

**CHAPTER 20**  
**The New Asian Development Bank**  
**Procurement Policy and Regulations:**  
**Promoting Innovation in Public**  
**Procurement in Asia?**

BY

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***1. Introduction***

The Asian Development Bank (ADB) is one of the multilateral development banks that has recently issued new policies and regulations in public procurement.<sup>(1)</sup> In April 2017, ADB approved a new procurement policy, and three months later (July 2017) ADB released the new “Procurement Regulations for ADB Borrowers,” replacing the 2013 Guidelines on the Use of Consultants and the 2015 Procurement Guidelines. While ADB has been very vocal that its policies and guidelines are “amended from time to time,” it is, however, worth noting that in these new documents, ADB uses the word ‘regulations’ instead of guidelines, arguably suggesting more binding requirements to its borrowers and recipients. In fact, a year later (June 2018), ADB elaborated on and explained these new policies and regulations by issuing 24 Guidance Notes for ADB Procurement Policy and the Procurement Regulations,<sup>(2)</sup> which are divided into six areas: (1) preparation and planning – procurement risk framework, strategic procurement planning, procurement review, and alternative procurement arrangements; (2) procurement methods – open competitive bidding, consulting

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(1) The African Development Bank issued the Procurement Policy for Bank Group Funded Operations in 2015; the World Bank issued Procurement Regulations for Investment Project Financing (IPF) Borrowers in 2016, and the European Bank for Reconstruction and Development released its Procurement Policies and Rules in 2017, among others. See also P. TREPTE, “All change at the World Bank? The new procurement framework”, *PPLR*, 2016, No. 4, pp. 121-150. J. JACKHOLT, “The procurement policies and rules and the procurement activities of the European Bank for Reconstruction and Development (EBRD)”, *PPLR*, 2016, No. 4, pp. 172-178. V. SHARMA, “An update on procurement reforms at the African Development Bank”, *PPLR*, 2016, No. 4, pp. 151-163. A. SALAZAR and M. LOPEZ, “The Inter-American Development Bank: reform to build up and increase the use of national procurement systems in Latin American and the Caribbean”, *PPLR*, 2016, No. 4, pp. 164-171.

(2) See Asian Development Bank, “Guide Notes on Procurement”.

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services, non-consulting services, and framework agreements on consulting; (3) bidding procedures – procurement price adjustment, procurement prequalification, procurement subcontracting, and procurement domestic preference; (4) new principles and practices – value for money, quality, contract management and abnormally low bids; (5) complaints, compliance and eligibility – bidding related complaints, noncompliance procurement, standstill period and State-owned enterprises; and (6) specialized areas – procurement in fragile situations, e-procurement, public private partnership procurement, and high-level technology. This chapter highlights the significant changes in the new procurement policy, regulations, and their supporting notes; more particularly, this paper tries to identify the strategic innovations in these new instruments that may promote innovations in public procurement in Asia.

## ***2. Asian Development Bank and Asia: Its Past, Present and Future***

The ADB was conceived in the early 1960s as a financial institution that would be Asian in character and would foster economic growth and cooperation in one of the poorest regions in the world.<sup>(3)</sup> From 31 members at its establishment in 1966, ADB has grown to encompass 67 members – of which 48 are from within Asia and the Pacific and 19 from outside. In partnership with member governments, independent specialists and other financial institutions, ADB is focused on delivering projects in developing member countries that create economic and development impact.

As a multilateral development finance institution, ADB provides not only loans, technical assistance and grants to its member governments, but also equity investments and loans to private enterprises of developing member countries. ADB raises funds through the issuance of bonds in the world's capital markets, the contributions from the members, the retained earnings from lending operations, and the repayment of loans. ADB's total operations of \$32.2 billion in 2017 consisted of \$20.1 billion in loans, grants, and investments from its own resources (up 51% from 2016) including non-sovereign operations<sup>(4)</sup> of

(3) See also the President and Chair of the Board of Directors Asian Development Bank, T. NAKAO, "Foreword", p. xii. P. MCCAWLEY, *Banking on the Future of Asia and the Pacific, 50 years of the Asian Development Bank*, Mandaluyong, ADB, 2017, "When ADB was established in 1966 [...] Asia was the poorest region in the world with an annual per capita income of about \$100 (less than ¼ of that of Latin America and below Sub-Saharan Africa) [...] Half a century later, Asia has emerged as a center of global dynamism. Today, it accounts for one-third of global GDP and contributes more than half of the world's economic growth [...] ADB has played an important role in the transformation of Asia".

(4) Nonsovereign operations comprise the provision of any loan, guarantee, equity investment, or other financing arrangement to privately held, State-owned, or subsovereign entities, in each case, (i) without a government guarantee... or (ii) with a government guarantee, under terms that do not allow ADB, upon default by the guarantor, to accelerate, suspend, or cancel any other loan or guarantee

\$2.3 billion (a 31% increase from 2016); \$11.9 billion in co-financing from bilateral and multilateral agencies and other financing partners; and \$201 million in technical assistance (an 11% increase from 2016).

### **3. ADB's Milestones in Procurement Reforms, 1960s to 2017**

ADB formulated its first policies on procurement as early as 1968,(5) and access to special funds (*i.e.*, funds that allowed ADB to make soft loans with long payback periods of up to 40 years and at low interest rates of 1.5%) from donor countries during those period were often “tied to procurement from donor countries”.(6) It was only in 1976 when ADB modified its domestic procurement guidelines for ADB-financed projects(7) by agreeing to finance the same portion or percentage of contract regardless of whether the contract was awarded to a domestic or foreign supplier/contractor, provided international competitive bidding was effectively carried out, and by permitting the procurement of domestic goods and construction services under ADB financing.(8)

Ten years later (*i.e.*, on the 10<sup>th</sup> annual meeting of ADB in 1977), ADB concluded the need to reform its operations by improving the procurement of goods and consultants. Borrowing countries noted that ADB was slow in disbursing funds because of its complicated procedures (including procedures on procurement).(9) In fact, it was this year (1977) when ADB conducted a comprehensive review of its financial policies, disbursements, and other loan administration matters in the hope of simplifying its procedures.(10) As a result, ADB issued revised guidelines on the use of consultants and procurement.(11)

A year later, in 1978, ADB reconsidered its procurement guidelines since it was one of the possible causes of delays,(12) and reviewed its domestic procurement and

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between ADB and the related sovereign. Asian Development Bank, “ADB Operations Manual Bank Policies and Procedures”, OM section D10, Iss. 24 May 2016.

(5) P. McCawley, *Banking on the Future of Asia and the Pacific: 50 years of the Asian Development Bank, op. cit.*, pp. 3 and ff., esp. p. 474.

(6) *Ibid.*, esp. p. 88: “In December 1969, the Agricultural Special Fund (ASF) was set up... following a contribution from Japan (7.2 billion yen, or \$20 million equivalent) to finance special projects in agricultural development. A similar agreement was signed with Canada for its contribution to the Multi-Purpose Special Fund (MPSF) (for \$25 million equivalent). These were voluntary and often tied to procurement in contributing countries”, *ibid.*, esp. p. 96.

(7) *Ibid.*, esp. p. 476.

(8) Asian Development Bank, *ADB Annual Report 1976*, pp. 23-25.

(9) P. McCawley, *Banking on the Future of Asia and the Pacific: 50 years of the Asian Development Bank, op. cit.*, pp. 3 and ff., esp. p. 123-124.

(10) *Ibid.*, p. 14.

(11) *Ibid.*, p. 16.

(12) *Ibid.*, pp. 3 and ff., esp. p. 140.

local currency financing;(13) ADB remained under pressure, though especially from industrialized countries, to maintain close controls over procurement arrangements.(14) In 1988, ADB intensified its project administration efforts and introduced innovative and streamlined project administration, *i.e.* through delegation of more authority to executing agencies, earlier procurement, and recruitment of consultants.(15)

Although the 1990s marked an era for new trade arrangements (*i.e.* establishment of the World Trade Organization), leaders from developing and industrial countries still disagreed over government procurement, among other issues.(16) Nonetheless, ADB (in 1995) became the first development bank to develop a governance policy to ensure that development assistance fully benefits the poor.(17)

Another decade passed before ADB responded to the concerns of borrowing countries and donors on complicated arrangements, by streamlining its business processes – in particular, simplifying procurement and documentation requirements.(18) In fact, the year 2000 marked an era for more accountable and effective assistance from ADB, when it became the first multilateral development bank to establish a two-phase accountability mechanism: an informal consultation phase for those affected by ADB projects and a compliance review phase to investigate alleged violations of operational arrangements.(19) ADB likewise engaged with civil society to achieve environmental and social objectives.(20) The ideals of environmental protection and sustainability came to be more strongly reflected in the Sustainable Development Goals (SDG) in 2015. SDGs are more extensive than MDGs because they embraced a triple bottom line, combining economic development, environmental sustainability and social inclusion.(21)

In 2008, ADB approved Strategy 2020 which reaffirmed both ADB's vision of an Asia and Pacific free of poverty and its mission to help its developing member countries improve their living conditions and quality of life.

Interestingly, in 2015, choices for borrowing countries in Asia widened. Two financial institutions were established – the Asian Infrastructure Investment Bank (AIIB) in Beijing and the New Development Bank (NDB) in Shanghai. Although both institutions were based in China, the latter was

(13) *Ibid.*, pp. 3 and ff., esp. p. 477.

(14) *Ibid.*, pp. 3 and ff., esp. p. 140.

(15) *Ibid.*, p. 18.

(16) *Ibid.*, pp. 3 and ff., esp. p. 159.

(17) *Ibid.*, p. 264.

(18) *Ibid.*, pp. 22 and ff., esp. pp. 264-267.

(19) *Ibid.*, pp. 22.

(20) *Ibid.*

(21) *Ibid.*, pp. 22 and ff. esp. pp. 301-302.

established by Brazil, the Russian Federation, India, the People's Republic of China and South Africa, and was considered the first MDB set up entirely by emerging economies.(22) Both institutions have adopted standards for addressing the environmental and social impacts of projects, as well as for fair and transparent procurement systems that are at par with those of the existing MDBs.(23)

In response to the call for a “stronger, better, and faster ADB,” ADB started a new initiative for incorporating advanced technologies in projects by strengthening project design, putting more emphasis on quality in procurement procedures and helping countries access the best expertise.(24) ADB likewise improved business processes through a 10-point program, which aimed at reducing procurement time while maintaining fiduciary oversight. ADB implemented faster processing of procurement contracts and delegated more authority to resident missions, and thereby enabled ADB's staff to work closely with their clients (*i.e.*, Member States and private enterprises).(25)

In 2017, ADB approved a new procurement policy that “marks a transition from a ‘one size fits all’ approach to a ‘fit for purpose approach’.(26) Accordingly, the new procurement policy will help achieve value for money by improving the quality of procurement decisions, reducing overall procurement time, permitting the use of customized procurement methods, and supporting high-level technologies.(27)

#### **4. ADB at 50: Innovations in Public Procurement**

The year 2016 marked not only the fiftieth anniversary of ADB, but also the second generation of procurement reforms.(28) ADB introduced procurement reforms intended to ensure value for money (VFM) by improving flexibility, quality, and efficiency throughout the procurement.(29) VFM has become a part of a holistic procurement structure with three support pillars: efficiency, quality, and flexibility.(30) The two key procurement principles of transparency and fairness weave across all elements of the structure.(31)

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(22) P. McCawley, *Banking on the Future of Asia and the Pacific: 50 years of the Asian Development Bank*, *op. cit.*, pp. 3 and ff., esp. p. 303.

(23) *Ibid.*, p. 18.

(24) *Ibid.*, pp. 3 and ff., esp. pp. 326-327.

(25) *Ibid.*, pp. 3 and ff., esp. p. 330.

(26) Asian Development Bank, *ADB Annual Report 2017*, p. 46.

(27) *Ibid.*, p. 33.

(28) T. NAKAO, “Remarks at ADB's 50th Anniversary”, 14 December 2016.

(29) Asian Development Bank, *Guide Notes on Procurement*, *op. cit.*, p. 3.

(30) *Ibid.*

(31) *Ibid.*

#### 4.1. Quality-based procurement principles

Article 14 of the ADB Charter states the operating principles of ADB, which for years have also been referred to as ADB's procurement principles, to wit: 1) Source of Procurement (*i.e.*, the proceeds of a loan can be used only for procurement of goods and works supplied from, and produced in member countries of ADB; 2), Economy and Efficiency, *i.e.*, contracts are to be procured through international competition unless other forms of procurement are more suitable and have been agreed upon between ADB and the borrower; 3) Fairness, *i.e.*, procurement procedures must give member countries adequate, fair, and equal opportunity to compete for contracts; and 4) Transparency, *i.e.*, as an essential principle to achieve economy and efficiency and to combat fraud and corruption.(32)

Without abandoning its fiduciary duty to ensure that the proceeds of any loan made, guaranteed, or participated in by ADB are used only for the purposes for which the loan is granted,(33) the new procurement policy expands the core procurement principles by adding two additional principles – quality and value for money.

##### 4.1.1. Quality

For the first time, ADB defines quality as a core procurement principle in its 2017 procurement policy.(34) ADB provides for definitions of quality for individual procurements.(35) For the standard of goods, quality is defined through technical specifications and standards and the product characteristics and tolerances.(36) For routine construction services, quality is defined through technical specifications for the defined inputs, and through industry standards applied to construction methods.(37) For large infrastructure projects, or where the use of high-level technology is proposed, quality is defined through the functional objectives achieved, serviceability, durability, and functionality, and through social, economic

(32) See also, par. 1.2, General Conditions of ADB Procurement Guidelines, April 2015. The 2015 Procurement Guidelines extended these principles into five basic procurements by including as one of its principles the interest of ADB in encouraging the development of domestic contracting and manufacturing industries in the country of the borrower.

(33) Par. (ix) and (xi), Art. 14 of ADB Charter specify that ADB financing shall be used only for procurements in member countries of goods and services produced in member countries, except by Board waiver, and that ADB will ensure its finances are used only for the purposes for which the loan was granted and with due attention to considerations of economy and efficiency. See also Asian Development Bank, "ADB Procurement Governance Review", January 2013.

(34) Asian Development Bank, "Quality, Guidance Note on Procurement", June 2018, p. 4.

(35) *Ibid.*, pp. 40 and ff., 6.

(36) *Ibid.*

(37) *Ibid.*

and environmental impacts.(38) ADB emphasizes quality in the key stages of its procurement cycle(39) (*i.e.*, procurement planning,(40) development of specifications,(41) bid evaluation and contract award,(42) including contract management(43)).

The Guidance Notes on Quality list the potential issues that may arise at each stage of procurement, with suggested mitigation measures. There is also a quality checklist found in the appendix to provide the procurement practitioners with a list of items to consider at each key stage of the procurement cycle to ensure that quality is being incorporated in the decisions about the procurement process.(44)

Although quality is already recognized as a part of the value for money (VFM) equation(45) (*i.e.*, quality increases VFM),(46) ADB emphasizes that improving the quality of procurement decision-making and support will increase efficiency, reduce procurement time and help in the reduction of risk,(47) although this may be insufficient for more complicated goods, works and services which call for a complex trade-off between quality and costs.(48) Quality requires that the procurement arrangements will be structured to procure inputs and deliver outputs of appropriate standard in a timely and effective manner and achieve the project outcomes and development objectives, taking into account the context, risk, value and complexity of procurement.(49) ADB notes that the assessment of qualitative factors is open to the risk of possible abuse of discretion, as well as conscious and unconscious bias in decision-making.(50)

#### 4.1.2. Value for Money (VFM) as a core procurement principle

Value for money (VFM) is not really a new procurement principle in a multi-lateral development bank (MDB) or in Asia. VFM is an already expressed procurement principle of the other MDBs such as the World Bank,(51) and

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(38) *Ibid.*

(39) *Ibid.*

(40) *Ibid.*, pp. 40 and ff., esp. 8.

(41) *Ibid.*, pp. 40 and ff., esp. 13.

(42) *Ibid.*, pp. 40 and ff., esp. 19.

(43) *Ibid.*, pp. 40 and ff., esp. 26.

(44) *Ibid.*, pp. 40 and ff., esp. 29.

(45) *Ibid.*, pp. 40 and ff., esp. 1.

(46) *Ibid.*, pp. 40 and ff., esp. ix.

(47) *Ibid.*, pp. 40 and ff., esp. 54.

(48) *Ibid.*, pp. 40 and ff., esp. 3.

(49) *Ibid.*, pp. 40 and ff., esp. 4.

(50) *Ibid.*, pp. 40 and ff., esp. 55.

(51) World Bank, Value for Money: Achieving VfM in Investment Projects Financed by the World Bank, July 2016.

the African Development Bank.(52) Even in Asia, VFM had already been endorsed by the Asia Pacific Economic Cooperation (APEC) as early as 1998 to be one of the two non-binding principles in government procurement (*i.e.*, the other principle is open and effective competition).(53) Nonetheless, it was only in 2017 when ADB “for the first time” defined VFM as a core principle in its procurement policy,(54) thereby introducing “life cycle costing” (*i.e.*, taking into account not only the acquisition cost, but also a combination of paid price plus the cost of operating and maintaining the goods or services procured)(55) and the requirement for evaluation of benefits along with assessment of risks, non-price attributes and/or total cost of ownership (*i.e.*, acquisition costs, operating costs, maintenance costs and disposal costs).(56)

By incorporating VFM in its core procurement principles, ADB hopes to address concerns regarding obtaining quality results. ADB seeks to prevent a contract decision based solely on efficiency or economy that may result in a contract being awarded to the lowest-priced bid regardless of other relevant factors, such as reliability, performance and maintenance, including externalities such as environmental and social impacts.(57) To achieve VFM, it is recommended that evaluation criteria must consider factors such as cost, quality, risk, sustainability and innovation. Non-priced criteria (*i.e.* quality of methodology and work plan, performance capacity or functionality features, and sustainable procurement) may be assessed based upon a scoring system using weighted criteria.(58) VFM is now considered as a factor in effectively managing a contract that can be best achieved through specific, measurable, relevant and time-bound (SMART) key performance indicators (KPIs) which are directly linked to the project objectives and deliverables.(59)

(52) V. SHARMA, “An update on procurement reforms at the African Development Bank”, *PPLR*, 2016, No. 4, pp. 151-163, (“in a time of limited fiscal space, local governments are now more serious about achieving Value for Money (VfM) in procurement. Exclusive focus on ‘lowest price’ is no longer seen as adequate when spending public monies – considerations such as life-cycle costing sustainability, and environmentally and socially responsible procurement (ESRP) are bringing new variables into bid evaluation”).

(53) S. BROWN, “APEC developments – non-binding principles of value for money and open and effective competition”, *PPLR*, 1999, 1, CS16-19 (“Government procurement practices and procedures should be ‘directed to achieving the best available value for money in the acquisition of goods and services to deliver, or support delivery of, government programmes’. Purchase price alone does not provide complete information with respect to ‘total relevant costs’. The test agreed by Members involves a comparison of costs and benefits on a whole life basis. Benefits in terms of taxpayer and supplier savings may also be realised through improvement in procurement processes and management”).

(54) Asian Development Bank, “Value for Money, Guidance Note on Procurement”, ADB, June 2018.

(55) *Ibid.*, pp. 60 and ff., ix.

(56) *Ibid.*, pp. 60 and ff., 21.

(57) *Ibid.*, pp. 60 and ff., 3.

(58) *Ibid.*, pp. 60 and ff., 15.

(59) *Ibid.*, pp. 60 and ff., 18-19.

In case, however, of potential conflicts with other core procurement principles (*i.e.*, quality, efficiency, economy, transparency, fairness), ADB provides a list of mitigation measures such as the inclusion of VFM in transparency, identification of potential risks, a mechanism to address conflicts, and a valid complaints mechanism.(60)

#### 4.2. Procurement risk framework

Addressing the risk attached to public procurement is not a novel procurement policy.(61) In fact ADB had already introduced a risk-based procurement approach in 2013 but only for the purpose of streamlining its procurement processes to increase efficiency.(62) Accordingly, ADB implemented a 10-point procurement action plan(63) in 2014 that aimed to (i) improve ADB's business processes, (ii) increase ADB responsiveness and engagement, and (iii) more effectively respond to evolving changes of global procurement practices.(64) Despite the encouraging results of these actions,(65) ADB's procurement procedures were still perceived as cumbersome, inflexible, and not conducive

(60) Appendix 3: Interplay among the Core Procurement Principles, Asian Development Bank, "Value for Money, Guidance Note on Procurement", *op. cit.*, pp. 60 and ff., 30-33.

(61) See also the 2015 OECD Recommendations, which include risk management as one of the 12 principles for public procurement, *i.e.*, transparency, integrity, access, balance, participation, efficiency, e-procurement, capacity, evaluation, risk management, accountability and integration. These principles reflect the critical role that governance of public procurement must play in achieving and advancing public policy objectives.

(62) Asian Development Bank, "Midterm Review of Strategy 2020: Meeting the Challenges of a Transforming Asia and Pacific", April 2014, p. 10. See also Asian Development Bank, "The Strategic Importance of Public Procurement", *ADB Brief*, 23 November 2011.

(63) Asian Development Bank, "Midterm Review of Strategy 2020: Meeting the Challenges of a Transforming Asia and Pacific", *op. cit.*, pp. 60 and ff., esp. p. 69. "On 25 February 2014, ADB approved the 10 Point Action Plan on Procurement Reform... which includes the following actions: (i) undertake new procurement assessments under an enhanced procurement risk assessment methodology; (ii) approve new procurement thresholds for international competitive bidding and national competitive bidding; (iii) introduce new prior-review thresholds and procurement supervision approach, including post-review based on sampling; (iv) increase ADB's Procurement Committee approval threshold to \$40 million and implement new decision authorities; (v) classify projects by procurement risk and complexity during project concept clearance; (vi) fully roll out the procurement review system; (vii) agree on master bid documents during project preparation; (viii) streamline the Procurement Committee process; (ix) implement a single standard procurement approval form for all levels of procurement; and (x) undertake a thorough review of consultant selection, approval, and contract variation processes."

(64) Asian Development Bank, "Improving ADB Project Performance through Procurement Reforms", March 2017.

(65) *Ibid.*, pp. 1-2, "An increase in the value of the contracts awarded in ADB projects by almost 40% from \$6.8 billion in 2013 to \$9.5 billion in 2016 was recorded and attributed to the implementations of the 10 point agenda, specially, the reforms due to the introduction fo project procurement risk based classifications based on value and complexity, *i.e.*, of 220 projects in 2015, 25% or 55 were classified as category A or "higher risk, thus requiring close support and oversight by procurement specialist; completion of 10 country-based procurement risk assessment, including sector-specific assessment; introduction of post-review on lower-risk procurement transactions, and creation of regional procurement committee. Project procurement risk-based classifications resulted to an increase in the value of the contracts awarded in ADB projects by almost 40% from \$6.8 billion in 2013 to \$9.5 billion in 2016".

to timely or high-quality results;(66) hence, the need for a new procurement framework that will not only increase efficiency and reduce procurement time, but will also reduce risk, and deliver value for money.(67)

ADB's new procurement risk framework hopes to manage risk throughout the procurement cycle from the country partnership strategy to contract closeout.(68) It introduces four risk management tools – the country and sector/agency procurement risk assessment, procurement risk categorization, project procurement risk assessment, and a contract management plan – that the country, sector, agency and project can use in identifying, assessing and managing the risks within their respective levels,(69) whilst allocating responsibilities for risk management in the procurement cycle between ADB and the borrower.(70) ADB is not only responsible for risk management during country partnership strategy and project conceptualization, but also accountable for risk management during procurement planning.(71) The borrower is only consulted during the first two stages in the procurement cycle (*i.e.* country partnership strategy and project conceptualization), and its responsibility for risk management begins during procurement planning, project implementation and contract management. It is worth noting that ADB's overt actions on risk management diminish during project implementation and contract management, as it has become the primary responsibility of the borrower subject only to consultation with ADB.(72)

Risk management includes risk assessment and treatment. Procurement risks are estimated according to their likelihood to occur (*i.e.* rare to almost certain), their consequences (*i.e.*, insignificant to severe), and rated (*i.e.*, likely to high) for the purpose of prioritizing for possible treatment (*i.e.*, risks rated 'extreme' and 'high' should be given special attention, but treatments to mitigate 'medium; and 'low' risk should also be considered).(73) ADB likewise suggests four possible risk treatment options – 1) Avoid (not proceeding with the project activity); 2) Reduce (reduce the likelihood and consequence of the occurrence, e.g., procurement approach, contract management, etc.); 3) Transfer (transfer the risk to another party, e.g., insurance); and 4) Accept (accept the risk without mitigation, e.g., low risk).(74)

(66) Asian Development Bank, "Improving ADB Project Performance through Procurement Reforms", *op. cit.*, p. 72.

(67) Asian Development Bank, "Procurement Risk Framework, Guidance Note on Procurement", June 2018, p. xi.

(68) *Ibid.*, pp. 74 and ff., 1.

(69) *Ibid.*, pp. 74 and ff., 7.

(70) *Ibid.*, pp. 74 and ff., 9.

(71) *Ibid.*

(72) *Ibid.*, p. 78.

(73) *Ibid.*, pp. 74 and ff., 12.

(74) *Ibid.*, pp. 74 and ff., 13.

Since all projects are prone to risk and uncertainty,(75) ADB's new procurement risk framework emphasizes the need to treat and manage risks after identification by highlighting risk management as an ongoing activity.(76)

### 4.3. New practices

In addition to the two core principles, ADB introduced contract management and abnormally low bids as among the new public procurement practices.

#### 4.3.1. Contract management

ADB highlights the three stages in contract management: a) preparation and planning activities prior to contract award, b) contract administration during contract implementation, and c) contract closure.(77) Aside from preparing a contract management plan (CMP) acceptable to ADB prior to contract signing, borrowers should monitor the performance and progress of contracts under the CMP and provide timely reports to ADB. Reporting to ADB should be regarded as an ongoing activity throughout contract implementation. For contracts subject to post review, the borrower shall seek ADB's no-objection for any significant variation.(78)

The Guidance Notes on Contract Management summarize the borrower's responsibility in contract management as follows: 1) planning contract management during the pre-contract award stage and incorporating contract management requirements into the draft contract; 2) developing a CMP prior to contract award, 3) submitting a completed CMP to ADB prior to contract signing, 4) implementing the CMP to ensure that contract performance is satisfactory, appropriate stakeholders are informed, and all contract requirements are met; 5) submitting quarterly performance reports to ADB during contract implementation, 6) requesting ADB's no objection where any modification would individually or in aggregate increase the original contract price by over 15% (for contracts subject to post review), and 7) preparing and submitting post contract closure performance report.(79)

#### 4.3.2. Abnormally low bids

ADB addressed for the first time the issue of abnormally low bids (ALBs). Under the new procurement regulations, it is possible to reject a bid, require an

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(75) *Ibid.*, pp. 74 and ff., 6-7.

(76) *Ibid.*, pp. 74 and ff., 16-17.

(77) Asian Development Bank, "Contract Management, Guidance Note on Procurement", June 2018, p. ix.

(78) *Ibid.*, pp. 84 and ff., 17.

(79) *Ibid.*, p. 85.

increase in the amount of the performance security as a condition to award the contract (the amount of the performance security shall generally not exceed 20% of the contract price), or accept the bid as such,(80) subject to the proper procedural determination of an ALB. The ALBs Assessment Process adopts three broad steps in dealing with ALBs, to wit: 1) Identify, 2) Clarify and Analyze, and 3) Decide.

To identify ALBs, it necessary to revalidate the engineer's cost estimates and compare those with the bid price, compare the bid price with the other responsive bids received and compare the bid price with prices paid in similar contracts.(81) Thereafter, check for omissions, errors and underpricing, seek explanations for resources, inputs and pricing, review scope and compliance, check for redundancy, contingency, and profit margins, check the rate or price quoted by the bidder for similar nature of works in other projects, either government, or development partner-funded (clarify and analyze).(82) Finally a decision is to be made on whether to accept or reject, based on the evidence presented, and then a report is made on the outcome of the ALB process.(83)

It is worth noting that there is no automatic exclusion due to a bid falling above or below a predetermined assessment of bid values,(84) as there may be good reasons for a low bid price (*i.e.* the economy of the manufacturing process, the services provided, or the construction method, the technical solutions chosen or any exceptionally favorable conditions available to the bidder for the supply of the products or services or for the execution of the work, the originality of the bidder's works, supplies, or services proposed, change in underlying input prices, e.g. commodities, economies of scale, effective supply chain management, or as a loss leader to establish a market presence, and the bidder may intend to quote only at cost (without profit margin) to establish its business in a country or sector to gain experience to compete for future bidding).(85)

An ALB is not in and of itself negative.(86) Dealing with ALBs may even increase efficiency and reduce implementation time (*i.e.*, improve contract implementation by identifying potential costing issues up front, reduce time delays during contract implementation, avoid possible project failure), ensure quality (help to identify unfit or unreliable bidders, and ensure that reliable, competent bidders are selected), reduce risk, (*i.e.*, 'de-risk' projects in which the

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(80) Asian Development Bank, "Abnormally Low Bids, Guidance Note on Procurement", June 2018, p. ix.

(81) *Ibid.*, pp. 87 and ff., 12.

(82) *Ibid.*, pp. 88.

(83) *Ibid.*

(84) *Ibid.*, pp. 87 and ff., 2.

(85) *Ibid.*, pp. 88 and ff., 3.

(86) *Ibid.*, p. 92.

bidder does not sufficiently account for the financial implications of employment regulations, health, safety, security and environmental requirements, environmental obligations and/or technical requirements), and improve value for money (identify unrealistic or inaccurate borrower project cost estimates).(87) Nonetheless, an ALB requires additional investigation, as it could be a sign of risks such as (i) a lack of technical or commercial competence, (ii) an intent to not follow design standards or specifications, and/or (iii) an intent to not comply with environmental or labor laws.(88)

#### 4.4. Specialized areas

ADB addresses specialized areas in procurement by issuing separate guidance notes on procurement during fragile, conflict-affected and emergency situations, e-procurement, procurement for public-private partnership, and procurement of high-level technology.

##### 4.4.1. Fragile, conflict-affected and emergency situations

Recognizing the enormous challenges in operating in fragile and conflict-affected situations (FCAS) and in emergency situations, ADB offers simplified and flexible procurement measures in addressing FCAS according to country conditions.(89) While ADB distinguishes fragility from conflict, including post-conflict, ADB generally characterizes FCAS as countries with political instability, weak governance and institutional capacity, economic and social insecurity, high levels of poverty, wide gaps in the level of social and economic services, lack of competition, disputes over access to resources and the sharing of their profits, and greater vulnerability to the effects of natural hazards and climate change.(90) Emergency situations include disasters, which refer to sudden, calamitous events that seriously disrupts the function of the community and society causing widespread human, material, economic or environmental losses that exceed the community's or society's ability to cope using its own resources.(91) An emergency occurs after a natural or manmade disaster, or conflict, when unforeseen circumstances require immediate action and the local capacity is insufficient to address and manage traumatic events.(92)

ADB enlists flexibility measures in procurement depending on operation situations (*i.e.*, FCAS or emergency situations), but provides common

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(87) *Ibid.*, p. 87.

(88) *Ibid.*, p. 92.

(89) Asian Development Bank, *Fragile, Conflict-Affected, and Emergency Situations, Guidance Note on Procurement*, June 2018.

(90) *Ibid.*, pp. 96 and ff, 4.

(91) *Ibid.*, p. 97.

(92) *Ibid.*

procurement flexibilities to either situations. These include special procurement arrangements, *i.e.*, simplified procurement such as community participation and the use of the borrower's national procurement procedures acceptable to ADB, allowance for split packaging, *i.e.*, broadening the pool of qualified local contractors and suppliers, the use of framework agreements, the use of procurement agents, including contract management support (*i.e.*, especially when large-volume procurement is involved), lower bidder qualifications, waiver of performance securities (*i.e.*, for goods and small works), increase in advance payment, and use of alternative forms of contracting (*i.e.*, use of lump-sum and output-based contracts).(93)

As of 2017, ADB listed 11 FCAS countries, *i.e.* Federated States of Micronesia, Kiribati, the Marshall Islands, Nauru, Papua New Guinea, Solomon Islands, Timor-Leste, Tuvalu and Vanuatu, and two conflict-affected countries, *i.e.*, Afghanistan and Myanmar.(94)

#### 4.4.2. E-procurement

Like most multilateral development banks (MDBs), ADB encourages the use of electronic procurement (e-procurement) in different stages of the procurement process. In fact, in harmonization with other MDBs, ADB adopted the latest version of the modules published by the World Bank Group on e-bidding or e-tendering in borrower-led e-procurement, *i.e.* E-tendering Requirements for MDB Financed Procurement, an electronic reverse auction (e-RA) module in e-procurement, and other modules such as catalog management or e-marketplace.(95) As a result, a prior clearance from ADB is required before using an e-procurement system in ADB-financed projects.(96)

ADB borrowers are required to use ADB's Consultant Management System (CMS) to advertise all consulting opportunities listed for competitive selection under the procurement plans for projects financed in whole or in part by an ADB loan or grant, or by ADB-administered funds. For goods, works and non-consulting services, borrowers are encouraged to use e-procurement for all procurement methods (e.g. open competitive bidding with international or national advertisement, limited competitive bidding, request for quotations). At a minimum, borrowers are required to publish an advance procurement notice and procurement plan on the ADB Web site, as well as advertise all their

(93) *Ibid.*, "Appendix: Flexibility Measures Available in Fragile, Conflict-Affected and Emergency Situations", pp. 96 and ff., 19-21.

(94) Asian Development Bank, "Abnormally Low Bids, Guidance Note on Procurement", *op. cit.*, p. 92.

(95) Asian Development Bank, "E-procurement, Guidance Note on Procurement", 2018, pp. 6-7.

(96) *Ibid.*, pp. 102 and ff., 7.

open competitive bidding procurement contracts with an international advertisement on this site.

Except in the case where the use of e-procurement is limited to advertising opportunities and publishing contract awards, ADB requires prior accreditation of an e-procurement system. Only an e-procurement system that is previously accredited by ADB or another MDB may be used in its projects.(97) Nonetheless, non-accredited systems will be reassessed, and remedial measures will be recommended to address their non-compliance.(98) Only after these issues are addressed and agreed upon by ADB and the borrowing country will ADB authorize the use of an e-procurement system.(99)

ADB emphasizes that an effective implementation of e-procurement increases efficiency and reduces procurement time (e.g., automated and electronic system reduces the processing and communication times in procurement for both buyers and bidders), reduces risk (e.g. automated processes reduce the risk of mistakes that could compromise the procurement), improves transparency and fairness (e.g. supports the timely online publication and disclosure of information pertaining to procurement plans, opportunities, processes, and results); and delivers VFM (e.g. a cross-government e-procurement system minimizes duplication of process, etc.,).(100)

#### 4.4.3. Public-private partnerships

The Guidance Note on Procurement for Public-Private Partnerships discusses only the selection of PPP operators for ADB's sovereign lending operations and does not apply to other operations of ADB, such as but not limited to non-sovereign operations, downstream procurement of goods, works and services by the private operator, etc.(101) Interestingly, the key considerations in PPP procurement find support from other PPP resources such as the ADB *Public-Private Partnership Handbook*(102) and the World Bank *Public Private Partnership Reference Guide*.(103) Accordingly, procurement for PPP may be through either (i) unsolicited proposals or direct negotiations ("sole sourcing"), (ii) competitive negotiations, or (iii) competitive bidding.(104)

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(97) *Ibid.*

(98) *Ibid.*

(99) *Ibid.*

(100) *Ibid.*, pp. 102 and ff., ix-x.

(101) Asian Development Bank, "Public-Private Partnership, Guidance Note on Procurement", June 2018.

(102) Asian Development Bank, "Public – Private Partnership Handbook", 2008.

(103) World Bank Group, "Public-Private Partnerships Reference Guide", V. 3, 2007.

(104) Asian Development Bank, "Public-Private Partnership, Guidance Note on Procurement", *op. cit.*, citing "Public – Private Partnership Handbook", 2008, *op. cit.*, pp. 108 and ff., 6.

#### 4.4.4. High-level technology

ADB launched the High-Level Technology Fund(105) to promote the adoption of high-level technology (HLT) and innovative solutions(106) by its developing members. Accordingly, projects that have any of the following characteristics may be considered HLT and innovative for purpose of securing ADB's HLT Fund: (i) improves efficiency, productivity, quality, functionality, and/or access to service delivery; (ii) addresses climate change mitigation and/or adaptation, including resilience to disaster risks; (iii) introduces innovation in processes, methods, techniques, and the use of new or improved equipment and materials in construction, operations, and maintenance; (iv) reduces environmental and social costs; (v) reduces total cost of ownership, increases durability, and improves long-term performance; (vi) enhances the scaling up of HLT and market opportunities for scale-up; and (vii) promotes synergies and increases scale and impact through cross-sector collaboration.(107)

HLT can be incorporated into ADB operations in several ways: a) an acquisition of equipment and goods that employ HLT that is new globally, in ADB operations, or to an ADB DMC; b) construction or civil works based on specifications that require contractors to meet enhanced performance standards and/or employ HLT in the construction process, materials, and other inputs; and c) consulting services that require specific knowledge and expertise in the use of HLT in different phases of the innovation cycle, as well as different sectors and applications.(108)

#### 4.5. Strategic procurement planning

ADB's principle-based procurement approach paves the way for the adoption of the process of strategic procurement planning (SPP).(109) Unlike the previous compliance-based procurement planning approach, SPP begins during the project conceptualization stage and continues as a main activity within the procurement planning stage.(110)

The ADB Guidance Note on Strategic Procurement Planning lists some of the tools and techniques that the borrower may use in developing procurement strategy and procurement plans, e.g., strengths – weaknesses – opportunities

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(105) Asian Development Bank, "Public-Private Partnership, Guidance Note on Procurement", *op. cit.*, pp. 108 and ff., 1.

(106) Asian Development Bank, "High-Level Technology, Guidance Note on Procurement", June 2018.

(107) *Ibid.*, pp. 113 and ff., 1-2.

(108) *Ibid.*, pp. 113 and ff., 114 and ff., ix.

(109) Asian Development Bank, "Strategic Procurement Planning, Guidance Note on Procurement", 1, 2018.

(110) *Ibid.*, p. 116.

– threats analysis to determine the capacity and capability of the borrowing country,(111) external influences analysis to identify any external drivers of change to the project,(112) and stakeholder analysis to identify and position all the internal and external stakeholders who may be involved in a project during the planning and implementation of a project.(113) SPP likewise encourages the borrower to conduct a robust market analysis through the use of strategic analytical tools such as Porter’s five forces analysis, supply positioning, and supplier preferencing.(114) Risk management through project procurement risk assessment and a risk register is an important part of the SPP process as it will help in identifying and mitigating the potential risk to the project and its procurement contracts.(115) Options Analysis is used in evaluating the available options to fulfill the project’s development objectives,(116) which helps in the formulation of the procurement strategy in the SPP document.(117) The final step of the SPP is the synthesis of the analysis, preferred options, and strategy into the project procurement plan.(118)

Another important process in strategic procurement planning is the conduct of a procurement review and the possibility of adopting alternative procurement arrangements in the conduct of public procurement.

#### 4.5.1. Procurement review

In line with its fiduciary duty, ADB conducts procurement reviews in one of two ways: (1) prior review, in which ADB reviews and approves key documents and decisions prior to them being implemented, and (2) post review (sampling), in which ADB reviews documents, decisions, and procurement processes, on a sample basis, after contract signing.(119) Prior review is conducted on contracts that are categorized as high risks and requires a ‘no-objection’ from ADB to each step in the procurement process to confirm that the borrower’s proposed actions comply with ADB’s 2017 procurement policy and regulations, the project’s financing agreement, procurement plan, and other relevant documents.(120)

Procurement post review (sampling) may be conducted at each reimbursement cycle, where series of withdrawal applications are received, or as part of

(111) *Ibid.*, pp. 116 and ff., 6.

(112) *Ibid.*, pp. 116 and ff., 7.

(113) *Ibid.*, p. 119.

(114) *Ibid.*, pp. 117 and ff., 11.

(115) *Ibid.*, 24-26.

(116) *Ibid.*, 27-33.

(117) *Ibid.*, 34.

(118) *Ibid.*, 35.

(119) Asian Development Bank, “Procurement Review, Guidance Note on Procurement”, June 2018.

(120) *Ibid.*, pp. 126 and ff., 3.

project review missions by ADB or its consultants.(121) Under the post review (sampling), the borrower approves the award and signs the contracts, while ADB will post review only a sample of contracts awarded and signed.(122) The sample size should endeavor to capture contracts representing (i) about 30-50% of total project value and (ii) about 20% of the total number of contracts identified for post review (sampling).(123) Post review likewise helps ADB in checking possible integrity violations, *i.e.*, checking the list of contracts against ADB's list of suspended and debarred firms and individuals, including any entities debarred or suspended under MDB's Agreement for Mutual Performance and Debarment Decisions (2006).(124) Each borrower is rated on its management of the procurement process concerning compliance with the agreed procurement procedures, which shall be evaluated as 'satisfactory', 'partly satisfactory', or 'unsatisfactory', assessed for its overall risk rating, *i.e.*, high, medium or low, and thereafter, the findings are discussed with the borrower for an opportunity to clarify any issues and to provide the necessarily mitigating and strengthening measures.(125)

#### 4.5.2. Alternative procurement arrangements

ADB addressed for the first time the usage of alternative procurement arrangements (APAs) in its mainstream procurement operations,(126) either through the use of an APA under another multilateral or bilateral agencies' procurement rules and procedures involved in the project (e.g. other MDBs or specialized United Nations agencies), or with an agency or entity of the borrower accredited by the ADB.(127) In doing so, co-financing agreements must be executed between ADB and its partners, e.g., other donors. In any case, partners are required, among other things, to protect the privileges and immunities of ADB(128) and to comply with the universal requirements under ADB's Article of Agreement (e.g., member country eligibility requirements, adherence to the provisions for United Nations sanctions and MDB agreed cross debarments etc.)(129) Effective application of alternative procurement arrangements may increase efficiency and reduce procurement time, ensure quality and manage risk, and deliver value for money.(130)

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(121) *Ibid.*, 6.

(122) *Ibid.*, p. 129.

(123) *Ibid.*, p. 128.

(124) *Ibid.*, p. 126 and ff., 11.

(125) *Ibid.*, p. 126 and ff., 11-12.

(126) Asian Development Bank, "Alternative Procurement Arrangements, Guidance Note on Procurement", June 2018.

(127) *Ibid.*, pp. 133 and ff., 3.

(128) *Ibid.*, pp. 134.

(129) *Ibid.*, pp. 133 and ff., 4.

(130) *Ibid.*, pp. 133 and ff., ix.

#### 4.6. Procurement methods

Open competitive bidding (OCB) is still the preferred procurement method for ADB-funded projects.(131) OCB consolidates the competitive procurement of goods, works, and services under a single procurement method.(132) Unlike the previous guidelines (Procurement Guidelines 2015, as amended from time to time), the new guidelines require the evaluation of past performance either through the submission by the bidders of evidence of their previous contracts or through third-party inquiry. In either event, bidders are given opportunities to respond to any adverse information.(133)

OCB encompasses competitive recruitment methods for consulting services and removes conceptual boundaries (for example, the understanding that merit point scoring should not be used in the procurement of goods or civil works) that previously limited the flexibility needed to achieve successful procurement and development outcomes.(134)

Moreover, the ADB 2017 procurement regulations empowered a bidder to raise “any issue of ambiguity, contradiction, omission, etc., prior to the submission of its bid to assure submission of a fully responsive and compliant bid that includes all the supporting documents requested in the bidding documents,”(135) including the right to write directly to ADB if the bidder is not satisfied with the explanation of the borrower (*i.e.*, in debriefing, the unsatisfied bidder can write ADB).(136)

##### 4.6.1. Consulting services and non-consulting administered by ADB borrowers

Prior to the 2017 ADB procurement regulations, ADB did not differentiate between customized intellectual and advisory services that are generally considered to be consulting services and standardized services that are generally considered to be non-consulting service.(137) Now, ADB introduces non-consulting services as a separate category of services, which comprise both physical and intellectual activities that are routine and measurable in nature (e.g., installation and maintenance services, household surveys, standard

(131) Asian Development Bank, Open Competitive Bidding, Guidance Note on Procurement, June 2018.

(132) *Ibid.*

(133) Asian Development Bank, Appendix 3, “Open Competitive Bidding, Guidance Note on Procurement”, *op. cit.*, pp. 138 and ff., 25.

(134) *Ibid.*, 3.

(135) *Ibid.*, 18.

(136) *Ibid.*, 20.

(137) *Cf.* Asian Development Bank, “Non-Consulting Services Administered by ADB Borrowers, Guidance Note on Procurement”, 1, June 2018.

audits, Web site maintenance, event management, interisland shipping, and vocational training).(138)

Consulting and non-consulting services can sometimes be difficult to distinguish, as both can include professional services.(139) Non-consulting services include (i) services for which the physical aspects of the activity predominate, that are bid and contracted on the basis of performance of a measurable physical output, and for which industry and performance standards can be clearly identified and consistently applied; or (ii) routine services which, while requiring expert inputs, are based on recognized standard offerings that are readily available and which do not require evaluation of tailored methodologies or techniques.(140) Consulting services refer to services which are of an intellectual and advisory nature, *i.e.*, evaluation of technical proposals that offer tailored approaches, methodologies, and specially qualified experts, *e.g.*, policy and governance studies; advice on institutional reforms; engineering designs; construction supervision; legal advice; forensic audits; procurement services; social and environmental studies; and the identification, preparation, and implementation of projects.(141)

ADB discusses in detail the characteristic five procurement modalities for non-consulting services – open competitive bidding, limited competitive bidding, request for quotations, direct contracting or single-source selection and framework agreements.(142)

#### 4.6.2. Framework agreements for consulting services

While ADB allows an executing agency (*i.e.*, borrowers) to establish its own framework agreement or to draw from one established by ADB, its guidance note is particularly focused on explaining how framework agreements for consulting may, among others, be established and administered in accordance with best practice and applicable ADB policies.(143) ADB discusses in its new procurement guide notes the process under which single contracts or ‘call-offs’ from a framework agreement are made and administered.

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(138) *Ibid.*, p. 143.

(139) *Ibid.*, pp. 143 and ff., 3.

(140) *Ibid.*, p. 145.

(141) Asian Development Bank, “Consulting Services Administered by ADB Borrowers, Guidance Note on Procurement”, June 2018.

(142) Asian Development Bank, “Non-Consulting Services Administered by ADB Borrowers, Guidance Note on Procurement”, *op. cit.*, pp. 143 and ff., 19-20.

(143) Asian Development Bank, “Framework Agreements for Consulting Services, Guidance Note on Procurement”, June 2018.

#### 4.7. Bidding procedures

ADB introduces the following new features in the conduct of bidding procedures.

First, ADB has adopted two new features to its prequalification process. These include the ability to limit the number of qualified applicants that are invited to bid and the inclusion of historical contract nonperformance in the criteria for assessing the suitability of the applicant to work on the project before inviting it to submit the bid.(144)

Second, ADB provides for different price adjustment formulas depending on the sizes and components of the contracts.(145) Price adjustment formulas allow contractors to offer more realistic prices at the time of bidding, by estimating actual cost implications that will be encountered.(146) Price adjustment provisions include formulas designed to protect both the borrower and contractors from price fluctuations.(147)

Third, ADB allows the contractor to use subcontractors to perform its obligations under contracts for the supply of goods, works, or plant, to the extent permitted in the bidding document used,(148) subject to the requirements on the treatment of subcontractors. Accordingly, ADB distinguishes three types of subcontractor under projects financed in whole or in part by an ADB loan or grant, or by ADB-administered funds: (i) those nominated by the borrower that all bidders must use, (ii) those specialist subcontractors that bidders may propose to deliver highly specialized equipment or key contract activities, and (iii) those subcontractors that bidders may propose for other purposes. It highlights risks to quality and supply chain integrity that can occur through subcontracting and suggests ways for borrowers to mitigate those risks.(149)

Finally, ADB removed the distinction between international and national competitive bidding (*i.e.*, the 2017 ADB regulations consolidate these two into ‘open competitive bidding’) which resulted in the removal of the limitation on the use of domestic preference only when international competitive bidding was used (*i.e.* domestic preference is now applicable even when only national advertising is used).(150) Although the domestic preference schemes are very similar to the past provision under the 2015 Procurement Guidelines,

(144) Asian Development Bank, “Prequalification, Guidance Note on Procurement”, June 2018.

(145) Asian Development Bank, “Price Adjustment, Guidance Note on Procurement”, June 2018.

(146) *Ibid.*, p. 151.

(147) *Ibid.*

(148) Asian Development Bank, “Subcontracting, Guidance Note on Procurement”, 3, June 2018.

(149) *Ibid.*, p. 154.

(150) Asian Development Bank, “Domestic Preference, Guidance Note on Procurement”, June 2018.

the new schemes allow more flexibility (*i.e.*, the margins of preference are no longer fixed and may be adjusted within specified ceilings).(151) A new method for the procurement of consulting services is also introduced, that is, the “use of national experts for key positions” as an evaluation criterion in technical evaluation.(152) In the past, the only possibility available was to require certain positions to be ‘national’.(153)

#### 4.8. Complaints, compliance and eligibility

Procurement-related complaints with regard to a bidding process may be brought to the attention of the borrower or ADB, or both, at the appropriate stage of the procurement process. Such complaints must be addressed objectively and in a timely manner, with transparency and fairness.(154) To ensure an effective complaints handling mechanism, ADB, for the first time, addresses the submission and handling of bidding-related complaints in a comprehensive manner.(155)

Bidding-related complaints may arise during the procurement planning, bidding (including prequalification), bid evaluation, contract award, post-award, and implementation stages of the ADB procurement cycle.(156) They can arise prior to the submission of bids, after bid submission but prior to contract award, and/or after contract award.(157) Complaints can arise under three possible scenarios: 1) fraud, corruption and other prohibited practices complaints;(158) 2) complaints arising out of, or related to, a bidding process subject to an alternative procurement arrangement (APA) that may allege fraud, corruption, and/or some other bidding-process-related irregularity or omission; and 3) breach of ADB’s policy and/or regulations (*i.e.*, misapplication or omission in application of ADB’s 2017 procurement policy and/or procurement regulations during a bidding process financed in whole or in part by an ADB loan or grant, or by ADB-administered funds).(159)

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(151) *Ibid.*, p. 156.

(152) *Ibid.*

(153) *Ibid.*

(154) Asian Development Bank, “Procurement Regulations for ADB Borrowers, Goods, Works, Nonconsulting and Consulting Services”, 8, 2017.

(155) Asian Development Bank, “Bidding-Related Complaints, Guidance Note on Procurement”, June 2018.

(156) *Ibid.*, pp. 161 and ff., 1.

(157) *Ibid.*, p. 162.

(158) Any violation of the ADB’s Anticorruption Policy (1998, as amended to date) and Integrity Principles and Guidelines (2015, as amended from time to time).

(159) Asian Development Bank, “Bidding-Related Complaints, Guidance Note on Procurement”, *op. cit.*, pp. 161 and ff., 2-3. See also *id.*, “Anticorruption and Integrity”, 2010; and *id.*, “Integrity Principles and Guidelines”, 2015.

In cases where the borrower fails to follow the applicable provisions of the 2017 procurement regulations or the agreed procurement arrangements, ADB provides a more flexible and proportional approach to noncompliance in procurement.(160) Some of the typical situations of noncompliance by a borrower may include, among others (i) using a bidding document that has not been endorsed by ADB, (ii) implementing a bid evaluation recommendation that has not been endorsed or approved by ADB, (iii) responding to a bidding-related complaint in ways contrary to those recommended by ADB, (iv) omitting to undertake required steps under a procurement method prescribed in the project procurement plan, (v) providing ADB with an incomplete or misleading record of a procurement transaction, and (vi) failing to take appropriate action when a party awarded the contract has breached its contractual obligations.(161)

Interestingly, however, under the 2018 Guidance Note on bidding-related complaints, noncompliance in procurement and complaints under the alternative procurement arrangements (APAs) do not include complaints arising from integrity violations as those complaints arising thereto are covered by ADB's anticorruption policy and integrity principles and guidelines. Accordingly, integrity violations such as fraud, corruption, coercion, collusion, among others, must be promptly referred to ADB's Office of Anticorruption and Integrity (OAI)(162) in accordance with ADB's Anticorruption Policy (1998, as amended to date) and ADB's Integrity Principles and Guidelines (2015, as amended from time to time).(163)

In the same manner that complaints under the alternative procurement arrangements (APAs) are handled according to the applicable procurement regime. In APA situations, in the absence of actual or suspected integrity violations, bidding-related complaints are handled by either the lead co-financier, under the relevant mutual reliance agreement(s), or by the accredited agency of the borrower under the relevant project agreement and applicable local procurement rules and procedures.(164) Nonetheless, APA transactions are still covered by the ADB's anticorruption policy and integrity principles and guidelines. Therefore, ADB reserves the right to determine whether any of its policies and procedures have been violated, including independently investi-

(160) Asian Development Bank, "Non-Compliance Procurement, Guidance Note on Procurement", June 2018.

(161) *Ibid.*, pp. 167 and ff., 5.

(162) Asian Development Bank, "Bidding-Related Complaints, Guidance Note on Procurement", *op. cit.*, pp. 161 and ff., 3.

(163) Asian Development Bank, "Non-Compliance Procurement, Guidance Note on Procurement", *op. cit.*, pp. 167 and ff., 4.

(164) Asian Development Bank, "Bidding-Related Complaints, Guidance Note on Procurement", *op. cit.*, pp. 169.

gating integrity violations under an APA procurement. In such circumstances, ADB's findings of noncompliance to its anticorruption policy may result in remedial action, including sanctions imposed by OAI. ADB may also exercise its right to withdraw, suspend, or terminate its own participation or financing under the relevant mutual reliance agreement and/or financing agreement.(165)

Complaints brought to the attention of the borrower or ADB must be submitted in writing and must be addressed objectively and in a timely manner, with transparency and fairness.(166) If received, ADB will promptly forward any submission or complaint relating to transactions subject to post review (sampling) to the concerned executing agency for review and resolution, provided that the said executing agency is not the responsible agency for any delay or expiration of any applicable period for the filing of the complaint, subject of review and resolution. If any such complaint received by ADB relates to allegations of integrity violations on the part of the executing agency and/or other parties, ADB will promptly forward such complaints to its Office of Anticorruption and Integrity for investigation and necessary action.(167)

Another novel practice that ADB introduced is the application of standstill periods in procurement in accordance with the national standstill provisions, or those of another development partner, to give unsuccessful bidders the opportunity to challenge a contract award decision.(168) ADB recommends a standstill period of not less than 10 working days following the notification of intent to award a contract, during which the bidders may challenge the award decision.(169)

Standstill periods take effect at the contract award stage of ADB's procurement cycle.(170) The purpose of a standstill period is to give unsuccessful bidders an opportunity to challenge an intended contract award decision before the actual notification of award. Although it delays the contract award for a period, it mitigates the risk of legal challenges that may delay a contract for far longer than the standstill period. It may improve levels of competition, as it will increase potential bidders' confidence that the procurement process will be transparent and fair.(171)

Standstill periods will not be applied under the following conditions: (i) for framework agreements, the mandatory standstill period applies at the stage at which the agreement itself is awarded, but not during subsequent call-offs

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(165) *Ibid.*, p. 161.

(166) *Ibid.*

(167) Asian Development Bank, "Bidding-Related Complaints, Guidance Note on Procurement", *op. cit.*, pp. 161 and ff., 16, Appendix 3.

(168) Asian Development Bank, "Standstill Period, Guidance Note on Procurement", June 2018.

(169) *Ibid.*, p. 175.

(170) *Ibid.*, pp. 175 and ff., 1.

(171) *Ibid.*, 2.

or mini-competitions within the agreement; (ii) in cases where only one bid or proposal was submitted in an open competitive bidding process; (iii) in cases of direct contracting, also referred to as single-source selection; (iv) in the first stage of a two-stage bidding process; (v) in the technical evaluation of a two-envelope bidding process; and (vi) for the results of prequalification.(172)

When a standstill period applies, ADB recommends that the bidding documents allow bidders 3 business days from their receipt of the notification of intent to award a contract to make a written request to the borrower for a debriefing, and the process for doing so will be described in the bidding documents. The borrower is required to debrief the bidder within 5 business days after receiving a debriefing request in writing. If the borrower fails to deliver a debriefing within this 5-day period, for reasons not within the control of the bidder requesting the debriefing, the standstill period shall be extended by 5 business days after the debriefing is delivered. All costs incurred for participating in a debriefing shall be borne by the bidder.(173)

If, after the standstill period concludes, a bidder wishes to ascertain the grounds on which its bid was not selected, the bidder may request an explanation from the borrower. If the bidder is not satisfied with the explanation provided by the borrower, or if the borrower fails to provide such debriefing, the bidder may forward the request directly to ADB. This should be done in writing to the director general of the Procurement, Portfolio and Financial Management Department, who will arrange a meeting at the appropriate level and with the relevant ADB staff as specified in Appendix 9 of the 2017 procurement regulations.(174)

#### 4.8.1. State-owned enterprises (SOEs)

ADB recognizes the continuing significance of state-owned enterprises (SOEs)(175) in its developing member country (DMC) economies in the context of procurement, but limits SOE participation in any bidding process financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, to situations that do not compromise ADB's procurement principles.(176) More particularly, ADB agrees to the participation of SOE bidders in the borrower's

(172) *Ibid.*, 4.

(173) *Ibid.*, 6.

(174) *Ibid.*, 7.

(175) Although there are different ways to define SOEs, the term 'SOE' (for purposes of the new procurement regulations) includes, but is not limited to, any entity recognized by the borrower's national law as an enterprise in which the State or government exercises direct or indirect (whole or partial) ownership or control. This term includes majority or minority owned, listed or unlisted, joint stock and/or limited liability companies, partnerships, unincorporated associations, and statutory corporations. Asian Development Bank, "State-Owned Enterprises, Guidance Note on Procurement", 3, June 2018.

(176) Asian Development Bank, "State-Owned Enterprises, Guidance Note on Procurement", *op. cit.*, p. 182.

country only if the SOE (i) can operate as a commercial entity, (ii) is legally and financially autonomous, and (iii) is not a dependent agency of the borrower. (177) By meeting these conditions, ADB will be satisfied that robust competition is maintained through a “level-playing field” by (i) avoiding any conflict of interest between the borrower and an SOE bidder; and (ii) preventing any undue competitive advantage benefiting such SOE bidder, to ensure that the 2017 procurement policy, including the core procurement principle of fairness, and ADB policies and guidelines related to integrity and conflict of interest will be satisfied. (178) Nevertheless, integrity risks may still exist due to the participation of SOE bidder(s), and appropriate due diligence should be applied and maintained throughout the procurement process. (179)

While SOE eligibility conditions protect the integrity of the bidding process and help to avoid the risks of undue competitive advantage and broader potential or actual conflict situations, conflicts of interest in terms of potential or actual violation of ADB’s Anticorruption Policy (1998, as amended to date) and ADB’s Integrity Principles and Guidelines (2015, as amended from time to time) is a separate and independent ground for challenging any SOE or borrower activities arising out of, or in connection with, a bidding process, contract award, and/or subsequent contract management until completion. (180)

### **5. Moving Forward: ADB Strategy 2030 Achieving a Prosperous, Inclusive, Resilient and Sustainable Asia and the Pacific**

Moving forward, ADB has recently approved its new long-term corporate strategy known as ‘Strategy 2030’ that sets ADB’s broad vision and strategic response to the evolving needs of Asia and the Pacific. (181) Accordingly, ADB will continue to strive to be stronger, better and faster by, among others, pursuing dramatic modernization of its business processes including timely and value-for-money procurement and the greater use of country systems, and accelerating its digital transformation. (182) While ADB seeks to increase the use of country systems in its public sector operations, (183) ADB must also

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(177) *Ibid.*

(178) *Ibid.*, pp. 182 and ff., 6.

(179) *Ibid.*, p. 185.

(180) *Ibid.*, p. 182.

(181) “ADB Launches Strategy 2030 to Respond to Changing Needs of Asia and Pacific”, 26 July 2016.

(182) Asian Development Bank, “Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific”, 11 July 2018.

(183) *Ibid.*, p. 188.

focus on enhancing the access to independent administrative review bodies and courts in addressing procurement related complaints (*i.e.*, the procuring entities are still the most common fora for procurement related complaints).(184)

Under Strategy 2030, ADB commits to uphold environmental and social safeguards,(185) increase its consideration on other socio-economic dimensions (*i.e.*, in Asia, some governments focus exclusively on environmental issues),(186) while addressing one of the most common barriers for sustainable procurement in Asia (*i.e.*, the market for sustainable products and services in Asia has yet to mature, and availability continues to be an important barrier to be addressed).(187)

## 6. Conclusion

Although the focus of this chapter is on documenting significant changes in the new procurement policies and regulations of ADB, it is clear that there is more to be done not only in promoting innovation in public procurement but also, and more importantly, in building capacity among procurement professionals. Countries with high-income economies have already began their professionalisation of public procurement, either by requiring specific trainings and/or professional qualifications for procurement specialists (e.g., college degree of twenty-four semester hours of study in the specified business/legal subjects for contracting officials in the United States)(188) or by advancing policy recommendations for the promotion of professionalisation in public procurement (e.g., European Commission Recommendation on Professionalisation of Public Procurement dated 3 October 2017(189)). Given the breadth of its procedural reforms outlined above, ADB must also do the same for procurement professionals. ADB should include a capacity-building component for procurement officials in all of its projects, more particularly, those projects that will adopt the new procurement regulations. ADB should also require prior training of contracting officials on the use of its new procurement regulations as part of its country risk-assessment initiatives. In the end, it is important to note that no matter how advanced the ADB's procurement regulations are, if the procurement professionals working for the borrowing/recipient countries

(184) World Bank Group, "Benchmarking in Public Procurement 2017: Assessing Public Procurement Regulatory Systems in 180 Economies", 39, International Bank for Reconstruction and Development / The World Bank, 2016.

(185) Asian Development Bank, "Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific", *op. cit.*, pp. 188 and ff., 18.

(186) UNEP, "Global Review Sustainable Public Procurement", 2017, p. 7.

(187) *Ibid.*, pp. 193 and ff., 45.

(188) G.M. RACCA and C.R. YUKINS, "The Promise and Perils of Innovation in Cross-Border Procurement", Introduction in this book.

(189) *Ibid.*

do not have the necessary skills and competencies to implement them in ADB funded projects in their countries, the same issues in procurement will continue to pose fiduciary and performance risks in ADB funded projects, whilst slowing the advance of a more sustainable Asia and the Pacific.

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