

Requirements for Local Procurement in Borrowing Countries

Introduction:

In the meeting of the Heads of Procurement on March 25-27 in Washington, this issue was discussed and below are the main conclusions reached. This would become the common platform for Banks working in the same Countries (especially when analyzing local procedures as part of CPARs) and would be used also as the basis for the World Bank for discussions with other Banks, bilateral donors and Governments when discussing Memoranda of Understanding for Implementation of Sector Wide Approach Programs (SWAPs)

General Aspects:

a) Scope of the Regulatory Framework

The procurement regulatory framework should preferably address all government contracts and not only those financed out of fiscal resources, and in particular it should encompass concessions and more generally the operation of public services as defined in the EU Directive 93/38 ECC, given the risk that otherwise private interests and well protected situations prevail over public interest.

b) Transparency

Transparency is best achieved by government agencies through the use of the following mechanisms: effective advertising, public bid opening, objective bid evaluation criteria, independent evaluation, award to the lowest evaluated bidder without negotiations, publication of award results, fair and speedy protest handling process, 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 which will result in bid submissions that are 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 and contained within appropriate limits.

c) Balance between public and private partners

Modern procurement regulations attempt to provide to losing bidders 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, in fact, 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.

c) 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 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 MLDBs and the common approach recommended.

1. **Registration of Bidders**: It is general agreement that Registration of Bidders as a condition for bidding is not a good practice and all Bank do not accept it for ICB. However, it is a very common practice in Countries to have registration previous to bidding as a due diligence process for screening bidders legal and fiscal capacity. It is also usual (in some countries) to use registration as a means for prequalification, specially for civil works. Mandatory registration is a cumbersome procedure which does not reflect changes in capacity achieved by potential candidates. Consequently, when mandatory registration is used, it is critical to conduct it rigorously and immediately respond to any request for registration or registration updating. Some specific points:

a) National Registration of Bidders:

- **Acceptance**: The issue is the transparency of the process. We will need to assess the system used especially on its transparency and be assured 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 us.
- **Foreigners and national bidders**: The third issue is on how to include foreigners in the registry. Foreign bidders should be allowed to register. However, 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 require bidders to keep their fiscal situation up-to-date in the registry. This is an additional burden but in some countries mandated by law. We could accept it.

- Financial qualification : Some countries require this information for qualification of bidders. Since the financial situation is specific for each bidding process, this is not a good practice. If used, it should be restricted only to civil works contracts and should not be generalized in the registry.
- Technical qualification : Same as for the financial qualification.

c) Registry :

- How to register: We should have an assessment on the registration procedures before accepting it. Bidders should be allowed to register by mail and, if the conditions in the country allow, through the internet.
- Frequency of up-dating: Registration should remain permanently open to bidders to be able to register or to update their information at any time and at their will. No deadline for specific bidding processes should be imposed.

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 for preparing their bid. To the extent possible, bidding opportunities should also be advertised electronically. The minimum requirement should be:

- 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. We should also provide incentives for advertisement in Development Business and the Gateway or other electronic means.

b) Eligibility: Eligibility criteria and procedures should not deny bidders access to a bidding process or an award for reasons which 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. They should not include additional restrictions (not related to such ability)
- No restrictions to foreign bidders;
- Local blacklisting for fraud and corruption carried out with due process and with rights for accused firms to defend themselves could be assessed by the Bank and accepted.

c) Qualification of Bidders: The procedures should define postqualification as the preferred rule. Prequalification should be restricted to civil works specially 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.
- 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
- Conducting a pre-selection instead of a pre-qualification should not be accepted, i.e., pre-qualification means that all candidates who have been determined to be qualified should be invited to bid whereas pre-selection 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 due to bureaucratic or non-substantial reasons

d) Standard Bidding Documents & Standard Contract: Standard Bidding Documents are of paramount importance for transparency, speed of the process, increase competition and creation of capacity (standardization of procedures). The Bank, other donors working in the country and the government should agree on common SBD to be used in all local open bidding processes. They should include:

- Time to submit bid: minimum 30 days
- Bids may be submitted by post or by hand.
- Budget: could be disclosed (if local legislation so requires)
- Clear instructions on how to buy bidding documents indicating address and price to buy the bidding documents. However, bidders who decide to submit a bid without having bought the bidding documents should not be disqualified, submitting their bids under their own risk.
- Clarifications to bidding documents should be in writing only
- Amendments to bidding documents should be advertised with the same procedure used for advertisement of bidding documents.
- Bid Forms should be similar to those used for ICB, however, with the flexibility required
- Number of Envelopes: we should encourage countries to use the same procedure for ICB (one envelope). In countries where the local law does not define the number of envelopes or allows the option to the implementing agency, we should require one envelope like in ICB. However, if the local law requires 2 envelopes we would accept it, provided the procedures allow for due processing of complaints.
- Evaluation Criteria: the bid evaluation criteria should be non-discriminatory. It should be disclosed and rigorously quantified in monetary terms to define the "lowest evaluated bidder". This allows to indisputably identify the lowest evaluated responsive bid.

Quantifying bid evaluation criteria in monetary terms is the only method that leads to transparent evaluation and that allows bidders to submit an effective protest to the awarding authority.

e)Language (bidding documents and contract): the language of commercial use in the country.

f)Bid Prices (and Payments): the country should define in the bidding documents the price (and payments) conditions: (i) the local (or any internationally used) currency could be used; (ii) for countries with high inflation all contracts should have price adjustment; (iii) for countries with stable currency, price adjustment should be included for contracts longer than 12 months; (iv) the method of payment should be defined in the bidding document; (v) the currency of payment should be the same of the bid prices; (vi) the employer should automatically pay interest for late payments; (vii) price adjustment formulas should not be used in bid evaluation.

g)Bid & Performance security: when required, they should follow the generally accepted practice used in the local market (securities issued by banks or by sureties). Alternative methods (like automatic penalty to bidders failing to honor a bid) in lieu of bid securities could be accepted. Retention of payment could also be used instead of performance security.

h)Liquidated damages: should be similar to the ICB document

i)Complaints & Settlement of disputes: Modern procurement regulations attempt to provide to losing bidders an effective way to submit protests pertaining to contract award. More generally, the private partner in a government contract must be proactive in implementing competitive mechanisms and, in fact, should be a guardian of those mechanisms exactly in the same manner as government agencies. 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 for the answers provided by the procuring agency.
- Such 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 carry administrative reviews. Their membership does not allow for arbitration or quasi-arbitration of the dispute and therefore an independent protest mechanism should be provided in order to review award disputes before the contract award is final;

- When protests are submitted before award they may lead to revisit 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.
- Contracts should include a system for Settlement of Disputes. The use of a Dispute Resolution Board should be encouraged before disputes be submitted to arbitration or to courts.

j)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
- 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 is used)

k)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 non-proprietary information could be made available to the public after an award recommendation has been published.

l)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 post-qualification or of the technical analysis of the bid a point system should not be accepted. We recognize that a point system may better suited for complex systems, however, it would be extremely exceptional that such procurement would not follow ICB.
- Rejection of all bids: borrower may reject all bids if: (i) all bids are not responsive; (ii) the price offered by the lowest bidder is substantially higher than the confirmed good estimate for the contract; (iii) the process was not competitive, i.e., only few bids (less than 3) were offered although several bidders could be interested in bidding.

m)Domestic preference: we could accept domestic preference in national bidding, provided it is defined by law and following quantified conditions on how to take it into consideration in bid evaluation. We would not accept the use of non-quantified bid evaluation criteria, such as the scope of the lots or the value of the products to be

domestically subcontracted, as those criteria would affect the predictability of the evaluation, or use of any other form of non-quantified preference.

n) Award Criteria:

- The award should be made to the bidder having submitted the lowest evaluated responsive bid
- 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, one of the main benefits deriving from public bidding.

o) E-procurement : We would encourage borrowers 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 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 Web-site systems (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 Web-site systems 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 due to technical, legal, and registration issues.

3. **Reserved Invitations – Private Bidding or “shopping”**: Procurement procedures other than open competitive bidding must be restricted and contained within appropriate limits. Restricted bidding is appropriate for small value contracts, and situations in which there is only a very small number of potential candidates. Consequently, very specific thresholds should be defined below which this method of procurement could be applied. In addition the following minimum requirements should apply:

a) Number of invitees & criteria for choosing:

- Minimum of 3 proposals received. However, the process should be open to whoever wants to bid, even if not invited.
- Invited firms should not be repeated, if possible. Except if other firms do not exist

b) Standard request for bids

- Simplified document asking proposals by letter, by fax or using electronic means.

c) Evaluation

- Minimum price or
- Combination of price and delivery time, in which case delivery time would be evaluated in monetary terms 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 records. The justification should specify the reasons for the direct contracting and who has approved it. The conditions justifying direct contracting are:

- Spare parts from the original manufacturer of the equipment
- Only one manufacturer exists for the required good
- Emergency, like natural disasters
- Very small contract (below a certain amount)

5. Local Consultants Selection Process: The consultants guidelines will apply for selection of consultants. However, for assignments below a certain threshold and for contracts where enough capacity exists in the country compatible with the complexity of the assignment, the short-list may comprise entirely national consultants. In this case this minimum requirements should prevail:

a) Registration: The same conditions described for bidder for goods and works above should be complied with.

b) Advertising: Borrowers should advertise the assignment for expression of interest by firms. The advertisement should include:

- 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 the bidding opportunities should be advertised. We should also provide incentives for advertisement in Development Business and the Gateway or other electronic means.

c) Short-List: Borrowers should use a short-list of 3 to 6 firms to request proposals. This short-list may result from comparing qualifications and experience among firms that have expressed interest. Borrowers could use a prequalification process for preparation of the short-list if:

- the local law so requires
- the prequalification exercise is used for the preparation of a short list, i.e., the process is not for open competition.

d) Standard RFP & Standard Contract: We should agree with the Borrower on a standard RFP similar to that used for Selection of consultants using a short-list composed of international consultants.

e) Language (RFP and Contract): the language of commercial use in the country.

f) Selection Process: Short-list; QCBS (other methods when justified)

g) Price:

- Currency – local
- Adjustment – if time is more than 12 months
- Interest for late payments -- yes

h) Award criteria: highest combined score (preferably using technical 80% and price 20%)