Introduction

The Confederation of International Contractors’ Associations (CICA) and European International Contractors (EIC) represent the global as well as the international construction industry and thus unite the private sector delivering civil works, which account for more than 50% of the prior-review Bank-funded contracts awarded under IDA/IBRD investment projects:

Policy Context

The World Bank is currently in the process of reviewing its operational procurement policy and procedures. The review was endorsed by the Board of the Executive Directors in 2012 and is expected to be finalised in 2015. In July 2014, Executive Directors of the World Bank approved the Phase II of a Proposed New Framework for Procurement in World Bank Investment Project Finance. The Bank’s primary motivation for the policy review is to move from a “one-size-fits-all policy” to a “fit-for-purpose policy”. Whilst the current policy has served the World Bank well with managing complexity in procurement throughout the past decades, it is nowadays confronted with changes in clients’ demands, including globalisation and growing client capacity. Hence, the World Bank has concluded that the procurement policy and procedures need to be changed in order to reflect those different realities and the specific client needs that are defined by those realities. Until the end of 2014, the World Bank is conducting global multi-stakeholder consultations to gather input into the new procurement framework. CICA and EIC concur with the Bank that the proposed New Proposed Procurement Framework could help modernise the Bank’s procurement policy by expanding the number of procurement approaches and methods that can be used based on an informed market analysis.

Lack of information and predictability

However, unless the Bank is able to share further information, the proposed new policy approach remains vague on a large number of details:

- The New Proposed Procurement Framework: Phase II sets out an ambitious new policy vision titled “Procurement in Bank Operations support clients to achieve value for money with integrity in delivering sustainable development” but it offers insufficient information as to how this vision shall be implemented. In particular, the Procurement Directives (cf. paragraphs 20 and 21), which will provide instructions on applying the new policy, for instance with respect to the use of prior review and post review, auditing, specific role of Bank staff and capacity-building, are not yet spelled out. Similarly, a further set of Bank Procedures will be developed at a later stage that shall detail the Accountability and Decision Making Framework for procurement activities. It appears that the Bank’s management is requesting a “carte blanche” for crucial aspects of the New Proposed Procurement Framework.
Whilst several updated and new topics have been added to the “Procurement Procedures for Borrowers” (Annex C of the Framework), the New Proposed Policy Framework does not clarify in which cases these Procedures shall apply. Whereas the Bank’s current Operational Manual (Operational Policies and Bank Procedures 11.00 with further Annexes) in accordance with the Procurement and Consultant Guidelines ensure predictability as to which Bank Procedure will apply in relation to a certain type of Bank-financed project, the New Proposed Policy Framework, as currently written, seems to empowers the borrower to select the procurement method unilaterally (cf. paragraph 3.3 of the Draft Borrowers’ Procurement Procedures: “On the basis of the analysis in the procurement strategy, the borrower decides on an appropriate approach to the market and selects procurement methods” [our emphasis]). Such wording seems to give too much discretion to the borrower as to which type of procurement method it can use and contradicts previous assurances by the Bank, namely that the final decision on the appropriateness of the specific procurement arrangements to support any individual operation will rest with the Bank as part of its obligation to provide fiduciary assurance.

Lack of precise wording and general vagueness of policy

We are somewhat concerned by the general vagueness and ambiguity of much of the wording of the New Proposed Procurement Framework. Whilst we understand the need for a certain degree of openness and flexibility to determine for each individual project the most appropriate “fit-for-purpose” approach to meet the development objectives and project outcomes, we believe that the use of the terms “appropriate” or “as needed” (46 times and respectively 10 times in a document comprising only 37 pages) is used excessively and often without any definition or measurable criteria what “appropriate” or “as needed” could mean in the respective context.

Examples can be found in:

- paragraph 13: “The Bank will continue to provide stringent fiduciary oversight of the procurement process, including through prior and post reviews, use of audits, and where appropriate by declaring misprocurement and exercising remedies; International Competitive Bidding (ICB) remains the preferred method for international competitive procurement, with appropriate use of the following: Harmonized Standard Bidding Documents; Agreed, standardized international model forms of contracts e.g. FIDIC; Prior review of the borrower’s procurement actions at key stages, depending on risk and/or value; and Risk-based clearance procedures”;

- paragraph 14: “Under the proposed Procurement Framework, the Bank remains fully committed to risk management, country procurement capacity-building, and appropriate application of good practices”;

- paragraph 42: “Management proposes to develop a comprehensive tool kit of materials to support any requested capacity-building on sustainable procurement. This tool kit will be informed by international good practice on sustainable procurement. Sustainable procurement would also be included as an aspect in the Bank’s diagnostic and capacity assessment of borrower agencies. Finally, to ensure that Bank staff have the appropriate sustainability skills to support borrower demands, sustainable procurement knowledge will be integrated into the skills assessment undertaken by Bank Procurement staff, and training will be provided as needed”;

- paragraph 44: “The use of alternative procurement arrangements would be subject to the following conditions: Appropriate implementation capacity in the implementing agency; universal eligibility, and appropriate application of the Bank’s debarment list; appropriate right for the Bank to review….”.
General terms, such as “appropriate” or “as needed”, can be interpreted in many different ways by different stakeholders and CICA and EIC can already imagine controversies on their specific meaning in individual cases. Hence, a more precise wording in the New Proposed Procurement Framework would not only help the Bank to avoid difficult debates with borrowers and bidders, it will also support Task Team Leaders in implementing the new policy in the field. As stakeholder consultations, IEG feedback, and demands from CODE and Audit Committee have indicated a pressing need for the Bank to take a more systematic approach to support capacity-building and procurement reforms in borrower countries (cf. paragraph 26), CICA and EIC suggest that the Bank provide more detailed and clearer guidelines for borrowers as to how the Proposed New Procurement Policy Framework should be implemented.

CICA and EIC agree with the Bank that International Competitive Bidding (ICB) should remain the preferred procurement arrangement for the highest-risk and highest-value activities (that is, activities above agreed thresholds based on market conditions), with appropriate Bank oversight (cf. paragraph 54) and that the investment in prior review is warranted in the highest-risk and/or highest-value contracts (cf. paragraph 59). We acknowledge that paragraph 3.22 of the Draft Borrower’s Procurement Procedures suggests the use of ICB also in the case of “complex” activities. However, none of these qualities have been defined and neither does the New Proposed Procurement Framework offer any tool for their interpretation, for instance example cases, categories or a typology. Unless further clarified in the Procurement Directives (which are unknown at this stage), the concept of limiting ICB and prior review to these specific cases lacks transparency and predictability for stakeholders, i.e. the Bank, borrowers and the bidders. Hence, we would urge the Bank to define the terms “highest-risk”, “highest-value” and “complex” projects and to stress more clearly that in these cases ICB and prior review are mandatory.

In the case of ICB for civil works, the Bank should also clarify that the borrower and its Contracting Authority – even in case of alternative procurement arrangements – are bound to use internationally accepted standard Conditions of Contract and Contract Forms in order to ensure a fair allocation of project risk under each infrastructure contract financed by the Bank. In this context, the use of the rather general and vague language linking the use of ICB with “appropriate use of Harmonised Standard Bidding Documents and standardised international model forms of contracts, e.g. FIDIC” (cf. paragraph 13) gives rise to misunderstandings. The standard of appropriateness is not consistent with the current approach in the Bank’s Procurement Guidelines for Goods, Works and Non-Consulting Services (see paragraph 2.12) and the Bank’s Operational Policies 11.00 (see paragraph 4) which require the borrower to use the Bank’s Standard Bidding Documents, including the standard form of contract, “with minimal changes, acceptable to the Bank, to address country- or project-specific issues”. CICA and EIC find that the use of a fair and balanced international standard form of contract is compatible with and is in fact a corollary to the risk-based and fit-for-purpose procurement approach.

Specific CICA-EIC Replies to World Bank Queries

Should Bank procurement increase its support to client capacity-building and institutional strengthening?

CICA-EIC reply:
The support of the World Bank to client capacity-building and institutional strengthening should be increased given that many borrowing countries lack adequate capacity. Yet, capacity-building cannot simply be mandated by the Bank’s headquarters but aims at initiating a reform process in the field of each borrowing country. Whilst the Phase II paper has identified a pressing need for the Bank to take a more systematic approach to support capacity-building and procurement reforms in borrower countries, it remains silent as to the human and budgetary challenges connected with this important goal. Procurement capacity-building, if to be done properly, needs a systematic and long-term commitment from the Bank and must be firmly addressed in the Bank’s procurement policy to become a priority. Hence, CICA and EIC would appreciate further information regarding the assignment of respective responsibilities within the Bank’s management and borrowers’ administrations and also regarding the Bank’s capacity-building roll-out strategy. We would be ready to share with the Bank our experience on the most pressing needs of procurement capacity-building in the context of Bank-financed civil works contracts.

Should the Bank extend the application of value for money decision-making in contract award decisions?

CICA-EIC reply:
CICA and EIC hold the view that the “lowest evaluated bid” system, which is currently used as the sole award criterion for civil works tenders by the World Bank, sometimes is subject to misuse, as it provides bidders with the opportunity of submitting an aggressive bid with a very low price and the wish to renegotiate any unreasonable risks incurred later. In our experience, if one of the bidders uses an aggressive approach seeking re-negotiation later, a reasonably and carefully priced bid may not appear to be competitive. Against this background, the World Bank should consider, at least in the case of the highest-risk and highest-value and complex civil engineering works, introducing quality aspects into the tender procedure and to broaden the scope of the award criteria from price only to technical and environmental elements, i.e. the “Most Economically Advantageous Tender” (MEAT). The European Union, for instance, supports the MEAT approach (i.e. the bid which embodies the most beneficial combination of technical performance, cost-effectiveness, flexibility, environmental impact, investment in the local community, social responsibility, etc.) because it avoids price “dumping” followed by uncertainty on final completion, price and quality of the Works. Instead MEAT encourages competition among the contractors on a higher level as they are encouraged to provide in their tenders both technical and environmental innovations to the benefit of the employer and the project.

Notwithstanding our generally positive assessment of “Value-for-Money decision-making”, we are missing in the Phase II report specific Bank guidance as to the methodology to be used by borrowers wishing to award contracts on the basis of Value-for-Money or the Most Economically Advantageous Tender. Whilst there is ample experience and literature available, the Phase II report remains rather vague in the paragraphs 32 - 37. In this context, CICA and EIC generally oppose any form of negotiated procedures in countries with low procurement capacity and would limit e.g. the use of the Competitive Dialogue procedure to PPP and Project Finance type of projects. By contrast, for conventional design-build tenders, we would recommend the use of a two-envelope procedure after prequalification, i.e. the technical design and the financial offer are submitted together in two separate envelopes; the technical design is reviewed first and the financial offer of only those
tenderers who have submitted a satisfactory technical design is open. CICA and EIC would like to stress that the selection of the most adequate tender procedure is a very sensitive procurement matter and we would be ready to share our experience on what could be the best-fit-for-purpose approach for certain types of projects with the Bank.

The “lowest evaluated bid” system also fosters the submission of so-called “Abnormally Low Tenders” (ALT) which are a form of unfair competition and can thrive particularly well under the World Bank’s and other MDBs’ procurement rules which traditionally award construction contracts to the lowest evaluated compliant bid. Contracting Authorities use this criterion because, allegedly, it offers the simplest method of evaluation, which is also the most easily defended in the case of a complaint. According to conventional wisdom, it is also the system less prone to corruption. However, Contracting Authorities, users, operators and also financiers of construction works may be negatively affected by ALTs as they can lead to poor Value for Money. This has been recently confirmed by a joint Working Group of the MDBs which has invited CICA and EIC as well as FIDIC to comment. We support the Working Group’s conclusion that Contracting Authorities should have the right, and authority, to reject tenders that are considered to be abnormally low, if and when vetted by a thorough clarification process. Such approach would be consistent with the approach advocated by UNCITRAL, the WTO/GPA and the European Procurement Directives and therefore consistent with the principles of the MDB’s procurement rules and guidelines.

*Does the CODE and Audit Committee agree that integrity is critically important in World Bank procurement?*

**CICA-EIC reply:**

Whereas CICA and EIC fully support the Bank’s Anti-Corruption Guidelines which require all persons and entities that receive, are responsible for the deposit or transfer, or take or influence decisions regarding the use of Bank proceeds to observe the highest standards of ethics, we hold the firm opinion that, in order to make these guidelines even more effective, the **Bank must strengthen its sanctions policy vis-à-vis its borrowers** by empowering the Bank to take legal action also against representatives from Member States in proven cases of fraud and corruption. As already laid out in the 2012 EIC Position Paper, CICA and EIC hold that an effective anti-corruption policy adopts a holistic approach under which all stakeholders must act simultaneously within their sphere of influence. Therefore, we would welcome if the Bank would require **Borrowers to ratify and implement UNCAC** and their **Contracting Authorities to adopt and publish governmental Code of Ethics**, thus mirroring private sector best practice. We would also propose that borrowers are required by the Bank, at least in the case of the highest-value and highest-risk projects, to establish an **Integrity Management System within their administration**. This should be a general requirement also in the light of the drafting work currently undertaken by the International Organisation for Standardisation (ISO) which is drafting an Anti-Bribery Management System for public and private organisations and NGOs, cf. http://www.iso.org/iso/home/store/catalogue_tc/catalogue_tc_browse.htm?commid=4515115&published=on&includesc=true.

CICA and EIC would like to recall in this context the proposal made at an earlier stage of the Procurement Policy Review, namely to introduce an **obligation for the borrower to follow the Guidelines for Preventing and Combating Fraud and Corruption** by a respective reference in the legal agreement for the particular operation. Such reference would delink the Bank’s anti-fraud and corruption policy from its procurement policy, reflecting the fact that procurement is not the only area in which fraud and corruption can occur.
With respect to the Bank’s Anti-Corruption Guidelines, CICA and EIC propose to delete the words “other than the Member Country (and/or, if such recipient is an entity rather than a natural person, any of its representatives)” in § 11 lit. (a). Only if the Borrower itself and all of its agencies, staff, personnel and agents are held accountable for any wrongdoing and run the risk of being held responsible the Bank’s Anti-Corruption Policy will be practical and operative. Last but not least, we suggest to the Bank to consider for its highest-value and highest-risk contracts the incorporation of elements proposed by the “Construction Sector Transparency Initiative” (CoST) or by FIDIC’s Government Procurement Integrity Management System.

Should borrowers be supported to identify and apply specific sustainable procurement criteria in Bank-financed procurement processes?

**CICA-EIC reply:**
CICA and EIC believe that more sustainability in procurement would encourage the use of state-of-the-art technologies and the dissemination of best practices. As mentioned already in the 2012 EIC Position Paper, proven benefits associated with Sustainable Procurement are not limited to environmental impact, but can include everything from social and health to economic and political benefits. By means of prequalification, the Contracting Authority could provide for a “level playing field” for bidders that are willing to comply with the World Bank’s policy goals on environmental and social sustainability. This is why we would be in favour of enlarging the Bank’s prequalification procedure with sustainability criteria, e.g. certification for Environmental Management (ISO 14001 or internationally recognised equivalent), for Health & Safety (OHSAS 18001 or internationally recognised equivalent), respect for the ILO Core Labour Standards and promotion of local content, e.g. by providing training schools and engineering education. The Instruction to the Bidders could include a reasonable requirement that each bidder shall include in its offer a binding declaration to what extent the bidder commits itself to employ local personnel for the execution of the contract. The above-mentioned declaration should be taken into consideration also during the evaluation of the different offers for the award of the contract. The respective tender documents could fix the minimum thresholds for local content.

Should alternative procurement arrangements be used for procurement under Bank financed operations when appropriate?

**CICA-EIC reply:**
First of all, CICA and EIC would like to recall that the Bank’s Procurement Guidelines and Standard Bidding Documents for Works are globally considered as setting an international standard which has been developed over decades in an collaborative effort between the MDBs, the global consulting engineering industry and the global construction industry and have been vetted through an extensive harmonisation process.

We therefore believe that maintaining the Bank’s “golden standard” of procurement documents and practices would be in the best interest of the Bank, its shareholders and borrowers as well as the private sector and civil society. Against this background, we question the move towards a greater use of alternative procurement arrangements and recall the position taken recently by the International Evaluation Group (IEG) which suggested “that it may be too early to take country-level decisions on whether to use country systems [as] such a decision would presuppose uniform national methods and uniform capacity among implementing agencies, which is not the case”.

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Concerning “alternative procurement arrangements”, we note again the general vagueness and ambiguity of the proposed policy which shall be based on the yardstick of “appropriateness”. In our view, this criterion is not measurable and will not help to ensure the transparency and accountability of the transition process. CICA and EIC have jointly expressed with FIDIC in the Position Paper submitted in January 2014 the concern that the proposed new framework no longer calls for the equivalence of client systems with the Bank’s own procurement procedures and documents but that the standard has been watered down to “acceptable procurement practices”. Both the criteria of “acceptable” or “appropriate” national systems are not destined to give verifiable results. Bearing in mind that there might be significant differences in procurement capacity within a certain country, CICA and EIC would not recommend taking country-wide decisions on client’s procurement arrangements but would suggest limiting decisions to a specific contracting authority in a specific sector in the borrowing country.

In this context, it has been proposed elsewhere that the Bank should accept that a country being a party to WTO’s GPA or subject to the EU Directives or adopting UNCITRAL’s Model Law on Procurement is sufficient evidence of the country having passed the “test” of the acceptability of a country’s legal framework. CICA and EIC believe that the World Bank should not base fundamental decisions of an internal character on external systems that have no direct relevance to Bank practice. The UNCITRAL Model Law on Procurement is not binding on borrowers in any way, but is a mere recommendation to them to give favourable consideration to the Model Law when enacting or revising their laws, and the GPA provides only a very basic set of government procurement principles and thus cannot answer the question whether a national procurement system is comparable with the Bank’s Harmonised Tender Documents.

We would like to renew our earlier proposal and advocate which process ensures that the quality of client procurement arrangements and institutions is monitored by an External Oversight Committee, which would be composed of a broad range of experts from the Bank’s client countries, the Bank’s development partners, the private sector and its professional associations, civil society organisations and independent, internationally recognised public procurement experts. There may also be a useful role for the International Advisory Group on Procurement (IAGP) to monitor the transition process.

Finally, we would like to reiterate that the Bank should continue prescribing the use of internationally accepted standard forms of contract – with minimal changes, acceptable to the Bank, to address project-specific conditions (as currently stipulated in the Bank’s OP 11.00) – in the case of highest-value and highest-risk and complex infrastructure works even where clients are authorised to use their own procurement arrangements and institutions. The international community is familiar and comfortable with these tried and tested standard forms of contract which support various procurement strategies and provide for a fair and balanced risk allocation between the contractual parties and are thus a prerequisite for smooth project implementation.

Should the Bank increasingly tailor its procurement approaches to country situations as, for example, in fragile and conflict-affected states/situations (FCS)?

CICA-EIC reply: CICA and EIC hold that, whilst the procurement capacity is arguably comparably low in those type of countries, this fact would not justify a deviation from the Bank’s high procurement standards in case of high-risk, high-value or complex infrastructure works that have a potential to attract international competition. As the New Proposed Procurement Framework intends to set a modern, good practice,
principles-based strategic foundation for Procurement in operations to support development effectiveness, these principles should also apply in fragile and conflict-affected states and situations.

Should the Bank enhance its approach to procurement related complaints?

CICA-EIC reply:
CICA and EIC fully respect the basic principle that the Bank is not a party to the final contract so that its role in procurement related complaints is by definition limited. Nevertheless the Bank should facilitate and supervise a thorough revision of the tender process and award decision in case that bidders can bring credible evidence that the tender process was biased in any regard. In order to be in a better position to come to an informed judgement in such cases, CICA and EIC would suggest that in the case of the highest-value, highest-risk or complex projects bidders are required to deposit a publicly certified copy of their original bid with the Bank.

We would also submit that the New Proposed Procurement Policy introduce an effective oversight mechanism for the full project cycle. This approach is particularly relevant to large infrastructure projects which normally face major civil engineering challenges, remote locations, local customs and traditions, environmental and safety issues abound and each project will have specific individual characteristics. Therefore, while appropriate DAB and arbitration dispute resolution provisions need to be included, the Bank needs to stay involved until all matters have been resolved.

CICA and EIC therefore advocate that the Bank ensure due cognisance of the Bank’s investment through to completion. In this connection it is important that the Bank:
- Follows-up the payments due, both in foreign and local currency, to the contractors. This follow-up has certain relevance in the issue of transparency;
- Reverts to being kept informed of the progress of the works so as to ensure disbursement of their financing conforms to foreseen standards. Perhaps this could be done by means of regular reports from a panel of independent experts or from a DAB;
- Monitors all aspects until the project has been finalised, including dispute resolution whether by arbitration or through national courts. There have been cases, where, after extensive arbitration proceedings, the Employer, upon being faced with payment of an award, has simply said there is no money available as the financing agency has already closed its agreement.

Should international competitive bidding (ICB) continue to be the preferred procurement arrangement for high risk and high value activities?

CICA-EIC reply:
CICA and EIC fully agree that International Competitive Bidding (ICB) should remain the preferred procurement arrangement for the highest-risk and highest-value activities (that is, activities above agreed thresholds based on market conditions), with appropriate Bank oversight (cf. paragraph 54) and that the investment in prior review is warranted in the highest-risk and/or highest-value contracts (cf. paragraph 59). We note that paragraph 3.22 of the Draft Borrower’s Procurement Procedures suggests the use of ICB also in the case of “complex” activities and we would suggest to also refer to “innovative” contracts in this context.
As mentioned earlier, we observe, however, that none of these qualities have been defined and that the New Proposed Procurement Framework does not offer any tool for their interpretation, such as example cases, categories or a typology. Unless further clarified in the Procurement Directives (which are unknown at this stage), the concept of limiting ICB and prior review to certain cases misses transparency and predictability for all stakeholders, i.e. the Bank, borrowers and the bidders. Hence, we would urge the Bank to define the terms “highest-risk”, “highest-value” and “complex” and to stress more clearly in the New Proposed Procurement Framework that in these cases ICB is mandatory. The Bank should also clarify whether it is sufficient that one of these qualities can be associated with the individual project or whether they apply in combination or even cumulatively. We note and agree with that paragraph 3.22 of the Draft Borrower’s Procurement Procedures suggests that the decision about ICB should be “based on market conditions” but, again, we note that the New Proposed Procurement Framework does not offer any tool for interpretation, such as example cases, categories or a typology.

It is equally important to stipulate the borrower’s obligation to use of internationally accepted standard forms of contract in order to ensure a fair allocation of project risk under each infrastructure contract financed by the Bank. In this context, EIC is concerned about the rather general and vague language used which links the use of ICB with “appropriate use of Harmonised Standard Bidding Documents and standardised international model forms of contracts, e.g. FIDIC” (cf. paragraph 13). As mentioned already, the proposed standard of appropriateness deviates drastically from the current approach in the Bank’s Procurement Guidelines for Goods, Works and Non-Consulting Services (see paragraph 2.12) and the Bank’s Operational Policies 11.00 (see paragraph 4) which require the borrower to use the Bank’s Standard Bidding Documents, including the standard form of contract, “with minimal changes, acceptable to the Bank, to address country- or project-specific issues”. CICA and EIC do not promote a specific contract model or organisation but would like to stress that the use of a standardised international standard form of contract provides an indispensable reassurance for international bidders that each bid process is subject to clear rules and regulations and is managed properly by the individual Borrower.

When preparing ICB, the Bank should ask the borrower to take responsibility for the clear determination and communication of the important required outcomes of the project, such as its objectives, functionalities and performances, to the bidders who are not supposed to fill such gaps. The concept of the Well Prepared Project “WPP” should be utilized wherever possible in order to present the case clearly, including all available key technical data, such as soil investigation and other type of local input. Such important pieces of information are costly and/or difficult to obtain from other sources in short time and, therefore, the Contracting Authority must be in charge to provide this information in order to ensure a fair competition and to receive the most competitive offers under given circumstances.

Should the Bank continue to support national competitive bidding (NCB), with the Bank’s requirements for its use streamlined to issues of key importance?

CICA-EIC reply:
CICA and EIC would recommend that the Bank follows in future the same principle as under the current Operational Policy 11.00 which stipulates that, for NCB, the borrower may use its own standard bidding documents if the Bank has assessed that they are acceptable and consistent with Bank policy. The Bank should continue to review NCB documents and to modify them as necessary to assure economy, efficiency, transparency, and broad consistency with the Bank’s Core Procurement Principles.
If foreign firms wish to participate in NCB they shall be allowed to do so on the prevailing NCB terms and conditions that apply to national bidders.

**Should the Bank focus its prior review of procurement activities on the highest-risk and/or highest-value contracts?**

**CICA-EIC reply:**
CICA and EIC can support the Bank's intention to **focus its prior review of procurement activities on the highest-risk, highest-value as well as on complex contracts** in order to provide fiduciary assurances throughout the full project cycle from project design up to implementation. However, even if the Bank cuts the volume of prior review, such streamlining does not necessarily mean less work for the respective Bank staff because a thorough and in-depth analysis of the above-mentioned types of works is time-consuming, in particular in case that sustainable procurement criteria and/or value-for-money decision-making are applied. Under such circumstances, Bank staff would have to review, as the case may be, several innovative procurement and contract elements in order to secure Value for Money and “Best-Fit-for-Purpose”, such as:

- Acceleration of environmental and sustainability procedures;
- Prequalification criteria to comprise sustainability issues;
- Economically Most Advantageous Tender / Value-for-Money / Sustainable Procurement;
- Rejection of Abnormally Low Tenders;
- Effective Dispute Settlement and Arbitration clauses;
- Transparency and Integrity Management Tools for all contractual parties;
- Financial and Advisory support to PPP projects in the infrastructure sector.

**Does the Bank need to support better contract management and improved performance of suppliers?**

**CICA-EIC reply:** CICA and EIC welcome the Bank’s intention to **support better contract management and improved performance of suppliers**, in particular in the case of the highest-risk and highest-value activities. In this context, **particular attention should be paid on the selection of a suitably qualified consultant for the project**. Given that Contracting Authorities in developing countries may not be familiar with the multiplicity of technical, commercial and legal considerations involved in a large infrastructure project, typically it will commission a consultant for the preparation and administration of the tender procedure as well as the supervision of the execution of the project. It is of paramount importance that consultants be chosen capable of producing reliable tender documents, including precise and state-of-the-art specifications and drawings, which are in turn the basis for the successful execution of an infrastructure project, as they define the scope and the technical requirements of the project.

Obviously, the **selection of professional consultants requires an adequate budget**. The consultant should not only be responsible for preparing the technical design of the project but should also ensure that the Contracting Authority has the right project management structure in place to implement the project smoothly. The Bank might also consider **allocating a separate budget for selecting an independent project management consultant** to supervise the implementation of the project.
Do the Bank’s procurement skills need to be enhanced to ensure that the Bank will maintain its position of leadership on procurement and to deliver the proposals in this paper?

CICA-EIC reply: CICA and EIC agree that the Bank’s procurement skills need to be enhanced to ensure that the Bank will maintain its position of leadership on procurement and to deliver the proposals in this paper. **Procurement capacity-building**, it to be done properly, needs a **systematic and long-term commitment from the Bank** and must be firmly addressed in the Bank’s procurement policy to become a priority. In the infrastructure sector, CICA and EIC observe a general trend to enhance global project preparation and facilitation skills, for instance through the International Infrastructure Support System (IISS), implemented by the Geneva based non-profit foundation, the Sustainable Infrastructure Foundation (SIF), which is accessible to public and private sector ensuring a high quality, consistent and systematic approach to early stage project development. This new online Cloud based project development tool for project sponsors is being launched with the support of major global development banks and key private sector entities to attract and increase investment into infrastructure.

CICA and EIC would appreciate further information regarding the human and financial resources that are needed to train procurement staff both inside the Bank and in the borrowing countries and also regarding the Bank’s roll-out strategy. In particular, we would be interested to learn how the transition process from the current to the New Proposed Procurement Policy and the many projects which have been initiated “in between” shall be managed. CICA and EIC, like other professional organisations, are fully prepared to give all assistance to the Bank’s goal to maintain its position of leadership on procurement. We would suggest that the Bank also continues to implement its harmonisation agenda, in particularly with a view to the enhanced use of co-financing for the highest-risk and highest-value and complex projects.

*Berlin, 17 December 2014*

Annexes:

Background
The three undersigned federations represent the global and international consulting engineering and construction industry and thus unite the private sector delivering consulting services and civil works, which account together for more than 50% of the prior-review Bank-funded contracts awarded under IDA/IBRD investment projects:

- The Confederation of International Contractors’ Associations (CICA)
- The International Federation of Consulting Engineers (FIDIC)
- European International Contractors (EIC).

Introduction
The construction industry welcomes the publication of “Procurement in World Bank Investment Project Finance, Phase I: A Proposed New Framework” and the World Bank’s procurement reform initiatives. From the outset of the consultation process in May 2012, CICA, FIDIC and EIC have strongly welcomed the Bank’s decision to review their procurement policies and procedures and to re-position the Bank in the context of its modernisation agenda and its multifaceted international commitments. All three federations have participated with great enthusiasm in the first consultation phase and have provided extensive written feedback to the Bank’s Initiating Discussion Paper dated 29 March 2012. The industry now offers its support for Phase II of the development of the proposed new policies and procedures published on the Bank’s website.

We take note of the appraisal introduced in paragraph 1 of the Proposed New Framework and repeated in paragraph 5, that “… the Bank’s clients have changed, along with their institutional capacity. The countries that borrow from the Bank spend several trillion US dollars annually on public procurement. The Bank finances less than one percent of that amount.” However, it is important to note that the percentage referred to is somewhat distorted by the lack of differentiation between different Borrower categories. If the Bank were to adjust the corresponding numbers by excluding the IBRD’s Top Ten Borrowers – which all have very sizeable national procurement markets, and which have consistently accounted for approximately two thirds of all loans outstanding – the share of Bank financing in relation to total national public procurement would increase significantly.\(^1\)

Comment 1: Vision Statement
When reading the Vision, as stated in the Proposed New Framework, we find that the fundamental procurement principle of equal opportunity for all bidders – whilst mentioned in paragraph 18 – may be dampened in the future procurement policy. Such tendency could further be driven by the fact that the Bank’s Procurement Guidelines would become one of several, different “fit for purpose” approaches that could be used in an individual operation (paragraph 24).

CICA, FIDIC and EIC would like to recall that the Bank’s Guidelines for the Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants (Procurement Guidelines) currently require the Bank in Article 1.2 lit. (c) to observe the interest in giving all eligible bidders from developed and developing countries the same information and equal opportunity.

to compete in providing goods, works, and non-consulting services financed by the Bank. In order to give all eligible bidders from developed and developing countries the same information and equal opportunity to compete, Article 2.12 sets out that Borrowers shall use the appropriate Standard Bidding Documents (SBDs) issued by the Bank with minimum changes, acceptable to the Bank, as necessary to address project-specific conditions.

The Bank’s above-mentioned Procurement Guidelines and Standard Bidding Documents are globally considered as setting an international standard. These have been adopted by other international and bilateral financial institutions and vetted through an extensive harmonisation process. We therefore believe that building on the Bank’s “golden standard” of procurement documents and practices would be in the interest of the Bank, and also in the best interest of its shareholders and borrowers, as well as the private sector, civil society and all other stakeholders. We believe that the quality of the procurement system has a direct impact on efficiency, transparency and integrity, and raises the level of competition, and the quality of the tenders submitted.

We would like to reiterate that the use of the Bank’s Standard Bidding Documents provide an indispensable reassurance for international bidders that each bid process is subject to clear rules and regulations and is managed properly by the individual Borrower. We would submit that the Bank’s flexibility in the field of procurement policy could be increased by adapting the existing obligatory Bank’s Procurement Guidelines rather than giving them a voluntary, non-binding character.

For instance, Article 3.20 of the January 2011 Procurement Guidelines, which stipulates that “…They [Country Procurement Systems] may be used by Borrowers in pilot projects that have been approved by the Bank under such Piloting Programs”, could be expanded to address additional situations where the use of Country Systems could be justified.

Our suggested approach is also in line with the recent International Evaluation Group (IEG) report entitled “The World Bank and Public Procurement: An Independent Evaluation”, which also questions the need for a drastic change of the Bank’s procurement policy. Specifically, the IEG report emphasises that “Bank procurement systems (as embodied in its Guidelines) are generally well tolerated by both client governments and private sector suppliers” and suggests “that it may be too early to take country-level decisions on whether to use country systems [as] such a decision would presuppose uniform national methods and uniform capacity among implementing agencies, which is not the case”.

The report further suggests that if and when the Bank plans to rely on the Borrower’s procurement arrangements, then the IEG would recommend that such Bank decision is based “also on the Bank’s own risk assessments, taking into account the views of the private sector”. The Bank may need a systematic, more comprehensive and rigid Risk Management Tool in order to be in a position to assess and verify the procurement capacity of each Contracting Authority.

In this context, we are very interested to work closely with the Bank on the development of its new “Public Procurement Tool Box”. A number of tools and guidelines developed by the industry may be of assistance to the Bank in the development of such a Tool Box and we would welcome the opportunity of working with the Bank in tailoring these documents to suit the Bank’s clients:

**Comment 2: Proposed New Policy for Procurement in Investment Project Finance**

In chapter IV, the Bank proposes changes to the Bank’s operational policies that govern procurement in investment project finance and underlines that the Bank’s primary aim is to help its client countries build and implement sound procurement arrangements and institutions provided that acceptable procurement practices are applied to the financial resources transferred by the Bank to its clients. The overall standard of procurement performance required by the Bank will be no less than present and the final decision on the appropriateness of the client procurement arrangements and institutions, as

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3 See footnote 2, at page xxxv.

4 See footnote 3, ibidem.
well as the specific procurement arrangements to support any individual operation, will rest with the Bank as part of its obligation to provide fiduciary assurance (paragraphs 32-36).

CICA, FIDIC and EIC support this new approach. However, we would strongly advise against a concept according to which the Bank’s current procurement methods and procedures become operational only when a Borrower so wishes. We would suggest that the Bank’s freedom to use one procurement method over another should be maintained and should be guided by weighing the choices against context-specific factors and criteria, e.g. country conditions, market structure, procurement capacity of the Contracting Authority, complexity of the project, level of interest from international bidders and, last but not least, fiduciary risk.

This concern is of particular note in the case of major infrastructure works projects, and we would like to take this opportunity to reiterate our firm position, submitted before during Phase 1 of the consultations, and urge the Bank to continue to require the use of its Procurement Guidelines and Standard Bidding Documents for large, high-risk and complex contracts. Given that only a very limited number of contracts fall into this category, we believe that this could be handled with existing Bank resources.

In the case of these infrastructure projects, we would like to strongly urge the Bank to continue supporting the use of internationally accepted standard Conditions of Contract and Contract Forms (current Part 3 of the Standard Bidding Documents for the Procurement of Works) even where clients are authorised to use their own procurement arrangements and institutions. The international community is familiar and comfortable with these documents available from or through FIDIC, as the suite of these documents, which support various procurement strategies, all provide for a fair and balanced risk allocation between the contractual parties and are thus a prerequisite for smooth project implementation. The use of internationally recognized standard contracts performs an important function in helping to mitigate the risk of corruption that can arise from unbalanced documents. The FIDIC form currently mandated by the Bank, the “MDB Harmonised Edition”, e.g., provides for the use of effective contractual, on-site, real time dispute settlement through Dispute Boards and facilitates the enforcement of international commercial arbitration awards.

Finally, yet importantly, experience shows that large infrastructure projects often face major civil engineering challenges. Therefore, the financing institutions need to stay involved over the entire project cycle, i.e. until all the matters have been resolved. In this connection it is very important that the Bank follows up the progress of the works, the payments and monitors all aspects including dispute resolution whether arbitration or through national courts.

Comment 2a:
In addition, we also have concerns that the proposed new framework no longer calls for the equivalence of client systems with the Bank’s own procurement procedures and documents (in paragraph 33), the standard has been watered down to “acceptable procurement practices” -- a term which is not destined to give clear and verifiable results. In this context, it has been proposed elsewhere that the Bank should accept that a country being a party to WTO’s GPA or subject to the EU Directives or adopting UNCITRAL’s Model Law as sufficient evidence of the country having passed the “test” of the acceptability of a country’s legal framework. The assumption seems to be that, by following WTO’s GPA, the EU Directives, and/or adopting the UNCITRAL Model Law, countries already meet a minimum standard on competition, transparency, and accountability.

We do not believe that this proposition necessarily stands the test of practical experience. We would like to draw the Bank’s attention to a study conducted by the London School of Economics for the European Parliament where the following conclusion was made with respect to the procurement practice in India: “A few states introduced legislation requiring transparency in public procurement, but the Indian system of public procurement has remained very fragmented. The effects of liberalisation on procurement practices have been (very) slow coming. Although there are nominal common rules

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broadly in line with the UNCITRAL Model Law on government procurement, the 246 central purchasing entities and around 800 state level entities effectively pursue different procedures and there is as yet still no standard bid documentation or criteria. This provides ample scope for discretion in the awarding of contracts and thus abuse.⁶

We therefore advocate that the process of verifying the quality of client procurement arrangements and institutions is monitored by an External Oversight Committee, which would be composed of a broad range of experts from the Bank’s client countries, the Bank’s development partners, the private sector and its professional associations, civil society organisations and independent, internationally recognised public procurement academics. There may also be a useful role for the IAGP to play here going forward.

Comment 3: Next steps

In chapter V, the document proposes that the Bank’s management will put in place an additional formal engagement point with Executive Directors - **effectively dividing Phase II into two parts** to allow for this dialogue to occur - before proceeding to the approval stage of the policy statement as originally planned.

CICA, FIDIC and EIC understand from the timetable published by the Bank that Phase II shall be divided into two parts and that no **public consultation** is foreseen until the last part of Phase II in early FY15, possibly shortly before the Executive Board approves the detailed policy proposals of the Proposed New Framework.

**Comment 3a:**

We would urge the Bank to revise the suggested sequencing of the drafting work, otherwise Executive Directors would be asked to give their approval already in the early part of FY 2014 on the outline of the new procurement policy. We would also suggest that **a public consultation take place after the first part of Phase II, i.e. in the middle of 2014.** Whilst this may not be as comprehensive as the one during Phase I, such public consultation is necessary, in our view, to comply with the **requirements of transparency and accountability** to legitimise the review process.

**Comment 3b:**

In addition to the issues that Management proposes to explore in paragraph 49 of the document, CICA, FIDIC and EIC would like to submit additional important issues that, in our view, need to be addressed in Phase II of the consultation:

- **Abnormally Low Tenders (ALT)** under works contracts and the associated issues surrounding as this subject is increasingly becoming a major issue for International Financing Institutions (IFIs), Employers and the Construction Industry under works contracts.

- The need to modify the current Bank policy regarding **Legal Remedies**, given that the additional possibilities to use client procurement arrangements and institutions.

- The need to modify the current **Bank guidelines on Fraud and Corruption** given that **Member States and/or any of its representatives are exempt from the Bank’s sanctions regime** (cf. paragraph 11 of the Bank’s Anti-Corruption Guidelines).

- Given that **integrity is now envisaged as integral to the procurement strategy**, it is proposed that due recognition be given for the industry’s contribution to raising the awareness of corruption issues. FIDIC has several integrity management tools which are offered as valuable contributions to understanding and mitigating risks of corruption. These are believed to comply with the Bank’s own efforts to deal with corruption. We would also like to suggest that the

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principles and mechanisms identified by the Construction Sector Transparency Initiative ("CoST") - which is already supported by the World Bank - could play a more prominent role in this context.

- The principles of Value for Money, Fit for Purpose, Open Contracting and Strategic Support as they relate to the Bank’s new Strategic Approach to Procurement, along with the new tools are available to assist in determining such investment decisions, as a life-cycle approach is followed, incorporating both sustainability and integrity principles, taking into account both borrower and supplier capacities.

- The prequalification process and how it can provide Contracting Authorities with an opportunity to define the standard of competition by setting out minimum requirements to be met in terms of tenderers' technical ability, financial position, capacity and experience (shown through a certificate of actual works performed) and track-record in terms of health & safety compliance and the international standards related to this process.

- Sustainability principles within the procurement framework. The industry would be pleased to offer its support and experience on sustainability issues, offering also its own tools, which have been designed to assist in developing strategies for investment in infrastructure.

- The Well Prepared Project proposal (WPP), already acknowledged in the final documents of the G-20 and B-20, has the objective to improve the assessment and management of project risk and to better define the chain of responsibility in projects financed by the World Bank. It calls for a comprehensive up-stream project preparation as an essential tool to accomplish the objectives of respecting deadlines, budget and quality. The achievement of these three objectives is a determining factor for the efficient use of Official Development Aid and thus for the good use of a scarce resource.

- Capacity Building, in terms of the Bank’s procurement policies and procedures, should ensure that the strategy includes clear and effective guidelines on up-skilling local resources; continuity of work to facilitate growth and development; National versus International bidding requirements; SME issues; and contract and programme management skills. For instance, there seems to be a lack of appreciation in the Bank’s procurement/evaluation model for Engineering consultant teams with a high ratio of permanent employees from the bidder. Winning tenders today are considerably more mixed than previously.

- Clarification of procurement of services according to the Bank’s guides with regard to wanting international firms or local firms. We see more and more short lists where there is a mix of international, regional and local firms, yet the Request for Proposals asks for Bids from International firms. The PQ requirements should match the type of firm the Client is looking for.

- The evaluation model with Technical and Financial scores and a final weighting mechanism is heavily misused, to the extent that the initial intention is set aside. We recommend a fundamental re-evaluation of the factors used in making an award in light of the procurement reform process and its new objectives of Development Effectiveness.

Conclusion
CICA, FIDIC and EIC, representing the private sector construction industry, look forward to continued close collaboration with the Bank in assessing the needs of its Borrowers and developing suitable programmes. We are available at any time to offer feedback and comment on any aspect of the development of this new Procurement Strategy.
EIC Position Paper

on the

Review of the World Bank’s Procurement Policy and Procedures

Introduction

European International Contractors (EIC) has as its members construction industry trade associations from fifteen European countries and represents the interests of the European construction industry in all questions related to its international construction activities. The main objective of EIC is to improve the political, legal and financial framework conditions for the international construction activities of its member companies. In 2011, European contractors were active in all world regions and generated an international turnover of more around 156 billion €, thereof around 45 billion € in non-OECD economies.

EIC is appreciative of the fact that the World Bank, over the past decades, has been able to maintain its leadership in setting international standards and principles in the field of public procurement. Whilst EIC acknowledges that the Bank’s has expanded in the 21st century its operations over a broad array of sectors and that today’s diversity of implementing entities – especially those inherent in sector-wide approaches and output and community-based activities – might need different procurement strategies, EIC observes that the Bank’s Operational Policy statement and Bank Procedures still call for the Bank’s prior review of procurement documents in relation to high-value contracts and that on average 60% of these prior review contracts relate to civil works.

Procurement Prior Review Contracts (Works) FY 2007-11 in relation to Total IBRD/IDA Commitments

<table>
<thead>
<tr>
<th>IBRD + IDA Commitments (in billion US$)</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>24.7</td>
<td>24.7</td>
<td>47.0</td>
<td>58.8</td>
<td>43.0</td>
</tr>
<tr>
<td>Development Policy Lending (in percent)</td>
<td>6.3 (26%)</td>
<td>6.6 (27%)</td>
<td>18.4 (30%)</td>
<td>23.0 (30%)</td>
<td>11.6 (27%)</td>
</tr>
<tr>
<td>Investment Lending (in percent)</td>
<td>18.4 (74%)</td>
<td>18.1 (73%)</td>
<td>28.6 (61%)</td>
<td>35.8 (61%)</td>
<td>31.5 (73%)</td>
</tr>
<tr>
<td>Prior Review – Total</td>
<td>7.7</td>
<td>10.2</td>
<td>9.8</td>
<td>11.0</td>
<td>11.5</td>
</tr>
<tr>
<td>Prior Review – Civil Works</td>
<td>4.1</td>
<td>6.6</td>
<td>5.8</td>
<td>6.9</td>
<td>7.1</td>
</tr>
<tr>
<td>In percent of Total Prior Review</td>
<td>53%</td>
<td>65%</td>
<td>50%</td>
<td>63%</td>
<td>62%</td>
</tr>
</tbody>
</table>


Against that background, EIC calls on the World Bank to maintain its oversight role with respect to the prior review civil works contracts – at least for the “Top 1,000 contracts” – in order to provide fiduciary assurances throughout the full project cycle from design up to implementation. EIC further suggests that for these limited number of high-value contracts several innovative procurement elements are incorporated in the tender process.
The analysis presented in the Initiating Discussion Paper captures the key issues and concerns that should be addressed in the review. Are there other challenges which the review should try to address?

Environmental Procedures/ Sustainability

EIC Recommendation: Environmental approval procedures need to be reduced in order to shorten the delays usually connected with major infrastructure projects in all sectors. In the hydropower sector, for instance, the sheer complexity of these approval procedures lead to unwelcome knock-on effects, such as the construction of carbon generating substitutes. EIC submits that the World Bank could accelerate the implementation of large and complex infrastructure projects by adopting and implementing new procedures that reduce the complexity and bureaucracy associated with these projects.

In the experience of EIC, environmental approval procedures nowadays take such a long time that private and public promoters and sponsors are either deterred or lose interest and abandon otherwise beneficial projects. One well-known example of such extensive procedures is the Report of the World Commission on Dams (WCD) which, although formally only consisting of “guidelines”, is interpreted by the Bank as obligatory. As a consequence, the Bank has financed since its publication in the year 2001 only a limited number of projects and compliance with the Bank’s strict environmental regulations makes it difficult, if not impossible, for hydro projects to proceed. The shortfall due to the absence of hydro projects has been filled largely by carbon generating alternatives which instead have an unsustainable impact on the global climate.

EIC submits that the Bank should endeavour to strike a balance between the observation of comprehensive environmental guidelines and the Bank’s mandate to finance major infrastructure projects which are a prerequisite for social and economic development, inclusive growth and wealth creation. As far as the hydropower sector is concerned, EIC asks the Bank to consider the constructive approach laid out in the “Hydropower Sustainability Assessment Protocol” published by the International Hydropower Association in November 2010. Similar Protocols need to be developed for all major infrastructure categories such as roads, ports and airports mining sector.

EIC would like to draw the Bank’s attention also to the fact that industry is also negatively affected by the potential legal insecurity arising from the question whether or not environmental rules have been adhered to in the project’s planning phase. To avoid unnecessary costs for bidders, EIC asks the World Bank to prevent Borrowers from proceeding to tender phase unless the required Environmental Impact Assessment has been finally adopted by the Borrower’s competent national authorities.

Dispute Settlement

EIC Recommendation: The dispute settlement mechanism is an important element of international construction contracts and the ultimate tool that allows a Party to enforce its rights under a Contract. EIC appreciates that the World Bank Procurement Guidelines require the Borrower to use international commercial arbitration in a neutral venue as the final option. However, EIC requests the Bank to also promote effective contractual, on-site, real time dispute settlement tools, such as Dispute Boards. Furthermore, the Bank should better facilitate the enforcement of Dispute Board decisions and international commercial arbitration awards.
Dispute Boards

Dispute Boards are well established internationally in providing a dispute settlement procedure for major infrastructure projects and are part of the FIDIC MDB Harmonised Construction Contract mandated by the Bank in its Standard Bidding Documents for major works. EIC would request the Bank to stipulate the formation of 3-person Dispute Boards for larger projects (1 person for smaller projects) at the outset of a project which issues binding decisions until overturned by incorporating a corresponding provision in the standard contract form of all Bank-funded projects. Without an effective dispute settlement procedure, such as a Dispute Board, economic dislocation and severe cash-flow problems potentially will arise as the settlement of disputes fails to progress in parallel with execution of the works such that timely project delivery is threatened. On large projects, the best results will come from a Dispute Board that has both informal and formal dispute resolution capabilities which visits the site regularly, e.g. on a quarterly basis (a “standing board”). Many disputes may be resolved by informal procedures with more difficult disputes going to a formal procedure involving written submissions and hearing.

EIC also observes that there are two obstacles to the implementation of Dispute Boards namely, a lack of Borrower financing, and a lack of knowledge of the Dispute Board system/application in Borrower agencies. EIC understands that the cost of these elements is customarily covered by the Borrower itself with result that implementation languishes and training not occur as funds are in practice unavailable. EIC would like therefore to suggest that in its review the Bank consider that as part of the loans, amounts are mandatorily included for board costs and Borrower Dispute Board training. This will encourage reduction in project delivery damaging disputes and enhance best practice in DB usage. Moreover, the costs related to Dispute Boards are much lower than those incurred for International Commercial Arbitration and, at least for the private sector, the cost associated to lack of decision of disputes is higher than those for Dispute Boards to operate.

Finally, EIC member companies time and again report that Borrowers obstruct the Dispute Board settlement process. Therefore, we call upon the World Bank to intervene if any of the parties ignores or does not honour the obligations resulting from the Dispute Board mechanism. Similarly, the World Bank should ensure, e.g. in its Loan Agreements with clients, that decisions which have become final and binding under the Dispute Board procedure are enforceable and enforced in the client’s country.

International Commercial Arbitration

International commercial arbitration has long been used as a method of dispute resolution between parties; however, it has only assumed a position as a viable alternative to court proceedings since the introduction of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which allows for the cross border recognition of arbitral awards. Since that time, international arbitration within particular industrial sectors has served a useful purpose for projects crossing national boundaries.

Local arbitration has developed in recent years, in certain countries, to be very much independent of national courts. However, this varies across jurisdictions, with some countries still allowing interference by national courts in the arbitration procedure and sometimes in the merits of the case.

In addition, as a default mechanism in the appointment of arbitrators, local institutions are found to be specified in Bid documents.

In its Loan Agreements with Borrowers, the Bank should insert a standard international arbitration clause, formulated so as to avoid interference by national courts, enforceable under the New York Convention (Exequatur), and designed to ensure a fair and equitable outcome. The Loan Agreement must specify that it overrules contradicting national legislation, including constitutional articles, thus international law superseding national law, because otherwise some jurisdictions still allow interference by national courts in the arbitration procedure and sometimes in the merits of the case.
Taking into account the new concepts of public procurement and the broader context of public sector management best practices, what type of changes should the Bank take into consideration in modernising its procurement policies?

“Most Economically Advantageous Tender” / Value-for-Money

**EIC recommendation:** *EIC observes that whereas the Bank’s Procurement Guidelines for Consultants explicitly prescribe the evaluation of the consultant tenders in two separate stages – first the quality and then the cost – the general rule for the evaluation of the contractor tenders still is the “lowest evaluated cost”. We accordingly propose, at least in the case of large and complex civil works, that awarding the contract on the basis of “Most Economically Advantageous Tender” or respectively “Value for Money”, rather than the lowest price, would be more appropriate to ensure the Bank’s goals for cost-effectiveness.*

The lowest price approach is generally suitable for the rather straight-forward procurements of short-term, low-level services or goods of a standard specification, such as some stationery or linen. In the services sector, this approach may be useful for the procurement of clearly-specified services or works which have sufficient mandatory aspects that would allow a simple choice on the basis of the lowest cost. Having said so, the “lowest-price” system sometimes is subject to misuse, as it provides bidders with the opportunity of submitting an aggressive bid with a very low price and the wish to renegotiate any unreasonable risks incurred later. In the experience of EIC, if one of the bidders uses an aggressive approach seeking re-negotiation later, a reasonably and carefully priced bid may not appear to be competitive.

Against this background, the World Bank should consider, at least in the case of large and complex civil engineering works, the introduction of quality aspects into the tender procedure and to broaden the scope of the award criteria from price only to technical and environmental elements, i.e. the “Most Economically Advantageous Tender” (MEAT). The European Union, for instance, supports the MEAT approach (i.e. the bid which embodies the most beneficial combination of technical performance, cost-effectiveness, flexibility, environmental impact, investment in the local community, social responsibility, etc.) because it avoids price “dumping” followed by uncertainty on final completion, price and quality of the Works. Instead MEAT encourages competition among the contractors on a higher level as they are encouraged to provide in their tenders both technical and environmental innovations to the benefit of the employer and the project.

There is no definitive list of quality criteria that should be applied to all procurements, but they must be linked to the subject matter of the contract, that is directly related and proportionate to the contracting authority’s requirements. The following may be appropriate:

- Capability and Capacity
- Technical merit
- Aesthetic and functional characteristics
- Performance standards, quality control, self monitoring and complaints
- Sustainability issues and environmental characteristics, Life-cycle costs
- Skills level of the workforce
- After-sales service and Customer care policy
- Technical assistance
- Delivery date or period and ability to deliver.
- Impact on the development of the country and local content
- Continuous improvement.
EIC does not want to propose a specific evaluation system for “Most Economically Advantageous Tender”. However, the following principles could be considered: If tenders are invited on the basis of various criteria other than price (e.g. quality, performance specifications, design requirements, time for completion, life-cycle costs, etc.) the evaluation of such tenders can become much more complex, if not subjective. Therefore, the interpretation of public procurement rules should respect its primary objective, which is economical in nature, and at the same time integrating life-cycle and environmental criteria, without, however, replacing the primary objectives of procurement. The steps to be taken by the Contracting Authority normally cover four stages:

- Choice of the award criteria in addition to price;
- Weighting of the criteria;
- Assessment of the tenders in the light of each criteria;
- Final ranking of the tenders.

EIC recommends in this context the use of the so-called two-envelope system under which bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. This permits the Contracting Authority to evaluate the technical quality of proposals without being influenced by their financial components. The advantage of a two-envelope system is that first the technical proposals are evaluated, and the technical solutions that are the most attractive to the Contracting Authority can be selected without any bias from the knowledge of the price of that solution in those cases where the need for a good technical solution is obviously more predominant than the corresponding price. However, a transparent procedure is required if the two-envelope system is to work properly. Ideally, all second envelopes, containing the financial proposal corresponding with the technical proposal of the individual bidders, are placed in the hands of a third party (civil law notary or attorney), in whose presence only the financial proposal corresponding with the desired technical solution is opened. If the financial proposal does not correspond with the Contracting Authority’s budget, the financial envelope relating to the technical solution deemed “second best” is opened and so forth until a selection is made. The unopened envelopes are sent back to the non-successful bidders after award of the contract. Based on this procedure, abnormally low tender will be excluded.

**Bank policy on Abnormally Low Bids**

**EIC Recommendation:** Abnormally low bids (ALB) are a form of unfair competition and can thrive particularly well under the World Bank’s and other MDBs’ procurement rules which base award construction contracts to the lowest evaluated tender price. Contracting Authorities use this criterion because it offers the simplest method of evaluation, which is also the most easily defended in the case of a complaint, and, according to conventional wisdom, it is also the system less prone to corruption. However, Contracting Authorities, users, operators and also financiers of the construction works may be negatively affected by ALB as they can lead to poor Value for Money. Usually, awarding the contract to the lowest possible construction price increases the costs in use, maintenance and replacement costs (life cycle costs).

As mentioned above, when bidding under the lowest price system, bidders have the option of either submitting an abnormally low bid (ALB) with a very low price and the wish to renegotiate any unreasonable risks incurred later. Usually, if one of the bidders uses an aggressive approach seeking re-negotiation later, a reasonably priced bid may not appear to be competitive. In the assessment of EIC, ALB are a form of unfair competition and therefore should be rejected on World Bank financed contracts as they have adverse effects on all parties in the construction industry.
Enterprises that submit ALB are more likely to suffer financial loss leading to excessive pressures to save costs and reduce expenditure on quality, investment, innovation, training, working practices and health and safety. These effects are passed on through the supply chain to sub-contractors, suppliers, other service providers and employees. SMEs are particularly vulnerable to the adverse effects of ALBs because of their limited financial resources and commercial strength.

EIC would like to propose to the Bank to analyse the pros and cons of existing methods on the market to detect, examine and eliminate ALB whilst keeping tenderers’ competitiveness. The elimination of ALB should be admissible provided that it is clear for all bidders before the tender process and that the process and the calculation formula is objective. Under some systems, any tender differing by a certain percentage from a combination of the Contracting Authority’s estimate and from the average of bidders or other statistical analysis is used whilst elsewhere the calculation method results in an “indicative price” where the nearest bid from below or above this indicative price is awarded. Another option would be to ask bidders to provide a detailed break-down of quantities and unit prices in their tenders.

**Prequalification criteria**

**EIC Recommendation:** The pre-qualification process provides Contracting Authorities with an opportunity to define the standard of competition by setting out minimum requirements to be met in terms of tenderers’ technical ability, financial position, capacity and experience. In order to ensure coherence with other Bank policies, EIC proposes that the prequalification process should also reflect the Bank’s broader policy goals by scrutinising each bidder’s capacity to comply with the Bank or other international standards on environmental management, health & safety, corporate governance and with the Bank’s goal to finance inclusive growth and the local income.

EIC recommends that it is favourable for both employers and the contractors to rely in the case of major civil engineering projects solely on the “pre-qualification or two-stage tender procedure” and to dismiss the “post-qualification or one-stage tender procedure”. This approach will not only be more economical as only the contractors included in the short-list will face the high cost related to the submission of the offer, while with the “one-stage tender procedure” all interested contractors will have to incur the cost of the offer with the risk of not being qualified for the evaluation of the offer. It will also encourage more competition due to the fact that the uncertainty of the post-qualification deters many potential bidders and will thus eventually lead to a higher level of competition.

EIC believes that the participants in the pre-qualification should be allowed to avail themselves of the financial, economical, technical references of those other companies (i) whose balance-sheets are consolidated with the one of the relevant tenderer, or (ii) are one under the influence of the other or submitted to the common influence of a sole decision-making body, provided that in this case it is established that the relevant tenderer actually has available to it the resources of the companies under common influence that are necessary to carry out the contracts. This is a way to incentivise Joint Ventures between international and local contractors.

Last but not least, the World Bank should ask the Contracting Authority to prequalify only those bidders that can demonstrate their ability to satisfy MDB policy goals on environmental and social sustainability. EIC proposes to enlarge the Bank’s prequalification procedure with sustainability criteria, e.g.:

- Certification for Environmental Management (ISO 14001 or internationally recognised equivalent)
- Certification for Health & Safety (OHSAS 18001 or internationally recognised equivalent)
- Respect of Core Labor Standards and Local Content.
In this context, the prequalification system should scrutinise how an interested company has implemented the management of environmental, health & safety and corporate governance aspects in its internal day-to-day operation and to which extent an interested company is able and willing to integrate local content in its offer, to transfer know-how to the local industry and workers. For instance, the Instruction to the Bidders should include a requirement that each bidder shall include in its offer a binding declaration to what extent the bidder commits itself to employ local personnel for the execution of the contract. The above-mentioned declaration should be taken into consideration also during the evaluation of the different offers for the award of the contract. EIC considers that the adoption of such proposal would ensure a useful training to a big number of local workers, hence would contribute to a faster development of the construction industry of the relevant Country. Therefore, the tender documents could fix the minimum thresholds for local content.

In light of various levels of risks and capacity among borrower agencies, how can the Bank best ensure that funds provided by the Bank are used for the purpose intended?

**Bank Risk Management**

**EIC Recommendation:** EIC submits that the World Bank optimises its internal risk management system regarding the capacity of its Borrowers as well as its project management system. As regards its internal Risk Management procedures, the Bank should provide for training programmes for World Bank staff to be followed by all operative management levels with the Bank’s Executive Board being involved in controlling tasks of overriding importance. As regards its Project Management System, the Bank needs to check that: (1) risks are allocated to the party which is in the best position to control and manage the project risks; (2) Geo-technical Baseline Reports are provided by Borrowers / its Contracting Authorities; (3) risk matrixes are applied that identify all the risks involved in the project.

**Bank’s own Risk Management in relation to Borrower Capacity**

If Borrowers are not able to meet the required performance level or if they perform poorly, behind schedule or not at all, it can lead to difficulties for the overall performance and to financial losses. These risks can be countered by carefully selecting Borrowers and their national Contracting Authorities in terms of reliability and performance. EIC would like to emphasise that the World Bank scrutinises systematically several risk factors related to the Borrowers capacity of implementation:

- Accountability for procurement decision
- Internal manuals/clarity of procurement process
- Review of decisions and complaints
- Record keeping
- Staffing
- Procurement planning and oversight
- Contract management and administration

Compliance risks can have a variety of consequences for the Borrower and its Contracting Authorities. These range from damage to the Borrower’s reputation. The clarification of suspected cases alone often leads to substantial costs through the use of internal and external resources. A compliance system can make targeted efforts to avoid these risks. Suspicious events are actively investigated.
Human resources risks might arise due to shortage of qualified staff and, therefore, training programmes have to be made available. Effective risk prevention and avoidance requires training programmes for World Bank staff and must be followed by all operative management levels. The functionality and effectiveness of key elements of this system, in particular the operational, non-accounting related internal controlling system and the internal risk system are to be reviewed by Audit Committees. Any recommendations on the optimisation of the Risk Management System resulting from these reviews are to be implemented immediately.

**Bank’s Project Management System**

On large international infrastructure projects a key aspect is the management of risks. A common and reasonable starting point in managing and allocating risk would be the basic parameters that the party to a contract should bear the risk if and when:

- The risk is within the party’s control;
- The party can transfer the risk, e.g. through insurance, and it is most economically beneficial to deal with the risk in this fashion;
- The preponderant economic benefit of controlling the risk lies with the party in question;
- To place the risk upon the party in question is in the interests of efficiency, including planning, incentive and innovation;
- If the risk eventuates, the loss falls on that party in the first instance.

The use of a geotechnical baseline report (GBR) for allocation of underground risks is most useful. The American Society of Civil Engineers (ASCE) have released guidelines for the preparation of GBRs for incorporation in contract documents as an effective means of avoiding construction disputes involving subsurface and underground work. ASCE published a guideline and practice manual recommending the inclusion of a GBR in the tender documents for underground works with the primary purpose of establishing a contractual statement of the geotechnical conditions anticipated to be encountered during subsurface and underground construction. This ensures that tenderers have the financial responsibility for the risks involved in dealing with the contractually binding baseline conditions described in the GBR. At the same time, tenderers would have recourse in the event of conditions more difficult than the baseline and would not need to include contingencies in their tenders for such conditions. So, lower and comparable tenders should ensue.

A further idea for better risk management is the use of a risk matrix to allow early identification and management of all risks without allocation of responsibility. This alerts all parties at an early stage so that appropriate and timely action may follow.

**Anti-Corruption Policy**

**EIC Recommendation:** With the Anti-Corruption Guidelines the World Bank has developed a set of guidelines which require all persons and entities that receive, are responsible for the deposit or transfer, or take or influence decisions regarding the use of Bank proceeds to observe the highest standards of ethics. In order to make these guidelines even more effective, EIC proposes to strengthen the Bank’s sanctions policy by empowering the Bank to take legal action also against representatives from Member States in proven cases of fraud and corruption.
The “Guidelines On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants” (Anti-Corruption Guidelines) dated 15 October 2006 establish that the borrowing country has the obligation to take all appropriate measures to prevent corrupt and fraudulent practices, to immediately report the Bank any respective allegations and to co-operate fully with Bank representatives in any respective investigations. However, whereas the Bank may declare a private firm, consultant or individual ineligible if it determines that such person or entity has engaged in corrupt or fraudulent practices in connection with Bank proceeds, the Bank has no right under these guidelines to impose any sanctions on government officials and employees of the Borrower.

EIC holds that an effective anti-corruption policy adopts a holistic approach under which all stakeholders must act simultaneously within their sphere of influence. Therefore, EIC would welcome if the Bank would require Borrowers to ratify and implement UNCAC and their Contracting Authorities to also adopt and publish governmental Code of Ethics, thus mirroring private sector best practice. With respect to the Bank’s Anti-Corruption Guidelines, EIC proposes to delete the words “other than the Member Country (and/or, if such recipient is an entity rather than a natural person, any of its representatives)” in § 11 lit. (a). Only if the Borrower itself and all of its agencies, staff, personnel and agents are held accountable for any wrongdoing and run the risk of being held responsible the Bank’s Anti-Corruption Policy will be practical and operative. Last but not least, EIC suggest to the Bank for its largest contracts (i.e. above 50 million US$) to incorporate elements of the “Construction Sector Transparency Initiative” (CoST) or from the Integrity Pacts as advocated by Transparency International in the project implementation.

The Initiating Discussion paper highlights the multiplicity of demands and contexts procurement is serving today – diverse sectors, instruments, delivery mechanisms and clients with varying institutional frameworks and governance conditions. What recommendations could help the Bank best tailor its procurement requirements to meet these diverse and varying demands and needs?

Best-Fit-Procurement for Prior Review Civil Works Contracts

EIC Recommendation: EIC calls on the World Bank to maintain its oversight role with respect to the prior review of civil works contracts – at least for the “Top 1.000 contracts” – in order to provide fiduciary assurances throughout the full project cycle from project design up to implementation. EIC suggests that for this limited number of high-value contracts several innovative procurement and contract elements mentioned in this paper, such as Prequalification, Rejection of Abnormally Low Bids, Economically Most Advantageous Tender, are incorporated in the Standard Bidding Documents.

EIC is aware that the Bank has expanded its operations over a broad array of sectors and that the diversity and number of implementing entities – especially for small, dispersed contracts that are inherent in sector-wide approaches and output and community-based activities – might need different procurement strategies. Admittedly, the Bank has moved over time from primarily a financier of large-scale infrastructure to becoming the world’s largest external supporter of education, an advocate for the reform of health delivery systems, and a proponent of community-driven development, rural livelihoods, and conditional social transfers for the poor. Even more important, the Bank has developed new instruments and delivery mechanisms some of which do not entail any procurement subject to Bank’s Guidelines, e.g. all operations under policy-based lending.
At the same time, the Bank has been able to maintain its leadership in setting and maintaining international standards and principles in the field of procurement with respect to the contracts which are subject to the Bank’s prior review in accordance with the Operational Policy statements and Bank Procedures on Procurement. On that basis, the Bank has issued Procurement Guidelines governing the procurement of goods, works, and non-consulting services which apply to Bank-financed procurement and to the Bank’s review of borrowers’ procurement actions. They are incorporated by reference in the loan agreement and are binding on the borrower. For International Competitive Bidding, the Bank’s procurement policy requires the borrower to use the Bank’s Standard Bidding Documents with minimal changes, acceptable to the Bank. The Bank oversees procurement operations carried out by the borrower by conducting prior or post reviews of contracts. According to the Bank’s own statistics, on average 60% of the value of the Prior Review Contracts relate to civil works; this amounts, on average, to a 20% share in relation to total Investment Lending and to a 15% in relation to Total World Bank Lending (including Development Policy Lending).

### Procurement Prior Review Contracts (Works) FY 2007-11 in relation to Total IBRD/IDA Commitments

<table>
<thead>
<tr>
<th>Total</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Committed (in billion US$)</td>
<td>24.7</td>
<td>24.7</td>
<td>47.0</td>
<td>58.8</td>
<td>43.0</td>
</tr>
<tr>
<td>Development Policy Lending (in percent)</td>
<td>6.3 (26%)</td>
<td>6.6 (27%)</td>
<td>18.4 (39%)</td>
<td>23.0 (39%)</td>
<td>11.6 (27%)</td>
</tr>
<tr>
<td>Investment Lending (in percent)</td>
<td>18.4 (74%)</td>
<td>18.1 (73%)</td>
<td>28.6 (61%)</td>
<td>35.8 (61%)</td>
<td>31.5 (73%)</td>
</tr>
<tr>
<td>Prior Review – Total</td>
<td>7.7</td>
<td>10.2</td>
<td>9.8</td>
<td>11.0</td>
<td>11.5</td>
</tr>
<tr>
<td>Prior Review – Civil Works</td>
<td>4.1</td>
<td>6.6</td>
<td>5.8</td>
<td>6.9</td>
<td>7.1</td>
</tr>
<tr>
<td>In percent of Total Prior Review</td>
<td>53%</td>
<td>65%</td>
<td>59%</td>
<td>63%</td>
<td>62%</td>
</tr>
</tbody>
</table>


Whilst acknowledging the Bank’s finding in paragraph 3 of the Initiating Discussion Paper that “operational experience shows that their complexity and [alleged] prescriptiveness, while reflecting the complexity of procurement processes, limit their positive impact, particularly in countries that lack procurement capacity and sound institutional, legal, and governance systems”, EIC would still urge the World Bank to maintain its oversight role with respect to the prior review of civil works contracts – at least for the “Top 1,000 contracts” – in order to provide fiduciary assurances throughout the full project cycle from project design up to implementation. EIC further calls upon the Bank to expand “prescriptiveness” for a very limited number of high-value civil works contracts, say the “Top 100 contracts” in terms of value, and to introduce for this small fraction several innovative procurement and contract elements mentioned in this paper. As mentioned earlier the Bank might consider making its internal approval procedures more flexible for this type of contracts and even establishing some kind of special department – a major projects unit – within the Bank. As the largest 100 contracts represent in terms of value represent only 1% of the total number of contracts, the additional regulation should not draw too much on the Bank’s or the borrower’s resources.

Hence, for this very limited amount of high-value and high-risk contracts, the Bank might wish to consider adding the following elements to its procurement policy and procedures in order to secure Value for Money and “Best-Fit-for-Purpose”:

- Acceleration of environmental and sustainability procedures
- Prequalification criteria to comprise sustainability issues
- Economically Most Advantageous Tender / Value-for-Money / Sustainable Procurement
- Rejection of Abnormally Low Tenders
- Effective Dispute Settlement and Arbitration clauses
- Bank Oversight over the full project cycle
- Transparency and Integrity Management Tools for all contractual parties
- Financial and Advisory support to PPP projects in the infrastructure sector.

With regard to the suggestion that the Bank maintains oversight on large contracts over the full project cycle, EIC submits that such oversight on a limited number of contracts still would have a positive effect on procurement capacity in the country. Such oversight could be complemented by so-called “Self-Assessment Programmes” which are instrumental in benchmarking national procurement systems with the World Bank’s benchmark (“golden standard”) and thereby enhancing over time national procurement capacity.

Moreover, Standard Bidding Documents, including standard forms of contract used by the Bank, could include specific line items for technology transfer and training. Training and technology transfer is often noted in qualification documents and contract standards for hydropower in developing countries, but content and goals are rarely identified, and measurement of actual technology transferred is difficult. Clients are nevertheless more reluctant to spend money for technology transfer than to measure its success. It is especially difficult to build training and capacity building into contracts that have very aggressive construction schedules beyond the fact that there is more need for trained and knowledgeable people on site.

What could the Bank do to simplify and streamline its current policies and to take advantage of the potential gains offered by E-procurement and IT-based tools?

**E-Procurement and IT-based tools during the tender procedure**

**EIC Recommendation:** The adoption of a public electronic procurement platform may bring many benefits for the businesses involved in public procurement, such as simplicity, transparency, more business opportunities, security and trust.

The new generation of E-Procurement tools has introduced a set of advanced features in order to support the evaluation of complex works, allowing the involvement of an experienced tender committee where the merit of each technical proposal should be positively acknowledged. This committee will be able to have a collaborative evaluation of the different parts of the proposals, by using IT tools, with several advantages, in particular by using automatisation of the administrative and low value added work, increasing efficiency, transparency and reducing bureaucracy in the phase preceding the submission of tenders and following the tender award, such as:

- Bidders get automatically notified about the news relevant for them;
- Bidders get notified about deadlines to be compliant with in order to avoid mistakes;
- Bidders can download the tender documentation through the internet avoiding useless costs;
- Bidders can integrate estimation tools with the platform in order to import the items list, make an analysis and estimation, and export back prices to their proposal;
- Bidders are guided throughout the process getting alerts about documents or information pending steps;
- Bidders get an automatic validation of the proposal before submission in order to avoid mistakes that could lead to exclusion;
- Bidders have one structured overview about all the stages of the public procurement procedure;
- The opening ceremony is done online with high standards of security, avoiding waste of time;
- Bidders get notified and have online access to the official reports, notifications, award notices online in one single place;
- Bidders can get the award online as well as contract documentation.

Nevertheless, the E-Procurement tools are not supposed to replace the human evaluation of the proposals, especially in the evaluation of qualitative and technical attributes on complex tenders for works or services.

Last but not least, EIC would recommend complementing the E-Procurement with E-Customs system to alleviate the bureaucratic burden for importing construction equipment and materials.

**International consensus calls for use of country systems and harmonization among development partners. What can the Bank do to advance the use of country systems and harmonization among partners through the procurement policies?**

**Capacity-building with and for Borrower’s staff**

**EIC believes that the Bank should, on the political level, continue to promote country systems and harmonisation, in particular in its co-operation with emerging donors, in order to establish a true international consensus on the use of these two goals. In its co-operation with borrowers, the Bank should lead a country dialogue addressing the systematic weakness and the potential and conditions for gap-filling measures. On the technical level, the Bank should increase financial and technical support for capacity-building with procurement staff of borrowers and use Self-Assessment Programme.**

EIC questions the Bank’s perception that there is an “international consensus” which calls for the use of country procurement systems and harmonisation among development partners. We perceive rather an “OECD-DAC consensus” not necessarily supported by emerging and or Southern donors. For instance, paragraph 2 of the Busan Outcome Document states that “The nature, modalities and responsibilities that apply to South-South co-operation differ from those that apply to North-South co-operation... The principles, commitments and actions agreed in the outcome document in Busan shall be the reference for South-South partners on a voluntary basis” [our emphasis]” This means that Southern donors have a somewhat different perception with respect to the use of country systems and harmonisation. In this context it is important to note that the “Beijing Action Plan 2013-2015” adopted at the 5th Ministerial Conference of the Forum on China-Africa Co-operation (FOCAC) on 23 July 2012 does not mention the Busan Outcome Document nor any of the previous Declarations adopted in Paris and Accra nor does it call for the use of country systems and harmonisation of development partners. Given the reticence and hesitation of emerging donors to harmonise their systems around international procurement standards, for instance towards the untying of aid, and to apply country systems, EIC sees no reason why the Bank should be at the forefront of implementing such policy.
The general view of EIC with regard to Country Procurement Systems is that they could easily create a sense of insecurity amongst bidders about the reliability and the practical implementation of rules and regulations. Instead of abandoning the Bank’s “golden procurement standard” which has provided an international benchmark over decades, EIC believes that the Bank should, on the political level, continue to promote country systems and harmonisation, in particular in its co-operation with emerging donors, in order to establish a true international consensus on the use of these two goals. In its co-operation with borrowers, the Bank should lead an unadorned country dialogue addressing the systemic weaknesses and the conditions for gap-filling measures. On the technical level, the Bank could increase financial and technical support for capacity-building with procurement staff of borrowers.

As mentioned above, EIC recommends, in order to fulfil this objective, the use of Self-Assessment Programmes which are instrumental in benchmarking national procurement systems with the World Bank’s benchmark (“golden standard”) and thereby enhancing over time national procurement capacity.

What suggestions do you have to monitor and evaluate the Bank’s Procurement policies and assess their impact and effectiveness?

Bank Review over the full project cycle

EIC Recommendation: The monitoring or evaluation capacity of the World Bank could be improved through a Bank-internal performance matrix or indicator which would be instrumental in scrutinising the effectiveness of the Bank’s Procurement policies on the project level. Moreover, the Bank should take a holistic approach and look after its investments not only until physical completion of the project but until all financial issues have been resolved whether by arbitration or otherwise.

The World Bank’s Procurement Guidelines for the Procurement of Goods, Works and Non-Consulting Services define four main principles to guide the Bank’s procurement policies in these sectors: The need for economy and efficiency; all eligible bidders have equal opportunities to compete; the development of domestic industries; a transparent procurement process.

EIC suggests that the Bank could develop a performance matrix or indicator oriented to assess and evaluate on the project level the effectiveness of the Bank’s Procurement policies in each of these four aspects. In the case of International Competitive Bidding it could focus on the following aspects.

1. **Accountability:** For projects that are subject to prior review by the Bank, accountability could be reinforced through the Bank keeping a track record of potential claims, increases of the initial contract price as well as the impact in life-cycle cost in relation to abnormally low bids. EIC would be ready to share its expertise to generate statistics which illustrate Value for Money.

2. **Innovation:** The Bank might establish a mechanism under which the Borrower reports innovative concepts incorporated into the winning bid.

3. **Potential distortion of tender procedure:** In order to prevent any kind of potentially undue interference of tenderers with the transparency and the neutrality of the tender process, it would be helpful if the Bank would continue to harmonise the tender process, to require Borrowers to give full and open clarifications to all bidders or, ultimately, to intervene at an early stage when tender documents are challenged by some of the bidders.
4. **Complaint mechanism during tender stage:** In addition to the Bank’s supervisory role in the case of prior review contracts, as described in Appendix 1 of the Procurement Guidelines, the Bank should also offer bidders a mechanism to report to the Bank, at least for Top 100 construction projects, such cases and incidents which raise serious doubts as to the transparency and equal opportunities within the bidding process.

Presently, the Bank’s mandate and “no objection” powers expire according to the Procurement Guidelines of Goods, Works and Non-Consulting Services (Procurement Guidelines) with the award of the contract. EIC advocates, however, that the Bank should take a holistic approach to the financing of large international infrastructure projects and ensure due cognisance of the Bank’s investment through to completion. In this connection the Bank it is very important that the Bank:

- Follow-up by the payments due, both in foreign and local currency, to the contractors. This follow-up has certain relevance in the issue of transparency;
- Revert to being kept informed of the progress of the works so as to ensure disbursement of their financing conforms to foreseen standards. Perhaps this could be done by means of regular reports from a panel of independent experts or from a DAB;
- Monitors all aspects until the project has been finalised, including dispute resolution whether by arbitration or through national courts. There have been cases, where, after extensive arbitration proceedings, the Employer, upon been faced with payment of an award, has simply said there is no money available as the financing agency has already closed its agreement.

This approach is particularly relevant to large infrastructure projects which normally face major civil engineering challenges, remote locations, local customs and traditions, environmental and safety issues abound and each project will have specific individual characteristics. Therefore, while appropriate DAB and arbitration dispute resolution provisions need to be included, the financing institutions need to stay involved until all matters have been resolved.

**Do you have other suggestions to help the Bank develop a proposal for a new policy framework and guiding principles for revisions to the Bank’s procurement policy?**

**Role of the Bank in Infrastructure Public-Private Partnerships (PPP)**

**EIC Recommendation:** *EIC notes that, within the World Bank Group, the rules and procedures of the IBRD and IDA are geared towards the collaboration with public sector entities in borrowing countries whereas the IFC and MIGA instruments are instrumental in attracting private sector investment in developing countries. Despite this well-established and comprehensible division of tasks EIC believes that the IBRD could take a more pro-active role in promoting PPPs in the infrastructure sector, in particular with regard to the promotion of best practice examples and provision of additional development finance (both equity and guarantees) in case of Infrastructure PPPs, including municipal and regional projects.*

EIC believes that the World Bank could make important contributions to reinvigorating the economies in borrowing countries by providing development finance alongside or together with commercial or trade finance in order to finance Infrastructure PPPs, including municipal and regional projects.
In practical terms, EIC asks the World Bank to support Infrastructure PPPs in the following areas:

- To give guidance for a thorough preparation which defines the most suitable type, size and design of the project and provides the “best fit” for the intended purpose, evaluating not just the initial cost but also all the lifecycle and maintenance costs;
- To establish assessment criteria that would enable relevant parties to evaluate in advance whether a particular project is likely to be eligible for support from the Bank and to streamline and simplify procedures to make the IBRD more suitable and accessible for smaller projects;
- To provide clear guidelines for the legal framework of PPP’s, in particular in countries with legal systems based on civil law rather than common law and professional and financial support to Governments in the preparation of such legal framework and the regulatory prerequisites for the implementation of PPP projects;
- To define a suitable Public Sector Comparator (PSC), i.e. a thorough and comprehensive analysis of the true cost of public sector services; acknowledging that there is an absence of best practice in the public sector in adequately maintaining infrastructure, careful management of assets during their lifecycle, control and adequate accounting for the true costs associated with these requirements, hidden costs associated with inefficient management;
- To develop standardised tender documents and concession contracts, including the final dispute settlement by arbitration (to reduce the risk of litigation and thus the project risk);
- To give technical assistance and financial support to governments in the preparation of the tender process and documentation of complex projects;
- To give guidance on the selection criteria; whilst it goes without saying that regulations must be the same in practice as well as substance for all interested parties (e.g. mandatory social regulations encompassing salaries and working practices and environmental responsibility) the price or length of the concession should not always be the decisive criteria but the quality, technology, timing and capacity to perform should carry greater weight in the adjudication process;
- Where the country risk is substantial or the financial markets may not be able to cope with it in amounts consistent with the volume of investment of the project, to provide either coverage directly or a counter-guarantee to a commitment by the Government;
- To provide financing denominated in local currency or of FX coverage in order to inject liquidity in the financial markets and by contributing to a reduction in the cost of capital by mitigating project risk associated with Infrastructure PPPs, with a view to also mobilise the local financial resources, such as pension funds, life insurances and savings.

- In the current context of scarcity of financing for the private sector, to provide temporary financial guarantees to facilitate the debt funding of PPP projects at a reasonable cost. Such guarantees should (i) be dimensioned in such a way to be consistent with investment grade ratings, (ii) carry a cost which would incentivise their unwinding once market circumstances are normalized, (iii) provide a symmetric risk / reward limitation to developers benefiting from them, and (iv) be attached to specific projects from the bidding process, thus maximising their efficiency through competition between different bidders and between different financial institutions.
- Suitable legislation: providing a platform for an efficient licensing process, the structuring of project finance funding mechanisms (e.g. compatibility with attributing suitable step in rights for lenders), adjustment of tariffs, suitable allocation of risk and adjustments to the model throughout the lifecycle of the project to ensure its sustainability on a long term basis;
- Project Finance: to achieve a structure allowing for longer ramp-up periods achieving breakeven somewhat later in depressed economies, reevaluate assurance mechanisms associated with a more equitable allocation of risk (guarantees) between the public and the private sector (risks laying with the party best placed to manage/control the risk), free-up liquidity held in debt service reserve accounts, alleviating pressure on cash-flow and balance sheets and within certain parameters greater flexibility and ability to adjust together with the divergent performance intervals of the project and the relevant economy/business sector.

Green Procurement

**EIC Recommendation:** Proven benefits associated with Green or Sustainable Procurement are not limited to environmental impact, but can include everything from social and health to economic and political benefits. Besides allowing public authorities to achieve environmental targets such as cutting emissions, saving energy and avoiding air, water and soil pollution, Green Procurement also sets a positive example to private consumers and helps raise awareness for environmental issues. In economic terms, Green Procurement often leads to savings of both money and resources when life-cycle costs are considered. Therefore, EIC recommends that the World Bank closely studies the potential benefits of Green Procurement and possibly incorporates incentives to employ it in its Procurement Policy.

The challenge for public organisations is not only to employ good procurement, but good and green procurement, since climate change is a reality and floods, desertification, erosion are a direct consequence if it is not slowed down or stopped. The public must be made aware that green public procurement is essential in order to achieve this.

Although Green Procurement has higher initial costs, it may often be the case that when considering the entire life-cycle, including maintenance, operating costs and disposal, it is the best solution in terms of value for money. Public authorities need to be convinced to require Green Procurement in their tenders. The most important factor here is capacity building, since the authorities need to train their staff in order to correctly perceive and evaluate the importance and quality of green procurement.

Another prerequisite for green procurement is the implementation of the concept “well prepared projects (WPP)” and the role of the engineer. WPP, provided with all engineering reports, may lead the competition to more innovative processes promoting Green Procurement.

In order to promote “Green Procurement”, one option may be to name green products at the design stage, which all competitors will have to use. Another option is to honour merit points for green solutions in the early pre-qualification stage. This, however, might be difficult in terms of anti-corruption and allegations of poor assessment.

The World Bank could reserve a quota to finance Green Procurement projects such as sustainable energy projects, which may start with a small percentage of all projects today and increase each year to reach 100% within a decade.

In the meantime; the recognition and/or accreditation process of “green” should be simplified in order not to discourage investors and not to divert investors towards environmentally less caring public investments.

*Berlin, 27th September 2012*