

International Law Institute Comment on the World Bank “Procurement Country Systems Piloting Program.”

The International Law Institute (ILI) welcomes the opportunity to comment on the above World Bank (WB) piloting program. We believe that this WB initiative presents opportunities but also poses some challenges. Before responding briefly to the specific questions, we make the following general background observations.

Introducing a Country System for International Competitive Bidding (ICB)

Until 1987 borrowers were allowed to prepare their own bidding documents to be reviewed and approved by the WB, sometimes resulting in multiple documents, mostly of poor quality. Use of such borrower specific documents on occasion resulted in inconsistent awards to different bidders.¹ Hence the 1987 decision to mandate Bank issued SBD for ICB. Even so, some countries themselves recognized the absence of a proper unitary legal framework and contract documents within the particular country system when conducting international or global competition, and used the internationally produced FIDIC conditions (Red and Yellow books) until the Bank set of SBDs replaced them in 1987.

Subsequently, during the past 20 years considerable resources have been invested, both in terms of expertise and funds, to steadily raise the quality of the Bank issued SBDs and the accompanying processes. Also, new features were introduced, like the DRB which was copied by FIDIC. Further, the document was harmonized across IFIs and bilateral donors, and FIDIC was encouraged to produce a special version for use by the IFIs. The result is an outstanding and workable document. This raises a significant question whether the introduction of the pilot program will be an improvement over the present system, given the enormous effort and perhaps dubious gains. Country ownership is an important goal, but it is also an open question whether countries do in fact feel an overall lack of ownership, given the quality and consistency of the WB ICB documents and processes. We therefore believe that this initiative may possibly set back the accomplishment in reforming ICB and practically standardizing a common high quality bidding document across the developing world. Incidentally the step may also be a damper on the WTO's promotion of the GPA and enhanced international trade.

Introducing a Country System for National Competitive Bidding (NCB)

In contrast to the above observations in respect to ICB, country systems are generally developed for NCB, suited to local laws, traditions and practices. When the WB accepts NCB for certain contracts they should accept the country system without caveats, provided it encourages economy and efficiency, non discrimination, transparency and integrity. There is no harm if the accepted system and bidding documents differ from country to country, unlike in the case of ICB. Until the 1990's the Bank only examined whether the NCB procedures had any serious weakness either in law or in practice and addressed them in the loan documents and since then, in a more elaborate side letter. During the process of implementing country reforms pursuant to CPAR recommendations, the WB has steadily improved various country systems. The ultimate goal should be to accept a country system and documents for Bank projects, without any

¹ An example is provided for illustration. Prior to 1987, there was an ICB for the same equipment at the same time in two different countries resulting in identical bidders. Country X rejected the lowest evaluated bid from bidder A as its bid security was not present at the time of bid opening in the correct amount and correct format. Country Y applied the requirement more flexibly giving additional time after bid opening to the lowest evaluated bidder B for submission of bid security in which bidder A was the second lowest evaluated. When the aggrieved bidder A met the Bank officials for an explanation for losing the award in both countries for opposite reasons, there was really no satisfactory answer. The use of the Standard Bidding Document eliminated such different possible interpretations.

condition or side letter to the loan agreement, and *encourage* a set of Standard Bidding Documents by all agencies eliminating agency specific bidding and contract documents. To that end, improving country systems will be the correct follow-up to earlier efforts, and will compliment the reform agenda.

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?

- 1.1 See general comments. For ICB, the country should continue to follow WB Guidelines and SBDs. Any “equivalent” document could again introduce the proliferation of bidding documents, resulting in different interpretations by different countries and perhaps bringing discredit to the WB. We believe that most countries would prefer to continue to use the WB issued SBD’s for ICB.
- 1.2 Overall, there seems to be an assumption that procurement is centralized and systematic (though there are references to sub-national projects, which should be carried out using national rules), which may indicate that there could potentially be a “disconnect” with some existing practices.
- 1.3 We believe that the discussion of e-procurement could perhaps be expanded, in order to enhance procurement by utilizing electronic advances to the maximum. The discussion in paragraph 7 probably does not take sufficient account of the oversight and control advantages of an integrated e-procurement system, and not just websites.
- 1.4 We believe that there is insufficient emphasis on performance assessment during all the stages referenced in paragraph 21, and perhaps underscores that the *outcome* is not given sufficient weight. Also, we believe that Annex 6 does not provide sufficient detail to support paragraph 21. Further, there appears to be little discussion of contract implementation/administration.

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?

We believe that the rating of “Equivalence” could be subjective, with a bias to acceptance of local procedures and process – which may result in a bidding document of lesser quality. We would propose continuation of the use of WB SBDs for ICB.

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?

No. The caution shown is wise. In fact, we feel that all ICB should be exempt from the pilot. Perhaps the more prudent approach may be to gain some experience in applying the Country System in NCB in totality without inserting any caveats, and then reviewing the rationale for the next phase, namely ICB.

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

Yes. In fact most countries seem to have adopted the WB's Guidelines and SBDs on "Selection of Consultants," since they did not have similar traditions or well established practices as in the case of procurement of goods and works.

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?

Not quite. A numerical marking system as proposed is probably a poor proxy. Addressing corruption requires considerable and sustained efforts, also in other spheres of Government activity, including enforcement of laws and codes of conduct.

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?

6.1 We believe that the assistance to countries are probably better delivered by implementing the Country Procurement Assessment Report (CPAR) recommendations faithfully, rather than potentially undercutting them by accepting country systems and bidding documents in place of well established (and we believe well accepted) WB norms for ICB - which were developed after considerable experience. In fact, with the excellent CPAR program in place it is not clear what added value the proposed Pilot Program would deliver. It seems that most if not all of the objectives of the Pilot Program could be achieved through a proper implementation of CPAR programs. The purpose of selecting a Pool of Countries and Pilot Projects is not clear, nor is the relation between the CPAR exercise and the Pilot Program.

6.2 Also, being a pilot project, the subsequent monitoring has to be considered. Some of the experiences in respect to ISO 9000+ certification come to mind, where companies initially pass the assessment and then later deviate from the agreed standards.