

A Guide on the Operationalization of Beneficial Ownership Information within Public Procurement



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A Guide on the Operationalization of Beneficial Ownership Information within Public Procurement

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Introduction

There is no single international definition of a beneficial owner however international bodies such as the Financial Action Task Force (FATF) have provided one and in recent years, international bodies have converged somewhat to provide definitions that incorporate the three key components of an effective definition. These are:

1. The beneficial owner must be a natural person.
2. Beneficial ownership should cover both ownership and control interests.
3. Beneficial ownership should encompass both indirect and direct interests¹.

In general terms, a beneficial owner is defined as:

“A natural person who has the right to some share or enjoyment of a legal entity’s income or assets or the right to direct or influence the entity’s activities (control). Ownership and control can be exerted either directly or indirectly”².

In recent years, there is a growing trend towards collection of beneficial ownership information to meet multiple policy aims, including tackling money laundering, improving integrity of public procurement or for wider national security reasons. In Lebanon, there are multiple definitions of a beneficial owner across the Lebanese legal framework, nonetheless, they all provide for the same conditions that adheres to the FATF definition³.

To understand who a beneficial owner of a company is, the director can help reveal the identities of the people who are ultimately owning or controlling it. This means it is possible to know who the owners and controllers of a company you are entering a business relationship with are, and not just those people named in certain company position e.g. director or company secretary. In public procurement, understanding the ultimate ownership of a business is part of basic due diligence and supports the effective management of operational, financial, and reputational risks.

The most urgent use case for beneficial ownership (BO) information in public procurement is to prevent fraud and corruption by identifying shared ownership of companies bidding on government contracts, which is a well-established red flag for bid-rigging and identifying conflicts of interest a company or its beneficial owner(s) may have.

¹ Low, P and Kiepe, T, Beneficial ownership in law: Definitions and thresholds, Open Ownership, 2020 p. 6

² Ibid, p. 3

³ See “Almoghbat, M, Assessment of the Lebanese Beneficial Ownership Regime; in line with international standards. Lebanese Transparency Association. February 2022” for a full assessment of the Lebanese Beneficial Ownership Legal Framework. Available at: https://transparency-lebanon.org/Uploads/Workshop/18/download/658921c8-37d8-4043-8132-9be4b461e804_18.pdf

In addition, the following uses for beneficial ownership are being deployed or explored by several governments around the world who operationalized BO information within public procurement:

- Improve service delivery through competition by managing risk to expand and diversify the supplier base which may support getting better value in public contracts or introducing smaller businesses into the supply chain. In addition, there is a role for this information to play in regulating competition in the marketplace - there is a growing awareness among national competition authorities that understanding ultimate ownership supports an understanding of how markets are functioning.
- Verify supplier eligibility in strategic and preferential procurement where this is based on ownership criteria;
- Provide oversight, verification and accountability by civil society and the public through the publication of data;
- Assess policy effectiveness and improve policies by analysing BO data together with other datasets such as open contracting and spend data;
- Improve procurement indirectly on a systemic level by improving the business environment, allowing companies to use BO data to manage and reduce risk in their own due diligence and other anti-money laundering processes⁴.

⁴ Okunbor, E and Kiepe, T, Beneficial ownership data in procurement, Open Ownership, 2021, p. 3

BO data Sources

BO data Collection

BO data Use cases in procurement

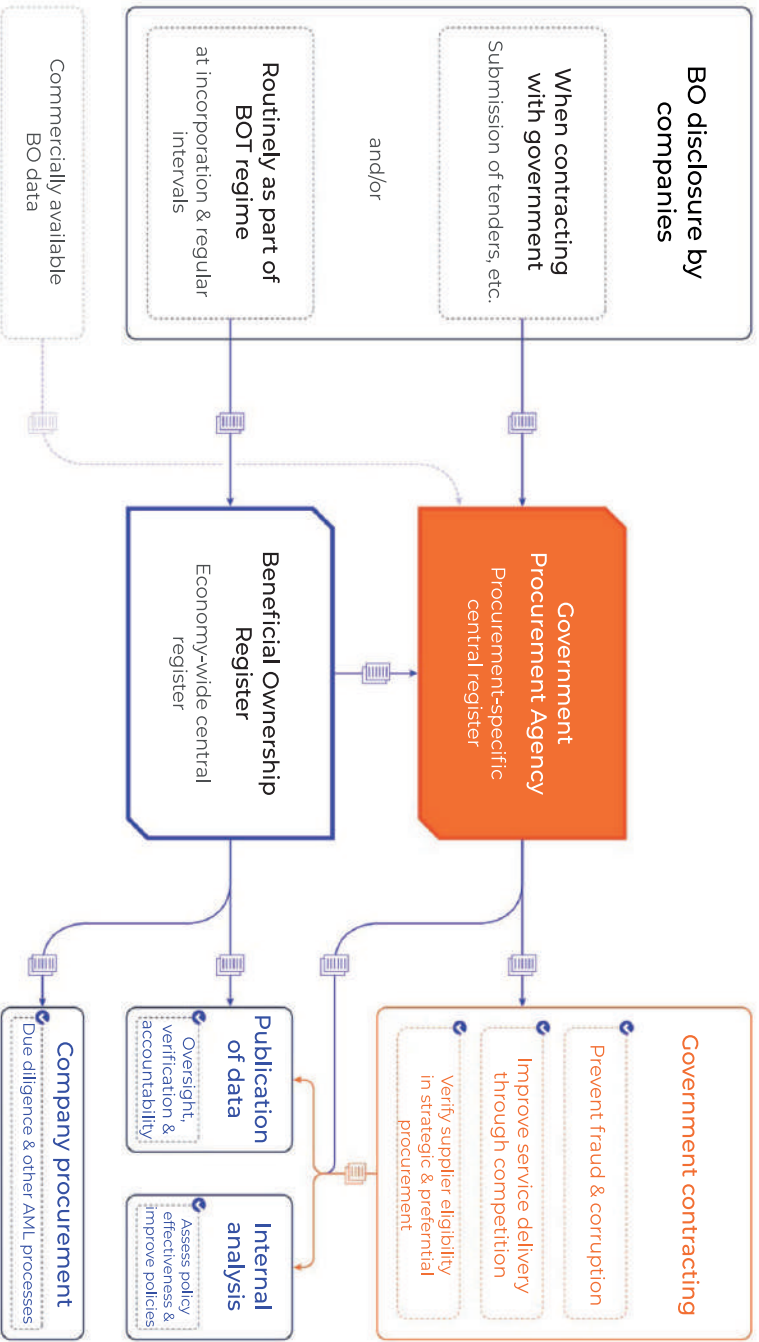


Fig 1. Overview of how beneficial ownership information improves procurements⁵

⁵ Modified from, *ibid*, p.4



This booklet will go into further detail on each of these areas and explain how BO data can support delivering these goals.

Beneficial Ownership Use in Procurement Under Lebanese Law

Currently, the Public Procurement Authority has no explicit competence to collect BO information, however, Article 7 of the new Public Procurement Law provides a range of qualification criteria for bidders' participation as well as providing, in its chapeau clause, the jurisdiction to require "any other criteria deemed appropriate by the procuring entity".

Recommendations:

- The PPA can require that all bidders confirm their compliance with beneficial ownership disclosure requirements to the Tax Department at the Ministry of Finance (MOF) and provides a beneficial ownership declaration as a requirement for a bid's acceptance in accordance with Article 7 paragraph 3 of the new Public Procurement Law that requires from any bidder to have fulfilled their tax obligations.

In addition, the PPA should take steps to verify the information gathered through this disclosure. The information should be verified so that it is possible for it to be used for decision making in procurement. For example, if a decision is taken to exclude a particular bidder from a procurement process based on their beneficial ownership it is essential that steps have been taken to verify that this information is correct, otherwise the PPA or other authorities risk a legal challenge by a failed bidder who has been wrongly excluded. A brief overview of verification options is laid out below as well as guidance and links to relevant examples of how to effectively collect this information.

- The PPA may consider developing a risk-based approach to beneficial ownership information if it deems the collection of this on all public contracts too onerous either for the PPA or bidders. One approach to this is to set a financial threshold above which beneficial ownership information must be collected, or requiring the resubmission of the M18 (18 □) form required under Decision No. 2045 by the Minister of Finance. Alternatively, a financial threshold could be set along with the development of a published risk-based framework for designating tenders under the financial threshold as requiring disclosure.

The Benefits of Using Beneficial Ownership Data in Procurement

Fraud Detection

Fraud in public procurement can be due to false representation, failure to disclose information and abuse of position. This can be done by bidders to a tender conspiring to manipulate a bid by forming a cartel. This can be done by suppressing bids to decrease competition, or by businesses submitting false bids to steer the decision of officials towards a particular bidder.

BO information should be collected at the point of bidding to be effectively used to look for the most common red flag - are there shared beneficial owners across multiple businesses bidding? If so, this is not in itself a sign of wrongdoing, but should raise concerns as part of the assessment process, and this information be used in conjunction with other common procurement red flags. Open Contracting Partnership (OCP) has produced a comprehensive list of procurement red flags at each stage of the process⁶ and relevant indicators to be used in conjunction with an

⁶ See: <https://docs.google.com/spreadsheets/d/12PFkUIQH09jQvcnORjcbh9-8d-NnLuk4mAQwdGIXeSM/edit#gid=2027439485>

initial red flag of shared bidder ownership, these are:

- a) Bids are an exact percentage apart - very similar or equal bid prices is considered a signal of potential collusive agreements between bidders.
- b) Prevalence of joint bid patterns (consortia).
- c) Line-item bid prices by different bidders are identical, very close or an exact percentage apart.
- d) Physical similarities in documents by different bidders - e.g. Same font type, format, calculation or spelling errors appear in two or more bid packages.

There are significantly more red flags that should be integrated into a procurement system to ensure integrity across all stages, but shared ownership of multiple bidders should be considered a significant red flag prompting forensic analysis of all bids to a tender.

Recommendations:

- The PPA should consider integrating a full set of procurement red flags into its systems. Where a number of these are triggered at the tender stage, and BO information is not available, this information should be requested from a bidder to maintain their participation in the process.
- Where BO information is available, and shared ownership of bidders is revealed, a full investigation of the tender process should be conducted.

Conflict of Interest

BO information can help check for conflicts of interests that may escape more superficial checks by identifying links between those holding positions of power, such as Politically Exposed Persons (PEPs) or procurement authorities, and the (hidden) ownership and control of companies. Unlike fraud detection, there are few alternative red flags that can suggest a conflict of interest if one isn't evident from more superficial checks, e.g. known associations between companies and PEPs for example.

Selected Wider Benefits of Beneficial Ownership Information in Procurement

Reducing and Managing Risk

Knowing the BO of companies involved in procurement and their broader ownership structure collected as part of BO disclosures, helps manage operational risks (for instance, by checking for financial liabilities of other entities within an ownership structure, which could be used to hide debt or losses which may indicate risk that a business is not financially secure, and therefore, at risk of failing during the delivery of a government contract.

Ensuring Eligibility with Beneficial Ownership Data

Where a particular procurement process has a preferential aspect, e.g. government policy supports targeting contracts at particular groups, e.g. a defence or national security contract that can only be delivered by a Lebanese company, understanding beneficial ownership is a key aspect of knowing whether the intended beneficiaries are the ultimate owners of a winning bidder.

Knowing the beneficial owners of a counterparty is a fundamental aspect of any due diligence process, and above we have outlined some of the key advantages of using this information in public procurement.



Effective Collection of Beneficial Ownership Information

Effective and appropriate collection of beneficial ownership information is essential to ensuring good information is generated and the process is understandable to those companies required to disclose. Open Ownership has produced detailed guidance on how to create effective disclosure forms and how to align these with existing systems⁷.

In brief, the features of an effective BO declaration form are:

- It is clear who (people as well as companies) will fall under the scope of the disclosure process (It may be necessary to provide detailed guidance, alongside the form, and referenced from the form to achieve this.)
- The form is easy to understand and navigate.
- It is easy for people to supply good quality data for each field.
- It is easy for companies with very simple BO structures to make their declarations.
- The full range of BO structures, declarable by law, can be disclosed via the form(s).
- Form submissions can be linked to data in other official databases, so that companies do not have to submit the same information multiple times.

Adding Beneficial Ownership Information Collection at the Point of Tender

There are two primary ways to gather information on BO during the procurement process:

1. Governments can collect data during the procurement process, and hold this in a central procurement-specific register.
2. Governments can pull data from a central BO register that covers all sectors of the economy into procurement processes.

If the PPA does not have persistent access to BO data from other parts of government, which currently collect this data. Given this, the PPA will need to collect information at the point of tender and ideally make this publicly available which will allow for improved verification and scrutiny by any party inside or outside of government and provide an important source of information to demonstrate the procurement process has been delivered with integrity.

Recommendation:

- The PPA should mandate the disclosure of beneficial ownership information at the point of tender submission by a bidder. A tender will only be considered valid and considered for award when this information is disclosed and verified. A number of countries have specified a financial threshold above which this data is mandatory, e.g. Slovakia requires this information for all public contracts and grants above EURO €100,000. The PPA should conduct fuller assessment of when and how to apply a more risk-based approach to collection of this data prior to proceeding. Ideally, this risk assessment would be designed by sector expertise drawn from across industry and civil society, who together can designate certain types of contracts (based on duration, value, tender type, or all three) and certain sectors, e.g. defence, as higher risk requiring more detailed or more frequent disclosure of BO information over the lifecycle of the contract.

⁷ For detailed guidance see: <https://www.openownership.org/en/publication-categories/sample-forms/>

Ensuring Beneficial Ownership Information is Useful

Whenever BO information is collected, the following principles should be adopted to ensure it can be best used. These are drawn from the Open Ownership principles which give a full overview of the best approach to the reform as whole. While all principles are relevant, of particular importance are:

1. A central public register
 - ▶ Having a centralised and public beneficial ownership register means that people and authorities can access information on the beneficial ownership of companies through one central location in a standardised format.
2. Information should be structured and interoperable
 - ▶ BO information should be available as structured data, with declarations conforming to a specified data model or template.
 - ▶ Information should be available digitally, including in a machine-readable format.
 - ▶ Information should be available in bulk, as well as on a per record basis, free of charge.
3. Measures should be taken to verify the data (see LTA's "A Guide on Beneficial Ownership Information Verification Process").
4. Data should be kept up to date and historical records maintained.

Recommendations:

- The PPA should establish an electronic system for disclosure to ensure that data can be collected in the most uniform and structured manner possible.
- The PPA should securely store this information and provide an option for companies bidding on multiple tenders, or again bidding for tenders in the future to be presented with their existing disclosure and asked to either update or confirm that the details are still correct and the same as their current M18 Template (18 □) disclosure to the MOF.

Accessing and Sharing Beneficial Ownership Information

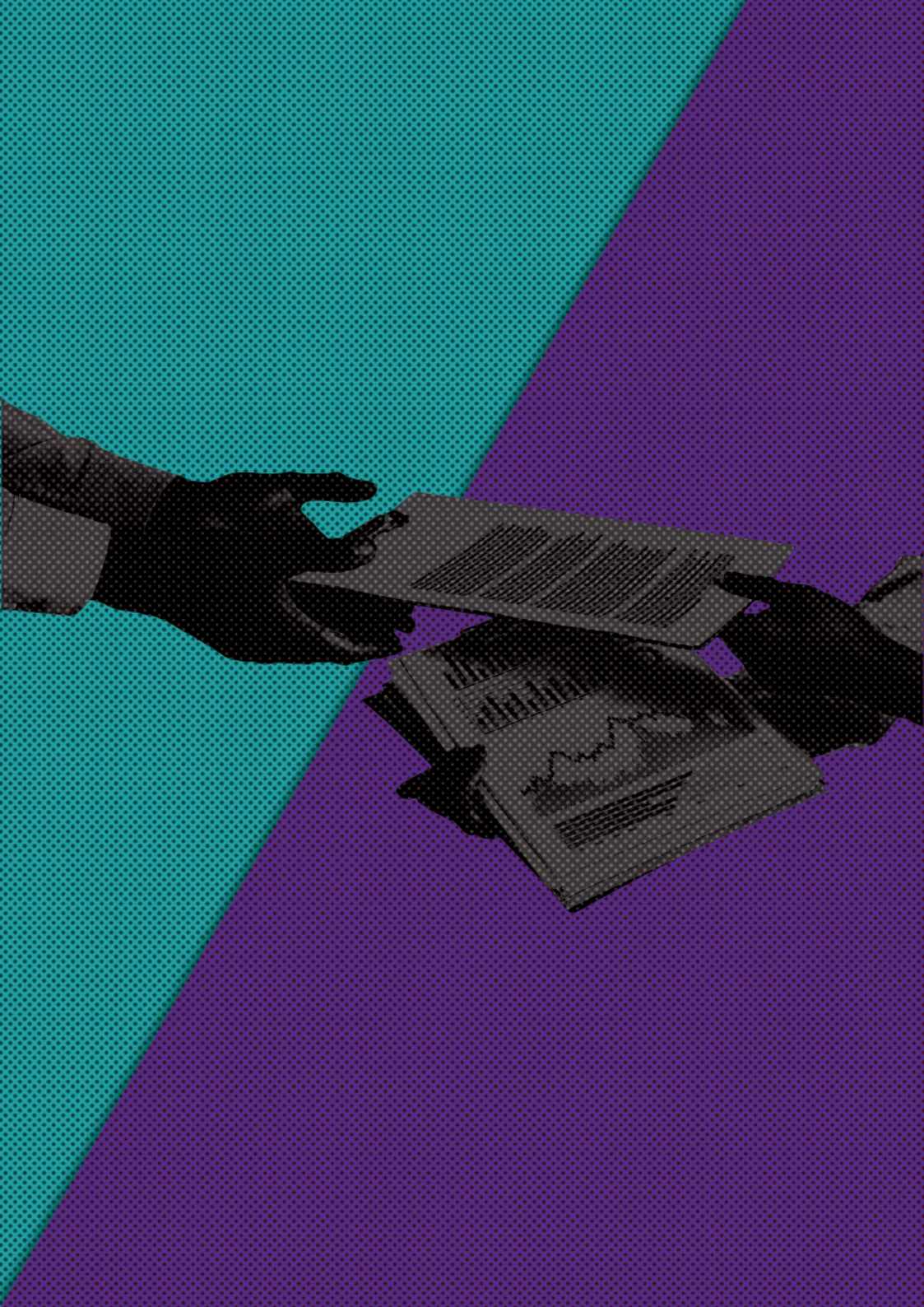
To make the best use of BO information in procurement, it is important that officials have access to data, that conforms to the principles mentioned above (as well as the wider Open Ownership principles) at the right time. In procurement, this means presenting officials with BO information attached to each bid to a particular tender. This allows for the important fraud and conflict of interest red flags to be available prior to an award. Open Ownership has developed a prototype software solution called Blue Tail which brings together tender information and beneficial ownership information in a usable way to be assessed during the award process.

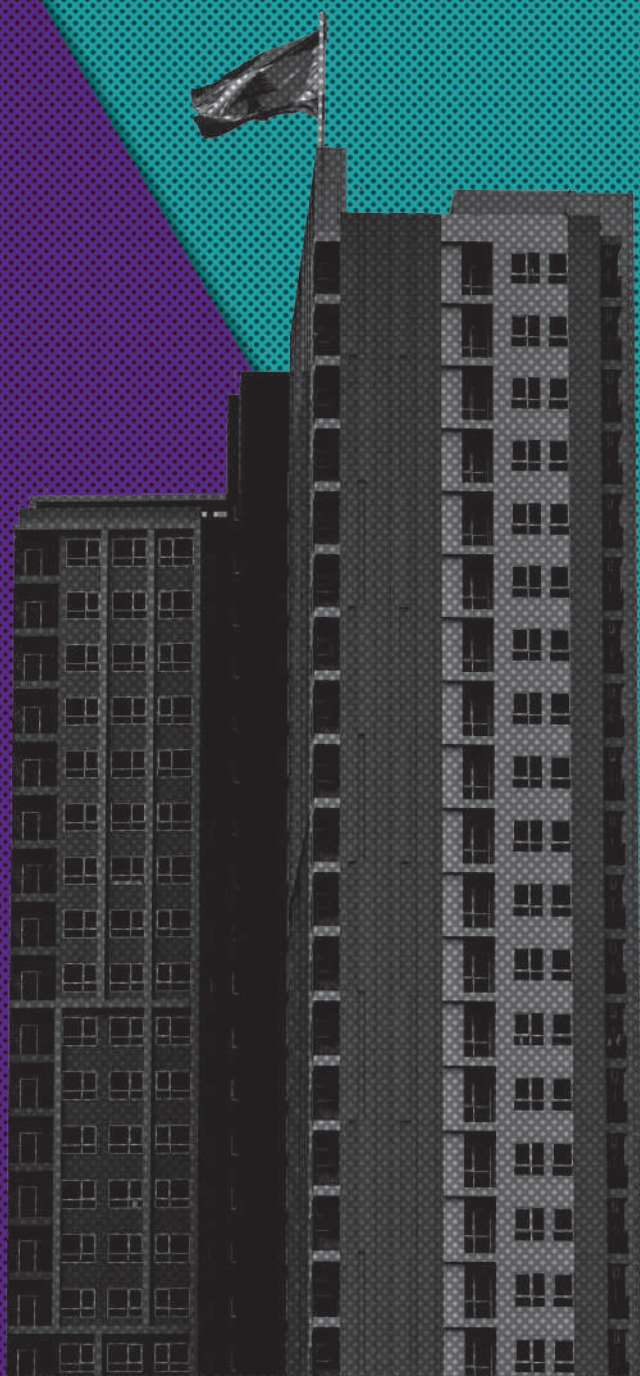
Data Sharing Internally to Government

All government agencies that hold beneficial information should store the information in a common and structured format. In addition, where cross-departmental data sharing is possible, a clear policy should be communicated internally on the process for accessing this information.

Recommendations:

- The PPA should consider ensuring that where they hold BO information, it is both held in a common machine-readable and structured format, and a clear policy written and communicated as to how this can be accessed and under what legal basis.
- All government authorities in Lebanon should have access to this data, but the MOF and SIC should regularly ingest this data to support their own investigations and check for conformance with the BO information they hold.





Data Sharing Externally to Government

Publicly sharing BO information can be the most effective way to ensure that the maximum number of policy objectives can be achieved. Publicly sharing BO information allows anyone to perform due diligence, enhances trust in an economy and supports anti-corruption and integrity initiatives by allowing journalists and citizens to understand and scrutinise company ownership within their jurisdiction.

Disclosure and publication of beneficial ownership information has legitimate public interest purposes, and can be compliant with data protection and privacy legislation, as has been done in many different jurisdictions (e.g. France, Denmark, Slovakia, Indonesia to name a few⁸), here beneficial ownership systems have been implemented. In practice, this means that the fields of data that are collected and published (including identifiers) should be developed in the context of local legislation, whilst maximising availability of information that supports effective data use.

It is important to note that in no jurisdiction, where BO information is publicly available, is all data collected by government published, e.g. most regimes only publish month and year of birth, whereas the full date of birth will be disclosed only to governmental agencies. In addition, most jurisdictions, where information is published openly, have in place a process to redact that information from the public domain where a beneficial owner has legitimately demonstrated a need to do this, e.g. personal harm from publication.

In general, potential negative effects should be understood and can be mitigated, example, through implementing layered access and a protection regime, in compliance with the above principles of data usability.

Recommendations:

- The PPA should consider publishing the beneficial ownership information of both bidders and contract awardees.
- If this approach is unachievable, there are a number of interim steps that should be considered, e.g. only publishing the beneficial ownership information of contract awardees.
- Businesses, citizens, and civil society in Lebanon should be actively consulted on the most effective way for disclosing this information publicly.
- Civil society and media actors in Lebanon should ensure they have the technical data analysis skills to make best use of this data, including methodologies for comparing it to other data sources available domestically and internationally, e.g. the Open Ownership Register⁹, or the Organised Crime and Corruption Reporting Project's Aleph tool¹⁰.

Conclusion and Recommendations

"[BO data] can have both direct and indirect benefits for procurement. It can improve procurement directly by using BO data to enhance the information recorded by procurement systems about people and organisations, to help make decisions and conduct analysis. Indirectly, BO transparency strengthens procurement on a systemic level"¹¹.

⁸ For a live list of countries with either a public register in place or a political commitment to deliver one, see: <https://www.openownership.org/en/map/>

⁹ Open Ownership Register – Beta. Available at: <https://register.openownership.org>

¹⁰ Aleph. Organized Crime and Corruption Reporting Project. Available at: <https://aleph.occrp.org>

¹¹ Okunbor, E and Kiepe, T, Beneficial ownership data in procurement, Open Ownership, 2021, p. 9

This booklet has outlined the definition of beneficial ownership, where the topic is covered in Lebanese law, the use cases for BO data in public procurement, and how best to collect, use, and share this data, both internally and externally.

Existing procurement Law in Lebanon does not provide a direct competency for the procurement authorities, but there is a broad scope for the PPA to collect information it deems necessary to allow a bidder to participate. The PPA should consider collecting beneficial ownership information in a structured manner at the point of bid submission and taking steps to verify information - at a minimum requiring documentary evidence from bidders to support their BO disclosure and where possible cross-checking this information where alternative official sources of information exist, e.g. evidence of identity.

This booklet provides a starting point for that assessment. The Lebanese Transparency Association – No Corruption, Open Ownership, and a host of other international organisations have published a range of guidance, information, and technical tooling on the issues covered in this publication, and can be contacted for further information.

Finally, this publication provides the below recommendations for the PPA, the Government of Lebanon, and Lebanese Civil Society:

- The PPA can require that all bidders confirm their compliance with beneficial ownership disclosure requirements to the Tax Department at the Ministry of Finance (MOF), and provide a beneficial ownership declaration as a requirement for a bid's acceptance in accordance with Article 7 paragraph 3 of the new Public Procurement Law that requires from any bidder to have fulfilled their tax obligations.
- The PPA may consider developing a risk-based approach to beneficial ownership information if it deems the collection of this on all public contracts too onerous either for the PPA or bidders. One approach to this is to set a financial threshold above which beneficial ownership information must be collected or requiring the resubmission of the M18 (IΛϣ) form required under Decision No. 2045 by the Minister of Finance. Alternatively, a financial threshold could be set along with the development of a published risk-based framework for designating tenders under the financial threshold as requiring disclosure.
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- The PPA should establish an electronic system for disclosure to ensure that data can be collected in the most uniform and structured manner possible.
- The PPA should securely store this information, and provide an option for companies bidding on multiple tenders, or again bidding for tenders in the future to be presented with their existing disclosure and asked to either update or confirm the details are still correct and the same as their current M18 disclosure to the MOF.
- The PPA should consider ensuring that where they hold BO information, it is both held in a common machine-readable and structured format and a clear policy written and communicated as to how this can be accessed and under what legal basis.
- All government authorities in Lebanon should have access to this data, but the MOF and SIC should regularly ingest this data to support their own investigations and check for conformance with the BO information they hold.
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- Civil society and media actors in Lebanon should ensure they have the technical data analysis skills to make best use of this data, including methodologies for comparing it to other data sources available domestically and internationally, e.g. the Open Ownership Register, or the Organised Crime and Corruption Reporting Project's Aleph tool.



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