EBRD Core Principles on an Efficient Public Procurement Framework

The core principles on an efficient public procurement framework (the “Core Principles”) are based on a review conducted by the EBRD in September 2009. The review looked at international public procurement standards and current best practice relating to the procurement cycle, and all international public procurement instruments presently under revision.

The Core Principles reflect the standards generally regarded as international best practice in the public procurement process. The principles also draw on the practical experience of the EBRD as a direct investor and financier in the region.

The Core Principles are based on the assumption that the primary role of a public procurement law is to accommodate the business process of negotiating a contract in a public governance context. As public procurement constitutes a major economic activity for all governments, regulation is a sensitive component of a country’s legal framework, and is an essential supplement to public finance legislation. Since power dynamics within the public procurement process are inherently unequal, regulatory and enforcement institutions are of immense importance. Consequently, the Core Principles focus, in particular, on the issues of objectivity, consistency and enforceability of public procurement regulation.

The principles apply not only to the tendering phase, but also to the pre- and post-tendering phases. The contracting entity launching the public procurement needs to ensure that the fundamental principles of public procurement are maintained throughout the entire process.

Modelling the content of a national public procurement framework will depend on the contractual traditions of individual transition countries. At the same time, public procurement legislation needs to comply with international standards to ensure that key internationally recognised public governance values are respected. The Core Principles therefore may serve as an aide-mémoire and a checklist for the drafting process.
1. The PP legislative framework should foster accountability of public sector spending

The framework should promote accountability across all stages of the procurement process, balancing public and business dimensions of the process.

In the procurement process, accountability begins with a requirement for a clear chain of responsibility between management, budget, technical, legal and procurement officials. Furthermore, a separation of duties and authorisation should be enforced to ensure a transparent and smooth decision making process. Public procurements should be managed by a dedicated procurement specialist, responsible for co-ordinating of the entire procurement process and acting as a contact point for all tenderers competing for a contract.

It is essential that the framework require a sound contract profile and procurement plan to be established before the tendering process is launched, to avoid economically unjustified and unnecessary purchases. For large value contracts a special approval process should be in place.

The framework should also require technical specifications of tenders to be based on relevant quality characteristics and/or performance requirements.

The scope for rejecting all valid tenders should be clearly and narrowly defined. In cases where all tenders are rejected, the framework should require the contracting entity to provide reasons, and compensation, if valid tenders are received in response to the terms of reference, whenever appropriate.

A public procurement remedies system should strike a balance between protection of public finance and the right of the tenderer to seek effective remedy or compensation. There should be an independent review body with the authority to impose sanctions upon parties who do not comply with the public procurement values. In resolving disputes, the review body must treat contracting entities and tenderers in a fair and impartial way.

2. The PP legislative framework should ensure the integrity of the procurement process

The PP framework should promote integrity between the procurement function, transparency in delivering government policy and value for money.

The law should ensure that the behaviour of management and procurement officials is consistent with the public purpose of their organisation. It should contain measures to limit the scope for undue influence and to avoid conflict of interests at all stages of the procurement process.
Disclosure of a public investment and procurement information should be broad but regulated and information should be provided equally to all parties of the process.

In the public procurement process, communication between the contracting entity and tenderers should be made by best available means (preferably electronic) that provide a record of the content of the communication.

The law should limit the opportunities for negotiations or amendments to final tenders and proposals after submission.

3. The PP legislative framework should provide an adequate level of transparency

For public procurement to be acceptable to all stakeholders it should be seen to be public, transparent and objective. Any suggestion of an un-disclosed resolution must be avoided. The law should promote the extensive use of e-procurement as one of the methods to prevent collusion with tenderers.

PP regulation should:

- require an effective, official and dependable publicising of the procurement opportunities, through a single point of access;
- underline the importance of advance procurement and contract award notices; and
- require the public procurement process is real-time recorded, preferably through electronic means, accessible to the public free of charge.

A contracting entity should whenever possible publish tender documents free of charge on the contracting entity’s website, instead of supplying same by request only and for a fee.

As a rule, tenders should be opened in public opening session promptly after the deadline for the submission of tenders.

A contract award notice should be published for all contracts finalised by the contracting entity.

4. The PP legislative framework should enable competition

To begin with, the PP framework should promote fair competition and prevent discrimination in public procurement. Tenders and tenderers of equivalent status should be given equal treatment, without regard to nationality, residency or political affiliation. The law should not allow domestic preferences.

For regular understanding of grounds for exclusion, the PP framework should distinguish between the public procurement eligibility criteria, qualification and technical requirements to be met by tenderers.
The law should comprise minimum tender deadlines to ensure a level playing field and should demand consistency in its application throughout the procedure. In addition, where tenderers are eliminated, a sufficient standstill period or an alternative procedure should be in place to provide for immediate conservatory and protective measures.

Secondly, the law should encourage competitive contract through the tendering process. Sound PP law should permit both tendering and competitive negotiations, wherever appropriate, to ensure fit-for-purpose outcome. Selection of tender type or procedure should be based on the value of the tender, specifics of the purchase and the contract profile. The law should provide clear tests for the choice of procedure – it should be explicit to both the contracting entity and potential tenderers what circumstances may justify exceptions to open tender arrangements.

To ensure genuine competition takes place it is essential for the law to require tendering processes to stipulate reasonable technical specifications, requirements and suitable award criteria, adequate to the scope and value of the contract prior to embarking on the tendering process. The law should enable potential tenderers to decide quickly whether to tender. Confusions or complexities in the tender documents may result in too few or too many submitted tenders or a biased evaluation.

For the same reason, the contracting entity should be instructed on how best to deal with an abnormally low tender – it should be able to ask for clarifications and either reject the tender or increase the contract security to mitigate or limit perceived risks.

5. The PP legislative framework should promote economy in the procurement process

The law should enable public procurement to be accomplished professionally in a reasonable time. Formal requirements essential for transparency reasons should be kept simple and the costs low. All of the costs involved in the public procurement process are eventually paid for by taxpayers’ money. High costs of participation in the procurement procedure (including tender document fees, cost of certified statements and translations, inappropriate cost of producing a tender excessive in size, disproportionate tender security and so on) will increase the cost of contract and diminish the efficacy of the process. Enforcement costs will reduce the profit margin on the contract and may negatively impact the quality of contract delivery.

The law should grant the tenderers an ability to submit an inquiry or tender in a confidential but simple and time and cost-effective manner.

The PP law should encourage aggregation of lots, and whenever possible, the use of a life cycle costing for the purchase of goods and works. It should instruct the contracting entity in the pre-tendering phase not to divide contracts into small lots unless it is absolutely unavoidable. Aggregation of lots also allows for a ‘double check’ of the accuracy of the needs assessment.
6. The PP legislative framework should promote efficiency of the public contract

Sound programming and planning of the procurement is crucial to agree a cost effective and accurate public contract. An efficient public contract starts with an accurate and unbiased assessment of the contracting authority’s needs. Once this has been achieved, the public procurement process should not normally be initiated until the appropriate budget has been allocated or a source of financing is defined.

The PP framework should ensure value for money is achieved, and promote methods of tender evaluation considering both the quality and cost of purchase.

Contract terms and conditions should be fair and balanced and reflect the best available business practice. The law should clearly identify when a contracting entity may obtain a tender deposit or contract security, and specify relevant limits.

The law should mandate proper contract management. The mismanagement of the contract or fraudulent payments may increase the costs of the contract. Variations to the signed contract should be permissible, once carefully scrutinised from an integrity perspective, and should be prohibited when amendments significantly alter the economic balance of the contract in favour of the tenderer in a manner which was not provided for in the tender and terms of the initial contract.

7. The PP legislative framework should recognise the value of proportionality

Effective and efficient procurement regulation calls for a proportionality rule. Although these core principles apply to any public procurement, the formality and extent of the procedure should reflect the scope and size of the procurement. The contracting entity should align the value and scope of the contract with a choice of the contract type and formal tendering procedure.

The PP law should comprise cascaded (monetary and other) thresholds to instruct contracting entities how to produce an effective procurement strategy for a public contract.

The proportionality test should also be employed to decide on the use of languages; the contracting entity should allow proposals, offers or quotations to be formulated in a language customarily used in international trade except where, due to the low value of the goods, works or services to be procured, only domestic tenderers are likely to be interested.

8. The PP legislative framework should be comprehensive and limit derogations to reasonable exemptions acknowledged by international instruments yet should distinguish between state and utilities public procurement
For public procurement to be feasible, the PP regulation should be unitary, comprehensive and cover all public contracts. Notwithstanding, state/municipal budget contracting authorities and the entities in a utilities sector may have very different requirements in terms of function and commitments and an effective PP framework should be clear in determining the requirements of contracting entities of a different status.

At the same time, the PP framework should limit the exemptions from regulation to contracts outside the public procurement domain for evident and justified reasons, specifically defence procurement, special housing arrangements or development projects. For example, in providing finance to development and transition projects, International organisations are bound by their charters to observe special arrangements in relation to procurement, and have as a result developed special procurement policies, quality assurance systems and methods for publishing information pertaining to procurement opportunities. For this reason, all international PP regulation instruments, including the WTO Government Procurement Agreement, EU Treaty and UNCITRAL Public Procurement Model Law recommend that national procurement laws should not apply to public contracts awarded pursuant to international rules.

9. The PP legislative framework should be stable, but flexible

To make the process efficient, stakeholders must learn their roles, rights and obligations, within a stable legislative framework. Any market with a public procurement sector cannot operate smoothly if there are frequent changes to the law.

At the same time, the framework should be capable of flexible so as to accommodate the changing market. This is often best done through secondary legislation. Rules of the procedure should be reasonably constant, with a primary legislation constituting the basic principles and general framework of the procurement process. Secondary legislation should model specific matters, giving sufficient instruction to produce satisfactory tender documents and procurement reports.

10. The PP legislative framework should be enforceable

Public procurement law should be easy to enforce. Regulatory mechanisms should be able to assess the compliance of the contracting entities and employ corrective measures when necessary.

The dedicated national PP regulatory agencies should be professional, independent and provide audit and monitoring of the PP sector to raise the profile of procurement and drive up PP sector capability.