

EIC Position Paper

on the

Proposed Revisions to the Guidelines Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and ICA Credits by World Bank Borrowers

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. In 2009, European contractors were active in all world regions and generated an international turnover of 150 billion €, thereof around 40 billion € in non-OECD economies.

EIC is consistently advocating fair and transparent international tender and contract conditions and is through the so-called International Technical Advisory Group ("ITAG") collaborating with the World Bank on its Pilot Programme on the Use of Country Systems in Bank-Supported Operations.

EIC considers it a very positive step that the Bank is asking the global business community for feedback on this important subject matter. EIC commented already in 2003 on the then proposed revisions of the Procurement Guidelines and made several suggestions for their improvement. We have again carefully studied the revised version of the Procurement Guidelines 2010 and have prepared our comments measuring them against the four considerations that generally guide the Bank's requirements. These are:

- 1. the need for economy and efficiency in the implementation of the project, including the procurement of goods and works involved;*
- 2. the Bank's interest in giving all eligible bidders the same information and equal opportunity to compete in providing goods and works financed by the Bank;*
- 3. the Bank's interest in encouraging the development of domestic contracting and manufacturing industries in the borrowing country; and*
- 4. the importance of transparency in the procurement process.*

With regard to the proposed revisions to the guidelines the EIC would like to point out the following.

I. INTRODUCTION

1.2 General considerations

EIC submits that – notwithstanding the fact that the Bank is not a party to the contract resulting from the tender process – it would be pertinent if the Bank provides in the Procurement Guidelines for the general possibility of **payments directly to the contractor in case of default of the Borrower** or if it **assigns certain rights of the Loan Agreement** to the contractor. Whilst we acknowledge the general principle of Borrower ownership, it is an unfortunate fact of life that the current system of “non-interference” of the Bank has often the unwelcome effect of **late or even lack of payment by the Borrower**. The option proposed by EIC would demonstrate the Bank’s commitment to a fair and appropriate application of Bank funds and the Bank would put itself in a better position to control the execution of the project in its own interest if a major default should occur.

1.5 Applicability of the Guidelines

EIC is surprised to find a **reference to the “Use of Country Systems” (UCS programme)** under footnotes 10 and 39 (clause 2.15 [Language]) and later in clauses 3.1 [General] and 3.20 [Use of Country Systems] of the revised Procurement Guidelines. EIC is fully aware that a respective Pilot Programme is underway – and is in fact actively participating in the International Technical Advisory Group (ITAG) advising the Bank – which has the objective to shift the Bank’s role from providing prior review of procurement proposals to providing review after transactions have occurred, provided that national procurement systems are of sufficient quality and capacity to achieve generally the same results in terms of economy and efficiency as can be achieved through application of Bank procedures. However, as this programme has not moved out of the pilot stage (in fact to date no candidate country has been able to demonstrate that it has national procurement systems in place which would meet the requirements of the UCS programme) it seems premature to codify UCS within the Guidelines as if they were fully operational. **EIC, therefore, asks the Bank to postpone any reference to the UCS programme until a group of candidate countries has been officially declared eligible by the Board of Directors of the World Bank for the use of its national procurement system.**

1.6 & 1.7 Conflict of Interest

The Bank has considerably expanded the criteria for conflict of interest. EIC would like to draw the Bank’s attention to the fact that personal relationships and sub-contractors’ involvement are sometimes issues which a bidder can hardly control or even be aware of. In addition, and bearing in mind that many bidders participating in World Bank tenders may actually be part of a larger group, a potential bidder may not even be informed of the participation of another company of the group during the design phase. Therefore, **EIC would recommend restricting paragraph 1.7** to cases where a bidder directly controls through majority shares or voting rights or common management a company which has provided consulting services as well as **allowing for a bidder’s declaration that it did not benefit from any particular information**. Last but not least, as written, the clause

apparently relates only to privately organised companies and **EIC queries if and how such conflicts of interest are regulated in the case of a government-owned enterprise or institution** (see also next comment).

1.8 – 1.10 Eligibility

EIC holds that in order to comply with sub-clause 1.2 lit. b), which requires the Borrowers to give “*all eligible bidders from developed and developing countries [...] equal opportunity to compete in providing goods and works financed by the Bank*”, the **Bank needs to prevent unfair competition** between privately-owned government-owned enterprises or institutions, **regardless of whether they have their legal seat inside or outside the Borrower’s country**. Therefore, EIC asks the Bank to **delete in sub-clause 1.10 lit b) any reference to the Borrower’s country** as the distortion of competition is not arising from the location of the state-owned entity but from the risk of hidden state subsidies towards government-owned entities. The emphasis should be, therefore, on the criteria under which such competition can be acceptable. In order to verify the autonomy of the state-owned entity the following sentence should be added at the end of the sub-clause: “***Borrowers are required to verify that government-owned enterprises or institutions have demonstrated their legal and financial autonomy by means of a balance sheet audit carried out by a reputable international accounting firm in accordance with internationally recognised accounting rules***”.

1.13 Bank Review

EIC acknowledges the Bank’s general policy in accordance with clause 1.2 is that the responsibility for the implementation of the project rests with the Borrower. However, we feel that fulfilment of the requirements of a fair, transparent and efficient tender process can only be achieved if the **Bank maintains an increased influence on the evaluation process** in form of a **full-scale project control mechanism** which begins at the pre-qualification stage and ends only after the final settlement of all disputes related to the project financed wholly or partly by the Bank. Therefore, the Bank should not leave the entire responsibility of the tender procedure with the Borrower, but share this burden – considering its own four key principles mentioned above – by **closely reviewing the essential steps of both the procurement decision and the project execution**.

Against this background, **we agree with the refinement of sub-clause 2d) in Appendix 1** [Review by the Bank of Procurement Decisions and Publication of Awards of Contracts] which states that “*if after publication of the award, the Borrower receives protest or complaints from bidders, a copy of the complaint, the Borrower’s comments on each issue raised in the complaint, and a copy of the Borrower’s response shall be sent to the Bank for its review and comment.*” EIC would recommend incorporating a similar provision for complaints from the successful bidder during the project execution. EIC also **welcomes the new wording introduced under lit. j)** but would still recommend that the **Bank stipulates the requirement to provide a copy of each original bid at the date for submission of the tender to be safely stored with the Bank** in order to prevent any possibility for subsequent falsification.

1.16 & 1.17 Fraud and Corruption

EIC observes that the clause has been tightened in order to punish also any indirect infringement against the Bank's ethics policy rules. EIC supports the Bank's efforts to banish unethical behaviour from the procurement and execution of Bank-financed contracts. We do continue to oppose, however, any unilateral requirements which relate to bidders only. Instead, EIC proposes an **undertaking that obliges all parties to sign a Joint Code of Ethics** which expressly obliges the Borrower as well as consultants, suppliers, contractors and their agents to observe a *"country's laws against fraud and corruption"*. Similarly, the Bank is strongly urged to **apply sub-clause 1.16 lit d) also to Borrowers** and to **introduce similar sanctions against Borrowers** which have violated the Bank's ethics policy rules.

II. INTERNATIONAL COMPETITIVE BIDDING

2.6 Two-stage Bidding

EIC considers the changes that the Bank is making to this paragraph as a **step forward**. It appears, however, that two-stage bidding is being restricted to complex works of a special nature, such as industrial plants and facilities, or involving complex information and communication technology and cannot apply to "ordinary" construction projects even if they are of a sizeable value. EIC holds, by contrast, that **the two-stage bidding procedure may be applicable in all cases of sizeable project value and/or where the Borrower does not wish or is not capable to prepare a detailed design**. EIC agrees again with the Bank that the second stage of the bidding be based on a completely transparent, revised technical and pricing policy.

2.9 & 2.10 Prequalification of Bidders

In line with our earlier public statements EIC recalls that the **prequalification process should be considered as an opportunity to raise the standard of the competition** by setting out the minimum requirements to be met in terms of the tenderers' technical ability, financial position, capacity and experience. By introducing an intense and comprehensive screening of the candidates' general performance capacities, the Borrower can establish a limited number of experienced and qualified bidders that have the intention on submitting competitive tenders, thereby focusing, not limiting, the competition. The pre-qualification process should be based entirely upon the capability and resources of prospective bidders; **(i) experience and past performance (ii) capabilities and (iii) financial position**. Again, it appears that the Bank would like to restrict pre-qualification to complex works of a special nature, such as industrial plants and facilities, or involving complex information and communication technology and cannot apply to "ordinary" construction projects even if they are of a sizeable value. EIC holds, by contrast, that **prequalification may be applicable in all cases of a sizeable project value where the high costs of preparing detailed bids could discourage competition**.

2.11 & 2.12 General

EIC notes that the Bank now prescribes that *“The bidding documents shall not indicate detailed Borrower’s detailed Borrower’s cost estimates such as priced bills of quantities”*. Conversely, EIC would expect that **bidders are specifically informed** by the Contracting Authority, in case the award is based also on **additional criteria to price, such as quality, technical merit, environmental and functional characteristics, running costs, cost-effectiveness, technical assistance, delivery date or period of completion**, about the relevance of such additional criteria and **their relative weighting**.

2.16 – 2.18 Clarity of Bidding Documents

The Bank should ensure that the **Borrower has carefully prepared the tender** to such detail that there are no “white spots” in the information issued to all bidders, thus resulting in price quotations that contain a minimum of guess work, which is often caused by insufficient data in the tender documents, and which generally tends to either inflate the price or put considerable strain on the execution of the contract where the contingencies built into the price prove to be insufficient during the execution of the project.

2.34 -2.36 Terms and Methods of Payment

Recalling our comment with respect to clause 1.2 [General Considerations], EIC submits that it would be pertinent if the Bank provides in this chapter for the general possibility of **payments directly to the contractor** in case of default of the Borrower or if it **assigns certain rights of the Loan Agreement to the contractor**. In the light of frequent complaints about late or even lack of payment by the Borrower the option proposed by EIC would demonstrate the Bank’s commitment to a fair and appropriate application of Bank funds and the Bank would put itself in a better position to control the execution of the project in its own interest if a major default should occur.

2.37 Alternative Bids

EIC welcomes that the Borrower is free to allow the submission of alternative bids. EIC holds that **alternative bids should be more encouraged in the Procurement Guidelines** because that would lead to an increased quality-based competition rather than focusing exclusively on the lowest price of bids. The idea matches with the concept of the “Economically Most Advantageous Tender” (EMAT) as laid down for instance in the EU Procurement Directives. See also the EIC statement referring to paragraph 2.59.”

2.38 Conditions of Contract

Where Borrowers have to use standard conditions of contract through the Bank’s Standard Bidding Documents, as it is the case in the Procurement of Works with the **FIDIC “MDB Harmonised Construction Contract”**, it is of paramount importance that the

Procurement Guidelines obligate the Borrower, not to deviate from the **General Conditions (Part I)**, as they provide a **baseline for the fair balance of risks** in crucial items such as amount and duration of guarantees, the terms of payments and the procedure for certification. Regrettably, it is often the practice, even under MDB-financed projects, that a Borrower changes the balance of such risk allocation through home-made specific conditions to be more to its favour. Bearing in mind the 2nd sentence of the clause, which allows the insertion of *“any special conditions particular to the specific goods or works to be procured and the location of the project”*, EIC suggests that the **Bank draw up – after consultation of the business community – a conclusive list of permissible Particular Conditions.**

2.39 & 2.40 Performance Security

This clause blends the issue of retention moneys into the security for the Employer for a possible breach of contract by the Contractor. Whilst the retention money is common practice to increase the security for an Employer, it puts a heavy burden on a company's cash flow. EIC welcomes the general possibility to substitute the retention money by a Bank guarantee but **would ask the Bank to provide for the possibility to replace the retention money already from the outset of the project** (and not only after provisional acceptance).

2.43 Applicable Law and Settlement of Disputes

EIC would like to recall that the use of **binding dispute review procedures** during the construction period as well as **international arbitration** – probably under the expanded jurisdiction of the **ICSID regulations** – are important tools to resolve remaining disputes between the Borrower and the contractor. EIC very much welcomes that the Bank now, in principle, “requires” international arbitration “in a neutral venue”. We would like to reiterate, however, that in our 2003 Position Paper we have emphasised that the commencement of international arbitration procedures should not be subject to any further approval by any of the Borrower's state authorities. We are **concerned that the general rule becomes over time** (or even from the beginning) **an exception** as the clause provides for a possibility that *“the Bank [can] specifically agree to waive this requirement for justified reasons such as equivalent national laws and regulations for arbitration procedures”*.

2.59 Award of Contract

It is EIC's firm belief that **award criteria beyond lowest price**, such as quality, technical merit, environmental and functional characteristics, running costs, cost-effectiveness, technical assistance, delivery date or period of completion, etc., can contribute effectively to the goals pursued by the Bank in reducing the strain on the Borrower's budget in later years through e.g. reduced maintenance costs, and thus leaving more money available to the Borrower for other investment necessities. Therefore, **EIC would encourage the Bank to also stipulate the option of awarding a contract on the basis of the “economically most advantageous tender”**.

III. OTHER METHODS OF PROCUREMENT

3.20 Use of Country Systems

We would like to reiterate that EIC is surprised to find a **reference to the “Use of Country Systems” (UCS programme)** in the 2010 revised version. We are certainly aware that a respective Pilot Programme is underway – and is in fact actively participating in the International Technical Advisory Group (ITAG) advising the Bank – which has the objective to shift the Bank’s role from providing prior review of procurement proposals to providing review after transactions have occurred, provided that national procurement systems are of sufficient quality and capacity to achieve generally the same results in terms of economy and efficiency as can be achieved through application of Bank procedures. However, as this programme has not moved out of the pilot stage (in fact to date no candidate country has been able to demonstrate that it has national procurement systems in place which would meet the requirements of the UCS programme) it seems premature to codify UCS within the Guidelines as if they were fully operational. **EIC, therefore, asks the Bank to postpone any reference to the UCS programme until a group of candidate countries has been officially declared eligible by the Board of Directors of the World Bank for the use of its national procurement system.**

Berlin, 15th May 2010