state. Budeshi seeks to achieve this objective by demonstrating to public institutions the utility of using uniform data standards to publish and report information across all stages of the procurement value chain.

The second objective of Budeshi (2019) is to open public service delivery to public scrutiny:

we can turn budget and procurement data into a tool for verifying the performance of public services and for improving efficient eventual public service delivery ... If a system such as Budeshi were adopted across the Nigerian public service, there would be a greater incentive for every contractor to prove their competence in relation to other contractors. There would also be the potential to see the standard of public projects rise since anyone would be able to verify how well a contractor has delivered a project. Thus, through such a system, we could professionalize the process through which contracts are awarded.

This objective is achieved by making the platform openly accessible and by making the data easy to understand and compare.

According to the PPDC website, Budeshi presently publishes data received from the Universal Basic Education Commission and the National Primary Health Care Development Agency and will update the platform when it receives data from other ministries, departments and agencies. Data are often still obtained by lodging requests under the Freedom of Information Act, followed by digitizing, cleaning and preparing the data for publication on the platform.

Budeshi does not explicitly articulate the inclusion of marginalized communities in public procurement as a desired outcome. Its parent, PPDC, states that it “seeks to assist and empower ordinary people to capture public space and participate in governance and development in a way that prevents corruption” and that its procurement governance initiative “has successfully revamped public contracting conducts and access to information by improving disclosure practices of public institutions and their responsiveness to citizens demand; enhanced public service effectiveness in Africa and facilitated increased citizen participation in governance”. While neither Budeshi’s nor the PPDC’s ambitions and achievements focus explicitly on marginalized communities, it is possible that marginalized communities may benefit indirectly in cases where the PPDC’s community-based procurement monitors make use of Budeshi and spearhead interventions that are to the benefit of marginalized communities, particularly those in non-urban areas.

## Outcomes

Budeshi was set up with two objectives: (1) to be a platform and a movement to advocate for the adoption of OCDS by the government of Nigeria, and (2) to make possible the use of contracting data by the public to ensure improved delivery of goods, services and works by government. With available datasets from the Universal Basic Education Commission and the National Primary Health Care Development Agency, Budeshi has sought to demonstrate that linked procurement and budget data can enable the discovery of red flags in the contracting process.

A notable outcome of Budeshi in concert with the efforts of other stakeholders was the announcement of the government of Nigeria at the 2016 London Anti-Corruption Summit to adopt OCDS.

In terms of its second objective, examples of the use of data from Budeshi are to be found in the media, suggesting some uptake of the platform by data journalists. Legit, an online news and entertainment platform in Nigeria, reports on the state of healthcare facilities: "According to the data obtained from Budeshi.ng, an open contracting portal, each of the contracts awarded at the same cost of N2,292,203 million to F.R. Resources Limited, Bit Shelter Limited, and Tegiriti Proact Limited in 2009 are yet to be completed."<sup>16</sup> The Guardian (Nigeria), reports on corruption in the building of schools: "The Public and Private Development Centre (PPDC) through its initiative, Budeshi had also monitored several schools in five states including those monitored by The Guardian. And the organization found similar 'inadequacies and gaps in contract implementation' of UBEC. Gift Maxwell, Budeshi Program Director at PPDC, in an email to The Guardian noted that UBEC had already given a clean bill of health to Mr. Nzeribe's company on the N35 million contracts at St. Anthony School, Ihiala. This is the same project that The Guardian's investigation and Mr. Nzeribe himself had confirmed to be uncompleted."<sup>17</sup>

Whether the use of the Budeshi platform by data journalists or other stakeholders has resulted in any changes in the awarding of public contracts or in any remedial action on the part of government -- in cases where irregular processes have been brought to light -- remains unclear at this stage.

The PPDC also uses Budeshi in its own public service monitoring exercises such as the monitoring of procurement in the primary healthcare sector in Benue, Delta, Kano, Lagos, Ogun and Osun States, and it reports several examples where they have relied on public procurement data to identify issues which have subsequently been resolved.<sup>18</sup>

What is not certain is the extent to which any of these interventions targeted or benefited marginalized communities in particular.

## Case analysis

In Nigeria, an opportune niche emerged with the publication of the Open Contracting Data Standard (OCDS):

The fact that information is mainly accessed through FOI requests and not proactively through a system that links various stages, makes it tedious; and means that only few people can really participate in the process through which public services are delivered. And so when the Open Contracting Partnership launched and published the open contracting data standard in November 2014, there arose the opportunity to advocate for its adoption in Nigeria as we genuinely believe it responds to the challenges of incoherence we face with using data to verify the performance of public services. (Public and Private Development Centre 2019: 39)

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<sup>16</sup> <https://www.legit.ng/1135846-investigation-how-contractors-shortchanged-nigerian-government-abandoned-hea.html#1135846>

<sup>17</sup> <https://guardian.ng/features/how-contractors-fleece-government-in-ubec-school-project-contracts/>

<sup>18</sup> <https://www.procurementmonitor.org/resources/our-reports/>

This led to the development of the Budeshi platform by a team of Nigerians supported by the global network of open contracting advocates in its development and promotion. Initially, the team struggled to make the case for OCDS to government officials in Nigeria. In other words, there was no value transfer. However, after repeated efforts to translate the technical value of the platform into political terms, a successful meeting with Attorney-General finally resulted in value activation of OCDS. The Attorney-General saw the value of OCDS for the improved management of public procurement. With the political backing of the Attorney-General, successful interactions with other government agencies, including BPP, followed. And when the London Anti-Corruption Summit presented an opportunity for political gain on the global stage, OCDS was endorsed by the government of Nigeria. In effect, the technical value illustrated by Budeshi as part of a global development network was successfully converted into something of value in the global political network. As a result, Budeshi can be seen as successful in meeting its primary objective of the formal adoption of OCDS by the federal government, and this success can, at least in part, be attributed to the successful activation of value in a (political) network where power resides.

Budeshi's second objective, however, remains a challenge. Budeshi has become a tool for procurement monitoring by the CSO that created the platform, yet it is not being used by other intermediary organizations in Nigeria. To some degree its value has been diminished by the development of the federal government's own procurement portal, made possible by the federal government's initial adoption of OCDS, which provided the public procurement agency with the mandate to implement its own platform. At this stage, there is insufficient evidence to suggest that either Budeshi or the government's procurement portal have done more than disrupt existing data flows by making the procurement of public goods, services and works more transparent. And while OCDS created an opportune niche for the design and implementation of an open contracting portal, as well as high degree of co-operation between a single CSP and a government champion, there does not appear to be an opportune niche attracting other intermediaries or government enablers to participate in open contracting or public procurement reforms.

## 5.4 Preferential Procurement, South Africa

The passing of legislation to make public procurement more inclusive, particularly in terms of the inclusion of marginalized groups such as women, small businesses and the youth, is becoming increasingly common. The African Union roadmap on harnessing the so-called 'demographic dividend' offers general recommendations on employment and entrepreneurship, including increasing youth's access to government procurement and finance facilities (AU n.d.). And there are several examples globally of initiatives that seek to include small- to medium-sized enterprises (SMEs) in public procurement opportunities (see DCED [2017] for a comprehensive overview of policies that promote SME participation in public procurement). There are, however, relatively few examples of initiatives that target specific marginalized groups (DCED 2017). South Africa is one such country.

## Context

South Africa has been plagued by corruption in public procurement and expenditure since the dawn of democracy in the country in 1994 (PWC 2014, 2016). In October 2016, shortly before he retired as the National Treasury's chief procurement officer, Kenneth Brown warned that up to 40% of the state's total procurement budget, then worth ZAR600bn, was tainted by 'inflated prices and fraud'. In November 2018, Auditor-General Kimi Makwetu reported that irregular expenditure<sup>19</sup> by national and provincial departments, as well as some state-owned entities amounted to approximately ZAR51-billion. Some of the reasons behind this exorbitant figure include non-compliance with procurement laws and unfair procurement practices. Corruption at all levels of government has hampered the delivery of public services (particularly in health, education and transport), and crippled public utilities which, in turn, have dented investor confidence and hampered the development of the country.<sup>20</sup> This has left previously disadvantaged and other marginalized communities on the fringes.

At the same time, South Africa has made several global commitments to combat systemic corruption. These include its statement on anti-corruption commitments at the London Anti-Corruption Summit in May 2016; its membership of the Open Government Partnership, a global member organization that promotes open and transparent government; and its membership of the G20 Group of countries which established the Anti-Corruption Working Group in 2010,<sup>21</sup> and developed in 2014 the G20 Anti-Corruption Open Data Principles<sup>22</sup> as a step towards leveraging open data as a crucial tool to enable a culture of transparency, accountability and access to information to prevent corruption. A report published by Transparency International<sup>23</sup> in 2017 found that South Africa is commitment rich and implementation poor; that too few key anti-corruption datasets are available as open data; and that the use of open data to make government more transparent in efforts to combat corruption is not even across government departments (Van Schalkwyk 2017).

South Africa has in place a legislative framework that aligns with the principles of open contracting (see Naidoo et al. 2018). As in the case of its global commitments, the law is poorly implemented (Naidoo et al. 2018). In January 2017, the South African government passed legislation requiring that all public contracts that exceed a prescribed amount must include provisions for the outsourcing of at least 30% of the contract to designated previously disadvantaged groups, that is small businesses owned by black people, black youths, black women, black people with disabilities, black people living in rural or underdeveloped areas or townships, a cooperative owned by black people or black military veterans.<sup>24</sup> The promulgation of this legislation is an attempt by government to use its purchasing power to achieve economic transformation or, in terms of the interest of this study, greater inclusion in the contracting process and in the awarding of public contracts.

This legislation came into effect in a context where globally the construction, energy and mining sectors experience the highest levels of bribery (PWC 2014). In 2013, the country's Competition

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<sup>19</sup> Any expenditure which does not comply with the Public Finance Management Act (PFMA).

<sup>20</sup> <https://city-press.news24.com/Voices/politicians-loot-without-consequence-no-wonder-the-people-take-law-into-their-own-hands-20190926>

<sup>21</sup> <https://star.worldbank.org/star/about-us/g20-anti-corruption-working-group>

<sup>22</sup> <http://www.g20.utoronto.ca/2015/G20-Anti-Corruption-Open-Data-Principles.pdf>

<sup>23</sup> [https://www.transparency.org/whatwedo/publication/open\\_data\\_and\\_the\\_fight\\_against\\_corruption\\_in\\_south\\_africa](https://www.transparency.org/whatwedo/publication/open_data_and_the_fight_against_corruption_in_south_africa)

<sup>24</sup> Preferential Procurement Regulations, 2017.



Commission levied fines of approximately R1.4bn (USD93m) on construction companies that had colluded to inflate costs for the construction of football stadiums. The introduction of the legislation has had unexpected effects on the construction industry. Small contracting firms insist that despite the provisions for preferential procurement, they remain excluded from larger construction contracts. Frustrated by their lack of inclusion, they have mobilized existing business forums and disrupted work on construction sites to draw attention to their demands for the implementation of the outsourcing provisions in public procurement legislation.

### The inclusive contracting initiative

Principles of open contracting are provided for in the South African constitution which, in a specific section on procurement, states that all public contracts for the provision of goods and services must be fair, equitable and transparent (Constitution of South Africa 1996, section 217[1]). South Africa also has in place over 80 legal instruments related to public sector procurement and a legislative framework that aligns with the principles of open contracting (Naidoo et al. 2018).

The Preferential Procurement Policy Framework Act No. 5 of 2000 came into effect on 1 April 2017. Tolo Nkosi, the CEO of Umso Construction,<sup>25</sup> describes the Framework as a necessary 'platform for participation' between communities, small businesses and their larger counterparts.

There are three subcontracting rules in the Preferential Procurement Regulations that organs of state must adhere to when issuing tenders to the general public:

- 1) Regulation 4 states inter alia: if an organ of state decides to apply pre-qualification criteria to advance certain designated groups that organ of state must advertise the tender with a specific tendering condition that only certain bidders may respond.
- 2) Regulation 9 states inter alia: if it is feasible to sub-contract for a contract above R30 million, an organ of state must apply sub-contracting to advance designated groups. The designated groups mentioned in Regulations 4 and 9 are small and micro enterprises owned by:
  - a. at least 51% by black people;<sup>26</sup>
  - b. at least 51% by black people who are youth;
  - c. at least 51% by black people who are women;
  - d. at least 51% by black people with disabilities;
  - e. black people living in rural or underdeveloped areas or townships;
  - f. a cooperative which is at least 51% owned by black people;
  - g. at least 51% by black people who are military veterans;
- 3) Regulation 9 also states that if an organ of state applies subcontracting, it must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to designated groups.

A fourth subcontracting rule is related to the subcontracting of the tender *after* the award.

Regulation 12 states inter alia: a person awarded a contract may not subcontract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE

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<sup>25</sup> <https://www.youtube.com/watch?v=SJyUOMI5WWw>

<sup>26</sup> A 'black person' is defined in the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as 'is a generic term which means Africans, Coloureds and Indians'.

status level of contributor than the person concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the subcontract.

Organs of state are expected to apply these regulations rigorously.

In February 2013, in his annual budget speech, minister of finance Pravin Gordhan revealed that the government had appointed a new chief procurement officer as part of its fight against corruption and to bring public procurement in line with the provisions of the Constitution (National Treasury, 2015).

The Office of the Chief Procurement Officer (OCPO) is a division of the National Treasury, and its main aim is to restructure and simplify governmental procurement processes. The strategic objectives of the OCPO rest on five pillars: (1) value for money; (2) open and effective competition; (3) ethics and fair dealing; (4) accountability and reporting; and (5) equity.<sup>27 28</sup> It is evident that openness is a central tenet that cuts across most of the pillars.

One of the six functions of the OCPO is ICT, e-procurement and data management (National Treasury 2015). However, technology is not seen as playing a central role in creating a more open procurement process; rather, the focus is on technology's role in improving the performance of the procurement process: "Technology is employed to simplify, standardize and automate SCM with a view to optimize performance."<sup>29</sup>

Publication of public contracting data has lagged behind government policy and strategic objectives of the OCPO. According to a 2015 National Treasury report (2015: 22), procurement practices were not always implemented in line with legislation. For example, although procurement notices were published, no bid documentation was available online; minutes of the Bid Evaluation Committees were not available for public access; contracts entered into with winning firms were not available for public scrutiny; some bids were not opened in public and the list of bidders was not published; the bid evaluation process was not open to public scrutiny; and contract progress reports were not publicly available.

A 2015 survey of procurement officials in South Africa found that only 59.7% of respondents agreed that procurement information is available via a central portal (Naidoo et al. 2017). The South African government committed to improve transparency in the public procurement process by: (a) developing and prescribing a public disclosure framework, which governs transparency within the procurement process; (b) prescribing that all information in the bid process be disclosed publicly; (c) improving the accessibility of information; (d) improving the quality of information and encouraging its strategic use; (e) creating an environment conducive to stakeholder participation in the different stages of the procurement process; and (f) building the capacity of the private sector, civil society and relevant stakeholders to take part effectively in enhancing transparent public sector procurement (National Treasury 2015: 23).

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<sup>27</sup>"The word 'equity' in the context of these Guidelines means the application and observance of government policies which are designed to advance persons or categories of persons disadvantaged by unfair discrimination. This fifth pillar is vital to public sector procurement in South Africa. It ensures that government is committed to economic growth by implementing measures to support industry generally, and especially to advance the development of Small, Medium and Micro Enterprises and Historically Disadvantaged Individuals."

<sup>28</sup> [http://ocpo.treasury.gov.za/About\\_Us/Pages/Strategic-Objectives.aspx](http://ocpo.treasury.gov.za/About_Us/Pages/Strategic-Objectives.aspx)

<sup>29</sup> [http://ocpo.treasury.gov.za/About\\_Us/Strategic\\_Areas/Pages/Information-and-Communication-Technology.aspx](http://ocpo.treasury.gov.za/About_Us/Strategic_Areas/Pages/Information-and-Communication-Technology.aspx)

Commitments were also made to improve the public procurement system so that it “will enable electronic validation of supplier tax compliance. Suppliers will also be able to register and maintain their details on a central supplier database, thus eliminating unnecessary effort and cost. Tender portals, e-procurement platforms and e-auctions will be among the options available to suppliers competing for government business” (National Treasury 2015: 65).

National Treasury acknowledges that “capacity is generally weak with practitioners unable to conceptualize and implement tenders aligned with government’s developmental objectives” (National Treasury 2015: 14).

Since the publication of the 2015 report by National Treasury, a central supplier management system has been implemented as well as an electronic tender information portal. However, ongoing calls by civil society suggest that not enough progress has been made:

While there have been some noteworthy reforms in the country’s procurement landscape, we are deeply concerned by what appears to be some loss in momentum and commitment on this front. The establishment of the Office of the Chief Procurement Officer in 2013 as well the introduction of government’s e-tender portals and central supplier databases in 2015 constitute fundamental strides towards more transparent government systems. However, it is clear that more can – and must – be done (Selabalo et al. 2019).

An assessment of the eTender portal conducted as part of this study shows that, in general terms, progress has been made in increasing the amount of information available on public tenders and in centralizing all government tenders in one online space. However, it is also clear that integrating tender information across multiple government entities remains a challenge. Presenting information in standardized formats highlights the many gaps public in procurement data.

The experience of the International Budget Partnership South Africa (IBP) (South Africa) is instructive in relation to the limitations of the eTender portal. IBP supports citizen monitoring of public goods and service delivery (social audits) by grassroots organizations that engage directly with government to improve the quality of civil goods and service provision. IBP has published several papers and reports on public procurement,<sup>30</sup> including “A Guide to Finding Information about Municipal Contracted Services in Your Community”<sup>31</sup> and “Monitoring Public Procurement In South Africa: A Reference Guide For Civil Society Organizations”.<sup>32</sup>

As part of its approach, IBP helps community-based organizations to work with poor, marginalized and often largely illiterate communities, to find and understand procurement documents to monitor whether the services provided meet the standards defined in public contracts. The end result is to create feedback loops between government, civil society organizations and the public.

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<sup>30</sup> <https://www.internationalbudget.org/budget-work-by-country/ibps-work-in-countries/south-africa/>

<sup>31</sup> <https://www.internationalbudget.org/publications/south-africa-guide-to-finding-information-about-municipal-contracted-services/>

<sup>32</sup> <https://www.internationalbudget.org/publications/monitoring-public-procurement-south-africa-guide/>

IBP has consulted communities to determine the types of information that are needed for their monitoring activities. These include: bid specifications; a centralized list of current contracts that specify when the contract is due to start and expected to end; whether a tender used an open tender process; and information on extensions. In an ideal scenario, IDB suggests that communities would be able to access information about the timeline of all phases (tender start and end dates, award date, contract start and end dates), and what should be public at each point (the legally mandated publishing requirements). This would enable them to compare what is actually being published against the mandated information requirements, which would enable them to spot missing information and correct information. Tracking the quality of services and goods requires information on what the final good or service is supposed to look like (technical specifications). Key information for signed contracts includes a description of each phase of development, and by those phases that should be completed (milestone dates and milestone descriptions).

While IBP reports successful outcomes from the social audits, these rely on direct engagement between affected communities and their local governments. IBP reports that their partner community-based organizations are unable to rely on government procurement portals to access comprehensive and reliable data on public contracts awarded for the delivery of goods and services to marginalized communities and that no mechanism is in place for the data needs or information gathered from social audits to be fed into government's central procurement system.

From the perspective of prospective bidders, not all bidders are equally placed to access online procurement data, with those targeted by preferential procurement legislation being less likely to find the eTender portal accessible. According to Tolo Nkosi, the CEO of Umso Construction, many of the business forums discover only new contracting opportunities when their communities are included in pre-contracting consultations initiated by successful bidders. In other words, the small businesses that represent marginalized communities (black South Africans, youth, women) do not access data or information from online procurement portals and must rely on the actions of successful bidders for an opportunity to participate in large public construction projects.

Given the current design of the eTender portal, even if access to the portal was to be improved, it is not possible to filter tenders on the eTender portal by tender amount/value making it impossible to locate those tenders that are required by law to subcontract 30% to designated groups.

## Outcomes

Government's policy to regulate the awarding of public contracts to designated groups combined with the interpretation and implementation of the regulations by successful bidders, has led to unanticipated, negative outcomes. Frustrated small, black-owned businesses have resorted to occupying construction sites, and threatened violence and other intimidating tactics, in cases where they believe contractors are not subcontracting as per the conditions of their tender awards. There are also reports of increased levels of corruption to secure subcontracts.

The Delangokubona Business Forum allegedly occupied construction sites in the KwaZulu-Natal province and threatened violence as it demanded a share in major construction contracts. The

Forum's intimidating tactics stalled several construction projects in the province.<sup>33</sup> In April 2018, the Forum, acting together with the military veterans association and a local taxi group, brought a large road construction project outside Durban to a halt.<sup>34</sup> The group demanded a 30% stake in these construction projects, saying local black business must be given its fair share of local projects. Similar demands are being made by forums in other parts of the country.<sup>35</sup>

The demand for a fair share of contracts is also reportedly what lays behind the killing and injuring of mineworkers from the Modikwa Platinum mine near Burgersfort in Limpopo in April 2018. A local official from the National Union of Mineworkers blamed the deaths on local business people trying to 'gain access to contracts'. This assessment was echoed by a traditional leader, Chief Masiya Mohlala, who said that 'conflict among people competing for mining tenders in the area was the root cause of the problem, with desperate unemployed young people being used to instigate violence against competitors' businesses'.<sup>36</sup>

The Federation for Radical Economic Transformation (Fret)<sup>37</sup> was established in 2017 to represent the growing number of business forums. Fret represents more than 30 business forums, including the Delangokubona Business Forum, which reportedly has more than 3 000 members. According to Malusi Zondi, the president of Fret, for small and micro enterprises that qualify under the provisions of the preferential procurement regulations, exclusion persists because the decision to subcontract rests with the successful contractor, and there is no mechanism in place to monitor whether or how the contractor has awarded subcontracts.<sup>38</sup>

Competition for BEE construction contracts is also contributing to new forms of corruption. One example is the reported rigging of the ruling government party's internal elections. Says ANC member Omry Makgoale: 'There is a process of paying for bulk [ANC] memberships at construction sites, where businessmen will pay large sums of money for people to become ANC members. These people have no clue about ANC policies, their sole task being to vote for specific slates at an [ANC] conference that will secure these businessmen ... the promise of future tenders.'<sup>39</sup>

Without full transparency, accountability and remedial action, a well-meaning regulatory intervention in public procurement has had the unintended consequences of furthering corruption.

## Case analysis

As set out in the conceptual framework, it is important to understand the distribution of power if one wishes to understand the likely effects or impact of making certain data openly accessible. In this case, power is concentrated in a small network of large construction companies, often referred to in the country as the 'Big Five'.<sup>40</sup> While these construction companies form a tight network in South Africa, they are intricately connected to global capital markets. All are listed on the Johannesburg Stock Exchange and count global investors among their shareholders. Any

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<sup>33</sup> <https://www.timeslive.co.za/news/south-africa/2016-06-04-durban-building-site-shut-down-after-workers-assaulted/>

<sup>34</sup> <https://www.timeslive.co.za/news/south-africa/2018-02-09-mafia-style-business-forum-halts-multi-million-road-project/>

<sup>35</sup> <https://www.moneyweb.co.za/news/south-africa/construction-mafia-moves-from-kzn-to-joburg/>

<sup>36</sup> <https://irr.org.za/media/the-bee-sting-that-kills-2013-analysis-of-a-policy-gone-horribly-wrong-biznews>

<sup>37</sup> <https://www.facebook.com/FFRETSA/>

<sup>38</sup> <https://iono.fm/e/670584>

<sup>39</sup> <https://city-press.news24.com/Voices/anc-killings-are-caused-by-rigged-conference-elections-20180517>

<sup>40</sup> <https://constructionreviewonline.com/2018/07/top-construction-companies-in-south-africa/>

attempts at introducing greater transparency and accountability in this sector -- or ones that seek to distribute the benefits of public contracting more equitably -- must take into account the dominance of large construction companies and their ambitions that are defined in terms of global capital markets rather than local needs and priorities.

The South African case has shown how a critical change in procurement conditions was effected with the introduction of new legislation aimed at bringing previously excluded and marginalized businesses into the public procurement process as primary beneficiaries of public expenditure. In other words, through legislation, the government of South Africa created an opportune niche in public procurement. This has created a space for business forums to enter into procurement negotiations on behalf of their members who are typically small businesses or sole proprietorships located in or near sites where large public works are taking place. These business forums are, in other words, intermediaries between their representative constituents and the large construction companies, and have 'emerged' as a result of regulations requiring the participation of small businesses owned by marginalized communities in large publicly-funded construction projects.

While National Treasury has sought to make the procurement process more transparent and efficient by developing a central supplier database and e-tender portal, there is no evidence that these technologies have disrupted the asymmetrical flows of data that have historically favored the big construction companies. Data published is incomplete and inconsistent, precluding the eTender portal from connecting marginalized communities to government.

Those intermediaries that have emerged to provide new, third-party websites and tools for identifying relevant public tenders appear to target established businesses. No infomediaries have emerged to connect what data is available to those marginalized business owners who are expected to benefit from the introduction of the preferential procurement regulations. These business owners only become aware of large construction projects when they break ground rather than at earlier phases of the construction process when there are likely to be favorable opportunities to negotiate participation and partnership in public tenders. There is, therefore, no organization attempting to translate when data is published into more usable (valuable) data for those communities identified as beneficiaries in the procurement regulation.

At the same time, as the work of the IBP illustrates, the absence of award and project implementation data on the eTender portal, make it impossible for communities where public services or works are being delivered to conduct monitoring and accountability exercises.

In short, legislation has created the opportunities for increased inclusion of marginalized communities as primary beneficiaries of public expenditure. However, the publication of poor quality data from only a part of the public contracting process, places limits on more effective participation and monitoring of public procurement by marginalized communities. The result is business as usual in the awarding of large public construction projects, and a lack of transparency regarding the outsourcing practices of the large construction companies, leaving those traditionally marginalized from public procurement to resort to more aggressive tactics to challenge existing power structures in order to lay claim to their legally-enshrined right to participate.



Unlike in the Bantay Kita case, no trusted intermediary has emerged in South Africa to engage across the spectrum of stakeholders and suppliers, to create value from the available data and to mediate solutions to the undesired outcomes that have materialized.

## 5.5 Access to Government Procurement Opportunities, Kenya

As in the case of South Africa, the Kenyan Government has ‘intervened’ in the public procurement system to create greater equity in the distribution of public contracts to communities previously excluded from participation.

### Context

The Kenyan economy is confronted with the challenge of providing employment opportunities for the large numbers of young people entering the labor market annually. Based on UN estimates, the country's youth population is made up of over 9.5 million people, more than 20% of all Kenyans (Samuel Hall 2017). According to World Bank estimates, 500 000 young people enter the labor market each year (Hivos East Africa 2018). Kenya has experienced volatile yet comparably high economic growth rates in the last two decades. However, this generally positive macro-economic development has not translated into benefits for all citizens.

While annual GDP growth of more than 5% cent has been recorded, Kenya's youth unemployment rate has shown little to no positive development, and stood at 26.2% in 2017 for those aged 15 to 24 (UNDP 2018: Table 11). The most recent official statistics from Kenya's statistics agency is the 2015/16 Basic Labor Force report released in March 2018 estimates that there were 1.22 million unemployed Kenyans aged 15 to 34 from September 2015 to August 2016. This puts the official youth unemployment rate at 11.4% (KNBS 2018).

Young women in rural locations constitute the largest share of unemployed Kenyan youth (in absolute numbers), while their counterparts in urban areas are most likely to be unemployed (in relative terms). The participation rate in the labor market for women older than 15 years of age is 62.4%, while for men it is 68.5% (UNDP 2018: Table 5). Gender and living location are defining factors (Samuel Hall 2017).

### The ‘open contracting’ initiative

Affirmative action in government procurement through the Access to Government Procurement Opportunities (AGPO)<sup>41</sup> initiative launched by the Kenyan government in 2013 seeks to empower women, youth and persons with disabilities by including them in public procurement opportunities. The mechanism for doing so is along the same lines as in South Africa, that is, by awarding these targeted groups 30% of all public procurement expenditure. However, whereas in South Africa 30% of the value of public contracts above a certain threshold must be subcontracted to marginalized communities, in the case of Kenya, all government procuring entities are required to allocate at least 30% of their procurement spend for the purposes of procuring goods, works and services from micro- and small- enterprises owned by youth, women and persons with disabilities.

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<sup>41</sup> <https://www.agpo.go.ke/pages/about-agpo>

The AGPO program is founded on several pieces of Kenyan legislation: (1) the Constitution of Kenya, 2010 Article 227 which prescribes the fair equitable, transparent and cost-effective public procurement of goods and services; (2) the Constitution of Kenya, 2010 Article 55 on affirmative action; and (3) the Public Procurement and Asset Disposal Act, 2015, which is the specific piece of legislation which requires all procuring government entities to allocate 30% of their procurement spend for the purposes of procuring goods, works and services from SMEs owned by youth, women and persons with disabilities.

Definitions of each of the intended beneficiaries of AGPO are provided. ‘Woman’ means a person of the female gender who is 18 years’ old and includes a company, association or body of persons, corporate or unincorporated in which at least 70% of the shareholders, members or persons and a majority of its directors are female. ‘Youth’ refers to young people between the ages of 18 years and 35 years. A youth-owned enterprise refers to a legally registered business in the form of a sole proprietorship, partnership or limited company. For both partnerships and limited companies, at least 70% of the capital invested or shares owned should be held by the youth. ‘Disability’ means physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. All persons with disabilities seeking preference in government procurement must provide their National Council for Persons with Disabilities (NCPWD) registration number.

Tenders are advertised on the AGPO’s open contracting portal<sup>42</sup>. Tenders can be filtered by ‘tender category’, ‘tender type’, and ‘procuring entity’. The following information is listed for each tender on the main page: title, number, procuring entity, published date, closing date, tender status. It is not possible to sort tenders by field thus making it impossible to group open tenders or tenders recently published. Additional information is listed on each tender’s page under two tabs, ‘Tender details’ and ‘Tender documents’, The ‘Tender details’ page provides additional information to what is displayed in the list of tenders, including the tender reference number, application fee, tender opening venue and ‘other details’. In addition, the ‘Tender documents’ page contains no additional documents or information.

A quick enumeration of the portal on 5 December 2019 found only 4 open tenders, although this may be because the bulk of the tenders close in August. Of the 520 tenders listed (both open and closed), none were for consultancy or non-consultancy services, one was for goods/services and 187 tenders were for the supply of goods. The remaining tenders were not categorized by ‘tender category’.

Information about public tenders is also available from a variety of other sources, including:

1. The Public Procurement Information Portal (PIIP)<sup>43</sup>
2. AGPO Facebook page<sup>44</sup>
3. Newspapers
4. Individual websites of national government ministries, departments and agencies
5. County government websites

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<sup>42</sup> <https://www.agpo.go.ke/pages/tenders>

<sup>43</sup> <http://www.tenders.go.ke>

<sup>44</sup> <https://www.facebook.com/AGPOKenya/?ref=bookmarks>

6. Notice boards at government institutions and
7. Supply chain departments of government institutions

The Public Procurement Information Portal (PIIP) lists a much larger number of tenders (25 991 as of 4 December 2019) than the AGPO portal (520 tenders as of 5 December 2019) because it is not limited only to tenders that fall within the 30% allocated to women, youth and persons with disabilities under its affirmative action program. It is not, however, clear why at 2%, the proportion of tenders on the AGPO portal is well below 30%. This could be explained by differences in the criteria for tenders being listed on the two portals (e.g. the AGPO portal only lists more recent tenders). The PIIP portal includes a database of suppliers which provides information on the company name, business registration number, business type, physical address, VAT registration status, company directors (full name, partial passport number, nationality), and contracts awarded. However, the supplier database does not indicate whether suppliers qualify under the AGPO program.

In general, the PIIP is a comprehensive portal with detailed information about open tenders, contracts awarded, procuring entities and suppliers. For example, for awarded contracts, information about each contract, the tender, the awarded company, bidders, evaluators and inspection/evaluation is published (although information is not always complete). However, from the perspective of communities that qualify under the AGPO program, the PIIP provides little by way of information relevant to those communities.

The limited amount of useful data published on the portals is supported by research that 50% of AGPO applicants accessed information about public tender opportunities from newspapers, 9% from friends and only 17% from the AGPO website (Hivos East Africa 2018).

## Outcomes

A 2015 study found that almost all government procuring entities subjected AGPO participants to additional pre-qualification requirements when their AGPO certificates should have served as sufficient for participation in the public tenders advertised (Addushakur 2015 in TISA 2017). A more recent study found that only 20% of respondents were in possession of AGPO certificates (TISA 2017).

A 2018 study by Hivos East Africa sought to evaluate Kenya's efforts to empower women, youth and persons with disabilities through AGPO. The report found that the AGPO initiative had contributed to an 82% increase in the number of youth-owned enterprises in the country. There was general agreement (80%) among those interviewed that there had been a significant increase in the number of enterprises owned by youth, women and people with disabilities. Of the 544 firms interviewed, 36% reported that they had successfully won a public tender which, in turn, resulted in an increase in annual revenue for 71% of those firms. However, only 172 out of 2 232 (7.7%) public tenders between 2013 and 2016 were awarded under the AGPO initiative which falls well short of the 30% target.

Only a fraction of the monetary value of contracts was awarded to marginalized communities. Of the KES 183.5 billion total value of public tenders issued, only KES 7.0 billion (4.1%) was awarded to AGPO registered firms.

Mostly, companies based in Nairobi benefited from AGPO raising questions about its inclusivity in terms of communities located outside of the capital.

Other concerns noted by the report were that marginalized communities lacked the capital to execute tender opportunities; that there was a mismatch between what marginalized communities have to offer (mainly services) and what tenders require (mainly construction); that applicants from marginalized communities experienced challenges accessing bidding information and documents; that unsuccessful bidders received no feedback on why their bids were unsuccessful or when they queried the outcomes of certain awards; and that the AGPO created new opportunities for corrupt practices. For example, ineligible public servants registering their own firms, window dressing and on-selling of tenders. These concerns echo those of an earlier study (TISA 2017).

The Hivos East Africa report concludes that AGPO has contributed to an increase in the number of youth-, women- and persons with disabilities-owned companies and in the earning of those companies but that for the reasons outlined above, the gains for the companies owned by these communities has been marginal.

### Case analysis

The AGPO program is an example of one type of network seeking to disrupt another network. That is, the political network which sees value in introducing programs that support growing constituencies of voters (e.g. youth and women) introduces rules that disrupt the functioning of the economic/financial network of larger, established suppliers of goods, services and works. The disruption shows limited signs of success to the extent that there has been an increase in the participation rate of small businesses in the economic network. The increase is, however, marginal and suggests that it has only reached levels that are still tolerable to the economic network and pose no threat to its central program of capital accumulation, in this case from state tenders.

That the initiative has been largely unsuccessful in increasing the participation of communities outside of Nairobi, the economic hub of Kenya, may further indicate that those who are benefitting from AGPO are those who may well have been successful in gaining access to the economic network had the intervention not been introduced.

## 6 COMPARING FINDINGS FROM THE CASES

Table 2 shows which of the conditions put forward as important for the inclusion of marginalized communities in public procurement reforms (specifically, reforms geared towards open contracting), have largely been met (green), somewhat met (orange), or for which no evidence of the condition having been met could be found (red). The categorization of conditions on this basis is not based on quantitative calculations and hard thresholds; it is based on the analysis of each case presented in the section above and is intended to indicate in the form of a simple graphic the extent to which the conditions have been met in each of the five cases. Notes are added to each of the categorizations to provide support for the categorization (red, orange or green) and to provide a degree of context for each categorization made.

**Table 2:** Summary of conditions met by the cases with regard to open contracting and social inclusion

CASE	Disruption of data flows	Opportune niche	Infomediarities	Value creation	Switchers	Value activation	Outcome re: Inclusion
Bandung [Indonesia]	Creation of contracting portal but no access provided to API needed by intermediaries	OGP membership; donor agency support	<i>Open Data Lab Jakarta; data journalists</i>	Journalists write stories, develop app and produce data visualizations but these are one-off initiatives with no evidence of uptake	No evidence of switchers.	None. No disruption to existing power dynamics via stories in the media.	No evidence of primary benefits to marginalized communities. But a more inclusive process.
Bantay Kita [Philippines]	Publication of mining contracting data	Philippine Mining Act, 1995; Local Government Code, 1991; PH-EITI & OGP membership	Bantay Kita, Palawan State University	Problem-focused training and capacity-building.	Bantay Kita brings multiple stakeholders together (including mining company and government).	Data presented to mining company in terms that questioned how royalties are calculated.	No improvement in material benefits for marginalized community but improvement in social benefits from a more inclusive process.
Budeshi [Nigeria]	Budeshi OC portal showcases value of implementing OCDS but fails to attract users	Open Contracting Data Standard (OCDS) but low uptake other than by Budeshi parent	The Public and Private Development Centre (PPDC)	Limited use by journalists and by PPDC; creation of infographics	Attorney-General connects development and political networks for adoption of OCDS; but no similar actor for data use	No evidence of data published on Budeshi changing corrupt practices.	No evidence of primary benefits to marginalized communities. Possible secondary benefits from monitoring efforts.
Preferential procurement [South Africa]	OC portal centralizes and publishes public tender advertisements and awards. Data is incomplete and insufficient for assessing compliance with regulations	Preferential Procurement Regulations, 2017	No evidence of infomediarities or of trusted intermediaries.	No evidence of data use for bidding nor of data use for monitoring contract delivery.	Business forums attempt to mediate. Process is driven by legislation and not by the availability or value of data. Forums are not able to engage all stakeholders (i.e. limited in the case of large construction companies where power is concentrated)	No impact on established procurement procedures. Communities respond to implementation of regulation based on observation of new construction projects.	Clashes between marginalized communities and large contractors. No evidence of primary benefits to marginalized communities nor of secondary benefits from monitoring efforts.

(continued) CASE	(continued) Disruption of data flows	(continued) Opportune niche	(continued) Infomediaries	(continued) Value creation	(continued) Switchers	(continued) Value activation	(continued) Outcome re: Inclusion
Access to Government Procurement Opportunities [Kenya]	Central OC portal and portal dedicated to contracts for marginalized groups. 17% use data from dedicated portal	Public Procurement and Asset Disposal Act, 2015: AGPO Program	No evidence of intermediaries.	No evidence of value add products targeted at marginalized communities.	No evidence of switchers	No impact on established procurement procedures.	Marginal increase in participation in public procurement -- 4% of the value of contracts which is much lower than the target of 30%.

In the introduction to this report, a clear distinction was drawn between primary and secondary beneficiation for marginalized communities resulting from public procurement reforms, including open contracting. Primary benefits are derived when marginalized communities are able to participate equitably and are evaluated equally in the awarding of public contracts, thus allowing them to derive direct monetary returns for their labor. Secondary benefits are derived when communities or intermediaries are able to monitor the awarding and execution of public contracts to ensure that communities derive the social and economic benefits that accrue to them from the successful delivery of those contracts.

The Bantay Kita, Kenya and South Africa cases show how governments introduced specific legislation to ensure the accrual of benefits from economic activity directly to marginalized communities. In the case of the Philippines (Bantay Kita), the law ensures that indigenous people benefit financially from mining activities on their ancestral land, and, in the cases of South Africa and Kenya, the law ensures that designated communities benefit financially by being included in the delivery of large public-funded projects, mainly in the construction sector. In effect, the governments of all three countries have created **opportune niches** in different economic sectors specifically for the benefit of marginalized communities. In network terms, the government as the most powerful actor in the national political network is attempting to intervene in the global financial (economic) network where large mining and construction companies operate. The success of this intervention is not guaranteed because the global financial network is likely to respond to any intervention or interference by defending its own interests (network program), particularly when such an intervention seeks an equitable distribution of wealth and is therefore not aligned with the central program of the global financial network -- that is, the accumulation of wealth by the most powerful actors in the network (Stalder 2006).

In all of these three cases, access to data on public contracting is important to excluded and marginalized communities (and their representatives) because they hold the potential to empower these communities to challenge the defensive actions of the powerful actors in the global financial network. Bantay Kita has been more successful than the governments of Kenya and South Africa (or the intermediaries acting on behalf of marginalized communities) because it was able to access relevant data. Bantay Kita added value to the data by making it meaningful to



the community, and, because the data was meaningful to the mining company concerned to the extent that it challenged how it calculated its royalty payments thus posing a possible threat to its legal compliance procedures. On this basis, Bantay Kita was able to facilitate dialogue between the community, the mining company and government to resolve a concern pertaining to the distribution of wealth to the local indigenous community.

Both the Kenya and South Africa cases show intent to make public procurement opportunities more inclusive, yet the operationalization of intent is weak and ineffective. Preferential procurement legislation creates new opportunities for marginalized communities and there is evidence in the Kenya case of these communities seeking to exploit these opportunities. However, their efforts are hampered by the failure of governments to change procurement practice such that it provides relevant contracting data and responds to the specific needs of marginalized communities that would allow them to participate more equitably and effectively. In both cases, open contracting portals are in place, but these portals contain insufficient or irrelevant data in relation to the needs of marginalized communities. The open contracting portals are developed in parallel to legislation that seeks to make public contracting more inclusive, but the failing of both governments is that the portals and the levers for challenging entrenched power dynamics remain disconnected. The result is that while legislation challenges the existing power distribution in the economic network, there is no real disruption in the flow of data, the portals play no role in supporting legislation by connecting marginalized communities to the economic network, and no intermediaries capable of switching between networks are to be found.

In the Bandung and Budeshi cases, there is a greater focus on secondary benefits, and not a specific focus on primary benefits for marginalized communities that would accrue from their direct participation in public procurement opportunities. The expectation is that open contracting data can assist in the monitoring of public service delivery with the intention of improving delivery and the benefits that accrue from the availability of public infrastructure and services. In the case of Budeshi, data use by PPDC is problem-focused, suggesting that the data has a certain amount of value for the purposes of monitoring the delivery of public services. But in general, no infomediaries, communities of users or switchers have emerged to use the data for monitoring or addressing specific problems faced by communities, particularly marginalized communities.

Overall, the findings highlight the limitations of conceiving of open contracting initiatives in narrow, overly technical terms. The implementation of open standards may introduce value in terms of more efficient government systems and may enable more effective monitoring by joining up data, but this value is curtailed if the intention of open contracting extends beyond efficiency gains. This is because for open contracting to deliver social returns, data is not enough. Consideration must also be given to the process of public contracting and the social dynamics in which the process is embedded. In fact, the five case studies show that data was the least important part of including new actors -- including marginalized communities -- in public contracting. In most cases, open contracting data published by governments did not disrupt existing data flows or challenge the programs of powerful networks. Communities need to determine what is valuable to them based on the specific problems they face and this should determine what data is published. In other words, value emerges when problems are articulated. The Bantay Kita case illustrates this. Infomediaries are needed to translate data into problem-

relevant information that communities can act upon. Switchers are needed to support the actions of communities, to activate value in other networks where change is required, and to challenge the unequitable programs of those networks. Inclusive problem definition and design, infomediation, switching and challenging powerful networks are all social processes. In sum, without successfully challenging existing power, marginalized communities will remain excluded from participating in public procurement.

## 7 LESSONS LEARNED

In this section, the lessons and insights from the analysis of the cases that would help practitioners plan, implement and monitor inclusive open contracting initiatives are presented. Four learnings are extracted from the analysis of the five cases. For illustrative purposes, we link back to the cases for each of the learnings.

- a. **For open contracting initiatives to be inclusive, they need to be inclusive by design.** Several cases are examples of how initiatives can be inclusive by design, conditioned by several factors, including:
  - o Legislation can hasten the participation of marginalized communities in public contracting. In both the South Africa and Kenya cases, legislation that requires a certain percentage of contracts to be awarded to marginalized communities guaranteed participation. In the Philippines, legislation ensures that indigenous communities have access to and benefits from mining royalties.
  - o Project design can intentionally target specific segments of the population and increase their opportunities to access, understand and act on published data. In the Philippines, Bantay Kita aimed to work with and for a specific marginalized community (the IPDO), and built their capacity to engage with contracting data on mining revenues. We found no evidence to support inclusive design processes in the cases of South African, Kenya or Nigeria.
  - o Problem-centric approaches adopted when designing programs will reveal exclusionary practices, and will thus point to opportunities for inclusion. In the Philippines, South Africa and Kenya cases, the recognition that a problem exists (i.e. the exclusion of marginalized groups), paved the way for the identification of appropriate solutions (e.g. legislation and intentional targeting).
- b. **Inclusive by design is insufficient without an implementation process that is mindful of the inclusive intent.** Inclusive design is implemented in contexts where power structures prevent marginalized groups from participating in and benefitting from an initiative. The case studies reveal that open contracting initiatives that do not address underlying power structures need to be carefully monitored during implementation in order to avoid unintended negative outcomes.
  - o The negative consequences in South Africa, where the supposed beneficiaries of the legislation made use of intimidating tactics to claim what is due to them, was caused by their frustration resulting from subcontractors being in a position to decide which

organizations to award subcontracts to in a non-transparent process; a process which likely favored existing suppliers within their networks to the exclusion of other suppliers. Transparency in the processes of contracting and subcontracting could have mitigated these negative consequences by allowing different groups to monitor the granting of sub-contracts by winning companies, and for contracts to be cancelled in instances where subcontracts breached requirements for the awarding of subcontracts to qualifying suppliers.

- The requirement in Kenya for pre-qualification requirements becomes an exclusionary mechanism that prevents women, youth and disabled persons from participating in government contracts. While this paper did not delve into the causes why AGPO was successful in only including marginalized groups in Nairobi to the exclusion of non-urban areas, it highlights the fact that initiatives that are designed to be inclusive can still have exclusionary effects when implementation is not properly structured and monitored.
- c. **Interventions need to be tailored to targeted marginalized communities.** Specific activities need to be designed with the end-goal of enabling excluded communities to participate in and benefit from contracting activities. One-size-fits-all interventions will not work.
- In the Philippines, Bantay Kita worked with a local university to design and implement interventions specifically for IPDO in accessing and understanding the datasets as a basis for their advocacy for transparent mining royalties. In Nigeria, the lack of purposive support to users, whether marginalized or not, resulted in limited uptake of contracting data.
- d. **The publication of and access to contracting data is only part of the processes to make open contracting inclusive.** There are other systemic hurdles that need to be addressed for public contracting to serve the interest of excluded groups.
- In both Indonesia and the Philippine cases, the publication of datasets did not automatically result in use, more particularly by marginalized groups. Inclusion only happened when the intermediaries implemented targeted interventions by building the capacity of users to make sense of published data, and by using the data to advance their agenda and to amplify their voice in the discourse. In Nigeria, the publication of data has had limited uptake, let alone an inclusive impact.
  - In Kenya and South Africa, the failure to publish data to enable the monitoring of the grant of subcontracts impeded the process of ensuring that marginalized groups benefit from the legislation. What is needed is for the respective governments to ensure equitable enforcement of the legislative measure and to ensure contractor compliance.

## 8 CONCLUSION

This study set out to answer three questions: (1) Are public procurement reforms such as open contracting and the concomitant increase in the availability of contracting data realizing expected results in relation to the inclusion of marginalized groups as beneficiaries of government contracts? (2) What contextual and programmatic aspects in open contracting contribute to achieving meaningful results and benefits for these marginalized groups? (3) What do specific marginalized stakeholders experience as significant barriers/impediments to achieving the desired results and benefits?

This research has attempted to draw attention to the specific contextual conditions premised on both the opportunities created by greater openness, but also the need to take into consideration the inherently exclusionary effects of social networks and the requirement for any intervention to challenge the programs of those networks, if open contracting is to be truly inclusive. Based on five case studies, open contracting was not found to lead to the inclusion of marginalized groups as beneficiaries of public contracting. In a single case, where a trusted and established intermediary facilitated a flexible and inclusive process, focusing as much on the needs and capabilities of a marginalized community as on the availability and usefulness of data, the outcome was positive for the community. In all other cases, the open contracting data published did not match the needs of marginalized communities. As a consequence, the available open contracting data failed to support legislative interventions introduced in some contexts to increase the participation of these communities; nor were infomediaries or switchers sufficiently attracted by the data to work with communities to challenge existing power constellations that exclude them from participating in the benefits of public contracting.

Our findings and conclusions lean heavily on the value and effects of data in public procurement reforms, especially as they relate to the inclusion of marginalized communities in public contracting. And yet data was shown to play a limited role at most in the five case studies. This is not to suggest that data is not important; it may well play a more constructive role in contexts that differ from those that prevail in Indonesia, Kenya, Nigeria, the Philippines and South Africa. It could be argued that the relatively data-centric conceptual framework adapted for this study may not have been the most appropriate to frame research on inclusive public sector reforms, even though it made sense to adopt this approach based on open contracting's founding principles which include the timely and proactive disclosure of documents and data related to public contracting. This raises several concluding thoughts.

First, if open contracting is a process embedded in and its outcomes are determined by social processes, then a conceptual framework that may lean towards data but that is underpinned by concepts related to social processes such as social networks and power may nevertheless hold promise for future work that seeks to understand the possibilities and limitations of interventions in social process to unlock benefits for excluded communities. As the concluding chapter of *The State of Open Data* notes: "Power is a recurring theme throughout the chapters in this book. Data is seen as a source of power, and advocacy for open data as a strategy to redistribute that power. [...] However, there has also been growing recognition that, in conditions of unequal access to the skills and resources to work with data, or with wider existing patterns of exclusion and disadvantage, opening up data may not always lead to desirable outcomes" (Davies et al. 2019: ).

The second and final concluding thought is a concern about what the future holds for open contracting if change processes in government procurement are not only about data but also about praxis (Smith & Reily 2013). Stated differently, what becomes of open contracting when the focus shifts from data as a driver of change to data as a component of change in socio-technical systems? How is open contracting then different from public sector reform processes that have been ongoing for decades and the subject of intense study by multiple scientific disciplines (e.g. sociology, political studies, development studies, business management studies, etc.)?

A recognition of the limits of data and an acceptance of power dynamics is evident in the growing acknowledgements and changing approaches being adopted by many advocacy groups in the open movement, including open contracting. Recognition is a step in the right direction; yet, with few exceptions, very little is being done within the open movement to understand, develop and apply current knowledge about power in a society that is fundamentally different because of networked communication. Networks as social structures and power relations in networks require greater attention in future research on change interventions designed with the expectation of more inclusive outcomes.

## Appendix 1: Questionnaire

### A. GENERAL QUESTIONS

1. What is the change that the project hopes will take place as a result of the publication of open contracting data?
2. How is the project using open contracting data to effect change?
3. Is inclusion a stated objective of the open contract project? YES / NO
  - a. If inclusion is a stated objective, have *specific* target groups or communities been identified who stand to benefit from the open contracting initiative(s) being implemented by the project? YES / NO
    - i. If YES, who are the specific target groups or communities?
    - ii. If YES, what evidence exists regarding the outcomes of open contracting data in terms of
      1. the type of participation by the targeted communities in decision-making processes and
      2. the level of participation by communities in decision-making processes?
4. Is there evidence to show that participation in open contracting processes and/or access to open contracting data has been *beneficial* to the excluded groups/or communities *in general*?
  - a. If YES, what have been the benefits?
5. Reflecting on achievements to date, what contextual or environmental factors have contributed to an increase in the inclusion (or exclusion) of marginalized individuals or groups?

### B. DISRUPTING DATA FLOWS

1. What data on public contracts were previously collected but not openly available or accessible?
2. Has the open contracting project made the data more accessible? YES / NO
  - a. If YES, describe how it has made the data more accessible:
3. What contracting data is being published as open data?
  - a. List sectors if not all sectors.
  - b. Provide details on what data is published:  
NEW TENDERS: Date of announcement / Title of tender or contract / Issuing government department / Closing date for applications / Value of tender or contract / Terms of reference or similar / Conditions of who is eligible to apply / Supporting documents / Contact information  
AWARDED TENDERS: Name of company of consortium who was awarded the tender of contract / Name of company directors / Company registration number / Company website / Company contact information / Value of the contract awarded / Duration of contract
4. Who publishes open contracting data?
5. Where is the data published? URL(s)



6. Is there only one source of open contracting data OR are there multiple sources? SINGLE / MULTIPLE
7. IF there are multiple sources:
  - a. Are there multiple sources of the same data? YES / NO AND/OR
  - b. Are there multiple sources for different open contracting data (e.g. by sector/industry/government department)? YES / NO
8. If there are multiple sources, are all of them open? YES / NO

### C. OPPORTUNE NICHES

1. Are you aware of any changes in your context that allowed organizations or individuals to become more involved in the public procurement process?
  - a. If YES, describe
    - i. the changes that took place
    - ii. the organizations or individuals
    - iii. how the organization or individuals became more involved, i.e. what did they do?
    - iv. the particular skills or competencies they have
2. Are you aware of any changes in your context that allowed organizations or individuals to become more involved in the public procurement process where they were specifically working to improve access to public contracts by marginalized groups **through the publication of open contract data**?
  - a. If YES, describe
    - i. the changes that took place
    - ii. the organizations or individuals
    - iii. which marginalized groups
    - iv. how the organization or individuals became more involved, i.e. what did they do?
    - v. the particular skills or competencies they have

### D. INTERMEDIARIES

1. Are you aware of others who repurpose, republish or reuse<sup>45</sup> the open data?
  - a. If YES, who is repurposing, republishing or reusing the data? **[LIST IF MORE THAN ONE, AND ANSWER THE QUESTIONS BELOW FOR EACH INTERMEDIARY]**
  - b. If YES, how is the republished/repurposed/reused data different from the original data?
  - c. If YES, in what format is the data republished?
  - d. If YES, where is the data republished? URL (if relevant)

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<sup>45</sup> Repurpose = reworking the data and publishing it in a different format (e.g. journalists publishing articles), arrangement (e.g. as structured data) or file type (e.g. from PDF to csv). This may also include combining the open contracting data with other data. Republish = making the open contracting data available in the same format, arrangement and file type but on a different platform. Reuse = using the open contracting data from any of the available sources for use by an application via an API.

- e. If YES, for whom is the the republished/repurposed/reused data? In other words, is it clear who the intended users of the data are?

## E. VALUE OF DATA

1. Is the data that is published being used by any of the intended users? YES / NO
  - a. If YES, how was this made possible?
  - b. If YES, please describe how the data is being used.
  - c. If YES, for what purpose is the data being used?
2. Is any data missing from the data currently published that, if available, would make the data more useful to the intended users? YES / NO
  - a. If YES, please describe the data that is missing.
  - b. If YES, please describe how this missing data would be useful.
3. Is any data missing that, if available, would make the data more useful to users from marginalized communities?
  - a. If YES, please describe which marginalized communities.
  - b. If YES, please describe the data that is missing.
  - c. If YES, please describe how this missing data would be useful.
4. Are there any other issues that prevent the open data from being used?
  - a. If YES, please describe.
  - b. If YES, is the project working to improve the use of the data?
    - i. Please describe how the project is cultivating data use.

## F. VALUE TRANSFER

1. Who is in a position to effect change as envisioned and described in Question A2?
2. Are the published open contracting data of value to specific individuals or groups?
  - a. If YES, for which groups are the data valuable?
3. Has your project brought in additional partners to ensure the effective use of open data?
  - a. If YES, who has been brought into the project?
  - b. If YES, what are the roles played by each of these partners in supporting the change process?
  - c. IF YES, how are these partners connected to those in a position to effect change (see F1)?

## Appendix 2: Inventory of mining data disclosed by the Department of Finance (DOF)

Economic data	Operations data	Fiscal data
<ul style="list-style-type: none"> <li>• Extractive Industries in 2017</li> <li>• Gross value added in the Extractive Industries (current prices, in million PHP)</li> <li>• Share of the Gross value added in mining and quarrying of each region to GRDP (in current prices and in %)</li> <li>• Gross value added in mining and quarrying by region (in current prices, in %)</li> <li>• Summary of Production Value in the Mining Sector (in million PHP)</li> <li>• Summary of Production volume in the mining sector (in thousand units)</li> <li>• Exports of metallic and non-metallic mineral products (in million US\$)</li> <li>• Summary of export data, per ore and destination</li> <li>• PMDC Income and Revenues</li> <li>• Domestic Production of Oil (in billion barrels of oil, bbl.)</li> <li>• Domestic Production of gas (million cubic feet of gas)</li> <li>• Exports of oil and gas (FOB in million US\$)</li> <li>• Volume of Gold Production based on BSP Purchases</li> <li>• Value of based on BSP Purchases from SSM, 2009-2017</li> <li>• SSM Production Volume and Value in 2017</li> <li>• Domestic production of coal (at 10,000 Btu/lb., Btu = British thermal unit)</li> <li>• Production data summary of participating large-scale metallic companies for 2017</li> <li>• Summary of production data of Top 20 producers non-metallic companies for 2017</li> </ul>	<ul style="list-style-type: none"> <li>• Number and products of operating mines per region</li> <li>• Employment in mining and quarrying per region and share to total regional employment</li> <li>• Declared Minahang Bayan as of 2018</li> <li>• List of EPs awarded in 2017</li> <li>• Status of Mineral Production Sharing Agreements in the Philippines as of 31 October 2017</li> <li>• Number of Mining Tenements existing as of October 2017</li> <li>• Mining Companies with MOAs with IP Communities</li> <li>• Equity share of PNOC EC in petroleum service contracts</li> <li>• Areas awarded for petroleum exploration under PECR5</li> <li>• People's Small-scale Mining Areas or Minahang Bayan Declared by the DENR as of December 2018</li> <li>• Number of Active SSM Operations per Region</li> <li>• MGB RO XII Inventory of SSM Associations as of December 2018</li> <li>• Number of SSM Tunnels/Adits Owned by SSM Operators with and without Individual SSM Contracts Issued by the Provincial Governor</li> <li>• Number of ball mills and CIP plants per area and mineral processing permit holders</li> <li>• List of MPSA with approved area expansion as of 2017</li> <li>• List of Operating metallic mines in the Philippines</li> <li>• List of top 20 producers of non-metallic minerals in the Philippines</li> <li>• List of operating large-scale non-metallic mines in the Philippines</li> <li>• List of Petroleum Service Contract Operators as of July 2017</li> <li>• List of Coal Operating Contracts as of June 2017</li> <li>• 46 targeted large-scale metallic mining entities for fiscal year 2017</li> <li>• 20 targeted large-scale non-metallic mining entities for fiscal year 2017</li> <li>• Targeted oil and gas companies for the fiscal year 2017</li> </ul>	<ul style="list-style-type: none"> <li>• Summary of taxes and fees paid by oil and gas sector, per government agency</li> <li>• PNOC EC Revenues (in PHP millions)</li> <li>• Range of Taxes and Regulatory Fees Paid according to SSM Related Activity</li> <li>• South Cotabato's Total Collection from SSM in 2017</li> <li>• Summary Taxes and Regulatory Fees Collected by the Tiboli Municipality from Various SSM Related Activities</li> <li>• Taxes, fees, and royalties from Mining (in million PHP)</li> <li>• Shares from National Wealth from Mining Taxes (fiscal year 2017)</li> <li>• Shares from National Wealth from Mineral Resources (fiscal year 2017)</li> <li>• LGU collections per region and municipality/city (fiscal year 2017)</li> <li>• Total Payments per Company, Fiscal Year 2012-17</li> </ul>
<b>Social and environmental data</b>		
<ul style="list-style-type: none"> <li>• Summary of employment data from participating mining companies for 2017</li> <li>• Social and environmental spending by mining companies in 2017</li> <li>• Summary of employment data from participating oil and gas companies for 2017</li> </ul>		

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