



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

**The President**

**Our ref:** LS-0121-B

**Date:** December 15, 2007

**Mr Jeffrey Gutman**

Vice-President and Head of Network  
Operations policy and Country Services  
Director of Operations Services (OPCOS)  
The World Bank  
1818H Street, N.W. Washington

Subject: Country Systems Procurement

Dear Mr Gutman,

Thank you for the opportunity you gave us to comment on the "Detailed Methodology for Procurement Country Systems Piloting Program". Although we would have preferred having more time to prepare our response, we thank you for having been kind enough to postpone the deadline.

As in 2005, we agree with the principle of increasing the use of country systems in Bank funded projects but we believe an important number of improvements must be made in order to make sure the implementation of this program shall not have detrimental effects for all the parties involved. The lack of best practices that could be used as reference is the key factor in the reservations we must make on the immediate implementation of the system.

We have attached as Annexes 1 to 6 the detailed responses to the questions of the Bank Site.

If we cannot support the whole proposal as currently drafted, we nevertheless are looking forward to working with you in order to improve the current draft and make it operational as soon as possible; the eligible countries indeed are waiting eagerly for its implementation.

Yours faithfully

Manuel R. Vallarino

cc. : P. Harrold / B.Becq



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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### **ANNEX 1: Response to WB Question # 1**

The World Bank has proposed a detailed methodology for a procurement country system piloting program in 8 - 10 countries. What remaining questions need to be addressed or clarified about this program?

Time allowed for participants to provide the WB with their response is very short and makes it difficult to provide a comprehensive and detailed analysis of the proposed methodology, which is very technical. It also is a pity that the Bank did not make a detailed response to CICA comments on the 2005 Bank proposals.

CICA considers as a progress that, contrarily to the 2005 draft, the current methodology starts with a phase in which the Country is assessed.

Nevertheless, there are still a large room for clarification about the whole process

#### **1. The stakes for the Construction industry.**

- a. A chart showing how Bank funded projects are and shall be managed would help appreciate better the impact of the changes proposed, nevertheless, the implementation of the country systems generates mixed feelings amongst the contractors.
- b. MNEs from donor countries are concerned by a move that could close national markets through practices that could bias fair competition and even favour unethical behaviours, which would be detrimental not just to them but also to the borrowing countries involved by limiting competition, a source of progress.
- c. Eligible countries welcome a system that, they hope, would facilitate the access of local SME's to the Bank funded projects and also make easier and quicker the flow of Bank loans to these countries.
- d. In fact these positions must not be seen as antagonistic as long as a fair set of rules and practices is established and fairly implemented.
- e. This position is close to the one of the Bank whose questionnaire concerns the legal system that would be used as a framework for the implementation of the "Country systems"
- f. Nevertheless, CICA must remind that it does not consider current practices as "best practices" but just as "most commonly used practices" but the fact that these practices are implemented according current Bank rules is a reassuring factor for the Contractors' community; they cannot contemplate without any misgivings the implementation of "equivalent rules" by Borrowers and entities,

who may not have a convincing record of "good governance" and who would not give serious guarantees concerning the evolution of their system.

## **2. The Bank's long term vision.**

- a. The methodology considers the case only of 8-10 countries to which the Bank's methodology shall be applied in order to determine "pilot projects". Is this position really sustainable at mid- or long-term and how does the Bank see the future in regard with other countries asking for implementation of the "Country systems" for themselves. There is no indication of the way the Bank sees its future in relation with the use of country systems; is it the policy of the Bank to get this system generalized or shall it be restricted to a reduced number of countries? Such clarifications are necessary because the current drive regards a very limited part of the Bank's activity; current proposals therefore cannot have much influence in alleviating Bank's tasks and, in particular, does not concern the poorest countries, which are the clients targeted in priority by the Bank
- b. It does not state clearly enough the technical objectives of the proposed methods, in particular:
  - What flaws or shortcomings of the current methodology the new procedure is supposed to address?
  - What progresses are expected from the new methodology?
  - What the Bank shall accept and what it shall never accept from eligible countries?
  - Which tools the Bank shall use to avoid occurrences of the unacceptable?
  - How does the Bank intend to maintain the system and make it progress once a country has got the label of eligibility
- c. The main underlying question is therefore "How shall the Bank keep the control of the system". The draft is not clear in this regard.

## **3. Lack of sustainable commitment from the Borrowers and the agencies**

- a. The methodology proposed by the Bank is a benchmarking of the procurement system of the country.
- b. This method is certainly not valueless but is very static if not accompanied by a whole set of adequate measures aimed at maintaining the system. We must remind that quality - in procurement also - is not a status; it is a process. The real concern cannot be just the Borrower having an "equivalent system" at the moment of the benchmarking. It is also guaranteeing a positive evolution of the system in the future.
- c. The implementation of the country systems should therefore include provisions aiming at:

1. Avoiding Borrowers systems deteriorate once the "equivalence certificate" granted. Experience of some newly admitted members in the EU has shown that the risk must be taken seriously.
2. Making sure that eligible countries upgrade their systems in accordance with and at the pace of the forthcoming improvements of the "Best international practices" in procurement and contract managing.
3. Entitling the Bank to downgrade, if necessary, borrowers, an operation that might be "politically" very difficult to achieve but that must be contemplated to make the system reliable.

No provisions seem to have been made to address these three very important issues; as a consequence the procurement system of the cleared country may evolve in a very negative way having bad consequences for the Construction Industry and its workers and the country itself.

- d. In order to prevent the evolution mentioned above, it would be absolutely necessary that the borrowing entities commit themselves to a "Code of continuous progress" in the matter related to procurement at large - including the management of the works once awarded.

#### 4. **A partnership for progress**

- a. The application of Country Procurement Systems - as proposed - is in practice a unilateral mark of confidence from the Bank.
- b. As, once again, the experience of some of the EU new members evidenced it, these "gentleman agreements" based on unilateral trust does not work any longer as soon as national or private interests conflict with the principles agreed upon, it means very soon.
- c. It therefore should be advisable that the "Country system" be a "contract" between the Bank and the eligible country through which:
  - The borrowing country commits itself to maintain and upgrade its system according to the evolution of the "best practices"
  - The Bank is entitled to enquire each time when need be about the implementation of the system and even to withdraw its agreement to the Borrowing country.
- d. These measures do not mean in any way a lack of trust into the potentially eligible countries; they are just elementary prudence; they would help preventing misgivings generated by this new system of procurement. Above all they would help make sure that the country keeps the full benefit of sound governance.
- e. Nevertheless, these "commitments" and "contracts" shall be of poor help if not supported by a comprehensive and reliable system of monitoring ensuring continuous progress.

#### 5. **Using the ISO "continuous progress scheme"**

- a. In its July 29, 2005 position paper ref. PP-0015-G, CICA made a very clear reference to the ISO standards to manage the whole process of the increase of the use of Country systems in procurement of the Bank funded projects. We think useful to recommend once again this approach to manage the whole system either by the Bank, or by the Borrower. Provisions of this system should also be used to word the above proposed contract between the Bank and the Borrower.
- b. The main features of ISO standards, whose effectiveness is not any more challenged, are:
  - Defining clearly the objectives
  - Commitment of the management to continuous progress
  - Defining the means that shall be used to achieve the objectives (Phase 2: "P-Plan")
  - Setting the tools that shall permit the monitoring of the objectives through, notably but not exclusively with a system of relevant indicators (Phase 3: "C-Check")
  - Reassessing at fixed time (yearly at least) the objectives, the relevancy of the indicators (and notably the risk of adverse collateral damages) and setting new objectives (Phase 4: "A-Act")

In the methodology proposed, no reference, even implicit, is made to such process, neither from the Bank nor from eligible borrowing countries, nor from eligible agencies which all should, in our views, commit themselves into such system.

## **6. The time schedule issue**

- a. Current methodology does not set any time schedule for the implementation of the country systems in pilot countries.
- b. It consequently is very difficult to assess the feasibility of the whole process and agreeing would be giving the Bank a blank check of a sort.

## **7. The feasibility issue**

- a. Assessing the country system of a country is certainly a delicate task and we are not sure that the Bank has, at the moment, all the resources necessary to proceed with 10 countries at a time to a sufficient in depth analysis of systems that would later be used by eligible countries without Bank supervision.
- b. In particular, the ex-post analysis shall be made much more difficult. The ISO standards dispose that the Checking indicators must be set from the inception of the project during the first stage of the Quality Wheel (phase "Plan") in order to be recorded and followed up in a reliable way during the execution phase (phase "Do") and provide a reliable basis for the assessment phase (phase "Act"). The task of the Bank in the final assessment phase by the Bank shall be made much more difficult and even impossible if the required follow-up indicators were not set from the start. It shall be possible only if very clear rules are set at the start and implemented all the duration long of the works, which does not appear very clearly in the methodology.

- c. This feasibility issue shall still hold once the system implemented and may be made still more critical. No doubt that an ISO based monitoring system could help.

## **8. The political issue**

- a. The procedures submitted to our comments concern, according to the Bank's own declaration, a limited number of pilot countries and agencies and probably at the end of the day a very small part of its portofolio.
- b. Nevertheless, some doubts still remain:
  - Is such a position sustainable even at short term? All countries shall probably ask for entering the Country System Procurement and how shall the Bank resist such move and control it if other countries' requests are agreed.
  - The Paris declaration signed by the Bank contemplate as a 2010 target an use of country system for 90 % of the donors; does it mean that the Bank intends to generalize the use of country systems.
- c. There is therefore a question of principles: shall the 10 pilots chosen in a first stage be kind of Trojan horses preparing an in-depth change of the rules of the Bank? And shall today's agreement on the methodology be used on a much larger scale and for much more countries where it could not be relevant with detrimental side effects on the whole system?

### **CONCLUSION**

**The three main remaining questions regard:**

- a. **The Bank's objectives and policies**
- b. **The mid- and long-term sustainability of the system**
- c. **The feasibility of the implementation of the system**



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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### **ANNEX 2: Response to WB Question # 2**

The OECD/DAC benchmarking index provides for scoring of 54 sub-indicators on a 0-3 scale with a score of 3 representing best practice. 30 of 54 sub-indicators in the OECD/DAC tool have been identified as critical and require achieving the highest score of 3 for 22 of the sub-indicators or a score of 2 with an agreed action plan for 8 of the sub-indicators. Is this achievement level appropriate and if not, why?

The issue of indicators and sub-indicators is a rather difficult one to deal with; it is in reference to it that we asked for a postponement of the deadline and unfortunately we have not been able to go through this question that would require a time consuming combinatory analysis.

We therefore shall limit our questions to the method used:

1. The purpose of the benchmarking is to establish an equivalency with the WB standards and the benchmarking is made against OECD/DAC benchmarking methodology.
2. At the moment, and in spite of some progress made thanks to the cooperation of the Procurement department of the WB, we consider that there are no "Best practices" that could be considered as reference. Nevertheless, the Bank's presence is part of the system; even if some countries would adopt without any modification the Bank's Procurement Documents, these documents would not be in the eyes of Contractors "equivalent" because the authority in charge of the implementation would imprint its own features making it a very largely different system.
3. Another point, purely theoretical but with very practical consequences, that leads to a precautionary approach is that the notion of equivalence is not transitive: A may be equivalent to B and C to B does not entail that A be equivalent to C.
4. So, the whole concept of equivalence must be handled with precaution, having in mind that the implementer is not known.
5. Regarding the indicators and sub-indicators, they all correspond to good governance criteria - although certainly not sufficient by themselves - and we do not see why just a limited number of them are required, except if there is a deliberate political will from the Bank's part to "make it work". As far as we understand, potentially eligible countries

have no record of good governance; it is not a good service to their people to downgrade requirements from their governments.

6. Another matter of concern regarding the limitation of the number of indicators whose compliance is required is that it may create some loopholes through which mandatory requirements are made devoid of concrete content just as "particular conditions" are too often used to "bypass" "General Conditions"
7. In fact contractors feel ill at ease with the very general requirements of the indicators. For them what matters are concrete implementation and enforcement. The discussions we have with the Bank within the "Restricted Working Group Meetings" are a good example of what we mean.
8. For instance:
  - a. Regarding indicator 12 dealt with in Question # 5, we can say "Yes, The bank has ethics and anticorruption in place" but we can also say "These measures do not deal with the dynamics of corruption and they are not fully relevant to the issue at stake".
  - b. Regarding Sub indicator 8.b "Contracts include dispute resolution procedures that provide for an efficient and fair process to resolve disputes arising during the performance of the contract" but contractual provisions limit the time during which the Contractor may present his claim and leave him defenceless before Employers harassment...
9. The entrepreneurial culture is "act and react" it is the reason why we insisted in the response to question 1 on the monitoring of the "continuous progress" with the certainty that if such a system is not set in place and given the means to work properly whatever shall happen. This system was already proposed in our July 2005 comments, we regret this letter was not replied and our concerns were not addressed.
10. In fact the lack of concrete detailed really "Best practices" that could implement at the contractual level the indicators and sub-indicators proposed is very critical in the assessment of the methodology proposed.

## **CONCLUSION**

1. **The set of indicators proposed is relevant and necessary: all should be made mandatory.**
2. **The indicators proposed are not sufficient by themselves to guarantee fair conditions fair competition and ethical behaviours.**



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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Date: December 12, 2007

### **ANNEX 3: Response to WB Question # 3**

Under this proposal, not all procurement would be included in these pilots. Should the Bank include complex, high value procurement such as those [e.g. highway construction, power generation equipment, information technology] now cleared by the Operations Procurement Review Committee (OPRC) in the use of pilot country procurement systems?

#### **1. Background**

The 2005 WB paper on increasing the use of Country systems in procurement set a threshold of 25 million US\$ above which "the Bank would continue to carry out prior reviews" and then escape to the use of Country Systems (Executive summary, page ii). We would have preferred this threshold to be set at 15 million US\$.

The present proposal does not refer to any financial threshold but just to technical threshold of complexity and "high value".

The Construction market may be divided in two broad categories of very different sizes:

- A national and even sub-national market concerning local SMEs or subsidiaries of MNEs
- An international market concerning MNEs

The criteria differentiating the two markets are size and technology; under a given threshold - 15 million US\$ for instance - MNEs are no more competitive and therefore not interested: it is a consequence of the economics of the Construction industry, not a matter of regulation. By nature the Construction is only partially global: to summarize it "You may sell a truck built in Stuttgart in Mali, you cannot sell a bridge built in Stuttgart in Mali"

This difference between local and global market must be considered as a criteria to appreciate the relevancy of the country systems.

#### **2. Principles**

- a. CICA is the unique representative of the global construction industry; it gathers MNEs as well as SMEs from the highly developed to the poorest countries, its position in respect to Question 3 takes into account both the positions of its members and the common good of the Contractors, their workers, the Borrowers and the development concerns.
- b. At the moment, CICA's position is

- Regarding the national markets, the increased use of Country systems may, if well implemented without downgrading the best standards and if periodically upgraded to comply with the latest progress in Construction standards, be a good solution: it could facilitate the access of local SMEs to Bank funded projects through easier processing of Bank funds to the country and the uses of national regulations the SMEs are more familiar with; it shall enhance local competition, source of progress.
  - Regarding the global market (defined by either complex, high added value projects or a size superior to 15 million US\$) the use of Country systems goes against the objectives of harmonization and would make more difficult the access of the market to MNEs thus reducing competition with consequences detrimental to the borrowing countries.
  - At the moment, the inclusion of the projects relevant from global market into the country systems would certainly increase the risks of mismanagement of the project either through lack of technical capacity available or through unethical behaviours.
  - It anyway appears really too early to take this measure at the present stage where only pilots are concerned and without any feedback of how the country systems work when implemented in less important projects.
- c. Nevertheless, in a mid term perspective, the inclusion of global projects into country systems could be contemplated. But due to the importance of the subject matter, the World Bank would be well advised to field-test the application of Country Procurement Systems in the context of projects of the "local market" below a certain threshold. If and when a country has proved that it is able to fairly operate its national procurement system over a period of no less than 10 years for these types of projects, only then it should be allowed to tender bigger projects on the basis of its country system. More complex projects would also require a prior technical audit of its capacity to manage such projects. The World Bank should involve the private sector in the implementation process of country systems, particularly in the monitoring process, and it should communicate with both the local business community as well as with fully representative international business associations, such as CICA, FIDIC, etc.

### **3. Conclusions**

**No, the Bank should not, in the current stage, include in the use of pilot country procurement systems:**

- **Technologically complex projects;**
- **High value projects of above 15 million US\$**



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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Date: December 12, 2007

### **ANNEX 4: Response to WB Question # 4**

Is the proposed handling of the Selection of Consultants in the pilots satisfactory? If not, how can this be strengthened?

CICA not being an association of Consultants, it is difficult to have any detailed opinion on this issue.

As stated in our paper on Quality Assurance in Construction (CICA position paper PP-0034), the capacity of the team of consultants is of paramount importance during all the phases of the project.

Nevertheless, if the capacity of the Consultant is necessary for the proper execution of the Works, it is not sufficient; other key factors should be taken into consideration:

1. Are the terms of reference of the Consultant sufficiently well defined to make him able to provide the Contractors with all the data and documents he needs (Concept of turnkey site - Cf. Position Paper PP-0034 on Quality Assurance in the Construction Industry)?
2. Did the Borrower fund the Consultancy budget sufficiently to allow the Consultant to comply fully with its contractual duties?

These two basic questions are not answered in the methodology. CICA's recommendation is that these issues be addressed properly before clearance of the eligible countries in which local preference may play a decisive role.



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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### **ANNEX 5: Response to WB Question # 5**

Are the proposed performance based measures sufficient to address transparency, access to information and governance and anticorruption issues (GAC) that have been raised with regard to the pilots of country systems in procurement?

#### **4. Preamble: Ethics and anti-corruption in World Bank methodology**

- a. The proposed methodology refers explicitly to chapter 12 "Ethics and anticorruption policy and measures" of the OECD-DAC/World Bank "Methodology for assessment of national procurement systems"
- b. As a preamble we must notice that the concept of ethics here referred to is not the same as the one referred to by CICA: shoddy and misleading bidding documents are not considered as "unethical" by OECD-DAC/WB round table, but CICA insists: they are and they should be liable to the same treatment as "Corruption" and "fraudulent actions"
- c. CICA's positions must also take stock of the way similar policies are, until now, implemented or understood either by IFIs among which the Bank, by public opinion, media and single issue NGOs pretending represent the voice of the civil society.
- d. This system scores seven baseline indicators, 2 of which (12.c and 12.d) correspond to indicators of performance.
  - i. Five indicators ((12.a, b, c, d and f) refer whether to an existing legal frame dealing with corruption and fraudulent actions; the focus on punishment is clear.
  - ii. The 12.e refers to stakeholders support to integrity which is always guaranteed even by those who most benefit from extortion and bribes. Absence of such support is certainly a matter of concern; existence does not mean anything.
  - iii. The 12.g refers to code of ethics - certainly a good thing but the real issue is the practical implementation - with a focus on disclosure, it means an eye towards coercive and punitive action rather than tackling the causes.

As a consequence, the methodology may be rightly suspected of being a new version of the "Bashing the Contractor" approach aiming more at "scapegoating" some stakeholders without tackling a system in which corruption is "built in" to maximize the benefits of other stakeholders.

- e. CICA evidently supports the measures recommended by these 12 indicators but they should be part of a much wider package addressing more directly the causes of unethical behaviours. Given the importance of the issue in many countries, preventive actions should be given the priority. Criminalization policies are necessary but they may be useless and even counterproductive if not first preceded and then accompanied by contractual changes that would eliminate the dysfunctions generating unethical behaviours (Contractual clauses and practices fostering irresponsibility in CICA language) The line of action should be "End corruption not just fight it"
- f. Having this in view, CICA suggest to add at least four indicators in chap 12:
- i. Indicator 12.h would make mandatory the setting up of a committee composed of responsible stakeholders involved in the works to analyse on a technical point of view the structural causes of corruption and propose the relevant changes in legal, financial, contractual practices. Contractors, Consultants, public Agencies, governmental Departments shall of course be part of this committee which should work under very strict conditions of confidentiality to make it effective. Performance indicator would be evident: the number of changes implemented as follow-up of the recommendations of this committee.
  - ii. Indicator 12.i would make mandatory to public agencies and government departments the establishment and the maintenance of a manual of procedures regarding ethical issues (in the sense of CICA)
  - iii. Indicator 12.j would allow challenging public decisions regarding the preparation of the bid in particular the selection of bidders and the awarding of the contracts.
  - iv. Indicator 12.k would allow international arbitration in those matters; governments wanting to avoid international arbitration for the sake of sovereignty may well have something to conceal.
- g. It must be worthwhile anyway noticing that this chapter 12 does not refer to any positive reference to any set of "best practices" for the prevention of corruption. The lack of such "best practices" from the Employers' part was exposed by the private sector, notably during the BIMILACI 2007 meeting in which FIDIC proposed its GPIIMS (Government Procurement Integrity Management System).
- h. The setting up of these "Best practices" should be addressed through a piecemeal, coordinated, comprehensive and realistic approach taking into account all the issues involved directly or indirectly.

## **5. The indicators of performance**

- a. Indicator (12.c) refers to implementation measured through the "percentage of cases that result in sanctions or penalties", CICA's comments:
- i. The system is essentially focused in repression and coercion.
  - ii. Regarding these "sanctions & penalties", no difference is made between those inflicted on public or private sector, neither between corporate/public and private responsibility which makes the indicator not operative in analyzing the causes of "corruption".
  - iii. The indicator on implementation does not refer to structural corrective actions taken by the relevant authorities that could curb corruption and prevent future misbehaviours from whichever stakeholder.

Hence, CICA's opinion:

- This "indicator" refers to an anti-business coercive system which allows keeping a blind eye of the economics and dynamics of corruption.
  - Nevertheless, it would be a lack of prudence not to refer to this indicator at the first step: absence of sanctions and penalties means something that cannot be overlooked.
  - As a long range "indicator", the issue is too complex to be dealt with through an unique indicator.
- b. The second and last indicator in relation to "compliance and performance" is the "Percentage of favourable opinions by the public on the effectiveness of the anti-corruption measures" (12.d).
- i. In this matter, "people who know do not speak, people who speak do not know"
  - ii. A cunning politically motivated press campaign may change these percentages in a very significant way without any real changes in the behaviour of the stakeholders involved in the procurement process.

As a consequence, we consider this "indicator" as not interesting and in this matter any reference of indicators lacks of credibility.

## 6. CICA's proposals

- a. Some of CICA's proposals are well known by the Bank and are listed in the response to question 6.
- b. Others were made in § 1 above
- c. We must remind that the paragraph IV.5 of the "Paris Declaration on Aid Effectiveness" to which Country systems refers, stipulates that "Where corruption exists, it inhibits donors from relying on partner country systems". Therefore, we feel that the World Bank would need to strengthen its supervision rather than reducing it through in an increased use of country systems.
- d. Since the application of Country Procurement Systems means in practice a unilateral mark of confidence from the part of the international donor community, those countries benefiting from such policy shift should have clearly demonstrated beforehand not only that they have equivalent Country Procurement Systems in place, but also that they are appreciating also other important international conventions which have immediate relevance for the international contractual world, such as the World Bank's ICSID Convention and the "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards and have ratified the United Nation Anti-Corruption Convention, the Global Compact, or some convention of the like: the best would be to adhere to OECD 1997 convention.

- e. As important tools, the Bank should also make it mandatory :
- i. To require from Borrowing countries' , Borrowers' and Agencies' commitments to continuous progress supported by "Procurement Code of Ethics"
  - ii. To introduce an integrity manual of procedures implementing concretely the values of the "Procurement Code of Ethics" along the entire value chain, i.e. comprising the Bank itself as well as Borrowers, Contracting Authorities, Consultants, Contractors and Suppliers. This manual should be managed through a quality system such as ISO standards requiring periodical reviews and reassessments by the highest authorities of the entity concerned to manage integrity, quality, transparency and progress and to ensure the practical and real implementation of the practices and their adequateness with the goals set.



## CONFEDERATION OF INTERNATIONAL CONTRACTORS' ASSOCIATIONS

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### **ANNEX 6: Response to WB Question # 6**

Do you have other suggestions that will strengthen the World Bank Group's efforts to help countries improve their procurement systems and help us learn from these pilots?

#### **7. CICA's position on the so-called "Best practices" in Construction Sector.**

- a. Through its reinforced cooperation with the Bank through the Restricted Working Group Meetings and its dialogue with some major stakeholders of the Construction field such as FIDIC, ILO, IOE, IBA and BWI, CICA has transmitted a set of proposals aiming at improving the way Construction Contracts are executed.
- b. These proposals have been made after an in-depth analysis of the situation of the global Construction Industry as well as a careful examination of the contractual practices prevailing in the field.
- c. This analysis evidenced the higher expectancies of the society at large from the Construction Industry; the standards concerning welfare and occupational safety of the workers, environmental protection, ethics and inclusion into the lives of the communities concerned by the works have been significantly raised either explicitly or implicitly. But the contractual frame in which the Contractors are supposed to work is basically unchanged; the relationship between Employers, Consultants and Contractors are based upon obsolete schemes that do not take into account the need for a closer partnership between these three entities. The globalization of the market add up to this confusion and makes still more urgent rethinking the contractual practices.
- d. As a consequence of these reflections, CICA considers that there are not any more "Best practices" but just "most commonly used practices" that may vary in quality but are all marked by the seal of obsolescence and inadequacy in regard of new expectancies.
- e. The inadequacy of these rules is somewhat mitigated when implementation is made through a reliable entity and in this sense, Contractors feel WB's presence in the

process as a comforting factor while its disappearance through the Country system is a matter of real concerns for many.

- f. The proposals made by CICA can be classified under five main headings:
  - i. Getting rid of the "Contractual Clauses and Practices Fostering Irresponsibility".
  - ii. Promoting the "Turnkey site"
  - iii. Include social and environmental requirements into the contracts
  - iv. Improving arbitration practices
  - v. Increasing whenever possible the use of New Forms of Contract
- g. These proposals constitute a consistent package aiming, also, at "helping the countries improve their procurement systems". They, apparently, are not scheduled in the Country systems paper in spite of the fact that one of the purposes of this system is upgrading local systems.
- h. In CICA's views, the timing of the Country systems is rather unfortunate; it would have been better to first upgrade the contractual practices and only in a second stage check the equivalence of the eligible countries' systems with Bank's practices.
- i. Hereunder we recall the most prominent documents transmitted to the Bank and their rationale.

#### **8. Getting rid of the "Contractual Clauses and Practices Fostering Irresponsibility".**

- a. In order to try to improve governance, to curb corruption and unethical behaviours, to enhance the economical feasibility and actual implementation of the requirements resulting from the new expectations of the civil society regarding environmental, social and ethical values, CICA proposed to the Bank a "How to help Contractors" approach through getting rid of what CICA calls the "Contractual Clauses and Practices Fostering Irresponsibility"- acronym: CC&PFI. This approach takes stock of Contractors' on the spot experience. They are considered by the Contractors' community as a necessary but not sufficient step. Conversely, the refusal of NGOs', IFIs', Governments' or Employers' community to take the juridical, financial and contractual steps they entail is considered by the Contractors as a lack of genuine will to tackle these issues except through ineffectual lip services corresponding to the politically correct trends of the moment.
- b. It is also self evident that the call to more responsibilities from all stakeholders shall greatly enhance the quality of the projects as well as a larger participation from reliable Contractors, then improving quality of procurement and in execution.
- c. The rationale of this approach was defined in the following documents already submitted to the Bank:

PP-0034: Quality Assurance in the Construction Industry

PP-0005: On ethical issues

PP-0009: Unbalanced Contractual clauses

PP-0018: The "How to help Contractors" approach

PP-0019: Protecting contractors from local authorities  
LS-0112: Contractual Clauses fostering irresponsibility  
NP-0048: The ethical issue in Construction Industry  
NP-0063: An overview of CICA's position on Ethical issues  
NP-0064: CICA DG's Intervention during BIMILACI 2007

PP-0006-Social clauses  
Joint Statement BWI-CICA

These documents are not comprehensive and need further developments on which CICA is ready to discuss with the Bank. Discussions with the Procurement department have allowed some progress to be made but there is still much more to do probably by involving more departments within the Bank. This realistic approach clearly requires a kind of "Copernican revolution" to which too many stakeholders are not ready, but once again it is really a necessary step.

d. Considering that:

- i. Contractors consider a criteria of good governance getting rid of these "CC&PFI"
- ii. Current Bank standards still do not fit this criteria
- iii. No reference is made in the proposed methodology to these CC&PFI
- iv. No agenda was set to address Contractors' community request,

CICA considers that the proposed measures are not sufficient and that the transfer of ownership of the procurement to the countries without the traditional control of the Bank shall very likely still worsen the situation.

## 9. The issue of independent arbitration

- a. In the discussions with WB regarding the contractual rules, CICA always insisted on the need of a system of arbitration that would be affordable to the Contractors, which they are familiar with and that would be really independent from governmental pressures; Government and the Borrowers indeed are more or less the same party in litigations and the independence of the justice is not guaranteed in most of the countries, the Bank is dealing with. Consequently, in most of the case adequate international arbitration could be the right solution, provided its ruling be implemented by the borrowing country. The Bank's response was always that it was beyond Bank's power to impose international arbitration to some borrowing countries.
- b. In CICA's views, the process of increasing the use of Country Systems that aims according to WB's statement to increase the quality of the procurement process in eligible country could be an opportunity to introduce effectual international arbitrations in all contracts be they at national or international level. A country that would refuse to accept international arbitration may rightly be considered as trying to escape rules that would limit its freedom to act within or without the framework set by its "Bank equivalent" procurement system; as such it should not be eligible to "Country System in WB funded projects".
- c. Moreover, in order to insure good governance, it should be established that Borrowers' decisions concerning not just the management of the contract once

awarded but also the awarding process could be challenged through international arbitration.

- d. The combination of a system defining more clearly the responsibilities of each party (Contractors-Employers) and of a really independent arbitration system entitled to deal with the whole cycle of the project (Preparation, awarding and execution) could initiate a built in "virtuous circle" in which all the stakeholders would have to pay the price tag for their own shortcomings. It would greatly diminish unethical behaviours, opportunities for Employers' blackmail and corruption and enhance transparency. It is a necessary contractual step prior to criminalization. It of course does not address the issues of grand/petty, centralized/decentralized corruption that must be addressed at the state level. It should also greatly enhance efficiency of the international aid.

## 10. Borrowers' and Employers' commitment to continuous progress

- a. Two to tango: The motto repeated by CICA regarding the integrity issue is that "It takes two to tango" applies also to the execution of the contract in all its stages; problems cannot be addressed but through a common action from all the stakeholders.
- b. What is needed is real commitment of all the stakeholders to address those issues realistically and practically. Regarding corruption, Contractors and Consulting Firms who have made a considerable effort through code of ethics and internal procedures. They consider that these efforts have not been reciprocated by public sector; they must reckon that such policies
  - i. Are a commercial handicap in many countries
  - ii. Are not reciprocated by a equivalent commitment from the public sector (hence the issuance of the GPIIMS by FIDIC)
- c. This fact emphasises a too common attitude of Borrowers and Employers: there is no real commitment to progress from them. During the Dubai restricted Working group meeting, CICA suggested the borrowers - both countries and agencies - implement their own Quality Systems concerning the preparation of the bidding documents, the awarding of the contracts and their execution. CICA recommends again this proposal: eligible countries should be required by the Bank to set up their own manual of practices and procedures that would be managed according to the ISO standards. Such a requirement could greatly help countries to improve the management of their works and the funds received from the Bank, It also would greatly help the Bank in its assessment reports.

## 11. Conclusions

**CICA recommends, preferably prior to the granting of the status to the countries:**

- 1. The implementation of its recommendations,**
- 2. Bank to require from eligible countries and agencies the setting-up of Quality Assurance Systems managed according to ISO rules to start a cycle of continuous progress regarding all the phases of the works projects**