

International Labor Standards In Procurement: Integrating The Social Dimension Into Procurement Policies and Practices

International Labor Office¹

This note includes a background preamble, desirable recommendations on objectives, general comments on procurement related issues, and some specific comments on the Bank's procurement methodology and country pilots program.

Background

This note bears in mind:

- - The ongoing process of consultations on procurement methodologies and procurement pilots (SOME of which the ILO was invited to), eg. in Washington in Dec, May, etc. and
- - Related information available on the World Bank's (WB) webpage:
 - *Public Electronic Forum*: the Bank's "e-Forum: Use of Country Systems for Procurement" provides an internet forum for dialogue on the ongoing consultation process:
<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:21454087~pagePK:84269~piPK:84286~theSitePK:84266,00.html>
 - *E-mail Feedback*: questions and comments are accepted by the Bank via email to: procurementcs@worldbank.org
 - *Incorporation of social standards*: The WB has claimed to have "...adopted several new policies, such as incorporating all four core labor standards in its procurement contracts for large public works . . ."
<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:21592159~pagePK:220503~piPK:220476~theSitePK:228717,00.html>

Desirable objectives for the revision of procurement methodologies and related consultations, country pilots and revisions

The International Labor Office's participation and review of recent consultations and related documents made available by early December 2007 highlights the following thoughts on desirable objectives:

- I. To ensure that the Follow-up to the Paris Declaration on Aid Effectiveness, related developments in procurement methodology, and ongoing OECD/DAC and World Bank country pilots:

¹ The reference to the "ILO" specifically in connection with comments and suggestions in this text concerning procurement methodology and country pilots applies strictly to the "International Labor Office", i.e. the Secretariat of the International Labor Organization. These comments/suggestions reflect a consolidated view of Office staff including, in particular, Armand F. Pereira (ILO-WAS), George Politakis (ILO-NORMES), and Stephen Oates (ILO-ED/NORMES). Some points reflect also views and research from ILO colleagues and consultants, including Lee Swepston, Leigh Anne DeWine and others.

- a) Observe basic principles guiding the functioning of all multilateral inter-governmental agencies regarding treaties and related member State obligations.
 - b) Incorporate universally recognized standards on environment and human rights into procurement project tools (i.e., CPAR, CAS, PRSPs, checklists, and all forms of measurements and indicators), specifically including the ILO's subset of core labor standards which all ILO Member States have the obligation to promote and realize in good faith under the ILO Constitution.²
 - c) Do no harm, i.e., respect and do not penalize or otherwise undermine the right of member States of multilateral agencies to ratify and comply with their international treaty obligations and related national laws on basic working conditions, e.g. regulations on working time, wages, occupational safety and health, etc. One particularly (but not exclusively) relevant example is the obligation of States party to the ILO's Labor Clauses (Public Contracts) Convention 94, a treaty concerning the prevention of social dumping in basic labor conditions in public contracts, e.g. via double standards in the application of national legislation on wages, etc.
- II. To ensure that consultations and pilots carried out as a part of OECD and World Bank procurement reform lead to periodical review of procurement methodologies that:
- a) include a full and open consultation process;
 - b) take into account the concerns of a broad range of stakeholders and every junction, including creditors, donors, and other multilateral agencies;³ and
 - c) consider the linkages between multilateral guidelines and country systems.

General comments

1. The ILO welcomes the opportunity for consultations on practical ways to promote efficiency and transparency of international competitive bidding. It recognizes WB's sustained efforts to pursue procurement law reform around the world with particular focus on anti-corruption, transparency and fair competition safeguards. The ILO

² Those covered by the eight fundamental ILO Conventions enshrined in its Declaration on Fundamental Principles and Rights at Work and its Follow Up (1998).

³ One timely example of relevant concerns is in USAID Technical Paper: *The role of labor-related issues in the foreign assistance framework* (Washington, February 2008).

considers these to be important objectives. It is concerned, however, that the “social dimension” of public procurement, especially the question of labor standards applicable in the execution of public contracts, continues to be disregarded or marginalized in the global debate on modern public procurement systems.

2. The ILO has been campaigning with success for the inclusion of the fundamental workers’ rights underlying the eight ILO core Conventions (covering freedom of association and right to bargain collectively; prohibition of forced labor and of child labor, and non-discrimination in employment and occupation) in various guidelines, model laws and standard bidding documents on procurement used by IFIs, MDBs and membership organizations.⁴

3. Beyond the fundamental standards, other basic conditions of work, in the areas of occupational safety and health, working time, wages, etc., have been increasingly recognized as valuable, due to a growing acceptance of the importance of decent work in development. For instance, such standards are included in the IFC’s performance standards, the equator principles, OECD Guidelines on Multinationals, Social Accountability International’s SA-8000, and other international instruments.

4. The ILO does have one instrument, ILO Convention No. 94,⁵ which directly reflects this basic philosophy of incorporating social standards into procurement and it is binding on the 58 member States that have ratified it. This is the only universal instrument or international agreement open to ratification (as contrasted with regional instruments such as EU directives) to deal with labor clauses in public contracts. The list of countries currently party to the Convention includes a number of European states (France, Spain, Italy, Austria, and Denmark) several African countries (including Nigeria, Ghana, Egypt, Cameroon, Mauritania and the DRC), Brazil and Uruguay in

⁴ E.g. sub-clauses 6.20-6.21, 6.22-6.24 of the General Conditions in the Bank’s SBDW.

⁵ International Labour Organization Convention 94 Concerning Labor Clauses in Public Contracts, June 29, 1949, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C094> (“C. 94”).

Latin America and Philippines and Malaysia from Asia. Finland ratified it in 1996 while the latest ratification was Armenia's which was registered in 2005.⁶

5.. Convention No. 94 offers a set of straightforward standards that encourage socially responsible public contracting by prohibiting the use of labor costs as an element of competition among bidders. The Convention requires that all bidders meet the highest of locally established working conditions. Pursuant to Article 2 of the Convention, every bidding contract shall include clauses ensuring workers are provided with “wages (including allowances), hours of work and other conditions of labor which are *not less favourable than those . . . for work of the same character* in the trade or industry concerned in the district where the work is carried on” established via (1) collective agreement (2) arbitration award, or (3) national laws or regulations.⁷ This approach to procurement first gained currency in the post-WWII reconstruction period but seems equally relevant today. For example, two recent cases before the European Court of Justice confirm that “social dumping”, or more accurately, “wage dumping”, remains a critical issue and needs to be addressed.⁸

6. The ILO Committee of Experts, the Organization's principal supervisory organ, has recently completed a global review of the application of C.94 in the present-day public procurement environment. The report is expected to be published in March, 2008, and will be the subject of a tripartite examination at the next session of the International Labor Conference in June, 2008. The Committee of Experts reaffirmed the relevance and importance of C.94's objective while acknowledging its limitations, especially the fact that it does not adequately reflect modern procurement patterns (public-private partnerships etc.). The Committee called for a more proactive policy in marking the Convention's presence and engagement in a more visible dialogue with influential actors such as the international financial institutions. The survey findings suggest that the principle of social protection in public contracting, as espoused by C.94, has actually

⁶ Ratification record of the Convention can be found at <http://www.ilo.org/ilolex/index.htm>

⁷ Convention 94, Art. 2.

⁸ ECJ, *ITWF and Finnish Seamen's Union and Viking Line ABP, OU Viking Line Easti* C-438/05, 23 May 2007; ECJ, *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* C-341/05, 23 May 2005.

been adopted quite widely, including by numerous non-ratifying states. The Committee of Experts' final conclusion was that C.94 offers a normative platform on which a more modern and comprehensive standard could be built for the promotion of decent labor conditions in public contracts.

7. Parallel to these developments, the International Labor Office is currently revising its own procurement rules (which may be supplemented with a "policy document" – pending internal consultations and decision)..

8. The Office remains concerned that despite growing interest amongst international actors in procurement law reform, specifically in the area of fundamental principles and rights at work, most procurement laws adopted in the past five years have been silent on issues related to working conditions and social policy (or in some cases have even served to undermine them). The Office believes labor standards form a necessary part of the global development agenda, a position supported by key policy statements made, *inter alia*, at the 2006 Summit and by subsequent ECOSOC decisions, among other channels. Furthermore, procurement has emerged as a vital tool to development strategy at all levels – now used by international financial institutions, UN agencies, national governments, and in some cases, at state and city levels. This surge in procurement-based development strategies suggests the drive for inclusion of labor and social standards in procurement reform is all the more urgent an issue in the push for coherence and sustainability.

Specific Comments on Draft Methodology for Procurement
and the Country Systems Piloting Program⁹

In light of the preceding remarks, the Office makes the following points in response to the draft methodology:

1. With regard to phases I and II of country selection and assessment, as outlined by the Draft Methodology, ILO's commentators observe that the Bank has proposed much of the selection process be based on information contained in Country Procurement Assessment Reports (CPARs) (Draft Methodology, paras. 6-7). However, CPARs provide little information on labor aspects of procurement in general, and in particular ignore compliance with Convention No.94 by ratifying countries. Among the nearly 45 CPARs examined for the purposes of the ILO Committee of Experts' General Survey on C.94, none of them seem to reference ILO Convention No. 94, its requirements, or its possible influence on removing competitive labor market pressures faced by contractors. *It is proposed that the ratification and effective application of C.94 be reflected in the mapping and "qualitative" assessment of the legislative framework of candidate countries. To this end, CPARs should reflect the formulas of C94 and related instruments (such as the IFC's Performance Standard 2: Labor and Working Conditions¹⁰) in order to adequately measure candidate countries' ability to protect fundamental principles and rights at work and other basic working conditions.* It is also noted that CPARs contain an Annex A, essentially a checklist comparing National Competitive Bidding Procedures and World Bank Policy. Question

⁹ *Detailed Methodology for Procurement Country Systems Piloting Program: Draft for Consultations*, World Bank, 9 Sept 2007, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:21454087~pagePK:84269~piPK:84286~theSitePK:84266,00.html> ("Draft Methodology").

¹⁰ International Finance Corporation, Environmental and Social Development Performance Standards, <http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards>.

16 of this annex asks whether there are “restrictions on sources of labor and material” within national procurement laws. Pursuant to World Bank policy, “[n]o restrictions are allowed, except for unskilled labor, if available locally.” *It is proposed that this indicator be edited such that a country is not penalized, via its participation in Bank programs, for providing labor market protections in public procurement.*

2. The same critique may apply to the sub-indicators derived from the OECD/DAC benchmarking tool¹¹ (Draft Methodology, para.9 and annex 3). This tool is based on a series of indicators and sub-indicators providing detailed analysis of specific characteristics of a country’s procurement system, assessing and qualifying each separately. There are 54 sub-indicators evaluated on a scale of 1-3, with a score of 3 representing “best practice.” The Draft Methodology has identified 22 of those as “critical sub-indicators” and requires that a country achieve a score of 3 in each of these measures in order to be considered for the pilot program. None of these indicators gives even passing attention to the level of labor protections provided for in public procurement. As currently formulated in the July 17, 2006, version of the OECD/DAC methodology (“Version 4”), critical sub-indicator 7(c) requires a country place “no major constraints inhibiting private sector access to the public procurement market” in order for its procurement system to receive a score of 3. This indicator is particularly noteworthy because in a previous 2005 version of the methodology (“Version 3”) labor standards were explicitly mentioned as a possibly systematic constraint. This reference has been completely removed from the most recent version. *It is proposed that a new critical sub-indicator be included beneath Baseline Indicator 1 (The public procurement legislative and regulatory framework) that addresses the existence of social protection clauses (e.g. labor) in public contracts.* It is also noted that sub-indicator 2(f) evaluates whether the general conditions for

¹¹ OECD, Methodology for Assessment of National Procurement Systems, Version 4, 17 July 2006, http://www.oecd.org/document/40/0,3343,en_2649_19101395_37130152_1_1_1_1,00.html.

public sector contracts are consistent with “international requirements,” where applicable. *It is proposed this indicator be further clarified to explicitly include all international treaty obligations as well as state obligations as members of international organizations, ideally with specific reference to the relevant international labor standards.*

3. ILO commentators also find the OECD/DAC benchmarking tool problematic with regard to the threat it poses to state compliance with obligations under ratified international treaties and conventions. Under its current formulation, countries are actually penalized for meeting international legal commitments to provide social protections in national legislative and regulatory frameworks. *It is proposed that, pending comments of international supervisory organs (e.g. ILO Committee of Experts on the Application of Conventions and Recommendations), ratified international agreements impacting procurement be reflected among the “suggested source of information” and “considerations for assessment” listed in Part II of the OECD/DAC methodology. This is a question of assuring both policy coherence and adherence to the rule of law at both international and national levels.*

4. It is further noted that the Performance Assessment (Draft Methodology, para. 21 and annex 6) makes no mention of possible data or key principles relating to actual contract execution. *It is proposed that Annex 6 be amended to include the principle of “social responsibility” as one of the elements of performance data to be monitored (first column), defined by a performance dimension of “observance of labor clauses” (second column) and evaluated through “labor inspection reports/court decisions/other enforcement measures” (third column).*

As a final observation, the ILO staff that follow developments in procurement outside the Office believe the WB methodology on procurement systems, while primarily focusing

on transparency and efficiency in the tendering process, could be more reflective of the broader discourse on the implementation of social requirements in public procurement. The ILO's commentators (including those in footnote 1) reiterate their interest in pursuing a dialogue with the WB, based on improved synergy and shared knowledge, and with the hope of arriving at convergent procurement policies in the near future or at the least, ensuring a process of continued evaluation, consultation and improvement.