

August 2000

Procurement Policies and Rules



European Bank
for Reconstruction and Development

267992



Procurement Policies and Rules for projects financed by the European Bank for Reconstruction and Development

First published January 1992
Revised August 1994, May 1995, March 1996,
February 1998, April 1999, **August 2000**

© European Bank for Reconstruction and Development
One Exchange Square
London EC2A 2JN
United Kingdom

All rights reserved. No part of this document may be reproduced or transmitted in any form or by any means, including photocopying and recording, without written permission of the copyright holder. Such written permission must also be obtained before any part of this document is stored in a retrieval system of any nature.



Revisions

A number of revisions to the Bank's Procurement Policies and Rules were approved by the Bank's Board of Directors on 23 August 1994, 16 May 1995, 20 March 1996, 24 February 1998 and 31 May 2000. This edition includes a new Annex 2 – Guidance to tenderers – and changes the following paragraphs in the April 1999 version of Procurement Policies and Rules to reflect this addition.

paragraph numbers		
<i>new</i>	<i>amended</i>	<i>renumbered</i>
Annex 2	3.34	Contents
	5.12	
	Annex	"Annex" to "Annex 1"
August 2000		

Contents

1.	Introduction	1
2.	Principles and considerations	2
	Eligibility	3
	Client responsibilities	3
	Fraud and corruption	3
3.	Procurement Rules for public sector operations	5
	General	5
	Applicability of the Rules	5
	Procurement process	6
	Procurement planning	6
	Notification	6
	Open Tendering	7
	<i>Prequalification of tenderers</i>	7
	<i>Two-stage tendering</i>	7
	Exceptions to Open Tendering	8
	<i>Selective Tendering</i>	8
	<i>Single Tendering</i>	8
	<i>Shopping</i>	8
	<i>Local Competitive Tendering</i>	8
	<i>Utilities</i>	9
	Open Tender documentation	9
	<i>Evaluation criteria</i>	9
	<i>Co-financing</i>	10
	<i>Language</i>	10
	<i>Standards and specifications</i>	10
	<i>Tender prices</i>	10
	<i>Currency</i>	11
	<i>Payment</i>	11
	<i>Time limits</i>	11
	<i>Conditions of contract</i>	11

Eligibility to submit tenders	12
Tender opening	12
Tender evaluation and contract award	13
Advance contracting	13
Contract administration	13
Procurement monitoring and Bank review	13
4. Procurement in private sector operations	15
5. Procurement of consultant services	16
General	16
Consultant selection procedures	16
Short lists	17
Evaluation and selection	17
Contract negotiations	18
Contract administration	18
Bank review	18
Annex 1	
Bank review of procurement decisions	19
Annex 2	
Guidance to tenderers	21

1. Introduction

1.1 In their transition to market economies and in applying the principles of multiparty democracy, the countries of operations of the European Bank for Reconstruction and Development need to achieve economy and efficiency in both public and private sector operations, and transparency and accountability in public administration. The establishment of sound procurement policies and practices must be an integral part of the transition process. Competition is the proven way to do this, and it is also the fundamental principle of good procurement practice.

1.2 Open and fair procedures for awarding public sector contracts for goods, works and services help to create dependable and stable markets for efficient private enterprises. They also form the basis for establishing accountability and encourage the cost-effective use of public funds, a matter that is of concern for both the Bank and its countries of operations. Article 13 of the Agreement Establishing the European Bank for Reconstruction and Development requires that:

“(xii) the Bank shall place no restriction upon the procurement of goods and services from any country from the proceeds of any loan, investment or other financing undertaken in the ordinary or special operations of the Bank, and shall, in all appropriate cases, make its loans and other operations conditional on international invitations to tender being arranged; and

(xiii) the Bank shall take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in by the Bank, or any equity investment, are used only for the purposes for which the loan or equity investment was granted and with due

attention to considerations of economy and efficiency.”

1.3 At the level of specific projects, which are the focus of the Bank's operations, the efficiency of the procurement process directly affects the costs and the time required for project execution and the ultimate performance of the operation. Good procurement practices should lead to significant time and money savings for the Bank's clients and help ensure successful project implementation and operation.

1.4 The Bank will help countries of operations meet their objectives of achieving economic development and transforming their public administration systems by carefully selecting and designing the projects it supports and by assisting in the development of appropriate institutions that are consistent with the philosophy and needs of market economies. Fostering sound procurement policies and competent organisations to administer them will be an important target in this effort.

1.5 Supplementing the principles contained in the Agreement Establishing the Bank, this document sets out the procurement policies and rules to be followed in Bank-financed operations. Section 2 describes general principles and considerations that are applicable for all operations. Section 3 contains rules for procurement in operations involving the public sector. Section 4 describes procurement arrangements in Bank-financed operations in the private sector. Section 5 concerns the selection of consultants by clients in Bank-assisted public sector operations and by the Bank when administering Technical Cooperation Funds or when engaging consultants directly.

2. Principles and considerations

2.1 The "Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development", Article 13, paragraph 6, notes agreement:

*"... upon completely open procurement (and not procurement open only to members) based on international tendering, where appropriate, and ... such tenders should be genuinely competitive, in line with the GATT Agreement on Government Procurement."*¹

The WTO/GPA (Government Procurement Agreement) establishes a framework of rights and obligations with respect to laws, regulations, procedures and practices regarding public procurement. The aim of the WTO/GPA is to achieve greater liberalisation and expansion of world trade by establishing transparent, fair and open procurement practices. The Bank supports the development of public procurement laws and practices within its countries of operations that are consistent with the principles of the WTO/GPA.

2.2 The underlying principle of WTO/GPA and the underpinning for the Bank's policies is that public sector contracts should normally be awarded on the basis of open competitive tenders. Only in special cases should contracts be awarded on the basis of selective or single tendering. The laws and practices for carrying out procurement should not discriminate between foreign and local products, suppliers or contractors and the procedures should be transparent and fairly applied.

2.3 The Bank will periodically review with its countries of operations their procurement

laws, regulations and procedures and will provide advisory services, technical assistance and training to help them reach consistency with the principles of the WTO/GPA and harmonisation with the Bank's policies and rules.

2.4 The Bank works in close cooperation with other multilateral institutions including the World Bank, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the European Union and the European Investment Bank and seeks to increase the flow of investments to its countries of operations by co-financing projects with multilateral and bilateral development agencies, export credit agencies and commercial entities. When projects are co-financed on a joint basis, the Bank's procurement policies and rules would normally be applied for co-financed contracts. When projects are co-financed on a parallel basis, the co-financiers' procurement procedures would be applied for contracts financed by them but the Bank will assure itself that quality goods and services are received at economic prices, that contracts are fair and provide adequate protection to the project and that contracts are completed in a timely manner.

2.5 The Bank's concerns for economy and efficiency, quality of results, contractual protection and timely completion cover an entire project even if Bank funds are applied only to a portion of the project. The Bank will finance only those contracts that are an agreed part of a project and that have been awarded and executed in accordance with the Bank's rules as agreed to be applied to that project.

Eligibility

2.6 The Bank permits firms and individuals from all countries to offer goods, works and services for Bank-financed projects regardless of whether the country is a member of the Bank. Firms from developing countries as well as from the Bank's countries of operations are encouraged to participate on equal terms and thereby assist their own country's development process. Any conditions for participation shall be limited to those that are essential to ensure the firm's capability to fulfil the contract in question.² Clients will not exclude a firm from open competition for a contract for reasons unrelated to its capability to perform the contract in question unless, as a matter of law or official regulation, the client's country prohibits commercial relations with the firm's country.

2.7 Consistent with international law, the proceeds of the Bank's loans, equity investment or guarantees should not be used for payment to persons or entities or for any import of goods, if such payment or import is prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations. Persons or entities, or suppliers offering goods and services, covered by such prohibition should therefore not be eligible for the award of Bank-financed contracts.

Client responsibilities

2.8 Clients are responsible for implementing Bank-financed projects, including all aspects of the procurement process from the planning stage through

the award of contracts, as well as the administration of the contracts themselves. The Bank may advise and assist clients in the procurement process and institutional development for specific projects but is not a party to the resulting contracts. The rights and obligations of the client *vis-à-vis* tenderers for goods, works and services to be furnished for the project will be governed by the tender documents issued by the client and not by these Policies and Rules.

Fraud and corruption

2.9 It is the Bank's policy to require that clients (including beneficiaries of Bank loans), as well as tenderers, suppliers, contractors, concessionaires and consultants under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts.

In pursuance of this policy, the Bank defines, for the purposes of this provision, the terms set forth below as follows:

- i) **"corrupt practice"** means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official, or the threatening of injury to person, property or reputation, in connection with the procurement process or in contract execution in order to obtain or retain business or other improper advantage in the conduct of international business.
- ii) **"fraudulent practice"** means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the client, and includes collusive practices among

¹ Replaced by WTO/GPA (Government Procurement Agreement), effective by 1 January 1996.

² See also Paragraphs 3.26, 3.27 and 3.28.

tenderers (prior to or after tender submission) designed to establish tender prices at artificial, non-competitive levels and to deprive the client of the benefits of free and open competition.

The Bank, in respect of the procurement of goods, works and services governed by Section 3, the selection of concessionaires pursuant to Paragraph 4.4, and the selection of consultants governed by Section 5:

- a) will reject a proposal for award if it determines that the supplier, contractor, concessionaire or consultant recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;
- b) will cancel the portion of the Bank financing allocated to a contract for goods, works, services or concessions if it at any time determines that corrupt or fraudulent practices were engaged in by representatives of the client or of a beneficiary of the Bank financing during the procurement or the execution of that contract, without the client having taken timely and appropriate action satisfactory to the Bank to remedy the situation;
- c) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a Bank-financed contract;
- d) reserves the right, where a client or a firm has been found by a judicial process or other official enquiry to have engaged in corrupt or fraudulent practices,
 - (i) to cancel all or part of the Bank financing for such client; and
 - (ii) to declare that such a firm is ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract; and
- e) will have the right to require that, in contracts financed by the Bank, a provision be included requiring suppliers, contractors, concessionaires and consultants to permit the Bank to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the Bank.

3. Procurement Rules for public sector operations

General

3.1 Competition is the foundation for good procurement practice. In addition to economy and efficiency, the public sector requires transparency and accountability for the use of public funds, and this affects the choice of the procurement method and the documentation and procedures that are used. Therefore the Bank requires its public sector clients, in all appropriate cases, to obtain goods, works and services through open tendering procedures in accordance with the rules outlined in this section. Other methods may be appropriate for special circumstances, depending on the nature and value of the goods, works or services to be obtained, the required completion time and other considerations. All exceptions to open tendering should be clearly justified and agreed by the Bank, and specified in the operation report and the legal documentation.

Applicability of the Rules

3.2. For the purpose of these rules, public sector operations³ are operations:

- a) which are guaranteed by the government or a public agency or instrumentality of the country of operations; or
- b) for utilities⁴ majority owned by national or local governments, or government agencies of the country of operations, other than such utilities operated by concessionaires who were awarded their concession following competitive tendering procedures acceptable to the Bank, and which in the Bank's judgement

are operating autonomously and are subject to bankruptcy and insolvency law; or

- c) for national or local governments of the country of operations or agencies and enterprises majority beneficially owned by any of them, other than such enterprises that in the Bank's judgement are operating autonomously in a competitive market environment and are subject to bankruptcy or insolvency law.

3.3 These rules shall apply to goods, works and services contracts (except consultant services, for which the procedures are described in Section 5) financed in whole or in part by the Bank in public sector operations. Contracts shall be procured following open tendering⁵ if their value is estimated to equal or exceed €200,000 for goods and services and €5 million for works. If the Bank determines that the above thresholds may have the effect of limiting competition or are not likely to ensure the most economic and efficient outcome, more appropriate thresholds would be required for such specific circumstances and would be specified in the Bank's operation report and the legal documentation. No procurement requirement shall be divided with the intent of reducing the value of the resulting contract(s) below these thresholds with the purpose of circumventing these rules. For goods, works and services contracts below these threshold values, clients are encouraged to follow open tendering but may use other procedures⁶ that are consistent with principles concerning competition,

³ "Operations" refer to loans, equity investments or guarantees of the Bank.

⁴ "Utilities" are authorities or undertakings directly involved in providing, through fixed networks, a service to the public in water, electricity, gas, heat, telecommunications or rail transport.

⁵ See Paragraph 3.9.

⁶ See Paragraphs 3.12 and 3.13.

transparency, economy and efficiency and which are acceptable to the Bank.

3.4 The rules apply to all forms of acquisition of goods, works and services (except consulting services for which the procedures are described in Section 5), including, *inter alia*, purchase, hire-purchase, rental and leasing.

Procurement process

3.5 The normal process for public sector procurement involves the following steps:

- a) notification of opportunities for tendering;
- b) prequalification where appropriate;
- c) invitation to tender and issuance of tender documents;
- d) receipt of tenders, evaluation of tenders and contract award; and
- e) contract administration.

The extent of the process and specific procedures to be followed for each step will depend on the method of tendering that is used.

Procurement planning

3.6 Sound planning of procurement is crucial. The client must determine what goods, works and services are required to carry out the project, when they must be delivered, what standards are needed, the need for co-financing⁷ and which procurement and contracting procedure is most suitable for each contract. The client should complete the overall procurement plan and the Bank should clear it before any procurement begins.

The particular procedures and the goods, works and services to which they apply are determined by agreement between the Bank and the client and are specified in the Bank's operation report and the legal documentation. Adjustments and refinements to the plan with the Bank's concurrence should continue as needed throughout the duration of the project. Review and approval of the procurement plan by the Bank is one of the essential steps for establishing the use of the proceeds of the loan.

Notification

3.7 After the procurement plan has been prepared and as early in the project cycle as possible, the client must issue a General Procurement Notice that advises the business community about the nature of the project. This notice should include the amount and purpose of the loan and the overall procurement plan, including:

- a) the goods, works and services to be procured;
- b) the expected timing; and
- c) a name and address to contact to express interest and obtain additional information.

This notice shall be published in a newspaper with wide circulation in the client's country and in official gazettes and international trade publications, as appropriate. In addition, the notice shall be submitted to the Bank not later than 60 days before invitations to tender are issued. The Bank will arrange for publication of the notice in the Procurement opportunities section of the Bank's Web site (www.ebrd.com) and in the United Nations' *Development Business*.

The General Procurement Notice shall be updated annually so long as any goods, works or services remain to be procured by open tender.

3.8 Open tendering, including prequalification where required, for individual contracts shall be advertised in a newspaper with large circulation in the client's country and in official gazettes and international trade publications, as appropriate. The Bank will arrange for publication of the notice in the Procurement opportunities section of the Bank's Web site. Tender and prequalification notices shall also be sent to potential tenderers that have responded with an expression of interest to the General Procurement Notice and to local representatives of foreign countries that are potential suppliers of the goods and works required. Publication of tender notices in international publications such as the United Nations' *Development Business* and the *Official Journal of the European Communities* is also encouraged. In order to encourage and facilitate the participation of sub-contractors and suppliers in contracts, the client should make available to interested parties the list of potential tenderers that have purchased tender documents and, where pre-qualification is being followed, the list of pre-qualified tenderers.

Open Tendering

3.9 Open Tendering procedures are those procedures under which all interested suppliers or contractors are given adequate notification of contract requirements and all such tenderers are given an equal opportunity to submit a tender. It provides the greatest

opportunity for competition and satisfies the needs for economy and efficiency. The client must give sufficient advance public notification of open tendering opportunities for potential tenderers to determine their interest and to prepare and submit their tenders.⁸

Prequalification of tenderers

Clients may require potential tenderers to prequalify for large and complex contracts and all tenderers that meet the prequalification criteria should be allowed to submit tenders. The notification for prequalification and the evaluation procedure shall be consistent with those for open tendering in these rules. Prequalification is not a form of selective tendering. The prequalification criteria, which shall be specified in the prequalification documents, shall be based entirely upon the capability and resources of prospective tenderers to perform the particular contract satisfactorily, taking into account such factors as their (a) experience and past performance on similar contracts, (b) capabilities with respect to personnel, equipment, and construction or manufacturing facilities, and (c) financial position.

Two-stage tendering

Detailed design and engineering of the goods and works to be provided, including the preparation of technical specifications and other tendering documents, normally precede the invitation to tender for major contracts. However, in the case of turnkey contracts or contracts for large complex plants or works of a special nature, it may be undesirable or impractical to prepare complete technical specifications in advance. In such a case, a two-stage tendering procedure may be used,

⁷ See Paragraph 3.17.

⁸ See Paragraph 3.23.

under which first unpriced technical proposals on the basis of a conceptual design or performance specifications are invited, subject to technical as well as commercial clarifications and adjustments, to be followed by amended tendering documents and the submission of final technical proposals and priced tenders in the second stage. These procedures are also appropriate in the procurement of equipment which is subject to rapid technological advances, such as major computer and communication systems.

Exceptions to Open Tendering

3.10 **Selective Tendering** procedures are similar to those for open tenders except that the client preselects qualified firms, who will be invited to submit tenders. It may be a suitable method for awarding contracts where:

- a) the required product or service is highly specialised and complex;
- b) there are only a limited number of suppliers of the particular goods or services needed;
- c) other conditions limit the number of firms that are able to meet contract requirements; or
- d) critical goods, works or services are urgently required.

In these cases a client may, with the Bank's approval, invite tenders from a list of qualified firms, selected in a non-discriminatory manner. The list should include foreign firms wherever possible.

3.11 **Single Tendering** may be used in exceptional cases where:

- a) the extension of an existing contract awarded in accordance with procedures acceptable to the Bank for additional goods, works or services of a similar nature would clearly be economic and efficient and no advantage would be obtained by further competition;
- b) there has been an unsatisfactory response to open or selective tenders carried out in accordance with the Bank's procurement rules;
- c) a product can only be provided by a single supplier because of exclusive capabilities or rights;
- d) standardisation with existing equipment is determined to be important and justified, the number of new items are generally less than the existing number and compatible goods cannot be provided by other suppliers; or
- e) it is a case of extreme urgency.

In these cases a client may, with the Bank's approval, invite a single firm to present its tender without prior public notification.

3.12 **Shopping** procedures may be agreed to by the Bank for contracts of a small value for (a) readily available off-the-shelf items; and (b) standard specification goods. Shopping is a simplified form of competitive purchasing that only requires written price quotations from at least three suppliers, including foreign suppliers wherever possible.

3.13 **Local Competitive Tendering** in accordance with national procedures may be the most economic and efficient method of procuring goods, works or services when:

- (a) contract values are small; (b) works are scattered geographically or spread over time; (c) the goods, works or services are available locally at prices less than the international market; or (d) by their nature or scope contracts are unlikely to attract foreign competition. The procedures under which local competitive tendering is carried out must be acceptable to the Bank. They should provide for adequate notification and competition in order to ensure reasonable prices, evaluation criteria should be made known to all tenderers and should be applied fairly, and the conditions of contract should be fair and appropriate to the project. Foreign firms should be allowed to participate in accordance with national procedures.

3.14 In operations with **utilities**⁹ which are moving towards majority private ownership or control¹⁰ by implementing programmes in this respect, and already have a significant degree of private ownership and control, such utilities should normally be expected to follow open tendering. However, where such utilities are operating autonomously and are subject to or have adopted sound procurement procedures, the Bank may agree that such utilities follow competitive tendering procedures in accordance with their own procedures, subject to such procedures being acceptable to the Bank. To be acceptable for use in Bank-financed procurement, the procedures of the utility should provide for adequate international notification,¹¹ non-discriminatory competition, transparent and fair evaluation procedures, monitorable compliance, as well as fair and balanced contracts.

Open Tender documentation

3.15 Tender documents are the basis for informing potential tenderers of the requirements to supply specific goods and services or to construct works, so they should furnish all information necessary to permit tenderers to submit responsive tenders. Tender documents shall be drafted so as to permit and encourage international competition. They shall clearly define the scope of works, goods or services to be supplied, the rights and obligations of the purchaser and of suppliers and contractors, and the conditions to be met in order for a tender to be declared responsive, and they shall set out fair and non-discriminatory criteria for selecting the winning tender.

The detail and complexity will vary according to the size and nature of the contract but generally they should include an invitation to tender, instructions to tenderers, the form of tender, tender security requirements, the conditions of contract, advance payment guarantees, performance security requirements, technical specifications and drawings, a schedule or requirements for the goods, works or services, and the form of contract. Clients should use the Bank's standard tender documents appropriate for each type of procurement.

3.16 **Evaluation criteria.** Tender documents shall specify the relevant factors in addition to price to be considered in tender evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated tender. Factors which may be taken into consider-

⁹ See Paragraph 3.2 (b).

¹⁰ Control is measured by the ability to effectively determine the decisions and policies of the utility, and not merely by the ability to set utility tariffs.

¹¹ See Paragraph 3.7.

ation include, *inter alia*, the costs of inland transport to the project site, the payment schedule, the time of completion of construction or delivery, the operating costs, the efficiency and compatibility of the equipment, the availability of service and spare parts, and minor deviations, if any. The factors other than price to be used for determining the lowest evaluated tender should be expressed in monetary terms or, where that is not practicable, given a relative weight in the evaluation provisions of the tender documents.

3.17 Co-financing.¹² Where co-financing is required to complete the financing package for an operation and joint co-financing of specific contracts is appropriate, tender invitations may require that tenderers include in their tender specific co-financing offers for the contract. This requirement shall only be used where, in the Bank's judgement, significant competition will be maintained. The agreed level and general terms of the co-financing required shall be specified in the tender documents. These should normally be consistent with the OECD consensus terms when ECA financing is envisaged. Evaluation of tenders should be based on the evaluated tender price, which could include any finance costs above the specified terms.

3.18 Language. Tender documentation, including all published procurement notices, shall be prepared by the client in one of the Bank's working languages. In the interest of open competition as well as economy and efficiency, the Bank may require that tender documentation also be provided in another working language of the Bank which shall be specified in the tender documents as the

governing language. In addition, the client may prepare further sets of the tender documentation in the local language, in order to assist local firms in tendering.

3.19 Standards and specifications. Clients should use international standards and specifications wherever these are available and appropriate. If particular national or other standards are used, the tender documents shall state that other standards that ensure equivalent or higher quality or performance than the specified standard would also be accepted. The use of brand names or other designations that would discriminate among suppliers should be avoided. If they are necessary to clarify the nature of the product requirements, the tender documents shall state that products of equal or higher quality would be acceptable.

3.20 Tender prices. Tender prices for the supply of goods shall be requested on the basis of Incoterms CIP, DAF or similar, border entry point, for foreign goods and ex-factory for local goods. Evaluation of tenders for supply of goods should exclude import duties and taxes payable on imported goods and on directly imported components to be incorporated in locally supplied goods, but should include all costs associated with the supply, delivery, handling and insurance of the goods to the final destination. Tender prices for works and services contracts to be substantially executed in the purchaser's country may be requested inclusive of all duties, taxes and other levies. The evaluation and comparison of tenders shall be on this basis and the selected contractor would be responsible for all duties, taxes and levies in the performance of the contract.

3.21 Currency. A tenderer may express the tender price in any currency or in euro or a combination of these. Clients may require tenderers to state the local cost portion of a tender in the local currency. For the purpose of tender evaluation and comparison, tender prices shall be converted to a single currency, selected by the client, using the selling (exchange) rates for the currencies of the tender price quoted by an official source (such as the central bank) for similar transactions on a date selected in advance and specified in the tender documents, provided that such date should not be earlier than 30 days prior to the date specified for the opening of tenders nor later than the original date prescribed in the tender documents for the expiry of the period of tender validity. Payment under the contract will be made in the currency or currencies in which the tender price is stated in the tender of the successful tenderer. For civil works and other similar contracts that involve performance in the client's country, and provided the client's currency is fully convertible, the tender price may be converted into that currency and payment of equivalent amounts will be made in the client's currency without loss or risk to the contractor.

3.22 Payment. Payment terms and procedures shall be in accordance with the international commercial practices applicable to the goods, works or services and the market in question. Contracts for supply of goods shall provide for full payment on delivery and inspection, if so required, of the contracted goods, except for contracts involving installation and commissioning, in which case a portion of the payment may be

retained until the supplier or contractor has complied with all its obligations.

3.23 Time limits. Prescribed time limits for preparation and submission of tenders shall be adequate for all tenderers to prepare and submit tenders. Generally not less than 45 days from the publication of the invitation to tender or the availability of tender documents, whichever is later, should be allowed for the preparation and submission of tenders. For large or complex works or items of equipment, this period should be extended to 90 days or more. Tender validity periods and delivery dates shall be consistent with the client's reasonable requirements but shall not be used to discriminate against any potential tenderer. In exceptional cases it may be necessary to request tenderers to extend the validity of their tenders. In such cases tenderers should not be allowed or required to change their tender and should be free not to give such extension. Where the tender is for a fixed price contract, provision should be made in the tender documents for the tender price of the successful tenderer to be adjusted for inflation¹³ up to the date of contract award, so as to mitigate the risk accruing to tenderers offering such an extension.

3.24 Conditions of contract. The form of contract to be used should be appropriate to the objectives and circumstances of the project. Contract conditions shall be drafted so as to allocate the risks associated with the contract fairly, with the primary aim of achieving the most economic price and efficient performance of the contract. The contract shall clearly define the scope of

¹² See Paragraph 2.4.

¹³ An appropriate index, such as the official cost of living index in a country which is expressed in the currency of the tender, should be used.

goods, works or services to be supplied or performed, the rights and obligations of the client and of suppliers and contractors and should include, *inter alia*, appropriate provisions for guarantees of performance and warranties, liability and insurance, acceptance, payment terms and procedures, price adjustment, liquidated damages and bonuses, handling of changes and claims, force majeure, termination, settlement of disputes and governing law. Wherever appropriate, standard forms of contract incorporating generally accepted international conditions should be used.

3.25 Nothing in the tender documents shall be designed to restrict competition or offer an unfair advantage to a tenderer. Clients shall not provide to any potential supplier or contractor information regarding a specific procurement which would have the effect of reducing or precluding competition. All amendments to tender documents must be sent to each recipient of the original tender documents.

Eligibility to submit tenders

3.26 A tenderer may submit or participate in any capacity whatsoever in only one tender for each contract. Submission or participation by a tenderer in more than one tender for a contract will result in the rejection of all tenders for that contract in which the party is involved. However, this does not limit the inclusion of the same subcontractor in more than one tender.

3.27 No affiliate of the client, or of a procurement agent engaged by the client, shall be eligible to tender or participate in a tender in any capacity whatsoever unless it can be demonstrated that there is not a

significant degree of common ownership, influence or control amongst the client or the client's agent and the affiliate.

3.28 Where a firm, its affiliates or parent company, in addition to consulting, also has the capability to manufacture or supply goods or to construct works, that firm, its affiliates or parent company normally cannot be a supplier of goods or works on a project for which it provides consulting services, unless it can be demonstrated that there is not a significant degree of common ownership, influence or control. The only exceptions would be turnkey, single responsibility, public works concessions or similar undertakings where design, supply and construction activities are an integral part of the contract or where certain proprietary and critical items of equipment and materials are an essential part of the process design.

Tender opening

3.29 Tenders solicited under open and selective procedures shall be received and opened under procedures and conditions guaranteeing the regularity of the opening as well as the availability of information from the opening. The time specified for tender opening should be the same as for the latest delivery of tenders or promptly thereafter. On the date and at the time and place described in the tender documents, the client will open all tenders that have been received before the latest time stipulated for the delivery of tenders. Tenders should be opened in the presence of tenderers or their representatives who wish to attend. The name of the tenderer and the total amount of each tender, including alternative tenders if permitted, shall be read aloud and recorded when opened. The client shall maintain a complete record of

the tender opening, which should be copied to the Bank. Tenders received after the stipulated deadline for the submission of tenders shall be returned unopened to the tenderer.

Tender evaluation and contract award

3.30 When competitive procedures are used, the client must evaluate all tenders and compare them only on the basis of the evaluation criteria set out in the tender documents. The tender evaluation process up to the award of the contract should be confidential. Contracts should be awarded within the period of tender validity to the tenderer whose tender has been determined as being substantially responsive and, in terms of the specific evaluation criteria set forth in the tender documentation, is determined as the lowest evaluated and who has been determined to be fully capable of undertaking the contract. Tenderers should not be allowed or asked to change their tender nor required to accept new conditions during evaluation or as a condition of award. The terms and conditions of the contract shall not, without the Bank's concurrence, materially differ from those on which tenders were invited. The client should only reject all tenders if there is evidence of collusion or if there has been unsatisfactory competition, including receiving tender prices that substantially exceed the cost estimates or funds available. Before rejecting all tenders, the client must obtain agreement from the Bank on the procedures to follow.

3.31 The client should submit to the Bank a report containing the results of the tender evaluation and its recommendation for the award of the contract. The Bank will review the findings and recommendations as the

final step in establishing the eligibility of the contract for Bank financing.¹⁴

Advance contracting

3.32 In some cases it may be advantageous for the client to sign a contract before the signing of the related Bank loan. Clients undertake such advance contracting at their own risk and the Bank's concurrence with the procedures, documents or the proposal for award does not commit the Bank to make a loan for the project. All procurement procedures must be consistent with the Bank's policies and rules in order for contracts signed in advance of loan approval to be eligible for Bank financing.

Contract administration

3.33 The client shall administer contracts with due diligence and shall monitor and report to the Bank on the performance of contracts. The client shall seek the Bank's concurrence before agreeing to any material modification to the terms and conditions of a contract including, but not limited to: (a) granting a material extension of the stipulated time for performance of a contract; or (b) issuing a change order or orders which in aggregate would increase the cost of a contract by more than 15 per cent of the original price.

Procurement monitoring and Bank review

3.34 As an integral part of their project implementation responsibilities, clients are required to prepare and maintain documents and records pertaining to the procurement process and the administration of contracts

¹⁴ See Paragraph 3.34.

following their award. The Bank's review of the procurement and contract administration processes will focus on critical steps that are necessary to ensure eligibility of the contract for Bank financing, in particular the procurement plan, the tender documents, the tender evaluation and contract award recommendations, and material changes and claims during execution of the contract. These review procedures are described in Annex 1. All contracts to be procured following open or selective tendering should normally be subject to the Bank's prior review. The Loan Agreement will specify the contracts subject to review.

3.35 When a complaint regarding any aspect of a tender procedure is received by the Bank (see Annex 2), the Bank will ensure that the complaint is fully reviewed to its satisfaction and that, pending the outcome of such review, no decisions are made or approvals given which could prejudice the outcome of the review.

3.36 If the Bank finds that the procurement or administration of a contract has not been carried out in accordance with the agreed procedures, the contract would no longer be eligible for financing with the proceeds of the loan and the outstanding portion of the loan allocated to the contract would be cancelled.

4. Procurement in private sector operations

4.1 The Chairman's Report, in Article 13, Paragraph 6, notes that:

"Delegates agreed upon completely open procurement ... based on international tendering, where appropriate, and ... such tenders should be genuinely competitive ... Private sector enterprises in which the Bank held equity or debt might be encouraged, but not obliged, to use international tenders to obtain goods or services efficiently and economically."

The Bank's concerns for the appropriate use of funds and for economy and efficiency apply equally to its public sector operations (as defined in Paragraph 3.2) and its private sector operations. Private sector enterprises often meet these concerns by following established commercial practices other than formal open tendering for their procurement. Nevertheless, wherever appropriate, the Bank will encourage the use of competitive tendering methods by its private sector clients, particularly for large contracts.

4.2 The Bank will satisfy itself that private sector clients use appropriate procurement methods which ensure a sound selection of goods and services at fair market prices and that they are making their capital investments in a cost effective manner. Careful procurement planning that takes into account the particular needs of the enterprise is essential for the Bank's evaluation and agreement.

4.3 Contracts awarded by private sector clients should be negotiated on an arm's length basis and should be in the best financial interest of the client company as distinct from the sponsors. Where

a shareholder of the client company or one of its affiliates, including parent companies and affiliates of such parent companies, is also a contractor or supplier to the project, the Bank will satisfy itself that the costs are in line with current market prices and the original cost estimates in the operation report, and that the contract conditions are fair and reasonable. The Bank will not finance costs that exceed market levels.

4.4 Where the Bank is involved in advising or assisting a government or public entity in contracting with private operators for a public works concession, build-operate-transfer (BOT) operation or other similar undertaking which enjoys special or exclusive rights, or other state concession such as a recognised monopoly, with the objective of the Bank ultimately financing the successful candidate, competitive tendering procedures acceptable to the Bank should be followed for the selection of the concessionaire. Such competitive selection procedures would be considered as meeting the objectives of a competitive market environment for the purpose of Paragraph 3.2 (c).

4.5 Where an operation provides funds to a financial intermediary to finance sub-loans to private beneficiaries such as small and medium-sized enterprises, the procurement under the sub-loan is undertaken by the respective beneficiaries in accordance with normal procurement practices for private sector operations acceptable to the Bank. Where sub-loans are made to public sector beneficiaries, procurement under such sub-loans must be in accordance with the Bank's procurement rules for public sector operations outlined in Section 3.

5. Procurement of consultant services

General

5.1 The Bank and its clients employ individuals and consulting firms to provide a wide range of expert advice and consulting services in connection with their operations and management responsibilities. The main concern when choosing consultants should be the quality of the services that are provided. The procedures for selecting consultants and contracting for their services should be flexible and transparent to ensure that assignments can be efficiently executed with high standards of performance, while providing the necessary accountability. The procedures described below shall be followed for consultant contracts to be financed with the proceeds of Bank loans under public sector operations and for contracts with consultants engaged directly by the Bank. For consultant contracts financed with Technical Cooperation Funds, these procedures shall also be followed to the extent that they do not conflict with agreements reached with the donors for the use of such funds.

Consultant selection procedures

5.2 The selection process for consultants normally involves the following steps:

- a) defining the scope, objectives and estimated budget of the proposed assignment and determining the selection procedure to be followed;
- b) identifying consultants that are qualified to perform the required services and preparing a short list of qualified firms;
- c) inviting proposals from the short-listed firms;

- d) evaluating and comparing capabilities and proposals and selecting the preferred consultant;
- e) negotiating a contract with the selected consultant; and
- f) contract administration.

5.3 Some of these steps may be simplified or omitted, depending on the value of the contract for services to be performed:

- a) For contracts estimated to cost less than €50,000 with individuals or firms, a qualified consultant may be selected directly, without the requirement to prepare a short list, and a contract negotiated with the selected consultant.
- b) For contracts estimated to cost €50,000 or more with individuals, selection should be made on the basis of an evaluation of short-listed, qualified candidates and the rationale for the choice should be recorded.
- c) For contracts with firms that are estimated to cost €50,000 or more and less than €200,000, a short list of qualified firms should be prepared. The selection should be based on an evaluation of the short-listed firms' proven experience and current expertise related to the assignment, without a requirement that the firms submit specific proposals for carrying out the assignment.
- d) Major contracts with firms estimated to cost €200,000 or more should follow a competitive procedure based on invited proposals from a short list of qualified firms.

Short lists

5.4 Short lists of consultants should normally include no less than three and no more than six qualified and experienced consultants (individuals or firms, as the case may be). The list should normally comprise a wide geographic spread of consultants, including wherever possible at least one qualified consultant from one of the Bank's countries of operations and normally no more than two from any one country.

5.5 No affiliate of the client shall be included on a short list unless it can be demonstrated that there is not a significant degree of common ownership, influence or control amongst the client and the affiliate and that the affiliate would not be placed in a position where its judgement in the execution of the assignment may be biased.

5.6 For large assignments with firms estimated to cost €200,000 or more, complex or specialised assignments, or operations involving a significant number of similar assignments, a formal notice soliciting expressions of interest from qualified firms shall be published in the Procurement opportunities section of the Bank's Web site. The short list shall be prepared on the basis of the responses to the solicitation.

5.7 Requests for proposals, including all published procurement notices, shall be prepared by the client in one of the Bank's working languages. The Bank may require that requests for proposals also be prepared in another working language of the Bank which shall be specified in the request for proposals as the governing language.

Evaluation and selection

5.8 When formal proposals are requested from a short list of firms, the invitation for proposals should clearly state the criteria for evaluating them. The evaluation of consultants should normally be based only on technical considerations including, but not limited to, experience in similar assignments, local experience and presence, qualifications of key personnel proposed for the assignment, and suitability and quality of the work plan. For some assignments of a straightforward technical nature, the price of the services can be a secondary consideration but quality should remain the principal factor in selection. When formal proposals have been requested, the consultant that submits the highest rated proposal should be invited to negotiate a contract with the client.

5.9 Competition through a short list is preferred; however, in some circumstances it may be necessary or advantageous to engage or continue with a specific firm, where:

- a) the firm has unique expertise or experience; or
- b) the firm has been or is involved in the early phases of the project such as feasibility or design and it has been determined that continuity is necessary and no advantage would be gained from following competitive procedures. Provision for such an extension, if considered in advance, should be included in the original terms of reference and contract, which preferably should have been awarded after a competitive selection.

In such cases a client may, with the Bank's prior approval, invite the firm in question to submit a proposal and negotiate a contract.

Contract negotiations

5.10 During contract negotiations the selected consultant's proposal may be modified by mutual agreement between the client and the consultant. The client should indicate any changes that may be desirable in the scope of services and in the staffing proposed by the consultant, and appropriate adjustments in the price of services should then be agreed. The draft final contract should be presented to the Bank for review before signing.

Contract administration

5.11 As in the case of other contracts in Bank-financed projects, the client is responsible for managing and administering the consultant's work to ensure high performance standards, authorising payments, making contract changes as may be needed, resolving claims and disputes, ensuring timely and satisfactory completion of the assignment and evaluating the performance of consultants.

Bank review

5.12 Where consultants are being engaged by a client, the qualifications, experience and terms and conditions of employment shall be satisfactory to the Bank. The Bank will review the proposed scope of services and terms of reference, the proposed short list of firms, the recommendation for consultant selection and the final contract to ensure that

the assignment is eligible for Bank financing. The review procedures are described in Annex 1. Consultancy contracts estimated to cost €200,000 or more should normally be subject to the Bank's prior review. The Loan Agreement will specify the contracts subject to review. The Bank will also require an evaluation by the client of the consultant's performance.

5.13 If the Bank finds that the procurement or administration of a contract has not been carried out in accordance with the agreed procedures, the contract would no longer be eligible for financing with the proceeds of the loan and the outstanding portion of the loan allocated to the contract would be cancelled.

Annex 1 – Bank review of procurement decisions

Contracts for goods, works and services

1. For all contracts which, in accordance with the legal documents, are subject to the Bank's prior review:

- a) prior to an invitation to prequalify or tender, the client shall submit the complete prequalification or tender documents to the Bank for its review and concurrence;
- b) prior to finalising a prequalification list or awarding a contract, the client shall submit a detailed prequalification or tender evaluation report setting forth the specific reasons on which the recommendation to prequalify firms or award the contract is based, to the Bank for its review and concurrence; and
- c) one conformed copy of the contract shall be furnished to the Bank prior to the submission of a withdrawal application in respect of such contract.

2. For contracts not subject to prior review, the client shall furnish to the Bank, prior to the submission of a withdrawal application in respect of such contract, a conformed copy of such contract, together with a tender evaluation report for its review and concurrence.

Contracts for consultant services

3. For all contracts which, in accordance with the Loan Agreement, are subject to the Bank's prior review:

- a) prior to an invitation to submit proposals, the client shall submit the proposed short list of firms, the scope of services and terms of reference and the evaluation

criteria for the assignment, to the Bank for its review and concurrence;

- b) prior to inviting a selected firm for negotiations, the client shall submit a detailed evaluation report setting forth the specific reasons on which the recommendation to select the successful firm for negotiations is based, to the Bank for its review and concurrence; and
- c) one conformed copy of the contract shall be furnished to the Bank prior to the submission of a withdrawal application in respect of such contract.

4. For contracts not subject to prior review, the client shall furnish to the Bank, prior to the submission of a withdrawal application in respect of such contract, a conformed copy of the contract, together with an evaluation report for its review and concurrence.

All contracts

5. The client shall make such modifications in procurement documents or reports as the Bank shall reasonably request. The approved documents or reports shall not be materially changed without the Bank's concurrence.

6. Before agreeing to any material modifications or waiver of the terms and conditions of a contract or granting a material extension of the stipulated time for performance or issuing any change order or orders (except in cases of extreme urgency) which in aggregate would increase the cost of a contract by more than 15 per cent of the original price, the client shall get the Bank's concurrence to the proposed modification, waiver, extension or change order.

7. If the Bank determines that the award of a contract, the contract itself or any modification or waiver of such contract is not consistent with the Loan Agreement, it shall promptly inform the client and state the reasons for such determination.

8. Upon the award of any contract to be financed by the Bank, the Bank may publish a description of such contract, the name and nationality of the party to which the contract was awarded and the contract price.

Annex 2 – Guidance to tenderers

Purpose

1. This annex provides guidance to potential tenderers wishing to compete in Bank-financed procurement for goods, works and services and concessions in accordance with Section 3 and for consultant services in accordance with Section 5.

Responsibility for procurement

2. The client is responsible for all aspects of the procurement of contracts in accordance with Section 3. It invites, receives and evaluates tenders and awards the contract, which in all cases is concluded between the client and the supplier, contractor or concessionaire. The client is also responsible for all aspects of the procurement of contracts with consultants engaged by the client in accordance with Section 5. The Bank is responsible for the procurement of consultants in accordance with Section 5 engaged by the Bank itself.

The Role of the Bank in procurement

3. The Bank reviews the procurement procedures, documents, tender evaluation reports, award recommendations and final contracts to ensure that the tendering process is carried out in accordance with agreed procedures, as required in the Loan Agreement. In the case of major contracts (defined usually as those exceeding a particular euro threshold established in each Loan Agreement), the documents are to be reviewed by the Bank prior to their release. If at any time in the procurement process (even after award of contract), the Bank concludes that the agreed tendering or contract administration procedures were not

substantially followed in any material respect,¹⁵ the Bank may also declare that the contract is no longer eligible for Bank financing, consistent with Paragraphs 3.36 and 5.13. However, if the client has proceeded to award such a contract after issuance of the Bank's no objection, the Bank will declare the contract to be ineligible for Bank financing if it determines that its no objection was based on incomplete, inaccurate or misleading information about the procurement process furnished by the client, or if it determines that the client or the successful tenderer has engaged in corrupt or fraudulent practices. The Bank may also declare a contract or a portion of it to be ineligible for Bank financing if, during the administration of the contract, it appears that it has not been carried out in accordance with the agreed procedures, consistent with Paragraphs 3.33 and 5.11, or if it determines that either the client or the successful tenderer has engaged in corrupt or fraudulent practices.

4. The Bank has published several *Standard Tender Documents* (STDs) for various types of procurement. As stated in Paragraphs 3.15 and 3.24, clients should use these documents when they prepare specific tender documents for each type of procurement, with minimum changes and additions to address country, project and contract-specific issues and requirements.

Information on tendering

5. Information about tendering opportunities being procured through open tendering procedures in accordance with Paragraph 3.9 may be obtained from General Procurement

¹⁵ The judgement as to whether a procedural or other deviation is considered "material" or "critical" will be made exclusively by the Bank based on a reasonable assessment of all the facts in each case.

Notices and Specific Invitations to pre-qualify or tender, as described in Paragraphs 3.7 and 3.8. General guidance on how to participate, as well as advance information on business opportunities in upcoming projects, may be obtained in the Procurement opportunities section of the Bank's Web site (www.ebrd.com), which also contains invitations for expressions of interest for large consultant contracts, in accordance with Paragraphs 5.6 and 5.7.

Guidance for tenderers

6. Once a tenderer receives a pre-qualification or tender document, the tenderer should first study the documents carefully to decide if it can meet the key technical, commercial and contractual requirements and conditions. Failing that, the effort and cost of preparing and submitting a tender would not be justified. The tenderer should next critically review the documents to see if there is any ambiguity, omission or internal contradiction, or any feature in the technical specifications or elsewhere which are unclear or appear discriminatory or restrictive. If so, it should seek clarification from the client, in writing, within the time period specified in the tender documents for seeking clarifications. Requests for clarification should be copied to the Bank.

7. The criteria and methodology for selecting the successful tenderer are defined in the tender documents, usually in the Instructions to Tenderers (ITT). If these are not clear, or if there are apparent ambiguities or inconsistencies between the criteria and methodology set forth in the ITT and other sections of the tender documents, e.g. the

technical specifications, clarification should be similarly sought from the client. It should be emphasised that the specific tender documents issued by the client govern each tender process, as stated in Paragraph 3.30. If a tenderer feels that certain tender document provisions are inconsistent with the Bank's Procurement Policies and Rules, it should raise this directly with the client, copying the Bank on the query.

8. The tenderer should raise any issue of ambiguity, contradiction, omission or any other issues of this nature prior to the deadline for submission of requests for clarifications, if any, specified in the ITT, to assure submission of a fully responsive and compliant tender, supported by all the necessary documents. Non-compliance with critical technical and/or commercial requirements will result in rejection of the tender.¹⁶ Therefore, if a tenderer wishes to deviate from a non-critical requirement or propose an alternative solution, and no specific guidance is provided in the ITT in this regard, in order to be considered responsive it must submit a tender that is fully compliant with the tender documents in every respect, and separately indicate the adjustment in price associated with acceptance of the deviation or alternative solution. Once tenders are received and publicly opened, a tenderer will not be required or permitted to change the price or substance of its tender.

Confidentiality

9. As stated earlier, the process of tender evaluation shall be confidential until the notification of award is made. This is

essential to enable the reviewers of the client and Bank to carry out their work without improper interference, and in recognition of the negative impact that release of certain tender information might have in the market. If at this stage, a tenderer wishes to bring additional information to the notice of the client, of the Bank, or both, it should do so in writing. As pointed out in the last sentence of Paragraph 8 of this Annex, however, no assurance can be given that such additional information will be considered in the evaluation.

Procurement queries and complaints (procurement by client)

10. As recommended above, tenderers are invited to send to the Bank copies of correspondence with the client on issues and questions relating to the tendering process, or to write to the Bank directly when the client does not respond promptly or when tenderers wish to complain about the client's or the Bank's handling of the procurement process. All such communications should be addressed to the Director of the Banking Department Team responsible for the project and copied to the Director of the Procurement and Technical Services Unit (PTSU). Correspondence received by the Bank prior to the closing date for submission of tenders will normally be referred to the client for action or response, along with comments as appropriate.

11. Communications received after the opening of tenders will be handled as follows. In the case of contracts not subject to prior review by the Bank, the communication will be sent to the client for due consideration and appropriate action, if any. These will be

reviewed during subsequent monitoring of the project by Bank staff. In the case of contracts subject to prior review, the Bank will examine the issue in consultation with the client before the evaluation is completed. If additional information is required, it will be obtained from the client. If information or clarifications are required from the tenderer, the Bank will ask the client to obtain it and take it into account, as appropriate, in the evaluation report. The Bank will not complete its review until the issues raised in the communication are fully examined and considered.

12. Except for acknowledgement of receipt, the Bank will not enter into discussions or correspondence with any tenderer relating to the details of an ongoing evaluation during the actual evaluation and review process of the tender, until notification of award has been made.

Procurement queries and complaints (procurement by the Bank)

13. Requests for clarification concerning documents issued by the Bank in connection with consultant contracts procured by itself in accordance with Section 5 should be addressed to the staff member named for the contract in the Procurement opportunities section of the Bank's Web site. Complaints about the procurement process for such contracts should be addressed in writing to the Director of the PTSU.

Debriefings

14. If, after notification of award, a tenderer wishes to ascertain the grounds on which its tender was not selected, it should address its request to the client, with a copy to the Bank.

¹⁶ In its review of client evaluation reports (see Annex 1), the Bank will, among other things, before giving its no objection, examine the grounds for any rejection related to "substantial non-compliance" or "material" or "critical" deviations.

If the client refuses the request, or if the tenderer is not satisfied with the explanation given and wishes to discuss the matter with the Bank, it may ask the Director of the PTSU to arrange a formal debriefing, copying the request to the Director of the Banking Department Team responsible for the project. In the case of consultant contracts procured by the Bank, the request should be addressed to the Operation Leader for the contract, with copies to the Head of the Consultants Services Unit and the Director of the PTSU. The Bank will arrange a meeting at the appropriate level and with the relevant staff. In this discussion, the relative strengths and weaknesses of the tender submitted and any other appropriate information necessary for the tenderer to better understand how it can improve its future chances of success will be discussed.