

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

IBRD + IDA Commitments (in billion US\$)	2007	2008	2009	2010	2011
Total	24.7	24.7	47.0	58.8	43.0
Development Policy Lending (in percent)	6.3 (26%)	6.6 (27%)	18.4 (39%)	23.0 (39%)	11.6 (27%)
Investment Lending (in percent)	18.4 (74%)	18.1 (73%)	28.6 (61%)	35.8 (61%)	31.5 (73%)
Prior Review – Total	7.7	10.2	9.8	11.0	11.5
Prior Review – Civil Works	4.1	6.6	5.8	6,9	7,1
In percent of Total Prior Review	53%	65%	59%	63%	62%

Source: World Bank Annual Report 2011, Financial Management and Procurement in World Bank Operations, Annual Reports for FY07-11

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).

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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 automatisations 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 systematic 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:

- Follows-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