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CICA Position Paper on the Review of the World Bank Procurement Policy and Procedures

Introduction

The Confederation of International Contractors' Associations (CICA) represents the Construction Industry at the world level. The Worldwide Construction Industry, involving contractors of all sizes, represents a global turnover of US\$ 7 trillion and employs around 150 million employees.

CICA is also a forum for North-South discussion on institutional, legal, contractual, financial and environmental issues, corporate social responsibility (CSR) and development.

CICA allow its members to participate in the defense and promotion of the construction sector, especially to International Organizations and Financial Institutions.

As Contractors are some of the main users of World Bank policies and procedures, CICA is appreciative of contributing to the comprehensive review of the procurement policy and procedures used by the Bank and its borrowers, through its direct consultation¹ and its participation in the International Advisory Group on Procurement (IAGP).

The review aims at identifying changes to the policy framework (including the current guidelines, policies and procedures both internal and applicable to borrowers) that will allow the Bank to continue to be a global leader in procurement in development, while adapting to the Bank's modernization agenda², its [reform of investment lending](#), and new opportunities and challenges in a changing world.

The Bank is expecting from this major review to collect ideas and proposals from the private sector to reflect the profound changes in the global economy, as well as the principles as perceived resulting notably from the:

- United Nations Millennium Development Goals;
- Rome (2003) and Paris (2005) Declarations, Accra Agenda for Action (2008) and Busan Partnership for Effective Development Cooperation (December 1, 2011) promoting among others transparency, good governance, the appropriation by recipient countries of the Official Development Assistance (ODA), the Use of Country Systems (UCS) for Procurement, the untying of Aid, the reinforcement of "budget aid" at the expense of "project aid", etc;
- Sustainable Development principles resulting from Rio+20.

These principles spread slowly and participate in the evolution of the policy, institutional, legal, social and financial framework to which our companies are then facing up to both local and

¹ WB-CICA Meeting in Paris on July 3, 2012.

² - [World Bank document "Modernizing the World Bank Group: An Update" \(April 4, 2011\)](#)

- [Transformation through Infrastructure - World Bank Group Infrastructure Strategy Update FY2012-2015](#)



international level. These evolutions need to be reflected in the Bank's proposals for its Procurement Review.

To share our views and recommendations, CICA used the following questionnaire recommended by the Bank:

1. 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?

🚩 Innovation

Even though care must be taken **not to encourage unnecessary sophistication**, CICA believes that innovation is insufficiently emphasized. Technical solutions are often locked by the tender itself. "Open" tenders allowing variants (as required under the ongoing reform of the EU Directives on Public Procurement) would promote innovation, **without dismissing the offer from local competitors**. Moreover, the Bank shall encourage a balanced co-contracting to promote the protection of all parties, allowing them to bear undue losses in solidarity.

Nevertheless, CICA recalls that if innovations are being sought, the Bank shall select the appropriate procurement model best responding to the innovation in question, but if a strict design-bid-build approach is used prohibiting the bidders to provide modifications, bids should be evaluated based upon the original design requirements.

In addition, advanced mechanisms of dispute resolution³ can support employment and training of local staff.

CICA Recommendation: CICA suggests a large experimentation on the creation of an "innovation space" at the World Bank based on various practices already used.

However, special attention should be paid on the specific needs of local businesses to also participate under conditions satisfying to the innovation process, but that should not become a barrier to market access for them.

🚩 Selection criteria

The Bank must set higher standards for the selection or prequalification of the bidder (compliance requirements, managerial and technical capacity, provision of equipment and staff...).

To enhance the relevance of this measure, it would be advisable that the Bank provides a uniform set of indicators, allowing for comparison of conditions among regions, and tracking improvements, creating an opportunity for intraregional knowledge transfers and collaboration.

➤ **Corporate Social Responsibility (CSR):**

For CICA, a practical way to make progress in this field will be to have a contractual approach.

CICA Recommendation: CICA recommends that the CSR performance level expected in these contracts, i.e. requirements over and above the respect of statutory obligations, should be detailed as much as possible by the client

³ See also item on "Dispute avoidance and dispute settlement" detailed thereafter in pages 4-5 at the end of question 1.

(including conditions of work, accommodation, security, health and training, etc), by ensuring the direct link between the subject matter of the contract and the requirements for bidders, so that it can then be quantified and correspondingly priced by tenderers. This would contribute to competition taking place on a level-playing field non discriminatory for local and foreign SMEs to maintain a large competition's environment. To do so, CICA requests the introduction of a control procedure during the construction phase.

CICA questions the Bank if the bid evaluation and supervision criteria related to such issues should be included in the bank's procurement evaluation procedures or in what form if elsewhere.

➤ **Abnormal Low Tenders (ALT):**

Being resolutely against Abnormal Low Tender (ALT) because it does not contribute to the elevation of skills of the local construction industry, CICA suggests to the Bank to analyse the pros and cons of existing methods on the market to detect, examine and eliminate ALT whilst keeping tenderers' competitiveness. In CICA's opinion, the elimination of ALT, for which the low price has not been justified by the tenderer (voluntary undervaluation, error, other form of distortion of competition, etc), should be mandatory, provided that it is clear for all bidders before the tender process and that the process and the calculation formula is objective.

CICA Recommendation: The Bank shall study the conditions of implementation of a mechanism, based on best practices, that allows the contracting authority to consider and treat Abnormal Low Tenders (ALT) so as to avoid conditions for unfair competition, fraud, corruption and underperformance, and consequently to contribute to the reinforcement of the capacity (technical and managerial) of the local construction industry and the proper use of Bank's funds.

- ✚ **Improving the process of selection of consultants: Quality based selection** (selection also based on skills and not exclusively on the price).

CICA suggests that the Bank improves its Guidelines for the preparation of the Terms of Reference (ToR) and selection criteria of consultancy.

- ⇒ organize and process a selection leading to ToR fully adapted to the objectives and realistic in terms of budget, timing and nature of the consultancy work.

✚ **Conditions for success of Public-Private Partnerships (PPPs)**

Concessions and other PPP families (user fee vs. availability fee) are an effective response that can provide sustainable and adequate management of infrastructure and public services in developing countries and at lower cost over the duration of the project life cycle.

But a PPP, regardless of its family affiliation, is a contract for public services to be delivered with a long period of time, that's why it must be adapted to the objectives and be evolutive to take into account the changes of the socio-economic needs. This implies in most cases a different mechanism than that used for standard public procurement.

Without a better understanding of the key concepts (cf. Gold Standards of G20 High Level Panel on Infrastructure) properly disseminated and available to all and without an adequate institutional and legal framework and capacity of all stakeholders, it is not reasonable to expect to largely develop PPP pipelines announced, notably in Africa or Latin America.



To address these needs, CICA has developed essential conditions gathered in a Vademecum to ensure a simple, didactic and consistent information of Gold Standards, which will be used for training programs in partnership with ministries and local implementing agencies. This will offer to countries and their contracting authorities much better chance of long-term success of PPP projects in developing countries.

In addition, CICA suggests to the Bank to support PPPs by helping to mobilize local financing and unbanked local savings (e.g., pension funds, etc).

CICA Recommendation: CICA suggests to the Bank to take into account the need for elaborating a guide or best practices allowing countries to adopt a basic and common institutional and legal framework on PPPs to edit ensuing adapted Procurement Rules, Standard Bidding Documents and Contract Templates. CICA is ready to participate under the Bank's leadership in this work from lessons learned issued from the large experience of its on-going projects, and will circulate to the Bank for information its upcoming "Vademecum on the conditions for Success of PPPs" (after finalization planned in Fall 2012).

Dispute avoidance and dispute settlement

CICA is of the view that dispute settlement mechanisms as well as efficient alternative dispute resolution technics are essential for the success of international construction contracts and the ultimate tool that allows a contracting party to enforce its rights under the contract. The Bank should then promote the following mechanisms:

- **Partnering or other similar technics**
- **Dispute Board:**

Without an effective dispute settlement procedure such as Dispute Boards for large infrastructure projects, economic dislocation and severe cash-flow problems may arise as the settlement of disputes fails to progress in parallel with execution of the works, which can lead to a severe weakening, if not the disappearance of the companies involved, including SMEs from countries benefiting from Bank's support. In the international context, a Dispute Board, which issues binding decisions unless and until overturned at a further forum such as arbitration, best achieves this goal.

Dispute Boards should be further promoted and guidance should be given to the nature of the Board best adapted to the project. The Board should also be rendered more cost effective and their costs should be taken into account in the tender documents.
- **International Commercial Arbitration:**

A standard international arbitration clause, stipulating a neutral venue for the place of arbitration (e.g., as formulated in the FIDIC/MDB Harmonised Major Works (Construction) Contract), should be included in all World Bank contracts. CICA recommends to the Bank to stipulate in the Loan Agreement with the Borrower that the arbitration agreement with the Contractor comes into force simultaneously with the contract rather than at the time of a dispute or after completion.
- **Misprocurement:**

CICA suggests the Bank to provide pre-referral process procedures.



CICA Recommendation: Dispute settlement mechanisms are an important element of international construction contracts and the ultimate tool that allows a contracting party to enforce its rights under the contract. CICA appreciates that the World Bank Procurement Guidelines require the Borrower to use international commercial arbitration in a neutral venue as the final option. However and without advocating an increase of procedures, CICA requests that the Bank also provides contractual and on-site dispute settlement tools (e.g., Dispute Boards) that shall be simple, fast, cost effective and binding. Furthermore, the Bank should better facilitate the enforcement of international arbitration awards.

2. 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 modernizing its procurement policies?

✚ Favor the “Most Economically Advantageous Tender” as the best way to deliver Value-for-Money

⇒ To meet, as detailed into the Request For Proposal (RFP), socio-economic compliance obligations for sustainable development, education, environmental quality and technological support for companies on a long cycle performance and efficiency of supplies...

The borrower must have a choice of the tenders' evaluation:

- ✓ The weight / scoring of the technical offer (taking into account new qualification criteria) and financial offer may be different depending on the type of contract (e.g., "simple" supply of goods versus global solution with impact on sustainable development, resource savings...)
- ✓ Some criteria are also included in the World Bank “Program-for-Results” (PforR).

CICA Recommendation: The Bank should consider, at least in the case of large and/or complex contracts, the introduction of quality aspects, which have to be directly linked to the subject matter of the contract, into the tender procedure and to broaden the scope of the award criteria from price only to technical, social and environmental elements, i.e. the “Most Economically Advantageous Tender”. The use of the “Most Economically Advantageous Tender” can be beneficial not only in terms of quality but also regarding cost effectiveness on the life cycle of the project, provided that the project in tender has been prepared according to the principles of the “Well-Prepared Project” (WPP). The WPP concept currently developed by CICA and detailed hereafter (see in question 3, page 3) is a tool that can generate increased value-for-money. The use of these two concepts can launch transparent and non-discriminatory tenders satisfying the best use of aid funds as well as the Development Goals.

CICA would most likely support such an approach provided the selection criteria and its application are clearly communicated to all proponents, applied fairly and evenly to all proposals (e.g. use of a fairness monitor), and where proponents are given the opportunity for post award debriefings so as to ascertain how they fared.

3. 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?



✚ **Reintroduce the execution control (soft power) and improve the Bank's supervision over the execution of contracts**

➤ **Strategic tools to develop for the Bank:**

Financial and legal security is critical for companies. While the WB is not a party to the contract, even if "soft power" of the Bank can be exercised during project implementation, it is important to include as part of the Procurement Review the possibility to develop strategic tools and options that are workable for the Bank. Greater involvement in the quality of control is also imperative.

➤ **Efficient and timely execution of contracts:**

To cope with the priority concern of MDBs to get efficient and timely execution of contracts, CICA has developed the concept of **Well-Prepared Project (WPP)**, whose main objective is better: i) assessment & risk management for the initial preparation, and ii) definition of the chains of responsibility in the projects. The involvement of and monitoring by the Bank in contract execution were also raised as a critical issue for the review, in particular as regards the control of the logistics chain after the supply of goods and the mobilization of contractors and respect of contractual provisions with regard to access to site, equipment, permits, licenses, etc.

The WPP can allow an **improved aid and fiduciary obligations' effectiveness of World Bank** in its projects by developing a **Guide of Good Practices** that can be disseminated to the all production line. The approach is also expected to be applicable to new issues such as sustainability, green procurement, social environment (including training) and ethics. The WPP should contribute to:

- achievement of consistency
- meeting costs, time schedule and quality targets
- less disputes⁴ and corruption.

➤ **Bank Risk Management**

CICA Recommendation: Regarding the Risk Management procedures, the Bank shall optimize its risk management system in relation to the capacity of its Borrowers. Effective risk prevention and avoidance require training programs for WB staff and must be followed by all operative management levels.

To achieve this objective, 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 of the Bank. Then, any recommendations on the optimization of the Risk Management System resulting from these reviews are to be implemented as soon as possible. In addition and given the importance of this subject, it seems useful and natural that the Bank's Executive Directors are more closely associated.

Regarding the Project Management system, risk mitigation measures have to be agreed by stakeholders and made part of project requirements, and then effectively tracked during project implementation. In case of persistent disagreement, it is recommended to set a Project Management Advisory Board independent of the Employer and Contractor to ensure the efficient and timely

⁴ Early detection of disputes with the establishment of an advanced mechanism for preventing litigation in relation with the item "Dispute avoidance and dispute settlement" detailed in pages 4-5.



execution of contracts. Besides, the Bank must ensure that risks are allocated to the parties in best position to efficiently manage them.

✚ Deeper engagement on Anti-Corruption Policy

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 and report any corrupt and fraudulent practices.

CICA holds that an effective anti-corruption policy adopts a holistic approach under which all stakeholders must act simultaneously within their sphere of influence.

CICA Recommendation: The holistic approach based on an effective anti-corruption policy should lead countries to implement codes of ethics in accordance with the guidelines of the Bank. CICA invites the Bank to consider practical ways to implement these guidelines, which will have to be adapted to the countries’ specificities.

In addition, CICA suggests to the Bank for its largest contracts to encourage awarding authorities to incorporate elements of the “Construction Sector Transparency Initiative” (CoST initiative) or from the Integrity Pacts⁵, having contractual value, as advocated by Transparency International in the contract.

Finally, CICA stresses again that the WPP could favor cost mitigation, time schedule and quality, and is an additional way to reduce situations conducive to corruption.

✚ Fight against the continued decline in consultants’ budgets

Increased budgets for studies and engineering would be largely compensated by the achievement of the project with the initial price and time delivery, delivering as well the quality expected. This justifies the use of WPP.

4. *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

CICA 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 and/or complex contracts and that on average 60% of these prior review contracts relate to civil works.

CICA Recommendation: CICA calls on the World Bank to maintain its oversight role, or any other form resulting in an equivalent result⁶, with respect to the prior review of civil

⁵ Conclusion of an integrity pact: the parties declare in their contractual conditions to keep the contract clear of corruption.

⁶ See in item “Capacity Building” page 9.



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. CICA suggests that for this limited number of high-value and/or complex contracts, several innovative procurement and contract elements mentioned in this paper, such as Prequalification, Treatment of Abnormally Low Bids, Economically Most Advantageous Tender, are incorporated in the Standard Bidding Documents.

✚ Less “one size fits all” and more “fit for purpose”:

CICA shares the view of the Bank that it must ensure that the multiplication of different forms of contract does not give rise to too much complexity and make sure to have simple features, operational and easily understandable by the different actors in the field.

CICA Recommendation: To optimize the contracts available to contracting authorities, CICA suggests the Bank to provide contract templates based, for example, on three inputs: sectorial, nature of the contract (the simplest to the most global) and common law / civil law.

✚ The positive contribution of Civil Law to the review of Procurement rules

Experience shows that the provisions and practices of Civil Law can better achieve the objectives of the Bank and deliver a better legal and contractual security allowing to:

- reach the objectives of the Bank
- reduce the cost and time of transaction
- support an efficient and prompt treatment of disputes.

CICA Recommendation: CICA suggests to the Bank to study how to introduce efficient principles of Civil Law in the Procurement Review applicable in both Civil Law and Common law Countries.

5. 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?

CICA appreciates and acknowledges that E-procurement and IT tools might bring several advantages to the procurement of construction works, in particular by increasing transparency, enabling a more effective fight against corruption, and reducing bureaucracy in the phase preceding the submission of tenders and following the tender award.

However, CICA questions whether a computerized award system is the best solution in the case of large and complex works where the merit of each technical proposal should be positively acknowledged by an experienced tender committee.

CICA Recommendation: The adoption of a public electronic procurement platform may potentially bring many benefits for the businesses involved in public procurement, such as simplicity, transparency, more business opportunities, security and trust, provided that the entire mechanism is reliable. However, in the case of civil engineering works, E-procurement and IT tools might be more suitable for standard and small projects rather than for large and complex structures.



6. 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?

🚧 Capacity Building

Capacity Building is an instrument that meets the objectives of the Bank. But it is a major issue difficult to address.

Capacity Building can have universal value only if all donors effectively harmonize their country procurement systems. Failing to realize this, it would generate distortions of competition and discriminations.

CICA supports the commitment of the Bank 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 principles. 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 local institutions / procurement staff / companies / professional organizations.** The development of local industries raises questions of ownership given the current evolution of global trade and has impact on such critical issues as preferences. The development of local industries shall be contemplated in the Bank procurement policy. One suggestion is to include mandatory training as part of contract execution when the tender is granted to large and experienced Contractors.

CICA Recommendation: CICA suggests that Capacity Building should keep on being part of the Bank's policy. How would the Bank effectively choose which countries to focus on capacity building activities? The choice can be made based on the results of a Self-Assessment Programme of Local Rules of Procurement led by the country. The programme will be developed in a framework involving the country authorities in charge of public procurement, the World Bank and an expert group composed of North/South representatives from the private sector (engineering and contractors), international organizations including those of donors (members of the OCDE Development Assistance Committee – DAC), other MDBs and bilateral development agencies as well as representatives of civil society. The results of the self-assessment will then be reviewed by the expert group and a capacity building programme will be set up, based on the findings and recommendations resulting from the identification of lacking knowledge and practice areas, and implemented with the financing from MDBs or the use of Trust Funds.

🚧 Increase harmonization among partners

CICA Recommendation: The Bank being party to international commitments on harmonization and convergence to enhance the effectiveness of development programs with specific actions to be taken to strengthen procurement capabilities of recipient countries, this requires the Bank along with other donors, i.e. MDBs but also bilateral development agencies and private donors, to strengthen their financial cooperation for large projects and their harmonization efforts that the Bank leads around international procurement standards. These efforts are all the more necessary that we see increasingly large projects with multisource funding, with the aim of involving the private sector. Their



regional dimension justifies a greater compatibility of country procurement systems in order to achieve these projects.

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

🚧 Supervision over the full project cycle is a key element

For large and/or complex projects, CICA believes that the Bank shall restore the key role of the independent Engineer in important areas such as time, scope, additional works, remedies, time and acceleration, procedure for the acceptance of payments due to the company, etc.

Regarding problems of payment, we must ensure that the payments that depend on the Borrower (either the part that directly funds or assistance received through budget support) must be paid to the company within the contractual deadlines.

CICA Recommendation: CICA suggests the Bank to find solutions to improve the supervision of the project focusing on the role of the independent Engineer, the proper implementation of payments and the full enforcement of arbitral awards in favor of the Contractor.

On this last issue concerning the execution and payment of awards in favor of the Contractor, CICA questions how the Bank can facilitate this process.

8. 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 policies?

🚧 Prequalification criteria

CICA recommends that it is favorable for both employers and the contractors to rely, in the case of major civil engineering projects, 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 lead to a higher standard of competition.

Furthermore, 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 (use of references and support of the parent company), 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.

Last but not least, the World Bank should ask Contracting Authority to only prequalify those bidders that can demonstrate their ability to satisfy MDBs policy goals on environmental and social sustainability may proceed. Against that background, CICA proposes to enlarge the Bank's prequalification procedure with sustainability criteria, such as:

- Certification for Environmental Management (ISO 14001 or internationally recognized equivalent)



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- Certification for Health & Safety (OHSAS 18001 or internationally recognized equivalent)
 - Respect of Core Labor Standards (SA 8000, Global Compact or internationally recognized equivalent)
 - Sustainable construction standards and criteria: to be defined, taking into account notably waste management policy, energy efficiency and water use in the construction process, responsible material procurement, etc.

CICA 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, CICA 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, accommodation, training, corporate governance and with the Bank's goal to finance inclusive growth and the local income.

Paris, September 28, 2012

