

EIC Position Paper

on the World Bank Consultation Paper

Increasing the Use of Country Systems in Procurement

Introduction

European International Contractors (EIC) represents the interests of the European construction industry in all questions relating to its international construction activities. It has as its members construction industry trade associations from 15 European countries. In 2003, the total volume of international turnover carried out by EIC member companies outside the European Union amounted to some 35 billion €. Europe's international construction companies are currently active in all corners of the globe and are working in all types of infrastructure development. Through their international activities, they are contributing to employment, income and tax revenues in the host countries and through the co-operation with local partners, the transfer of know-how and the training of local people they are helping to create a climate for cross-cultural understanding as well as for economic growth. It is fair to say that European international contractors for many decades are making a significant contribution to what is nowadays labelled "Sustainable Development". Therefore, we readily submit our response to the World Bank's consultation on "*Increasing the Use of Country Systems in Procurement*".

General EIC Position on the Procurement of Major Civil Works

As a matter of principle, we would like to point out that the Bank's consultation is based on a procurement system against which EIC has expressed strong reservations over the past years. In the "*EIC Blue Book on Sustainable Procurement*" of November 2004, EIC published its critical view on the current procurement guidelines and practice in the case donor-financed infrastructure projects. We believe that the current practice is not sustainable due to the absence of quality-orientated award criteria and suggest that the Multilateral Development Banks and International Financing Institutions modernise their procurement regimes for major infrastructure works by allowing bidders to compete on quality and technology in addition to price.

EIC, therefore, recommends that the World Bank use its leverage to prescribe a holistic project management process by introducing quality-orientated elements, such as pre-qualifying applicants also on their social and environmental performance, broadening the scope of the award criteria from solely financial to technical and environmental elements, allowing bidders generally to submit Alternative Proposals with their tenders or, in more complex projects, inviting tenders on a "turnkey" / "design and construct" basis, in a staged bidding process or under Performance-Based Procurement schemes.

Practical comments on World Bank Consultation Paper (March 2005)

I. Introduction

EIC considers the European construction industry as a potential partner in achieving the Millennium Development Goals of the international development community and, therefore, generally supports all realistic initiatives that are apt to improve the efficiency of official development aid and development co-operation.

II. Background

Considering the *rationale* for the increased reliance on country procurement systems in Bank-financed operations, we would agree with the Bank in the assumption that the use of well-designed country systems in procurement could have a significant potential to scale up the development impact, improve capacity-building and increase country ownership. However, EIC proposes that, as a prerequisite for success, the Bank or the Borrowers will heavily invest in building up the necessary human resources both amongst Bank staff and in the national administrations.

We are not fully convinced, however, that such decentralisation will lead to more harmonisation in procurement systems at the global level, since we have observed that universal standards, such as the FIDIC standard form of contracts or the ICC Rules of Arbitration are sometimes applied on the domestic level in an arbitrary manner. Based on our experience, a uniform set of rules leads to more transparency and equal opportunities for both local and foreign bidders, whilst the application of a multitude of particular systems might lead to a watering down of the international standards. This in turn might lead to a further withdrawal of European international contractors which would approve a more active role of the international donors both in the procurement process and also in the supervision of the execution of the works.

EIC also queries whether the money which will be spent on monitoring the compliance of Borrowers with the international standards, as laid down in the Country Procurement Assessment Reports, will help to reduce the transaction costs of infrastructure financing in developing countries. Therefore, a cost-benefit analysis should be undertaken after a short trial period.

III. Proposed Benchmarking Framework

European international contractors require a reliable legal framework for their international activities which ensures that their operations are not subject to arbitrary interventions. We welcome that the set of **Baseline Indicators**, designed to measure the quality of the national or sub-national procurement system to ensure compliance with the World Bank's Procurement Guidelines, is comprehensive. However, the application of the system based on categories such as "*fully achieved*", "*substantially achieved*", and "*not achieved*" seems to be too vague to deliver appropriate and country-specific results. For instance, how can one assess whether *the public procurement system is mainstreamed and well integrated into the public sector governance system*?"

The introduction of minimum standards on the domestic implementation of the Bank's procurement rules is welcome, but it appears that some of the proposed **Performance Indicators** should be reconsidered, e.g. the "*bidders participation*", "*Number of protests*" or "*Time to answer protests*". On the other side, the criterion of the "*contract amount increase*" might be very helpful to deter poor tender preparation by the Employer.

As can be seen from the explanations under "methodology" (paragraph 15), the Bank itself does not feel all too comfortable with its proposed rating system and the definition of satisfactory thresholds. In addition, the problem of country gaps may not be underestimated and hard to handle in practice. In sum, EIC feels that the Bank will face many difficulties in examining the Borrower's implementation practices, track record and capacity.

Concerning the **ICB Indicators**, it will be difficult for the Bank to scrutinise in the field whether it coincides with what has been laid down in writing. Past experience from International Competitive Bidding shows that procurement theory and practice diverge widely. This is, e.g., the case for customs duties and import taxes which in turn often lead to late payments. Moreover, it will not be sufficient for the Bank to analyse the dispute resolution mechanism under the contract, since party hostility in international arbitration proceedings, e.g. by challenging arbitrators or the validity of the arbitration clause, delay the claiming party for years. A further crucial element in international arbitration is the acknowledgement of the awards. Here it is a very common practice that the Borrower resorts to its own local courts in order to have the award set aside.

The analysis on **Advantages and Risks** shows that Bank is fully aware that this policy effort also will have repercussions on the Bank's reputation, i.e. when the system of indicators is misused or misrepresented.

IV. Implementation and Proposed Pilot Programme

As indicated before with regard to our general position on the procurement of major civil works, EIC has serious doubts whether, with regard to large infrastructure projects, the plain use of country systems in procurement will lead to the results and objectives envisaged by the Bank. We would suggest that, instead, the Bank's new policy on the increased reliance on country systems in procurement must not be considered in isolation but rather as an integral element of a more comprehensive approach aimed at improving the present procurement rules and practice for larger infrastructure works.

When implemented in isolation, the increased use of country systems in procurement might even be counterproductive, e.g. through the increase of disputes which have several negative effects, also for the Borrower. As already analysed in our "EIC Blue Book on Sustainable Procurement", "*for sustainable development to be achieved, sustainable development is indispensable both in theory and practice*". Only if the Bank reforms its procurement rules and practice for large infrastructure works and closely monitors the implementation of Bank-financed projects, i.e. is also prepared to take severe measures in case of non-compliance of the Borrower to reach the goals set by the Bank, the policy goals can be achieved. Against this background, World Bank staff should, in particular in those countries where the new policy is applied, monitor the implementation of the procedures and also the process of the contract negotiations.

With regard to the similar policy objectives of the European Development Fund (EDF), the European Court of Auditors reached the conclusion that the present procurement practice of the European Commission must be improved.¹ The Court of Auditors explicitly stated that *“the European Union and the ACP states must improve supervision of the implementation of works contracts financed by the EDF and, in particular, must reduce the extent of the divergences that were found between contracts and their actual implementation”*. Similar observations could be made with regard to World Bank financed infrastructure projects.

Given the past track record, EIC is concerned that the deficits, as identified by the European Court of Auditors, might be aggravated by the increased use of country procurement systems, since the Bank as well as the Borrowers would be faced with the irreconcilable task of delegating or receiving more authority at a time when the Bank’s customary procurement practice must be considered to be inadequate. In order to be successful with a policy aiming at the increased use of country systems in procurement, it is of paramount importance for the Bank to amend its procurement policy for major infrastructure works, e.g. by prescribing initial pre-qualification or the mandatory publication of evaluation results, and to closely monitor the conduct of the contracting parties during the development of the project.

V. Next Steps

EIC is ready to co-operate further with the World Bank on this effort. Given the world-wide activities of our membership, EIC could be an important partner for the Bank to provide feedback on how the practical implementation of this policy is proceeding with regard to major infrastructure works.

Berlin, 01 June 2005

¹ ECA Special Report No. 8 of 2003. See Official Journal of the EU 2003/C 181/01