



Joint Position Paper of CICA, FIDIC and EIC on the Revised Proposed New Framework for the World Bank's Procurement Policy *(dated October 18, 2013)*

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**

¹ MOODY'S Credit Analysis on IBRD (World Bank), dated January 11, 2013. The Top Ten Borrowers ranked by Share of Total Loans Outstanding in the FY 2012 were: Mexico, China, Turkey, India, Brazil, Indonesia, Colombia, Poland, Argentina, Romania, cf. http://treasury.worldbank.org/cmd/pdf/Moodys_IBRD_Report_2013.pdf.



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"**² 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"**.³ 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"**.⁴ 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

² IEG Report "The World Bank and Public Procurement: An Independent Evaluation", at page xxii.

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**.⁵ 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*

⁵ Japan International Cooperation Agency (JICA), Checklist for One-Sided Contracts, dated March 2011 cf. http://www.jica.go.jp/activities/schemes/finance_co/procedure/guideline/pdf/check_e.pdf.



*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.*⁷⁶

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

⁶ Stephen Woolcock, Study on Public Procurement in International Trade, dated 25 October 2012, Ref.: EXPO-INTA_ET(2012)457123 FULL, cf. [http://www.europarl.europa.eu/RegData/etudes/etudes/inta/2012/457123/EXPO-INTA_ET\(2012\)457123_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/inta/2012/457123/EXPO-INTA_ET(2012)457123_EN.pdf)



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.