

EIC Position Paper

on the World Bank's revised proposal (*dated March 20, 2008*) on

The Use of Country Systems in Procurement in Bank-Supported Operations: Proposed Piloting Program

Introduction

European International Contractors (EIC) has as its members construction industry trade associations from 15 European countries and represents the interests of the European construction industry in all questions related to its international construction activities. European construction companies are currently active in all corners of the globe and, in 2006, they generated an international turnover of 50 billion € *outside* of Europe. Through their international presence, European contractors are contributing to tax revenues and **economic growth in partner countries** and through co-operation with local partners and employment of local workforce they are **transferring management skills and technical expertise**.

EIC concurs with the international development community on the **importance of transparent procurement systems as a precondition for fair competition** in construction services. We therefore, **support the endeavours of the international community as a whole to enhance transparency and accountability in the procurement cycle on a global level**, a vision set out recently in the *OECD Publication on "Integrity in Public Procurement" (2007)*. We have presented the respective proposals of the European construction industry to this important discussion by publishing our "EIC Blue Book on Sustainable Procurement" (November 2004).

Over the past three years, EIC has been voicing repeatedly its strong reservations against the various World Bank documents on the "Use of Country Systems in Procurement". It is pertinent to clarify, however, that from the very beginning our objections were *not* directed against the overarching development objective to strengthen partner countries' procurement capacity, as expressed in the *Rome Declaration on Harmonisation* (25 February 2003) or the *Paris Declaration on Aid Effectiveness* (2 March 2005). EIC has been and is rather concerned that the **implementation** through the "Proposed Piloting Program" (Draft dated March 20th, 2008) is **totally irreconcilable with the above-mentioned vision** because it **jeopardises the well-established international procurement standards** which are currently enshrined in the World Bank's Procurement Guidelines and Standard Bidding Documents.

EIC is disappointed that the proposed piloting programme does not reflect any of the amendments voiced during the consultation period by numerous stakeholders from the industry, such as *CICA, FIDIC, BIAC, ILI, ILO, TI, MEDEF, BDI, CBI, Confindustria, DI, VNO-NCW, CEOE, NAM* and others. Instead, the latest **Bank Draft lowers once again the requirements for successfully passing the "equivalence test"** between international best practice and country procurement systems.

Executive Summary

EIC recalls that experts of ten Multilateral Development Banks and International Financial Institutions (the so-called “Harmonization Working Group”) have been working together over the past years to produce harmonised bidding and proposal documents. In the meantime, **agreement has been reached on harmonised master bidding documents** for procurement of goods and civil works, prequalification of civil works and requests for proposals for consulting services. These Master Procurement Documents reflect today the **corpus of best practice in international procurement**.

Regrettably, the achievements of the Harmonization Working Group, which are highly appreciated by the industry, are undermined by the World Bank’s strategy on Country Procurement Systems and in particular by the latest **Draft Proposal for a Piloting Program (dated March 20, 2008)**. This document has serious shortcomings, e.g.:

1. The OECD/DAC procurement benchmarking tool (cp. paragraph 20 of the Draft Proposal), **does not reflect the “generally accepted international practice”**, as incorporated in the harmonised master bidding documents. It is descriptive in character and cluttered with ambiguous terms such as “adequately”, “appropriate”, “sufficient”, “reasonable”, etc. which can not provide sufficient guidance for evaluation.
2. The Draft Proposal allows in paragraph 26, concerning the use of Standard Bidding Documents, “a deviation from a strict interpretation of the provisions of the Bank’s Guidelines”. For contracts that “*might attract foreign competition*” (a fuzzy definition by itself), it merely requires the existence of national sample bidding documents (NSBDs). Again, the equivalence test here leaves too much discretion, using a yardstick which simply provides that “*such NSBDs are broadly consistent (?) with Bank-issued documents*”. The Bank also **omits to provide any details on how to use the “checklist of mandatory provisions that would be used to assess such NSBDs”**.
3. Whilst it is true that Multilateral Development Banks retain a certain flexibility **with respect to ICB thresholds**, it is **common World Bank practice to define a certain monetary range**. For instance, in construction works, the normal range applies from 5 - 20 million US\$ above which ICB procedures apply. In paragraphs 25 and 38, the Draft Proposal omits to define any monetary threshold and dodges to wooly language, such as “*complex and non-standardised procurement*”. EIC submits that **any project with a contract value above 20 million US\$ is complex and non-standardised**.
4. Concerning Governance and Anti-Corruption (cp. paragraphs 46 and 47), EIC is saddened that the Bank has not responded to industry’s suggestion to require pilot countries to ratify the **UN Anti-Corruption convention** or the **ICSID convention** or the “**New York**” **Convention** as a prerequisite for participation (cp. Annex A, page 47).
5. The World Bank announces in paragraph 48 that it will *not* insist on safeguarding the core labour standards, which are now **mandatory under its Standard Bidding Documents and contrac forms for civil works**, under the Pilot Programme.

In the light of such serious flaws, EIC holds the view that, **until these shortcomings are rectified**, the current Draft Proposal violates one of the fundamental principles stipulated in § 1.2 (b) of the World Bank Procurement Guidelines, namely “*the Bank’s interest in giving all eligible bidders from developed and developing countries the same information and equal opportunities to compete in providing goods and works financed by the Bank*”.

As “the core effect of using country systems in the area of international competitive bidding (ICB) is to **shift the Bank’s role** from providing prior review of procurement proposals to providing primarily **post review**” (cp. paragraph 6 of the Proposed Piloting Proposal), EIC urges the World Bank’s Executive Board to instruct the Bank’s management to eventually **convene a Technical Working Group** (including industry experts) in order to **elaborate a more effective Proposal for a Piloting Program before approval of any change to the Bank’s Procurement Guidelines**. If the current proposal proceeds unamended, **small and medium-sized companies (SMEs) will be particularly affected**, since they simply do not have the capacity to adapt themselves to numerous national procurement systems.

Detailed Comments on Proposed Piloting Program (Draft March 20, 2008)

WORLD BANK TEXT	EIC COMMENT
<p>Paragraph 20, OECD-DAC “methodology”: <i>The Bank would assess those systems against generally accepted international practice, largely relying on the OECD-DAC procurement benchmarking tool. This tool, which has been vetted internationally by donors and aid recipient countries, is complementary to the CPAR.</i></p> <p>Annex B (page 54): <i>The Bank classifies the 54 sub-indicators in four categories which reflect the relative importance of the sub-indicators and the indicators under which they fall:</i></p> <ul style="list-style-type: none"> ▪ <i>seventeen core sub-indicators which should be assessed...</i> ▪ <i>ten sub-indicators which could be assessed...</i> ▪ <i>twenty-five sub-indicators which should be assessed...</i> ▪ <i>two sub-indicators (...) could be subject...</i> 	<p>EIC would like to stress once again that the OECD-DAC procurement benchmarking tool does not represent “generally accepted international practice”, as it is much too sketchy and vague to be able to define any standard. In connection with Annex B of the March 20th Draft Proposal for a Piloting Program, it is nothing but camouflage. Note that most of the CPARs are outdated or not available on-line!</p> <p>The March 20th Draft Proposal leads to a further erosion of the OECD/DAC benchmarking tool, as the Methodology in Annex B reduces the number of critical indicators to just 17 (from 22 in 2007) which, according to the Bank, “should (or could) be assessed”, not “must be assessed”(!). The handling of the category “sub-indicators for which a “2” will be considered if accompanied by an action plan of corrective measures” is completely cryptic and haphazard. Unless this “tool” is substantially modified, the Bank will be prevented from any plausible assessment of national procurement systems. A visual overview on the erosion of the criteria since 2005 is annexed (DFI Inc. Copyright).</p>
<p>Paragraph 21, Assesment: <i>The assessment would entail evaluating the country’s system using the 54 sub-indicators of the OECD-DAC benchmarking tool. The Bank would in general conduct the benchmarking exercise itself, preferably in collaboration with donors which are active in the country, in particular MDBs with which it traditionally jointly conducts fiduciary assessments.</i></p> <p><i>It may rely on exercises that have already been completed, provided that they were carried out with or by other donors and that the Bank was also involved.</i></p>	<p>We note with great unease that the latest version has suppressed previous footnote 4 (paragraph 20 of the Draft Proposal dated February 21st) in which it was announced that “the OECD/DAC-JV will review the tool and all the indicators and sub-indicators...” We would indeed expect a revised Version before the adoption of the Proposed Piloting Program, as the benchmarking tool is the crucial element in the so-called “Stage I: Selection of a Pool of Candidate Countries”:</p> <p>In addition, we believe that the World Bank must be held accountable for its evaluations and shouldn’t be authorised to “rely on exercises that have already been completed”. Any such amalgamation of duties and responsibilities violate the principles of transparency and accountability.</p>

<p>Paragraph 22, Pool of Candidate Countries: <i>If a country's procurement system does not receive an acceptable rating, at the government's request the Bank may help it develop a medium-term plan of corrective action, including a capacity-development plan, to address the key areas that need strengthening. The Bank would then work closely with other donors to develop, coordinate, and finance a wide-ranging capacity-development program to support those countries in strengthening their procurement systems; a number of donors have already expressed interest for this purpose.</i></p>	<p>The notion to "develop a medium-term plan of corrective action" opens the door to political "horse-trading" between the Bank and a Borrower, which should not be the case with regard to such an important topic. As noted earlier, the handling of the category (b), i.e. "sub-indicators for which a "2" will be considered if accompanied by an action plan of corrective measures", is completely cryptic and haphazard. Even more alarming is the handling of category (c), i.e. that countries can participate in the pilot programme although it "is rated less than "2" for a few subindicators". The impression is that the Bank goes at any lengths just to include even the most questionable candidates. Again, any such capacity-development programme would clearly blur the lines of responsibility, a fact which is aggravated when third-party donors are also involved in the process.</p>
<p>Paragraph 25, Comparison with Procurement Guidelines: <i>To ensure that procurement under UCS would continue to be guided by these fundamental considerations, the Bank would carry out a step-by-step comparison of the country's bidding procedures and documents with the Bank's ICB requirements that apply when international competition is sought for goods, works, and non-consulting services (see Annex C for the detailed procedure).</i></p> <p><i>Given the significant differences in national procurement markets among potential participating countries, no specific contract value or size can be determined across the board to define contracts for which international competition is sought, the Bank will rely on its own ICB thresholds as benchmarks to identify contracts likely to attract international interest.</i></p>	<p>Whilst a comparison with the Bank's Procurement Guidelines under Stage II is welcome – since <i>they</i> (and not the OECD-DAC benchmark tool) represent in fact the generally accepted international standards – we note with discomfort that the legal agreement for any pilot makes SECTION I ("Introduction") of the Procurement Guidelines applicable, whereas ICB requirements of SECTION II ("ICB") will only be assessed through Annex C and hence be diluted. As a consequence, the Bank's commitment to require "equivalent" standards on the national level remains empty and void. According to footnote 3 of ANNEX C (page 68), the Bank will only make "acceptable bidding documents" a key element of the process, which is a vacant statement.</p> <p>Whilst we understand the reasons for the Bank's "<i>flexible approach depending on the countries and the particular conditions prevailing for selected sectors and pilot projects</i>", EIC asks the Bank to respect the ICB thresholds also under UCS and to define an – admittedly high – numerical threshold, e.g. 20 million US\$, at least for infrastructure. With the exception of China and Brazil, generally all of its construction projects above 15 million US\$ are classified for international competition (see also paragraph 38).</p>
<p>Paragraph 26, Areas of Deviation: <i>The Bank would require the existence of relevant NSBDs for the pilot projects, consistent with the principles set out in paragraph 2.12 of the Bank's Procurement Guidelines. The Bank has developed a checklist of mandatory provisions that would be used to assess that such NSBDs are broadly consistent with the Bank-issued documents.</i></p>	<p>EIC rejects the Bank option to "<i>accept a deviation from a strict interpretation of the provisions of the Bank Guidelines</i>" with regard to the use of Standard Bidding Documents, language and currency. As a minimum, the Bank should make transparent the criteria for its "checklist of mandatory provisions that would be used to assess that such NSBDs are broadly consistent with the Bank-issued documents". The mere enumeration and description of paragraphs gives no reassurance that their content will be respected under UCS.</p>

<p>Paragraph 27, Meeting the Requirements: <i>The Bank anticipates that countries that substantially meet the criteria – even if their procurement systems are not yet fully consistent with and equivalent to the Bank’s policies - would be able to address weaknesses quickly through gap-filling measures.</i></p>	<p>Again, as in "Stage I", the Bank intends to build also under "Stage II" a bridge between its standards and non-performing Borrowers <i>"through gap-filling measures"</i>. Such leap of faith might provide the wrong incentives, as it sends out the clear message to potential pilot countries that the Bank will not insist on or fight for its own procurement standards. The impression is that the Bank goes at any lengths just to include even the most questionable candidates. EIC would rather advise the Bank to apply a clear-cut mechanism: either a candidate country has passed or failed the test.</p>
<p>Paragraphs 28 – 36, Stage III: Assessment at the Sector/Project Level</p>	<p>EIC acknowledges the efforts of the Bank to also assess the risk at project level. We doubt, however, whether the precautions taken are sufficient. For instance, the "Dynamic Procurement Risk Management Tool", referred to in ANNEX D (page 79) as one of the instruments to conduct an Agency Assessment (<i>cp.</i> paragraph 30) is merely 17 lines long.</p>
<p>Paragraph 38, Complex and Non-Standardised Procurement: <i>The Bank would look carefully at country policies and specific procedures with regard to the handling of complex, high-value, and non-standardised bidding processes that would potentially attract the participation of foreign bidders.</i></p>	<p>Whilst we would generally support the Bank’s <i>"flexible approach depending on the countries and the particular conditions prevailing for selected sectors and pilot projects"</i>, EIC would maintain that the Bank should also give <i>special attention</i> to projects with an – admittedly high – numerical threshold, e.g. 20 million US\$, in addition to the types of procurement processes mentioned. The argument is that all projects above a value of 20 million US\$ are indeed complex and certainly non-standardised (see also paragraph 25). Also the risk of sidelining Bank funds is much higher with respect to high-volume projects.</p>
<p>Paragraph 47, GAC Strategy: <i>Both the [GAC] Strategy and the implementation plan support increased reliance on country systems: indeed, it is one of the key pillars of the strategy. No country would be considered for the piloting program if it does not have an acceptable governance environment (as assessed in Stage I, in particular with regard to indicators 8, 10 and 12 of the OECD/DAC benchmarking tool).</i></p>	<p>The preconditions set by the Bank with respect to the GAC Strategy are not sufficient. It has been suggested by the industry, to <i>"use TI index to help determine eligible countries"</i> (<i>cp.</i> ANNEX A, page 46). It has further been proposed that <i>"international conventions such as the ICSID convention, the New York Convention on the Recognition and Enforcement of Arbitral Awards and the UN Anti-Corruption convention be signed by pilot countries"</i> (<i>cp.</i> ANNEX A, page 47).</p> <p>All these suggestions have been refused by the Bank rather bluntly. EIC maintains, however, that the World Bank should require a minimum performance with respect to such international standards and benchmarks, also in the context of UCS and the Piloting Program, as a condition sine qua non for participation.</p>

<p>Paragraph 48, Safeguards and Responsible Procurement: <i>The Bank has included core labour standards (CLSs) in its standard bidding documents and contract forms for civil works through the applicability of the country labour laws and specific clauses in the general and particular conditions of contract. Given the Bank's own commitment to support the CLSs, the Bank would engage with the executing agencies of the pilot projects in a dialogue aimed at addressing these issues in the context of the piloting program, and would propose the adopting of these standards when reviewing the terms and conditions of the SBDs to be used for each pilot project.</i></p>	<p>This paragraph illustrates that the Bank will not be able to maintain the standards it has set for itself (on Environmentally and Socially Responsible Procurement) under UCS. Interestingly, the last sentence of this passage in paragraph 46 of the previous Draft Proposal dated February 21st ("However, the Bank would not make any requirement with regard to CLSs and ESRP mandatory under the piloting program"), which revealed the full inconsistency of the whole exercise, has been deleted on the quiet by the draftsmen in the latest version dated March 20th – which, of course, doesn't delete the problem itself, i.e. that CLSs will not be applied under UCS!</p>
<p>Paragraph 54, Policy Framework: <i>To ensure that the Bank can take this new approach to procurement under Bank-sponsored operations without relinquishing its fiduciary obligations, it is proposed that UCS would be incorporated into the Bank's Procurement and Consultant Guidelines as a new method of procurement.</i></p>	<p>The Bank should not enshrine UCS in the Bank's Procurement Guidelines unless a sound body of experience has been gained over a certain period of time. Instead, the Bank should explore the advantages and disadvantages on a trial and error basis without changing the Guidelines immediately. Experience shows that it is harder to get something deleted from the Guidelines than inserted. See also next paragraph where it is laid down that a "roll-out strategy" should only start after rigorously assessing experience - the same goes for the Procurement Guidelines.</p>
<p>Paragraph 56, Reporting: <i>To keep Bank staff, the Board, and stakeholders fully informed about the piloting program, reporting would include the following:</i></p>	<p>The Reporting clauses are appreciated.</p>
<p>Paragraph 59, RECOMMENDATION: <i>Based on this paper, it is recommended that the Executive Directors approve the following:</i></p> <p>(a) <i>A change in the Bank's policy to introduce the use of country systems as a new method of procurement under the Procurement and Consultant Guidelines.</i></p>	<p>At this point in time, EIC would strongly advise <u>against</u> introducing UCS as a new method of procurement under the Procurement and Consultant Guidelines. The Bank should not rush into UCS before it has even started to gain experience in the field. We would find such legal implications premature since it is contradictory to and inconsistent with the - more careful - approach under lit. (b), outlining "a detailed examination of the equivalence and consistency of a country's procurement policies with the principles of the Bank's procurement policies as stipulated in its Procurement Guidelines".</p>
<p>Paragraph 60, Implementation Steps: <i>Management will prepare for Board approval the necessary revisions to the Procurement and Consultant Guidelines and at the same time submit the revised OP/BP 11.00 for information.</i></p>	<p>Management should be discharged by the Board from working on the necessary revisions to the Procurement Guidelines, but it should focus on producing a revised and improved OECD-DAC assessment tool.</p>

2008 Country Systems Proposal: OECD-DAC Country Assessment Tool Does Not Meet International Best Practice

2005 Country System Proposal							2007 Country Systems Proposal						
Based upon 77 sub-indicators:							Incorporates 2006 OECD-DAC Version 4 in methodology						
27 "mandatory" 50 "standard"							54 sub-indicators: 22 "critical" (score of 3) 8 "critical" (score of 2 only w/ action plan in loan agreement) 24 "non-critical" (no action plan)						
1a1	1a2	1a3	1b1	1b2	1b3	1c1	1a	1b	1c	1d	1e	1f	
1c2	1c3	1d1	1d2	1d3	1d4	1e1	1g	1h	2a	2b	2c	2d	
1e2	1e3	1f1	1f2	1f3	1f4	1g1	2e	2f	3a	3b	3c	3d	
1g2	1g3	1h1	2a	2b	2c	2d	4a	4b	4c	4d	5a	5b	
2e	2f	3a	3b	3c	3d	3e	5c	5d	6a	6b	6c	6d	
4a	4b	4c	5a	5b	5c	5d	7a	7b	7c	8a	8b	8c	
6a	6b	6c	6d	6e	6f	7a	9a	9b	9c	9d	9e	10a	
7b	7c	7d	7e	8a	8b	8c	10b	10c	10d	10e	11a	12a	
9a	9b	9c	9d	9e	10a	10b	12b	12c	12d	12e	12f	12g	
10c	10d	10e	10f	11a	11b	11c							
12a	12b	12c	12d	12e	12f	12g							

2005 Country Systems Proposal: Withdrawn as inadequate and not meeting international best practice. (These weakened 2005 Indicators became OECD-DAC 2006 Version 4 indicators later adopted in 2007 / 2008 Country Systems Proposals)

In an early 2007 meeting w/ OECD-DAC, World Bank, and US and European Industry, Industry strongly criticized OECD-DAC Version 4 paper **as NOT representing international best practice and urged capacity building focused on best practice.**

OECD/DAC Tool Changes from '07 to '08 CS Proposal	Critical*: Score of 3	Critical*: Score of 2 + Capacity Development Plan [^]	Non-critical*: score 2 – no action plan
Public Procurement Legislative and Regulatory Framework	1a 1c 1d 1e 1f 1g 1h		1b
Existence of Implementing Regulations / Documentation	2f	2c 2d 2a 2b 2e	
Public Procurement System Integrated with Governance System		3a 3b 3c 3d	
Country has a Functioning Regulatory Body	4d**	4b* 4a 4c	
Existence of Institutional Development Capacity	5a*	5b 5c 5d	
Country Procurement Operations and Practices are Efficient	6c*	6a 6b 6d	
Functionality of the Public Procurement Market		7c 7a 7b 7d	
Existence of Contract Admin. and Dispute Resolution	8a* 8b 8c		
Country has Effective Control and Audit Systems	9a* 9b*	9c 9d	
Efficiency of Appeals Mechanism	10a 10b 10c 10e**	10d	
Degree of Access to Information		11a	
Country has in place Ethics and Anticorruption Measures	12a 12b 12d 12f	12c 12e 12g	

[^] Set forth in Loan Agreement only; no clear methodology for monitoring, consequences

2007 Country Systems Proposal: Reduces standards below withdrawn 2005 proposal.

Only 24 indicators designated as mandatory (44%)

During World Bank consultations on the proposal, Industry and others **repeatedly** and strongly criticized tool as NOT representing best practice.

Note: Asterisks designate 8 indicators subsequently changed in 2008 draft proposal. (See below)

OECD/DAC Tool Changes from '07 to '08 CS Proposal	4d 10e SHOULD BE 3	COULD BE 2 + Capacity Development Plan [^]	SHOULD BE 2
Public Procurement Legislative and Regulatory Framework	1a 1c 1d 1e 1f 1g 1h		1b
Existence of Implementing Regulations / Documentation	2f	2c 2d 2a 2b 2e	
Public Procurement System Integrated with Governance System		3a 3b 3c 3d	
Country has a Functioning Regulatory Body		4a 4b	4c
Existence of Institutional Development Capacity		5a 5b 5c 5d	
Country Procurement Operations and Practices are Efficient		6a 6b 6d	
Functionality of the Public Procurement Market		7c 7a 7b 7d	
Existence of Contract Admin. and Dispute Resolution	8b 8c		8a
Country has Effective Control and Audit Systems		9a 9b 9c 9d	9e
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2008 Proposal: **Blue indicates further, substantial weakening from 2007 proposal.**

- Reduces to 17 the number of critical indicators (31% down from 44%)
- Weakens overall level of requirements from "mandatory" to "should be" met or even "could be" met
- Indicators related to **Conflict of interest substantially weakened**. Previously simply pass or fail – now failure permitted with "action plan" **allowing conflict of interest in direct procurement operations and allowing interference or conflict of interest in complaint body**
- Addition erosion includes: safekeeping of procurement records; appropriate

2005 Country System Proposal

Based upon 77 sub-indicators:
 27 "mandatory"
 50 "standard"

1a1	1a2	1a3	1b1	1b2	1b3	1c1
1c2	1c3	1d1	1d2	1d3	1d4	1e1
1e2	1e3	1f1	1f2	1f3	1f4	1g1
1g2	1g3	1h1	2a	2b	2c	2d
2e	2f	3a	3b	3c	3d	3e
4a	4b	4c	5a	5b	5c	5d
6a	6b	6c	6d	6e	6f	7a
7b	7c	7d	7e	8a	8b	8c
9a	9b	9c	9d	9e	10a	10b
10c	10d	10e	10f	11a	11b	11c
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2007 Country Systems Proposal

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54 sub-indicators:

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OECD-DAC and World Bank admitted that indicators had been "*watered down*" (12 were downgraded)

OECD/DAC Tool Changes from '07 to '08 CS Proposal	Critical*: Score of 3								Critical*: Score of 2 + Capacity Development Plan [^]		Non-critical*: score 2 – no action plan		
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Existence of Implementing Regulations / Documentation	2f							2c	2d	2a	2b	2e
Public Procurement System Integrated with Governance System									3a	3b	3c	3d
Country has a Functioning Regulatory Body									4a	4b		4c
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