



Lebanese Oil & Gas Initiative  
المبادرة اللبنانية للنفط والغاز

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# ***Reinforcing Transparency in Subcontracting in the Lebanese Oil and Gas Sector***

**September 26, 2018**





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# ***Reinforcing Transparency in Subcontracting in the Lebanese Oil and Gas Sector***

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Lebanese Oil and Gas Initiative (LOGI)

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- LOGI

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# Executive Summary

This policy brief analyzes the subcontracting process in the nascent Lebanese oil and gas sector from the perspective of transparency. The possibility that contractors and subcontractors engage in corrupt contractual arrangements, away from governmental or public scrutiny, is especially high in countries with weak institutions and ineffective civil society organizations. Examples of these corrupt arrangements include the award of contracts to firms in which politically exposed persons hold stakes directly or indirectly.<sup>1</sup> Another example is the possible exclusion of qualified suppliers from competing for contracts in order to benefit specific subcontractors. In these cases, Lebanese citizens not only stand to lose the immediate economic benefits of the natural resources of their country but also can suffer from slower economic growth and a degradation of the rule of law in the long run.

The policy brief reviews the regulatory framework of subcontracting in the Lebanese oil and gas sector. It offers recommendations aimed to better shield Lebanon from the risks of corruption associated with the award of contracts to subcontractors. Up to this day, very few international benchmarks exist with respect to subcontracting per se. Faced with such paucity of international standards, the brief surveys the international best practices applicable to contracting in oil and gas and constructs a suggested list of best practices on subcontracting. The policy brief evaluates the governance of subcontracting in the Lebanese oil and gas sector in light of that list.

Three legal instruments stand out in the Lebanese regulatory framework of subcontracting in oil and gas. The Offshore Petroleum Resources Law ('OPRL') of 2010 provides the general legal framework under which the Lebanese government contracts with oil companies to explore and produce oil and gas. The OPRL is also the main instrument which enables oil companies to enter into agreements with subcontractors. The Petroleum Activities Regulation ('PAR') of 2013 is an executive decree which delineates further the rights and obligations of the parties involved in the exploration and production of oil and gas, including subcontractors. The Exploration and Production Agreement ('EPA') of 2018 contains the specific terms of the agreement between the Lebanese government and three oil companies, Total, Eni, and NOVATEK, to explore and produce oil and gas in Blocks 4 and 9 of the Lebanese Exclusive Economic Zone.

This policy brief analyzes the strengths and weaknesses of the current regulatory framework of subcontracting in the Lebanese oil and gas sector. Important anti-corruption mechanisms are already included in the aforementioned legal instruments. For example, all actors involved in Petroleum Activities are required to collaborate with the Lebanese government to prevent corruption and may not engage in any activity which could be construed as corruption (Art. 162 PAR).<sup>2</sup> Likewise, every Right Holder is mandated to notify the Lebanese Petroleum Administration (LPA) of any arrangement or agreement to be entered into in connection with the Petroleum Activities in which such a Right Holder or its Affiliate has a direct or indirect interest that could reasonably be expected to conflict with the interests of the State (Art. 42 EPA).<sup>3</sup>

## 1

According to the Financial Action Task Force, Politically Exposed Persons (PEPs) in the domestic political context of states are individuals who are or have been entrusted with prominent public functions. This category also includes individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil) forms of partnership. Likewise, the individuals who are closely connected to a PEP, either socially or professionally, are considered PEPs. Examples of PEPs include heads of state or of government; senior politicians; senior government, judicial, or military officials; senior executives of state-owned corporations; and important political party officials. <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> at 4-5.

## 2

See Section II for what is referred to as 'Petroleum Activities' under the Lebanese law.

## 3

See Section II for what is referred to as 'Right Holders' under the Lebanese law.

Nevertheless, the policy brief shows that more can and should be done in order minimize the risk of corruption in subcontracting and to ensure that the oil and gas sector is effectively contributing to the development of Lebanon. To this end, it highlights several provisions of the PAR and the EPA which should be reconsidered to reinforce transparency and public oversight of subcontracting. Luckily, the OPRL imposes no legal constraints on reinforcing transparency in subcontracting through executive decrees and amendments to the EPA. Consequently, the proposed reforms can be put into effect without going through the laborious legislative process.

The policy brief recommends that the regulatory framework of subcontracting in the Lebanese oil and gas sector should be amended to achieve the following goals:

- Allowing all potential suppliers to participate in the competitive bidding process without any restrictions as long as the contractors' requirements are met.
- Guaranteeing the publicity of the beneficial owners of subcontractors and the accessibility of the awarded contracts.<sup>4</sup>
- Minimizing the risk of corruption by excluding the holders of public office whose participation in the subcontracting process would give rise to conflicts of interest.
- Monitoring the preferential treatment obligations in the award of contracts and efficiently resolving any related disputes.

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**4**

*See Section III for more on the disclosure of the beneficial owners of subcontractors.*





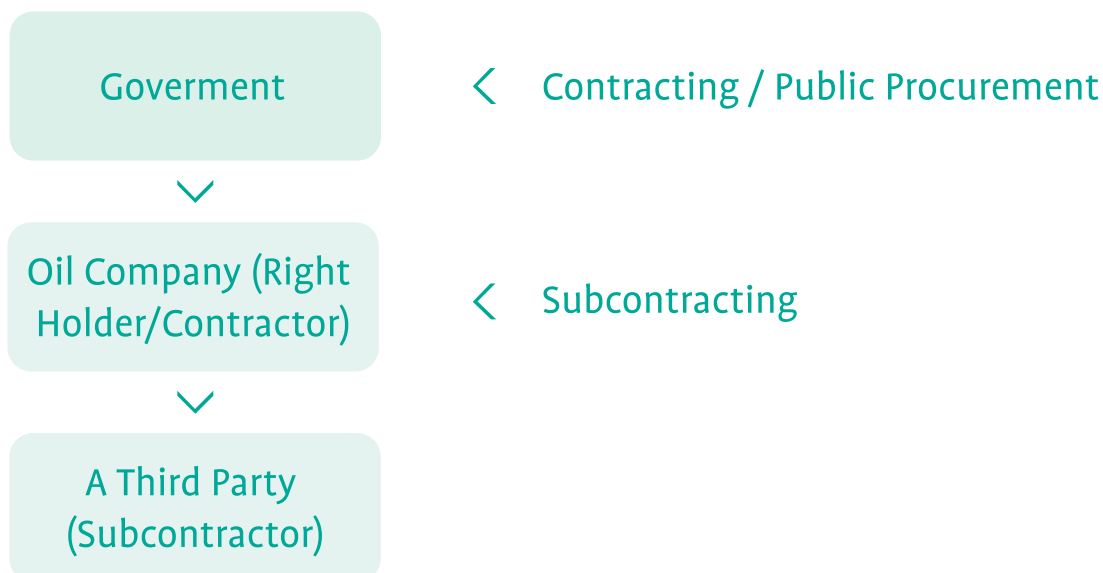
# 1. What is Subcontracting?

Under the OPRL, the PAR, and the EPA, and for the purpose of this policy brief, ‘subcontracting’ refers to a private agreement between two parties – one is known as the contractor and the other is known as the subcontractor. In the Lebanese context, the former is referred to as the ‘Right Holder’ or the ‘Operator’. Under this agreement, the subcontractor provides the contractor with goods and services necessary for the execution of oil- and gas-related activities, or what is known as ‘Petroleum Activities’ under the Lebanese law.

This private agreement should be distinguished from ‘contracting’ which mostly refers to an agreement between a government entity and a private or state-owned entity, typically an oil company, to explore and produce oil and gas. Likewise, although the subcontracting agreement is sometimes called a ‘procurement agreement’, it should be distinguished from ‘public procurement’. Under the latter, a private or state-owned entity undertakes to provide goods and services to a government entity subject to the law.

Most of the time, subcontracting is a second-tier agreement which is entered into to execute a first-tier contract or a public procurement as illustrated by the below diagram. This policy brief is solely concerned with subcontracting along the previous lines in the Lebanese oil and gas sector.

**Diagram 1: Contracting and Subcontracting in the Oil and Gas Sector**



## 2. The Scope of the Policy Brief

Subcontracting, as defined in section II, normally involves three distinct topics each of which raises specific governance challenges:

1. The allocation or the award of a contract by a contractor to a subcontractor. Such allocation can be done through a competitive bidding/public tender, on a rolling/first-come-first-served basis, or through more discretionary processes. Both the OPRL and the PAE mandate that subcontracting, within certain confines, be carried out through a public tender. While the award of contracts represents the main focus on this policy brief, the brief does not analyze the pros and cons of any of the previous methods. It rather highlights certain transparency-related problems in the competitive bidding process established by the Lebanese law for subcontracting. Additionally, the OPRL, the PAR, and the EPA require the Right Holders to grant Lebanese firms preferential treatment in subcontracting whenever the terms and conditions offered by the Lebanese suppliers are equivalent to their competitors. This obligation, mistakenly referred to by many as local content requirements, gives rise to key transparency challenges about the monitoring the Right Holders' commitment to preferential treatment in the award of contracts. Another related challenge is to resolve any disputes which may arise in that regard. Due to the technicality and the vastness of this topic, this policy brief only makes general recommendations about these two challenges.
2. The drafting of the contract awarded by the contractor to the subcontractor. This topic involves complex questions about the division of liability between the two parties for violations of safety, health, and environmental standards. The allocation of liability has important implications for the compensation payable to third parties upon the occurrence of the abovementioned violations. Despite its importance, the analysis of the content of subcontracts lies outside the scope of this policy brief. However, the policy brief addresses the disclosure of this content as a transparency-related challenge in subcontracting.
3. The implementation or the management of the contract between the contractor and the subcontractor which may extend over a few years. Among the various questions relevant to contract management, the most important has to do with the enforcement of local content requirements which are not provided for in the Lebanese law. This question is also not covered in this policy brief.



## 3. International Best Practices on Subcontracting

Private procurement or subcontracting in the oil and gas sector has so far received very little attention from the international forums which set international best practices in the field.<sup>5</sup> On the contrary, these forums have already developed a large repertoire of international best practices for both contracting and public procurement. Faced with this vacuum, this policy brief sought to come up with a list of suggested best practices on subcontracting inspired by the established international best practices for contracting and public procurement. To construct this list, the policy brief consulted the best practices recommended by the Extractive Industries Transparency Initiative (EITI) as well as other prominent international initiatives/organizations.

### 1) The EITI 2016 Standard

The guidelines set by the EITI, specifically the 2016 Standard, constitute the most important source of international best practices on contracting in the Lebanese context.<sup>6</sup> In 2017, the government of Lebanon undertook to fully comply with the EITI recommendations so as to reinforce transparency and good governance in the nascent oil and gas sector.<sup>7</sup>

When it comes to subcontracting, the 2016 Standard offers little to no guidance. This is because it is solely concerned with the contracts concluded between governments and oil companies rather than subcontracting as defined in section II. However, some countries, such as Mali, have taken steps beyond the 2016 Standard by implementing pro-transparency policies specifically targeted at subcontracting.<sup>8</sup>

Notwithstanding the lack of direct reference to subcontracting, the 2016 Standard can still be relevant by adapting some of its guidelines on contracting to the governance of subcontracting. Specifically, Requirement 2 – Legal and Institutional Framework, including Allocation of Contracts and Licenses provides important recommendations on the reinforcement of transparency in contracting which may well be extended to the allocation of subcontracts in the oil and gas sector.

The main focus of Requirement 2 is to ensure the disclosure of information about the legal, regulatory, and contractual frameworks which govern the extractive sector, especially the award of contracts and licenses by the government to oil companies. The recommended disclosure of Requirement 2 covers the enabling legal framework and the fiscal regime of the extractive sector, the selection of licensees or awardees of contracts, the content of licenses or contracts, and the beneficial owners of licensees or awardees:

- **2.1:** Requires disclosure of the legal framework and fiscal regime governing the extractive sector.
- **2.2:** Requires disclosure of information about the process of awarding licenses, the technical and financial criteria for selection, and information about the recipient(s)

5

*International Best Practice for Transparency in Contract Management; <https://resourcegovernance.org/sites/default/files/documents/international-best-practices-contract-management-english.pdf> at 33-34.*

6

*The EITI Standard 2016; <https://eiti.org/document/standard#r6>.*

7

*Lebanon Commitment to Implement EITI; <https://eiti.org/news/lebanon-commits-to-implement-eiti>.*

8

*Going Beyond the Standard <https://eiti.org/guide#going-beyond-the-standard>; EITI Opportunities For Increasing Local Content Transparency, [https://eiti.org/sites/default/files/documents/brief\\_on\\_eiti\\_and\\_local\\_content\\_transparency\\_-\\_formatted.pdf](https://eiti.org/sites/default/files/documents/brief_on_eiti_and_local_content_transparency_-_formatted.pdf) at 8, 9, and 19.*

of licenses. Where licenses are awarded through a bidding process, the government is required to disclose the list of applicants and the bid criteria.

- **2.3:** Requires maintaining a public record of (1) the license holders, (2) the size and location of the license areas, and (3) the duration and date of award.
- **2.4:** Requires the disclosure of any contracts and licenses that provide the terms attached to the exploitation of oil, gas, and minerals and the documentation of the government's policy on the disclosure of contracts and licenses.
- **2.5:** Governments are required to maintain a publicly available register of the beneficial owners of the corporate entity(ies) that apply for or hold a participating interest in an exploration or production license or contract of oil, gas or mining. Information on beneficial owners should include the owner's name, nationality, and country of residence and should identify any politically exposed persons.

These disclosure requirements can be transposed to the subcontracting context by requiring contractors (i.e., the Right Holders under the Lebanese law) to disclose detailed information about the process of allocating contracts to subcontractors. This information should include the rules governing the allocation, the criteria for pre-qualification and selection, the list of applicants or bidders, the content of the contracts awarded to subcontractors, and the beneficial owners of subcontractors – especially whether politically exposed persons have direct or indirect interest in them or not.

## 2) Other International Best Practices:

A number of international initiatives/organizations, other than EITI, have set best practices for contracting which can also be relevant to subcontracting. With regard to transparency in the allocation of contracts by a contractor to subcontractors, a valuable source of guidance is a report issued by the Open Contracting Partnership and the Natural Resource Governance Institute titled “Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice.”<sup>9</sup> The report offers various recommendations on how governments should allocate contracts in the extractive sector. Among the report's sections, the most relevant to subcontracting are:

- **3.3:** Requires transparency about the nature of the allocation process (competitive or non-competitive).
- **4.1:** Requires governments to publicly announce that a contract allocation will take place and to disclose the object of the contract.
- **4.2:** Requires disclosure of the rules of the game for the allocation of contracts and the criteria for selection.
- **4.3:** Requires governments to disclose information about their decision-makers and the beneficial owners of both the applicants and the selected companies. With respect to the beneficial ownership of the applicants, it is specifically recommended that governments screen and disqualify companies whose beneficial ownership poses specific corruption risks such as those in which politically exposed persons have an

interest. In the same vein, countries are called upon to hold centralized beneficial ownership registers.<sup>10</sup> In fact, holding these registers is becoming the norm in a growing number of countries. For instance, the EU adopted in May 2018 a reform of its anti-money laundering legislation which must be implemented by the EU Member States by 2020. The new legislation requires all EU Member States to hold a central register in which information about the beneficial ownership of all legal entities is made publicly accessible.<sup>11</sup>

- **4.6:** Requires the disclosure of detailed information about the award of contracts including the contract itself, how a specific contractor was selected, and the justifications for this selection.<sup>12</sup> This requirement, however, can be qualified by limiting it to contracts meeting a specific threshold percentage of the total project expenditure.<sup>13</sup>

Although meant to reinforce transparency in contracting, the previous recommendations are perfectly applicable to subcontracting with minor modifications. Within a subcontracting context, contractors (or the Right Holders) should be required to publicly disclose as early as possible their subcontracting plans so that all qualified companies can apply. They also have to make publicly available the object of the contract, the rules for application, and the criteria for selection. Contractors should announce any subsequent modifications to the subcontracting plans and/or arrangements.<sup>14</sup> Additionally, they should disclose information about their decision-makers and the beneficial owners of both the applicants and the awardees. Moreover, contractors should disqualify the applicants whose beneficial owners are politically exposed persons. Finally, they should disclose the terms of the contract awarded to the subcontractor as is specifically required by the Open Contracting Global Principles.<sup>15</sup>

## 10

Open Contracting Partnership & Natural Resource Governance Institute, *Open Contracting for Oil, Gas and Mineral Rights* <https://resourcegovernance.org/sites/default/files/documents/open-contracting-for-oil-and-gas-mineral-rights.pdf> at 24, section 2.5. resourcegovernance.org/sites/default/files/documents/open-contracting-for-oil-and-gas-mineral-rights.pdf at 24, section 2.5.

## 11

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

## 12

Other reports similarly recommend that the terms of the contracts should be disclosed in full. See, the United Nations, *Principles for Responsible Contracts: Integrating the Management of human rights risks into state-investor contract negotiations*, [https://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf) at 10.

## 13

National Resource Governance Institute, *International Best Practices for Transparency in Contract Management*, <https://resourcegovernance.org/sites/default/files/documents/international-best-practices-contract-management-english.pdf> at 36.

## 14

This is required, for instance, under the EU public procurement law: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Article 71(2) and (5).

## 15

Open Contracting Global Principles, <https://www.open-contracting.org/implement/global-principles/> at 3 (d).

## 4. The Regulatory Framework of Subcontracting

This section evaluates the regulatory framework of subcontracting in the Lebanese oil and gas sector in light of the suggested list of best practices developed in section IV. The following analysis will explore the extent to which the Lebanese law furthers transparent subcontracting. It will also highlight the areas where improvement is needed and will provide specific recommendations on how this can be done.

**Table 1: Analysis and Recommendations of the Regulatory Framework of Subcontracting in Lebanon from a Transparency Perspective.**

Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
The Lebanese Constitution 1926	Article 89, mandating that no contract or concession for the exploitation of the natural resources of the country, a public utility service, or a monopoly be granted except by virtue of a law and for a limited period.		
The Code of Obligations and Contracts 1932	Articles 689-657, providing general rules on the rights and obligations of the parties to a subcontracting agreement.		
The Offshore Petroleum Resources Law (OPRL) (Law 2010/132)	Article 5 – Permits, stating that the activities of any foreign firm executing or participating in Petroleum Activities shall be subject to the Lebanese law.  Article 59 – Health and Safety Conditions, mandating that any entity managing or executing any Petroleum Activity shall guarantee that its employees and the employees of its subcontractors maintain a high standard of professional safety and health.		

Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
	<p>Article 65 – Agreements between the Right Holders and Parties to Contracts, stipulating:</p> <hr/> <p>The obligation of the Right Holder to ensure that contractors and subcontractors comply with the requirements provides for in the OPRL with respect to the supply of goods and services related to the Petroleum Right.</p> <hr/> <p>That all contracts related to Petroleum Activities, the Petroleum Right, or Facilities shall be governed by the OPRL and any other applicable Lebanese law.</p> <hr/> <p>Article 67 – Local Content, establishing that:</p> <hr/> <p>The Right Holders and subcontractors must give priority to Lebanese firms in the award of contracts for the construction of a Facility and the supply of material, goods, and services related to Petroleum Activities when the terms and conditions offered by the Lebanese suppliers are equivalent to their competitors.</p> <hr/> <p>The Right Holders and subcontractors must employ qualified Lebanese employees whenever available and organize and fund the training of Lebanese human resources associated with Petroleum Activities.</p>	<p>Contrary to the public perception that the Lebanese law imposes local content requirements on the Right Holders, the law merely provides preferential treatment to Lebanese firms in the context of subcontracting. In and of itself, this legislative choice does not raise any transparency-related concerns.</p>	
	<p>Article 69 – Liabilities, providing that whenever a person undertaking tasks for a Right Holder incurs liability vis-à-vis a third party, the Right Holder shall be jointly and severally liable for the resulting damage with the former or its subordinate.</p>		

Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
	<p>Article 72 – Subcontracting, entitling the Right Holder to enter into subcontracting agreements for the provision of material, goods, and services relevant to Petroleum Activities and obliging the Right Holder to disclose those contracts and to ensure that subcontractors abide by the OPRL. Article 72 also authorizes the Council of Ministers to issue a decree upon the recommendation of the Minister of Energy and Water to specify the obligations of the Right Holders with respect to the disclosure of subcontracts.</p>	<p>This Article establishes, in principle, the Right Holders' obligation to disclose subcontracts. It also provides the Lebanese government with the legal authority needed to enforce any pro-transparency reforms pertaining to subcontracting in the oil and gas sector through executive decrees without the need to amend the OPRL. Consequently, the Lebanese Council of Ministers is not constrained by the OPRL with respect to putting the suggested reforms in this policy brief into effect.</p>	
<p>Pre-Qualification of Companies to Participate in Licensing Rounds for Petroleum Activities (Decree 9882/2013)</p>	<p>No direct relevance to subcontracting.</p>		
<p>Petroleum Activities Regulations (PAR) (Decree 10289/2013)</p>	<p>Article 128 – General Requirements on Health, Safety, and the Environment, requiring the Right Holders to ensure that subcontractors abide by the regulatory requirements on health, safety, and the environment.</p>		



Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
	<p>Article 157 – Procurement and Local Content, setting forth that major contracts for the procurement of goods and services necessary for the execution of Petroleum Activities shall be awarded through a public tender and clarifying that these major contracts include:</p> <ul style="list-style-type: none"> <li>• Contracts that materially or substantially affect the design or performance of Facilities or the concept or timeline of development, production, or resource management and depletion policies.</li> <li>• Contracts of substantial value, meaning that the performance or non-performance of the contract may substantially affect the good order of the project or the financial capability of the Right Holder.</li> </ul> <p>Additionally, Article 157 mandates preferential treatment to be given to the goods and services of Lebanese origin in procurements by the Operator whenever these goods and services are internationally competitive with respect to quality, availability, price, and performance.</p> <p>Furthermore, Article 157 establishes procedural rules for the abovementioned public tender according to which:</p> <ul style="list-style-type: none"> <li>• Invitations for pre-qualification to tender or to submit bids shall be distributed to a reasonable number of suppliers considered or anticipated to be capable of delivering the required goods and services.</li> <li>• The Right Holder must submit a list of the pre-qualified bidders to the Lebanese Petroleum Administration (LPA) for notification purposes.</li> <li>• The LPA must be notified of the award of any major supply.</li> <li>• The Right Holder or the Operator must provide information about the allocation of a major contract, including the justifications for the selection of the supplier.</li> </ul>	<p>This Article limits the allocation of contracts through public tender to a specific category of supply contracts, i.e., major contracts, which is not problematic per se. What is problematic, however, is that Article 157 does not require the Right Holders to publicly announce that a contract will be awarded. Instead, it merely mandates them to communicate pre-qualification invitations to a reasonable number of suppliers considered or anticipated to be capable of delivering the required goods and services. This makes it possible for the Right Holders to favor specific subcontractors by excluding a large number of qualified bidders. Such exclusion can be done simply by limiting the invitation to pre-qualify to a few selected suppliers. The risk of arbitrary exclusion is not alleviated by the Article's requirement that all potential suppliers receive the same invitation or that a list of those suppliers is submitted to the LPA. This is because both requirements provide no mechanism for including the left-out suppliers after having been excluded by the Right Holders.</p> <p>Article 157 does not oblige the Right Holder to disclose information about the beneficial owners of the applicants, to screen the applicants based on that information, and to exclude the applicants in which politically exposed persons have direct or indirect interests.</p> <p>Article 157 requires the Right Holders to notify the LPA of the decision to allocate a major supply contract. It also states that the information about this allocation, including the reasons for selecting a specific supplier, should be provided. Apart from the notification of the LPA, it is not clear from the language of the Article if “providing” the above mentioned information implies that the Right Holders should publicly disclose this information or not. Moreover, there is no requirement to disclose the content of the contract.</p>	<p>The Right Holders should be required to publicly announce that a contract will be awarded, and all qualified suppliers should be allowed to bid in the public tender.</p> <p>The Right Holders should be required to disclose detailed information about the beneficial owners of the applicants and the awardees. Such disclosure essentially requires revealing the identity of the natural persons who are shareholders in those companies. The Right Holders should also be required to screen the applicants based on that information and to disqualify the companies in which politically exposed persons have direct or indirect interests.</p> <p>The Right Holders should be required to publicly disclose the decision to award a major supply contract to a subcontractor, the content of the contract, the grounds of the selection, and the reasons for rejecting other bidders.</p>

Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
	<p>Article 162 – Prevention of Corruption, requiring every natural or juristic person participating in Petroleum Activities to collaborate with the Lebanese government on preventing corruption. Moreover, Article 162 prohibits the advancement or acceptance of any offer, payment, or benefit of any kind which would or could be construed as an illegal or corrupt practice.</p>	<p>This Article embodies a serious attempt by the Lebanese lawmakers to confront corruption in the oil and gas sector by criminalizing specific actions. Nevertheless, the Article merely lays down a general obligation to collaborate with the government on preventing corruption without any further specification of the parameters of that collaboration or the consequences of violation. Additionally, the Article mostly addresses prosecution which typically follows, rather than precedes, the commission of an act of corruption.</p>	<p>The best means to prevent corruption is to reinforce transparency in the Lebanese oil and gas sector. Transparency facilitates both the work of law enforcement agencies and popular oversight through civil society organizations. The reinforcement of transparency is crucially needed in subcontracting in the oil and gas sector as an area where the activities of private entities can easily escape public scrutiny, especially in countries with a poor governance record like Lebanon.</p>

Legal Instrument	Relevant Provision	Analysis / Risk Assessment	Recommendation
<p>Exploration and Production Agreement (EPA – Block 4 &amp; Block 9) 29/1/2018</p>	<p>Article 17 – Health, Safety and Environmental Requirements, laying down an obligation on the Right Holders to ensure that anyone carrying out work on their behalf, including contractors and subcontractors, abide by the health, safety, and environmental requirements provided for in the EPA.</p> <p>Article 27 – Procurement and Supply Bases, stipulating that the Right Holders shall secure procurements through public tenders for any contract, or group of related contracts, whose total value exceeds US\$50,000. Article 27 also requires the Right Holders to grant preferential treatment to the goods and services of Lebanese origin provided that these goods and services are competitive with regard to quality, availability, price, and performance. Such obligation is equally applicable to both contractors and subcontractors. The Article authorizes the Article 27 – Procurement and Supply Bases, stipulating that the Right Holders shall secure procurements through public tenders for any contract, or group of related contracts, whose total value exceeds US\$50,000. Article 27 also requires the Right Holders to grant preferential treatment to the goods and services of Lebanese origin provided that these goods and services are competitive with regard to quality, availability, price, and performance. Such obligation is equally applicable to both contractors and subcontractors. The Article authorizes the Operator to enter into agreements with contractors and to permit the latter to enter into agreements with subcontractors. The approval of the Minister of these agreements is mandatory if (i) a Right Holder or its Affiliate (with the exception of the Operator) is a party to such agreements, or (ii) the amount of recoverable costs to be incurred by such agreements exceeds US \$10 million in any calendar year or US\$20 million overall.</p> <p>Article 42 – Conflict of Interest, creating an obligation on any Right Holder to notify the LPA of any arrangement or agreement to be entered into in connection with the Petroleum Activities in which such Right Holder or its Affiliate has a direct or indirect interest that could reasonably be expected to conflict with the interests of the State.</p>	<p>While Article 27 sets forth clear criteria for giving preferential treatment to Lebanese subcontractors, it leaves the assessment of these criteria solely to the discretion of the Right Holders. It also does not establish any mechanism for monitoring the commitment of the Right Holders to the preferential treatment obligation. Furthermore, it does not specify any means for settling the disputes that may arise in that regard between the Right Holders and the bidders. For example, a Lebanese supplier may meet the conditions necessary to be granted preferential treatment, yet the Right Holders may still award the contract to a foreign supplier. The Lebanese supplier may wish to dispute this decision, but this would simply not be possible as Article 27 offers no dispute settlement mechanism to resolve such disputes.</p> <p>The Article provides an important mechanism for the avoidance of corruption by requiring the Right Holders to notify the LPA of any potential conflict of interest prior to entering into any agreement or arrangement. Nevertheless, the efficacy of this notification mechanism is undermined by the ambiguous language of the Article which provides no definition of the ‘interests of the State’. It also leaves the assessment of whether a conflict of interest exists or not to the sole discretion of the Right Holders. This can be especially problematic in the Lebanese context of subcontracting given the lack of any obligation on the Right Holders to disclose the beneficial owners of subcontractors.</p>	<p>A monitoring mechanism should be put in place to evaluate the Right Holders’ commitment to the preferential treatment obligation in the selection of subcontractors. Moreover, a speedy and efficient mechanism for the settlement of any potential disputes between the Right Holders and the bidders, such as arbitration or a transparency committee, should be established. A better option, however, is to require the Right Holders to fully disclose the reasons why contracts were awarded to a specific supplier and why other suppliers were rejected. Should this be the case, the publicity of the process will, to a great extent, ensure its fairness and prevent disputes from arising in the first place.</p> <p>A better definition of ‘the interests of the State’ which specifies the interests that can be jeopardized by conflicts of interest should be employed. Additionally, an independent third party, such as a transparency committee, should be named to decide about the existence of a conflict of interest or the lack thereof.</p>



## 5. Policy Recommendations

To reinforce transparency and make the regulatory framework of subcontracting in the Lebanese oil and gas sector less prone to the risk of corruption, this policy brief recommends the following:

### 1. Amendment of Article 157 of the PAR by:

- Requiring the Right Holder to publicly announce that a contract will be awarded.
- Opening up the competitive bidding process to all qualified suppliers as long as the Right Holders' requirements are met.
- Requiring the Right Holders to publicly disclose information on the beneficial owners of the bidders and the awardees of contracts.
- Requiring the Right Holders to disqualify companies in which politically exposed persons have direct or indirect interests.
- Requiring the Right Holders to publicly disclose the decision to award a specific contract to a subcontractor, the content of the contract, the grounds of the award, and the reasons for rejecting other bidders.

### 2. Amendment of Article 27 of the EPA by:

- Introducing a monitoring mechanism for the evaluation of the Right Holders' commitment to the preferential treatment obligation in the selection of subcontractors.
- Establishing a speedy and efficient mechanism for the settlement of any potential disputes between the Right Holders and the bidders, such as arbitration or a transparency committee.

### 3. Amendment of Article 42 of the EPA by:

- Better defining 'the interests of the State'.
- Naming an independent third party other than the Right Holders, such as a transparency committee, to decide about the existence of a conflict of interest or the lack thereof.



## 6. Biographies


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• **Dr. Mohammad Sherine Hamdy** is a teaching fellow at Harvard University. He completed and successfully defended his S.J.D dissertation in the field of international economic law with emphasis on the relationship between the international legal regime of investment and economic theory. His dissertation was awarded the John Gallup Laylin and the Addison Brown Prizes at Harvard Law School. During his doctoral studies, Hamdy supported many professors with their legal research and teaching. Before joining Harvard, he taught public international law for three years at Alexandria University and cofounded the Arab Society for Commercial and Maritime Law. He holds an LL.B. from Alexandria University, a Master of Law from Cairo University, and an LL.M. and S.J.D. from Harvard Law School. Hamdy is a regular contributor to the Beirut Institute and a member of the Arab Brain Trust. Apart from international law, his academic interests include law and economics, law and development, human rights, and Arab and Islamic law. He speaks Arabic, English, and French.

• **Dr. Pieter-Augustijn Van Malleghem** is a S.J.D. candidate at Harvard Law School, writing a dissertation in the field legal theory and comparative law. He has been selected as an Honoree Graduate Program Fellow and a Byse Fellow. Van Malleghem serves as a guest lecturer at Harvard Law School supporting Professor Christine A. Desan in teaching EU law. Concurrently with his guest lecturer position, Van Malleghem serves as a professor at Leuven University in Belgium where he teaches European Union Law. Prior to starting his academic career, he served as a clerk for the Vice-President of the Court of Justice of the European Union, the Hon. Koen Lenaerts, and interned at Cleary Gottlieb Steen & Hamilton LLP. Van Malleghem is admitted to the New York State bar and holds a PhD and a Master's in law from KU LEUVEN, LL.M. from Harvard Law School, and master's in economics from Barcelona Graduate School of Economics. He fluently speaks English, French, Italian, German, and Spanish in addition to Dutch which is his mother language.

• **Abdulaziz Abdulrahman Al Moosa** is a J.D. candidate at Harvard Law School specializing in corporate and transactional law. He is a member of the Harvard Association of Law and Business and a contributor to the Harvard Bankruptcy Roundtable where he provides analyses of critical issues in corporate bankruptcy. During law school, Almoosa worked at Allen and Overy LLP and White and Case LLP as an intern. His legal work focuses on project finance in the energy and infrastructure sectors. Prior to attending Harvard Law School, Almoosa worked for several years as a business developer in the energy sector and served in various engineering and management capacities at Saudi Aramco. He received his bachelor's degree in Mechanical Engineering from Colorado State University. He is a native speaker of Arabic and a fluent speaker of English.

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