

Requirements for Local Procurement in Borrowing Countries.¹

General Aspects

1. *Scope of the regulatory framework*

The procurement regulatory framework should preferably address all government contracts (including those that may be financed out of fiscal resources, e.g., concessions).

2. *Transparency*

Transparency is best achieved by government agencies through the use of effective advertising, public bid opening, objective bid evaluation criteria, independent evaluation consistent with the stipulations of the bidding documents, award to a qualified bidder having submitted the lowest evaluated bid without negotiations, publication of award results, fair and speedy protest handling process, and disclosure of signed contracts and prices.

Procedural rules play an important role, particularly when it comes to open competitive bidding. In turn, these procedural rules impose the use of well-formulated bidding documents that will result in bid submissions free from qualifications. The same rules should exclude any provision or mechanism that could affect the transparency of the process. Procurement procedures other than open competitive bidding must be restricted within appropriate limits.

3. *Balance between public and private partners*

Modern procurement regulations attempt to provide losing bidders with an effective way to submit contract award protests. More generally, private partners in government contracts are expected to be proactive in implementing competitive mechanisms and should be the guardians of those mechanisms exactly in the same manner as government agencies. Private partners must be offered fair contract conditions. Certain institutional mechanisms have a critical role to play in the balance between partners and in the transparency of the process.

4. *Exceptions and waivers*

To the extent that exceptions and waivers are needed by a government agency in order to proceed in a timely manner with its procurement, procurement regulations may include specific exceptions to contract law—for example, termination for convenience. The

¹ In a meeting of the multilateral development banks (MDB) heads of procurement, held March 25-27, 2002, in Washington, this subject was discussed and the matters related here were agreed on as a common platform for multilateral development banks (MDBs) working in the same countries (especially when analyzing local procedures as part of Country Procurement Assessments Reports). The platform would also be used by the World Bank when discussing Memoranda of Understanding for Implementation of SWAPs with other banks, bilateral donors, and governments.

regulations should also provide for any waiver needed in the context of international agreements.

Specific Aspects

Below are listed several specific aspects that were discussed among the multilateral development banks and the common approach recommended.

1. **Registration of Bidders.** There is general agreement that Registration of Bidders as a condition for bidding is not a good practice, and all banks do not accept it for ICB. However, some countries require registration prior to bidding as a due diligence process to screen bidders' legal and fiscal capacity or as a means for prequalification, especially for civil works. Mandatory registration is a cumbersome procedure that does not reflect changes in capacity achieved by potential candidates. Consequently, when mandatory registration is used, it is critical to conduct it rigorously, and to immediately respond to any request for registration or registration updating. Some specific points to consider include:
 - (a) National Registration of Bidders
 - *Acceptance.* The issue here is the transparency of the process. System assessments would focus on its transparency and ensure that this is not discriminatory against any prospective bidder.
 - *Centralized or by agency.* The registry may be centralized or decentralized, provided the system is acceptable to the Bank.
 - *Foreigners and national bidders.* Foreign bidders should be allowed to register. Moreover, when a bidding process takes place, foreign bidders should be allowed to bid, even without registration, leaving registration for after award and before signature of contract.
 - (b) Requirements
 - *Legal and commercial situation.* This is the basic information for registration. Ideally this minimum information could be the basic requirement.
 - *Fiscal situation.* Some countries' laws require bidders to keep their fiscal situation up-to-date in the registry. This is acceptable to the Bank.
 - *Financial qualification.* Some countries require this information for qualification of bidders. Since the financial situation is specific to each bidding process, this is not a good practice. If used, it should be restricted only to civil works contracts.
 - *Technical qualification.* Same as for the financial qualification.
 - (c) Registry
 - *How to register.* There should be an assessment of registration procedures before the Bank accepts the process. Bidders should be allowed to register by mail and, if the conditions in the country allow, through the Internet.
 - *Frequency of updating.* Registration should remain permanently open to bidders, including for updating information at any time. No deadline for specific bidding processes should be imposed.
 - *Time taken for registration.* Should be reasonable.

- *Advertisement.* Registration should not be used as a substitute for advertisement when open competition is required. However, when advertising for civil works, borrowers could indicate the required minimum category of contractor specified in the registration system.

2. ***Open Bid—National Competitive Bidding.*** Procedural rules play an important role particularly when it comes to open competitive bidding. They should impose the use of well-formulated bidding documents, which will result in bid submissions that are free from qualifications. Those procedures or rules are as follows:

(a) Effective advertisement

Advertisement should be broad enough (using the appropriate media), giving enough time to bidders to prepare their bid. To the extent possible, bidding opportunities should also be advertised electronically. The minimum requirement should be:

- *Newspaper.* Mandatory publication in one local newspaper, in addition to the official gazette (if existent).
- *Web page.* If the borrower (or the country) has a Web page, all bidding opportunities should be advertised. The Bank should also provide incentives for advertisement in UN Development Business and the Development Gateway or other electronic venues. The publication in the Web may be a substitute for the publication in Newspapers

(b) Eligibility

Eligibility criteria and procedures should not deny bidders access to a bidding process or an award for reasons that are not related to their qualification to carry out the contract. Consequently, the procedures should:

- Be based on the ability of bidders to carry out the contract.
- Not restrict foreign bidders;
- Allow local blacklisting for fraud and corruption to be carried out with due process, but with rights for accused firms to defend themselves and Bank to assess and rule on defense.
- Guarantee that government-owned enterprises acting as bidders should demonstrate that they are legally and financially autonomous and operate under commercial law, and are not selected or contracted by their reporting authority.

(c) Qualification of bidders

The procedures should define postqualification as the preferred rule. Prequalification should be restricted to civil works and be applied particularly for large or complex contracts or for special cases with due justification.

- Procedures should define postqualification as the rule, and the cases where prequalification should be applied. These rules should include satisfactory past performance of bidders.
- The review of bidders' qualification should be conducted by examining whether the bidder does or does not meet qualification criteria and not by using a point system reflecting the bidders' qualification.
- Review of bidders' qualification should be conducted separately from the evaluation of their bids.

- Preselection as distinct from prequalification should not be accepted. (Prequalification means that all candidates should be invited to bid, whereas preselection means that the government agency is free to invite any of those candidates but does not have to invite all of them.)
- No bidder should be disqualified on grounds of insignificant bureaucratic procedures.

(d) Standard bidding documents

Standard bidding documents are of paramount importance for transparency, speed of the process, increased competition, and fostering of capacity (standardization of procedures). The Bank, other donors working in the country, and the government should agree on a common standard bidding document to be used in all local open bidding processes. The documents should include the following items:

(1) *Instruction to Bidders and Selection Process*

- Minimum of 30 days to submit bid;
- Bids may be submitted by post or by hand;
- Budget—the maximum amount of budgetary resources available for the bidding process could be disclosed (if local legislation so requires)
- Clear instructions on how to buy bidding documents, indicating address and price. However, bidders who decide at their own risk to submit a bid without having bought the bidding documents should not be disqualified.
- Clarifications to bidding documents should be in writing only.
- Amendments to bidding documents should be advertised with the same procedure used to advertise the original bidding documents. There should be at least a week interval between the publication of the last amendment and the date for bid submission.
- Bid forms should be substantially similar to those used for ICB, with appropriate flexibility with respect to design.
- Countries should be encouraged to use one envelope as with ICBs. Where local laws do not define the number of envelopes, the Bank should require one envelope. However, if the local law requires two envelopes, this is acceptable, provided adequate safeguards against retaining the second envelope unopened are incorporated in the two-envelope procedures and effective bid protest mechanisms are in place for the due processing of bid complaints.
- Bid evaluation criteria should be nondiscriminatory. They should be disclosed and rigorously quantified in monetary terms to define the “lowest evaluated bidder.” Quantifying bid evaluation criteria in monetary terms is the only method that leads to transparent evaluation and allows bidders to submit an effective protest to the awarding authority.

(2) *Language* (bidding documents and contract). the language of commercial use in the country.

(3) *Bid prices*. Bidding documents should define price and payment conditions, including (a) the local (or any internationally used) currency that could be used; (b) the method of payment; and (c) price adjustment procedures, preferably using an adjustment formula. (All contracts for countries with high inflation should

have price adjustment; for countries with a stable currency, price adjustment should be included for contracts longer than 12 months.) Price adjustment formulas should not be used in bid evaluation.

(4) *Bid security.* When required, bid security should follow the generally accepted practice used in the local market (securities issued by banks or by sureties). Alternative methods (such as automatic penalty to bidders failing to honor a bid) in lieu of bid securities would be acceptable.

(5) *Liquidated damages.* Should be similar to the ICB document.

(6) *Complaints.* Modern procurement regulations attempt to provide to losing bidders an effective way to submit protests pertaining to contract award. The goal in the protest handling system should be:

- Complaints should be accepted at any time. Those received before bids are submitted should be addressed before bid opening. All others should be taken into account, but the response should be announced only after award is recommended.
- The borrower should have an administrative process for dealing with complaints, including an independent reviewer to review the procuring agency's responses to complaints.
- Protests should be submitted to an independent entity and not simply to the supervisor of the contracting agency. Specifically, tender committees, which are the arm of the government, can only conduct administrative reviews. Their membership does not allow for arbitration or quasi-arbitration of the dispute, and therefore an independent protest mechanism should be provided to review award disputes before the contract award is final.
- When protests are submitted before award they may lead to reconsidering the award of the contract; when protests are submitted after the award, their only consequence should be the bidder's entitlement to compensatory damages for the cost of bid preparation. The government may create regulations requiring protestors to deposit a guarantee against frivolous complaints.

(7) *Bid opening.* Public bid opening of all bids, and recording of the opening in minutes signed by all bidders in attendance, is required. In addition:

- Late bids should be rejected and returned unopened.
- Procedures for bid opening should be the same as those used for ICB.
- Minutes should follow the same procedure as for ICB.
- Safeguard of price envelope: when two envelopes are used the bidding documents should specify where and how the price envelope would be safely kept.

(8) *Confidentiality.* After bid opening and until contract award, all information about bids and their evaluation should be confidential. For transparency reasons,

the evaluation report and all nonproprietary information could be made available to the public after an award recommendation has been published.

(9) *Evaluation of bids.* Bids should be evaluated by an independent evaluation committee, taking special consideration for:

- Clarification of bids (should follow the same procedures used for ICB).
- Responsiveness (should follow the same procedures used for ICB).
- Qualification of the bidder should be conducted separately from the evaluation of its bid.
- Lowest evaluated cost criteria—the award should be made to the bidder having submitted the lowest evaluated responsive bid.
- Use of a point system to evaluate bids—scoring is an indirect way to express the outcome of the technical analysis of the bid, consequently, a point system should not be accepted.²
- Rejection of all bids: borrower may reject all bids if (a) all bids are not responsive; (b) the price offered by the lowest bidder is substantially higher than the confirmed good estimate for the contract; (c) the process was not competitive (for example, countries could decide that a bidding process was noncompetitive if fewer than three were actually offered).

(10) *Preference to some classes of bidders.* Preference to some classes of bidders may be acceptable in national bidding, provided it is required by law and procedures for the application of such preference in bid evaluation are properly defined and acceptable. Nonquantified bid evaluation criteria, such as the scope of the lots or the value of the products to be domestically subcontracted (which would affect the predictability of the evaluation), or use of any other form of nonquantified preference would not be acceptable.

(11) *Award criteria*

- The award should be made to the bidder having submitted the lowest evaluated responsive bid, provided that bidder has been determined to be qualified in accordance with predisclosed criteria.
- Award of contract should be without negotiations, since negotiations would lead bidders not to submit their best bid at the time of bid submission and would affect the perception of transparency (which is one of the main benefits deriving from public bidding).

(12) *Standard contract implementation.* Bidding documents should include standard contracts. The contract documents should identify the scope of work to be performed, the goods to be supplied, the rights and obligations of the borrower and of the supplier or contractor, as well as how the contract will be implemented and supervised. In addition the following provisions should be included:

² A point system may be better suited for complex systems; however, it would be extremely exceptional that such procurement would not follow ICB.

- Payments—(a) the method of payment should be the same as defined in the bidding document; (b) the currency of payment should be the same as that of the bid prices except when as a proxy for price adjustment a harder currency is used for bid price but payments are made in the currency of the Borrower at the exchange rate applicable on the date of payment; (c) the employer should automatically pay interest for late payments; (d) price adjustment procedures should be used, preferably using an adjustment formula
- Performance security—a guarantee for satisfactory performance of the contractor or supplier should be included either in the form of a performance security or retention of payment. Performance securities should follow the generally accepted practice used in the local market (securities issued by banks or by sureties).
- Settlement of disputes—contracts should include a system for settlement of disputes. In very large contracts the use of a Dispute Resolution Board (or a Dispute Resolution Expert in large contracts) should be encouraged before disputes are submitted to arbitration or to courts.

(13) *E-procurement.* Borrowers should be encouraged to move to electronic bidding, provided the local conditions of infrastructure, government agencies capacity, and business community capacity permits. Borrowers may move to E-procurement in steps, moving from less complex to more complex scenarios. The following scenarios are foreseen:

- E-disclosure—the use of a Web site for disclosing business opportunities, making bidding documents available to bidders, disclosing bid results, and making public disclosure of contract texts and prices. The Bank would need to assess the system and authorize it to become an official source of information.
- E-purchasing—the use of a website (centralized, decentralized or using private providers for E-markets) for procurement of high-volume-low-value types of contracts, where usually only the price is proposed. The Bank would need to assess the system and agree on its use for this type of bidding process.
- E-tendering—the use of a website for procurement of complex procurement and high-value-low-volume type of procurement, where a technical and financial proposal is submitted. The Bank would need to assess the system and agree on its use, especially in view of technical, legal, and registration issues.

3. ***Reserved Invitations—Private Bidding or “Shopping.”*** Procurement procedures other than open competitive bidding should be restricted within appropriate limits. Restricted bidding may be appropriate for small value contracts and situations in which there is only a small number of potential candidates. However, this should not be considered as a substitute for open bidding (or NCB), since it is restricted. This method should be subjected to the following minimum requirements:

- (a) Number of invitees and criteria for selection.

- Minimum of three proposals received; however, the process should be open to whoever wants to bid, even if not invited.
 - If possible firms should not be invited more than once, unless other firms do not exist.
- (b) Standard request for bids
- Simplified document asking for proposals by letter, fax, or electronic means.
- (c) Evaluation
- Minimum price; or
 - Combination of price and delivery time, in which case delivery time would be evaluated in monetary terms, and added to price. Minimum overall evaluated price would result in award.
- (d) E-procurement—if possible, e-purchasing should be preferred.
4. ***Direct Contracting.*** This should be used only in exceptional cases with due justification to be kept on record. The justification should specify the reasons for the direct contracting and who has approved it. The conditions justifying direct contracting are:
- (a) Spare parts from the original manufacturer of the equipment.
 - (b) Only one manufacturer exists for the required good.
 - (c) Emergency, such as natural disasters.
 - (d) Small-value contract.
5. ***Local Consultants Selection Process.*** Procedures that will be used for selection of consultants and the conditions under which each of them can be used should also be spelled out in the manual. The main methods should include Quality and Cost-Based Selection (QCBS), Selection Based on Consultant Qualifications (CQ), single source, and selection of individual consultants. General issues to be considered include:
- (a) Standard RFP and standard contract;
 - (b) Means of preparing shortlists; and
 - (c) Award criteria—highest combined score (for example, technical 80 percent and price 20 percent for QCBS)