

**DOCUMENT OF THE EUROPEAN BANK
FOR RECONSTRUCTION AND DEVELOPMENT**

**EBRD FINANCING OF
PRIVATE PARTIES
TO CONCESSIONS**

FINANCING OF PRIVATE PARTIES TO CONCESSIONS

1. Introduction

The European Bank for Reconstruction and Development (EBRD, *or* the Bank) seeks to encourage private sector involvement in the provision of public infrastructure and services through a variety of means. The involvement of private sector parties in infrastructure projects may take several forms, ranging from service contracts to concession arrangements, whereby a public authority entrusts a private sector party with the long-term implementation of a project, frequently involving large-scale and complex construction and operation. The Bank recognises that the undertaking of concessions raises a number of concerns of public interest. Private sector enterprises aim to ensure a reasonable return on invested capital commensurate with the risks taken and are concerned with the investment climate in the host country. When financing private parties to concessions, the Bank aims at achieving a balance between its desire to encourage private participation in infrastructure projects, on the one hand, and various public interests in its countries of operation, on the other.

On 1 May 2001, the Bank's Board of Directors discussed and approved a paper clarifying the Bank's approach to concession financing and elaborating on the issues involved when the Bank considers financing transactions involving concession or similar contracts awarded to private parties. These issues concern both the process by which the Concession has been awarded as well as the fairness and reasonableness of the Contract terms and conditions. Given the interest in such matters, the Bank is hereby providing extensive extracts of this paper on its Web site.

Where the Bank is assisting or advising a Contracting Authority the Procurement Policies and Rules (PPR - para. 4.4) require that competitive tendering procedures acceptable to the Bank be followed to select a Concessionaire¹ under a Concession Agreement². Similarly, legislation, regulation and government guidelines in many industrialised countries generally require that competitive procedures be followed in awarding such contracts, although unsolicited bids and negotiated contracts are allowed under certain conditions.¹ In some of the Bank's countries of operation legislation has been enacted to the same effect. In many others price setting for natural monopoly services is subject to regulation.

As set forth in Section 2 of this paper, Bank policy is based on the principle that as a rule a formal competitive tendering procedure should be used for the award of

¹ In this paper, the word "Concessionaire" is used to refer generally to refer to an entity that carries out public infrastructure projects under a concession issued by the public authorities of the host country. By extension, it is also intended to refer to private sector operators involved in build-operate-transfer ("BOT") operations or other similar undertakings, which enjoy special or exclusive rights as referred to in para 4.4 of the PPR.

² In this paper, the expression "concession agreement" means an agreement between a public authority and the entity or entities selected by that public authority to carry out an infrastructure project that involves obligations on the part of the private sector party to undertake physical construction, repair or expansion works in the infrastructure concerned with a view to subsequent private operation.

¹ Recently, the United Nations Commission on International Trade Law ("UNCITRAL") adopted a legislative guide on privately financed infrastructure which advises public authorities to use competitive selection procedures

concessions. Section 3 sets out the minimum criteria that must be met before the Bank would exceptionally consider financing a concession awarded using a different procedure. Section 4 deals with the legality and integrity of the process. Finally, Section 5 relates to the review of the outcome of a Concession Agreement, which should be conducted in all cases regardless of the process of selection of the concessionaire.

2. The Need for Applying Competitive Tendering Standards to Concessions

When the Bank lends to a public sector entity, it includes in the terms and conditions of the loan the requirement that the borrower follow the Bank's procurement rules for public sector operations in procuring goods and services financed by the Bank. Similarly, when the Bank advises a public sector entity in procurement matters, it advises the entity to follow similar procurement standards of competitive tendering that would be applied if the Bank itself were financing the procurement.

When the Bank is requested to finance a private sector entity that has entered or will enter into a Concession Agreement with a public sector entity, the operation is classified as private sector for the procurement undertaken by the private sector entity being financed. This means that the Bank will not require the private sector entity to follow a prescribed procurement method. However, the Bank will satisfy itself that the private sector entity employs sound and cost effective procurement methods, and that contracts awarded by them are negotiated on an arm's length basis and are in line with market prices. Nonetheless, the Bank must also be concerned about the procurement standards applied by the public sector entity in awarding the concession.

The Bank is concerned because the infrastructure and public services involved often have a natural monopoly character and entail significant social dimensions. This makes concession agreements for the provision and financing of such services visible in the public eye especially when they are for a long duration. Such agreements, therefore, can be politically sensitive and vulnerable to re-negotiation and abrogation unless the contracting process is perceived to have been open, fair and transparent. The Bank must therefore be particularly vigilant in relation to the transition², reputation and credit risks arising.

Therefore, the Bank supports the principle that award of concessions by a public sector entity should follow a formal competitive tender process designed to achieve the policy objectives of economy, efficiency, transparency and accountability specified in the Bank's PPR for public sector procurement. This would normally include a formal initial notification of the opportunity to potentially interested firms, a pre-qualification process, and a structured approach to requesting and evaluating proposals. However, the process may involve greater flexibility at earlier stages of the tender process and more negotiation at later stages than is typically envisaged in the PPR for the procurement of goods and works. Annex 1 sets out in more detail what the Bank would consider as acceptable competitive tendering procedures³ and

² In general terms, transition is the progression from a command economy to an open market-oriented economy.

³ This definition of acceptability will serve as the benchmark when the Bank considers whether the competitive tendering procedures followed by a Contracting Party are acceptable under the provisions of para. 4.4 of the PPR.

the optimal balance of competitive tendering and negotiation involved in the process. It emphasises the key role which expert advisers should play given the complexity of the issues, and the lack of experience of most Contracting Authorities in the region with such contracts and associated regulatory practices.

Often the Bank has very limited ability to affect the procedures used by the public sector entity. The Bank is not offering financing to the public sector entity, but to the private entity, and is usually not in a position to exert leverage on the public sector entity. Furthermore, by the time the Bank gets involved with the private entity, the public procurement process has already been established and cannot be changed. Thus the Bank is sometimes presented with the choice of either: (a) seeking to send a signal by not financing the project in which case it may be abandoned or financed by others who may not seek the same transition impact⁴ as the Bank might have done; or (b) financing the project provided that it is satisfied that it meets the usual criteria of sound banking, transition impact and additionality and further subject to the award process meeting minimum criteria. Under such circumstances, exceptions may be justified.

3. Criteria Justifying Exceptional Bank Involvement When Formal Competitive Tendering Procedures Have not been Used

In order to balance the potential for achieving a positive transition impact with the risks and negative transition consequences associated with procedures that are less competitive than those described in Annex 1, the Bank will finance Concessionaires only if it is reasonably assured, by thorough due diligence and a review of evidence, that the following criteria (“the Core Criteria”) justifying an exception have been met:

- (i) The process for selecting the Concessionaire has demonstrated sufficient fairness, transparency and competition;
- (ii) The process was free of corruption and in compliance with all applicable laws and regulations, and
- (iii) The outcome in terms of the Concession Agreement itself is fair and reasonable in terms of price, quality and risk sharing in relation to market practice.

In making the judgement whether the Core Criteria have been met, the Bank determines whether the following factors are present.

- (i) The Contracting Authority has defined the opportunity⁵ and made it known broadly enough to attract the attention of potentially interested and qualified firms. Furthermore, it must not have discriminated or limited the scope of potential participants on the basis of irrelevant and non-market criteria. The process will be considered unacceptable if due diligence reveals any evidence of discrimination by the Contracting Authority against a company that made an offer, whether solicited or unsolicited, on the basis of irrelevant or

⁴ Annex 2 discusses transition impact in relation to concessions.

⁵ The Bank would encourage that this and all other steps in the selection process be done with the benefit of appropriately qualified independent advisors.

contrived criteria. Systematic efforts by the Contracting Authority to limit competition would constitute sufficient grounds for the Bank to reject financing, even if a competitive tender has been conducted. Contracting Authorities may nonetheless limit potential Concessionaires to those who can demonstrate sufficient capability and resources to perform to a good standard all of their contractual obligations in respect of financing, construction and operation throughout all phases of their projects.

- (ii) The general public must be assured that the process has been open in terms of public scrutiny and adherence to appropriate public administrative procedures. In order to help assure itself that the process has been transparent, the Bank determines through due diligence whether the project was announced to local administrative and elected bodies concerned; whether such bodies had the opportunity to review and, possibly, approve the concession agreement; and to what extent the project and contracting process were the subject of public information and (if appropriate) consultation. There may be other meaningful evidence showing public and political debate on and support for the project. In carrying out its due diligence, the Bank may also review press reports and seek out the opinions of politicians, including politicians from significant opposition parties.
- (iii) If there has been more than one offer received, the various offers have been evaluated consistently against reasonable criteria.
- (iv) The Bank will require the Contracting Authority to provide to it a clear statement satisfactory to the Bank of the process followed and the selection criteria used.
- (v) The Bank will expect the Contracting Authority to publish a public notice of the Concession award and disclose the key terms of the contract.

Even if the Core Criteria have been met, deviations from formal competitive tendering may in the Bank's judgement still outweigh any positive transition impact associated with a particular operation.

As international practice is rapidly evolving in this area, the Bank will consult with other international and multilateral institutions engaged in concession affairs to ensure that its financing decisions are generally consistent with what is emerging as best practice. In case Management considers financing a project justified even though formal competitive tendering procedures acceptable to the Bank were not used, an early warning will be given to the Board's Financial and Operations Policies Committee describing the project and the justification for the exception. (Concessions being considered for financing under Multi-Project Facilities (MPFs) will also be subject to this early warning procedure.)

4. Legality and Integrity of the Process

The Bank undertakes legal due diligence to ensure that applicable local and national laws and regulations have been followed and that the documents provide adequate

protection against any corrupt practices of both the Contracting Authority and the Concessionaire. It includes normal integrity checks, as well as a review of the Concessionaire's qualifications, track record, reputation, and business integrity.

5. Review of Outcome

Whether or not the Concession Agreement has been awarded following formal competitive tendering procedures, before proceeding further the Bank will need to: (a) be satisfied that the Concession Agreement is fair and reasonable as a matter both of sound banking and of public policy; and (b) ensure that any conflicts between these two objectives are, where practical, adequately addressed.

The outcome of a Concession Agreement can be judged on the basis of three relevant criteria: (i) price; (ii) quality; and (iii) sharing of risk between the Contracting Authority and the Concessionaire (see Annex 3 for further details). In particular, the Bank's due diligence focuses on standard and fairness of the Concession Agreement and related project agreements. The considerations taken into account include:

Standard of Contract

- (i) Is the risk allocation generally consistent with good international practice?
- (ii) Is there a transparent and objective price setting mechanism (either within the contract or by regulation)?
- (iii) Are there appropriate dispute resolution and termination clauses?
- (iv) Are the works, goods or service necessary for the project to be procured on an arm's length basis?

Fairness of Contract

- (i) Is the price of the service in line with independently estimated costs or consistent with international benchmarks (in relation to those elements which can be benchmarked)?
- (ii) Is the price to the Contracting Authority fixed or based on cost pass-throughs? If the latter, does the Private Partner have appropriate incentives to efficiency?
- (iii) Are there appropriate incentives for efficient and optimal investment?
- (iv) Is there an efficient sharing of risk and is the risk-reward profile of the contract fair? In particular, does the contract transfer to the private sector the commercial risks relating to design, construction, financing and operation of the project sector (to the extent appropriate to the specific industry and project).

The above approach combines:

- (i) Reliance on competitive markets to produce a fair outcome; and
- (ii) Judgement by the Bank on whether the outcome is fair and efficient, regardless of the process followed.

This reflects the fact that use of a competitive process cannot alone guarantee a fair and reasonable outcome. The definition of the requirements of the Contracting Authority may have been less than optimal. The process itself may be flawed or manipulated or it may have attracted too few qualified tenderers to produce significant competitive pressure in practice. However the risk that the outcome will not satisfy the Bank's standards for a fair and reasonable outcome is higher in cases where competitive tendering procedures have not been followed, and greater weight therefore has to be placed on the Bank's independent judgement of that outcome. This is the case even if a qualified independent advisor has been hired by the Contracting Authority to evaluate the outcome.

The Bank's ability to judge the fairness of outcomes is itself dependent on the existence of competitive pressures in the selection process. In selecting the benchmarks for a fair and reasonable outcome, the Bank is dependent on the existence of an international competitive market for the public goods and services being procured by the Contracting Authority and the impact of that market on benchmark outcomes elsewhere. With a body of international experience, outcomes lend themselves easily to benchmarking. It is also then easier for independent advisors to the Contracting Authority to advise on the Contracting Authority's strategy in tendering and/or negotiation.

In the absence of such an international competitive market and the existence of suitable benchmarks, the Bank can only finance a Concessionaire where the following criteria had been met:

- (i) Formal competitive tendering procedures acceptable to the Bank have been followed in an effort to create and structure a market through stimulation of potential entrants to this new market;
- (ii) the financial return to the Concessionaire is reasonable in light of the risk profile of the project, and there is reason to believe wider economic returns are acceptable;
- (iii) the Bank's environmental policies and procedures have been correctly followed; and
- (iv) there are adequate provisions either in the Concession Agreement or through regulation by a third party to safeguard the public interest.

6. Conclusion

In summary, the Bank will continue to promote the principle that competitive tendering procedures should be used where it is given the opportunity to do so in the context of specific projects. Publication of this policy paper on the Bank's Web site and policy dialogue over a number of sectors and countries will also provide a broader-based platform to do so. However, under exceptional circumstances, the Bank may consider financing projects where formal competitive tendering procedures were not used for the award of the concession provided (i) they meet the Core Criteria for

exceptions set out in sections 3-5 above and (ii) the procedural deviations do not outweigh the positive transition impact of such projects.

ANNEX 1

ACCEPTABLE COMPETITIVE TENDERING PROCEDURES FOR CONCESSIONS

The objectives pursued by the Bank in accordance with its procurement policy are:

- (i) Economy and efficiency in relation to selection of the Concessionaire. Economy refers to selection of a Concessionaire that is most likely to perform under the contract in a manner best satisfying the price, quality and risk-sharing objectives elaborated in Annex 3. Efficiency refers to selection of Concessionaire within a reasonable amount of time and at reasonable cost both to the Contracting Authority and to the participating firms.
- (ii) Promotion of integrity and confidence in the selection process and of transparency and accountability in the procedures used by the Contracting Party.

The key elements, which make a competitive selection process acceptable to the Bank, include the following:

- (i) Appointment of experienced advisers covering the technical, legal, and financial issues likely to arise in what will often be a complex evaluation and to ensure that the selection process and communication with tenderers is handled to the highest professional standards.
- (ii) An invitation to pre-selection proceedings should be made public in a manner that reaches as wide as possible an audience of potential tenderers and which contains sufficient information to stimulate potential tenderers' interest and to allow them to judge whether they are likely to be qualified.
- (iii) Clear pre-qualification criteria are published. These are designed to narrow the range of tenderers to those qualified for what may be highly complex and sophisticated performance undertakings. The number of tenderers pre-qualified should balance the objective of ensuring strong competition through a reasonable number of tenderers with that of giving well qualified tenderers a reasonable chance of success (given that bid costs typically substantially exceed those required on standard public sector procurement contracts, pre-qualifying too many tenderers may affect bid quality).
- (iv) Issuance of a clear request for proposals, with a clear statement on what is required of tenderers in substance, on procedures for submitting proposals, and on the evaluation criteria.
- (v) A structured approach to evaluation of the proposals and subsequent negotiation with the best rated tenderer.
- (vi) Public disclosure of the key terms of the contract which has then been negotiated and of any other important elements of the proposal (subject to reasonable confidentiality concerns in respect of information that is proprietary to the tenderer or has been provided in commercial confidence).

Beyond these basic elements, there is a significant amount of further detail that would typically be included in a competitive selection process the Bank would consider acceptable in terms of communication with potential tenderers, evaluation of proposals, handling of negotiations, and publicity in relation to process and outcome. A useful compendium of many of these elements is contained in the consolidated legislative recommendations in the draft legislative guide on privately financed infrastructure projects produced by the United Nations Commission on International Trade Law (UNCITRAL).¹ The Bank draws on these documents in its discussions of detailed issues with clients.

¹ This document has been prepared by UNCITRAL to assist States in the preparation or maintenance of legislation relevant to privately financed infrastructure projects. UNCITRAL was assisted by an international expert group, including a member of the Bank's Legal Transition Team. The document was considered by the UN General Assembly at its 33rd session, which took place in New York from

The Bank recognises that there are several acceptable variants as to what the structured approach to evaluation of proposals and subsequent negotiation in step (v) above should consist of. However, as a critical element of transparency in the process, the Bank insists that the final request for proposals include the criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. The issues involved here concern:

- (i) The number of rounds of preliminary, subsequent, and final proposals from tenderers and what is required at each stage;
- (ii) The content of clarification of proposals in discussion with tenderers between rounds;
- (iii) The definition of what is negotiable vs. non-negotiable at different rounds;
- (iv) The stage at which a preferred tenderer is declared with whom it is intended to undertake final negotiations, reverting to other tenderers only if there is an unexpected impasse in those negotiations; and
- (v) The way in which the different evaluation criteria are combined in making a final decision (whether formal weighting or other approach).

These issues are best-determined case by case with the benefit of advice from experienced advisers who can adapt experience from elsewhere to the circumstances of the particular Contracting Authority, project, and tenderers.

The Bank avoids rigid prescriptions in this area because there are cases in which it may not be feasible for the Contracting Authority to formulate its requirements in sufficiently detailed and precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicator. In such cases, the Contracting Authority may wish to divide the selection proceedings in two or more stages and allow a certain degree of flexibility for discussions with tenderers. This process allows the tenderers to offer their own innovative solutions for meeting the particular infrastructure need of the Contracting Authority in accordance with defined standards of service. Following examination of the proposals received, the Contracting Authority may revise the initial proposals specifications and contractual terms prior to issuing a final request for proposals.

One implication of the above discussion is that there is nearly always some element of negotiation before a competitive tender can result in a legal, valid and binding contract between the Contracting Authority and the Concessionaire. However, changes in essential elements of the proposal should not be permitted, as they may distort the assumptions, on the basis of which the proposals were submitted and rated. Accordingly, an important element in the competitive tendering procedures considered acceptable to the Bank is that final negotiations are limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected tenderer's lenders. Final negotiations should not concern those terms of the contract that were stated as non-negotiable in the final request for proposals. In addition, the mere existence of a competitive tender alone is no assurance of full transparency, openness or lack of corruption. Tender documents that are faulty or too detailed in terms of technical specifications may well lead to a bad result. The use of qualified and experienced advisers is therefore critical, whether the Contracting Authority awards a contract by competitive tender or not.

12 June – 7 July 2000. The document reference is A/CN.9/471/Add.9 and a companion document reference A/CN.9/471/Add.4 provides background on the rationale for the recommendations. Both documents are available from the Legal Transition Team on request.

ANNEX 2

TRANSITION IMPACT AND CONCESSIONS

Two distinct channels of transition impact may be distinguished which flow from Bank financing of private parties to contracts relating to infrastructure facilities:

- (i) The ongoing impact of private sector involvement itself on institution-building in the sector and on development of commercial and market-related practices in the construction, operation, and financing of the facility. Where the impact of the private sector involvement is seen to be beneficial in these terms, there can be a positive demonstration effect leading to commercialisation and/or private sector involvement in other cases. This transition impact is not of course independent of the contract. If a flawed process leads to subsequent breach of contract or a flawed outcome leads to poor utility performance, the transition impact could be negative. But provided the process and outcome meet the Bank's Core Criteria, important transition impact can be achieved.
- (ii) A second channel of transition impact derives from the demonstration effect of the selection process leading to the contract award. If a competitive tendering procedure is followed and seen to work, then other Contracting Authorities will be encouraged to adapt that best practice to their requirements. Thus there can be incremental transition impact through this form of institution building and development of a competitive market for concessions (which once awarded, involve regulation through contract, substituting for the lack of ongoing competitive pressure).

The Bank's interest is of course to achieve maximum transition impact and thereby to encourage adoption of the competitive tendering procedures described in Annex 1. This is why it is a requirement in the PPR that competitive selection procedures acceptable to the Bank be followed where it is assisting or advising a Contracting Authority. The presumption is that in such cases it has the negotiating leverage to ensure adoption of that best practice.

Annex 1 describes the procedures the Bank recommends be used where it has the leverage to do so. Where these practices have not been followed, the Bank may well find that if it insists on the Contracting Authority starting the selection process again from scratch, the project will either not be financed at all, or else by other parties without the Bank's transition focus. In that case, much or all of the transition impact related to private sector involvement itself (i.e. under point (i) above) will be lost. If however the Bank does consider providing finance where competitive procedures have not been followed, the strength of that transition impact depends on the actual process followed and outcome achieved. Hence the need to satisfy the Core Criteria in relation to process and outcome as set out in Sections 3 through 5 of the paper.

Note that the Bank's additionality in relation to such operations may stem from its impact on the design, functioning, or existence of the projects in question. In some cases its changes or actions required to satisfy its Core Criteria will have a significant impact on the design and functioning of a project, in addition to other aspects of conditionality designed to enhance transition impact.

In assessing the transition impact in each case the Bank will need to be mindful of the role of the regulator (when there is one) and the need to balance its commercial interest as lender (or, even more acutely, equity investor) with its public policy duty to ensure a fair sharing of efficiency gains between the private parties and shareholders and consumers.

ANNEX 3

ASPECTS OF THE FAIRNESS AND EFFICIENCY OF CONTRACT OUTCOMES

The outcome of a Concession Agreement can be judged on the basis of three relevant criteria: (i) price, (ii) quality, and (iii) sharing of risk between the Contracting Authority and the Concessionaire.

Price. Generally, the Contracting Authority, all things equal, would like to obtain the lowest possible price for a good or service that it buys or the highest possible price for an asset that it sells. Unfortunately, other things are rarely equal. The Contracting Authority often has to choose among quality, risk sharing and price.

When purchasing a good or a service under a long-term agreement, the Contracting Authority must calculate the price over the life of the agreement. Similarly, if under a Concession Agreement, there are agreed prices at which the goods or services will be sold to the general public, the Contracting Authority would normally be concerned with the prices agreed in awarding or negotiating the Concession Agreement. Most Concession Agreements, however, provide for indexation of prices, the effect of which is uncertain and may be difficult to estimate. Evaluation of price on a Concession Agreement also requires the use of a discount rate to value future prices or costs on the basis of present value today. The choice of a discount rate can be very difficult and controversial.

Evaluation of price on Sales Contracts and Licenses is often much less difficult. The price paid for the asset or the license can more easily be used as a criterion, even the sole criterion, in awarding or negotiating such contracts.

Additional difficulties can arise in relation with the procurement of goods, works and services by the Concessionaire. When the EBRD finances Infrastructure Facilities under a private sector operation (for procurement purposes), the key risks are “transfer pricing” and over-investment (if regulation relies on a rate-of-return type of approach). In particular, where it is expected that goods or works might be procured from affiliates or subsidiaries of a shareholder of the project company, the Bank requires an independent review. This review must satisfy the Bank that that procurement was carried out on an arm’s length basis, that costs are in line with current market prices and the original cost estimates in the operation report and that contract conditions are fair and reasonable. As part of its due diligence on the Concession Agreement, the Bank will also make sure that the remuneration or pricing formula provides no incentive to the Concessionaire to incur capital expenditure beyond what is necessary.

Quality. The quality of the goods or services provided under a Concession Agreement is frequently a major factor in awarding or negotiating the Agreement. Reliability and flexibility are often highly valued. Environmental impact is an important consideration. The standard of purity is crucial in contracts involving water treatment. Normally, better quality can only be bought for a higher price.

Risk Sharing. The appropriate sharing of risk between the Concessionaire and the Contracting Authority is often a critical part of the outcome of awarding and negotiating a Concession Agreement. There is a strong correlation between price and the risks borne by the Concessionaire, the higher the risk the higher the price. If the Concessionaire bears more risk, the project will need more equity and will be able to raise less debt to finance the project. Since equity is more expensive than debt, the price of the project will have to go up. If the Concessionaire bears too much risk, the project may not be able to attract any debt financing and may be unwilling to undertake the project.

Market Comparisons. Since the criteria applied to the outcome of the process of awarding and negotiating a Concession Agreement are very complex and difficult to judge, it is prudent to rely on best market practice. The provision of infrastructure services by private companies is widespread and long-standing in many countries. In recent years the trend has been growing to utilise private sector entities to provide public services. The growing body of evidence as to what constitutes best market practice can be drawn upon by our countries of operations to ensure that the outcome is fair and reasonable.