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FEATURE COMMENT: Assessing The World Bank's Proposed Revision Of Its Procurement Guidelines

The World Bank Group, which commits tens of billions of dollars to funding projects in the developing world every year (see, e.g., Table 1), has published for comment proposed revisions to its procurement guidelines. The Bank's procurement guidelines are intended to ensure that procurements on Bank-financed projects are carried out efficiently and without corruption. As a practical matter, because of the many projects supported by the Bank's financing, the Bank's guidelines help shape procurement practices across the developing world, and their revision marks an important opportunity to improve procurement practices worldwide.

Table 1: World Bank: IBRD & IDA Operational Summary—Fiscal 2009

	Commitments	Projects
International Bank for Reconstruction & Development	\$32.9 billion	126
International Development Association	\$14.0 billion	176

from World Bank Annual Report, go.worldbank.org/AA92CEU590

Introduction to the Bank's Procurement Guidelines—The Bank's current procurement guidelines, *Guidelines, Procurement Under IBRD Loans and IDA Credits*, last revised in October 2006, are available at siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-evl.doc. A separate set of guidelines—generally more liberal than the procurement guidelines—covers the selection and employment of consultants for Bank-financed projects. See *Guidelines: Selection*

and Employment of Consultants by World Bank Borrowers (May 2004), available at go.worldbank.org/U9IPSLUDC0. Our discussion here focuses on the proposed amendments to the procurement guidelines, which were published in draft form in March and are available for comment until May 31, at go.worldbank.org/V10Z9HWPY0.

The procurement guidelines help the Bank meet two sometimes conflicting goals in its Articles of Agreement. See Sope Williams, "The Debarment of Corrupt Contractors from World Bank-Financed Contracts," 36 Pub. Cont. L.J. 277, 279 (2007). The procurement guidelines are intended to ensure that Bank-financed projects are conducted efficiently, transparently and without corruption, in keeping with the Bank's obligation to ensure that its resources are spent prudently and for their intended purpose. See, e.g., Articles of Agreement of the International Bank for Reconstruction and Development Art. III, § 4(v), Art. III, § 5(b) (as amended effective Feb. 16, 1989), available at go.worldbank.org/WAUZA5KF90. At the same time, however, because the Bank's procurement guidelines are tied to a specific project (the guidelines are typically referenced in a project's loan agreement) and do not force change in the borrower nation's own procurement laws, they honor the Bank's commitment not to interfere in the political affairs of borrower nations. *Id.*, Art. III, § 5(b), Art. IV, § 10; see Sope Williams, *supra*, at 279.

The Bank's procurement guidelines for borrowers cover most of the standard elements of any procurement law, including, for example, directions on contractor qualifications, procurement methods and domestic preferences. The guidelines take a generally conservative approach to procurement. This is because they are intended, in part, to reduce the reputational, operational and mission risks that the Bank and its borrowers face if Bank-financed projects are tainted by corrupt or ineffective procurement. See, e.g., Ole Kristian Fauchald and Jo Stigen, "Corporate Responsibility Before International Institutions," 40 Geo. Wash. Int'l L. Rev. 1025,

1046 (2009) (discussing procurement guidelines' role in checking corruption); *World Bank Communicates Governance and Anti-Corruption Strategy in Sierra Leone* (2008) (discussing corruption as a reputational risk to Bank's development work), available at go.worldbank.org/EGEOL49EY0.

Proposed Revisions to the Procurement Guidelines—The procurement guidelines, first published in 1961, have been reformed over the years to make them more streamlined and efficient. See, e.g., Jean-Jacques Verdeaux, “The World Bank and Public Procurement: Improving Aid Effectiveness and Addressing Corruption,” 2006 Pub. Proc. L. Rev. NA179 (2006). The guidelines remain, however, notably conservative, and they constrain borrowers from using more open-ended procurement methods, such as competitive negotiations with multiple offerors, which have become commonly accepted procurement methods elsewhere in the world. See, e.g., Federal Acquisition Regulation pt. 15, 48 CFR pt. 15 (detailed procedures for competitive negotiations). Over time, the guidelines' conservative approach has become more pronounced as other rule systems, such as the EU's procurement directives, see, e.g., Sue Arrow-smith, “The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?,” 35 Pub. Cont. L.J. 337 (2006), and the United Nations Commission on International Trade Law (UNCITRAL) model procurement law (pending revised draft available at www.uncitral.org, under “Working Group I”), have evolved to allow more liberal approaches to procurement.

The Bank's more conservative approach reflects, in part, the sheer diversity of its borrowers, which are developing nations with sometimes immature systems for containing corruption. The more aggressive approaches to procurement common in industrialized nations—including competitive negotiations, to continue the example—allow procuring agencies to gain better value, but depend on mature systems of corruption controls. The competitive negotiations (or competitive dialogues, as they are known in Europe) used in some industrialized nations do not lock offerors into fixed specifications, but instead allow them to put forward idiosyncratic, disparate and creative solutions. The industrialized nations that use these more loosely structured methods thus gain the value of those cutting-edge solutions, but they also take on additional risk that an unstructured, largely non-transparent negotiation process will breed corruption

and favoritism. The serious procurement scandals that have occasionally emerged in those industrialized nations, for example, in competitive negotiations in the U.S. federal procurement system, bear out those risks. See, e.g., Jeffrey Branstetter, “Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement,” 34 Pub. Cont. L.J. 443 (2005). However, the complex web of anticorruption protections in place in most industrialized nations helps mitigate those risks.

From the Bank's perspective, however, the procurement guidelines must assume that at least some borrower nations do not yet have those sophisticated anticorruption systems in place. The guidelines have therefore traditionally emphasized structured, transparent bidding, and over time the guidelines have been amended to introduce new anticorruption strategies.

Some Key Elements of the Proposed Revisions—The most recent proposed revisions to the procurement guidelines, published in March 2010, continue in the Bank's previous tradition. Generally speaking, the proposed revisions would bolster anti-corruption measures required of borrowers, but would not loosen the procurement methods allowed borrowers. At the same time, the proposed revisions would bring the Bank's guidelines into line with many of the reforms underway in other major regulatory regimes for procurement, worldwide. We will touch here on a few of the notable proposed revisions.

OCIs: One of the most broadly debated topics in procurement today is how to deal with organizational conflicts of interest—conflicts of interest that arise because a contractor firm, due perhaps to competing commitments or other goals, cannot provide objective advice to a customer agency. See, e.g., Daniel I. Gordon, “Organizational Conflicts of Interest: A Growing Integrity Challenge,” 35 Pub. Cont. L.J. 25 (2005); Peter Braun & Ceren Birespek, “Conflicts of Interest in Public Award Procedures: *Deloitte Business Advisory NV v. Commission of the European Communities*,” 2008 Pub. Proc. L. Rev. NA53 (discussing European case law and rules regarding firms' conflicts of interest). Organizational conflicts of interest undermine competition and erode performance. However, rules that too aggressively exclude companies with potential OCIs may, in the end, drive some of the most competent competitors from the market.

The Bank's proposed revisions to the procurement guidelines would expand the definition of a

disqualifying conflict of interest, to include circumstances in which a bidder, or any of its affiliates, has “been engaged by the Borrower to provide consulting services for the preparation or implementation of [the] project.” Proposed Revised Guidelines ¶ 1.7(a). This type of conflict—known colloquially as a “biased specifications” conflict of interest under U.S. law—arises because of the risk that the consultant may well write the specifications to favor the consultant’s product, or a client’s or affiliate’s product. Compare World Trade Organization, Agreement on Government Procurement Art. VI.4 (1996) (firm that drafted specification should not be allowed to bid against that specification).

The Bank’s revised guidelines apparently would not, however, extend to two other types of OCIs recognized under U.S. federal procurement law: “impaired objectivity” conflicts of interest, which arise if a contractor providing technical or professional advice to an agency may be biased by other interests; and “unfair advantage” conflicts, which may arise if, for example, a bidder has unfair access to procurement information. These additional types of conflicts were thoroughly canvassed in the U.S. Department of Defense’s recent proposed rules on OCIs, see Defense Federal Acquisition Regulation Supplement Case 2009-D015, Organizational Conflicts of Interest in Major Defense Acquisition Programs, 75 Fed. Reg. 20954 (April 22, 2010), and are part of the ongoing reform of the UNCITRAL model procurement law, see UNCITRAL Working Group I, UN Doc. A/CN.9/WG.I/WP.73, at 5 (Feb. 24, 2010) (chronicling proposed revisions to UNCITRAL model procurement law regarding conflicts of interest). A broader approach to conflicts of interest should, therefore, be considered as part of the Bank’s revised guidelines.

Bid Protests (Challenges): The Bank’s proposed revised guidelines mark progress for bid protests (also known as challenges or remedies internationally), although further attention is likely warranted. The revised guidelines would not allow bidders to protest directly to the Bank, but the procedures set forth at Appendix 1, § 2(e) of the revised guidelines would require that the Bank be kept apprised, in some detail, of any protest brought in a Bank-financed project. Revised ¶ 3.4 of the guidelines would require that a bid protest process be in place when borrowers undertake national competitive bidding (the bidding process normally reserved for Bank-financed

procurements that are unlikely to attract foreign competition). As the revised guidelines explain, government agencies undertaking national competitive bidding are required to have their own “effective and independent bid protest mechanism in place allowing bidders to protest and have their protests handled in a timely manner.” There would be no parallel explicit requirement, however, for a bid protest system in international competitive bidding.

The Bank may wish to consider more explicitly mandating bid protest systems for all forms of bidding for Bank-financed projects, and may wish to elaborate on what constitutes an acceptable bid protest system. Bid protest systems are increasingly common around the world because they promote transparency, integrity and accountability while furthering competition. In practice, bid protests brought by disappointed competitors can serve as an early warning system for corrupt or inept procurement.

To leverage the benefits of bid protest systems, the Bank may wish to elaborate on what would constitute an “effective and independent” bid protest mechanism. The Bank could draw on experience in the U.S. and EU in framing minimum standards for bid protest systems. See, e.g., Daniel I. Gordon, “Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make,” 35 Pub. Cont. L.J. 427 (2006); Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 Amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, available at ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm; Rhodri Williams, “A New Remedies Directive for the European Community,” 2008 Pub. Proc. L. Rev. NA19. In framing the elements of an acceptable bid protest system, the Bank also may wish to draw on the UNCITRAL model procurement law, which is under revision, but already reflects, in draft form, extensive discussion of best practices in protest systems around the world. See, e.g., UN Doc. A/CN.9/WG.I/WP.73/Add.8 (Feb. 22, 2010), available at www.uncitral.org/pdf/english/workinggroups/wg_1/73add8E.pdf.

Strengthening Norms for Fighting Fraud and Corruption: The Bank’s revised procurement guidelines would strengthen the definitions of “fraud” and “corruption,” and indirectly bolster the

Bank's sanctions procedures that can be triggered by violations of the procurement guidelines. See Sope Williams, *supra*; Parthapratim Chanda, "The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties," 32 Den. J. Int'l L. & Pol. 315 (2004). What is not clear, however, is whether the Bank's revised approach fully squares with emerging norms of corporate responsibility, including, for example, the contractor compliance systems now required under U.S. law. See, e.g., Sandeep Kathuria, "Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation," 38 Pub. Cont. L.J. 803 (2009). Because of the procurement guidelines' continued focus on fraud and bribery, broader issues, such as ensuring contractor compliance and responsibility, have not been extensively addressed in this round of revisions. To bolster the anticorruption protections for Bank-financed projects, the procurement guidelines should perhaps address these broader issues by setting standards for contractor compliance systems and other risk management measures.

Framework Agreements: The proposed revisions specifically endorse a vital and rapidly growing method of procurement: framework agreements. These agreements typically work as catalogue agreements for goods and services. They may be awarded to multiple contractors, sometimes simultaneously, and then agencies may contract against those standing agreements. Framework agreements have flourished in public procurement in the U.S. and Europe over the last decade. See generally Christopher R. Yukins, "Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting," 37 Pub. Cont. L.J. 545 (2008).

Although many of the finer points of framework contracting still remain unresolved in the U.S. and European regulatory systems, the Bank's proposed revisions to the procurement guidelines would stake out an aggressive position for framework agreements. Thus, for example, awards of both the master agreements *and* the subsidiary contracts would have to be published under the revised guidelines. What the revised guidelines do *not* do, however, is explain how they tie back into evolving rule systems in the U.S. and Europe. A set of reporter's notes, or an accompanying technical guide for the procurement guidelines, would help to explain the rules' provenance, and

would make it easier to integrate the Bank's evolving rules with the rapidly changing procurement systems around the world.

Use of Country Systems: The proposed revised guidelines would specifically accommodate those borrower nations that have permission to use their own country systems for procurement, under the Bank's "Use of Country Systems" pilot initiative. See generally World Bank, *Use of Country Procurement Systems in Bank-Supported Operations: Proposed Piloting Program* (R2008-0036/5) (June 19, 2008), available at go.worldbank.org/KB821V1X10. Harmonizing (or at least coordinating) the Bank's procurement rules with other regulatory regimes will become even more important as the Bank allows more countries to use their own country systems for procurement. Under this initiative, and initially on a pilot basis, the Bank would allow some borrower nations to use their *own* procurement rules—not the Bank's procurement guidelines—for international competitive bidding for Bank-financed projects. As the Bank's borrowers shift away from the uniformity of the Bank's guidelines and use their own procurement systems, the balkanization of rules and rising transaction costs may prompt the Bank and other stakeholders (including prospective contractors) to press for more harmonization of rules across procurement systems. The seeds of that harmonization are already there: the policy memorandum explaining the pilot program specifically noted that the capacity development at the heart of the initiative would be best served by encouraging "harmonization of the [implementing] country's system of procurement policies and procedures around generally accepted international practices." *Id.* at 5. In the same vein, the multilateral development banks have drafted a set of shared norms for their procurements as part of a broader effort to coordinate procurement procedures between the various banks. See *Requirements for Local Procurement in Borrowing Countries*, available at siteresources.worldbank.org/INTPROCUREMENT/Resources/localproc.pdf. Although the norms and practices set forth by the multilateral banks may not resolve all conflicts between procurement regimes, they are an important step forward.

Conclusion—Because of the sheer scope of the Bank's lending to projects in the developing world, the procurement guidelines have had an important

impact on procurement practices internationally. The Bank's pending revision of those guidelines thus offers an opportunity to improve procurement practices around the world. To succeed, the Bank's guidelines should encourage transparency, accountability and integrity, and should draw on best practices from other procurement regimes to enhance competition and best value. More broadly, to integrate the Bank's guidelines with other regulatory systems—including the systems of the Bank's borrowers, which may soon be allowed to pilot the use of their own procurement rules for Bank-financed projects—the Bank may wish to publish more detail on how its evolving guidelines correspond to other procurement regimes, which are rapidly evolving

and harmonizing as procurement grows ever more global and integrated.



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