

Modifying infrastructure procurement to enhance social development



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Executive summary

Introduction

1. This report presents the findings of research undertaken by Engineers Against Poverty (EAP) and the Institution of Civil Engineers (ICE) in collaboration with the ICE Presidential Commission 'Engineering without Frontiers' (EWF). These bodies share the common objective of enhancing the engineer's contribution to sustainable economic growth and poverty reduction.
2. The aim of the study is to identify opportunities to improve the delivery of social development objectives by modifying the way in which infrastructure projects are procured. The focus of research is public procurement of infrastructure in low and middle income countries. This is an opportune time for such a study as investment in infrastructure is set to increase dramatically in the developing world in the near future.
3. The research is based on the assumption that the procedures followed in the procurement of infrastructure and the details of the contracts entered into can have a significant impact on the social and operational performance of the asset, as well as contributing to the achievement of broader social and economic goals. Procurement procedures can therefore be used as a vehicle to deliver social objectives in infrastructure projects.

4. Two main areas of social development opportunity are explored:
 - (i) The impact/performance of the asset and the service it delivers (the product).
 - (ii) The opportunities during the project's construction and operation (the process).

Within these two areas, opportunities fall into two main categories, those that benefit labour and those that benefit society. The greatest benefits to labour are derived from the *process* and to society from the *product*, but the division between these categories is not clear cut. Examples of the former are the expansion of opportunities for employment. This report presents the findings of research undertaken by Engineers Against Poverty (EAP) and the with decent working conditions during construction and operation of the asset; and of the latter, the delivery and maintenance of an asset that is fit for purpose, serves the needs of the community and contributes to social and economic development goals. Good governance is also considered as an objective as it provides the enabling framework for delivery.

5. The research addresses two key questions:
 - How do existing procurement procedures inhibit or enable the achievement of beneficial social impacts of infrastructure projects in low to middle income countries?

- How can procurement procedures be improved and utilised as a mechanism to increase the contribution of the project to the achievement of social development objectives, while strengthening operational and asset performance?

6. The work was guided by a panel of expert advisors set up by ICE, who met four times during the course of the research to monitor progress and review outputs. On the advice of the panel an early decision was taken to expand the usual definition of procurement to include 'project identification' at the initiation of the project and 'monitoring and evaluation' at the conclusion. Five stages in the procurement cycle were identified as: (1) Identification, planning and design (2) Finance and procurement strategy (3) Tender and selection (4) Contract agreement documents (5) Monitoring, enforcement and evaluation.
7. To address these questions, three major avenues of enquiry were embraced:
 - (i) Detailed study of national procurement policy, procedures and documents in four case study countries (India, Indonesia, Kenya and Nigeria).
 - (ii) In-depth interviews with representatives of over 40 major international and national stakeholders, including multi and bi-lateral donors.

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- (iii) Roundtable discussions with the major stakeholders in the four case study countries.

Roundtable discussions were seen as a way of bringing developing country voices into the study. While views reported are not attributed to individuals in the interests of confidentiality, it is felt that the information in the report is a fairly accurate reflection of the views of some of those most directly involved in the delivery of infrastructure projects in the developing world.

Case study findings

8. Five common findings emerged from the study of procurement documents in the case study countries:
- (i) Public procurement reform is underway to improve governance, influenced by the recommendations of the World Bank 'Country Procurement Assessment Reports'.
 - (ii) A limited number of social objectives in national bidding regulations and documents.
 - (iii) A greater number of identifiable social objectives can be found in standard Multilateral Development Bank (MDB) bidding documents but there are questions over enforcement.
 - (iv) Even minimal social obligations (eg for health and safety) are not always met.
 - (v) New procurement strategies and increased social objectives are emerging as a consequence of greater private sector participation.

Summary of factors inhibiting beneficial social impacts

9. The interviews and roundtable discussions revealed a large number of factors in procurement procedures that are seen to be inhibiting the achievement of

social development objectives. The main inhibitors as they arise in the order of the procurement cycle are:

- Lack of public consultation, national plans or other clear criteria for project identification.
- Failure to incorporate social objectives in project appraisal, design and budget.
- Failure to plan and budget for operation and maintenance.
- Inflexible procurement strategies and adversarial contract forms.
- Intense competition and selection based on lowest price.
- Vague and conflicting messages regarding social obligations in contracts.
- Few clear standards for social objectives and failure to monitor and enforce the standards that exist.
- Failure to address corruption which is a major inhibitor at every stage of the procurement cycle.

10. Analysis of those responsible for the factors that are currently inhibiting the setting and achievement of social development objectives through the procurement process threw up some additional inhibiting factors:

- MDBs are results oriented and success is often measured by the quantity of funds disbursed rather than the quality of outcomes.
- Confusion over the roles of the client and donor can lead to a lack of leadership and poor implementation.
- 'Tied Aid' raises costs and limits effectiveness.
- Donors focus on financial auditing with minimal monitoring of social outcomes.
- Private financiers focus on social risk and neglect social opportunities.
- Governments fail to maintain robust registers of consultants and contractors.

- Governments fail to enforce regulations.

Roles of key stakeholders as agents of change

11. The analysis of the roles of stakeholders revealed the key part played by those involved in the early stages of procurement. The greatest chance to influence the setting and achievement of social development objectives in public procurement rests with the donors who provide much of the funding, in partnership with the governments and clients who create the culture for project implementation. Consultants acting as designers also have some influence but they are acting for clients and take their cue from them. Contractors have control over employment and labour standards and some influence over purchasing but only within the parameters set by the overall project design and budget.
12. Donors are currently driving procurement reforms in low income countries and helping to build the capacity of procurement officials. This is related on the part of some donors, led by OECD/DAC, to a move away from project funding toward budget support and channelling funds through national financial systems. These moves are designed to promote 'ownership' of donor funded projects and improve the effectiveness of aid. MDBs have also recently agreed a common approach to fight corruption, to develop proposals to assist country capacity in anti-corruption measures and to cooperate with civil society and institutions to enhance transparency and accountability. But it is important that inflexible procurement procedures and the drive for market competition do not compromise donors' desire to derive increased social benefit.



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13. Governments are also influential in promoting social objectives as they set the framework in which projects are identified, planned, designed, procured, constructed and maintained. Governments of many countries are reviewing procedures and promoting reforms, although these efforts can sometimes be complicated by decentralisation programmes. In some countries the social performance of companies is being included in assessment criteria for prequalification or registration. The use of Environmental Impact Assessments is increasing and Social Impact Assessments are beginning to emerge. Community groups are playing an increasing role in project identification, management, operation and maintenance with positive effect. These developments indicate a growing momentum to encourage good practice and social development impacts in public procurement. Two examples of good practice are singled out: (i) the use of 'targeted procurement' by government clients to assist disadvantaged groups, to promote growth within the small business sector and/or to target the unemployed in poverty alleviation programmes, and (ii) the incorporation of labour standard into project objectives with monitoring by the whole project team.

Conclusions

14. A number of key messages emerge from the research:

- (i) The decisions taken in the early stages of a project have the greatest impact on the achievement of social development objectives. The biggest potential social impact probably lies in the choice of the project.

- (ii) The participation of user groups and civil society at every stage of the procurement process from project identification right through to completion, operation and maintenance, can increase the social benefit derived.
- (iii) There is little point in including obligations in contract documents that require action on the part of the contractor unless the actions have been considered at the design and planning stage, budgets drawn up accordingly and some method agreed for monitoring and enforcing compliance.
- (iv) A more flexible approach by clients and donors to the choice of procurement strategy could improve the delivery of the project and the achievement of social development objectives.
- (v) Consideration of operation and maintenance at the design stage of a project can stimulate enhanced 'local content' (of materials, labour and business).
- (vi) Corruption is a major inhibiting factor and must be tackled at all stages of the procurement cycle.

Recommendations

15. The recommendations that emerged from the research, in the order in which they arise in the procurement cycle, are highlighted below:

Project identification, planning and design

- (i) Project identification should be in line with national, local or sector plans and/or based on public consultation.
- (ii) The whole life cycle of the asset should be considered during planning and design and an

operation and maintenance strategy developed for each new project.

- (iii) Social objectives should be clearly identified at the planning stage and incorporated into the design.

Finance and procurement strategy

- (iv) Funds are set aside in the budget for the realisation of the social objectives.
- (v) Consider alternative procurement strategies to ensure the appropriate approach to deliver the specified social objectives.

Tender and selection

- (vi) The social objectives must be clearly defined in tender documents and explained at pre-tender meetings.
- (vii) Attention should be paid to the bidder's social performance and capacity to deliver social obligations.

Contract agreement

- (viii) The project team must agree contractual mechanisms to deliver social objectives.

Monitoring, enforcement and evaluation

- (ix) Contractual obligations must be monitored and enforced through incentives and/or sanctions.
- (x) Social performance audits should be conducted with the same rigour as financial audits.

Further research is needed to test the feasibility of implementing the recommendations in particular contexts, as well as to test their effectiveness in achieving specific social development objectives.

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List of abbreviations

ADB	Asian Development Bank	NEC	New Engineering Contract
AfDB	African Development Bank	NEEDS	National Economic Empowerment and Development Strategy
CIDC	Construction Industry Development Council – India	NGO	Non-government organisation
DFID	Department for International Development	NHAI	National Highways Agency India
ECA	Export Credit Agencies	OECD/ DAC	Organisation of Economic Cooperation and Development, Development Assistance Committee
ECGD	UK Export Credit Guarantee Department	SEEDS	State Economic Empowerment and Development Strategy
EIA	Environmental Impact Assessment	SIA	Social Impact Assessment
ESIA	Environment and Social Impact Assessment	STI	Sexually transmitted infection
FIDIC	Federation of International Consultant Engineers	TI	Transparency International
H&S	Health and Safety	TOR	Terms of Reference
IFC	International Finance Corporation	UNCITRAL	United Nations Commission on International Trade Law
ILO	International Labour Office/Organisation	UNDP	United Nations Development Programme
MDB	Multilateral Development Bank	WB	World Bank
MDGs	Millennium Development Goals		



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1. Introduction

This report presents the findings of research undertaken by Engineers Against Poverty and the Institution of Civil Engineers in collaboration with Engineering without Frontiers. These bodies share a number of common objectives.

Engineers Against Poverty (EAP)

is an international non-governmental organisation that works with the engineering industry to promote social and economic development and contribute to the fight against poverty. EAP is supported by the UK Department for International Development (DFID), the Institution of Civil Engineers and the Institution of Mechanical Engineers.

Institution of Civil Engineers (ICE)

represents around 80,000 professionally qualified civil engineers worldwide. It seeks to advance the knowledge, practice and business of civil engineering, to enhance the engineer's contribution to sustainable economic growth and promote ethical standards.

Engineering without Frontiers (EwF)

is a Presidential Commission of ICE established to examine, *inter alia*, the engineer's role in meeting the UN Millennium Development Goals.

Earlier work by EAP in South-East Asia suggested that there may be opportunities for enhancing the social development impact of infrastructure investment (and hence the contribution of engineering) by incorporating social development objectives into the procedures for procurement of projects. Public procurement plays a central role in translating national and local budgets into public services. It is widely recognised that strengthening procurement capacity and improving procurement practices can make a major contribution to the effectiveness of AID. But procurement guidelines have traditionally focused on the 'conventional' performance requirements of cost, time and to a lesser extent quality and only recently started to include environmental and some social objectives.

The aim of the current work is to identify opportunities to improve the delivery of social development objectives by modifying the way in which infrastructure projects are procured. The focus of research is public infrastructure in low and middle income countries. This is an opportune time for such a study as investment in infrastructure is set to increase dramatically in the developing world in the foreseeable future. Much of the increased investment will be funded by bi-lateral and

multi-lateral donors who may be anxious to increase the contribution that such investments can make to social and economic development in general and in particular to the reduction of poverty and the delivery of the Millennium Development Goals.

The subject is huge and complex and the study makes no claim to finality or completeness. Rather it should be seen as a 'scoping study', an initial exploration of a key issue at the interface of civil engineering and development.

1.1 Research objectives

The research is based on the assumption that the procedures followed in the procurement of infrastructure projects and the details of the contracts entered into can have a significant impact on the social and operational performance of the asset, as well as contributing to the achievement of broader social and economic goals. Procurement procedures can therefore be used as a vehicle to deliver social objectives in infrastructure projects.

The research explored two main areas of social development opportunity:

1. the impact/performance/quality of an infrastructure asset and the service it delivers to consumers and society (the *product*)
2. the social development opportunities during the project's construction and operation (the *process*)

Within these two areas, opportunities fall into two main categories, those that benefit labour (the people involved in the production process) and those that bring benefits to the broader society. However, the dividing line between labour and society impacts is not clear cut. Poverty

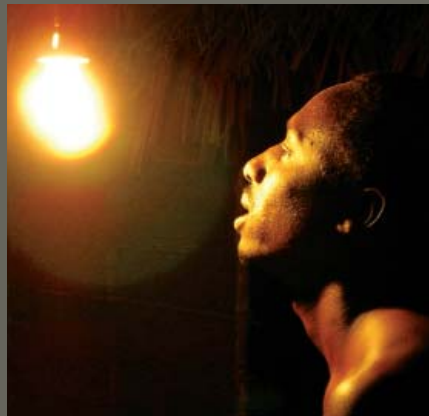
“This report presents the findings of research undertaken by Engineers Against Poverty and the Institution of Civil Engineers in collaboration with Engineering without Frontiers.”

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reduction is a major objective but is seen as a subset of social development which is a much broader concept. Good governance is also considered as an objective as it provides the enabling framework for delivery. The following are some of the main specific objectives under these headings. Further detail is provided in section 2.2.

Labour

Creating opportunities for local people to earn income through employment or business is one of the major means of alleviating poverty in the developing world. The process of constructing and maintaining infrastructure does generate many such opportunities. But the quantity of employment created from a given level of investment can often be increased by choosing a technology that requires a more intensive use of labour in place of machines. Similarly subcontracting to local enterprises and specification of local materials, components and locally manufactured equipment can generate employment in these supply industries and boost the 'local content' of the project. Either action will bring additional benefits to the economy through the employment multiplier effect, while at the same time reducing the requirement for scarce foreign exchange.

The quality of employment is as important as the quantity of jobs created. The basic objectives for the labour force involved in the construction, operation and maintenance of the asset are that they should be provided with a safe and healthy place to work, that the work should be voluntary and wages should be fair and paid in full and on time. These are some of the key objectives for labour that are embraced within the ILO concept of 'Decent Work'. They are explained in detail in a sourcebook published by the Water Engineering and Development Centre (WEDC) of Loughborough

"Millions of poor people in low and middle income countries lack access to basic infrastructure."

University¹. Other widely recognised objectives are that the project should build the capacity and capability of local workers and enterprises through training and the transfer of knowledge; and that the recruitment of unskilled labour should, wherever possible, be from within the local community.

Society

The greatest benefit to society from investment in infrastructure projects lies in the services derived from the constructed asset. Millions of poor people in low and middle income countries lack access to basic infrastructure. The Millennium Development Project addresses this issue, both directly and indirectly. The project comprises eight broad goals (MDGs) and 18 specific targets. Infrastructure appears most prominently in Target 10 which is to halve by 2015 the proportion of people without sustainable access to safe drinking water and basic sanitation and Target 11 which is to achieve a significant improvement in the lives of at least 100 million slum dwellers by 2020. There is also a clear link between several other MDGs and infrastructure provision. The Millennium Project Report 2005 notes that infrastructure investment is needed for both urban and rural development². Urban infrastructure and services include electricity, transport, water, sanitation, waste disposal etc. In the rural areas there is also a very urgent need for investment in roads, and this is especially so in Africa.

Other objectives that fall under the 'society' heading relate to the process of construction rather than the end product.

One key issue that is already receiving a lot of attention following NGO campaigns is the resettlement of affected communities and payment of compensation. Some countries have national policies on resettlement but generally clients agree to use donor policies. This is partly because of recognition that national legal frameworks do not adequately protect communities, indigenous people or those that lack tenancy or land tenure rights. Some NGOs have called for the prior informed consent of indigenous peoples before they can be resettled. Development banks indicate that involuntary settlement occurs on a relatively small proportion of funded projects each year, although still involving millions of people.

Environment

Environmental issues are considered and addressed, but only in the context of their impact on project affected communities.

Governance

Objectives under the 'governance' heading are fair and efficient procurement procedures that deliver value for money in the final asset, to increase transparency and eliminate corruption, and increase the involvement of the community and the workforce in key decisions that affect their lives.

1.2 Defined procurement procedures

To aid the process of identifying social objectives within the procurement procedures it was important to define procurement. Former President of the South African Institution of Civil Engineers, Ron Watermeyer defines procurement as the:



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...process which creates, manages and fulfils contracts. If procurement is a process, it can be documented as a succession of logically related actions occurring or performed in a definite manner which culminates in the completion of a major deliverable or the attainment of a milestone. Processes in turn are underpinned by methods and procedures, which are informed and shaped by the policy of an organisation³.

Watermeyer identifies the procedures as the formal steps to be taken in the performance of a specific task. By identifying these steps, it would be possible to identify where social objectives must be incorporated to achieve maximum impact. The research team broke the procurement process down into five procedures:

1. project identification, planning and design
2. finance and procurement strategy
3. tender and selection
4. contract agreement documents
5. monitoring, enforcement and evaluation

Following some initial stakeholder interviews, the decision was taken to expand the generally accepted definition of procurement procedures. Stakeholders stressed that the early stages of project identification, planning and design are crucial to realising social development objectives, as are the final stages of monitoring and evaluation.

It was also important to identify what the research team understood by each stage of the procurement process. The following outlines the key activities at each stage.

- 1. Identification, planning and design:** Projects and services are identified from national, regional and sector plans to meet a specified socio-economic need. The project and/or service is then planned and

designed to ensure it meets the specified need and maximises socio-economic impact within the set budget. This process should ensure that social objectives are properly understood, are part of the early decision making process and that a delivery mechanism is put in place with sufficient budget to meet the desired outcome.

2. Finance and procurement

strategy: When a project has been designed and budgeted, decisions have to be reached as to the appropriate means of financing the project, including social objectives. This could be achieved through self-financing, applying to public or private donor for a loan or grant or private sector investment. These decisions affect the type of procurement strategy adopted, particularly when borrowing from a donor or when seeking private investment. Procurement in this sense is understood in its traditional sense, ie the strategy taken to implement the project.

3. Tender and selection: The client follows a clearly defined and transparent process that will lead him to the selection of the consultant and/or contractor that will implement the project requirements and social objectives.

4. Contract agreement documents: Once selected, the client and contractor will finalise and agree the

contract documents. It will be these documents that the parties will be contractually obliged to follow during the implementation of the project and social objectives.

5. Monitoring and evaluation:

Ongoing monitoring and performance evaluation will be needed to ensure that the parties are meeting their contractual obligations, that the asset is built to the agreed requirements and that the social objectives are delivered. Where contractual obligations are not being met, there must be ways to enforce them.

1.3 Defined social objectives

The social objectives outlined below were selected on the basis of internationally recognised impacts and standards. The following defines the key actions needed to meet labour, society and governance objectives.

Labour objectives:

- *Health and Safety (H&S):* the provision of a safe and healthy working environment for the labour force to operate in, where potential occupational risks or hazards have been assessed and mitigated.
- *Decent work:* the promotion of opportunity for men and women to obtain decent and productive work in conditions of freedom, equity, security and dignity. These include the provision of fair income, job security and equal opportunities⁴.

“When a project has been designed and budgeted, decisions have to be reached as to the appropriate means of financing the project, including social objectives.”

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- *Child labour*: the employer does not employ children in a manner that is economically exploitative, or is likely to be hazardous or to interfere with the child's education⁵.
- *Forced labour*: all work is performed voluntarily and the employer does not extract work or service from an individual under threat of force or penalty. This covers any kind of involuntary or compulsory labour, such as indentured labour, bonded labour or similar labour-contracting arrangements⁶.
- *Migrant labour*: the rights of migrant workers are protected, their integration with the local population is promoted and potential risks (eg sexually transmitted infections) identified and managed.
- *Employee capacity building*: the employer builds the capabilities and capacity of the local workforce through training, knowledge transfer (eg work shadowing, workshops) and promotion.
- *Freedom of association*: the employer does not discourage workers from forming or joining workers' organisations of their choosing or from bargaining collectively, and does not discriminate or retaliate against workers who participate, or seek to participate, in such organisations and activities.
- *Increased local content*: the objective is to advance the development of local

enterprises and workforce in order to raise local content. This is achieved by defining a proportion of inputs by value (labour, materials and equipment) that are sourced from the immediate locality or the country.

Society objectives:

- *Social and environmental impact*: the identification, mitigation and management of the social and environmental impact that are consequence of the construction and operation of the asset⁷.
- *National development plan*: a plan to meet the stated national socio-economic objectives including infrastructure targets: the objective is that projects are in line with national objectives.
- *Public consultation*: a clear and transparent process that enables all project affected people to be informed and their voices heard throughout the procurement process. This should result in consent being more easily obtained and local community commitment to the resolution of any problems that arise thus maximising the social benefit derived from the construction and operations of the asset.
- *Resettlement plans*: the operation of a fair and transparent resettlement plan with minimum disruption for those individuals or affected communities who

have lost their land, means of livelihood, social support system or way of life. This includes compensation for lost assets and lost income, assisted relocation, provision of appropriate land, housing, infrastructure and other compensation, comparable to the pre-project situation. Affected people will be fully informed and closely consulted on resettlement and compensation options⁸.

- *Product safety*: avoiding and minimising potential health and safety risks and impacts on the user and surrounding community during the life cycle of the asset.
- *Asset performance*: the degree to which the performance of the asset meets the defined social objectives.

Governance objectives:

- *Corruption*: minimising the risk of corrupt practices with the provision and application of appropriate and transparent mechanisms within procurement procedures.
- *Politics*: to reduce the level of influence that political actions (eg political donations, electioneering) have on the procurement process, particularly project identification and planning, and levels of funding for non socio-economic reasons.
- *Transparency*: raising the level of clarity, openness and accountability within the procurement procedures and their successful application.
- *Governance capacity*: strengthening the capacity of the client to operate the set procurement procedures in a fair, transparent and efficient manner that will enable the delivery of the project and social objectives.
- *Decentralisation*: the process of moving responsibility for the procurement of infrastructure projects from national governments to the appropriate tier of local government: the objective is that the local tier of government will be provided with the necessary capacity and resources to take on this responsibility.

“Social and environmental impact: the identification, mitigation and management of the social and environmental impact that are consequences of the construction and operation of the asset.”



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1.4 Research methodology

At its outset, the research aimed to address two key research questions:

1. How do existing procurement procedures inhibit or enable the achievement of beneficial social impacts of infrastructure projects in low to middle income countries.
2. How can procurement procedures be improved and utilised as a mechanism to increase the contribution of the project to the achievement of social development objectives, while strengthening operational and asset performance?

In order to address these questions the following steps were envisaged:

1. Identify the most common principle procurement procedures for design, build, operate and/or maintenance contracts for infrastructure projects in low/middle income countries.
2. Review the areas of social impact contractors currently have to address and where they are identified within the procurement process (prequalification, contractual obligations and specifications) and in national legislation and/or corporate policies.
3. Review the implementation of social obligations in contracts and the influencing factors.
4. Identify those groups who are party to the delivery of infrastructure and their role and influence within the procurement process.
5. Establish the areas of opportunity in procurement procedures to enhance social development and recommend changes in procedure to bring this about.

The research embraced three major avenues of enquiry:

1. Detailed study of national procurement policy, procedures and documents of four case study countries (India, Indonesia, Kenya and Nigeria).

2. In-depth interviews with some of the major international and national stakeholders.
3. Roundtable discussions with the major stakeholders in the four case study countries.

The research was guided by an ICE Expert Panel, who met four times during the course of the project to monitor progress and review the outputs of the research. The Panel members are listed in Appendix II.

1.4.1 Case studies in four countries

Analysis of current procurement procedures and how they are applied in practice is key to understanding the factors inhibiting or enhancing social performance. It is also important to establish where social objectives are identified within procurement procedures and contract documents. In order to achieve these objectives a detailed study of national procurement policy, procedures and documents was undertaken in a small number of countries chosen as case studies.

Four countries were selected: India, Indonesia, Nigeria and Kenya. They were selected because they are strategic regional leaders with capacity to promote the recommendations emerging from the research and to influence other countries in the region. Other selection criteria were the availability of data and contacts of the research team.

In each country a detailed analysis was undertaken of national procurement policy and legislation, national standard bidding regulations and documents. The Multilateral Development Banks (MDBs) harmonised bidding document and a limited number of project documents were also consulted. This approach was chosen to illustrate the requirements a public sector client would have to consider and the procedures they would have to abide by when procuring infrastructure works and/or services.

This approach allowed the identification of social obligations in current procurement procedures. In order to examine the extent to which these contractual obligations are actually met, the research team looked at health and safety in construction projects in the case study countries. As the research progressed, it also became important to consider each government's infrastructure policies to meet country MDG targets. The policies adopted to deliver these targets would have an influence on the procurement strategy adopted and the social objectives to be addressed.

1.4.2 In-depth interviews

Interviews were conducted with representatives of over 40 key stakeholders. Respondents included the following donors: The World Bank, Asian Development Bank, UK Department for International Development (DFID) and the European Commission. Other respondents were government departments, international and national consultants and contractors, and NGOs. Each respondent was asked about their individual work experiences and their views on current practice. The information gathered from the interviews, together with the findings of the case studies, was used to identify the inhibiting factors in delivering social objectives through the procurement process. Some enabling factors also emerged from the discussions. Identification of enabling factors was supplemented by an extensive review of past and current initiatives currently undertaken by donors, financiers or other groups to improve the performance of procurement systems to deliver social objectives.

Due to the sensitivity of the subject matter, interviews were conducted in private and confidentiality was assured. Hence the views expressed in this report are not attributed to particular individuals or groups. While attribution of contributions

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may have further increased the validity of the findings, it would probably have made them less willing to contribute. It is felt that the information in the report is a fairly accurate reflection of the views of some of those most directly involved in the delivery of infrastructure projects in the developing world.

1.4.3 Roundtable discussions

Roundtable consultations were held in each of the case study countries as one way of bringing developing country voices into the research. These meetings were facilitated and/or sponsored by the ICE Country Representatives, multilateral development banks, governments and private companies. Altogether over 100 delegates from across the stakeholder groups (clients, consultants, contractors, NGOs and other local stakeholders) attended these one-day meetings.

The participants in each meeting were asked to address the following two questions:

1. What are the opportunities to increase social development within engineering procurement procedures in the case study country?
2. What are the enabling factors for the opportunities to be achieved?

These roundtable discussions, together with the conclusions emerging from the case studies and the in-depth interviews, provided the basis from which the recommendations were drawn up.

1.5 Outline of the report

The full findings of the case studies in the four subject countries are included in Appendix I with the list of contributors in Appendix II:

The rest of the report is divided into five sections. **Section 2** presents a summary of the case studies that were conducted in the four countries. **Section 3** presents a synopsis of the factors in current procurement that are enhancing or inhibiting the attainment of social objectives and poverty reduction. This is followed in **Section 4** by an assessment of the role of the various stakeholders in effecting change at each stage of the procurement process. **Section 5** contains the conclusions of the study and **Section 6** the recommendations.

2. Summary of common findings from the case study reports

From the analysis of procurement documents and policy papers in the four case study countries (Kenya, India, Indonesia and Nigeria) it was possible to identify five common findings.

1. Public procurement reform is under way to improve governance.
2. A limited number of social objectives in national standard bidding regulations and documents.
3. A greater number of social objectives are found in standard MDB bidding documents but there are questions over enforcement.
4. Even minimal social obligations are not always met.
5. New procurement strategies and increased social objectives are emerging as a consequence of greater private sector participation.

2.1 Public procurement reform is under way to improve governance

Since the late 1990s the governance of procurement policy in the case study countries has followed a similar pattern of reform and development. This is being driven by the donor's switch from funding individual projects to providing more general support to sector programmes and central government budgets. Donors have also agreed to channel funding through national government systems; whenever the national government's financial management and governance capacity is considered to be of an adequate standard. The concomitant of this move is donor assistance to strengthen government procurement systems.

Following World Bank Country Procurement Assessment Reports, Kenya, Nigeria and, to a lesser extent, Indonesia established interim arrangements through policy directives and temporary legislation

“Like the UNCITRAL rules, national procurement legislation does not address the contract performance or implementation phase.”

to improve the efficiency and transparency of public procurement. More recently, these three countries have taken up the recommendation of the World Bank to establish a legal framework for public procurement, based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment⁹. The recommendations also encouraged the creation of a central authority to formulate procurement policy and monitor its implementation. However, only Kenya and Nigeria have adopted this recommendation.

The objectives of procurement legislation in Kenya, Indonesia and Nigeria closely follow those stated in the UNCITRAL Guide to the Model Law¹⁰. The guide states that the objectives of the model Law include:

...maximising competition, according fair treatment to suppliers and contractors bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses¹¹.

By following this stated principle, the Model directs a procuring entity towards competitive tendering with restrictions placed on other tendering methods such as restricted tendering and two-stage tendering¹². Although there is variation in how prescriptive the legislation is, public procurement in Kenya, Indonesia and

Nigeria¹³ all follow this model. Although, India has no legal framework, in its Tenth Economic Plan the Indian Government states that it wishes to enact 'legislations/ regulations to mandate strictly competitive bidding of all contracts and procurement of works, goods and services by the Government and its entities'¹⁴.

The legal frameworks have also sought to improve the governance of public procurement by adopting a complaints and review procedure based on the guidance provided in the UNCITRAL Model. It is also important to note that each law prohibits corrupt and fraudulent practices and includes a code of conduct for all procurement officials. However, the level of detail can vary considerably. For example, the Nigerian Public Procurement Bill only includes a short reference prohibiting fraudulent and corrupt practices. In contrast, Indonesian legislation not only prohibits these practices but requires officials to sign an integrity pact before starting procurement proceedings.

2.2 A limited number of social objectives in national standard bidding regulations and documents

Like the UNCITRAL rules, national procurement legislation does not address the contract performance or implementation phase. Instead, the expectation from the World Bank Country Procurement Assessment Reports is that national

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Carbon Trust

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“Many infrastructure projects in the case study countries are funded in part by loans from the Multilateral Development Banks (MDBs). It is the MDBs standard bidding documents that usually apply when they fund a project.”

governments should publish standard bidding documents. It was only possible to obtain the national standard bidding document for Kenya. However, the Construction Industry Development Council of India has published a standard bidding document that has been adopted by the Central Ministry of Public Works. ‘Due Process’ in Nigeria also provides for a set of requirements to be included in a bidding document. From the analysis of this documentation and a limited number of project documents, some social objectives related to labour (conditions of employment, health and safety and trade union rights) do emerge in the conditions of contract. The requirements tend to reflect national legislation.

The use of local content in carrying out the works or services can be identified in documentation from each case study country. In Kenya, Nigeria and India, domestic contractors have benefited from a margin of preference in the tender process. The margin of preference can vary from 7.5% to 15%, but is more commonly 10%. A margin of preference is also granted for the benefit of tenders using domestically produced goods or supply of services. The policy in India appears to be changing as several bidding documents stated that a margin of preference to domestic bidders was no longer offered¹⁵. This may be due to the

World Bank Country Procurement Assessment Report recommending the removal of such preferences.

The practice of offering a margin of preference to local contractors establishes the important principle that lowest cost is not the only factor to consider at tender stage. Other local content policies are in operation in some countries, such as a classification system in Indonesia that reduces the ability of overseas contractors to bid and bonus scores for demonstrating a history of local participation in Nigeria.

Environmental obligations fall into two categories. Firstly; on-site actions such as filling pits and landscaping have to be mitigated. These can usually be identified in the conditions of contract. Secondly; the client has a legal requirement to carry out an Environmental Impact Assessment (EIA) before carrying out the works. However, it is not clear if the recommendations of the EIA report are being included as part of the scope of works and are therefore being implemented.

2.3 A greater number of social obligations are found in Multilateral Development Bank bidding documents but there are questions over enforcement

Many infrastructure projects in the case study countries are funded in part by loans

from the Multilateral Development Banks (MDBs). It is the MDBs standard bidding documents that usually apply when they fund a project. It is their rules that take precedence when they conflict with national legislation. Therefore, it is important to assess the social issues that are addressed in the ‘Master Bidding Document for Procurement of Works’, which includes the MDB Harmonised Edition of the FIDIC Conditions of Contract for construction. These documents have been approved by 13 MDBs.

The general conditions do address governance, labour and society issues, but many of the social requirements are a test of reasonableness or do no more than ‘encourage’ action. Stakeholders unanimously questioned whether a number of these social obligations would be enforceable if tested in court. For example, clause 4.18 states ‘the Contractor shall take all reasonable steps to protect the environment’¹⁶. Clause 6.1 states that the Contractor is ‘encouraged’ to employ staff and labour from sources within the country¹⁷. These would seem to be examples of ‘symbolic policy’ that merely gives the impression that something is being done. Stakeholders report that if the client does not stipulate clear definitions with benchmarks of ‘reasonableness’ and ‘encourage’ in the specification, these conditions will be ignored thus an opportunity for social development will have been missed. Contractors stated it would simply put them at a competitive disadvantage to price for them.

The obligations to the labour force go further than the national standard bidding documents, with prohibition of child and forced labour and an obligation to ensure the supply of food and water to the workforce. There is also a requirement to appoint an accident prevention officer at the site, who is responsible for maintaining



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safety and protection against accidents. Where local labour laws are weak these conditions will be important.

The contract also includes a comprehensive contractual obligation for the contractor to conduct an HIV/AIDS awareness programme via an approved service provider. This includes conducting monthly information, education and consultation communication campaigns not only to staff and labour but the local community. There is also a requirement to provide sexually transmitted infection (STI) and HIV/AIDS screenings for all staff and labour and to provide condoms¹⁸. Stakeholders have questioned how these obligations will be priced and if and how the client and the contractor will measure whether the service provider has fulfilled its obligation. The majority of stakeholders also considered it to be more appropriate for the client to contract this function directly to the service provider. For example, the National Highways Agency India has contracted its HIV/AIDS prevention campaigns as separate packages to NGOs.

The bidding document does allow for a margin of preference for domestic contractors to be stated in the bid data sheet. However, this can only be applied if the GDP of the borrowing country is below a per capita level¹⁹. This is probably why the Country Procurement Assessment Reports recommended that a margin of preference in India and Indonesia be removed. From the project documents viewed the usual margin of preference is 7.5%.

It should be noted that other social requirements may well be included as part of the condition of the loan or grant. For example, from the project document reviews EIAs are the norm on MDB funded projects and if required an appropriate resettlement programme is undertaken. The EIA will often address social issues

and include stakeholder consultation. Governance objectives include definitions of corrupt practices with the funder rejecting a proposal for award or cancelling a proportion of the loan allocated to the contract if it determines that these practices have taken place. Responsibility for governance of the bidding process itself lies with the employer (client). The document does not state whether the employer should place this with a tender board or equivalent mechanism²⁰, or who should undertake the bid evaluation. As this is a generic document, again this may be something that is agreed as a condition of the loan or grant.

2.4 Even minimal social obligations may not be met

Most contracts specify, as a minimum, that contractors must obey all local laws and regulations. Legislation is generally adequate with special provisions to ensure the health and safety of the construction workforce. In the three countries studied legislation has been strengthened recently with the introduction of requirements for health and safety committees (with equal worker and employer representation) at all work places.

However, the actual standard of health and safety on construction sites in the countries studied falls far short of what is required by law. Fear of losing contracts to competitors is a powerful factor preventing contractors from including the full cost of meeting their health and safety obligations in tenders. Workers also are fearful of losing their jobs if they complain about unsafe or unhealthy worksites.

Many are simply unaware of their right to a safe and healthy workplace.

In addition, monitoring and enforcement of the provisions for health and safety in contracts is inadequate. Health and safety inspectorates are generally understaffed and visit construction sites only after an accident has occurred. Few contractors are charged for contravening the regulations and when they are the penalties are too small to serve as a deterrent. We could find no evidence of monitoring and enforcement of health and safety obligations from within the project team.

Health and safety requirements are sometimes spelled out in the bill of quantities and accompanied by detailed specifications. This encourages contractors to price for compliance with the regulations, while also drawing the attention of the client to what is being paid. This should in turn encourage more careful monitoring to ensure that the elements that have been budgeted are actually provided.

The health and safety record of contractors or consultants is seldom formally included in the criteria for pre-qualification. Registers of contractors and consultants are also lacking in some countries. A rigorous process for the registration of contractors and consultants (with the inclusion of social performance criteria) could ensure that only competent and responsible firms are employed. The examination of health and safety performance in registration or prequalification should also stimulate improvements in record keeping.

“In addition, monitoring and enforcement of the provisions for health and safety in contracts is inadequate.”

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Engineers Against Poverty

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Tamara Kummer

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2.5 New procurement strategies and increased social objectives are emerging as a consequence of greater private sector participation

Infrastructure is prominent in country plans to achieve MDGs. Governments have set specific infrastructure targets, particularly in the provision of water and sanitation, road connectivity and power supply to improve the lives of villagers and slum dwellers. The role of infrastructure in stimulating economic growth and reducing (both directly and indirectly) the number of people living in poverty is also recognised. All four countries aim to mainstream MDGs into national planning and budgeting. However, it is not clear whether this has occurred in practice.

The responsibility for the delivery of infrastructure at government level is changing, with countries following a policy of decentralisation. Central government will become responsible for setting policy and targets, with state, regional and local governments expected to procure the works and services. Questions have been raised as to whether these tiers of government have the financial capacity and technical capability to deliver²¹. Capacity building programmes for local government have been initiated.

The case study countries all recognise that they lack the finance to deliver their MDG targets. Therefore, they are increasingly looking towards the private sector and community organisations to deliver, operate and maintain infrastructure and related services. The private sector is being encouraged to bid for contracts to construct, operate and maintain infrastructure assets and recoup their investment through user charges. The driver for this change may well be the World Bank, which includes privatisation conditions as triggers for allocating grants to low income countries²².

Community organisations are also being encouraged to operate and maintain small scale and/or rural infrastructure assets using the funds generated from charging users for the service.

This is leading to a change in procurement procedures with governments wishing to engage contractors on long-term concession contracts ranging from 15 to 25 years. In these contracts the client has to consider the social obligations to be pursued over the course of the contract and ensure that there is a fair and transparent process with an adequate budget if the objectives need to change. It's not clear if this is being achieved.

Social objectives within the concession contracts go beyond the traditional

contracts with examples of the requirements from the EIA and SIA reports built in the project documentation (India). There is also legislation relating to private sector participation in infrastructure that specifies various social objectives. For example, laws relating to infrastructure in Indonesia make consultation with the local community a legal obligation for the client²³. It is then for the client to decide how this consultation is managed within the procurement process.

Monitoring and evaluation is currently not sufficiently developed to ensure feedback on the impact of public expenditure at local level (the National Planning Commission in Nigeria has developed a system to do this, with the help of major donors).

“Governments have set specific infrastructure targets, particularly in the provision of water and sanitation, road connectivity and power supply to improve the lives of villagers and slum dwellers.”



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3. Inhibiting and enabling factors

This section of the report summarises the main factors identified as inhibiting the achievement of social development objectives at the various stages of the procurement cycle. ‘Good practices’ that promote or enable the achievement of social development objectives are also discussed and some examples (of good and bad practices) are presented in boxes. The material presented in this section draws on the interviews with key stakeholders, designed to ascertain what actually happens on the ground, supplemented by the findings of the four country case studies and a broad review of recent documents and initiatives. Views expressed are not attributed to particular individuals in the interests of confidentiality.

The inhibiting and enabling factors are discussed in the order in which they arise during the procurement cycle. An attempt has been made to conform to the five procedural stages mentioned in the Introduction. However, in reality there are many more than five stages and the process is not linear but iterative. Additional headings have therefore been introduced where appropriate.

3.1 Project identification

3.1.1 Project identification not guided by plans

The process of delivering social development objectives through the procurement of infrastructure starts with the identification of a project. Key aspects are the consideration of the purpose of the work and the need for the project or service.

It is not clear who actually identifies infrastructure projects in many locations in Africa and occasionally in Asia. It is common on larger projects for the client (host government) to identify the project

“National engineering sectors seem to have played only a limited role in the creation of the national development plans.”

and present a request list to donors to appraise for funding. Little is disclosed about this process. However, the donors appear to be leading the client in a particular direction through their own country assessment reports or strategy papers in which they have identified infrastructure programme areas.

No evidence could be found in the four case study countries of project identification being guided by national long-term sector plans, thus missing a coordinated approach to improving the infrastructure of the country. Although such plans do exist in some countries, few stakeholders referred to national infrastructure strategic plans or master plans guiding project identification. Local development plans are also often missing. A few donors said that project identification in some countries is linked to programmes that are sector driven by different ministries or at the municipal level to more local plans. Other donors have stated there is a need for national sector plans and have indicated that they would be willing to support the development of such plans.

When prompted by the research team, various stakeholders including clients, development groups, consultants and contractors displayed familiarity with some strategic plans. In Nigeria, past master plans (Vision 2000) were

mentioned and new plans (eg for power) were said to be in the process of creation or in the approval stages. In Indonesia, departments were said to be developing master plans for infrastructure systems. In Kenya, a national roads strategy exists. However, in most cases, the plans or strategies were not linked to, or did not seem to be influencing, project identification.

3.1.2 Lack of public consultation inhibits social development

National engineering sectors seem to have played only a limited role in the creation of the national development plans. This is regarded as a missed opportunity given that national engineering professionals have significant knowledge regarding infrastructure planning, design, implementation and operation.

Even more serious is a lack of public consultation not only in project identification but also during the design and planning phase. Public consultation at this stage enables the client to establish the project(s) that would provide the maximum socio-economic benefit to the local population. It can also identify potential impacts on the local community that need to be mitigated in the project plan, such as resettlement issues. Such issues would be highlighted in environmental and social impact assessments (ESIAs) but these are not

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always carried out or not carried out effectively. Dialogue with community groups also provides a means for communicating the benefits of the asset and overcoming some of the local population fears. As the Southern Transport Development Project in Sri Lanka demonstrates, failure to consult can lead to considerable delays and additional cost (see box 1 for further details).

3.1.3 Corruption in project identification

There is insufficient transparency in the selection of projects, allowing corruption to appear in a variety of forms. Media reports of governments identifying and funding projects that do not actually exist demonstrate one extreme form of corruption at the initial project identification stage. Stakeholders refer to this corrupt practice as 'looting'.

Another manifestation of corruption is when project identification and choice of location are unduly influenced by politics. Infrastructure projects may be built to gain political support and projects may be selected to meet the needs of political leaders rather than the needs of the community. Media reports in the Kenyan press recently articulated Parliament's disapproval of the Government identifying and funding projects in the home areas of political leaders. A Parliamentary Committee decided to withdraw the budget until it was redrafted to reflect the MP's complaints.²⁴

With the introduction of some decentralisation policies, the ability of both national and local politicians with personal agendas to influence project selection is said to have increased. While the essential objectives of decentralisation include increased transparency and accountability, in practice it may have the opposite effect.

Box 1: Southern Transport Development Project in Sri Lanka

The Southern Transport Development Project in Sri Lanka demonstrates how a lack of public consultation with project affected people during the project planning phase can lead to considerable problems.

The 128 km highway scheme between Colombo and Matara was jointly financed by ADB, the Japan Bank for International Cooperation (JBIC) and the Sri Lankan government. Opposition and protests against a planned highway had started during the project planning phase with the focus on an illegal change to the final trace of the highway. The project was challenged in the Sri Lankan courts, culminating in January 2004 in a Supreme Court ruling that the affected people had a right to be heard on the final trace of the road. The Supreme Court ruled that compensation should be paid to the affected people.

In June 2004, the Joint Organisation of the Affected Communities on Colombo-Matara Highway submitted a complaint to the ADB Special Project Facilitator (SPF). As well as the final trace, the complaint raised a number of issues, most of which focused on a lack of communication between, the client, funders and the project affected people. The SPF found

the relationship between the complainants on the one hand and the Road Development Authority and ADB on the other was characterised by acute, deep-rooted mistrust. Disagreements tended to escalate and to become self-perpetuating and prone to upward spiralling.

The SPF stated that the opportunity for the affected people to participate in planning and implementing this project had been limited. The SPF found no indication that the project had followed a consultative process using participatory methods with documented proceedings at the village level.

Source: Asian Development Bank: 'Final Report of the Special Project Facilitator on the Southern Transport, Development Project Sri Lanka' (March 2005)

At local government level there is reported to be minimal allocation of funds according to plans and substantial evidence of financial mismanagement. In Federal states such as Nigeria, respondents highlighted that representative bodies at district level are legally responsible for identifying projects yet in practice it is the State Governors who select projects, and decide the allocation of funds. Nigerian stakeholders maintained that there is no real accounting for the funds at the disposal of local government councils

and state governments and yet their performance was not being challenged.

In Indonesia decentralisation policy is under revision. Initially local government submitted in their budget requests to central government, but there was no monitoring of spending and performance against targets. Central government is now in the process of back tracking on decentralisation policy in order to improve monitoring and the coordination of spending on a national basis. Local leaders' authority to administer budgets is



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being reviewed and some governors have been charged and penalised in both Indonesia and in Nigeria for financial mismanagement.

3.1.4 Projects are in line with development plans

Social benefits are most likely to be achieved when donors support projects that are in line with development objectives as set out in strategies and plans. Efforts to promote this are evident in donors support for the establishment of national development plans that include targets and implementation plans and are linked to strategies for poverty reduction and the achievement of the MDGs. Donors are supporting national planning departments in the development of such plans in Kenya, Nigeria, Indonesia and elsewhere, as outlined in Appendix I.

The OECD Development Assistance Committee (DAC) 'Working Party on Aid Effectiveness' set out an agenda in the Paris Declaration (2005) that is consistent with this approach. The overall aim is to enhance the effectiveness of aid so that it

can make a greater contribution to social development and the attainment of the MDGs. Key components to drive this are harmonisation of donor aid policies, alignment of aid with partner country priorities, systems and procedures and a move to budget support. Key aspects of OECD/DAC's harmonisation initiative are shown in box 2.

12 targets and indicators of progress towards meeting these objectives were agreed in 2005 by OECD members, partner countries and multilateral institutions. The first target is to raise the proportion of partner countries with 'operational development strategies' which are defined as 'national development strategies with clear strategic priorities linked to medium term expenditure frameworks and reflected in annual budgets'. The third objective is to align aid flows with national priorities measured by the proportion of aid flows to the government that are reported in partners' national budgets.

3.2 Design and budgets

3.2.1 Inadequate consideration of social objectives in project design

Project design is another important upstream activity. The terms of reference (TOR) for a project are developed at the planning and design stage. In addition to technical and financial factors, terms of reference may include some limited social development objectives such as land tenure and resettlement, provision of roadside amenities in road construction projects or management of selected environmental impacts. Recently the development banks have incorporated considerations of the impact of the project on HIV/AIDS at the design stage.

However, most stakeholders report that social objectives are not clearly defined at the planning and design stage. This may be because of a lack of standards and guidance, either from the regulatory framework or in the form of best practice benchmarks. There is little evidence of links between design and sector plans, national development plans, national policies (eg for employment generation) or legislation (for example, on occupational safety and health). Donors say that designs are guided by policy objectives and country strategies but the link is seldom clear.

NGOs or consumer groups are rarely involved in defining the TORs for a project and there has been limited community consultation. The usual practice is for clients and/or donors to engage consultants to carry out the project design. Those appointed may be national, international or national subsidiaries of an international group, depending on the origin of funding. National consultants complain that designs and project objectives are frequently drawn up at central headquarters rather than at country level, a practice which can mean

Box 2: OECD/DAC donor harmonisation

At the March 2005 Paris High Level Forum on Aid Effectiveness a number of proposals were adopted to strengthen country ownership and to harmonise donor policies and align them with systems in place in developing countries. This will be achieved by:

- collaboration between donors to harmonise their aid, conditionality and procurement procedures
- alignment of donor procedures to meet country priorities
- channelling funding into central budgets and sector programmes as opposed to the traditional direct funding of projects, with allocations based on the capacity of borrowing country institutions and national procurement systems
- the use of national systems for budget execution via use of country public financial management systems (PFM) and procurement systems. Having systems that are of adequate standard will be a condition of funding
- capacity building and improvement of country PFM and procurement systems
- local ownership with countries setting their own agenda

A
Credit:
Institution of Engineers Kenya

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Credit:
Ian Britton,
FreeFoto

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Credit:
Paul Jowitt

that the designers have limited knowledge of local conditions and available materials, hence designs are not adapted to the local context.

On the other hand, there is a long history of policies to promote 'local content' in project implementation. Promotion of local content usually means employing national contractors, supporting local enterprises, maximising the use of local labour and buying from local suppliers, all of which have implications for the design and planning of projects.

One of the most important aspects of policy to promote 'local content' is the creation of the maximum amount of local employment through the use of labour-based methods. However, the use of labour-based methods is generally promoted by donors on an ad hoc project basis, mostly on rural road projects in low-wage countries with high unemployment. The technical feasibility and economic viability of labour-based methods in low wage economies has been demonstrated by numerous donors over many years. In a number of Asian countries they are widely used, but in most African countries they have failed to move into the mainstream. One reason is that the adoption of labour-based methods may have implications for time and quality. It has therefore to be considered at the planning and design stage of a project. Attempts to expand and mainstream the approach are often hampered by inappropriate designs and insistence on tight schedules.²⁵

3.2.2 Corruption in project design

Corruption may be an additional factor inhibiting the adoption of labour-based methods and other 'local content' approaches. Projects can be designed to favour particular contractors or suppliers. Small local contractors and suppliers have few funds with which to bribe corrupt officials or consultants and cannot

therefore compete in this game. Another manifestation of corruption at the design stage is the practice of raising the specifications to please the client, or to inflate costs and therefore the rewards for the project team. Such practices indicate collusion between consultants and contractors and/or clients.

3.2.3 Neglect of maintenance consideration

African stakeholders highlighted the poor state of planning for maintenance after construction is completed, or what is conventionally considered the end of a developmental project. This can be traced back to a lack of consideration for maintenance in project planning and design. For example, if designs require heavy dependence on foreign technologies and skills maintenance becomes problematic from the moment the foreign workers depart at the completion of the project. On the other hand, the capability to operate and maintain a facility should be enhanced when designs maximise the employment of local technologies, skills, materials and components, embraced in the concept of 'local content'. An example is presented in box 3. Many other problems with maintenance are related to

the lack of funds, which creates a dependence on donors and undermines the principles of sustainability. These issues will be dealt with in the next section.

3.2.4 Inadequate budgets for operations and maintenance

One key aspect of asset sustainability is that adequate arrangements must be made to finance operation and maintenance. Traditionally clients and donors have often failed to consider the whole life cost of the asset. In particular there has been a failure to consider the long-term finance of the operations and maintenance of the asset. This has led to infrastructure such as roads deteriorating to such an extent that large-scale costly rehabilitation works are required.

Donors have changed their policy from funding only capital projects and assets in the 1970s and 1980s to funding maintenance projects today. However, donor policies have been abused thus inhibiting the maintenance of assets. For example, to qualify for donor maintenance loans, borrowers have to demonstrate a surplus in their current accounts. This has led some to shuffle funds from one account to another.

Box 3: Road maintenance in Kenya

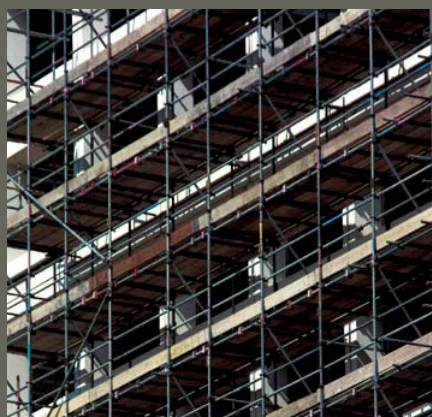
The Roads 2000 maintenance programme of the Kenyan Ministry of Roads and Public Works employs national contractors and uses labour-based techniques on low volume rural roads. Roads 2000 is development group/donor funded. Its predecessor, Rural Access Roads Programme, received significant international attention and was regarded as a model for labour-based and local employment methods. Other donors are supporting maintenance projects that maximise local (national or district) content. An EU funded rural project requires that:

'maintenance, repair and replacement capacities as well as skills available in the villages to carry them out need to be considered for all micro-projects already at the preparation and planning stage. A large proportion of micro-projects can be implemented relying on local technologies and local knowledge and skills.'

Source: www.delnga.cec.eu.int/projects/FinancingAgreements/Op3/FA%20-%20MPP3.pdf



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Donors have wrongly presumed that a 'surplus was demonstrated' and that funds for maintenance were available.

Another common occurrence is where donors and clients have expected the asset/service to generate revenue to pay for maintenance via user charges. Generating revenue for maintenance by charging users of the asset or service is a key to encouraging private investment. The practice has also led to community involvement, particularly in the management of small-scale, rural projects. However, the revenue generated may be inadequate, used on other initiatives, or siphoned off by corrupt practices.

Recently, road funds and boards with independent representation have been set up in African countries to help to ensure that revenue generated from assets goes to maintaining those assets. Appropriate levies and taxes are being considered. There has been a risk that the culture of financial mismanagement may move into the roads board, but donors have tried to counter such a trend.

3.2.5 Budgets fail to price social objectives

There is little evidence that clients and public departments budget for social development objectives when setting estimated of project costs. This is particularly so at the decentralised level as local authorities are often under funded and reluctant to incur additional costs. It is not clear how estimates are made, how prices are calculated and what the benchmarks are. Indonesian Government estimates are said to vary between being too low and too high. The level and type of scrutiny in project evaluations when setting project prices, was generally said to depend on the size of the project. Larger projects are often scrutinised and then politicised. Smaller projects are generally get scrutinised more appropriately according to the new procurement procedures.

Respondents were unanimous in believing that the costs of achieving social objectives have to be estimated within the project budget and priced in the tender, whichever pricing mechanism is used.

However, it was acknowledged that pricing these objectives is not straightforward, and this is why there are wide variations in budgets. Works contracts are usually priced by measuring the quantity used against the unit rate as set out in the bill of quantities. But social objectives cannot always be priced in this way.²⁶ Therefore, it is increasingly common for lump sums or prime cost items to be used, particularly when pricing labour standards.

3.3 Finance and appraisal

Projects may be funded by multilateral or bilateral donors in the form of grants or loans, by government funds or by private investors, or by any combination of these. The conditions attached to grants and/or loans provide the donor with a legal mechanism for ensuring the project meets their own policies. As such, they can have significant implications for the achievement of social development objectives.

The first part of this section looks at projects and programmes funded by donors, the second part examines privately financed projects.

3.3.1 Donor funded projects

3.3.1.1 Donor conditions inhibit attainment of social objectives

The predominant source of infrastructure funding in the poorest countries originates from loans taken by governments from MDBs. The donors appraise projects before the loan is agreed. Donor appraisal systems do not always or systematically consider social objectives. Social conditions attached to loans are restricted to issues of governance, including the reform of public procurement systems and revision of public expenditure procedures. Conditions relating to other aspects of social development and poverty reduction have not been clearly articulated.

Box 4: Lack of coherence to financing maintenance in Nigeria

In Nigeria stakeholders report a lack of coherent strategies for financing maintenance by user fees and limited attention paid to designing a revenue sharing formula. There are good international policies to learn from in this respect. However, clients are beginning to recognise the importance of including a maintenance strategy when funding new projects. The Nigerian Federal Government has reportedly set up a maintenance committee headed by the Minister of Federal Capital Territory. The Government will authorise each Ministry to set aside about 2% of project costs for maintenance and management. The initiative is being 'run by administrators' and it has been suggested that engineers should become involved to promote maintenance and training as part of all projects and implementation of approved policies. On projects not administered centrally, local government will continue to be responsible and there has been no indication of any improvements in policy and practice. Moreover, there is discussion on whether the pending Procurement Bill should recognise a mandate of three to five years warranty for projects. Extension of procurement law to cover maintenance and users of the project has also been suggested.

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Credit:
Tamara Kummer

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Credit:
Christopher Pritchard

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Although the World Bank has become less prescriptive in its application of conditionalities and is moving towards setting benchmarks and triggers, stakeholders still view them as being coercive and often impediments to achieving social objectives. For example, where the donor sets a condition whereby the procurement procedures must achieve economy, efficiency, transparency and equal opportunity to bidders, this can contradict the borrower's objective of promoting national contractors and suppliers.

3.3.1.2 Environmental and social issues in project appraisal

Donors began systematically considering environmental impacts during appraisals as recently as the mid-1990s. EIAs are now a standard requirement in most countries. In Kenya EIAs are required on all infrastructure projects. Indonesian consultants report that environmental issues are being considered in design and on the larger donor funded work. However, although the application and quality of EIAs is improving, the overall standard was reported to be poor. Assessment processes are often inadequately applied during the approval stage or sometimes undertaken after projects have been approved. Findings are reported to be ignored. Environmental management systems, to manage the risks and impacts identified in the EIA, should be identified during the design stage, but in practice there is little carry-over of the results and recommendations into project design. Stakeholders blamed the limited enforcement of EIA regulations on a lack of recommended standards and best practice benchmarks, as well as inadequate capacity.

Following the pattern of EIAs and public consultation undertaken in other countries, social impact analysis and assessments (SIAs) are beginning to

Box 5: Social objectives included in standards and design manuals in Kenya

The Kenyan Department for Water and the Kenyan National Environmental Management Authority (NEMA) are reviewing standards and design manuals for water projects and will incorporate social and environmental objectives. There is, however, no disclosed environmental standard for road construction despite all World Bank funded road projects now having to undergo EIAs. Consultants appointed by the client undertake EIAs and develop the design that must then be approved by the World Bank, the Government and NEMA. NEMA reports that environmental requirements such as erosion control and rehabilitation of quarries still have to be worked into the design of road construction projects.

emerge on donor-funded projects.²⁷ In other instances social assessments are applied to serve as risk management frameworks. SIAs require public consultation to establish the interests of the community and the impacts to consider in project design and implementation. This is particularly important given the increasingly decentralised framework for the provision of local services and renewed focus on investing in rural infrastructure. In 2004, the World Bank and the Kenyan Ministry of Roads and Public Works started requesting SIAs in road construction projects. It is too early to assess performance; as yet SIAs are less advanced than EIAs. It will be interesting to see whether the move by donors from project financing to programme financing will take on board the specification for SIAs, or if SIAs will lag behind other improvements in procurement as was the case for EIAs.

The World Bank and other donors have been reviewing and updating their 'safeguard policies' that regulate environmental and social assessment. The safeguards are based on the International Finance Corporations (IFC) Safeguard Policies adopted in 1998 and recast in 2006 as 'Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy'. Many donors, government finance institutions and lenders as well as commercial

investors base their social investment policies and guidelines on the IFC standards. The new standards contain stronger health and safety requirements for local communities, more stringent worker conditions and clearer rights for indigenous people. It is not yet clear what impact the new standards will have on MDB funded projects.

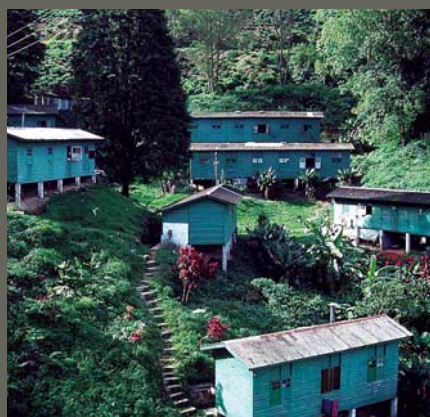
3.3.2 Privately financed projects

As the case studies demonstrate, national infrastructure plans identify a large increase in private sector investment and service delivery as a key means for meeting MDG infrastructure targets. However, to date it has proved difficult to match private investment with social development needs of poor countries. Investment continues to go to the better-off countries and to better-off groups within countries.

In very low income countries, particularly in Africa, the risks associated with private investment in infrastructure are considered to be high.²⁸ There are particular concerns about the regulatory systems, changes in government tariffs, breach of contracts and repayment failures. Financing long-term projects, such as the 10 year construction of the Chad-Cameroon pipeline, carries additional risks. However, the private sector is becoming involved in the management, operation and maintenance of infrastructure.



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3.3.2.1 Private banks fail to ensure 'Equator Principles' are included in procurement procedures

In 2003, 10 international commercial banks adopted the 'Equator Principles'. The principles are a voluntary set of guidelines for managing environmental and social issues in project lending. The Principles are based on the IFCs' environmental and social standards.²⁹ To date, 33 financial institutions from 16 countries that collectively represent some 80% of global private project finance have adopted the Equator Principles. As such, the Equator Principles are becoming the standard for addressing environmental and social issues in project financing globally.

The Equator Principles require all projects of US\$10 million or more to undertake ESIA in accordance with guidelines based on the environmental and social screening criteria of the IFC. The banks interviewed say that they do not provide loans directly to projects where the borrower is unable or unwilling to comply. But there have been criticisms that the guidelines are applied only to secure the loan and once this is achieved the ability of the banks to hold the borrowers to account rapidly diminishes. Private banks are not involved in the procurement procedures, thus they are not aware if the conditions of the finance are not carried over into contract agreements. They have also failed to

explain how their guidelines are applicable and relevant to their clients' project management frameworks and how the findings of the ESIA can be carried over to the management of the identified risks.

However, IFC Performance Standards for environmental and social assessment have recently been revised and the Equator Principles updated accordingly.³⁰ Some of the criticisms outlined above seem to have been addressed by the changes. For example, if the environmental risks are perceived to be medium to high, there is now a requirement to produce environmental management plans/systems (EMS), monitor compliance, submit performance reports, and possibly undergo independent environmental assessment.³¹ How well these new requirements will work in practice remains to be seen.

Box 6: Equator Principles, Revised July 2006

Financial institutions signing up to the Equator Principles undertake to only provide loans to projects that conform to the following 10 principles:

- Principle 1: Review and Categorisation:* each project must be categorised according to the size of potential impacts and risks, using screening criteria of the IFC. For high impact projects (category A and B) the following principles apply:
- Principle 2: Environmental and Social Impact Assessment:* compulsory for high impact projects
- Principle 3: Applicable Social and Environmental Standards:* ESIA to establish the project's compliance with IFC Performance Standards and with relevant host country laws and regulations
- Principle 4: Action Plan and Management System:* compulsory to address adverse impacts (risks)
- Principle 5: Consultation and Disclosure:* The above to be disclosed and the public consulted
- Principle 6: Grievance Mechanism:* to be set up as part of the risk management system
- Principle 7: Independent Review:* ESIA, Action Plan and consultation to be independently assessed
- Principle 8: Covenants:* the borrower covenants to comply with host country laws and regulations and with the Action Plan during construction, operation and de-commissioning and to provide periodic reports
- Principle 9: Independent Monitoring and Reporting:* compulsory
- Principle 10: EPFI Reporting:* Financing institutions that have signed up to the Equator Principles commit to reporting to the public about implementation processes and experiences

More details on each principle can be found at www.equator-principles.com

3.3.2.2 Failure by export credit agencies to assess social objectives

To help reduce risk and gain some security, investors in projects overseas seek insurance from export credit agencies (ECAs) such as the UK Export Credits Guarantee Department (ECGD), US Export Import Bank and others. ECAs are publicly backed government agencies that issue financial guarantees against non payment and political risk to companies operating in foreign markets exporting national goods and services. There is considerably more investment in low-income countries from ECA backed finance than direct donor funding.

While recognising that the UK ECGD's main mission is to benefit the UK economy by supporting UK business, international NGOs have called for major reforms following negative environmental and social impacts assessed on global infrastructure projects. ECGD estimates that around 50% by value and about 10 % by number of investments in civil works are considered to have high potential environmental and/or social impacts'.³²

Some progress has been made. ECDG started its assessment of social and environmental risk five years ago and now expects project sponsors of high potential impact projects to make environmental impact information publicly available before a final commitment to grant official support. Most exporters now acknowledge ECDG's requirement to conduct EIAs, but still rarely incorporate social development objectives. At the international level OECD Export Credit Agencies are working together to develop common environmental policies and a consistent approach to environmental assessment.³³

NGOs and watchdogs also claim that ECAs have indirectly supported corruption by turning a blind eye to the track-records of companies they finance. In 2000, the OECD Working Party on Export Credits and Credit Guarantees (ECG) issued an 'action statement' regarding ECAs and bribery. In 2004, ECDG announced new anti-bribery and ethical rules, yet the Parliamentary Trade and Industry Committee maintained that the rules had been weakened as a result of industry resistance.³⁴ In March 2006, ECDG announced that it would reintroduce the key anti-corruption rules.

3.4 Procurement strategies

3.4.1 Weak and corrupt national procurement systems

Public procurement systems are central to the way in which public money is spent since budgets are translated into services largely through the government's purchase of goods, works and services. Effective and efficient public procurement systems are therefore essential to the achievement of the MDGs and the promotion of sustainable development. Yet procurement systems in many developing countries are weak and corruption rampant and as consequence, have a negative impact for meeting poverty reduction targets (see box 7). There is some evidence that the situation has deteriorated with the decentralisation of the responsibility for delivery of capital and maintenance projects to local authorities has added to these problems.

The reaction to this situation on the part of donors is to maintain a high level of control over funds. Funders set many conditions to loans and grants and may also require that an external agent is appointed to administer procurement. Asian Development Bank (ADB) guidelines, for instance, stipulate that where borrowers lack the necessary organisation, resources and experience,

borrowers may wish (or be required by ADB) to employ, as their agent, a firm specialising in handling procurement. The agent shall follow all the procurement procedures provided for in the financing agreement and the guidelines, including the use of ADB standard bidding documents (SBDs), review procedure and documentation. This also applies in cases where UN agencies act as procurement agents. The extreme case (demonstrated on many World Bank projects) is the establishment of fully staffed parallel project offices, which do little to strengthen the performance of the national systems.

3.4.2 Rigid procurement strategies inhibit achievement of social objectives

The predominant form of public procurement procedure in developing countries is essentially traditional. A department or agency of government acts as the client. The client (or consultants working on the client's behalf) draws up detailed project plans and budgets and manages the project. The client serves as the contracting authority and appoints, through international competitive bidding, a consultant to design and a contractor to deliver construction.

Many stakeholders, particularly consultants, regard the procurement procedures used by the World Bank as inflexible, with projects and the implementation of social development objectives having to fit into a rigid system. The Bank's concern with the risk of corruption was perceived to be the reason why its procedures are so rigid. There is also felt to be an excessive focus on competition at the expense of other objectives. For example, the OECD Roundtable on Procurement aims to develop a methodology to measure the performance of country procurement systems against the objectives of

Box 7: Transparency International highlights the high levels of corruption in infrastructure

In its Global Corruption Report 2005, the anti-corruption group Transparency International highlights high levels of corruption in large-scale public projects. The report estimates that almost 10% of investment in infrastructure is lost to corruption. Corruption in public contracting raises overall project costs, undermines donor support and has other serious implications for the achievement of social objectives. Minimum transparency standards for public contracting are suggested by the report. These include the urgent need for strict conflicts-of-interest rules, transparent and open bidding processes, public access to all information on the contracting process and an invitation to civil society participation for independent monitoring of projects.



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'Economy, efficiency, transparency and equal opportunity to bidders'. Similarly, the ADB guidelines on procurement reflect the ADB Charter Operating Principles, stressing *economy and efficiency, fairness and transparency*. There are fears that the focus on economy and efficiency may serve to perpetuate the lowest price culture at the expense of social objectives.

There are particular concerns about the tension between international competitive bidding and the promotion of domestic contracting and manufacturing industries in the country of the borrower. If the former takes priority it implies that lowest price is considered to have more social development benefits than the development of the local economy. Particularly damaging is the practice of 'packaging' to increase the size of contracts in order to make them sufficiently attractive for international firms to bid, hence raising the level of competition.

3.4.3 Community involvement

Stakeholders report that donors may aim to involve a host community during project procurement to support objectives of project financial and management independence. The International Labour Organisation defines a 'community contract' as 'an agreement between a community and a contracting authority, whereby the community (or a section of the community) is responsible for the implementation of the works and therefore functions as a contractor'.³⁵ However, the World Bank has a different meaning for community contracting. According to the World Bank community contracting is 'procurement by or on behalf of the community'. In other words, the community serves as the 'contracting authority' responsible for letting contracts, as opposed to itself operating as a contractor.³⁶

“According to the World Bank community contracting is 'procurement by or on behalf of the community'.”

In some instances donor funded projects have requested the host rural community to provide labour free of charge as a form of 'in kind' contribution. This approach is aimed at enabling infrastructure development, operation and maintenance and increasing community ownership. However, there is a risk that local leaders may select free labour from the most vulnerable communities, namely the poor and politically weak. In such cases the intended beneficiary, namely the poor, may be exploited rather than benefiting from the project. Understanding of the social composition of the 'community' has frequently been lacking or ignored.

3.4.4 Limited impact of private sector procurement models on the poor

As the case study summary illustrates, the increase in private sector involvement is affecting procurement strategies with an increasing use of 'concession contracts' which use variations of design, build, rehabilitate, own, operate, maintain and/or transfer forms of contract. Used principally on urban and/or large-scale projects, with a large number of payees, the assets are usually owned by the public sector but are operated by a private company over a 15 to 25 year period. Companies are expected to make financial investments to meet the specified operational targets and service levels set by the government. Companies recoup their investment through user charges and/or government subsidies.

Private companies are also being commissioned by government under five to six year management contracts. The company operates the asset and provides the service for an annual fee based on the project size.

However, due to the need to recover investment, generally through user charges, private sector involvement is focused on the most profitable opportunities which usually means projects serving the urban areas and higher income groups. Hence the private sector only serves five percent of the market and public needs. On this basis the public sector will remain the major provider of infrastructure services for the foreseeable future, particularly in rural areas and services catering to the poor.

It has also been acknowledged that concession contracts have not delivered the expected results. At the end of a contract, the private company has often left the asset in poor condition. Stakeholders blame this on the limited incentives and lack of contractual obligations on companies to ensure the quality of the asset and invest in maintenance. The inclusion of social development objectives within the various privatisation and public/private contract models has been rare but, as the case studies demonstrate, this is increasing significantly.

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Credit:
Jill Wells

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Big Foto

3.4.5 Different procurement strategies could enable social objectives

The traditional method of procurement has a long history of reliability. Moreover, many consultants felt this method was not always suitable, leading to the project having to be made to fit the procurement system rather than the other way around. There are different procurement strategies that clients and donors could consider that might be more able to meet the project requirements and deliver social objectives.

For example, under a design and build arrangement, the contractor is responsible for meeting the employer's specification for the design, management and delivery of the project. The client benefits from using the contractor's design (the contractor may opt to subcontract the design) and construction and design teams operate in tandem to ensure that the design can be built according to the employer's desired quality, time, budget and social objectives. This may be preferable to the traditional system whereby the consultant or architect's design is simply handed to the contractor, who slowly realises that the design is more complex and expensive to build than was previously understood.

Turnkey contracts are also common, particularly on privately financed gas and oil pipelines. Similar to design and build contracts, the employer's requirements are expanded to include provision of a fully equipped facility, ready for operation (at

the turn of the 'key'). The contractor may also be contractually obliged to operate the asset for a commissioning period, lasting a few months. This is to ensure that any defects are fixed before the client takes over the asset.

Despite their successful use in developed countries, such as the UK, donors have been reluctant to allow low-income country clients to adopt these models. Both design and build and turnkey contracts often require a two-stage selection procedure, where a certain degree of flexibility for discussions with tenderers is carried out to integrate their ideas and concerns.³⁷ Donors may view this as providing an opportunity for corruption.

However, donors are now beginning to look at alternative procurement models, in particular output-based (or performance-based) procurement. In September 2005, the World Bank published 'Sample Bidding Documents for Procurement of Works and Services under Output and Performance-Based Road Contracts' (OPRC) on a trial basis to provide its clients with an alternative to the traditional methods of procuring road reconstruction, rehabilitation and maintenance. These documents are focused to fit the specific nature of 'Performance-based Management and Maintenance of Roads' (PMMR), but they are also suitable for the procurement of works and services under longer-term 'Design-Build-Operate-Maintain' (DBOM) contracts for roads.³⁸

The contractual relationship is based on payments for a quantity of measured outputs instead of the traditional method where inputs are measured. The technical specification defines the outputs and how they will be measured, including quality levels. In the case of the World Bank document, the measured outputs reflect the target conditions of the roads under contract.³⁹ Payment reductions may be made for lower quality level, of output and, in certain cases, premiums may be paid for higher quality level, of output. The bidding documents do not normally prescribe the inputs, or a work method for the contractor. The contractor is free to propose the most appropriate solution, based on mature and well-proven experience and demonstrating how the level of quality specified in the bidding documents will be achieved.

3.4.6 Generic schemes used to implement local content policies

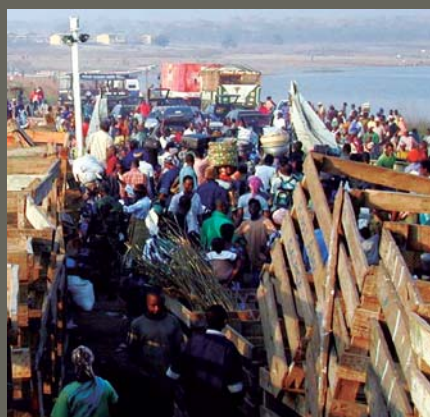
National governments consistently use public procurement to advance the economic growth of local enterprises. For example, Malaysian procurement policy supports the National Development Policy, which seeks to improve the economic participation of the Bumiputera and to make them equal partners of development in the country.⁴⁰ Watermeyer sets out four models that have evolved within public procurement with the goal of promoting non-commercial objectives: preferencing; reservation; indirect; supply side.⁴¹

Preferencing particular companies or groups, generally local firms, in the award of tenders is by far the most common means of implementing local content policies and can be consistently found in public procurement legislation (eg in Tanzania, Kenya, Gambia). Preferences for local contractors and suppliers are generally set at 7.5%, 10% or even 15% of the project price but we could find no rationale for the particular percentage set.

“Preferencing particular companies or groups, generally local firms, in the award of tenders is by far the most common means of implementing local content policies.”



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Effectively, the local contractor will have the preference figure discounted from their tender price thus providing an advantage against international competitors. Stakeholders were unaware of any studies to examine the effect of preferences on the development of the local industry. Some maintain that the lowest price always wins and preferencing is in practice ignored. There are also arguments that the practice distorts the market and that support for local industry, if required, should be provided from the supply side.

Preferencing is not only used on the basis of price, but also by allocating points in the tender process for non-commercial objectives. For example, bonus scores are allocated in Nigeria for demonstrating a history of local participation and South Africa utilises a scoring system as part of its Targeted Procurement policy (see box 8).

An alternative to price preferencing is **reservation**, where a proportion of project value is reserved for execution by local enterprises. In Indonesia the target was 70% under the Suharto government but this was never achieved and it was reduced to 50%. Others maintained it is set at 30%, but still local contractors may not have the capacity to bid and win and meet the target. Much depends on the size of the contracts, which may need to be broken down into portions that are manageable for local contractors. Reservation has been common in a number of Asian countries, including, India, China, and Thailand, but does seem to be in decline following pressure from the World Trade Organisation and donors. In India the policy is used at both state and national level. However, stakeholders report that targets are achieved through employing manual labour. Skilled labourers and professionals are often migratory workers.

Box 8: Targeted procurement

Targeted procurement is a system of preferencing within procurement which provides an option for setting goals or targets that are to be met in order to achieve socio-economic objectives, while maintaining donor rules of competition, fairness, efficiency and transparency. Developed in South Africa to specifically target those groups disadvantaged under the apartheid system, it has also been used to support local economic development, to promote growth within the small business sector and to target the unemployed in poverty alleviation programmes.

Traditionally, when procurement has been used as an instrument of social policy the models adopted are prescriptive and inefficient. The proponents of targeted procurement claim that models like price preferencing policy, set asides, step-in mechanisms, fixed contract participation or prescribing employment-intensive technologies can constrain the private sector in its ability to deliver. This can impact negatively on the time, cost and quality aspects of a contract.

In contrast, targeted procurement provides a system for setting clearly definable social objectives which are contractually enforceable. The specification is used to set measurable and quantifiable objectives and determine how they can be achieved. This allows the objectives to be monitored and evaluated, permits them to be verified and audited to satisfy public sector requirements for transparency.

A scoring system leads to bidders competing on the basis of price and how they incorporate social objectives into the project (for example, 90 points for price, 10 points for social objectives). This means that the social benefits are obtained at minimum cost to the client. Sanctions are applied to contractors where they fail to deliver their social obligations.

In South Africa, the use of targeted procurement has opened up the construction industry to emerging enterprises and delivered socio-economic benefits to the target group. For example, the market share of small businesses that were owned, managed and controlled by black persons increased from approximately 2.5% of the Department of Public Works budget immediately prior to implementation, to 22.3% after the first nine months of implementation, and to 32.4% in its third year of operation, with nominal direct financial premiums. However, where practical problems have arisen, it is often been due to poor planning and design with a failure to identify appropriate socio-economic goals and inappropriate choice of implementation methodology.

Sourced from Manchidi T.E. and Harmond I, 'Targeted Procurement in the Republic of South Africa: an Independent Assessment' (2002) and Watermeyer, R.B, 'Facilitating Sustainable Development Through Public and Donor Procurement Regimes: Tools and Techniques', Public Procurement Law Review 2004 Number 1.

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Credit:
Tim Haywood,
RedR-IHE

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When using the **indirect** model, clients employ their procurement strategies and requirements to promote policy objectives by constraining the manner in which the project is delivered, for example, specifying labour-based construction methods or community contracting. The classification system used in Indonesia, constrains the ability of enterprises of certain sizes to bid for work of stated value. This has the effect of reducing the ability of overseas contractors to bid. More information on this system can be found in the case study report in Appendix I.

Supply side measures are provided to targeted enterprises to overcome barriers to competing for tenders or for participating in procurements within the supply chain. Examples of mentorship and workshops were provided from projects in Singapore and Lesotho. Such measures could also include access to bridging finance.

3.4.7 Initiatives to strengthen country procurement systems

Recently attention has focused on strengthening local procurement systems. As a part of its aim to increase the effectiveness of aid, OECD/DAC is leading a coordinated initiative to build the capacity of country procurement and financial management systems so as to persuade donors to direct their aid flows through country systems and reduce the number of parallel implementation units. Country systems include public procurement rules, national budget processes, accounting, auditing, and the planning, programming and management of projects. Under this initiative OECD/DAC established a Roundtable on procurement involving developing countries and bilateral and multilateral donors. The OECD/DAC Roundtable developed an integrated set of tools and good practice guides to improve developing country public procurement systems and their

“The OECD/DAC Roundtable developed an integrated set of tools and good practice guides to improve developing country public procurement systems and their contribution to development outcomes.”

contribution to development outcomes. These are now undergoing review and refinement by the Joint Venture on Procurement consisting of the MDBs Head of Procurement. The tools aim to develop a system of baseline indicators for the assessment of the structure of country procurement systems and a methodology for measuring performance. The purpose is to increase the proportion of aid that is channelled through country systems with targets set for this achievement.

There is reported to be concern among international and western contractors about greater perceived risk in working directly with national governments without donor involvement. Media reports state that US contractors fear losing the donor funded contracts as local officials will have the role of awarding contracts. Companies are also concerned that they will experience an increase in bidding costs arising from the need to be familiar with many different procurement systems.⁴² Donors have responded by stating that they will only fund directly to central budgets if the country's procurement policies and contracting agency standards are equal to their own. Moreover, donors will undertake audits to assess country implementation and compliance. This feeds the concern of others that very few country systems will actually be used as most will not meet the required standards.⁴³

3.5 Tender and selection

3.5.1 Corruption inflates project cost

Corruption is prevalent throughout the procurement and project life cycle but seems to attract most attention when it occurs at tender stage. Corruption and the fear of corruption are major inhibitors to improvement in contractual and social performance, hindering decision making and undermining the efficiency of the procurement process. Stakeholders report instances where they have walked away from bids because of corruption. Others build corruption costs into the price.

In response to the calls for increased transparency, many countries have attempted to reform public procurement, usually through legislation. The legislative framework creates a series of checks and balances that aims to create a more transparent tender selection process. This includes developing and publishing scoring systems, pre-tender meetings where potential bidders can clarify tender requirements, setting up committees to evaluate bids, opening bids in public, publishing tender results and providing losers with reasons as to why they were not selected. Despite these changes, stakeholders report that many clients fail to apply these procedures and often abuse them. For example, the requirement to open the financial envelope only after the technical envelope has been opened and



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evaluated against the stated criteria is often flouted. Stakeholders also reported cases of bids being opened and resealed before the public announcement.

3.5.2 Accepting lowest price tender can have negative repercussions

The case studies have shown that a number of developing countries, at the prompting of the World Bank, are establishing a legal framework for public procurement based on the UNCITRAL Model Law. One of the basic tenets of the Model Law is that best value is achieved by maximising competition. The Model therefore directs a procuring entity towards competitive tendering, with restrictions on other methods such as two-stage tendering, negotiated tendering and restricted tendering. All four of the case study countries have adopted this principle. Donors may also have thresholds above which basic rules of competition apply.

However, accepting the lowest priced tender can have negative repercussions with implications for the achievement of social objectives. If the tender price is very low the successful bidder may be led to cut costs (and cover potential losses) by cheating on materials and taking other short cuts, which can affect the quality of the final product. Contractors may also cut back on labour costs by pushing down wages, hiring casual workers and failing to meet contractual requirements to ensure the health, safety and welfare of the workers. In many countries intense competition, particularly from Chinese companies is seen to be driving down standards and leading to neglect of social obligations. It also precludes local contractors from bidding as they do not have the financial capacity to take on the risk of bidding at such low prices.

3.5.3 Alternatives to lowest price tender

To ensure technical quality and not just lowest price, innovative practices have emerged over recent years. The standardised procurement procedures of the multi-lateral development banks promote the award of contracts based on the 'lowest evaluated tender' which includes consideration of the time schedule and quality requirements. The Asian Development Bank also has a policy of raising the price by 20-30% if the bid price is lower than the client's estimate. A two envelope system is commonly practiced (particularly for consultants) whereby the technical bid is submitted first and financial bids only solicited from a chosen few. UNDP uses this kind of two envelope system to assess bids, with 70% of points issued for technical quality and 30% on the basis of price. There may also be some marking of method statements that contractors submit with their bids. However, when scoring systems are introduced, clear criteria are needed to avoid subjectivity such as the Targeted procurement scoring system in South Africa (see 3.4.7).

Practices that can help to ensure that the lowest price is not accepted at the expense of the labour force include assessing the company's record on the implementation

of labour standards as a bid assessment criterion. It is also recommended that the standards required for the employment of labour are explained in detail at all pre-bid meetings, as well as how the requirements can be priced. This is because many small contractors in developing countries have little knowledge of labour standards, even though they are legally responsible.⁴⁴

3.5.4 Prequalification excludes social issues and registers are not robust

An alternative to open tendering is inviting bids from a select list of firms. In this situation prequalification procedures can be used to assess potential bidders before placing them on the tender list. References can also be requested. Typically, prequalification forms for contractors have requested information on financial capacity, previous experience (record of contracts of a similar nature), personnel capacity and experience and available equipment. There is seldom any reference to social issues, such as the firm's record on health and safety. This is in contrast to the UK where generic social and environmental factors are embedded into the prequalification procedures.

Registers can support or even supplant prequalification if they are robust and well maintained. Where registers of contractors or consultants are stratified

“Accepting the lowest priced tender can have negative repercussions with implications for the achievement of social objectives.”

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Credit:
Ian Britton,
FreeFoto

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Credit:
Engineers Against
Poverty

into different classes, clients may assume that those in a particular class have a minimum level of capacity and expertise and have not been involved in litigation. The record of companies on health and safety and other social issues can also be evaluated and those falling short of the required standards removed from the register. While such an exercise can be expensive if properly carried out, in the longer term money is saved if clients can rely on the register instead of having to make their own evaluation. However, registers are not always robust and the classification system may lack credibility. At a more sophisticated level, some UK clients are increasingly making use of common registers, as explained in box 9.

3.5.5 Measures to curb corruption

Greater transparency in tender awards can help reduce corruption. Some clients and financiers (for example the EU) provide feedback to bidders following bid evaluations. The amount of detail provided was not stated but most contractors and consultants think that feedback should be provided. The EU is reported to use very clear prequalification and selection criteria with high levels of clarity and transparency and little room for negotiation.

Blacklists of companies guilty of corrupt practices can be used to inform the prequalification process, with blacklisted companies barred from tendering. The development banks have led the way in issuing blacklists but with varying effect. There are calls for blacklisting procedures to be strengthened and for others to follow the lead of the banks. The UK Anti-corruption Forum⁴⁵ recommends that an international database be developed containing details of prosecutions and blacklisting to which procuring entities may refer during due diligence and tendering procedures. Transparency International has made similar calls.

Box 9: An example of prequalification in the UK

Some UK clients are making increasing use of common registers. The Highways Agency and the Strategic Rail Authority both currently use the Capability Assessment Toolkit (CAT) which is based on the Business Excellence Model. The Highways Agency, for example, requires an external examination of potential bidders three months before prequalification starts. The external examination (paid for by the contractors) takes place over three days with the assessors visiting to score, validate and accredit the contractors. Past performance data sheets are sent to the client for scoring. When the new project is advertised, contractors that have been certified submit 'slimline' prequalifications. The CAT system is popular with many contractors who have requested to apply it and extend it themselves to their own supply chains. Some contractors consider that the process promotes continuous improvement, particularly in the area of health and safety management and in partnering. In bids, community relations officers have to be listed by name when contractors state that they liaise with communities to consider their diverse interests in project design and implementation.

Transparency International (TI) recommends that clients should not permit any firm to bid for a project unless it has an anti-corruption code of conduct and management plan in place, including a policy for the protection of whistleblowers. TI has been working with companies in the construction and oil and gas sectors to develop and implement such a code and to encourage external certification and accreditation. At the World Economic Forum in 2004, 24 companies signed up to this code and a further 63 in 2005.

TI also proposes that contractors submit an 'express warranty' to clients and financiers that they will not bribe or associate with any other corrupt practices. In similar vein, the UK Anti-corruption Forum has very recently recommended that business associations and institutions encourage members to implement an anti-corruption policy embedded in a code of conduct with a disciplinary mechanism to sanction members in breach of the code. Clients should then only allow companies to tender if they can show evidence that they are implementing the policy. Positive weighting should also be

given during evaluation to companies that can provide credible external verification.

TI has also developed an 'integrity pact' to be signed by the client and the company bidding for work and sent out with the invitation to tender. The pact is independently assessed and the assessor has open book access to the tenders and is present at all tender meetings throughout the stages of the procurement cycle. The integrity pact is currently being used in 20 countries. It is expensive and is usually paid for by the client or the financier.

The UK based Anti-corruption Forum recently endorsed and built on TI's recommendation for independent monitoring and auditing of major projects. It is recommended that clients introduce effective anti-corruption monitoring and reporting procedures and that financiers ensure that these are in place. The relevant paragraph in the Forum's Anti-corruption Action Statement reads as follows:



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Corrupt practices are normally concealed. It is very difficult for anyone who does not have the appropriate skills, who does not have access to the relevant documents and people, and who does not have in-depth involvement in the project, to be able to prevent or uncover these practices. The Forum believes that independent monitoring mechanisms capable of preventing and identifying corrupt practices need to be introduced at project level. It recommends the development and implementation of mechanisms under which:

- a. The participants in projects commit to act with absolute integrity in relation to the project.
- b. Compliance with the integrity commitments is monitored throughout major projects by an independent expert who is given appropriate access to documents and individuals for the duration of the project.
- c. Breach of the commitment leads to contractual and, if appropriate, criminal sanction.

The Forum also recommends that increased resources be allocated to investigation and prosecution, and that blacklisting should be more effective and transparent. Mechanisms also need to be established for reporting corruption and for providing effective responses to allegations of corruption.

3.6 Contract agreements and documents

The contracts in most common use are either the standard FIDIC/World Bank documents or national contract models. The NEC contract model⁴⁶ has a small, but increasing, international market that includes South Africa and Botswana. In most international regions and on larger projects FIDIC's Conditions of Contract for Work of Civil Engineering Construction

are used. FIDIC and World Bank models also form the basis from which other models are derived. For instance, stakeholders in Nigeria stated that even on projects not funded by the development banks, contracts were drawn up in a similar manner to FIDIC models. This is because the guidelines and frameworks are disclosed and available for reference.

However, Indian stakeholders reported that all risks are invariably passed to the contractor who then ignores the contract

completely. As a consequence relationships between client and contractor deteriorate and disputes become the norm. While international consultants and contractors are well versed in utilising FIDIC and the local bespoke versions, the majority of stakeholders felt that local consultants and contractors would benefit from shorter, simpler contracts in the local language, with risk apportioned where it is best managed and transparency ingrained into the management of the contract (see box 10).

Box 10: Achieving transparency under the NEC contracts

The NEC achieves transparency by making sure that client and supplier have access to the same information at the same time, and that there are no 'hidden' transactions. The NEC contracts have a range of provisions which help to achieve a high level of transparency. These include:

1. Separation of the role of Project Manager and Supervisor avoids potential conflicts of interest.
2. Client Control: the Project Manager is not independent of the Employer.
3. The early warning obligation provides for effective communication.
4. The disclosure of the terms of sub-contracts to the Project Manager thus overcoming the problem of onerous, usually undisclosed, sub-contract terms damaging the achievement of the Employers' objectives.
5. The transparency of scheduling, methods and risk allowances through a detailed up to date Programme to show progress achieved and the Contractor's intentions for completing the remaining work.
6. Notification of compensation events and the assessment of cost and time consequences is made at the time the event arises thus allowing the Project Manager to manage change.
7. More precisely defined 'force majeure' events with the Project Manager making the final decision of how to deal with the event through consultation with the Contractor to identify the options.
8. In Cost reimbursable or target payment option, the contractor is required to keep detailed cost records and provide forecasts of future costs to the Project Manager at regular intervals.
9. An obligation on the contractor to notify the Supervisor of defects. Thus there is no 'hidden' correction of defects.
10. In the event of a dispute an independent third party appointed as adjudicator will give its decision on the dispute at that time when it arises.

By including terms requiring both transparency and cooperation, the NEC simultaneously helps to remove corruption and promote best practice management.

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Credit:
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3.6.1 Responsibilities for social objectives are not well defined

Responsibilities for social objectives are not well defined in the national standard bidding documents that were examined. As a minimum, most contracts specify that contractors must obey all local laws and regulations. Some obligations to the labour force can be found (such as health and safety, conditions of employment and trade union rights) as well as on-site environmental obligations (refilling pits and landscaping). But instructions are not clear and it is left to the contractor to interpret.

Unclear definition of responsibilities is a particular problem in community contracts. The Social Aspects of Construction (SAC) project on labour standards in construction, which uses the ILO definition, has recommended that the roles and responsibilities of the various parties to the contractual relationship should be more clearly defined in community contracting. This should include clear definition of responsibility for social objectives such as H&S.⁴⁷

3.6.2 Vague language and conflicting messages in contracts

Vague and sometime conflicting obligations in contracts complicate compliance. For example, contractors are expected to take 'reasonable care of the environment'. But national standards and guides are lacking, and little attention has been paid to the specification of sustainable materials and resources in design and delivery. Environmental impact assessments are now a standard requirement but it is not clear whether the recommendations of EIAs are carried over and reflected in the contract documentation.

The country case studies also noted some ambiguity in FIDIC contracts on the issue of local labour. FIDIC (4th Edition) conditions of contract part 1 clause 34.1

'Engagement of staff and labour' states that it is up to the contractor to decide who is employed, while clause 16.4 'Employment of Local Personnel' states that the contractor should employ nationals whenever possible. There is a similar ambiguity in other editions of FIDIC contracts. A clause in a contract of the Indian Public Works Department, States of Kerala and Orissa, seems to raise the bar with a statement that 'tribes of the locality should be employed to the extent possible'. There are also ad hoc initiatives on local employee recruitment and training from country to country and project to project.

The SAC project found a similar problem in its review of labour clauses in contract documents.⁴⁸ While contract clauses may state the general intent, such as 'take due precautions to ensure the safety of staff' the statements lack operational detail to inform the contractor or employer of what actually has to be done.

3.6.3 Some labour clauses in FIDIC contracts

The harmonised edition of the FIDIC contract (see case study summary) does go further than some national standard bidding documents consulted with regard to the obligations to the labour force. Child labour and forced labour are prohibited and the contractor has to ensure the supply of food and water. There is also a requirement to appoint an accident prevention officer at the site, who is responsible for maintaining safe working practices and protecting the workforce against accidents. Objectives for labour and labour clauses have also been included in contract document on donor-funded labour-based projects, for instance, Ghana and Mozambique have used contracts with labour clauses. Where local labour laws are weak these conditions could be important, but only if they are enforced.

However, some stakeholders have questioned whether the contract clauses are the right place for consideration of social requirements. A contract defines the management framework by which the contracting parties operate. The specification sets out the client's requirements, including the works to be undertaken and any constraints in undertaking the work. Some stakeholders suggested that the wider regulatory environment is better placed to ensure that social obligations are met with any specific project requirements defined with measured benchmarks in the specification. For example, as most countries have labour laws there should be no need to put special requirements into the contract. Environmental issues should be handled in national dialogue between government and donors rather than randomly applied through contracts. This has been the World Bank view until recently when lobbying from NGOs and community groups began to break through their resistance to the inclusion of some labour and environmental objectives in contract documents. The view finds support in the fact that the contract documents and specifications are not always read by the contractor and the legal language of contract documents is often not understood. Contract clauses are rarely enforced.

Others maintain that social objectives do need to be reinforced in contracts but have to be considered much sooner in the procurement process, preferably at the design stage. There is general agreement that if social requirements are included in contracts they must be factored into the design and budgets, and priced in the tender. These measures are also recommended by the SAC project and are being implemented on UK/DFID projects in Ghana (see box 11).



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Box 11: Social Aspects of Construction Project

The SAC project identified nine labour standards and undertook research to examine the extent to which they are actually observed on the ground under different types of contract arrangement. Pilot projects were then undertaken to see how labour standards could be promoted through the contract and monitored by the contract team. As a follow-up to the research, joint venture projects funded by DFID in Ghana have included in the contract documents requirements that contractors observe the nine labour standards. The SAC guide recommends that for each separate contract detailed specifications should be provided so that contractors are clear about the requirements. In some cases contractors had to invest to meet the required standards (eg in clean drinking water) but the costs did not present a problem because they had been included as a lump sum in the tender.

3.7 Monitoring, enforcement and evaluation

3.7.1 Poor project performance due to inadequate supervision

In the countries studied, project performance is often poor. Frequently the technical as well as the social requirements of the contract are not fulfilled. Sometimes the failure can be traced back to earlier stages in the procurement process. For example, acceptance of very low tenders and the need to recover costs may cause contractors to use substandard materials. Inadequate costing and/or poor definition of social obligations may lead them to take only minimal measures to protect the health and safety of the workforce. Late payment from clients, which can be due to inadequate budgets or bureaucratic procedures, also affects quality and performance as long delays before a contractor is paid impacts on his cash flow and provides an incentive to inflate claims, as well as affecting his ability to pay wages on time.

However, one major reason for poor performance and failure to comply with the terms of the contract in technical and/or social areas is inadequate supervision from within the project team. Under the traditional forms of contract, which predominate in the public sector in

low-income countries, the independence of the consultant from the contractor is jealously guarded on the grounds that it creates a system of checks and balances. The consultant represents the client's interests and assumes responsibility for supervising the work of the contractor to ensure that the terms and conditions of the contract are fulfilled. However, the quality of supervision is often inadequate due to distance, ignorance or collusion.

On infrastructure projects in remote areas the client/consultant's ability to supervise the project may be compromised by distance. Logistics often require that supervisors are 'hosted' by the contractor when visiting project sites to monitor performance. Reliance on the contractor's transport and accommodation during site visits reduces the supervisors' independence and objectivity and may result in distorted assessments in favour of the contractor and a failure to highlight areas in need of improvement. In effect, the supervisory function becomes corrupted. Collusion between the client, contractor and consultant to pass substandard work and/or allow fraudulent claims, is reported to be common (whether or not distance is a problem).

Ignorance may also be a factor inhibiting supervisors from monitoring social

obligations. Clients and consultants are unlikely to recognise and report a contractor's failure to fulfil social obligations in the contract when they are unfamiliar with the issues and what is required of the contractor to comply with the contract and/or the law. For example, the ILO reports a very low level of understanding of health and safety issues among construction consultants and clients in Tanzania. There is virtually no supervision of health and safety from within the project team in Tanzania, or in any of the case study countries. It seems that commitment to basic social objectives by supervisors and other stakeholders is generally weak.

3.7.2 Weak government enforcement of laws and regulations

The case studies have shown that national or local regulations regarding health and safety, as well as other social and environmental standards, are frequently ignored. The regulations are often there yet implementation is poor.

In addition to supervision on behalf of the client, responsibility for monitoring and enforcing standards and social obligations on construction projects is spread around a variety of bodies. Monitoring of technical standards to ensure that the structures are constructed according to the approved plans is generally the responsibility of the building departments of local authorities. Monitoring of health and safety and other labour and environmental standards is the responsibility of other government agencies or departments at central or local level.

In very poor countries, government regulatory agencies rarely manage to enforce standards in practice. Influencing factors include lack of capacity and the difficulty or monitoring the involvement of numerous small subcontractors over a wide geographical area. Monitoring and enforcement of the provisions for health

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Credit:
Tamara Kummer

and safety is certainly inadequate in the case study countries.⁴⁹ Health and safety inspectorates are understaffed and visit construction sites only after an accident has occurred. Few contractors have been charged for contravening the regulations. A similar situation prevails in Tanzania where a recent study has shown that on the few occasions when inspectors visit sites they speak only with the managers and ignore the labour force.⁵⁰ Inadequate monitoring and enforcement of the health and safety and labour regulations in that country has left contractors free to choose whether or not they obey the law, which has resulted in a very wide diversity of standards.

3.7.3 Post contract evaluation focused on financial audits

Project auditing, in the sense of analysis after completion to identify shortcomings, errors and mistakes, is limited. Stakeholders expressed the view that the implementation of many objectives, not just social, is not evaluated to a relevant and appropriate standard. Auditors tend to follow paper trails rather than actually checking that the physical asset and its components are in place and that they are to the specifications. Project appraisal staff at development banks are said to perform and be assessed according to fund disbursement quantity rather than project performance. Development bank appraisal systems reportedly do not integrate financial appraisal with technical appraisal and financial issues take precedence.

The supervision, monitoring and auditing of client financing by commercial banks and the application of the Equator Principles during the project life cycle has mixed reports. Some stakeholders state that it is weak with a complete lack of on-site monitoring and accounting of project expenditure being the norm. Others maintain that there may be on-site monitoring and evaluation, usually before the next loan instalment is released. While some banks have made a genuine effort to implement the Equator Principles and even extended their scope to non-project finance and publicly reported on these efforts, other banks have made little effort and performance is unclear. The main areas of improvement are public and transparent reporting, on the ground impact assessments and signatory implementation systems.⁵¹ Critics state that the Principles do not seem to prevent banks from financing the same kind of projects that have proven to be environmentally destructive in the past.⁵²

In cases of non-compliance, banks can default on loans, yet this is a very rare occurrence. The banks tend to engage the client and bring the client back into compliance. Some banks have a corrective compliance plan that can work with clients over a three to four year period to bring them back into compliance. In high-risk projects there is annual reporting with some external environmental and social consultants hired to review and report.

3.7.4 Lack of standards for monitoring

Effective monitoring requires clearly defined standards and objectives. International consultants report that measures and indicators for environmental management lack definition and risk being 'corrupted'. For instance, roadside tree clearing is a common management objective in road construction yet there is a risk that clearing may exceed necessary levels so that wood can be sold. In Indonesia, international and national standards for environmental monitoring are used, but national standards are said to be of a reduced quality, with low standards for accreditation.

Objectives and indicators for community involvement may also not be sufficiently well defined to capture the intended impact. In one example monitoring showed that the requirements of the contract were apparently being complied with, in that manual labour was locally recruited and local businesses were involved. But the impact was not as intended as the locally recruited labour was unpaid and the chief beneficiaries were local business monopolies. Independent monitoring highlighted the malpractices, allowing improvements to be made.

“Effective monitoring requires clearly defined standards and objectives.”



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3.7.5 Positive examples of monitoring, evaluation, enforcement

Labour standards in contracts are generally not implemented because they are not monitored and enforced through incentives and/or sanctions.⁵³ The SAC project has shown how monitoring and enforcement of labour standards that are spelled out in the contract can occur as part of the supervisory process within the project team. The process is greatly facilitated if the labour force is fully aware of their rights and entitlements and all the key stakeholders are involved. This has been tried on donor funded projects in Ghana, where the stakeholders (including the client, association of contractors, labour department, and unions) collectively identified the relevant labour standards to apply and then periodically reviewed problems and proposed solutions. Contractors complying with the standards were rewarded with bonuses. Over time, and after a number of different monitoring approaches had been tried, the supervising engineers began to take over the role of monitors. At first there was resistance, but gradually they began to see this as part of their normal work. The experiment has shown that consultants can effectively monitor the implementation of labour standards and review accounts, especially when specific obligations to the labour force are included and budgeted in contract documents.

Mid-term reviews and end of project evaluations are undertaken by several donors and development banks and a lot of changes can take place during these reviews. The European Commission reports that it has national indicative programmes, regional and country reviews that are undertaken mid-term. The EU country delegation and office monitor implementation performance and undertake budget reviews that may result in budget increases, decreases or stalling. Problems in project implementation have resulted in funds being stalled or moved from infrastructure projects into sectoral policy and governance programmes.

The EC also claims to have both process and system indicators (which measure performance in things like capacity building) and also outcome indicators to measure the impact on the beneficiary. Verifiable indicators on an EC funded rural water project include the number of installations completed in the different sectors and evaluations of their quality standards. Impact will be assessed through surveys of a random selection of sites. Indicators of social performance include the number of persons involved in communal labour, contributions to fund raising and organisational aspects. Independent evaluations are planned 18 months after the start and six months before the end of the programme.⁵⁴

Figure 1: Summary of the factors inhibiting and enabling the achievement of social objectives at various stages of the procurement process

	Inhibiting factors	Enabling factors
<p>Identification, planning and design</p> <p>Project identification</p> <p>Design and budgets</p>	<p>Lack of national or sectoral operational plans</p> <p>No alignment of projects with plans</p> <p>No public consultation</p> <p>Corruption including undue influence from national or local politicians</p> <p>Inadequate consideration of social objectives in project design</p> <p>Funds not set aside for social development objectives</p> <p>Neglect of maintenance considerations at design stage</p> <p>Inadequate budgets for maintenance</p> <p>Corruption in project design</p>	<p>MDGs mainstreamed into national or regional plans and budgets</p> <p>Project identification in line with plans</p> <p>Budget support from donors linked to national and sectoral strategies</p> <p>Community involvement in project identification and design</p> <p>Social objectives are included in the lending framework and budgeted accordingly</p> <p>Costs of meeting social obligations are estimated and funds ring-fenced (as happens for HIV/AIDS)</p>
<p>Finance and appraisal</p> <p>Public finance</p> <p>Private finance</p>	<p>Donor conditionalities may inhibit attainment of social objectives</p> <p>Some donors are more concerned with the asset than the delivery process and do not consider social objectives in project appraisal</p> <p>EIAs identify risks but not carried over to project design or risk management systems</p> <p>Private banks fail to ensure the 'Equator Principles' are carried over to procurement</p> <p>Export credit agencies rarely incorporate social objectives in EIAs and fail to tackle corruption</p>	<p>Use of Social Impact Assessments which necessitate public consultation</p> <p>Social and environmental risks identified and systems established to manage the risks – as required by revised 'Equator Principles'</p>
<p>Procurement strategy</p>	<p>Corruption in national procurement systems leads to donors by-passing and setting up alternatives</p> <p>Decentralisation may further inhibit delivery</p> <p>World Bank procedures considered inflexible and promote competition at the expense of social development objectives (eg local content)</p> <p>Large projects inhibit participation of local firms</p> <p>Community contributions in the form of 'free' labour can hurt the most vulnerable</p> <p>Concession contracts limited and serve the richer locations and groups</p>	<p>Flexible procurement options may lead to better outcomes</p> <p>Smaller contracts to maximise the participation of local contractors</p> <p>Targeted procurement to deliver social benefits at minimum cost</p> <p>Donors strengthen and use national procurement and financial management systems</p>

Figure 1: *Continued*

	Inhibiting factors	Enabling factors
Tender and selection	<p>Corruption and failure to apply proper procedures undermines efficiency and inflates costs</p> <p>Selection based on lowest price leads to shortcuts and neglect of social obligations</p> <p>Intense competition pushes contractors to under price and prohibits local contractors from bidding</p> <p>Social performance not considered in prequalification</p> <p>Registers of contractors/consultants are not always robust and classification systems lack credibility</p>	<p>Greater transparency in tender and awards, including feedback to tenderers, to tackle corruption</p> <p>Blacklisting, codes of conduct and integrity pacts can also be used to reduce corruption</p> <p>Two envelope system (as applied by UNDP) allows for evaluation on merit and price</p> <p>Social performance of companies (eg health and safety record) included in assessment criteria for prequalification and/or registration</p>
Contract agreements and documents	<p>Responsibilities for social objectives are not well defined in contract documents or supported by project design and budget</p> <p>Unclear definition of responsibilities is a particular problem in community contracts</p> <p>Vague and conflicting messages regarding social obligations in contracts (eg contractors must take 'reasonable' steps to protect the environment; free to employ who they wish but local labour 'encouraged')</p> <p>National standards and guides are lacking</p> <p>Difficult legal language in contract documents means they are often not read or understood</p>	<p>Social objectives detailed in specifications, included in designs and budgets and priced in the tender (as with detailed specification for combating HIV/AIDS in standardised documents of MDBs)</p>
Monitoring, enforcement and evaluation	<p>Poor technical and social performance on projects due to inadequate supervision</p> <p>Distance of sites makes supervision difficult but ignorance of social issues and collusion between client-contractor-consultant are also common</p> <p>Minimal monitoring and enforcement by government local laws and regulations</p> <p>Standards and indicators not sufficiently well defined</p> <p>Post contract evaluation limited and focused on financial audits</p> <p>MDBs more concerned with disbursing funds than project outcomes</p>	<p>Projects reviewed mid term and outcomes (including poverty reduction impact) monitored</p> <p>Social obligations in contracts monitored by the project team, with incentives for compliance and sanctions for non-compliance (as undertaken on DFID projects in Ghana)</p> <p>Workers' made more aware of their rights to aid monitoring of labour standards</p> <p>Independent monitoring and auditing of social performance</p>

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4. Role of key stakeholders

In figure 2 (pages 39-40) some of the inhibiting and enabling factors have been rearranged according to the stakeholder who is mainly responsible for the particular factor. It can be seen that a very large degree of influence rests with the donors, governments and clients. Consultants acting as designers can have some influence but ultimately they are responsible to the clients and take their cue from them. This section sets out the role and responsibilities of the stakeholders.

4.1 Donors

Some of those consulted complained that many donors are 'results oriented', that is more concerned with the asset to be delivered than with the delivery process itself. Another problem is that donors' initial feasibility appraisals and final reviews focus on financial rather than technical or social issues, which could partly be because donor performance is measured by the quantity of funds disbursed rather than by the quality of the investment. This means that drawings and specifications are not reviewed by the donors. Donors may also place restrictions on eligibility to bid ('tied aid') which can lead to less than optimum value for money.

At the same time as setting the conditions and standards, donors state that the responsibility for the implementation of the project, and therefore for the award and administration of contracts under the project, rests with the borrower. What is not clear is whether the borrower can be fully responsible when they have not set the conditions, terms and standards, with which they have to comply. It is therefore understandable that consultants and contractors report confusion over the roles of the client and donor and a lack of project leadership. The lack of leadership

can lead to poor implementation and a 'blame game' over responsibility for the ensuing problems.

On the other hand, donors have considerable power to promote the achievement of social objectives and there are examples where these powers have been used to good effect. For example, donors are driving procurement reforms and building the capacity of procurement officials, a development which is linked to the move on the part of several donors to provide budget support linked to national and sectoral strategies. The OECD/DAC is leading this initiative. The MDBs have now adopted standardised contract documents which do address some social issues, notably minimum labour standards and HIV/AIDS. MDBs have also recently agreed a common approach to fight corruption which involves improving the consistency of their investigative rules and procedures. They have also agreed to share information and ensure that compliance and enforcement measures taken by one institution are supported by the others. The banks also agreed to collectively develop proposals to assist country capacity in anti-corruption measures and to cooperate with civil society and

institutions to enhance transparency and accountability.⁵⁵

Donors can be even more influential in the projects that they fund directly. For instance, they can ensure that social objectives are incorporated into the design and budget and they can monitor the outcomes. Examples include the monitoring of poverty reduction and sustainability on EU funded water projects and monitoring of labour standards on labour-based construction projects funded by the International Labour Organisation.

4.2 Private financiers

Private financiers have not traditionally influenced the design or delivery of projects to achieve social objectives. But pressure groups and policy changes are nudging them in this direction, although only in terms of managing social risks not the social opportunities.⁵⁶ Many private financiers have adopted the 'Equator Principles' (see Box 5) to guide the management of social risks. They request borrowers to agree to abide by the social objectives inherent in these principles as part of the lending framework and they may undertake some monitoring of the outcomes. However, it is not clear how often the social conditions attached to the loan actually filter down into the tender

“Donors have considerable power to promote the achievement of social objectives and there are examples where these powers have been used to good effect.”



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and contract documents. Private financiers generally require EIAs and sometimes SIAs. Some have deferred to IFC standard environmental policy and require EIAs consistent with these standards. The monitoring of environmentally sensitive projects through project sponsor reports has increased, and some projects have been reviewed by independent environmental consultants. Finance for small loans for local enterprises has been limited due to the risks involved and the administration costs.

4.3 Governments

Governments are responsible for setting the framework in which projects are identified, planned, designed, procured, constructed and maintained. They also have responsibility for setting and enforcing standards for the asset itself, for the way in which it is constructed, for the treatment of the labour involved in the construction process and the communities affected by the process or the product.

Governments were criticised by industry stakeholders for failing to develop national, regional and/or sectoral plans and for failing to align projects to plans when they exist. Political considerations too often dictate which projects are approved and the priorities may be subject to frequent change, depending on who is in power. Governments are also criticised for failing to develop standards for social and environmental requirements, for not maintaining robust registers of contractors and consultants, for lack of transparency in the procurement system and for failing to inspect construction sites and enforce compliance with the law.

On the other hand many countries do have, or are developing, national policies and plans to achieve social objectives such as poverty alleviation and instances can be cited here of project identification that is in line with these plans. For example, at

“It is the client who must create the enabling environment and culture for successful project implementation.”

the 2005 Indonesia Infrastructure Summit the Government announced a series of projects that would be put out for tender which were linked to their infrastructure road map (further details are included in the Indonesian case study in Appendix I).

Budgets can be monitored by civil societies, which governments can promote. Governments of many countries are reviewing procurement procedures and undertaking reforms. Examples were also found of governments (with help from donors) adopting and promoting appropriate labour standards, incorporating these standards into contract documents and ensuring that they are monitored by raising awareness among the workers and the rest of the project team.

4.4 Clients

All those consulted were unanimous in the view that it is the client who must create the enabling environment and culture for successful project implementation. The public sector client may be a ministry or department of the central government or a semi-autonomous agency. Increasingly it is a local authority (regional, district, municipal) and in some cases a community group which acts as the client. Clients, particularly in Africa, are often unfamiliar with procurement procedures, tend to underestimate costs, encourage overly detailed design and focus on getting the lowest price with little attention given to operation and maintenance or to social objectives. Current moves to decentralise procurement to local authorities are likely to exacerbate many of these problems. However, clients do have the authority to promote the achievement of social

objectives should they so wish. They can do this in a variety of ways, for example by incorporating social issues into the design of the project, ring fencing funds, detailing requirements in the contract documentation, offering preferences to local contractors or suppliers or to those who fulfil other specified social objectives.

4.5 Consultants

Consultants are employed by, and responsible to, the client. However, they report that they often have to juggle demands from both clients and financiers which can cause tension. Most consultants say that they recognise the importance of environmental and social management and they can exert some influence over the client. They are also being engaged by donors in capacity building and management roles. However, many consultants are weak on what are seen as ‘softer’ issues.

4.6 Contractors

Contractors have some power to influence the achievement of social objectives. They are responsible for the terms and conditions under which labour is employed and for relations with the local community during implementation. They can increase local content by subcontracting to, and/or buying from, local suppliers. They can also generate employment by using labour-based techniques for sections of the work, but only within the parameters set by the overall project design.

Contractors maintain that they do what is required of them and will fulfil social obligations so long as they are specified in the contract and have been budgeted

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for. However, intense competition for work (as well as the desire for profit) often leads to price cutting at tender stage and subsequent failure to comply with regulations and standards in order to cut costs. In the absence of strict enforcement of standards by the government, contractors are in practice free to choose which standards they will observe. International contractors predominate on large projects in sub-Saharan Africa and recent research has revealed a very wide variation in standards practices by the various nationalities.⁵⁷

In many African countries, local contractors and suppliers are under-capitalised and inexperienced and have difficulty winning contracts. International contractors often partner with local companies and this can be beneficial to both partners. Joint ventures support access for local contractors that do not have the managerial or financial capacity to bid for work on their own. Simultaneously, the local contractor will bring knowledge of the local culture, customers and practices, including environmental and social context. There is evidence that joint ventures have facilitated knowledge transfer in Asia and the Middle East leading to an increased pool of qualified local contractors. However, in other regions the transfer of technology through the training and development of local companies may be quite limited.

4.7 Non-governmental organisations (NGOs)

NGOs are beginning to play a role as consultants or as independent auditors. They have undertaken work with communities in identifying small-scale infrastructure projects and in planning, design, finance, implementation, operations and maintenance. There are good examples of this practice from Africa, such as WaterAid in Nigeria, which aims to bring plans to meet the MDGs down to the local level instead of adopting the usual national level approach. The NGO believes that 'the decentralised Local Government Councils hold the golden key to achieving the MDGs in Nigeria'.⁵⁸

NGOs are also being contracted by contractors to deliver the HIV/AIDS management obligations that are now requested in projects funded by the development banks and other donors. In the few cases where this was reported, their performance was said to be good, as was the relationship between the contractor and NGO. The costs of engaging NGOs were also considered reasonable.

4.8 Communities

There are examples of the community, usually through a community-based organisation (CBO), working as the client, contractor, operator or performance monitor on small, donor funded projects. The available evidence suggests that the

record of communities as managers of projects is largely positive with a high quality of asset performance and service delivery being achieved at a low cost. However, there are also reports of communities being used for their labour alone, while not being engaged in the planning and procurement process or consulted on the project type, key delivery and management issues. It is also suggested that community leaders may appoint the weakest members of society (usually the poorest) to undertake the labour inputs.

There are indications of renewed interest in increasing the role of the community in various stages of the procurement process, in particular in monitoring and in operations and maintenance. Development organisations stress that infrastructure tends to be unsustainable where the necessary institutional frameworks do not exist within the communities and local authorities. WaterAid in Nigeria is supporting the construction of physical water and sanitation infrastructure in parallel with the establishment of water and sanitation committees based on traditional community institutions. They have also supported the training of local government representatives to understand the roles and responsibilities of participatory community project management and managing facilities at community level.

“In the absence of strict enforcement of standards by the government, contractors are in practice free to choose which standards they will observe.”

Figure 2: Major inhibiting and enabling factors within the sphere of influence of main actors

Actors	Inhibiting factors	Enabling factors
Donors	<p>MDBs results oriented: concerned with the asset more than the delivery process and exclude non-economic objectives</p> <p>Success measured by disbursement (quantity) rather than quality</p> <p>Tied aid raises costs and limits effectiveness</p> <p>World Bank procedures inflexible and exclude possibility of adapting the strategy to suit the project</p> <p>FIDIC contracts too adversarial with all risk passed to contractor</p> <p>Donors focus on financial auditing with minimal monitoring of social outcomes</p> <p>Blacklists not robust</p>	<p>Donors are funding capacity building and driving procurement reform</p> <p>MDBs agreed a common approach to fight corruption</p> <p>Move to budget support linked to national and sectoral strategies</p> <p>Funds to local government linked to performance</p> <p>Donors promote social objectives in design and budgets to meet them</p> <p>New standardised documents of MDBs do address social issues</p> <p>Donors can monitor social outcomes (poverty reduction on EU water projects: standards on labour-based works)</p>
Private financiers	<p>Have not traditionally influenced design and delivery or been concerned with social issues</p> <p>Have begun to focus on minimising social risks but not on maximising opportunities</p> <p>Social conditions attached to loans may not filter down to procurement</p>	<p>Adoption and monitoring of the 'Equator Principles'</p> <p>Social objectives included in the lending framework</p> <p>Mandatory EIAs</p>
Governments	<p>Lack of national, regional or sector plans and/or failure to align projects with plans</p> <p>Short term changes in line with political leadership</p> <p>No standards for social and environmental requirements</p> <p>Registers of consultant and contractors not robust</p> <p>No proper inspection of sites</p> <p>Failure to enforce compliance with law</p>	<p>National policies to promote social objectives and ensure project identification is in line with plans</p> <p>Promote civil society monitoring of public budgets</p> <p>Raising awareness among workers of their rights can aid monitoring of labour standards</p> <p>Promotion of integrity pacts among procurement officials</p>

Figure 2: *Continued*

Actors	Inhibiting factors	Enabling factors
Clients	<p>Lack of familiarity with procurement, especially in local authorities</p> <p>Unrealistic estimates of costs</p> <p>Responsibilities ill defined</p> <p>Tendency to encourage over design</p> <p>Main concern is lowest price</p> <p>Little attention to operation and maintenance or social objectives</p>	<p>Can create the environment for the achievement of social objectives by:</p> <ul style="list-style-type: none"> Incorporating social issues into design Ring-fencing funds for social objectives Detailing requirements in contract documents Preferences for domestic goods/services Pre-qualifying on social performance
Consultants	<p>Not strong on 'softer' issues</p> <p>Responsible to client and donors and may have to juggle conflicting demands</p>	<p>Can exert positive influence on clients</p> <p>Engaged by donors in monitoring and capacity building roles</p>
Contractors	<p>Contracts often under priced to win tenders</p> <p>Social objectives neglected</p> <p>Companies have wide variety of standards</p> <p>Limited involvement of local contractors or suppliers</p>	<p>Responsible for labour standards</p> <p>Can generate employment, but only within the parameters set by design</p> <p>Can increase local content by buying from local suppliers and subcontracting</p>

5. Conclusions and recommendations

Inhibiting factors

The research has shown that there are a large number of factors in procurement procedures that seem to be inhibiting the achievement of social development objectives. The main inhibitors are:

- lack of public consultation, national plans and other clear criteria for project identification
- failure to incorporate social objectives in project appraisal, design and budget
- failure to plan and budget for operations and maintenance
- inflexible procurement strategies and adversarial contract forms
- intense competition and selection based on lowest price
- vague and conflicting messages regarding consideration of social objectives in contract documentation
- few clear standards for social (and environmental) objectives and failure to monitor and enforce the standards that exist
- failure to address corruption which is a major inhibitor at every stage of the procurement cycle

The analysis of the role of the various stakeholders revealed a number of other inhibiting factors:

- MDBs are results oriented and success is often measured by the quantity of funds disbursed rather than the quality of outcomes

- confusion over the roles of the client and donor can lead to a lack of leadership and poor implementation
- tied-aid raises cost and limits effectiveness
- donors focus on financial auditing with minimum monitoring of social outcomes
- private financiers focus on social risk and neglect social opportunities
- governments fail to maintain robust registers of consultants and contractors
- government fails to enforce regulations

Role of stakeholders as agents of change

The analysis also revealed the key role played by those involved in the early stages of procurement. It is by now a well established fact that the decisions taken in the early stages of project procurement have the greatest potential impact (negative or positive) on cost.⁵⁹ This is also true for the identification and exploitation of social development opportunities. Hence the greatest chance to influence the setting and achievement of social development objectives in public procurement rests with the donors who provide much of the funding, in partnership with the governments and clients who create the culture for project implementation. Consultants acting as designers also have some influence but they are acting for clients and take their cue from them. Contractors have control over employment and labour standards and some influence over purchasing but only within the parameters set by the overall project design and budget.

Donors are currently driving procurement reforms in low income countries and helping to build the capacity of procurement officials. This is related on the part of some donors, led by OECD/DAC, to a move away from project funding toward budget support linked to national and sector plans, which is seen as a factor in improving the effectiveness of Aid. These initiatives would seem to have potential to enhance delivery of social development objectives. The recognition that the quality of public procurement systems plays a key role in influencing development outcomes and contributing to the achievement of the MDGs, rather than being simply a technical function, is welcomed. The OECD objectives of harmonising donor policies and channelling funds through country budgets are also key to promoting 'ownership' of donor funded projects and programmes and improved development outcomes. Eventually government should hold the responsibility for finance, procurement and outcomes as this will make it easier for national civil groups to measure accountability.

We have also seen in the case studies that the development banks have now adopted standardised contract documents that do address some social issues, although there are questions over enforcement. MDBs have also recently agreed a common approach to fight corruption, to develop proposals to assist country capacity in anti-corruption measures and to cooperate with civil society and institutions to enhance transparency and accountability. It is now important that these opportunities are taken up and that inflexible procurement procedures and the drive for market competition do not compromise donors' desire to derive increased social benefit.

A
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B
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FreeFoto

C
Credit:
Tamara Kummer

Governments are also influential in promoting social objectives as they set the framework in which projects are identified, planned, designed, procured, constructed and maintained.

Governments of many countries are reviewing procedures and promoting reforms, although these efforts can sometimes be complicated by decentralisation programmes. In some countries the social performance of companies is being included in assessment criteria for prequalification or registration. Environmental Impact Assessments are increasing and Social Impact Assessments are beginning to emerge. Community groups are playing an increasing role in project identification, management, operation and maintenance with positive effect. These developments indicate a growing momentum to encourage good practice and social development impacts in public procurement.

Two particular examples of good practice can be singled out. The first is the use of 'targeted procurement' by government clients to assist disadvantaged groups. Targeted procurement is a system for awarding tenders that provides the option to set targets or goals to achieve socio-economic objectives that are contractually enforceable, whilst retaining donor rules

of competition, fairness, efficiency and transparency.⁶⁰ A scoring system leads to bidders competing on the basis of price and how they incorporate the social objectives into the project (for example, 90 points for price and 10 points for social objectives). Developed in South Africa to specifically target those groups disadvantaged under the apartheid system, the system has also been used to support local economic development, to promote growth within the small business sector and to target the unemployed in poverty alleviation programmes. However, successful implementation clearly depends on appropriate planning and design and clear identification of goals, as well as the willingness and ability to apply sanctions to contractors who fail to deliver the social objectives they are contractually committed to.

The second example addresses the key issues of monitoring, evaluation and enforcement. One clear message emerging from the research is that contract agreements that require certain actions on the part of the contractor (even if this is simply to observe the law of the land) have to be monitored and enforced through incentives or sanctions. The Social Aspects of Construction project, supported by UK/DFID and tested in

Ghana, has demonstrated how social obligations in contracts (in this case labour standards) can be monitored as part of the supervisory process within the project team.⁶¹ The process is greatly facilitated if the labour force is fully aware of their rights and entitlements and all the key stakeholders are involved. On DFID funded projects in Ghana the stakeholders (including the client, contractors, labour department and trade unions) collectively identified the appropriate labour standards to apply and periodically reviewed problems and proposed solutions. Contractors complying with the standards were rewarded with bonuses. Over time and after a number of different monitoring approaches had been tried, the supervising engineers began to take over the role of monitors. The experiment has shown that consultant engineers can effectively monitor compliance with social obligations and review accounts when these are clearly defined and budgeted in contract agreements.

Recommendations

A number of key messages emerge from the research. These need to be kept in mind when proposing changes to procurement procedures in order to enhance the delivery of social development objectives.

First, it is clear that there are many stages in the procurement cycle and actions in one stage are constrained by decisions taken earlier. The very first decision, with possibly the biggest potential social impact, lies in the choice of the project. Therefore, project identification must be carried out in a clearly defined and transparent manner. It is suggested that it should be in line with national, local or sectoral plans and carried out in consultation with the community. The participation of user groups and civil society is widely believed to be beneficial

“Governments of many countries are reviewing procedures and promoting reforms.”



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B



C

at every stage of the procurement process from project identification right through to completion, operation and maintenance. It can also increase the social benefit derived.

Second, it is equally clear that there is little point in including obligations in contract documents (whether in the agreement or specification) that require certain actions on the part of the contractor unless the actions have already been considered at the design and planning stage and budgets drawn up accordingly. Some method has also to be agreed for monitoring and enforcing compliance. If these things are in place the contract agreement has potential as a means to promote social objectives at the tender stage.

Greater flexibility is needed in identifying a procurement strategy. The 'one size fits all' approach creates an inflexible system that is not appropriate for all projects. A move away from the lowest cost approach is envisaged, with a greater willingness on the part of donors to allow two stage and targeted procurement methods. A more flexible approach by clients and donors could improve the delivery of the project and the achievement of social objectives.

Fourth, the long recognised problem of poor maintenance is still very real. This is traced to the failure to consider the whole life cycle of an asset during planning and design, so as to ensure that the asset can be operated, as well as maintained, at minimum cost and with the resources that are available locally. If these considerations are at the forefront of decision making it is likely that 'local content' (of materials, labour and business) will automatically be enhanced. Respondents from all of the case study countries and many representatives of international agencies

“There are many stages in the procurement cycle and actions in one stage are constrained by decisions taken earlier. The very first decision, with possibly the biggest potential social impact, lies in the choice of the project.”

maintained that promoting local content is an efficient means of delivering significant social development impact. They recommended that investment to meet the MDGs should use and strengthen national engineering industries and resources.

Finally, it is worth noting that corruption (a major inhibiting factor) is pervasive and must be tackled at all stages of the procurement cycle. Tackling corruption at the tender and selection stage alone (which is the stage that currently received the most attention) is unlikely to be effective as the problem will simply move to a different stage of the process. The first step in tackling corruption is to increase transparency. It is therefore essential that processes at each stage of the procurement cycle are as transparent as possible.

On the basis of the above a number of recommendations are put forward for consideration.⁶² The recommendations are directed at improving existing mechanisms

in procurement procedures to deliver social objectives. They are presented below according to the research definition of procurement procedures starting with 'project identification, planning and design' through to 'monitoring, enforcement and evaluation.' The table also shows who should take the responsibility for implementing the recommendation by identifying the principal and secondary stakeholder.

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Credit:
Engineers Against Poverty



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Further research is needed to test the feasibility of implementing the recommendations in particular contexts, as well as to test their effectiveness in achieving social development objectives.

Procurement stage	Recommendations	Principal stakeholder	Secondary stakeholder
Identification, planning and design	Project identification should be in line with national, local or sector plans and/or based on public consultation	Government	Donor
	The whole-life cycle of the asset should be considered during planning and design, and an operation and maintenance strategy developed for each new project	Client	Donor
	Social objectives should be clearly identified at the planning stage and incorporated into the design	Client	Donor
Finance and procurement strategy	Funds are set aside in the budget for the realisation of social objectives	Client	Donor
	Consider alternative procurement strategies to ensure the appropriate approach to deliver the specified social objectives	Client	Donor
Tender and selection	Social objectives must be clearly described in tender documents and explained at pre-tender meetings	Client	Donor
	Attention should be paid to the bidders' social performance and capacity to deliver social obligations	Government	Donor
Contract agreement	The project team must agree contractual mechanisms to deliver social objectives	Client	Contractor/ consultant
Monitoring, enforcement and evaluation	Contractual obligations must be monitored and enforced through incentives and/or sanctions	Client	Donor
	Social performance audits should be conducted with the same rigour as financial audits	Client	Donor/ consultant

Case study reports

Case study report A: India

A.1. Introduction

In the absence of a procurement authority at central or state level, procurement policy is left to the 'finance rules' at both national and state level to exercise some limited control on the procuring entities. Each ministry, department, agency, local body and state enterprise is free to devise its own procurement procedures. This has created a procurement system where, even though the government, the procurement objectives, the works and the bidding community are all the same, each agency will employ different procedures and practices.⁶³ The Indian Government's policy of decentralisation of powers to state, rural and city authorities and increased private sector participation has the potential to further increase the number of procurement procedures in use.

Despite such a disparate mix of procedures and practices, there is a surprising amount of consistency in the application of social objectives within procurement procedures, particularly labour objectives. These objectives are usually limited to reflect legislation. The exceptions are on MDB funded projects, where greater social objectives, particularly environmental objectives, are included.

Procurement procedures are also being affected by the Indian Governments belief that the private sector is in a better position to deliver infrastructure projects and its plans to decentralise delivery to local tiers of government. Part of the Tenth Economic Plan (2002 – 2007), these policies are key to delivering the infrastructure targets of the Indian MDGs. However, to date up take from the private sector has been lower than expected and the capacity and capability of local government is being questioned.

A.2. Procurement policy

A.2.1. No central procurement authority

Despite a recommendation from the World Bank Country Procurement Assessment Report for a central procurement authority, to date no such body has been created. Governance of procurement is left to the

individual public procuring entities at all tiers of government. The nearest example of such an authority is the Infrastructure and Project Monitoring Division within the Ministry of Statistics and Programme Implementation. This body contains some of the functions usually found in a procurement authority; however, it addresses the implementation of the project rather than procurement procedures. The Ministry will monitor the performance of infrastructure projects, assists the Public Investment Board in the appraisal of projects and identifies causes and their remedies for time and cost overrun. From their analysis they have identified that many projects suffer from inadequacies in project formulation and implementation, resulting in large time and cost overruns, affecting the very viability of the projects.⁶⁴

A.2.2. Limited central procurement rules

The Indian Government acknowledges the problems within the procurement procedures in the Tenth Economic Plan (2002 – 2007) by stating that 'procurement is an area especially prone to malpractices'. It seeks to resolve these problems by enacting 'legislations/regulations to mandate strictly competitive bidding of all contracts and procurement of works, goods and services by the Government and its entities'⁶⁵ As of February 2006, the research team had found no evidence that legislation was being pursued. Therefore, any notion of a procurement framework public procuring agencies have to comply with is limited to a few highly flexible rules within the 2005 General Finance Rules, published by the Ministry of Finance.

Rule 128 of the General Finance Rules, demonstrates the flexibility allowed to public agencies. It states:

...subject to the observance of these general rules, the initiation, authorization and execution of works allotted to a particular Ministry or Department shall be regulated by detailed rules and orders contained in the respective departmental regulations and by other special orders applicable to them.⁶⁶

The general rules for works are limited to setting out the powers to sanction works and the procedures for execution of works. Rules on tenders are limited to prescribing open tenders for works costing Rupees five lakhs to Rupees ten lakhs and limited tenders for works costing less than Rupees five lakhs. There are no statements on invitation to tender, prequalification system, what should be contained in the tender documents, tender evaluation process or the conditions of contract to be used.⁶⁷ Therefore, each individual agency has the power to determine their procurement procedures including which, if any, additional social objectives to include, beyond those contained in legislation.

This has created a system of multiple of tender and contract documents, directives, instructions and manuals. The World Bank Country Procurement Report provides an example where, in one state there are four different tender documents for road construction depending on whether if it is issued by the Public Works Department or the Municipal Corporation or the Metropolitan Urban Development Authority or State Road Development Corporation.⁶⁸ The qualification requirements, selection criteria, payment terms and the dispute settlement mechanism are all different.

Despite this, each agency tends to follow a basic framework of rules and procedures based on an open tendering system governed by a tender board with public bid opening and either a pre-qualification, or a two-envelope tender selection process used. These are then tweaked to meet their own requirements. Examination of the bidding documents from two central government agencies charged with procuring construction and maintenance work reveals how, although a general framework is followed, each include their own variations. Both the National Highways Authority of India (NHAI) and Pradhan Mantri Gram Sadak Yojana (PMGSY)⁶⁹ follow an open tender, public bid opening, a two-envelope tender selection process and a very similar set of conditions of contract. However, as part of

the qualification of the bidder, the NHA requires total monetary value of civil construction works performed for each of the last three years and an experience certificate in works of a similar nature and size for each of the last seven years. In comparison, the PMGSY requires five years for each category. The PMGSY debars successful bidders who fail to deliver to the employer a performance security of five percent of the contract price within ten days. The NHA requires a performance security of 10% of contract value.

A.2.3. Consistency of approach to social objectives

The bidding documents for both agencies state that the contractor must comply with labour regulations and then lists the salient features of the major laws. The list is extensive and includes the laws dealing with minimum wages, payment of wages, industrial relations, workers compensation in case of injury, pensions, maternity benefit, the prohibition of child labour and health and safety provisions.

However, no mechanism for measuring the implementation of these objectives could be found.

A.2.4. Contract inequity and negotiation

The Indian Government reports that inequity in construction contracts has been identified as one of the major maladies in project execution.⁷⁰ Contracts tend to be one sided with all the responsibilities placed on the Contractor and the client sharing none of the risks. Contractors are not entitled to compensation even when the delays are caused by the client.⁷¹ This approach can hinder the growth of small domestic contractors, as they do not have the financial capacity to manage the potential risks.

Once selected, negotiation with the selected contractor to reduce the winning price is common and even encouraged as the purchaser believes this saves public money. On occasion negotiations are carried out with all the bidders, requiring them to 'match' the price of the lowest or quote a revised lower price. However, tenderers build in the potential for negotiation within their bid⁷² negating any advantage the client believes they are obtaining. Negotiations are part of the pervasive problem of delays within the tender process and contract award. The Construction Industry Development Council (CIDC) reports that as many as 10 to 12 agencies may be involved in the procurement process, creating multiple layers of scrutiny, evaluation, review and approval with inevitable delays.⁷³ As the

World Bank report states, 'bidders jockey for positions, political pressures develop, each layer of review becomes an opportunity for corruption and, eventually, a decision becomes very difficult'.⁷⁴

The CIDC has issued specific guidance directed at the client to illustrate the importance of developing an effective contract supervision and monitoring system to ensure proper implementation of the project. The guidance does not state any specific measures that should be taken but emphasises that poor contract management has led to the historic problems of time and cost overrun.

A.2.5. Procurement legislation at state level

The promotion of greater transparency within the procurement process has been led at state level. Three states, Tamil Nadu (Transparency in Tenders Act 1998), Karnataka (Transparency in Public Procurement Act 1999) and the Punjab (the Punjab Transparency in Public Procurement Act 2002) have created a legal framework that provides for the creation of separate tender inviting and accepting authorities, the publication of a tender bulletin containing tender notifications and decisions, along with a comparative explanation of why a particular bid was successful.⁷⁵ However, this legislation does not attempt to address social objectives beyond improving the governance of public procurement.

A.2.6. Emerging attempts to harmonise procurement procedures

Attempts are being made to improve the contracts used and to develop greater uniformity in procurement procedures. Initiatives include the development of standard World Bank bidding documents specifically for India and the publication of a standard contract document for domestic bidding. The latter has been published by the Construction Industry Development Council, approved by the Ministry of Statistics and Program Implementation (MOSPI) and adopted by the Central Ministry of Public Works. It contains a set of 12 'Core Clauses' that have been drafted to share the risks appropriately, provide uniformity and transparency, and to improve the management of contracts.⁷⁶

The core clauses address eligibility and prequalification, variations, payment, liquidated damages (0.5% per week capped at 10% of contract price), incentives for early completion (0.5% per week capped at five percent), dispute resolution and risks. The new standard contractor includes the same

compliance with labour regulations and list of major laws as the bidding documents reviewed earlier.

A.2.7. Local content

The new standard contract continues a trend away from the policy of building the capacity of small and medium enterprises through the provision of a preferential margin. For example, the PMGSY bidding document states that no preference is provided. Historically, to promote small and medium enterprises, a preference margin of 15% was very common both at a national level and state level, where 'in state' enterprises were favoured over 'out of state enterprises'. In its report, the World Bank stated that this policy had become counterproductive in the current economic philosophy of liberalisation, privatisation and market mechanism and called for its gradual removal.⁷⁷ In its place the CIDC seeks to develop the capacity and capability of the workforce through the use of trained and certified workmen. There is a requirement that 20% of the contractor's workforce must have certified skills.⁷⁸

A.2.8. Improving quality

The CIDC is also looking at a new grading system for contractors, clients, consultants and the project itself that it believes will help the client to get away from accepting the lowest priced bid and instead encourage them to consider the quality of the contractor. As a consequence the contractor could quote a reasonable and reliable price and concentrate on raising the level of workmanship and quality standards of the work. The grading system would ease the burden on consultants of recommending the best party for the work. The proposed grading is based on professional qualifications (65%) and a subjective element (35%) with the grade then applied within the prequalification evaluation.⁷⁹

A.3. The Tenth Economic Plan and Millennium Development Goals

Perhaps the greatest influences on procurement procedures in India arise from the proposed framework expected to deliver the Indian Millennium Development Goal targets. The Tenth Economic Five Year Plan (2002 – 2007) states that the ultimate objective is substantial improvement in the well-being of the entire population. To achieve this objective, the Government has set a target of eight percent economic growth per annum. However, this target is viewed as an instrument of improved welfare. Likewise, achievement of some social goals is necessary for sustained economic growth performance in the future.⁸⁰ To emphasise the primacy of the

Table A1: The Tenth Economic Plan targets and Millennium Development Goal targets

Tenth Economic Plan targets	Millennium Development Goal targets	Where are we now
Poverty to be cut to 20% by 2007 and to 10% by 2012	Extreme poverty to be halved	National definition 26% International definition 35%
All children to be in school by 2003; all children to complete five years of schooling by 2007	Ensure that all children can complete a full course of primary education	8 out of 10 children start primary school and six complete the full five years
Literacy to increase to 75% of the population by 2007; cut the difference between male and female literacy by half	Eliminate the difference between male and female literacy completely	Literacy 65% Women 52% Men 74%
Reduce infant deaths to 45 for every thousand births by 2007 and to 28 per thousand by 2012	Reduce deaths due to childbearing by three-quarters	Infant mortality: 68 per thousand births Under-five mortality: 93 per thousand births
Reduce deaths due to childbearing to two per thousand births by 2007 and to one per thousand by 2012	Reduce deaths due to childbearing by three-quarters	Levels around four to 5.5 per thousand births
All villages to have sustained access to good drinking water by 2007	Halve the proportion without safe drinking water (target – 85% of people have safe water)	Access to safe water – 95% of urban families 84% of rural families (but not all sources are sustained)

Source: Department for International Development (2004), India Country Plan p4

social development goals, the Tenth Plan has set out a number of indicators. These indicators are set out in the table A1, against the MDG target and current status of the indicator.

In its First Country Report on the Millennium Development Goals, the Government states that the report reveals substantial improvements in the lives of people. The report details improvement in poverty reduction, gender parity in education levels and infant mortality.⁸¹ Despite poverty being cut in half over the last two decades and continual economic growth, there are still doubts as to whether India will meet all its targets. With one in four people (around 260 million) are still poor the challenge of meeting these targets is still great.

This challenge is all the greater are the wide differences in all of the Millennium Development Goal indicators between and among the 28 states. For example, the infant mortality rate in the country as a whole is 66 infant deaths per 1,000 live births. However, this figure can vary from 11 in Kerala to 90 in Orissa with similar variations at district and village levels. These differences are widening with poverty concentrated in the large and poorer states of the north and east;

54% of the poor live in Uttar Pradesh, Bihar, Orissa and Madhya Pradesh. The gap between rural and urban areas also remains large with two-thirds of the poor living in rural areas and dependent on agriculture for their living.⁸²

A.3.1. Targets delivered by decentralisation and private sector participation

To meet these challenges, the Tenth Economic Plan proposes the decentralisation of power from the centre to states, states to district and areas within districts to villages and increased private sector participation.

Decentralisation will see the Indian Government establish a policy framework and withdraw from being a direct provider. The local tiers of government are expected to establish the delivery mechanisms by engaging with the private sector and community groups. Although this leads to a significant increase in delivery agencies, the Government expects this will be more effective in delivering local needs.

However, questions remain as to the capacity of state and city authorities to deliver. In 2001, UNESCO reported that the shift in responsibility to local bodies had come without ensuring they had the capability and economic capacity to deliver.⁸³

The lack of central, state and local revenue and the reduction of current and capital expenditures on infrastructure and social sectors has led to uncertainty with regard to the provision of basic amenities to the urban population, particularly the poor.

Secondly, to ensure the operation and maintenance of the asset, the Government proposed the continuation of its economic liberalisation programme, with a move away from 'free' services at the point of access with user charges expected to augment budgets and the participation of the private sector, NGOs and community groups encouraged. It is these bodies' who will then set a pricing structure that is affordable to the community it serves or more pertinently, what the market will bear. The effect of these proposals is a move away from the traditional consultant design, contractor build, client operate and maintain approach. Public sector clients are increasingly using a greater range of procurement models, particularly variations of the build operate and transfer (BOT) model, to ensure that there are the resources to deliver the infrastructure asset and properly operate and maintain it.

A.3.2. Roads sector

The move towards self-financing road projects is a good example of this policy.

At both central and state level, the Government does not have the capacity to self-finance road projects to improve the network to the desired level. The Government estimated that annual investment would have to increase three to four times in real terms to meet the cost of maintenance and expansion. Different strategies are adopted to ensure delivery.

Firstly, the upgrading of the national highway network is to be carried out through 20 year concession contracts. Private sector participation is encouraged through a fixed annual payment and the potential income from road tolls. The National Highways Agency India and the regional states are directed to use private operators and award routes on the basis of least subsidy. In this way benefits would be clearly targeted and costs more apparent. It was anticipated that this procurement model would ensure that roads are maintained to an acceptable level when the traditional procurement and finance models have failed. However, the NHAI report that the initial response from the private sector has not been encouraging with problems including land acquisition, shifting utilities, cutting of trees and law and order.

The social objectives within the concession contracts go beyond the traditional contracts. In this case, it is likely to have been due to the influence of the financier. In this case the Asian Development Bank (ADB) provided technical assistance on social assessment, environment, resettlement, poverty impact assessment, economic and financial analysis, design standards and procurement. The concession contract includes Environmental Impact Assessments and Social Impact Assessment reports with any requirements built into the project documentation. Independent consultants are appointed to each project highway to determine the conformity with the environmental requirements set out in applicable law and permits. Society objectives include road safety requirements including reporting and recording requirements at each stage, provision of truck lay-bys, bus shelters, pedestrian and cattle crossings. The NHAI is also appointing NGOs to carry out an HIV/AIDS awareness programme on these concession contracts.

Secondly, a traditional procurement route for delivering rural roads to over 500 unconnected habitations by 2007 with the construction of 369,000km of all weather roads, with improvement in infrastructure a precondition to the delivery of rural services and the achievement of the MDGs. Launched by the Indian Government in 2000, the Pradhan Mantri Gram Sadak Yojana

(PMGSY) scheme is seen as crucial to an effective poverty reduction strategy. The plan was established following the establishment of a clear link between the poorest states and rural connectivity. The plan is centrally sponsored with costs estimated at Rs1,032,000. Although the aim of the scheme is poverty alleviation, the procurement procedures are not used to enhance other social performance objectives.

A.3.3. Water and sanitation

The Tenth Economic Plan (2002 – 2007) envisages 100% coverage of both rural and urban population in terms of access to safer drinking water. In order to deliver this the plan proposes to reorient the structure and functioning of water supply planning and implementing agencies to ensure sustainability, cost effective and socially acceptable operation and maintenance strategies. Water is to be viewed as an economic asset rather than a free commodity, with responsibility for source regeneration on all user agencies. This change in the supply of drinking water and sanitation facilities from a centralised, government controlled and supply driven approach to a more decentralised, demand responsive policy reflects the overall ethos in the Tenth Plan.

At a rural level, the plan stresses the development of water resources with the village as the focal unit. Villagers would be empowered to make decisions in the choice of scheme design, control of finances and management and by ensuring partial capital cost sharing and shifting responsibility of operations and maintenance completely to end users. Effectively, the villagers would become the client and as such can determine the procurement procedures used. However, the Government estimated that \$0.4bn per annum was required to meet the operation and maintenance costs of rural water supply and sanitation. With only \$0.05bn available, doubts must be raised about the ability of villagers to raise the shortfall, especially in the poorest areas.

The Midnapur model (a village in West Bengal) is held up as a success story in the provision of sanitation through the demand led solutions. Effectively the village becomes the client, part financier as well as the user. The model sees the creation of private sector retail outlets that offer a wide range of sanitation products and promotion of personal hygiene. The resources for construction come from users, with the emphasis placed on advocacy to create the demand for services. Local government agencies help facilitate the creation of the retail outlets and in the provision of technical

and organisation training to village masons and the women caretakers of hand pumps. The Water Supply and Sanitation collaborative Council state the most important lesson of models like Midnapur is that official agencies are most effective when they seek not to do the job themselves but to stimulate and support community based initiatives.

However, the Tenth Plan recognises that most State Governments lacked the financial resources and technical and management capability to provide water and sanitation to a rapidly growing urban population. The Government proposed the use of fiscal incentives and an urban reforms incentive fund to encourage urban local bodies to improve their financial capacity, undertake market driven reforms and enforce user charges. Future urban water supply and sanitation projects, should take into account the poor but had to be run on along commercial lines. The Government encouraged delivery to be achieved through private sector participation and public private partnerships through concession contracts and BOT agreements.

A.4. Health and safety

A.4.1. Legislation

In the mid-1990s, pressure from a coalition of trade unions and NGOs resulted in legislation designed specifically to protect the construction workforce. In 1996, the Federal Government passed the 'The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act' (Act 27 of 1996) and 'The Building and Construction Workers Welfare Cess Act'. The first Act contains detailed requirements for health and safety, as well as proposals for the establishment of 'Construction Workers Welfare Boards' in each state. The second provides for the raising of a levy on all new construction to provide social security benefits to construction workers (sickness, pensions etc) to be administered through the labour welfare boards. Together the two Acts are considered adequate to protect the health, safety and welfare of the construction workers in India. The following are some of the main provisions of Act 27 of 1996:

Rules for OHS

The appropriate government (state or central) may make 'Rules' to fix working hours, wages for overtime work, first aid facilities, canteens, other welfare measures and Rules for the safety and health of building workers: the central government may make model rules. Drinking water, latrines, bathing, washing, accommodation, crèches (if more than 50 women on site) etc. are to be provided at all workplaces.

If there are more than 500 workers at a site, the employer is to appoint a safety officer and constitute a safety committee with equal numbers representing workers and employers.

Inspection

There is provision for the appointment of a Director General of Inspection at the central level and inspectors at state level with powers as prescribed by the appropriate authority.

Employers are obliged to notify the inspectorate of forthcoming projects and are responsible for providing constant and adequate supervision and all other practical steps to prevent accidents ('employer' is defined to include the client where no contractor is engaged).

Employers are also obliged to notify the appropriate body of any accident causing death or absence from work for 48 hours; if five or more deaths occur the authority is obliged to investigate.

Penalties for failing to give notice of building works, obstructing inspectors or contravening safety measures include imprisonment up to three months and/or fines up to 2,000 rupees: for re-offending the term of imprisonment may extend to six months and fine to 5,000 rupees.

A.4.2. Implementation of the legislation

The 'appropriate' body to make and enforce the 'Rules' for carrying out the provisions of the Act is either the central or the state government. Central government is deemed the appropriate body for projects carried out by central government ministries and affiliates. In all other cases the Rules have to be drawn up and implemented at state level.⁸⁴ The Central Rules were notified in 1998. To date only a few states have drawn up the Rules. Even fewer have designated enforcement agencies. Five states (including Delhi) have taken the Central Rules as State Rules. It is currently proposed that the Central Rule should be adopted as 'model rules' by all the remaining states, to avoid delay in framing different rules for each state.

The establishment of welfare boards is also progressing at a very slow rate. The two southern states of Kerala and Tamil Nadu were the first to have functioning construction labour welfare boards, which were set up under earlier legislation. The state of Delhi constituted its Board in 2002, but has so far only a tiny fraction of the cess has been collected and no workers have been registered for benefits.

A.4.3. Prosecutions

To date no employer in the state of Delhi has been prosecuted for failure to comply with the requirements for health and safety under the Act, or for any other failure.⁸⁵

There has also been no prosecution in the state of Kerala, where the Labour Department is the body responsible for enforcing health and safety legislation under the Act.⁸⁶

At central level there have been an increasing number of convictions, rising from 81 in 2001-02 to 335 in 2004-05, with 2,565 cases pending. According to the office of the Chief Labour Commissioner (central) in New Delhi, in 2004 penalties were imposed in 268 cases and 214 cases to date in 2005. But the penalties are very small, averaging only Rs. 960 (US\$ 21) in 2004 and Rs. 1,300 (US\$ 28) in 2005.⁸⁷

A.4.4. Health and safety culture

A questionnaire circulated to contractors by the Construction Industry Development Council⁸⁸ in 2002 revealed that the legislation is adequate to safeguard the health and safety of construction workers. But it is not enforced. The main reason given for ignoring the existing legal obligations is 'apathy to worker welfare'.

Underlying this attitude is the fact that there is a large surplus of labour looking for work, much of which is migrant labour from the rural areas. Employment in the construction industry is largely on a casual basis. In 1993 it was estimated that 66% of the men and 95% of women working in construction are employed as casuals, and casualisation is still increasing.⁸⁹ In this situation, if workers are injured or killed they are easily and quickly replaced. A further factor is the long-established practice of recruiting labour through subcontractors and intermediaries. Subcontracting may go through several stages on a large project, creating a multi-layered contracting system. At the bottom are the intermediaries, known locally as *mistris*, *jamadars* or *mukadams*, who recruit and control the labour.⁹⁰ The long chain of subcontracting which effectively separates the principal employers from the workers, diffuses any claims for compensation resulting from accidents. While most builders probably have insurance policies to cover injuries/accidents of employees, they do not register their workers (as required by the legislation) and resort to private hospitals to avoid official attention and compensation claims. If disputes arise they are resolved out of court. In practice few claims are taken up and disputes rarely go to the labour courts. Even where employers are compelled to pay dues they rarely face further penalties.⁹¹

Women comprise up to 50% of the workforce. The Self Employed Women's Association (SEWA) based in Ahmedabad in the state of Gujarat has been organising women construction workers since 1998. A socio-economic survey conducted among women construction workers at the time revealed that almost 90% of them felt that their physical health had been affected because of their work. Accidents at work are also commonplace but the women receive no compensation from the contractor. In response to this situation SEWA has developed its own insurance scheme for women construction workers.

A.4.5. Accident reporting

Employers are required to report accidents to the 'appropriate body', which is the designated enforcement agency at central or state level. As the majority of states have not yet designated their enforcement agency, it may be assumed that only limited data is being collected. However, data on accidents has been obtained from the Construction Labour Welfare Boards in the states of Kerala and Tamil Nadu and is presented in Table A2 and Table A3 opposite.⁹² Accidents are only recorded for registered workers and not all workers in the construction industry are registered with the Boards in these two states. The official estimate of construction workers in the state of Kerala in 2002 was 1.5 million, 1.02 million of whom (68%) were registered with the Board.⁹³ Assuming that the number registered was the same in 2004-05, the death rate for that year would be 3.1 per 100,000 workers.

However the death rate for Tamil Nadu would seem to be considerably higher. The estimated number of construction workers in the state in 2003 was 2,075,000 but only 394,250 (19%) were registered.⁹⁴ This gives a death rate of 25 per 100,000 workers in 2003-04 and 48 per 100,000 workers in 2004-05.

A.4.6. OHS in contracts

The CIDC Core Clauses requires the contractor and subcontractors to abide at all times by all existing labour regulations, whether enacted at Central, State or local authority level.⁹⁵ The major relevant items of legislation are listed, including on health and safety issues, the 1996 Act and the Factories Act 1948 which it replaced.

There is also a requirement that the contractor should indemnify the employer (client) against any action taken against him as a result of the contractor failing to observe the regulations. If the employer has to make any payment in this respect, he is authorised to deduct it from money owing to the contractor. He also has the right to

recover money from the contractor for making good any loss or damage he has suffered at the hands of the contractor. Responsibility for the labour force rests entirely with the contractor.

Contractors interviewed for a film commissioned by the ILO confirmed that there are health and safety requirements in public contracts at central and state level. However, the penalties are not spelled out and no monitoring and enforcement takes place.⁹⁶ Hence the

majority of contractors ignore them. A large state consultancy based in Delhi, Engineers India Ltd, was campaigning in 2002 to make the conditions of contract more visible in the area of labour standards and environment and to strengthen compliance in these areas.⁹⁷ They expressed the view that considerable improvement is feasible in the employment of labour by contractors on major national projects, including improvements in living conditions, health and hygiene of the workforce. It was proposed that a number

of requirements for inclusion in the general conditions of contract should be spelled out and agreed with clients; and that the client and consultant should ensure means of monitoring for compliance before signing the contract. Progress on these issues could not be established.

Table A2: Accidents in the construction industry in Kerala and benefits paid

Year	Non fatal accidents		Fatal accidents	
	Number	Benefits	Number	Benefits
1998-99	2639	1,693,847	Nil	
1999-2000	9253	4,110,674	3	150,000
2000-01	6237	3,027,719	20	1,000,000
2001-02	4159	4,338,750	12	700,000
2002-03	6211	8,725,066	18	1,750,000
2003-04	5121	7,487,230	13	1,300,000
2004-05	5675	7,747,684	31	3,100,000

Source: Construction Labour Welfare Board, Trivandrum

Table A3: Accidents in the construction industry in Tamil Nadu and benefits paid

Year	Non fatal accidents		Fatal accidents	
	Number	Benefits	Number	Benefits
1995-96	2	27,500	1	50,000
1996-97	1	7,000	4	200,000
1997-98	6	10,375	6	300,000
1998-99	8	187,500	9	750,000
1999-2000	5	160,000	20	1,900,000
2000-01	24	460,000	69	6,850,000
2001-02	45	512,800	73	7,200,000
2002-03	7	137,000	84	8,400,000
2003-04	1	24,000	99	9,900,000
2004-05	13	595,000	189	16,880,000

Source: Construction Labour Welfare Board, Chennai

Case study report B: Indonesia

B.1. Introduction

Public procurement in Indonesia has been regulated through a mix of presidential decrees, ministerial directives, letters of information and other decrees and instructions by governors, mayors and bupatis (heads of district government), thus creating a confusing system of overlapping regulations. Public procurement has also been used to service local small and medium enterprises, through a classification system and applying preferential biases within the procurement rules. This led to strong criticisms from multilateral banks, with the Asian Development Bank describing it as a system of procurement that is not market driven, is prone to misuse and abuse and fails to result in the best value for money for public funds.⁹⁸

Since the late 1990s, the Indonesian Government has sought to simplify the public procurement regime through the use of presidential decrees, with the aim of creating an open, fairer, more transparent and efficient system. Keppres 80/2003 was aimed at providing a single regulation to govern public procurement of goods and services.

In parallel to this process is the 'Infrastructure Road Map' that aims to increase the level of infrastructure funding required to meet the Indonesian Government's twin objectives of reducing unemployment and poverty. Through new infrastructure laws the 'Infrastructure Road Map' seeks to establish a new regulatory regime, fair competition and a simplified pricing structure to ensure predictability of income and reduce project uncertainty. The Government anticipates that these new laws will create a more attractive environment for private sector participation. These new laws also clearly identify that infrastructure assets are to serve a social and environmental function as well as an economic one. However, these new laws create a new system of overlapping regulations.

B.2. Procurement policy

B.2.1. Public procurement reform to improve governance objectives

The basic principles for all government procurement were set out in Keppres 18/2000; however, this only updated the Law on Government Procurement of 1994. In addition, a new construction law (Law 18/1999) and a presidential decree pertaining to centralised approval of construction contracts (Keppres 12/2000) contained important procurement provisions.

This may have improved the public procurement regime but there was still a multiplicity of laws, decrees and regulations. For the procurement of civil works, not only have the three laws listed above to be referred to, but also draft laws on State Finance, Treasury and Audit, the Law on Small Scale Business (9/1995), and new regulations relating to decentralisation published in November 2000 that could lead local and provincial governments to adopt their own procurement rules all have to be considered. Various instruments that were issued following the presidential decree in 1994 seem to remain in force, or at least their legal status was not clear.⁹⁹ Following, a World Bank Country Procurement Assessment Report on Indonesia and with the assistance of the Asian Development Bank, the introduction of new procurement guidelines in Keppres 80/2003 has gone a long way to meet demands for a more efficient, competitive and transparent procurement system. However, the demand for a National Public Procurement Office, although an objective for the Indonesian Government, was not met through the decree. This allows each department/government agency or local government authority to compile its own procurement strategy from planning to implementation but within rules set out in the decree.

Each procurement transaction is managed by a project officer and a procurement committee. The decree does contain a model bidding or contract document but it does set out the requirements that the project officer must follow. These include rights and duties for the parties engaging in the contract award, value or contract price covering payment requirements, clear and detailed technical specification, explanation of the works including term and amount of the works, and dispute resolution process.¹⁰⁰ The project officer can also choose between four tender methods; general auction; limited auction; direction election; direct choosing. However, like the UNCITRAL model, the rules direct the project officer towards general auction, more commonly known as open tender, with restrictions placed on the other methods.¹⁰¹ The bidder has to submit three documents (administrative requirement documents, technical requirements documents and price offer document) to the procurement committee in three possible ways: one-envelope method; two-envelope method or two-phase method.¹⁰²

B.2.2. Anti-corruption pact

The decree seeks to improve the governance of the public procurement regime and reduce corruption by introducing the 'Pact of Integrity'. This Pact is unique among the case study countries, as it legally forces the project officer, procurement committee, supplier/contractor/consultant or other party to sign a declaration form, which contains a pledge to prevent and not commit collusion, corruption and nepotism through the procurement process.¹⁰³ All those directly or indirectly involved in the procurement process must also comply with a code of ethics.

B.2.3. Local content reform

Traditionally, public procurement in Indonesia has been used as a means of enhancing the capacity of small and medium enterprises. As recently as 2000, Construction Law 18/1999 and Keppres 18/2000 established a procurement system that had a specific purpose in providing work with the highest possible local content. In its report, the World Bank stated that these regulations had the effect of limiting competition, thus violating the principle of one country, one market, and forgoing benefits that arise from increased competition.¹⁰⁴ Competition was reduced by a classification system that placed contractors within four separate classes based on a judgement of their capacity to carry out the works. Contractors in a higher class were then unable to bid for those contracts reserved for a lower class. For works, contracts under Rp. 1 billion are reserved for small firms; between Rp. 1 and 10 billion reserved for medium sized firms; for contracts above Rp. 25 billion large firms are required to form joint ventures or subcontract with small and medium sized firms domiciled in the locality of procurement. Foreign firms are restricted to bidding for contracts above Rp. 25 billion and are required to form partnerships with or subcontract to domestic forms.¹⁰⁵ Competition was then restricted with advertising of tenders confined to a particular locality thus restricting bidding firms to those residing in the geographical area of the project for certain sized contracts.¹⁰⁶

In an ADB/OECD 'Thematic Review on Public Procurement', the Indonesian Government stated that Keppres 80/2003 removes the local government list of eligible suppliers/contractors. However, it is not clear if the classification system has been removed or modernised. The decree does stipulate rules for the advertisement of a tender.

B.3. Lack of progress in meeting MDG targets

The First Progress Report on the Millennium Development Goals published in February 2004, illustrates the huge task Indonesia faces in achieving its Targets. Despite data not being available for all indicators, it appears that only four of the eleven targets will be met. This includes Target 1: halving, between 1990 and 2015, the proportion of people whose income is less than one dollar a day. In fact Indonesia is striving to reduce the proportion of people who live on less than \$2 a day from 71% in 1990 to 35.5%.¹⁰⁷ However, even where the Targets will be met, there are large regional disparities that have to be overcome.

The problems set out in the report in reaching Target 10 (to halve by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation) illustrate the kind of difficulties Indonesia has to overcome to meet the MDG targets. The report states that only 50% of the population have access to water from improved sources with the quality not meeting drinking water standards.¹⁰⁸ In urban areas the proportion of people with access to piped water increased by 4.3% per year. The report blames the low priority given by regional and central government to the provision of water, a lack of finance and a supply-oriented service that does not accommodate community needs and consumers' expectations. As well as ensuring that planning is linked to demand and sufficient funds, the report advocates a service that mobilises users through community participation.¹⁰⁹

Since the publication of the report, the Indonesian Government has made poverty eradication as an agenda item in the Medium Term Development Plan, 2004-09 and elaborated in more detail in the Annual Government Work Plan. This document is to be used for reference by ministries and regional administrations in their annual development programmes.¹¹⁰ There is also a National Strategy for Poverty Eradication that has been compiled with the participation of all stakeholders. In addition, around 60% of regional administrations have compiled a Regional Strategy for Poverty Eradication.¹¹¹

B.3.1. Infrastructure regulatory reform to meet poverty reduction targets

The Indonesian Government's twin objectives are to reduce unemployment from 9.7% in 2004 to 5.1% in 2009 and reduce the poverty rate from 16.6% to 8.2% by 2009.¹¹² To achieve these targets economic growth has to increase from 5% in 2004 to 7.6% in 2009. To meet this economic growth target the Indonesian

Government states that \$145 billion is required from 2004-09, in infrastructure investment.¹¹³ The Government would be responsible for 20-40% of this total with an expectation that the rest will come from the private sector. Through its 'Infrastructure Road Map', the Government sets out how it will achieve this funding gap.

The Government seeks to establish an environment within which the private sector would operate, through deregulation, fair competition and a simplified pricing structure to provide that certainty. To achieve this, in 2004 the Government passed new laws for road and water and planned a further 11 government regulations for 2005 as implementing regulations for infrastructure laws plus two presidential regulations on land acquisition procedures and procedures for private sector participation in infrastructure sectors.¹¹⁴

B.3.2. Deregulation of roads

With these new laws influencing the procurement of an infrastructure asset, clients and potential bidders have to consider an overlapping set of regulations. For example, when procuring a new toll road, as well as complying with Keppres 80/2003, the client and potential bidders have to consider road law no. 38/2004, which aims to establish the role of the road operator, determine a transparent and public toll road management and define the community's participation in the operation of the road.¹¹⁵ In addition, they must consider Keppres 67/2005, which seeks to develop and improve cooperation between the government (at both national and regional level) and enterprises in procurement of infrastructure and related services.

Over the previous 25 years, the state-owned enterprise Jasa Marga acted as both regulator and operator of toll roads. Road law no. 38/2004, will create a new structure with a single regulator, Badan Pengatur Jalan Tor (BPJT) or the Toll Road Regulatory Agency, with responsibility for executing the concession agreements with the operator. Its anticipated that competition will improve through a transparent and competitive tender, evaluation and award process managed by BPJT. It will also simplify pricing by recommending the initial tariff based on tender and tariff adjustment monitor and take over the road at the end of concession period, and give and take recommendations on financing the scheme after the end of toll road concession.¹¹⁶ Jasa Marga will purely focus on its role as a toll-road operator.

The motivation for the Government's termination of Jasa Marga's role as regulator may have been its poor performance in building new toll roads (164 km since 1994) rather than the potential for a conflict of interest. However, with a commitment 'to use less confrontational procedures and methods devised to ensure that potential projects are properly identified, fairly procured and that disputes, when they arise, do not escalate'¹¹⁷ the Government is acknowledging that the procurement process has not always been appropriate. It may also explain the problem of developers abandoning toll road developments.

B.3.3. Uncertainty over future reform

The Government may have to give further consideration to the laws concerning roads and other infrastructure following the decision by the Constitution Court in December 2004 to annul Electricity Law no. 20/2002. The court ruled it was against the nations' Constitution to open the door to full competition in the electricity business.¹¹⁸

Under the law the Government would end the monopoly of Perusahaan Listrik Negara (PLN), the state-owned electricity company by liberalising the power sector with private companies able to produce and sell power to the public. The court stated:

Economic sectors which are important to the state and crucial for the welfare of the people are controlled by the state and must be developed to give maximum benefit to the people.¹¹⁹

The decision meant that the Government could not separate the generation and distribution of power, thus throwing into doubt the legal framework for the power industry and creating uncertainty about the future direction of reforms. The Government has since issued a new regulation that allows private sector participation in the form of a partnership with state-owned utility companies. The partnership will be established by the utility calling for bids for new power generation projects; the utility will also act as the single buyer. To provide a legal framework for this proposal, the Government has undertaken to revise the 1985 Electricity Law, taking into account the Constitutional Court's concerns, and will submit the revised law to Parliament.¹²⁰

B.3.4. Project identification and planning for private sector participation

At the 2005 Indonesian Infrastructure Summit, the Minister of State for National Development Planning, Sri Mulyani Indrawati, stressed that it was not the absence of funds that led to more private sector involvement, but their efficiency and the greater likelihood of a lower cost and price to the consumer.¹²¹

With such a demand on private sector input, clients and bidders procuring a road toll must consider Keppres 67/2005 (the second law), which seeks to develop and improve cooperation between the Government (at both national and regional level) and private enterprises in procurement of infrastructure and related services. It also provides a legal framework that sets how and by whom projects are identified. The decree states that a cooperation project between the public entity and private enterprise with the purpose of ensuring continuous funding by private enterprise for infrastructure, improve quantity, quality and efficiency of services through healthy competition, improve quality of management and maintenance in infrastructure procurement and develop the use of the 'user shall pay for the services received' principles.¹²²

The decree goes on to describe the type of infrastructure project that can be undertaken in cooperation with enterprise (transport, toll roads, drinking water, waste water, telecommunications network, generation, transmissions and distribution of electricity, petroleum and natural gas) and the principles upon which the procuring entity and enterprise shall operate (fairness, openness, transparency, competition, accountability, mutual benefit, mutual need and mutual support).¹²³

Accountability for the identification of projects is clearly placed with the Minister/Head of Institution/Regional Head. These individuals must ensure that each project conforms to national/regional medium-term development plans and infrastructure plans, and the Regional Spatial Arrangement Plan. Each project proposal that is undertaken in cooperation with private enterprise must include a cost and social benefit analysis, a pre-feasibility study and a cooperation plan with the private enterprise. It should also include a project finance plan that sets out the sources of funds, and the means of offer to the private enterprise consisting of schedule, process and methods of evaluation.¹²⁴

B.3.5. Social objectives

The recent legislation for roads and water resources establishes social and environmental objectives as a central component in the delivery of new infrastructure. For example, Article 4 of Law 7/2004 states:

water resources shall serve social, environmental and economic function that will be implemented and realised in a harmonious manner.¹²⁵

Both laws specify community entitlements and obligations. For example that the Road Law states the community should: provide input to the road operator; participate in the operation of the road; obtain benefit from the operation of the road; obtain reasonable compensation for any error in the development of the road and that the community is obliged to participate in maintaining order in utilising the road's function.¹²⁶

The law concerning roads refers to a series of laws that will impact on new road tolls, including the Law Concerning Environmental Management (Law no. 23, 1997).¹²⁷ The law states that environmental impact analysis must be carried out as part of a business plan or activity. An environmental audit is then carried out to measure the performance of the business and/or activity.¹²⁸ The analysis will have to comply with the Regulation regarding Environmental Impact Assessment (Government Regulation no. 51 of 1993) and Guidelines for Preparation of Environmental Impact Assessment (MOE Decree No. 14, 1994).

B.3.6. Decentralisation and the need to build capacity

Indonesia is similar to India and Nigeria in that it is a huge country with great diversity in terms of physical, social and economic characteristics. Some regions have good connections between urban and rural areas, while the eastern provinces are generally lacking in infrastructure and human resources. The very unequal distribution of poverty between regions has led to the proposal that the MDGs should be 'decentralised' and progress monitored in each region rather than in the country as a whole.¹²⁹ However, in the short term the plans to address this unequal distribution are first, the provision of clean water and basic sanitation in regions that lack these services and second, construction of roads, bridges and ports in isolated regions.¹³⁰

Roads provide a good example of the regional approach for infrastructure delivery. Road infrastructure projects in developed regions such as Java and Sumatra islands would be fully funded by the private sector. Due to the higher socio-economic status of these regions, the Government expects to attract a considerable level of interest from the private sector. The developing regions that cover Kalimantan, Sulawesi Islands and West Nusa Tenggara require basic connectivity between activity centres. The road projects in this region may not be financially viable; therefore the Government will consider some level of financial support for projects in these

regions, in partnership with the private sector. In newly developing regions that cover Maluku, the Papua Islands and East Nusa Tenggara, basic infrastructure requirements are met with financing mainly from the national and/or local government. Private sector participation will be in the form of turnkey contracts as well via structured annuity schemes.¹³¹

Decentralisation means that while the national government retains overall policy making functions, regional councils have been given the right to supervise the regional executive, to approve the regional budget, including expenditure allocation, and determine major policies at this level of government.¹³² The Government expects decentralisation to improve the delivery of public services, to make the public sector more responsive and accountable to the needs and priorities of regional communities and to increase community participation in the policy making and oversight process.¹³³

However, decentralisation is also seen as a major obstacle to the achievement of MDG objectives. The progress report for 2004 notes that, while the management of the provision of drinking water and other infrastructure has been delegated to district and city governments, financing mechanisms for drinking water facilities and infrastructure are still centralised. The report warns that the MDG target for safe drinking water will not be reached if present funding trends continue. It advocates the development of alternative financial resources at the local level, through the issue of municipal bonds, incentives to private finance and cost sharing with local communities. In 2005 reference was made to a Special Funding Allocation to be set up to distribute funding to the regions.

The extent to which decentralisation is seen as a major obstacle is illustrated by the following:

Rapid decentralisation in public service provision in Indonesia (and also other Asian countries) poses a serious challenge to fiscal efficiency owing to weakness at the local level... The current obsession of many, if not most administrations is how to maximise local sources of revenue... Another alarming signal evident in the decentralisation process is the tendency of local governments to reissue levies and charges that were previously abolished.¹³⁴

Fundamentally there is not the capacity within the regions to take on this additional responsibility. This problem can be illustrated by the numbers of

qualified workers required to implement the new procurement regulations and infrastructure targets. In 2000, the Government had estimated that approximately 4,000 project managers were required to carry out public sector procurement at the national level. This number increased to 30,000 when considering the numbers required for the project procurement committees and would increase again when local governments were considered.¹³⁵ It was also identified that a new cadre of trained government procurement professionals had to be created. In effect, a large capacity-building exercise was required.

Initially, this led to the publication of decree 339/KPTS/2003, 'Guidelines for

Implementation of Procurement of Service Construction by Government Institution' published by the Ministry of Residence and Regional Infrastructure. The aim of the decree was to explain the rules and disseminate Keppres 80/2003 through seminar meetings to those government agencies procuring construction works, including those in the regions.¹³⁶ This decree and its action plan can be seen as part of a larger capacity-building programme, initiated by the National Framework for Capacity Building to Support Decentralisation. This framework outlines the policy on capacity building in the context of decentralisation, explains the roles and responsibilities of the different stakeholders (national government, the regions, donor agencies)

and determines several principles for capacity-building activities.¹³⁷

To support the implementation of regional autonomy, in February 2005 the Indonesian Government published 'Guidelines on Capacity Building in the Regions'. The guidelines were published to assist in conducting a systematic capacity-building needs assessment and then formulating a comprehensive medium-term regional capacity-building action plan.¹³⁸

Case study report C: Kenya

C.1. Introduction

In recent years the Kenyan Government has taken steps to reform the public procurement system. The reform process has focused on the establishment of a legal framework, appropriate public procurement institutions and creating monitoring and evaluation mechanisms¹³⁹ culminating in the Public Procurement and Disposal Act 2005. This Act replaces a confusing set of regulations that were perceived to be weak in authority and open to corruption by public officials. This reform process has been central to governance objectives. However, labour and society objectives are included within procurement procedures for civil works, mainly due to other legislative requirements and donor policies.

Infrastructure is regarded as enabler to delivering the Kenyan MDGs. However, the infrastructure is in such a poor state work programmes focus on rehabilitation as opposed to new build. As a consequence, there is not the same emphasis on private sector participation and less drive towards new procurement models.

C.2. Procurement policy

C.2.1. Background to the procurement reforms

In 1997, the Government in collaboration with the World Bank commissioned a study to assess the country's procurement process and procedures. The study illustrated the problems of the public procurement procedures, particularly the lack of transparency, fair competition and professionalism among procurement staff.

Public procurement rules were based on the Ministry of Finance's Government Financial Regulations and Procedures. However, these were overshadowed by the frequency of circulars and guidelines issued by the Ministry of Finance to the procurement officers in ministries and local authorities. There were no sanctions against government officers who breached the procurement rules, with the Government Contracts Act providing public officers with immunity from being personally sued on any contracts which they make in that capacity.¹⁴⁰

C.2.2. Interim procurement authority and procurement rules to improve governance objectives

Due to the length of time it would take to introduce this framework, the Exchequer and Audit Act 2001 was used as an interim measure to help regulate public procurement and improve its governance. The Act created the Public Procurement Directorate to replace the Central Tender Board as the central organ for policy formulation, implementation, human resource development and oversight in the public procurement process.¹⁴¹ It would also produce standard operational manuals and documents; monitor, inspect and report on the functioning of the public procurement system; and develop, promote and support training and professional development of officials and other persons engaged in public procurement.¹⁴²

In October 2002 the Public Procurement Directorate published a *User's Guide to Public Procurement* with which all public sector institutions defined in the scope of

coverage had to comply. The guide set out the purpose of procurement, programming and budgetary considerations, procurement plans, rules for tendering and evaluation of bids and execution of contracts. It also set out a comprehensive code of professional ethics in public procurement management and provided a process or punishment if an official were accused of breaking the code.¹⁴³ The guide provided a single document which enabled all public officials to understand the public procurement process, made auditing easier and provided an easily accessible guide to the public.¹⁴⁴ It was an admission that the current system was unsatisfactory.

C.2.3. Governance objectives embedded in a legal framework

The Public Procurement and Disposal Bill was first submitted to Parliament in 2002 but only enacted in 2005. The objectives of the Act are to improve procurement rules to maximise competition and to create a strong governance system by ensuring integrity and fairness within the procedures and increasing transparency, accountability and public confidence in those procedures.¹⁴⁵ The Act seeks to remove the multi-layered approach by establishing an effective governance structure to monitor and report on the public procurement system. It then sets out the procurement procedures that public entities are legally obliged to follow similar to those in the UNCITRAL model.

Social objectives are focused on improving the governance of public procurement, with labour and society objectives limited

to providing a preferential margin of 10% in the evaluation of tender price for domestic companies. This policy was first established in Treasury Circular no.1 of 1998 and is thus a good example of the Act being used to sweep up the various circulars and guidance into a single document.¹⁴⁶

C.2.4. Procurement authority

The Act will establish a new Public Procurement Oversight Authority under the auspices of a new Advisory Board, to monitor and report on the procurement system but not to involve itself in actual procurement. Its objectives, such as preparing standard documents, providing advice and assistance to procuring entities, developing, promoting and supporting training and establishing an examination body are similar to those of the Public Procurement Directorate but do not appear to replace it.¹⁴⁷ However, the Authority has greater powers of investigation to ensure the public procuring entities comply with the new Act.

A failing of the previous system was the lack of an effective mechanism to deal with a breach of procurement rules. Under the new legislation, the Director General of the Authority has the power to order an investigation and debar any person or cancel procurement proceedings where a breach of the Act has occurred.¹⁴⁸ It also provides a mechanism for managing complaints and appeals against the application of procurement proceedings through a Review Board. The Review Board has the power to annul anything the procuring entity has done in the procurement proceedings, even the proceedings in their entirety.

Each public procuring entity has to establish its own governance structure to ensure decisions are made in a systematic and structured way.¹⁴⁹ The Act recommends establishing a procurement unit and a tender committee for the purpose of making the decisions specified in the Act and regulations.¹⁵⁰ All procurement has to be within the approved budget of the procuring entity and planned for. Responsibility for complying with the regulations lies with the accounting officer of the public entity¹⁵¹ but each individual within each public entity has to comply with the regulations of the Act. From the terms of reference set out in the Act, the Public Procurement Oversight Authority will then monitor the public entity for compliance.

C.2.5. Procurement rules

The Act directs procuring entities to adopt open tendering by restricting the use of other tendering methods. Open tendering is viewed as providing a fair, efficient and transparent system compared to restricted

tendering or direct procurement, which are viewed as providing an uncompetitive market and a greater opportunity for corruption and malpractice. The Act does not stop the use of alternative methods but sets out when they can be used and the process for their adoption.¹⁵² The Act permits the use of special procurement procedures such as concession contracts and design competition¹⁵³ but direct procurement can only be used in exceptional cases, such as when only one person is capable of supplying the works or if there is an urgent need for the works.

The procedures for open tendering, including how to prepare and invite tenders, what should be included in the tender documents, tender security and procedure for the submission, receipt, opening and evaluation of tenders are covered in the Act.¹⁵⁴ Both prequalification and single envelope bidding processes are permitted, with the latter stating that the tender evaluation criteria must be objective and quantifiable and applied in accordance with the procedures, taking into consideration price, quantity and service. The successful tender shall be the lowest evaluated price.¹⁵⁵

The Act also seeks to improve the governance of procurement procedures by improving the definition of 'corruption' as assigned under the Anti-corruption and Economic Crimes Act 2003 by including the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process in contract execution.¹⁵⁶ This definition and the definition of fraudulent practices are as defined in the World Bank standard bidding documents but the definition of collusion has greater clarity than that of the World Bank. The Act also stipulates that anyone who has a conflict of interest shall not take part in procurement proceedings.¹⁵⁷ A contract becomes null and void if a conflict of interest has occurred. However, the Act does not define or outlaw coercive practices.

C.2.6. Labour and society objectives included in standard contractual conditions

The Public Procurement Directorate has published a set of standard tender documents for building works, civil works, small works, services and consultancy. Each document details the procedures for setting out the tender document, what should be contained in each submitted tender, the tender evaluation process, how the contract award should take place, the procurement strategy, standard conditions of contract to be adopted and what detail should be contained in the specification. The conditions of contract

also set out a number of labour and society objectives that generally emphasise legal requirements.

The procedures used have many similarities but also some differences to reflect the type and size of work for which they will be used. For example, the use of a two-envelope system is restricted to consultants. This is also reflected in the amount of labour and society objectives included, with the standard tender document for civil works including the largest number. Based on FIDIC 4th edition, reprinted in 1992, the conditions of contract for civil works contractually oblige the contractor to formulate and enforce an adequate safety programme and provide a minimum set of labour standards in accordance with legislation with regard to wages, compensation for injury, hours of work, housing amenities and facilities, and trade union rights. The contractor also has to take measures to reduce or eliminate adverse environmental effects of the site works.

Local contractors also receive a preferential bias in the bidding process, advance payment of 10% with strong contractual penalties for late payment by the client. Like the MDB standard bidding document, contractors are encouraged to employ domestic staff and labour, with the same consequence over lack of enforceability.

In addition to proving, equipping and maintaining adequate first aid stations throughout the works, the specification sets out a contractual obligation to provide and maintain a fully equipped dispensary on site for the duration of the contract. This has to be staffed by a qualified clinical officer or nurse who is able to offer medical advice on HIV/AIDS and related diseases to the engineers and contractors' site staff. Contractors should allow for this in the rates and be responsible for all site welfare arrangements at their own expense.¹⁵⁹

Although the standard tender documents only make limited reference to additional social objectives, there are other legislative requirements that will lead to their inclusion within procurement procedures for civil works. The Environmental Management and Coordination Act 1999 not only empowers stakeholders to participate in sustainable management of natural resources but makes Environmental Impact Assessments (EIAs) a legal requirement for all development projects. EIAs are guided by the Kenyan Environmental Impact Assessment and Audit guidelines and their implementation is supervised and coordinated by the National Environmental Management Authority.¹⁵⁸

The effect of this Act and other legislation such as the Kenya Roads Board Act 1999 can be seen in the implementation of the northern corridor transport improvement projects. Not only has the EIA led to measures to mitigate adverse environmental impacts, it has also led to an assessment of the socio-economic impact of the road on the local community. This has resulted in the inclusion of other social objectives within the project's procurement procedures, such as the planning of roadside amenities, a comprehensive resettlement plan, HIV management, gender issues and training requirements for the project team. These measures were enhanced by the requirement to consult with all stakeholders, including project-affected people, in the Kenya Roads Board Act 1999 and supported by the policies of the World Bank, particularly their resettlement policy. In this case consultation took place through the creation of a local capacity in village elders and local administration. Examples of the inclusion of some of these social objectives can also be seen in water management projects.

Implementation of these objectives is achieved through specialist consultants (eg gender issues, resettlement processes) or as a specified requirement within the bidding document and subsequent agreement with the main contractor (HIV management and awareness, construction of roadside amenities).

C.3. Health and safety

C.3.1. Legislation

The principal legislation relating to Health and Safety in construction are as follows:¹⁶⁰

1. *Factories and Other Places of Work (Building Operations and Works of Engineering Construction) Rules, 1984: The Factories Act Cap 514 and the Factories (Amendment) Act, 1990 (renamed as The Factories and Other Places of Work Act, 1990)* – Contains provisions for registration of factories; general provisions for health and safety, including welfare provisions (drinking water, washing facilities, first aid box, etc); special provisions; offences and penalties, etc. The amendments of 1990 extend the scope of application to places of work other than factories and make other changes in the general provisions (plus addition of schedules, eg listing dangerous occurrences, occupational diseases, etc).
2. *Factories and Other Places of Work (Building Operations and Works of Engineering Construction) Rules, 1984*. These are guidelines for

implementation of the Act in the building and construction sector. Contains sections on contractors' obligations (notification of commencement of work, appointment of safety officers and technical provisions).

3. *Factories and Other Places of Work (Safety and Health Committee) Rules, 2004, L.N.No. 31* – These Rules apply to all workplaces which regularly employ 20 or more workers. The Rules require the occupier or owner to establish a H&S committees at the workplace, organise safety representatives of managers and workers, monitor hazards and risks identified by the committee, develop an H&S policy, provide information on any accident, dangerous occurrence or incident of occupational disease, facilitate an H&S audit of the workplace by a registered H&S adviser. It is the job of the H&S committee to conduct inspections, investigate accidents and dangerous occurrences, compile accident statistics and conduct training for workers. Each member of the committee is to have a basic course on H&S.
4. *New Occupational Safety and Health Act* – A new OSHA Act is currently in the Bill stage. A new code on OHS auditing is also being developed, as well as a code of practice for scaffolding.

C.3.2. Implementation of the legislation

The 1990 Act provided for the establishment of a committee to advise and make recommendations relating to the administration of occupational H&S. The Chair is the director in charge of safety and health with one nominee from each ministry, from the universities and from the social partners, the Federation of Kenya Employers (FKE) and the Confederation of Trade Unions (COTU).

The mandate for enforcing the Factories and Other Places of Work Act, 1990 as well as all of the Rules developed under the Act lies with the Directorate of Occupational Health and Safety Services (DOHSS), under the Ministry of Labour and Human Resource Development. The DOHSS was formed in 1990 on the basis of the old Factory Inspectorate which dates back to 1951. Activity picked up in 2004 with the passing of legislation making OHS committees mandatory in workplaces.¹⁶¹ The Directorate is headed by a Director, Assistant Directors and OHS officers and is represented in seven provinces and eleven districts. In 2004 the staff comprised 55 OHS professionals and 61 administrative support personnel.

The core function of the Directorate is the implementation of an effective system to ensure:

1. the prevention of occupational accidents
2. the prevention of occupational ill health and diseases
3. the prevention of damage to property

To achieve these objectives the Directorate engages in inspections to ensure compliance with the Factories Act and institutes legal proceedings against those found contravening the Act. It also conducts audits to identify dangerous machinery, equipment and health hazards, investigates occupational accidents and diseases, conducts medical examinations of employees and provides training and dissemination of information.¹⁶²

There are four divisions: safety, occupational health, training and field services.

Construction comes under the safety division. In the past (in the 1980s) DOHSS had a specialist construction unit which inspected large sites on a regular basis, but this is no longer the case.¹⁶³

There are currently only two officers with expertise in construction and the inspection and auditing services have been contracted out. At the time of writing 40 Health and Safety 'advisers' have been approved to cover the auditing of workplaces (required since 2004) in all sectors of the economy including construction.¹⁶⁴ The approved advisers negotiate with employers for auditing services and produce reports with recommendations which DOHSS then follows up. The annual report for 2004 shows that the Directorate carried out 1,689 routine inspections during the year and made 675 visits to check compliance with recommendations made during previous visits. It is not known how many of these inspections or visits were to construction sites.

In addition to auditing and inspections the DOHSS provides information and training in occupational safety and health. The Directorate does some training itself and also registers training institutions. A total of 970 workers from 54 different workplaces were trained during 2004 and 2000 certificates have been issued to date. However there are concerns that the pool of trainers is now drying up and there is no centre for training the trainers in Kenya.

C.3.3. Prosecutions

Under the Factories Act, DOHSS officers may prosecute offenders before a magistrates' court and serve an 'improvement' notice or a 'prohibition' notice if the offence is considered to pose

imminent danger. However, they have no power to fine offenders. If prosecutions are successful the magistrates' court can impose fines but the maximum fine is 40,000 Kenya shillings (US\$550).

In 2004, the Directorate prosecuted 34 court cases and issued 41 improvement notices. The prohibition notice is problematic and is currently being redrafted, hence only one prohibition notice was issued in 2004. The policy in 2004 was to secure voluntary compliance wherever possible and employ legal action as a last resort. However, there are expected to be more prosecutions for non-compliance in the future. In 2005 it is planned to strengthen enforcement of the regulations in the use of personal protective equipment and the establishment of safety and health committees.

C.3.4. Accident reporting

The OHS information centre (under the DOHSS) receives and disseminates information from the provinces and districts on *occupational* injuries and diseases. In the year 2004, 1,387 occupational accidents were reported, 95 of which were fatal.¹⁶⁵ The DOHSS itself admits that the figure does not present a true picture of the number of accidents occurring at workplaces, as enterprises are reluctant to report accidents for fear of prosecution. It was not possible to ascertain the proportion of reported accidents that occurred in the construction sector in 2004, but official data shows only 16 occupational injuries reported in construction in 2003, which is clearly a gross underestimate.

DOHSS is proposing to establish a *Worker Injury Insurance Scheme* in place of Workmen's Compensation. This would be a contributory scheme whose primary objective would be prevention through research, training and dissemination of information on OHS issues. Administration of the scheme by DOHSS is expected to improve the collection of data on accidents and injuries.

C.3.5. Health and safety culture

There is a formal institutional structure in the construction industry in Kenya. Contractors and consultants meet regularly under the auspices of the Joint Building Council (JBC) to discuss issues of concern to the industry, including government regulations. A recent discussion over a government regulation to ban the transport of workers in trucks found the JBC to be divided, with consultants in favour of pricing for improved transportation and contractors opposed.¹⁶⁶ The introduction of the requirement for H&S committees at workplaces was also

opposed by the contractors' organisation, the Kenyan Association of Building and Civil Engineering Contractors (KABCEC) and by the Federation of Kenyan Employers, but both were eventually won over by the DOHSS.¹⁶⁷

There is also a collective agreement between the employers, represented by (KABCEC) and the workers, represented by the Kenya Building Construction, Timber, Furniture and Allied Industries Employees Union. The agreement is renewed every two years and registered with the Industrial Court. The agreement currently in force has clauses setting hours of work, basic minimum wages and benefits, overtime payments, annual leave, public holidays with pay, sick leave and maternity leave and procedures for termination of employment. There are also clauses on safety and health, protective clothing, transportation, medical treatment and funeral/burial assistance in the event of death in service. Officials of the trade union are responsible for policing and enforcing the agreement.

Contractors confirm that union officials, as well as DOHSS inspectors, do visit the larger sites, especially when an accident has occurred. However, enforcement is not effective due to corruption. Also, while it is impressive on paper the agreement applies only to organised workers, who are mostly regular employees with the larger companies and the public sector. With the trend towards outsourcing of labour (ie the recruitment of workers through labour contractors) and the growth of the 'informal construction system', organised workers represent a small and decreasing proportion of the total construction workforce.¹⁶⁸ The official number of workers in construction in 2003 was only 23,500 but the real total is believed to be much higher, maybe 10 times higher. If only 2% of the economically active population were employed in the construction industry the number would be over 300,000. Thus, the majority of workers in construction are not employed on a regular basis, are not members of the trade union and are probably working without protection.

A study of a sample of construction workers in Nairobi in 2003 confirmed this situation.¹⁶⁹ It also revealed a lack of awareness among workers of their right to a healthy and safe workplace. Two-thirds of the workers questioned believed they were responsible for their own safety. This view is borne out by the fact that workers have to provide their own protective clothing and the only measures taken to prevent accidents are cautioning workers to be alert and not to come to work under the influence of drink or drugs. When

workers are injured there is no follow up investigation. The burden of care is borne by the workers and their families alone.

C.3.6. OHS in procurement and contracts

Contractual OHS obligations in national bidding document have been identified earlier in this case study.

Bid documents for five separate road construction projects, funded by the World Bank in the 'northern corridor' in May 2005 contain a whole section on labour with a large number of sub-clauses covering fair wages (applicable to subcontractors as well), freedom to join trade unions, health and safety provisions, keeping of records, notification of accidents, etc. Some of these labour clauses would appear to be a new departure from standard practice in World Bank procurement and compliance is recognised as a problem.¹⁷⁰

In the private building sector the JBC standard form of contract is in general use. This has been developed and modified over the years.¹⁷¹ The latest edition has a clause (11.1), which requires the contractor to indemnify the employer against any claim due to injury or death occurring during the work. The contractor is also obliged to comply with the statutory, industrial and other rules and regulations governing the employment and working terms and conditions of labour, and to ensure similar compliance on the part of all subcontractors.

The bill of quantities used with the JBC contract has various provisions relating to health and safety including the following:

- provision for the safety of workers
- approved methods of transport for workers
- construction of toilets to specification
- cost of insurances

Some contractors choose to put a price against these lines in the bill of quantities while others include the cost of insurances and other items in their overheads. The view of the consultants in the JBC is that, while in Europe it may be acceptable to include such items in general overheads, in Africa they need to be spelled out in detail and separately priced.

Although some contractors are reluctant to include the full cost of some items for fear of losing the tender, consultants are generally of the view that contractors should price for compliance with all of the regulations. Consultants should then be responsible for ensuring that the

regulations are adhered to. This view is demonstrated by JBC Practice Note 01/2005/B which states:

Transport of Workers:

All concerned to note that the Traffic Act rules currently effective shall be adhered to and contractors are requested to price for compliance with the same as no claims for additional cost shall be payable.

While the JBC is trying to serve as a conduit for information and tries to regulate the industry, it is hampered by the fact that there is no provision for registration of contractors in Kenya (unlike in Tanzania, where the Contractors Registration Board is very effective). Prequalification on the basis of the OHS record of the contractor is never practised in any formal sense, although there is informal assessment. However, good clients can do a lot to raise the standards of health and safety and labour practices generally. Kenya Breweries takes OHS very seriously, as does the Aga Khan Foundation.

C.4. The role of infrastructure in achieving the MDGs

C.4.1. Planning

The Government of Kenya's plans to reduce poverty have been outlined in a number of documents. The first to focus on poverty was the National Poverty Eradication Plan (NPEP) which was published in 1999 with a planning horizon up to 2015. This was followed by the Poverty Reduction Strategy Paper (PRSP) of 2001 with a planning horizon up to 2004. The PRSP was developed under the presidency of Moi, allegedly with an exemplary degree of participation at national and local levels.¹⁷² It was later supplemented by an action plan. However, it was never officially presented to the Bretton Woods Institutions and the last budget presented by the Moi regime (2001-03) took no account of it.

The new NARC government, which took office in January 2003, abandoned the PRSP and developed its own Economic Recovery Strategy for Wealth and Employment Creation, 2003 (ERSWEC). This was presented to the IMF and World Bank as the document that was to fulfil the function of a PRSP. Following a request to make the document more specific, the Government developed an interim investment plan (IP-ERS) to make the ERS operational. The ERSWEC/IP-ERS focuses on stimulating economic growth by improving infrastructure and the operating environment for private sector investment. Direct measures to address poverty are few.¹⁷³

The 2003 MDG Country Progress Report for Kenya identified the MDG targets in which the country was lagging behind.¹⁷⁴ The report showed that Kenya was moving away from the MDGs rather than towards them. At the end of 2003 Kenya was chosen as one of a small number of 'resource-constrained' countries where case studies would be carried out (the other African countries were Ethiopia, Ghana and Senegal) to identify specific public policy interventions and investments for achieving the MDGs and to calculate the resources needed to fund the investments. The resulting 'Needs Assessment Reports' were to be used to produce national-long term MDG-based plans, which would be used for monitoring and reporting on resource use for poverty alleviation.¹⁷⁵

In 2005 the Government issued a directive to mainstream MDGs into national planning and budgeting processes. The Government directed that MDGs be provided for in specific budgets of ministries, departments and sectors, and that adequate funds be allocated for implementation. The outcome was reflected in the budget strategy paper 2005-06 to 2007-08, the objective of which was to shift resources progressively to the social and economic sectors. This was taken as an indication of the Government's commitment to meeting the MDGs and to aligning the ERS, sectoral policies and programmes, budgeting and monitoring and evaluation frameworks to the MDGs.

C.4.2. Infrastructure

Infrastructure figures prominently in the Kenya Needs Assessment Study and in subsequent plans. Physical infrastructure was one of four working groups set up to develop the Needs Assessment. Funding for physical infrastructure (energy, water, rail and air transport) was planned to almost double between 2004-05 and 2007-08.¹⁷⁶

The MDG status report for 2005 reviews the current situation and measures needed to achieve the MDGs in a number of specific areas. The objective for water and sanitation is to halve the proportion of people without access to these two essential services by 2015. If this were achieved, 80% of the population would have access to safe water (96% in the urban areas and 66% in the rural areas) and 96% would have access to improved sanitation (96% in urban areas and 89% in rural). It is noted that the National Development Plan (2002-08) has well-laid plans for these two sectors and there has been sustained donor support to the water sector.

To improve the lives of 100 million slum dwellers by 2020, the Economic Recovery Strategy contains plans to facilitate the construction of 150,000 housing units in the urban areas and the improvement of 300,000 houses in the rural areas. The Government has also established a Slum Upgrading and Low Cost Housing and Infrastructure Trust Fund and allocated US\$6 million for the Slum Upgrading Programme in 2005-06 (a national programme implemented in collaboration with UN Habitat).

The status report for 2005 also highlights energy as an essential input to the achievement of all eight of the MDGs:

Energy provides the stimulus, drive and momentum to all the MDGs, due to its 'hidden multiplier effect'. The MDGs cannot be achieved without provision of sustainable, affordable and appropriate energy at all times.¹⁷⁷

The annual growth rate of rural electrification is reported to have been just above 0.1% over the previous five years but the target is to increase customer connections to 150,000 each year. Priority is afforded to market centres, schools, health centres, dispensaries and water pumps.

Infrastructure is afforded a further section in the 2005 progress report under the heading 'Creating an Enabling Environment'. It is noted that infrastructure accounts for 10% of GDP and employed 183,000 workers in 2002. The ERS recognises the importance of infrastructure development in facilitating private investment, growth and job creation. The poor state of existing infrastructure is attributed, *inter alia*, to inadequate allocation of resources for construction, maintenance and rehabilitation. Particular mention is made of the fact that the road network has been neglected and fallen into disrepair over the past decade. A total of 150,000 km is reported to require upgrading or reconstruction annually. Problems in rail, air and sea transport are also reported.

Case study report D: Nigeria

D.1. Introduction

Sadly, principles of transparency, fair play, accountability and open competition were replaced with a broken down competition system that entrenched opaqueness, inefficiency, influence peddling and inflated costs with the attendant incidences of corruption. Over the past two decades estimates suggest a considerable portion of our public treasury was lost due to the poor contracting system. His Excellency Olusegun Obasanjo – at the Public Procurement Bill Workshop (July 2004).¹⁷⁸

The above quote emphasises how far the public procurement system in Nigeria had degenerated and the importance of reform to deliver its 'National Economic Empowerment and Development Strategy' (2004) (NEEDS). NEEDS describes a procurement system of inflated contract costs and processes that were at best closed, discretionary and well-designed conduits for abuse of public power.¹⁷⁹

Public procurement reform has focused on improving governance objectives through a certifying mechanism called 'Due Process'. Managed by the Budget Monitoring and Price Implementation Unit (BMPIU), due process certifies each public procurement transaction at the federal government level to ensure that they have complied with the stated criteria, including society objectives. The Federal Government is now seeking to establish a permanent legal framework through a Public Procurement Bill that is currently under review of the Federal Parliament. Based on the UNCITRAL model, this legislation differs from the other case studies in respect of specific details on project planning.

Although procurement reform has been principally aimed at improving governance objectives, the impact of private sector participation in the delivery of MDG infrastructure targets is leading to a change in the type of procurement strategies in use.

D.2. Procurement policy

D.2.1. Due Process improves governance objectives

Following a highly critical World Bank Country Procurement Assessment Report in 2000, the Nigerian Government issued a circular that set out 'New Policy Guidelines for Procurement and Award of Contracts in Government Ministries/Parastatals'. The guidelines aimed to improve the efficiency, quality and governance of the tendering

process through open competitive tendering, clearly defined bid criteria and a committee of professionals to evaluate bids.

The establishment of the Budget Monitoring and Price Intelligent Unit and a transitional 'Due Process Regime' has taken these guidelines and reform process further. This regime oversees the contract award, review and certification process but does not initiate the contract award process nor does it award contracts. With mandatory certification for public funding, only those projects that have passed the test for proper project implementation packaging leading to improved value for money are allowed to go forward.¹⁸¹

In its first two years, the Federal Government claimed that due process had led to reasonable progress in bringing competition into procurement, leading to cost savings of around \$800m for the Federal Government. It claimed that these cost savings were due to preventing overpriced contracts and securing a reduction in contract sums in a number of contracts. The BMPIU has denied certification and reinstated the rightful bid winner on over 250 contracts and cancelled or sent for re-procurement another 340 or more contracts.¹⁸² There does seem to be some conjecture over these claims, with opposition MPs describing the due process mechanism as a 'mere bureaucratic bottleneck that stalls public procurement through over-centralisation of contract certification. The process breeds corruption.'¹⁸³ The research team has not been able to substantiate the claims of the Government or opposition.

As part of its objectives, the BMPIU is tasked with harmonising all federal government policies and practices on public procurement, including a draft procurement manual for the public sector. This document is consistent with current finance and treasury circulars and follows the World Bank Country Procurement Assessment Report (CPAR) recommendation for new procurement procedures based on the UNCITRAL Model. The manual provides guidance and uniform procurement procedures for all government procurement agencies with the main objective of maximising economy and efficiency.¹⁸⁴

The BMPIU sets out six core requirements with which all procuring entities of the Federal Government have to comply:

1. Compulsory advertising requirements for passing the due process compliance

rule for openness and provision of a level playing field are specified.

2. The criteria and scoring system to evaluate bidders for prequalification are to be specified with 65% of the total score based on the experience and technical qualifications/skills of the bidder.
3. Invitation to tender/bid process is in two parts: a technical bid and a commercial (financial) bid.
4. Opening of tender should take place immediately after the tender period has closed and must be witnessed by the bidders.
5. Evaluation of tender to be carried out by a five member committee including at least three individuals experienced in procurement. Financial bids are only to be submitted by those successful in the technical bids.
6. The winner is the bidder submitting the lowest evaluated tender cost.¹⁸⁵

At the conclusion of the tendering procedure, the procuring entity is required to submit a report of its handling of the procurement process to the BMPIU. The BMPIU reviews the process and the outcome (was the winner and their price the right one?) and seeks to determine the degree of compliance with Treasury Circular Number A4 and B4/2002 and the due process check list.¹⁸⁶ BMPIU has the power to issue a certificate of compliance, advise the procuring entity to re-procure, or the due process certificate will be issued upon resolution of the cost (ie if the original valuation is deemed too high, the winner has the opportunity to reduce their cost).¹⁸⁷

The due process checklist goes beyond the governance and procedures of tender and selection to include 'upstream' procurement procedures, such as project planning and design, financing, procurement plans and their implementation, estimating, technical and economic appraisal, maintenance and operational manuals and the environmental impact assessment report. It is also a requirement to align the project with the federal government's strategic and sectoral priorities.¹⁸⁸

D.2.2. Due process and society objectives

Environmental objectives and local content objectives have a high prominence within due process. EIAs have been a prerequisite for all development projects since 1991.¹⁸⁹

The EIA report must describe in quantitative terms the expected positive or negative environmental impacts of the project and propose mitigating measures for the latter. It should also provide information on any applicable environmental or social regulations, laws or guidelines and indicate whether an environmental and social assessment has or will be undertaken. A final report and/or Terms of Reference for the works must be included. In the event that an EIA is not considered necessary, an explanation of how that decision was reached must be provided.¹⁹⁰ A bonus score of 5% is available in the bidding evaluation to respondents showing a history of using local content and another bonus of 5% is assignable for a history of community social responsibility.

D.2.3. New legal framework

Many of the principles established by due process are embedded in the Public Procurement Bill. Having been withdrawn in 2004 for broader consultation, the Bill went through its second parliamentary reading in October 2005. The Bill's objectives follow the UNCITRAL model of enhancing accountability and transparency, promoting competition and fair and equitable treatment of all bidders. It seeks to achieve this through a new governance structure and a legal framework that sets out how and when the various bidding/tender rules should be used.¹⁹¹

D.2.4. Procurement authority

The Bill seeks to establish a two-tier regulatory structure for public procurement. Chaired by the President, the National Council on Public Procurement is the political approval authority for public procurement policies, guidelines or regulation.¹⁹² Reporting to the National Council is the Public Procurement Bureau. The Bureau takes on many of the functions of the BMPIU including the role of certification¹⁹³ and is also responsible for:

- the harmonisation of existing policy and practices
- building the capability of its professional staff and the requisite institutional capacity through training programmes
- ensuring probity, accountability and transparency in the procurement process¹⁹⁴
- the inspection and/or review of procurement transactions to ensure compliance with the provisions of the Act
- acting on complaints by public procurement entities with the power to stop, suspend or seize any payments

paid or due under any procurement contract, activity or proceeding which has contravened or is likely to be in contravention of any provision of the Act¹⁹⁵

D.2.5. Procurement procedures include project planning phase

The procurement procedures are based on the UNCITRAL open competitive bidding process, with other bidding processes heavily restricted. The Bill sets out the requirements for advertising tenders, receiving, evaluating and selecting bids, and contract award and agreement.¹⁹⁶ The Bill differs from the UNCITRAL model by setting out requirements for 'procurement planning' (which equates to the project planning phase of the research definition of procurement). The requirements include a needs assessment and evaluation that will identify the works or services required. The Bill also requires an analysis of the cost implications of the proposed procurement ensuring that these costs are provided for in the Federal budget.¹⁹⁷

Governance of public procurement is to be improved by empowering the Public Procurement Bureau to investigate any matter related to the conduct of procurement proceedings or operation of a contract.¹⁹⁸ The Bureau can nullify the procurement proceedings and cancel the procurement contract. The Act also allows for any bidder to seek administrative review for any omission or breach by a procuring entity under the provisions of the Act, with the complainant able to take the matter to the Federal High Court if they do not obtain a satisfactory outcome. All those involved in the procurement of public assets are bound by a code of conduct. Anyone convicted of an offence in contravention of the Act will serve at least five years in prison.

D.2.6. Society objectives not included in legal framework

As with due process, the objective in selecting the winning bid is to choose the lowest cost bidder. However, unlike due process the Bill does not stipulate a scoring system for prequalification or bid evaluation, nor does it provide bonus scores for demonstrating a history of building indigenous capacity or of community social responsibility. A margin of preference to domestic bidders applies to tenders under international competitive bidding, but it is left to the procuring entity to stipulate the percentage margin.¹⁹⁹

D.2.7. Private sector participation creates new procurement strategies

Private sector participation in the delivery, management and operations of infrastructure is being actively encouraged through privatisation and new procurement

strategies, particularly the use of concession contracts.

D.3. The role of infrastructure in achieving the MDGs

D.3.1. Planning

To meet its development objectives, Nigeria has produced a plan known as NEEDS (National Economic Empowerment and Development Strategy).²⁰⁰ The plan built on the consultation process started in 2001 to produce an interim PRSP. The goals of NEEDS are wealth creation, employment generation, poverty reduction and 'value reorientation'. There are also state plans known as SEEDS.

NEEDS emphasises the critical importance of improving infrastructure in order to secure economic growth and meet the MDGs by stating that 'infrastructure development is one of the key areas in which NEEDS intends to make a difference'.²⁰¹

Six sectors (health, education, agriculture, power, transport and water) are targeted as the starting point to 'mainstream' the MDGs, three of which (power, water and transport) are infrastructure sectors. As such they have received the highest priority in resource allocation, about 60% of total capital budget.²⁰² Objectives for power include rural electrification and the connection of schools and hospitals to power supplies. The objectives for water also emphasise connections to hospitals and schools and provision of potable water in the rural areas. Transport is included as it supports agriculture and connects social services at local level. Heavy investment is foreseen in these three sectors to meet the needs of rural communities.

The urban poor are identified as a second vulnerable group. To meet their needs it is proposed to promote labour-intensive public works schemes, affordable housing and the provision of water and sanitation. Privatisation of waste management is also mentioned and there is expected to be a new and continuing boom in housing all over the country.

D.3.2. Implementation to be shared

The Federal Government sees its role in the delivery of infrastructure and corresponding services largely as a facilitator through policy formulation and the provision of an appropriate legal and regulatory framework. Responsibility for the implementation of policy will be shared between the public and private sectors, the donor communities and the users.

Power

For example, the Federal Government has developed different strategies for the

power sector. The Electricity Power Sector Reforms Act (2005) will lead to a new legal and regulatory regime for Nigeria's electricity sector that will provide the necessary investment and ultimately competition to meet current and expected demands.²⁰³ By unbundling Nigerian Electric Power Authority into a number of private business units, it is hoped that privatisation will overcome the problems of supply shortage, lack of investment, inappropriate capital structure, excessive executive interference and a lack of maintenance of existing infrastructure and facilities.

As such, targets are set for increased generation, transmission, distribution, collection of revenues, reduction of costs and losses. Targets with a date are to:

- a. create eleven semi-autonomous business units (profit centres) – achieved by January 2004
- b. make the transmission company semi-autonomous by April 2004
- c. unbundle generation by the fourth quarter of 2004. Other important elements of strategy include metering and outsourcing of revenue collection and managerial and technical support

In contrast, the Rural Electrification Agency will set up and administer the rural electrification fund as the means of ensuring a separate budget, funded through subsidies and user charges, for rural electrification projects and implement the rural electrification strategy and plan in accordance with the rural energy policy of Nigeria. By promoting, supporting and providing rural electrification programmes through public and private participation the Federal Government seeks to achieve more equitable regional access to electricity, maximise the economic, social and environmental benefits of rural electrification subsidies, promote expansion of grid and development of off-grid electrification and stimulate innovative approaches to rural electrification.²⁰⁴

Transport

The Federal Government also wishes to introduce concession contracts, as it believes the 'huge sums' available from the private sector will help to develop physical infrastructure.²⁰⁵ The Infrastructures Concession and Regulatory Commission Establishment Act 2005 will allow federal ministries and agencies to grant concession contracts to any duly prequalified firm in the private sector. It also establishes an agency to control Build, Operate and Transfer (BOT) and Rehabilitate, Maintain,

Operate and Transfer (RMOT) procurement models.²⁰⁶ Concession schemes are to be used to complete 3,000 km of roads, through the Road Vision 2000 initiative. The Road Vision Committee report claims that the national road network of 17,000 km has fallen into a state of disrepair.

Other detailed plans for the transport sector include modernising port handling, rehabilitating and upgrading railways and extending radar coverage to total air space.

Water and sanitation

Water supply and sanitation improvements are seen as central to many aspects of human development and hence to poverty reduction. The National Water Supply and Sanitation Programme proposes an intervention strategy in four areas: urban areas, small towns, rural areas and water resources management and sanitation. In urban areas the strategy foresees federal and state government cooperation in financing, a fundamental reorientation to see water supply as a service, separation of infrastructure investment and ownership from service operation to create competition, allowing more autonomy and service management and lease contracts with private firms. In small towns the policy is to decentralise ownership and operation to attract community involvement and support from the private sector. For rural areas the policy is to attain 60% coverage by 2007 through rehabilitation, expansion and construction of low cost rural water scheme, with communities taking charge of ownership and management.

D.3.3. Progress on MDGs

A progress report on implementing the MDGs, claims that the proportion of the population with access to improved water rose from 49% in 1990 to 57% in 2000 (from 78% to 81% in urban areas and 33% to 39% in rural areas).²⁰⁷ Failure to improve the situation in urban areas is attributed to poor urban planning, poor management and inability to expand at state level, ineffective mechanisms for collection of rates and lack of incentives to encourage private participation. In rural areas, failure is attributed to 'lack of commitment to rural development by the Government and limited knowledge by the rural population about the essence of improved water supply and health implications'.²⁰⁸

The proportion of the population with access to improved sanitation declined from 56.5% in 1990 to 55.5% in 2000 (69% to 66% in urban areas and a slight improvement from 44% to 45% in rural areas). It is noted that the trend corroborates the persistent problem of

urban decay. The causes for this are due to poor implementation of health, housing and related policies, high levels of poverty, low awareness of environmental issues and underdevelopment of rural areas.

D.3.4. Monitoring

Implementation is in the hands of the National Planning Commission (NPC), but the individual states receive 52% of federal resources. NPC and the donors (IBRD, DFID, EU, UNDP) have developed a system whereby state performance can be monitored, including a set of benchmarks to assess state performance on SEEDS.²⁰⁹ The benchmarks come under four headings: policy, fiscal and budget management, service delivery and communication and transparency. The following benchmarks have been picked out as having implications for procurement:

1. *Policy* – the state government uses participatory processes to produce a document (SEEDS) containing policy targets and strategies as to how they are to be met.
2. *Budget and fiscal management* – the budget demonstrates a clear link between the resources allocations and the poverty reduction strategies defined in SEEDS.
3. *Service delivery* – services are tailored to the needs of citizens who should have a mechanism to measure service quality.
4. *Communication and transparency* – ensure that due process, particularly in procurement procedures, is developed and positively assessed against federal government standards. Publication of all procurement processes and payments for contracts above 10 million naira in a national and state newspaper and easily accessible information on the award of contracts as well as payments effected. The state government makes and publicises efforts to expose corrupt practices. People and the state have the opportunity to publicly question their leaders about performance, sector by sector. The document goes on to set out the evidence that is required to make the assessments.

A speaker at an interactive workshop with civil society in Abuja in August 2005 claimed that there are currently insufficient monitoring and evaluation mechanisms to ensure credible feedback on the impact of public expenditure at local level. SEEDS presents an opportunity for local governments, communities and civil society to develop tools for monitoring and evaluation that will feed back into programmes to ensure better use of resources and improved systems for delivery.²¹⁰

Appendix II

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