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### FEATURE COMMENT: The New World Bank Procurement Framework

The World Bank's board of executive directors approved a new Procurement Framework on July 21 that will govern World Bank financed procurement projects, available at [consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/phase\\_ii\\_the\\_new\\_procurement\\_framework\\_-\\_board\\_paper.pdf](http://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/phase_ii_the_new_procurement_framework_-_board_paper.pdf). Framework Executive Summary ¶ 1 and Framework ¶ 12 describe the changes as “a once-in-a-generation systemic reform and culture change,” and “a comprehensive modernization of the Bank's entire procurement regime.”

The Framework is the result of “the first comprehensive review of Bank procurement since the Bank's founding”—a three-year review process involving numerous consultations between the Bank and its stakeholders. Framework, at ¶¶ 5–9. As the Bank states in its “Review of the World Bank Procurement Policies and Procedures: Questions and Answers,” available at [consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/procurement\\_reform\\_qa\\_august\\_2014.pdf](http://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/materials/procurement_reform_qa_august_2014.pdf), the review was undertaken because much has changed since the Bank's procurement guidelines were written in the 1960s, and the Bank's one-size-fits-all approach is not sufficiently flexible to meet its clients' current needs.

This FEATURE COMMENT highlights many of the most significant aspects of the new Framework. Among the changes are (1) providing more

flexibility during the source selection process; (2) streamlining the Bank's review of low-risk/low-value contracts, while increasing the Bank's involvement in technically complex and risky contracts; (3) streamlining the process for borrowers to use alternative procurement arrangements (APAs) rather than the Bank's arrangements; and (4) devoting additional attention to and revising aspects of the complaint process.

The Bank's current guidelines are in two separate documents. The first document, *Procurement of Goods, Works, and Non-Consulting Services under [International Bank for Reconstruction and Development (IBRD)] Loans and [International Development Association (IDA)] Credits & Grants by World Bank Borrowers*, is commonly referred to as the “Procurement Guidelines” or the “red book.” The second document, *Selection and Employment of Consultants Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers*, is commonly referred to as the “Consultant Guidelines” or the “green book.” Together, these documents have served as the Bank's *Procurement and Consultant Guidelines*, though frequently they are discussed simply as the red book and the green book. These guidelines, in combination with Operational Policy (OP) 11.00, *Procurement*; Bank Procedure (BP) 11.00, *Procurement*; and other related guidelines, such as the Anti-Corruption Guidelines and sanctions procedure, and OP 10.00, *Investment Project Financing*, govern how borrowers procure Bank-financed goods, services and construction.

The newly approved Framework consists of the Procurement Policy, Directive, Procedure, and Procurement Regulations for Borrowers, which are annexes to the Framework. It replaces OP 11.00, BP 11.00, and the *Procurement and Consultant Guidelines*. Breaking with tradition, the Framework combines the Bank's red book and green book into a unified set of guidelines. The Bank's approval of the Framework will not impact the applicability of the Anti-Corruption Guidelines, which will be unaffected by the new Framework except for “a few

technical and editorial (non-substantive) changes.” Framework, at ¶ 24.

Now that the Framework has been approved, Bank management will finalize and issue the Directive, Procedure, and Regulations. Management will also assess readiness and set a date for effectiveness in fiscal year 2016 (July 1, 2015–June 30, 2016). The Framework’s current implementation estimates (Annex K, Attachment 1) indicate that the Bank will begin in August to identify projects that can be transitioned to the new Framework as it becomes effective. Further, ¶ 22 of the Framework reflects the assumption that once the Bank has experience operating under the Framework, it will develop additional non-mandatory guidance to supplement mandatory rules that comprise the Framework.

Data available at [www.worldbank.org/projects](http://www.worldbank.org/projects) state that in FY 2015, the World Bank issued \$42.49 billion in lending commitments. While this is down from a high of \$58.75 billion in FY 2010, the Bank’s funding remains significant. Although the Bank must undertake significant activities before the Framework is effective, the Bank’s funding volume and the magnitude of the changes to its procurement regime should cause the procurement community to take note.

**Increased Flexibility in Source Selection Procedures**—Among the most notable changes is the increased flexibility borrowers will have to select awardees. The Framework adopts a “value-for-money” (VfM) decision-making approach that empowers selection officials to tailor the selection process to evaluate price factors and, in appropriate circumstances, non-price factors. Framework, at ¶¶ 35–39. Annex F to the Framework is the draft *Procurement Regulations for Borrowers*, which must be finalized by Bank management before implementation. Section VII of these regulations governs selection methods for goods, works and non-consulting services, while § VIII governs selection modalities for consulting services.

Although ¶ 2.49 of the red book permits borrowers to make award based on the lowest evaluated cost rather than merely the lowest proposed price, ¶ 2.52 requires that, to the extent practicable, all non-price factors be quantified and expressed in monetary terms. This requirement practically constrains borrowers’ ability to evaluate fully the myriad components of a procurement that may impact a VfM, or best-value-type determination. In contrast to the red

book’s focus on cost, ¶ 2.16 of the green book states that evaluation of the “quality” of a technical proposal for consultant services is “paramount” and, together with adjacent green book paragraphs, details how selection panels are to evaluate quality.

The new Framework provides more flexibility than either or both the red and green books, but the red book’s practical limitations on borrowers’ ability to consider the quality of goods, works and non-consulting services may mean that the Framework’s changes governing selection of these items are more significant than those changes related to the selection of consulting services. Instead of requiring quantification and reduction to a monetary value, ¶ 7.33 of the Framework’s Procurement Regulations authorizes the use of “rated-type criteria.” This will allow selection officials to devise ranking systems that award points for meeting or exceeding stated criteria. Among the non-cost factors that selection officials may consider under Framework, Annex F, ¶ 5.9, and Sub-Annex VII are sustainability (environmental) requirements.

Besides the increased authority for source selection officials to consider non-cost factors and the new flexibility to score offeror submissions, the Framework’s Procurement Regulations fundamentally change the evaluation process. Red book selection processes generally require offerors to submit sealed bids with no opportunity to revise the bids’ substance or price; however, § VII of the Framework’s Procurement Regulations will permit, under certain circumstances, borrowers to request proposals, enter into discussions, and then request a best and final offer (BAFO) from each offeror. Further, subsection B.11 of § VII provides authority for borrowers to obtain Bank approval to conduct, in “exceptional circumstances,” negotiations with offerors in lieu of requesting a BAFO.

**Revised Prior Review Requirements and Hands-on Implementation Support**—The Framework’s increased flexibility and discretion to choose among various source selection techniques and to apply more subjective selection criteria may increase the risk of corruption and will require more technically proficient acquisition officials than those required in a sealed bid procurement that selects the lowest-cost, substantially responsive bid for award. To address partially the increased complexity that accompanies discretionary decision-making tailored to specific circumstances, the Framework requires borrowers to develop a project procurement strategy for develop-

ment document analyzing a project's needs and risks, and include a summary of that analysis in the project appraisal document. The Bank will then review the appraisal document and use it to inform its actions.

To increase borrowers' ability to take advantage of the Framework's tailored approaches, the Bank will "provide hands-on expanded implementation to projects where the Borrower/beneficiary or, as appropriate, the member country is deemed by the Bank to: (i) be in urgent need of assistance because of a natural or man-made disaster or conflict; or (ii) experience capacity constraints because of fragility or specific vulnerabilities." Framework Executive Summary, at ¶ 8; see also Framework, at ¶¶ 41–47.

According to Framework ¶ 43, this hands-on implementation support can include identifying strengths and weaknesses in bids and proposals and "bid/proposal development." Although, as noted in Framework ¶¶ 43–45, Bank staff already provide considerable hands-on support to borrowers—during both the award and performance phases of projects—the support envisioned by the Framework is a significant expansion of the Bank's involvement in its borrowers' procurements.

The Framework attempts to mitigate its impact on the Bank's staffing requirements by increasing the prior review thresholds, thereby reducing the number of procurements subject to the Bank's prior review. Procurements of lower monetary value, or that the Bank classifies as less risky, will not require prior review. The applicable threshold varies depending on the type of procurement and the level of risk, with the exception of contracts in designated fragile and conflict-area states. The latter will be reviewed regardless of prior review thresholds. Also included in procurements to receive prior review regardless of value or assessed risk are procurements that use BAFOs, negotiations, competitive dialogue, or sustainable procurement considerations.

Paragraph 78 of the Framework estimates that eliminating prior review requirements for less-risky procurements will reduce prior reviews by approximately 7,779, according to FY 2014 data. As stated in Framework ¶¶ 76–77, contracts that do not receive prior review will be subject to "post review," which will be conducted using a risk-based prioritized sampling.

**Streamlined Processes to Approve Use of APAs**—Section F of the Framework outlines the streamlined requirements for a borrower to use its

own national procurement procedures, and defines the circumstances in which APAs may be used. The Bank will allow the following APAs to be used in any procurement financed by the Bank:

[1] [p]rocurement arrangements of other development banks/agencies/organizations with which the Bank has concluded agreements (bilateral/cofinancing agreements and/or Memoranda of Understanding that set out partners' agreed roles and responsibilities) [including the United Nations];

[2] [p]rocurement arrangements of full members of the [Agreement on Government Procurement] for covered expenditures/agencies, subject to review of Borrower implementing agency capacity acceptable to the Bank; and

[3] [p]rocurement arrangements of any Borrower implementing agency that is found acceptable to the Bank according to the Bank's assessment framework.

Framework, at ¶ 60.

Using APAs rather than the World Bank arrangements can increase the likelihood that the Bank's efforts will improve the capacity of the borrower's procurement system. At the same time, using APAs creates more uncertainty for potential offerors, who may refrain from participating in certain competitions in which they might have otherwise participated. See *Procurement Policy Review—Feedback from Consultations with External Stakeholders: Regional Reports—Summary for United States and Canada*, at 3, available at [consultations.worldbank.org/Data/hub/files/meetings/Procurement\\_Policies/ProcurementPolicyReviewExternalStakeholdersFeedbackSummaryReportUSCanada.pdf](http://consultations.worldbank.org/Data/hub/files/meetings/Procurement_Policies/ProcurementPolicyReviewExternalStakeholdersFeedbackSummaryReportUSCanada.pdf) (observing that Canadian and U.S. stakeholders cited challenges when using country systems rather than a uniform Bank system).

**Complaints**—Framework, Annex E, Sub-Annex V, and Annex F, Sub-Annex III govern complaints. Further, disputes are governed by OP 7.40, *Disputes over Defaults on External Debt, Expropriation, and Breach of Contract*. It is important to note that the complaint provisions apply to both award- and performance-related complaints. As ¶ 68 of the Framework states, the Framework will "significantly enhance [the Bank's] approach to procurement-related complaints."

Paragraphs 11–15 of Appendix 3 to both the red and green books address complaints. Although

these paragraphs provide for Bank review of and comment on relevant documentation, these paragraphs largely provide that the Bank merely refers the offeror back to the borrower. The Framework, however, establishes a procurement complaints team with dedicated senior Bank staff that will monitor, provide advice, and track complaints. Framework, at ¶ 68, and Annex E, Sub-Annex V, ¶ 2.2. Additionally, Sub-Annex III to Annex F contains complaint processing timelines for both borrowers and the Bank.

Also important for contracts subject to prior review, Framework, Annex F, ¶¶ 6.46–6.53, adopt a stand-still period of 10 business days from the time the notification of intent to issue award or conclude a framework agreement is transmitted to offerors. Unless an exception applies, borrowers must wait until the stand-still period concludes to issue award. Like the automatic Competition in Contracting Act “stay” familiar to U.S. practitioners that is available under 31 USCA § 3553 when a timely bid protest is filed with the Government Accountability Office, the stand-still provision is designed to enable disappointed offerors to obtain more meaningful relief than would otherwise be available if the contract were to be performed during the course of the dispute. Importantly, however, although a CICA stay applies only after a timely protest has been filed, the Bank’s stand-still provision applies regardless of whether a complaint is filed.

The Framework also imposes additional responsibilities on borrowers. For example, Framework, Annex F, Sub-Annex III, ¶ 2.8 states that borrowers must “[p]rovide timely and sufficient information to bidders to enable meaningful complaints.” While some of the information listed in this paragraph as borrower requirements relative to the complaints process merely reformats previous Bank requirements, their co-location in Sub-Annex III ensures that all parties can easily determine which requirements apply. For example, although ¶ 10 of Annex III to both red and green books and the paragraphs they cite require confidentiality of certain matters, these documents do not clearly address the borrower’s confidentiality obligations in the context of disputes (other than to state that a debriefing will be about the disappointed offeror’s submission and not those of other offerors). However, Framework, Annex F, Sub-Annex III, ¶ 2.8 explicitly puts the borrower on notice that it must “[p]reserve the confidentiality of commercial and finan-

cial information and trade secrets.” Clarity like this is a welcome improvement.

Although the Bank has traditionally had the authority to declare misprocurement and cancel financing if a procurement was not conducted in accordance with the procedures in the applicable agreements—such as in ¶ 1.14 of the red book and ¶ 1.19 of the green book—the Framework’s substantially increased treatment and allocation of resources to the complaint process may result in more instances of the Bank declaring misprocurement. The same is true for the Bank’s ability and willingness to take action against noncompliant borrowers by exercising other remedies under applicable agreements. Time will tell whether this more robust complaint structure adequately addresses the concern that, as noted in ¶ 66 of the Framework, “[m]any private sector organizations are frustrated with the Bank’s current approach to handling complaints and can feel abandoned by the Bank if something goes wrong with a procurement.”

**Framework Scope**—In addition to the substantive and procedural changes discussed above, the Framework also brings significant changes to the scope of its applicability, thereby freeing some transactions from the Framework’s constraints. Like its predecessor, OP 11.00, the Framework will apply to loans from the IBRD as well as to credits or grants from the IDA, project preparation advances, and grants from the Bank or a trust fund administered by the Bank and executed by the recipient. The Bank collectively refers to these arrangements as “Investment Project Financing.” Unlike OP 11.00, however, ¶¶ 15 and 18 of the Framework provide that the Framework will not apply to Bank guarantees or to lending that occurs through financial intermediaries to private borrowers. As explained in Framework ¶¶ 15 and 17–19, the rationale for these exclusions is that the Framework is designed primarily to promote public procurements, and these excluded transactions are more similar to commercial transactions than public procurements.

**Barriers to Implementation**—Successful implementation of the Framework will require extensive training for both Bank and borrower procurement staff, as well as acceptance of the additional risks associated with increased Bank involvement and enhanced borrower discretion.

Paragraph 23 of the Bank’s implementation plan (Framework, Annex K), states that an independent skills analysis revealed that procurement skills of



the top 10 percent of the Bank's procurement staff "compared favorably with those of the best in class benchmark comparators." Although the Bank's implementation plan presents the 10-percent figure as a positive finding, Jeffrey Gutman and his colleagues at the Brookings Institution observe in "World Bank procurement reform: Some notes for the Board," July 7, 2015, 9:00 a.m., available at [www.brookings.edu/blogs/future-development/posts/2015/07/07-world-bank-procurement-reform-gutman](http://www.brookings.edu/blogs/future-development/posts/2015/07/07-world-bank-procurement-reform-gutman), that this is a "relatively poor percentage for a normative and advisory institution."

Regardless of how one interprets this statistic, the amount of training and hands-on assistance borrowers are likely to require from the Bank to implement the Framework successfully may strain the Bank's resources, and organizations involved in Bank-financed projects should anticipate some growing pains as the Bank begins implementation. See Framework, at ¶¶ 90–95 (discussing Bank staff skills and anticipated training activities).

In addition to missteps during initial implementation, organizations should also anticipate delays. Framework Executive Summary ¶ 6 notes that "[a]gencies with low procurement capacity would require technical assistance/training before they could use some of the procurement tools introduced in the new Framework." Capacity development does not happen overnight, and some borrowers may not be immediately equipped to employ some of the newly authorized procurement methods.

Training alone will be insufficient to enable full realization of the Framework's reforms. The Bank must also accept additional risks to allow borrowers to use the Framework's tailored approaches. In ad-

dition to increasing the risk that borrower staff may improperly manipulate a procurement, the Framework also increases the risk that the Bank may face legal liability when it steps out of the traditional role of a financing institution that reviews and advises borrower activities, and into a hands-on support role helping to implement procurement activities. See Framework, at ¶¶ 48–51, and Annex F, Sub-Annex IV (addressing the Bank's approach to strengthen procurement integrity). Paragraphs 45–47 of the Framework acknowledge and provide mitigation strategies to the Bank's increased legal, financial and operational risks under the Framework, but staff must be willing to shoulder these risks if the Bank is to realize the full potential of the Framework's reforms.

**Conclusion**—Although much work remains before the Framework is implemented, change is imminent. Full implementation will take years, but the Framework's initial impacts should be seen in the upcoming months. As with many reforms, it will take time before the efforts can truly be declared transformative.



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