

BIAC Statement on Indicators reflecting Best Practices to be included into the draft Methodology for Assessment of National Procurement Systems developed by the Joint Venture for Procurement

I. Introduction

At the consultation with the Joint Venture (JV) on 18 September 2007 in Copenhagen, BIAC presented its *“Statement on the Methodology for Assessment of National Procurement Systems Developed by the Joint Venture for Procurement.”*¹ One of the most important issues raised by BIAC was that *“... best [procurement] practices as opposed to merely “good practices” should be the benchmark that developing and developed countries as well as international organizations should strive to implement in order to improve procurement systems and practices.”* BIAC expressed concern that the indicators and scoring criteria used in draft Methodology do not consistently reflect international best practices which we see embedded in the World Bank’s Standard Bidding Documents and Procurement Guidelines, the WTO “Agreement on Government Procurement” (GPA) and the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

BIAC was pleased to receive an invitation by the Co-chairs of the JV to submit a separate paper to the JV in which we make it clear which assessment indicators we would regard as genuinely reflecting best international procurement practices.

In section II of this submission BIAC refers to several (sub-)indicators used as baseline-indicators in the current draft Methodology (version 4, July 2006) and we make it clear what OECD business would regard as best practice and therefore, as critical (sub-)indicators for high quality assessment of any national procurement system.

In addition to our indicator specific points raised under section II, we would stress again that if donors plan to use the Methodology for assessments on whether national procurement systems should be trusted in the context of donor financed projects, clear minimum requirements must be defined which any given country system has to meet in order to provide a justification for the use of national systems. BIAC would see the potential value of the Methodology undermined if individual donors would, on a discretionary basis set their own priorities for the sub-indicators while referring to the JV Methodology and thereby creating the impression that their assessments were based on internationally agreed methods.

Another important general point is that the use of overly vague terms in draft Methodology leaves in our view too much discretion to any assessor authorised to carry out the evaluations of national procurement systems. Terms, such as “adequately”, “easily accessible”, “appropriate”, “sufficient”, “unduly”, “reasonable”, “when possible”, “relevant”, which are used throughout the Methodology, do not provide sufficient guidance concerning the substantive criteria to be applied during

¹ See “Final BIAC Statement on the “Methodology for Assessment of National Procurement Systems” Developed by the Joint Venture for Procurement” included in the “Summary Note to the Business – Industry Advisory Committee to the OECD from the Working Group of the OECD-DAC Joint Venture for Procurement” from October 31, 2007

assessments and thus make it rather unlikely that national procurement systems will be benchmarked against best international practices. In order to substantiate or “objectify” the current the Methodology, reference should be made under each sub-indicator to the relevant clauses in the World Bank’s Procurement Guidelines (WB PG).

II. Comments on specific (sub-)indicators

Sub-indicator 1 (a): Scope of application and coverage of the legislative and regulatory framework

- The texts used to define the scoring criteria (a) and (b) use the rather unspecific expressions “adequately recorded”, “clearly established” and “easily accessible”. This is one of the parts of the Methodology which in BIAC’s view leaves too much discretion to any assessor. BIAC suggests to provide clearer guidance on what “adequately recorded”, “clearly established” and “easily accessible” imply in concrete terms, for example does “easily accessible” mean that the procurement law and regulations are to be found on the internet?

Sub-indicator 1 (b): Procurement methods

- According to the current JV draft Methodology, procurement methods can be rated with a score of 2 out 3 points without meeting the important criterion (d) (“*Appropriate standards for international competitive tendering are specified and are consistent with international standards*”). In our view it should be mandatory that the criterion (d) be met in order to reach a score of 2.

Sub-indicator 1 (c) Advertising rules and time limits (cp. WB PG 2.7, 2.8, 2.44)

- Publication of all public procurement opportunities (scoring criteria c) in an official internet site or newspaper of wide national circulation is of crucial importance for any procurement system. Thus, this criterion should be met for a score of 2. Moreover, access to the publication of procurement opportunities should be free of charge.
- For donor-funded projects, the publication needs to be in the internet and in English language.
- For other projects, a brief English summary equivalent to the EU Tenders Electronic Daily (TED) should be required.
- In scoring criterion (b) (“*Publication of opportunities provides sufficient time ...*”), it should be specified what time is considered sufficient. WB PG 2.44 stipulates a minimum period of six weeks in principle and a period of 12 weeks “*where large works or complex items of equipment are involved*”.

Sub-indicator 1 (d) Rules on participation (cp. WB PG 1.6 – 1.8 and 2.55/2.56)

- Page 11, last para , third sentence which currently reads as follows

“The assessor should review carefully the justification and adequacy of these provisions to ensure that they do not unduly affect the economy and efficiency of the system” should be modified to read

“The assessor should review carefully the justification and adequacy of these provisions to ensure that they do not unduly deter fair competition and hinder participation of non-domestic bidders.”

- Concerning scoring criterion (a), the criteria of qualifications must be precise and non-discriminatory.
- Scoring criterion (b) (“*Ensures that registration if required does not constitute a barrier to participation in tenders and does not require mandatory association with other firms*”) should be replaced with: “*Ensures that registration if required does not constitute a barrier to participation in tenders and, to that purpose, registration cannot be required before bid submission, but it can be required before contract signature.*”
- Scoring criterion d) should specify (in accordance with the World Bank Procurement Guidelines) the requirements for government-owned enterprises’ participation in tenders. WB PG 1.8 lit.(c) specifies that “*government-owned enterprises in the Borrower’s country may participate only if they can establish that they (i) are legally and financially autonomous, (ii) operate under commercial law, and (iii) are not dependent agencies of the Borrower or Sub-Borrower*”.

Sub-indicator 1 (e) Tender documentation and technical specifications (cp. WB PG 2.11-2.43)

It should be required that the national tendering documents meet the requirements set forth under WB PG 2.11-2.43. For large and complex tenders (above 25 million US\$), which are financed internationally, the World Bank Standard Bidding Documents should apply and must not be waived or replaced by national documents.

- Concerning scoring criterion (b) BIAAC does not find the formulation ‘*when possible*’ appropriate. In our view any recourse to specifications which are not neutral and in conformity with international standards should be clearly an exception and for which detailed justifications should be provided.
- Additional scoring criteria are required to address bid validity and bid security as well as conditions for price adjustment. Further, we suggest including in this section a provisions concerning bidding in foreign currency. So far, there is nothing in the draft Methodology that calls for a government to be willing to accept bids in international currency.

Sub-indicator 1 (f) Tender evaluation and award criteria (cp. WB PG2.49-2.54 and 2.59/2.60)

- Page 13, second to last para, first sentence which currently reads

“The decision criteria for award should be based on awarding to the lowest price evaluated tender”

should be changed to read

“The decision criteria for award should be based on the lowest price evaluated tender or to the economically most advantageous bid” (which is not necessarily the bid with the lowest price, given e.g. life-cycle-cost considerations).

- Concerning scoring criterion (b) (“Criteria not evaluated in monetary terms are evaluated on a pass/fail basis to the extent possible”), we find that evaluation that is not based on monetary criteria should clearly be an exception and not be used to justify domestic preferences. The criteria used should be stated in a precise and non-subjective manner.
- Scoring criterion (c) relating to the relationship between quality and price should not only apply to consulting services, but equally to procurement of works and goods.

- Additional scoring criteria are required to define the time frame for award publication (in order to allow for an external financier's objection) and to define the content of the publication (e.g. names of all bidders and prices).
- The importance of confidentiality of the evaluation process should be elevated to the effect that it is not possible to reach a score of 1 without meeting criterion d.

Sub-indicator 1 (g) Submission, receipt and opening of tenders (cp. WB PG 2.44-2.47)

- Additional scoring criteria should define requirements for submission and receipt of tenders. In accordance with Art. 33 paragraph 3 of the UNCITRAL Model Procurement Law, it should be required that *"The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced or communicated"*.
- Further, a criterion should be included that explicitly states that bids received after the deadline or not read publicly will not be opened or considered.
- Criterion (b): As regards scoring criterion (b), we recommend clarifying who, when and how records of proceedings for bid openings can be reviewed. For example, will there be an emergency procedure for candidates who feel their answer was not justly assessed?
- We also suggest expanding on the concept of debriefing which is mentioned in scoring criteria (c) but is not formally recommended in any of the indicators. The idea of an informal debriefing is dealt with in the Appendix 3 of the World Bank's Procurement Guidelines and should be added to the Methodology.
- Criteria (d): We suggest replacing *"government"* by *"awarding authority"*.

Sub-indicator 1 (h) Complaints (cp. WB PG Appendix 3)

- Pillar I (Legislative and regulatory Framework) lacks a (sub-)indicator dealing with provisions for an appeals mechanism. Sub-indicator 1 (h) relates to complaints, but remains silent about the necessary legislative and regulatory framework for an *effective* appeals mechanism.
- Inter alia, a stand-still period before the final conclusion of the contract (to allow a review procedure initiated by a competitor to be effective, i.e. to call for a correction of an unlawful procedure before the contract is finally awarded) should be included as scoring criteria already at the Pillar I level. The same is true for a provision on an effective suspension of the procurement procedure respectively the final award in case of an appeals procedure. It is not sufficient to deal with appeals mechanisms at the Pillar IV (Integrity and Transparency) level (Indicator 10), since provisions in the legislative and regulatory framework are essential.
- It should be clarified that bidders remain entitled to lodge a complaint with the international financing institution and that the international financier is under an obligation to examine such complaint and to consult with the Borrower.

Sub-indicator 2 (a) Implementing regulations that provide defined processes and procedures not included in higher level legislation

- BIAC believes that both scoring criterion (b) and (c) are interdependent as an update of regulations and provisions must be authorised by the responsible authority. Thus, we suggest merging the criteria into one criterion.

Sub-indicator 2 (c) Procedures for pre-qualification (cp. WB PG 2.9/2.10)

- Scoring criterion a) should provide that pre-qualification has to be based entirely on capability and resources of prospective bidders to perform the contract satisfactorily (to be specified e.g. with the wording of World Bank Procurement Guidelines, para 2.9-2.10).

Sub-indicator 2 (e) User's guide or manual for contracting entities

- We question the value of graduation between four different scoring indicators (3 to 0). In our view there should be only two scores possible. Either a unique procurement manual exists and is used (3 points) or it does not exist or is not used (0 points).

Sub-indicator 2 (f) General Conditions of Contract (GCC) (cp. WB PG 2.38)

- We take issue with the use of the word "generally" in criteria (b) ("*The content of GCC is generally consistent with internationally accepted practice*"). The content must be consistent with internationally accepted practice. In the case of tenders for major works above 25 million US\$, the FIDIC documents must be applied.
- An additional scoring criterion should ensure that GCC have to provide a balanced allocation of risks and liabilities.
- The GCC need to be regularly updated according to previously established procedures and under the authority of a previously designated independent entity. The GCC updates need to be made public.

Sub-indicator 3 (b) Budget law and financial procedures support timely procurement, contract execution and payment

- Criterion (c): The authorisation of payments is only the first step. It must also be ensured that the effective payment of the company takes place no later than four weeks after the payment was authorized.

Sub-indicator 3 (d) Systematic completion reports are prepared for certification of budget execution and for reconciliation of delivery with budget programming.

- We find that the formulation "...sufficiently integrated..." stated in scoring criterion (a) is too vague and thus likely to be subject to diverging interpretations. We suggest replacing "sufficiently" by "fully".

Sub-indicator 5 (a) ... System for collecting and disseminating procurement information (cp. WB PG 2.60)

- cf. last point on sub-indicator 1 (f), see above.

Sub Indicator 6 (a) The level of procurement competence among government officials within the entity is consistent with their procurement responsibility

- In our view the procurement agencies' capacity, its independence and the conditions of the nomination of its staff members and their replacement need to be checked. The Methodology should clearly call for competitive filling of procurement positions based on merit. The wording used in the current draft still allows cronyism to be used to fill these positions.

Sub indicator 6 (c) There are established norms for safekeeping of records and documents related to transactions and contract management

- The criterion (b) contains a detailed list of important records to be kept. However, it is possible to mark 2 points without meeting (b), i.e. without actually having relevant documents awaiting a possible judicial review or spot procurement audit in the files. This should be changed by increasing the importance of criteria (b).

Sub indicator 8 (b) Contracts include dispute resolution procedures that provide for an efficient and fair process to resolve disputes arising during the performance of the contract (cp. WB PG 2.43)

- We find that the criteria used under this important sub-indicator need to specify in greater detail how exactly efficiency and fairness of dispute resolution process need to be ensured. We suggest using the relevant clauses of the World Bank as a point of reference.

Sub indicator 8 (c) Contracts include dispute resolution procedures that provide for an efficient and fair process to resolve disputes arising during the performance of the contract.

- See comment for sub-indicator 8 (b).

III. Conclusion

BIAC urges the JV to seriously take into account the comments made by the OECD business community on the (sub-)indicators used in the draft Methodology as well as the additional business comments on the Methodology presented by BIAC at the consultation in Copenhagen in September. We reiterate our offer to be a partner to the JV in further improving the Methodology and propose to establish a Technical Working Group, including industry experts, tasked to improve the draft Methodology.

BIAC would appreciate to be informed about the JV's views concerning the detailed business suggestions and comments provided in this paper.

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