

PROCUREMENT CONSIDERATIONS AND GUIDANCE TO CLIENTS AND TENDERERS DURING THE COVID 19 CRISIS

MARCH 2020

On 11 March 2020, the World Health Organization (WHO) confirmed the status of coronavirus as a 'pandemic'. The Bank expresses its sympathy and solidarity with all those affected by the pandemic and the people in our countries of operations particularly hit by this crisis. As a consequence of the pandemic, governments and international organisations have implemented severe measures to control the spread of the virus, with serious implications on contractors, suppliers and consultants and their staff and business partners. These implications will also have a substantial impact on tenders and contracts under Bank financed projects.

For the Bank, the health, safety and well-being of the people involved and the communities potentially impacted by the preparation and execution of a project is paramount.

Many Bank clients are currently either in the process of undertaking a procurement exercise in accordance with the Bank's Procurement Policies and Rules (PP&R) or planning to commence a procurement exercise in the near future. The current COVID-19 crisis has created a number of procurement related risks, issues and challenges for both the Bank and its clients and tenderers. Whilst it is important to note that, to remain eligible for Bank financing, all contracts must continue to be awarded fully in accordance with the Bank's PP&R, this Guidance Note aims to highlight the key procurement related risks for Bank clients and tenderers and to provide guidance as to how these risks can be mitigated and/or minimised.

Key Procurement Risks

In the current climate, the key procurement risks for any Client currently undertaking, or considering to undertake, a procurement exercise include the following:

- A potentially lower level of participation in procurement exercises (even no tenders in a worst case scenario) leading to uncompetitive and/or unsuccessful procurement exercises;
- Tenderers building - potentially unreasonably inflated - contingencies into their tender prices to compensate for unforeseeable risks and possible future penalties/events (for example, application of liquidated damages, forfeiture of tender securities/bank guarantees etc./contract termination) as a consequence of an inability to sign a contract or as a potential consequence of subsequent non-performance;
- Conversely, an increase in the submission of abnormally low tenders from tenderers that foresee an opportunity to seek additional costs/time in the future through contractual claims;
- Tenderers having an insufficient/inadequate period of time to prepare and submit quality and responsive tenders;
- Inability of tenderers to obtain access to the full set of design or other technical documentation, including site specific environmental, health and safety, as well as social constraints and requirements, during the tender preparation stage due to travel restrictions to the country of operation;

- Inability of tenderers to arrange tender signing by their authorised personnel;
- Inability of tenderers to physically attend pre-tender meetings/site visits;
- Tenderers facing difficulty in sourcing materials/equipment and identifying sub-contractors;
- Tenderers (and banks) facing issues in arranging/issuing tender securities in a timely manner;
- Inability of tenderers to arrange timely delivery of tenders prior to the tender submission deadline and to attend public tender opening sessions;
- Inability of successful tenderers to arrange the issuance of performance securities/advance payment securities in a timely manner; and
- An increase in procurement related complaints;

As a general principle, the Bank strongly recommends that clients take all possible actions to facilitate the participation of tenderers in procurement exercises and to maximise potential competition, which should in turn increase the potential for competitive tenders and ensure best value for money.

In this regard, for clients that wish to continue with procurement processes in the light of the aforementioned risks, the Bank provides the following guidance to clients and tenderers:

A: Guidance for Clients

- The use of the Bank's EBRD Client E-Procurement Portal (ECEPP) will significantly facilitate and simplify all procurement processes. For any on-going procurement exercises currently undertaken outside of ECEPP and for any new procurement exercises currently not envisaged to be undertaken in ECEPP, clients are strongly recommended to transfer the procurement process into ECEPP. The use of ECEPP will significantly facilitate communication and the exchange of information (and procurement documentation) between clients and tenderers and enable tenders to be submitted electronically, without the need for a public (personally attended) tender opening, in a highly transparent manner. In this regard, in the first instance, clients shall contact the Bank's Operation Leader and the dedicated Project Implementation Adviser to establish the procedure to be followed;
- Prior to commencing any new procurement process, undertake market/industry consultations to ascertain if, in the current market conditions, the key market players are in a position to prepare and submit responsive and competitive tenders;
- Clients are encouraged to undertake prequalification exercises prior to the commencement of formal tendering exercises. Particularly so for any high value/complex goods or works contracts and contracts that transfer design obligations to the contractor. This approach has the benefit of delaying the formal tendering process until the expected end of the pandemic cycle whilst addressing a critical stage in the procurement process;
- Clients shall consider health and safety as well as social and environmental matters when instigating or assessing any action and decision concerning COVID-19 implications;
- Due to potential market constraints/shortages of critical parts/components, clients shall pay particular attention to ensure technical specifications are drafted in a manner, which will attract the widest possible range of technically acceptable equipment/materials etc.
- Consider the possibility to offer higher advance payments (which should also be secured with an appropriate bank guarantee) and use of documentary letters of credits to assist potential suppliers that may be facing short term cash flow issues;

- Contractual provisions shall include adequate time extension and price adjustment mechanisms to be able to handle the extended quarantines/other restrictions if these continue to be in place for longer than expected;
- Clients shall ensure that periods for the preparation of tenders are reasonable. As a general guideline, in the current environment, tenderers should normally be provided with a longer than regular period for the preparation of tenders;
- Clients shall minimise translation and certification (notarisation) requirements;
- Clients shall be receptive to any reasonable requests from tenderers to extend tender preparation periods and any such extensions shall be substantive and not superficial. All requests for such extensions should be responded to by clients in a timely manner;
- For any procurement processes administered outside of ECEPP, consider allowing participants to submit procurement documentation that does not contain confidential or sensitive pricing information (for example, prequalification submissions/unpriced first-stage tenders) and are not time critical, by e-mail;
- Where tender documents provide for a pre-tender clarification meeting or a first-stage tender clarification meeting, clients should comply with national or regional restrictions regarding social gatherings, and consider, where practical, to hold such meetings through video conference facilities or use similar arrangements;
- Where practical, for works contracts, the full set of design documentation shall be made available electronically, for example, in ECEPP (size permitting) or through file exchange platforms or equivalent;
- Clients may, with the Bank’s prior approval, consider deleting from tender documents (through a formal amendment to the tender documents) provisions requiring the provision of tender securities;
- During the tender evaluation stage, Clients shall provide tenderers with reasonable periods (minimum 7 days) within which to provide clarification of their tenders;
- Where applicable, clients shall ensure that any abnormally low tenders are assessed in accordance with the Bank’s Guidance Note on the “Assessment of Abnormally Low Tenders under Works Contracts”;
- In the event that a client requires tenderers to extend the validity of their tenders, tenderers shall be given a reasonable period (minimum 14 days) within which to confirm any such extension along with a reasonable period within which to provide any extension to any tender securities (minimum 14 days);
- In instances where successful tenderers cannot provide performance securities and/or advance payment guarantees in a timely manner, clients should accept reasonable delays.

In respect of the guidance above or any questions/concerns/issues not covered by this note please contact the Bank directly through the Operation Leader and the dedicated Project Implementation Adviser, who stand ready and willing to assist and advise as necessary.

B: Guidance for Tenderers

- Ensure that your company is registered in ECEPP to ensure prompt receipt of procurement notices;
- Familiarise yourself with the Bank's PP&R and suite of Standard Procurement Documents;
- Raise any requests for clarification of procurement/tender documents or extension of tender preparation periods with the client as early as possible in the procurement cycle;
- Make every effort to participate in any scheduled pre-tender clarification meetings;
- Familiarise yourself with the Bank's Procurement Guidance Note on the "Assessment of Abnormally Low Tenders under Works Contracts" and ensure that your tender pricing can be fully substantiated;
- Take extra care to ensure your tender is fully responsive to all requirements of the tender document prior to submission;
- If the procurement exercise is administered through ECEPP, ensure you allow sufficient time to upload your tender into ECEPP prior to the deadline for submission of tenders (you will receive minutes of the public opening automatically by e-mail);
- If you require additional time to respond to a client's clarification request, inform the client promptly and request an extension;
- If following award of a contract you are unable to enter into a contract due to a force majeure event, ensure that full details of the event are provided to the client;
- Familiarise yourself with the Bank's Procurement Guidance Notes covering "Bank Review" and "Procurement Complaints" and where issues need to be brought to the Bank's attention do so in a timely manner;
- Be sympathetic to and understanding of the possibility of delays in procurement decisions during these uncertain and unprecedented times.

Contracts Under Implementation

The above guidance focusses on the procurement process up to contract award. However, the Bank is also very conscious of the fact that many clients also have signed contracts in various stages of implementation.

The Bank fully understands that the COVID-19 situation creates many unforeseeable risks for both clients and contractors that may potentially lead to the necessity to modify or suspend contracts or even terminate them, as well as to contractual disputes. The Bank is not a party to any contracts awarded under the Bank's PP&R, and therefore not in a position to provide any legal advice to clients and/contractors with respect to any contractual disputes. Nevertheless, in these uncertain times, the Bank is ready and willing to exercise reasonable flexibility and understanding. The Bank will do everything possible to support the resolution of contractual issues arising as a direct consequence of COVID-19, including amendments to contracts where needed and appropriately justified, particularly so in instances where the parties to the contract have found a reasonable compromise consistent with the provisions of the contract.

Health and safety issues, and the well-being of all client and contractor personnel and neighbouring communities are of particular importance to the Bank. Given the significant health and safety risks associated with the COVID-19 outbreak, the Bank encourages all clients to be sensitive to the

developments in their countries and comply with the instructions of their governments including recommendations on travel, gatherings and workforce. The Bank also advises clients to follow up on the latest information on COVID-19 provided by the World Health Organisation and National Health Authorities, and to subsequently seek advice from the relevant government agencies where appropriate.

The EBRD website provides further guidance on a range of issues including health & safety, labour and the importance of continued effective information disclosure and stakeholder engagement during the COVID-19 pandemic.