

The Legal Framework of Obtaining Business and Procurement Process in Overseas Contracting Services Sector

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Abstract

When considering the duties of a construction company obtaining an international construction work, there are three different types of contracting. These are: general contracting, design and construction contracting and management contracting. Wide range of factors which are affecting job opportunities of international contracting services sector abroad; the matters such as international financing of infrastructure projects, international procurement procedures and standard contract forms, international arbitration and alternative dispute settlement mechanisms, export credit insurance and the removal of barriers to entry into foreign construction markets stand out as priority issues. In this article, the international procurement process for overseas contracting sector, business-obtaining methods and the modernization of the competitive international procurement process of construction works are discussed.

Keywords: General Contracting, Design & Construction Contracting, Management Contracting, Economically Most Advantageous Tender, Two Envelope System, Performance-Based Procurement System, Public-Private Sector Partnerships.

Introduction

In this article, the international procurement process for overseas contracting sector, business-obtaining methods and the modernization of the competitive international procurement process of construction works are discussed.

A. Expanding Overseas Access of Turkish Contracting Companies

Across the globe, the constructions of infrastructure constitute 50 % of total industry output. Commercial production of housing constitutes one-third of total industrial output. Maintenance and repair of existing structures are considered as the output of the construction sector.¹ The construction sector has a structure that may be affected easily by fluctuations in a country's economy. Governments during economic fluctuations, using the construction sector as a regulator, if the economy goes into a rapid period of growing construction projects are reduced or the funds that feed this sector are cut, in case the economy suffers from decreased demand or increased unemployment, the governments boost the construction industry.² Disequilibrium in a country's income distribution is another important factor affecting the demand for construction. In addition, population growth and urbanization rate are among the factors that significantly affect the demand for construction.

According to the relevant studies, two-thirds of the world's population live in developing countries, but only 15% of world output of construction is derived in developing countries, the developed countries, per capita investment in the building construction investment in developing countries has been found as 30-35 times more. These results show the construction sector play an indispensable role in the development process of the countries.³ In Turkey after 1970, Iskenderun Iron and Steel Plants even has been under a Soviet company organization, investment of it has been wholly-made by the Turkish construction companies, this has been a development that opens up our contractors' horizons. Today gaining the large-size work experience of the construction companies which successfully represented our country abroad and turning to institutionalization with technical and financial growth have happened during this period.

¹ Kanıt Recep, İnşaat Sektöründe İş Almanın Yönetimi, Gazi Kitabevi, Ankara, Şubat 2005, p.1.

² Ibid., p.2.

³ Ibid.

Also during this period, the Turkish construction firms have begun to export their services abroad.⁴ After the world petrol crisis in 1973-1974 and 1979-1980, due to rapid increase of oil prices, the oil producer Middle East and North African countries, all have embarked on investment activities mainly in infrastructure and housing construction sectors. These countries have opened all areas of investments to the foreign investors, due to lack of knowledge and qualified personnel. Turkish construction companies have participated in international competition without any support especially after 1978. But for such result, at that time, that Turkey's total construction work capacity for public sector had been fallen to the level at which could meet only one-third of the work volume of our contractors has had a great effect.⁵ Expansion abroad also led to positive developments within the country, quality has become sought after in the Turkish construction sector. In addition, the construction companies have begun to focus more and more on organization, planning and management.⁶

Within the framework of the searches for new markets abroad, since 1990 Turkish contractors' demands of getting civil works in the former the Soviet Union countries, submitted to the Commonwealth of Independent States member countries by our governments (Turkish Governments). That natural gas contracts has been signed with these countries, the method, which is absorbing some of the cost of natural gas purchased under the natural gas agreements with contracting services, has facilitated entry of the Turkish construction companies to these countries' markets. Also since 1990 our contractor companies have started to get the construction works in Eastern Europe, Germany and Pakistan.⁷ Present Turkish contractors working abroad have 2-3% of the volume of business world-wide. According to International Contractors Association (ICA)'s data, our construction companies have undertaken so far nearly 40-billion-dollar commitments whose significant part is ongoing in 55 countries. Turkish construction companies which are operating abroad, have employed nearly 50.000 workers for the work they undertook.⁸

When the distribution of works, which have been performed abroad by Turkish construction companies is examined between the years 1972 and 1979, it is observed that residential construction has had the lion's share with the rate of 40%. In the period between 1980 and 1989, the construction companies have undertaken works for primarily housing, then infrastructure, road, bridge, tunnel, irrigation works are seen, but constructions of the dams, pipelines, hotels also present themselves as diverse business areas differently from previous period. In the period 1990-1999, residential construction work undertaken abroad has maintained priority status despite losing significance. During this period construction companies also have started to have a corner on trade of construction such as trade centers, airports and petro-chemical plants.⁹ In the period from 2000 to the present, for construction companies abroad, the load of the projects types such as industrial plants, roads, bridges, tunnels, airports, petro-chemical plants, which require a high level of specialization, project management skills and advanced technology, has increased. The load of residential projects, which had been in the first place in construction works abroad in the past, has greatly decreased. The received works has been progressing from small projects towards large and technology-intensive projects.

Today, there is a growing interest in African, Latin American and Southeast Asian markets beside the activities in traditional markets. As a result of orientation of Turkish construction companies to consortiums and business partnerships with local and foreign construction companies, there is a branding tendency at global level. Turkish construction companies today have come to the forefront, undertaking investment and operation of the major projects in the countries where once they had worked as contractors for the construction projects.

B. Business Obtaining Methods in International Contracting Services Sector

From the perspective of modern management principles, it can be said that the contracting has not gained "profession" quality yet, has remained still as an "occupation" statute in our country. According to data of the Ministry of Public Works and Settlement, in the Turkish construction sector, there are 90.000 construction contractors. The construction contractor has not been defined in our country yet. According to some data, number of the construction contractors reaching a very high figure, such as about 200.000 in Turkey, is due to such deficiency.¹⁰

⁴ Ibid., p.5.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid., p.6.

¹⁰ Ibid., p.7.

Achieving the goals of a contractor requires a certain level of profit (i.e continuity of income.) For this, to do business, which will bring the profit in a certain period of time, is required. A construction company has three main ways in order to find a construction work to undertake.¹¹

1. Creating his own work

The Company can start the work by finding suitable solution for a project which had been not considered before by another company or of which how to financing is unknown. In this case, until the company gets the achievements, it should be able to finance the project. The biggest risk for this type of works is possibility of not finding a serious buyer when the project is complete. In our country, preference of the companies forming his own work is usually the residential construction in the style of build-sell.

2. Obtaining Business

A Construction company, depending on its size and organizational structure, can have people who will seek business for itself. In a great company, even a department could be constituted whose task is just finding a project. "Business Development" unit in large construction companies is an example to this. To find to a construction project, contractors must mostly follow the advertisements of employers. In some cases, contractors may also give an advertisement highlighting their expertise. Another way to make it easier to find a project is that the contractor becoming a member of a professional association or organization.

3. Invitation to procurement

Depending on the original characteristics of the project, employer may invite a group of contractors, knowing that they have certain specifications in order to receive a quote. Such company, to be involved in the group, has to prove himself to the employer. The tender documentations usually consist of three parts. The first part documentations are conditions of contract, the second part documents are the technical details such as drawings, specifications and a list of materials / equipment, and the third part documentations are instructions to bidders regarding how to submit tender proposals.

In international procurement invitations, there are usually five records in the following:

-In the procurement invitation, there is usually given record indicating that the employer has not to accept the lowest bid or any bid.

- The record that the employer holds the right to ask for a description of an offer by a bidder may be placed in the invitation.

- If in the tender priority is given to certain offers, for non-commercial reasons, such as political, regional or, citizenship by the employer, this fact should be clearly stated in the invitation.

- If corruption, bribery or any form of connection to the contractor or its personnel in connection with the agreement is proved, that the employer shall avoid signing the contract should be clearly mentioned in the invitation.

- Because the bidders from different countries usually are invited to the procurements, the bid prices expressed and the contract price to be paid in which foreign currency exchange rate or rates should be clearly stated in the invitation.

In terms of competitive environment provided for the selection of the contractor firm to implement the employer's construction project, following three approaches are mainly available:¹²

1. Open Competitive Procurement

The size and capabilities of construction companies are not important in the international tenders where open competition is applied. All bidder companies willing can bid for this tender. However, the realization of the project on time, with desired quality and low cost is important for the employer, in most cases the participation of contractors in the tender are limited with number of financial and technical qualification criteria. Although this method has advantages such as creating a strong competitive environment, giving a chance to enter the market for the new and unknown companies, it has some disadvantages such as meeting a very low price proposals, in this competition lack of companies specialized in this field unless they suffer for having work.

2. Limited Competitive Procurement

Limited competition environment is preferred when the employer's project has features in terms of technical aspects in the tenders for major structures such as tenders of dams, tunnels, ports property owned by the public.

¹¹ Ibid., p.8.

¹² Ibid.

When this method is used, the invited firms are already experts in their area and have the ability to compete to submit bids; these firms are very less likely to be inadequate. However, by applying this method, the offered prices are higher than in an open competitive environment. On the other hand, the fact that the invited companies to the tender provide information on prices to each other has a possibility higher.

3. The Selection Method with Negotiation

This method is preferred when an employer decide the project features, cost and duration of the project with a single contractor with necessary expertise regarding the project. This also means that the contractor to execute the work is determined at the design phase.

The selection method with negotiating is advantageous when the company's expertise is necessary to do business. After all, the company can shorten the duration of the work by detecting needs early. However, because the needs are not exactly known at the beginning of the work and of non-competitive environment, there is a risk of high cost for the work.

C. Contracting Systems in International Contracting Services Sector

When considering the duties of a construction company obtaining an international construction work, there are three different types of contracting. These are: general contracting, design and construction contracting and management contracting:¹³

1. General Contracting

In this contracting system, the employer prepares all plans and specifications related to the project, the project is put out to the tender by precise conditions and construction work is carried out by a single general contractor according to the provisions of the construction contract. It is easy to give a realistic offer by a contractor for a construction project whose all conditions are clear in detail. However, because the design, procurement and construction processes follow by each other, the project completion time is long. On the other hand, in order to achieve the desired quality, mandatory use of audit tools such as technical specifications and as-built project mean the restriction of the contractor in making technical innovations. Due to there is nothing to do with general design for the contractor, the contractor's views on issues, such as method of construction and use of financial resources, could not be benefited, thus it brings the risk of high cost to the employer.

In the general contracting system, different sub-systems are available in terms of determining the project cost and carrying out the work. These are lump-sum method, unit price method and cost plus profit method.

a) The Lump sum Method: This method is also known as lump sum turnkey. In this method, after the design is completed and as-built project prepared, bids are taken from the companies for the project. Usually the most appropriate bid is the lowest bid. The cost of the project is clear at the beginning. Generally, the contractor, who will do the business, tends to shorten the period of construction. In this method, having project modifications are very difficult and such situation means a high financial risk for the employer. The faults, while determining the cost of the project, shall absolutely damage absolutely one of the parties, employer or contractor.

b) Unit Price method: The productions are priced by determining each of the amount of productions to be realized within the project and the construction work is tendered through the such estimated cost. In some cases, because of technical features of the work, bid prices for each production may also be asked. In this method, requiring bid with more or less amounts before the completion of as-built projects may shorten the duration of the work. However, there is a possibility that the amount of production coming out more than the estimated. This also means the high cost and lengthening of the work duration.

c) Cost + Profit Method: In this method, in order to determine the monetary value the productions, a profit at a certain rate of production is added to the production cost. Identified rate of profit, may be valid for the whole work, such as different rates for certain manufacturing items can be determined.

In this method, that the cost items would not cause any dispute should be defined explicitly and in detail. Projects in which quality is very important, it is easier to achieve the goal with cost plus profit method.

2. Design and Construction Contracting: In this method the employer selects one contractor who is responsible for project design and construction. Therefore, the tender of the work is done before the design. Thus, the contractor can determine appropriate technology for the design and can direct resources to the work in most efficient way.

¹³ Ibid., p.9-10.

When this method is preferred, the contract price will be finalized at the beginning of the work. Starting construction in design process could shorten the time.

In this method, the exact responsible of the performance and the methods used is the project contractor.

Each contractor will place a bid because of approaching with different perspectives to different projects, it is not easy to make comparison for selecting one of them.

In this method, if the employer can not place requests in the conditions of contracts explicitly enough, he may not realize the quality expectations.

3. Management Contracting: In such system also known as Consulting system, a professional contractor performs(executes) and controls the project, who is trying to optimize employer's cost, quality and time-running expectations. Executive (consultant) company organizes more than one contractor on behalf of the employer company. This provides the employer an optimization on the project. In addition, for the project management and control, the employer's staff need is reduced.

D. Qualification Criteria for International Construction Procurements

Every country's related public contracting authority, which will tender a construction work, wants completion of his work in a certain time within the framework of quality and cost. For this, the contracting authority determines the minimum qualification criteria of the company which will undertake the construction business, in financial and vocational-technical sense. Such qualification criteria are definitely included in public advertisements of the international competitive procurements.¹⁴ When construction work is original, requires expertise and / or advanced technology, the contracting authority advertises pre-qualification criteria to bid for this tender companies who think that they are qualified to perform such work and apply to the contracting authority. Here also bidders have to provide minimum criteria, which are pre-determined and advertised by the contracting authority.¹⁵

In international competitive tenders for construction works in order to evaluate the bidders in terms of financial and vocational-technical competencies; any information, document, and evaluation criteria requested by contracting authorities can not be determined in the manner that will prevent the competition.¹⁶ All the documents in relation to financial-vocational-technical competence requested by the contracting authorities usually are as follows:¹⁷

1. Documents of Financial Capability

- a.) **The documents issued by the banks:** Submitting usually used Cash credit or unused letter of guarantee not less than 10% of the Contract Price, at the amount before the banks determined by the bidder issued by domestic or foreign banks to the contracting authority is mandatory.
- b.) **The balance sheet of the Tenderer or equivalent documentation:** The year-end balance sheet or necessary parts of balance sheet, or their equivalent documents belong to the previous years' tender must be requested from the bidder.

If the Tenderer is a business partnership, each partner have to submit the requested documents separately and provide specified conditions.

- c.) **The documents showing the business volume of Tenderer:** The income statement showing the total turnover of the tenderer, and the work progress reports showing the amount of work completed under the subject contract or usually the other documents of the previous three years of the procurement are required by the contracting authorities.

The subject tender for the business accounting in the amount of work completed under the contract, the bidder contractor carried out in the country and abroad, the sum of revenues provided by operating activities in the construction sector are taken into account.

2. Documents on Professional and Technical Capability

- a) **Documents indicating that the Contractor's activities are continuing and he has authority to bid:** Generally the following documents are requested from the local and foreign contractors by contracting authorities in International Competitive tenders for construction works:

¹⁴ Ibid., p. 47.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid., p.47-50.

-The document evidencing the commercial registry of tenderer legal entity contractor in the Chamber of Commerce and / or Chamber of Industry, according to the legislation of his country, in the same year of the first announcement of the tender,

-According to the legal interests of other bidder contractor showing the status of shareholders, members, founders and managers of legal entity in the Trade Registry Gazette of his country or the documents certifying these issues with the notarized circulars,

-The declaration evidencing the capital companies whose more than half of the capital is owned by the tenderer contractor.

In case of participating by proxy in an international tender on behalf of a contractor, power of attorney attested by a notary and signature statement attested by a notary of this authorized person must be submitted to the contracting authority.

In case of a business partnership bidding on an international tender, each of the contractor firms consisting the partnership must submit the documents mentioned above with a declaration confirming the business partnership separately to the contracting authority.

b) Documents showing the business experience: The documents regarding business experience and demonstrating the tender contractor's experience of previous similar works of tender subject, certificate of work completion, certificate of business status, certificate of business management and certificate of labour inspection. Similar works, evaluated in business experience, are the ones that are similar to the procurement subject or parts of the subject work in terms of quality and size and require the same or similar construction procedures and techniques, facilities, machinery, equipment and other equipment with the financial strength, expertise and organization. Which character of the work/s would be considered as similar one/s shall be determined and stated by the contracting authority on the pre-qualification document or announcement or invitation on pre-qualification.

c) The Documents on Bidder Contractor's organizational structure and personnel status: All or some of the following information and/or documents could be asked and the minimum qualification criteria can be determined: These are; document or information on the tender contractor's organizational structure and declaration that the company has employed or shall employ a personnel at certain quantity and quality provided for by the contracting authority, and the documents showing the training and vocational qualifications of the management team and technical personnel who will carry out the work, the certificate of related trade association membership showing experience duration, premium payments approved by the institution of social security which certify the term of employment.

If the key technical personnel is provided for as a minimum qualification criteria, such personnel must be usually at least five year experienced architect or engineer, must have been hired before the date of the tender and must be working in the bidding company as of the date of the tender. If the Tenderer is a business partnership, regardless of partnership share rates, all of the key personnel of pilot and other shareholders are evaluated. In case the documents on the status of the bidder company's organizational structure and personnel are required and the qualification criteria is provided by through them, documents, and conditions shall be determined by the contracting authority.

d) Documents related machinery and other equipment: The contracting authority deems that a plant, machinery, equipment and other equipment are necessary to have the work performed, he can request information and documents regarding them and determine the minimum qualification criteria on them. There is no obligatory that Plant, machinery, equipment and other equipment that the contractor will use while carrying out the construction work for the subject tender should be owned by the contractor. That the bidder contractor's own plant, machinery, equipment and other equipment are registered in invoice, inventory or depreciation book, shall be determined by a notary report or a certified public accountant report. For the plant, machinery, equipment and other equipment to be obtained by contracting, a commitment attested by notary must be submitted. The plant, machinery, equipment and other equipment, which have been acquired by temporary import or according to the provisions of the Financial Leasing Act No. 3226, shall be deemed the own property of the the bidder contractor on condition that adding the lease contracts and evidencing payment of rents up to date of the first announcement of the procurement. Business partnerships between companies and other partners in the pilot contractor's plant, machinery, equipment and other equipment, regardless of the partnership rates are treated as wholly. In case of Machinery and other equipment requesting and providing for the qualification criteria through these, the required documents and their conditions, shall be determined by the contracting authority. The contracting authorities require originals documents or copies attested by notary public.

These documents must be submitted to the contracting authority after attested by a notary public whose were translated by a certified translator and to English or to the official language of the contracting authority's country. The winner of the tender must submit originals of the business experience documents attested by notary public to the contracting authority before signing of the contract. The contracting authoritys can keep up correspondence with trade association where the bidder contractors are registered, on state of bidder contractor operating abroad in relation to trade register entry, about the establishment and its partners and can have institutions specializing in this field the for the detection of reliability of the bidder contractor. Foreign contracting companies must submit the equivalent documents necessary for the procurement in accordance with the legislation in their countries to contracting authority. In case there is no equivalent of some necessary documens, it is obligatory to submit a written declaration, which states the documents under the legislation of their own country is not applicable or absent, to the contracting authority. However, this must be confirmed by the diplomatic mission chieftainships of the country, where the foreign contracting company's headquarters is located, in Turkey or the Republic of Turkey Mission chieftainships in these countries.

E. Innovative Methods for International Competitive Procurements

In order to consider a procurement as international, the participant contractors must have different nationalities than the employers and contract price subject to the currency of the subject country must not be freely transferable from the country where the the project is applied and transfer conditions all or part must have been determined or the payment must be made with different currencies. Therefore, it is one of the most firmly held beliefs of European International Contractors (EIC) that much benefit would accrue to Contracting Authorities and Multilateral Development Banks (MDBs) if the below mentioned innovative forms of procurement are more frequently adopted:¹⁸

1. The first option for the Contracting Authority is to reserve more room for quality-based selection of tenders within the traditional procurement process. Apart from upgrading the procedures on pre-qualification, tender documentation, conditions of contract and securities, Contracting Authorities could foster the submission of reasoned tenders by adopting various selection criteria, such as basing the award on the Economically Most Advantageous Tender (EMAT) rather than the lowest price, inviting Alternative Proposals in appropriate cases and carefully applying a Two-envelope system.
2. The second option for the Contracting Authority is to make better use of the tenderers' skills in the design phase by procuring a "turnkey" or "designbuild" project. Under such a procurement scheme the Contracting Authority notifies the tenderers of the basic project parameters in its Employer's Requirements and divides the selection procedure into a two-stage process where a certain degree of flexibility for discussions with tenderers is permitted in order to integrate their ideas and concerns.
3. The third option for the Contracting Authority is to use a form of contract that rewards the contractor for achieving a specified level of performance in terms of "outputs" rather than focusing on inputs. Such arrangement may resemble a "design-build" or "turnkey" project, but the Contracting Authority can extend this principle and fully delegate the delivery of a service to a private third-party provider under long-term contracts that comprise planning, construction, rehabilitation, maintenance and operation. As a general rule, the "performance-based tendering" work performed by the method of design, construction or any defect in the operation phase, will be the responsibility of the contractor.
4. The fourth option for the Contracting Authority is to use a variant of the so-called Public-Private Partnership (PPP) model and to "outsource" the delivery of a public service to the private sector. It has to be borne in mind that there is not yet an overarching definition for PPP and that the term describes more generally a wider range of arrangements where the public sector and the private sector enter into a formal agreement in order to draw on private resources – either financial, commercial or technical – in providing infrastructure works and/or delivering public services. PPP models are most common in the infrastructure sector, both social and economic, but equally can be applied to public buildings. The common feature is that these projects comprise a substantial initial capital expenditure for construction and/or rehabilitation and they attract maintenance and operation costs after completion of the construction phase, for which no government up-front borrowing is required. These costs are refinanced over the project's life-cycle either through "user" or "unitary" payments made by the state. EIC submits that "Sustainable Procurement" starts with an efficient pre-qualification of applicants, followed by a tender process based on high-quality documents and balanced contract conditions. The period that follows the submission of bids, and which runs until the contract becomes effective, is not only the part of the procurement process that is least prescriptive but is also the most under-utilised.

¹⁸ EIC, "Blue Book on Sustainable Procurement", Germany, November 2004, p.12.

It is the period when the contractor's offer must be rigorously tested to ensure that it is completely compliant with the requirements of the Contracting Authority. Finally, to ensure the highest quality for the lowest price (i.e. the most sustainable project solution), MDBs should more often apply innovative tender procedures that allow qualified bidders to bring their expertise to the competition.¹⁹ Conventionally, procurement of internationally financed construction works has taken place according to a standard pattern. The "Borrower" or "Client" or "Contracting Authority" engages a consulting engineer to develop comprehensive specifications and documentation to be included in the invitation to tender. The bidders then review the documentation and submit their proposed price.²⁰

In the past, the focus of the traditional tender procedure was much more on the lowest construction cost of an infrastructure facility rather than on the optimisation of the project's life-cycle costs. Although there are, in theory, no apparent objections to the traditional approach, it is also true that inherent problems have often been encountered, such as²¹: -The cost increase due to provisions for risks, A tendency toward unreasonable tenders and therefore expensive risk allocation, often due to insufficient funding for consulting services (leading to poor preliminary studies) and/or excessive time between preliminary studies and work implementation (leading to obsolete tender documents);

- The inability of the Contracting Authority to explore with the tenderers options for innovation, added efficiency and value engineering;

- The need for early investment of significant resources by the Contracting Authority.

It is a long tradition that infrastructure projects financed from MDB loans are procured as design-bid-build projects through International Competitive Bidding (ICB). The Contracting Authority usually employs a consulting engineer to carry out the design and then prepare the tendering documents. The consulting engineer designs and defines (in the form of drawings, specifications and other documents) the Works, whilst the contractor is engaged to do the work of construction in strict accordance with the design and documents prepared by the consulting engineer.²²

The tender dossier is distributed to all interested, and usually pre-qualified, bidding companies, who will then prepare their tenders. Tenders are all received at the same time, and all based on precisely the same tendering documents and information. The received tenders are then checked for compliance with the tendering requirements, and evaluated by the Contracting Authority or by his consulting engineer. No negotiations with any of the tenderers are permitted, although limited clarifications may sometimes be allowed. Non-complying tenders are rejected, and the contract is invariably awarded to the Contractor offering the "lowest evaluated tender", i. e. lowest construction price.²³

As part of their development policy, MDBs should not leave the entire responsibility of the tender procedure with the Contracting Authority, but share some of the burden by closely reviewing the essential steps of both the procurement decision and the project execution. This could be introduced by obliging the consulting engineer or employer's representative (as the case may be) to report to the MDBs all events of non-compliance of tenders. During the execution phase any material default in relation to the construction contract and any proposed variations to such contract should also be monitored. Such procedures would begin at the pre-qualification stage and end only after the final settlement of any disputes.²⁴

MDBs should check the quality of the feasibility studies before the Contracting Authority proceeds with the project. MDBs should also become actively involved in the implementation of variations and extensions of Loan Agreements/ Grants. In addition, despite the fact that MDBs are not a party to the contract, MDBs' procurement rules should provide for the possibility of payments directly to the contractor in the event of default of the Contracting Authority or assignment of certain rights of the Loan Agreement to the contractor by naming the contractor as an intended third party beneficiary in such Loan Agreement. Such an option would demonstrate the MDB's commitment to the project and would put it in a better position to control the execution of the project in its own interests should a major default occur. It would also mitigate the perceived risk of non-payment by the Contracting Authority to the contractor.

¹⁹ Ibid., p.13.

²⁰ Ibid.

²¹ Ibid., p.16-17.

²² Ibid.,p.18.

²³ Ibid.,p.19.

²⁴ Ibid.

EIC would welcome MDBs adapting their Standard Bidding Documents to them most modern types of procurement strategies, including “turnkey” and “designbuild” schemes, Performance-Based Procurement and Public-Private Partnerships. Such an addition could help to initiate a drastic change of attitudes in those parts of the world where the roles of the parties are still traditional and sometimes, regrettably, adversarial. EIC asks that it shares all relevant data and information at its disposal with all tenderers, in order to ensure a level playing-field in the competition. Thus, the Contracting Authority must be obligated to ensure that the tender documents for construction contracts comprise, at least, the following information²⁵:

- Relevant technical information, including geo-technical conditions,
- Duration of design and construction phase,
- The nature and quantity of the Work to be carried out,
- Survey information for a quality check,
- Construction specifications, standards and norms,
- Environmental impact assessment,
- Security and environmental standards and norms.

Contracting Authorities should exempt the contractors in accordance with the national legislation from obtaining clearance through customs, obtaining import and export licences and from compliance with port regulations, storage and transport regulations, etc.²⁶ In traditional contracts, the consulting engineer exercises a dual role, balancing its powers between acting as the Contracting Authority’s agent for designing and supervising the execution of the works and as the neutral decision-maker in terms of costs, approvals and variations. For many years now, this ambiguity has introduced inherent conflicts between the engineer’s alignment with its client and its duty to decide on contract matters in an unbiased manner. These dual roles potentially cause difficulties for both the Contracting Authority and the contractor and, ultimately, the financier.²⁷

Whether a consulting engineer is appointed by the MDB directly or by the Contracting Authority, it is of paramount importance that consultants be chosen which are capable of producing reliable tender documents, including precise and state-of-the-art specifications and drawings, which are in turn the basis for the successful execution of an infrastructure project, as they define the scope and the technical requirements of the project. Any ambiguities in the final tender documents will unavoidably lead to serious problems for project execution in later stages. In our experience, the root of many problems in projects is sub-standard documents which result from under-funding in the tender preparation.²⁸ Comprehensive data and information must be provided in sufficient detail to enable the tenderers to assess accurately the nature and the scope of the works, all in conjunction with the specifications and the bill of quantities. The quality of materials and the standards of workmanship to be provided by the contractor must be clearly described.²⁹

Thus the Contracting Authority could select one engineer to design the project and to administer the tender phase, and another engineer to supervise project execution and to administer the contract. Whilst a separate control-engineer might be impartial between the designer and the contractor if problems arise during the performance which could be due to the negligence or error of either party, a combination of the design and control functions in a single person would allow the designer to check whether his design ideas are properly applied in practice.³⁰ EIC calls, instead, on the MDBs to provide for a Dispute Board, in the contract conditions. Such board should be appointed at the commencement of the contract and should be empowered to make a binding decision in the event of any difference in opinion between the consulting engineer and the contractor in connection with the design and implementation of the project.³¹

Whereas in the early days of international construction, business was procured mostly by contractors submitting competitive bids in the traditional manner, nowadays design-build and turnkey contracts have become much more commonplace, particularly in Performance-Based Procurement and PPP models, with the contractor being responsible not only for the design and the construction of the project but in some cases also for the performance and even the financing of the facility.

²⁵ Ibid., p.20.

²⁶ Ibid., p.21.

²⁷ Ibid., p.22.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

Conversely, procurement practice of the MDBs has not evolved at the same pace and thus many European international contractors are increasingly reluctant to enter into the competition for MDB financed projects, not out of fear of competition, but in the awareness that their added value: high quality products, efficiently designed and built and within a proposed budget and within the required timeframe, cannot be realised in a competition simply to obtain the lowest price.³² European international contractors have observed that certain aspects of the pre-qualification (PQ) process are unnecessarily complicated, costly and timeconsuming. Pre-qualification questionnaires often contain requirements for unnecessary formalities which, unless required by the substantive law of the contract, could easily be eliminated, such as³³:

- Annual statements with the auditors' original signatures for each PQ and each tender;
- Bank references with the bank's original signature for each PQ and each tender;
- Translations by a certified translator, sometimes bearing his signature and attested by a notary;
- Powers of attorney attested by a notary and by an apostille (which means that the contractor's chief representatives must go to see the notary for each offer and each PQ application);
- Statements of origin or even certificates of origin for the equipment intended to be used in the project;
- Certifications from a notary, even though the notary system is not widely used in many countries which makes it difficult to obtain such notary attestations;

More and more invitations to tender contain requirements which put excessive burden on the PQ applicant;³⁴

-Bank statement on the availability of a credit line specifically for the project, which costs money and blocks the overall credit line and which does not make sense in a PQ where the tenders for the project are expected more than half a year later;

-Contractors' statement that the personnel and the equipment listed is intended exclusively for the project, which makes it difficult, if not impossible, to tender for several lots at the same time with the expectation that only one lot will be awarded to the contractor and which does not make sense in a PQ where the tenders for the project are expected more than half a year later;

-The requirement that all or half the equipment to be used in the project must be owned by the contractor as opposed to leased or acquired under a hire-purchase agreement or under other financing arrangements;

-The Eligibility Statement required in the text often is not identical to the Eligibility Statement provided in the Forms. Non-relevant information that normally is not readily available to the contractor often must be submitted. The relevance of information concerning "the applicant's history of non-performing contracts" or "pending claims or litigation as related to company assets" is not readily understood. Furthermore, the prospective bidder is normally not informed as to how such information will be used by the Contracting Authority in the PQ process which leads to the suspicion that the evaluation process will be subjective.

EIC recommends that the pre-qualification criteria be objective and expressed and published clearly in the tender notice. They should be applied equally to all prospective tenderers. From the EIC viewpoint, it should be sufficient to submit:³⁵

-Similar documents, photocopies of documents such as commercial registers, annual statements, bank references etc.;

-Simple translations instead of certified ones;

- Power of attorney signed by the contractor;

- A statement that all the equipment to be used in the project will have its origin in eligible countries.

-(or a short list of the limited number of bidder related) must be adequate to be submitted by. if originals, certificates and attested signatures are considered an absolute must, it should be sufficient to require them to be provided only by the successful tender (or alternatively from a limited number of shortlisted bidders) at the end of the bid evaluation procedure. EIC estimates that Contracting Authorities inviting international tenders spend, on average, approximately 3% of the total project capital cost in the preparation of the tender design and the bidding documents.

³² Ibid., p.23.

³³ Ibid., p.24-25.

³⁴ Ibid., p.25-26.

³⁵ Ibid., p.26.

Such expenditure is, of course, a function of the nature of the project, but it would appear that it may be insufficient to perform state-of-the-art feasibility studies.³⁶ In order to overcome notorious under-funding for the preparatory project stage, EIC recommends that the Contracting Authority take full responsibility for the quality and sufficiency of studies, specifications, drawings, etc. prepared by the selected consulting engineer before tenders are invited.³⁷

F. Tender Securities in Competitive International Procurements for Construction Works

There is a standard requirement in international construction contracts to guarantee private and public sector clients the completion of a project within budget and on schedule. Typically, an unconditional guarantee issued by a bank (generally in the amount of about 10% of the Contract Price) is used to satisfy an international client's demand for collateral security.³⁸ Conversely, the use of Contract Bonds issued by surety companies as contract guarantees is not usual practice in international contracting. Under the surety bond system the guarantor not only underwrites financial aspects of the contract guarantee, but provides an assurance to the Employer that the Contractor's obligations under the construction contract will be fulfilled (i.e. the Works will be completed). Surety bonds may be issued to satisfy all of the Contractor's guarantee obligations under the contract, performance, advances and retention release mechanisms.³⁹

Principal advantages for the contractor under this system are that:

1. The bond does not affect the credit facility of the contractor,
2. The contractor is protected against unfair demands, and
3. Disputes are often avoided because the surety is involved in the development of the project.⁴⁰

This form of guarantee is also attractive to the institutions financing the project since the reliability of its investment is guaranteed by the assurance that the project will be completed.⁴¹

The International Chamber of Commerce (ICC) has issued Uniform Rules both for Demand Guarantees and Contract Bonds. The Rules have been ratified by member states and provide protection for the principals and the guarantors against the improper use of these financial instruments.⁴²

EIC recommends that MDB's Standard Bidding Documents contain provisions for the use of either the Demand Guarantee or the Contract Bond as may be appropriate to the project. Alternatives also can contribute to lower end cost as the contracted price has to accommodate such costs. It is suggested to use guarantees issued by surety companies, as they are in general cheaper to procure and thus also an advantage for the Contracting Authority. Ultimately, the reference to the ICC Uniform Rules in the text of the Guarantee or Bond should be mandatory for the Parties.⁴³

G. Modernisation of the Procurement Process

1. Economically Most Advantageous Tender

Whilst it would be desirable for the Contracting Authority to appreciate the merits of the reasoned bid in the sense of the "Economically Most Advantageous Tender" (i.e. the bid which embodies the most beneficial combination of technical performance, cost-effectiveness, flexibility, environmental impact, investment in the local community, social responsibility, etc.) in reality, it will usually rely solely on the "lowest price", since it has its own responsibilities toward public officials who may not understand fully the difference between the "lowest price" and the "Economically Most Advantageous Tender."⁴⁴

The European Court of Justice recently decided that the "lowest price" is recognised as being an "objective criteria", but the selection of a single award criterion deprives the Contracting Authority of the ability to take into account the nature and specific features of each contract, to choose the most appropriate criteria for free competition and therefore to make sure that the best tender is selected.⁴⁵ It concluded that a framework law on public Works procurement, which for the open and restricted procedures imposes the sole "lowest price" as mandatory award criteria, runs counter to Community law.⁴⁶

³⁶ Ibid., p.27.

³⁷ Ibid.

³⁸ Ibid., p.30.

³⁹ Ibid., p.30-31.

⁴⁰ Ibid., p.31.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid., p.35.

⁴⁵ See, ECJ, C-247/02.

⁴⁶ EIC, op.cit., p.35.

To overcome the “lowest price syndrome” in MDB funded projects, EIC recommends that MDBs strongly encourage Contracting Authorities to award the project on the basis of the “Economically Most Advantageous Tender (EMAT).⁴⁷ “The Economically Most Advantageous Tender” should be established by applying appropriate weightings to quality, price and life cycle costs in accordance with the mechanism laid out in the tender dossier. However, if tenders are invited on the basis of various criteria other than price (e.g. quality, performance specifications, design requirements, time for completion, life-cycle costs, etc.) the evaluation of such tenders can become much more complex, if not subjective.⁴⁸

The steps to be taken by the Contracting Authority normally cover five stages:⁴⁹

- Choice of the award criteria in addition to price;
- Weighting of the criteria;
- Assessment of the tenders in the light of each criteria;
- Rejection of abnormally low tenders;
- Final ranking of the tenders.

2. Alternative Proposals

Alternative proposals are tenders that the tenderer believes satisfy the Contracting Authority’s needs, but do not specifically comply with the requirements set out in the tender documentation. It may involve a technical innovation or some other change in approach which will reduce the costs or improve the performance of the project.⁵⁰ EIC recommends that contractors should have the option to propose technical alternatives without being disqualified. A prospective tenderer may have the knowledge to offer a solution to the construction of the project that is different from the solution described in the tender documents. The practical solution is to invite tenderers to present alternative proposals, provided that such tenders reduce costs (where appropriate, taking into account life-cycle costs), shorten the construction period or allow better implementation of the project.⁵¹

3. Two Envelope System

In order to avoid the risk of abnormally low tenders, in some countries bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. This permits the Contracting Authority to evaluate the technical quality of proposals without being influenced by their financial components.⁵²

The advantage of a two-envelope system is that first the technical proposals are evaluated, and the technical solutions that are the most attractive to the Contracting Authority can be selected without any bias from the knowledge of the price of that solution in those cases where the need for a good technical solution is obviously more predominant than the corresponding price.⁵³

“However, a transparent procedure is required if the two-envelope system is to work properly. Ideally, all second envelopes, containing the financial proposal corresponding with the technical proposal of the individual bidders, are placed in the hands of a third party (civil law notary or attorney), in whose presence only the financial proposal corresponding with the desired technical solution is opened. If the financial proposal does not correspond with the Contracting Authority’s budget, the financial envelope relating to the technical solution deemed “second best” is opened and so forth until a selection is made. The unopened envelopes are sent back to the non-successful bidders after award of the contract.⁵⁴

4. Two-Stage Procedure System

An increasing number of engineering projects world-wide are being procured as so-called “turnkey” or “design-build” projects on the basis of so-called “performance” or “functional” specifications which set out the performance or “output” that the facility is required to achieve. The combination of “single point” responsibility for design and construction will decrease the overall time for completion. Furthermore, efficiencies in the design and construction process are likely to reduce the price of the project.⁵⁵

⁴⁷ Ibid.

⁴⁸ Ibid., p.36.

⁴⁹ Ibid.

⁵⁰ Ibid., p.37.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.,p.37-38.

⁵⁵ Ibid.,p.38.

Bearing in mind some bad examples, where “turnkey” type of contracts have been awarded on the basis of ill-defined Employer’s Requirements in a single-stage procedure, there are good reasons to apply a two-stage tender procedure in these cases, provided that the process is run efficiently and does not take too long. Subsequently, a selected short list of bidders is compiled and these bidders are asked to make a financial proposal on revised and equal terms.⁵⁶

5. Performance-Based Procurement System

The new approach of “Performance Based Procurement” (PBP) tries to improve the delivery of services by outsourcing their provision to the private sector and linking the payment of subsidies to the delivery of services to targeted groups. Whereas under traditional projects the Contracting Authority orders and receives a facility (e.g. a water treatment plant or a highway), under many PBP projects it purchases a service (e.g. the supply of treated water or the provision of a highway– which includes duties relating to its maintenance and operation).⁵⁷

EIC generally welcomes the PBP concept, as it allows tenderers to compete on a much broader spectrum of award criteria than just price. Therefore, EIC fully backs a recent World Bank research study which comprises an analysis on Performance-Based Procurement of MDB and Bilateral Donor Organisations(BDO)-funded large, complex projects with the purpose of investigating whether procurement of large, complex projects funded by the World Bank and other donors should, in some cases, be made on the basis of performance or functional specifications. The Study, which is limited to infrastructure type projects, particularly in the fields of power production, water and sewage, and the other utilities, has concluded that there are “a number of very significant benefits to be gained by all concerned when PBP of projects of the types mentioned are adopted. For large, complex projects, these benefits would appear to outweigh any negative aspects by far.”⁵⁸

The main conclusions of the Study can be briefly summarised as follows:

- Contractors and manufacturers may offer their own newer, more efficient and often cheaper technological solutions;

- Nothing in the World Bank’s Procurement Guidelines or Standard Bidding Documents precludes the use of performance or functional specifications;

- Pre-qualification followed by a two-stage procurement procedure is most suitable;

- European experience shows that PBP has worked well where Employers with qualified and experienced staff have taken over and operated the completed facilities themselves;

- In developing and transition countries, when Employers do not have suitably trained operation and maintenance staff, more satisfactory results may be achieved by requiring the contractor to be responsible for the operation of the completed facility, i.e. for providing a service to the users rather than just a facility;

- Preparation of functional specifications and evaluation of tenders requires consulting engineers with competent and experienced technical draftsmen.⁵⁹

Bonding on PBP is even more critical than bonding on standard warranty projects because the contractors assume a larger investment over a much longer period of time and they create a burden on both the contractor and the surety industry. the situation is likely to be worse if contracts are to be extended to periods much longer than seen in traditional contracts. Adequate tools should therefore be introduced for PBP schemes, such as partial risk guarantees. Payment has often proven to be problematic in some developing countries.⁶⁰

6. Public-Private Sector Partnerships

Under the generic term “Public-Private Partnership”, numerous project models have been created and implemented (Private Finance Initiative, Design Built Finance Operate, Build Operate Transfer, Build Own Operate Transfer etc.) which all aim at organising private sector participation in the project.⁶¹ Evidence from many national sources shows that well-designed PPP schemes in fact produce improvements in the quality and the quantity of infrastructure services, as well as major efficiency gains.

⁵⁶ Ibid., p.38-39.

⁵⁷ Ibid., p.39.

⁵⁸ See Study on Performance-Based Procurement of International Financing Institutions (IFI) and Donor-Funded Large, Complex Projects – Final Report, March 29, 2004, p.14.

⁵⁹ Study on Performance-Based Procurement of IFI and Donor-Funded Large Complex Projects – Final Report, March 29, 2004, p.14.

⁶⁰ EIC, Op.cit., p.41.

⁶¹ See Public-Private Partnerships in Developing and Transition Countries – A Critical Review of Existing Experiences and Analysis of Possibilities of Donor Intervention, European Commission Staff Working Document, 30 July 2004.

By shifting risks from the public to the private sector, either through competition or through an effective regulatory framework, additional value for money can be created.⁶² “Sustainable Procurement” starts with an efficient pre qualification of applicants, followed by a tender process based on high-quality documents and balanced contract conditions. To ensure the highest quality for the lowest price, however, MDBs should more often apply innovative tender procedures that allow qualified bidders to bring their expertise adequately to the competition. Through “turnkey” or “design-build” tenders, Performance-Based Procurement and Public-Private Partnerships, added value can be achieved, such as:⁶³

1. Investment in the developing markets;
2. Transfer of knowledge to local contractors;
3. Increased efficiency through early involvement of contractors in the initial phases of the project;
4. Optimised life-cycle costing;
5. Adherence to the principles of sustainable development, including the principles of socially responsible enterprising.

In particular, there are no contradicting interests if large contracts were awarded to foreign contractors, who have the required skills and resources to manage the job, and then subcontract to local contractors, wherever possible.⁶⁴

⁶² EIC, op.cit., p.42.

⁶³ Ibid., p.44-45.

⁶⁴ Ibid., p.45

Conclusion

Around the world, the constructions of infrastructure constitute 50 percent of total industry output. Commercial production of housing constitutes one-third of total industrial output. Maintenance and repair of existing structures are considered as the output of the construction sector. The construction sector has a structure that may be affected easily by fluctuations in a country's economy. Governments during economic fluctuations, using the construction sector as a regulator, if the economy goes into a rapid period of growing construction projects are reduced or the funds that feed this sector are cut, in case the economy suffers from decreased demand or increased unemployment, the governments boost the construction industry. Disequilibrium in a country's income distribution is another important factor affecting the demand for construction. In addition, population growth and urbanization rate are among the factors that significantly affect the demand for construction. According to the relevant studies, two-thirds of the world's population live in developing countries, but only 15 percent of world output of construction is derived in developing countries, the developed countries, per capita investment in the building construction investment in developing countries has been found as 30-35 times more. These results show the construction sector play an indispensable role in the development process of the countries.⁶⁵

In Turkey after 1970, Iskenderun Iron and Steel Plants even has been under a Soviet company organization, investment of it has been wholly-made by the Turkish construction companies, this has been a development that opens up our contractors' horizons. Today gaining the large-size work experience of the construction companies which successfully represented our country abroad and turning to institutionalization with technical and financial growth have happened during this period.

Whereas in the early days of international construction, business was procured mostly by contractors submitting competitive bids in the traditional manner, nowadays design-build and turnkey contracts have become much more commonplace, particularly in Performance-Based Procurement and PPP models, with the contractor being responsible not only for the design and the construction of the project but in some cases also for the performance and even the financing of the facility.

Today, there is a growing interest in African, Latin American and Southeast Asian markets beside the activities in traditional markets. As a result of orientation of Turkish construction companies to consortiums and business partnerships with local and foreign construction companies, there is a branding tendency at global level. Turkish construction companies today have come to the forefront, undertaking investment and operation of the major projects in the countries where once they had worked as contractors for the construction projects.

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