

# **Public Procurement in Latin America and the Caribbean and IDB-financed Projects**

## **A Normative and Comparative Study**

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## Abstract\*

In recent years, Latin American and Caribbean (LAC) countries have made important advances in the modernization of their public procurement systems. The Inter-American Development Bank (IDB), with the aim of maintaining and deepening its commitment to LAC countries under its development effectiveness framework, has been adapting the approach to procurement in projects to ensure that internationally accepted standards and good market practices are followed, while assisting countries efficiently and effectively in a changing environment. This study presents a comparative analysis of the normative public procurement frameworks of 12 LAC countries with respect to IDB procurement policies. The main goal of the study is to identify the main differences and opportunities that have been analyzed the most in IDB's procurement policies to support the strategy of alignment to the demands of the countries in the abovementioned development effectiveness framework. The study identified the need to describe explicitly the guiding principles of public procurement in the IDB's Procurement Policy, as well as broaden the concept of value for money; include new methods of procurement, such as competitive dialogue and negotiation; make the evaluation criteria for works and goods in complex projects more flexible; incorporate the use of technology for certain contracting methods, such as framework agreements and reverse auctions; and streamline the use of national public procurement systems.

**JEL Codes:** H5, H57, K, K1, K2

**Keywords:** approaches to public contracting, contracting methods, economic development in Latin America and the Caribbean, government procurement, hiring, procurement, procurement policy, public procurement

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## **Abbreviations and Acronyms**

CGS	Common Goods and Services
CQS	Selection Based on Consultants' Qualifications
DAC	Development Assistance Committee
DCR	Differentiated Contracting Regime
FBS	Selection under a Fixed Budget
ICB	International Competitive Bidding
IDB	Inter-American Development Bank
LAC	Latin America and the Caribbean
LCS	Least-Cost Selection
NCB	National Competitive Bidding
OECD	Organization for Economic Cooperation and Development
PC	Policies for the Selection and Contracting of Consultants Financed by the IDB (document GN-2350-9)
PGW	Policies for the Procurement of Goods and Construction Works Financed by the IDB (document GN-2349-9)
QBS	Quality-Based Selection
QCBS	Quality- and Cost-Based Selection

## Executive Summary

Responding to the significant advances in public procurement in Latin America and the Caribbean (LAC) during the past years, the Inter-American Development Bank (IDB) has been modernizing its procurement approach to ensure alignment with internationally accepted standards and good market practices. This study makes a comparative analysis of public procurement legislation from a sample of 12 LAC countries with respect to the IDB Policies for the Procurement of Goods and Construction Works (document GN-2349-9) (PGW) and the Policies for the Selection and Contracting of Consultants (document GN-2350-9) (PC).<sup>1</sup> This document also analyzes different international public procurement trends, with the aim of identifying the main differences, strengths, and opportunities for further analysis that could eventually support the IDB's strategy of alignment to the demands of the countries to continue increasing development effectiveness. The study identifies several areas for a possible alignment of the IDB Policies with current international practices. The main areas include: (i) explicitly describing the guiding principles of public procurement in the Procurement Policy of the Bank; (ii) broaden the concept of value for money; (iii) including new methods of procurement, such as competitive dialogue and negotiation; (iv) increasing the flexibility of evaluation criteria for works and goods in complex projects; and (v) supporting the use of technology for certain procurement methods, such as framework agreements and reverse auctions. Additionally, the study recommends optimizing the use of national public procurement systems in IDB-financed operations.

The main results of the comparative analysis of national public procurement legislation of the 12 LAC countries identify the following key aspects contained in their regulatory frameworks:

1. Clear statement of guiding principles of public procurement.
2. Structuring of norms and regulations of public procurement based on the modality of procurement. Currently, IDB's Procurement Policies are defined by the purpose of the contract (works, goods, services, and consultancies).
  - (i) Public bidding, which is the general rule, with its alternatives, without prejudice to the fundamental exceptions in limited competitions.
  - (ii) Direct contracting, exceptional and limited.
3. New methods of procurement for complex projects. Complex projects are those in which the contractors do not have the knowledge of the latest technological or constructive solutions available in the market and normally require multiple stages and negotiation.
4. Qualitative, non-monetary criteria for the selection of offers, such as environmental and innovative aspects, which tend to enrich the evaluation process in line with concepts like the "most economically advantageous offer" contained in the recent Directive 2014/24/UE of the European Union (EU).
5. Electronic contracting (framework agreements, reverse auctions, electronic catalogs), which is generally the norm for contracting goods and services with standard conditions (CGS).

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<sup>1</sup> Hereafter, these policies will be referred to interchangeably as "IDB Procurement Policies" or "IDB Policies."



The comparison of the various procurement methods in the sample countries, the IDB Policies and internationally recognized practices could shed light on the need to carry out a more detailed analysis of these policies to maximize the efficiency and effectiveness of the management of IDB-financed procurement. For this purpose, the following should be analyzed:

1. Unified structure of IDB Policies (PWG and PC) based on the contracting modality and not on the purpose of the contract, so that the criteria for selecting consultants does not determine the methods, and consequently, are not inextricably linked to each of them.
2. The inclusion of innovative methods for the contracting of works and goods in complex projects, which have been proven in industry and are currently internationally recognized as good practices.
3. The incorporation of information and communication technologies (ICT) in contracting processes (electronic contracting) to improve the efficiency and effectiveness of process management and the use of public funds.
4. The use of non-monetary evaluation criteria to perform an adequate cost-benefit analysis and obtain best value-for-money per the project's characteristics. The use of non-monetary evaluation demands a specific evaluation of their pertinence, as well as the weighting of their hierarchy.

The report concludes that the examined countries are employing public procurement methods and practices that are not specifically contemplated in the IDB Policies, and which are currently recognized as good practices and normally used in other world regions. Resorting to these practices and methods is a direct consequence of the introduction of technology, evolution of the countries' needs, and of market supply.

## I. Introduction

This study is based on an evaluation conducted by the IDB of its own procurement policies. This assessment was encouraged by the importance of considering the progress made by countries in their public procurement systems and aims to shed light on how the Bank's policies could be aligned with the changing realities of the countries in the region, while considering international trends and recognized good practices.

The study presents a comparative analysis of the procurement regulations of 12 LAC countries. Countries were selected considering their economic importance and geographic location and with the aim of providing a representative sample of the region. The sample includes countries of the Caribbean (Guyana and Jamaica), Central America (Costa Rica, Honduras, Mexico, and Panama), South America (Argentina, Brazil, and Chile), and from the Andean region (Bolivia, Ecuador, and Peru). The sample includes countries whose legal regimes are based on civil law.<sup>2</sup> However, it also includes countries whose legislation is inspired in the common-law tradition.<sup>3</sup> This is the case of the two Caribbean countries.

The methodology consisted of a qualitative analysis of the countries' public procurement regulations based on which different countries' regulatory frameworks were identified and classified. The comparative study of each national legislation and the IDB's procurement policies enabled the identification of differences and elements in common, as well as of the advantages, weaknesses, risks, and aspects to potentially be improved that might provide a reference for a deeper examination of the IDB Policies.

This study also identified significant aspects of the sample countries' public procurement systems that are absent from the IDB Policies, such as a clear statement of guiding principles for procurement or supplier registration mechanisms, which offer important elements for reflection and subsequent analysis. Likewise, the study has reconstructed the general outlines of the different supplier selection methods, by identifying their stages and, whenever possible, their duration, as well as shared characteristics, thereby highlighting the limitations and the opportunities for further detailed analysis and studies of the Bank's selection methods.

After the introduction, this study is divided into three sections and three annexes. Section II presents a comparative analysis of public procurement legislation in the sample countries and the IDB's Policies. Section III presents the main strengths and weaknesses that result from the comparison of the regulatory frameworks and the IDB policies. Section IV lays out the conclusions and recommendations that could serve as a basis for a deeper analysis of the IDB Policies in the future. [Annex 1](#) provides a set of tables comparing the competitive contracting methods by country with those of the IDB, the causes of direct contracting, and the treatment of complaints. [Annex 2](#) contains a summary table with the main strengths, weaknesses, risks, and opportunities most analyzed in the IDB Policies. [Annex 3](#) analyzes the circumstances under which direct contracting is used in the sample countries and compares them with the rules of the IDB.

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<sup>2</sup> Civil law corresponds to the legal tradition of continental Europe, based on the law as the essential source of rights. Civil law has traditionally inspired and oriented legal frameworks in LAC countries.

<sup>3</sup> Common law is the common or customary law that holds way in most of the countries with an Anglo-Saxon tradition. It stems from the legal system created in England after the Norman Conquest (1066). It is called "common" because it became the law that was universally observed throughout the entire kingdom by the King's courts, which all applied the same body of legal principles and rules. In a wider sense, the term common law is used to refer to the legal system based primarily on the decisions adopted by the courts, in contrast with civil law systems, in which the principal source is the law itself.

## II. Comparative Analysis

The comparative analysis of the regulatory framework for public procurement of the countries in the sample with the IDB Policies starts from a contextualization of the contracting methods within each regulatory framework, for which the following aspects have been identified:

- (1) Regulatory sources of public procurement
- (2) Guiding principles of public procurement
- (3) Methods of procurement
- (4) Selection criteria of contractors in the bids
- (5) Duration of the bidding processes
- (6) Procurement of consultancies
- (7) Use of technology to acquire goods and services in uniform conditions
- (8) Complaint resolution
- (9) Aspects that can favor efficiency and effectiveness in the procurement process

### II.1. Regulatory Sources of Public Procurement

**Regulatory structure.** In general, the sample countries structure their procurement regulations from formal and hierarchical regulatory sources. Except for Jamaica, the other countries in the sample set out regulations on public procurement in their constitutions, either to establish the general rule for public bidding and/or to define the legal nature of the exceptions (Brazil, Costa Rica, Honduras, Mexico, Panama, and Peru), to preserve guiding principles for procurement regulatory frameworks (Argentina, Bolivia, and Chile), or to establish the conditions for a regulatory agency (Guyana). The Constitution of Ecuador establishes the criteria by which public procurement should be governed.

This regulatory hierarchy states that procurement legal frameworks must be subject to legislative regulation,<sup>4</sup> which are established by issuing decrees, and in some cases, included in the manuals published by the procuring agencies or by the procurement system's regulatory agency. A further common characteristic is the existence of general procurement laws that are applicable across different levels of government, like in the case of Brazil,<sup>5</sup> which is organized as a federal country. Argentina<sup>6</sup> and Mexico provide the exception where general laws only apply to federal procurement agencies, although in Mexico, the federal regulation extends to the state and municipal levels when projects are executed with federal government funds.<sup>7</sup>

All types of contracts are governed by these regulatory frameworks, whether by a general consideration by the administration (Bolivia), or the public sector (Guyana), or by specific levels of government; including the legislative and judicial branches, audit agencies, public enterprises, and joint ventures with majority public capital (Bolivia, Costa Rica, Ecuador, Jamaica, Mexico, and Panama). The Honduran framework considers a broad, comprehensive

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<sup>4</sup> Only in Ecuador do organic laws regulate the procurement framework; in the remaining cases, the legislation is of an ordinary nature.

<sup>5</sup> Despite the federal order, the General Law [8.666/1993](#) regulates the procurement of works, services, purchases, expropriations, and leases not only at the federal level, but also at the state and municipal levels (Art. 1).

<sup>6</sup> Argentina has a general procurement regulatory framework approved by the Executive in exercise of the powers delegated to it by the Federal Congress. "As Argentina is a federal country, and as administrative procurement is not a competence delegated by the provinces under the National Constitution to the federal power, each one of the provinces, and the Autonomous City of Buenos Aires (CABA) (Ciudad Autónoma de Buenos Aires), has its own procurement regulations" (Cassagne, 2016).

<sup>7</sup> Art. 1º of the federal laws on procurement, leases, and services (LAASSP) and public works and related services (LOPSR).

formula that includes “any government agency financed with public funds”.<sup>8</sup> Panama and Ecuador also include non-governmental associations, organizations, and other bodies that receive public funds and goods or donations from the State.<sup>9</sup> Peru includes public charities and the public or private funds established totally or partially with public funds.<sup>10</sup>

In Chile, where there is no single general public procurement rule, the Organic Constitutional Law of the State Administration (LOCBGAE) (Ley Orgánica Constitucional de Bases Generales para la Administración Pública) establishes the fundamental basis for the awarding of contracts, such as the general rule on public bidding, free competition, and equal opportunity to bid, while also respecting the principles of general interest, efficiency, and effectiveness (Arts. 3 and 9).

Regulations in Mexico introduce an interesting particularity. They separate the procurement for leases and services from public works and their related services. Jamaica, however, follows IDB policies structure with the procurement of goods and services on the one hand and, consultancy services on the other.<sup>11</sup>

Although the IDB has separate policies according to the type of procurement, the study did not identify this practice as a general rule in the sample countries. Public funds constitute the most common criterion when defining the applicability of procurement legislation, irrespective of the procurement agency, its government level, autonomy (centralized or not), links with the administration or with other branches of government or with other autonomous agencies. The same principles apply regardless of the industrial or commercial nature of the agency. This trend raises the question of what justifies separating IDB Policies by procurement type.

The World Bank was the first entity to develop PGW and PC separately, which was replicated by other multilateral development banks (MDBs). Historically, PGWs were first developed with the aim of remedying the lack of appropriate legislation in many borrowing countries during the post-war period. At that time, the World Bank financed mostly heavy civil engineering projects for which procurement was based fundamentally on price competitions for works with detailed specifications. Regulation on the selection of consultants came much later (1966). Since then, the selection of consultants has been treated separately from the procurement of goods and works in the MDBs’ policies by arguing that these were professional services where quality was essential for the integrity and the successful results of the projects. As of the 1970s, price has been included in the selection criteria.

In subsequent years, the fusion of PGW and PC was proposed, but the dominant view was that it was clearer and more manageable to keep them separate. Among other reasons, because of the diversification of sectors, types of consulting, and the complexity of the selection methods. The Bank should evaluate the costs and benefits of possibly merging the two documents.

**Special Regulations.** Despite the regional trend to define a general framework for public procurement, countries do not have a single set of rules. The establishment of special regulations is a recurrent feature. Some correspond to cases under comparative law, free trade agreements, such as those that refer to procurement by enterprises in which more than 50 percent of their capital is generated by their commercial activity; procurement between public agencies (Baca Oneto, 2008), procurement by financial institutions, loans, leases or real estate procurement, procurement by diplomatic offices overseas, procurement by philanthropic institutions and fiscal agencies, as well as, the award of contracts related to

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<sup>8</sup> [Legislative Decree 74/2001](#), Art. 1º.

<sup>9</sup> [Law 22, 27 June 2006](#), Art. 5.

<sup>10</sup> [Law N° 30225](#), 2014 (in force from 9 January 2016), Art. 3, (h).

<sup>11</sup> It is worth highlighting that this separation is stipulated in the manuals published by the Ministry of Finance, in which the regulations on procurement are explained in detail.

specific programs, such as international cooperation agreements, recruitment of disabled people, prison labor, or procurement related to national security or to joint project execution by the contracting parties (Álvarez and Benavídez, forthcoming publication).

National legislation usually considers special regulations for strategic sectors or services, such as hydrocarbons (Bolivia, Brazil, Ecuador, Mexico, and Bolivia), mining and energy (Bolivia), environment (Bolivia, Peru), telecommunications (Brazil), health services (Chile, Jamaica), pension funds (Jamaica), essential public services (Honduras), public monopolies (Honduras), or in more specific cases, such as, the management of the Panama Canal (Panama). In various countries, defense procurement and procurement related to natural disasters are included under special regulations. Rather than special regulations, some exceptions correspond to instances of direct contracting, such as the purchase of medicines (Ecuador, Panama), the procurement of spare parts for machinery (Ecuador) or vehicles (Jamaica), or communication media services and air transport (Jamaica). The list of exceptions is broadened due to specific treatment based on procurement type, such as public agency auditing (Bolivia, Peru) or technical oversight of infrastructure projects (Bolivia).

Exceptions considered in national regulatory frameworks might be due to temporary situations, such as the need for agility and flexibility when contracting very large construction works required for events such as international football championships or Olympic Games, or specific constraints, such as national development projects (Jamaica), funding the Ministry of Education at the beginning of the school year (Panama) or the specific needs for the Tocumen Airport (Panama).

In these circumstances, the wide use of special regulations weakens the trend towards harmonizing procurement regulations, which doesn't represent a positive outcome.<sup>12</sup>

**Governing body for public procurement.** The formal regulatory sources set out in the sample countries (constitution, law, regulation) are complemented by the establishment of regulatory agencies. In all the countries studied, there is a procurement regulatory agency that sets the rules and carries out the functions of monitoring, sanctioning, and registering, among others, (Argentina,<sup>13</sup> Bolivia,<sup>14</sup> Chile,<sup>15</sup> Costa Rica,<sup>16</sup> Ecuador,<sup>17</sup> Guyana,<sup>18</sup> Honduras,<sup>19</sup> Jamaica,<sup>20</sup> Mexico,<sup>21</sup> Panama,<sup>22</sup> Peru,<sup>23</sup> and Brazil<sup>24</sup>).

Furthermore, based on the value of the contracts or their objective each country has procurement-related authorities, which, in some cases, must provide authorization or approval

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<sup>12</sup> However, certain sectors justify having a more flexible, agile, or efficient framework, as in the case of the oil, electricity, or water sectors, in which the time factor is extremely critical or there are particular operational needs.

<sup>13</sup> National Procurement Office (Oficina Nacional de Contrataciones, or ONC): [www.argentinacompra.gov.ar](http://www.argentinacompra.gov.ar). The ONC is the regulatory agency for goods and services, but it has no authority to procure works or individual consultants.

<sup>14</sup> Ministry of Economy and Public Finance (Ministerio de Economía and Finanzas Públicas): <http://www.economiayfinanzas.gob.bo/>.

<sup>15</sup> Public Procurement and Contracting Directorate (Dirección de Compras y Contratación Pública): [www.chilecompra.cl](http://www.chilecompra.cl).

<sup>16</sup> Public Procurement Directorate General (Dirección General de Administración de Bienes y Contratación Administrativa): [www.hacienda.go.cr/scripts/cruiext.dll?UTILREQ=COMPRARED](http://www.hacienda.go.cr/scripts/cruiext.dll?UTILREQ=COMPRARED).

<sup>17</sup> National Public Procurement Service (Servicio Nacional de Contratación Pública, or SERCOP): <http://portal.compraspublicas.gob.ec/sercop/>.

<sup>18</sup> Public Procurement Commission: <http://www.npta.gov.gy/>. The Constitution considers the creation of the Public Procurement Commission. However, according to the law and while the aforesaid Commission is being set up, public procurement is managed by the National Tender and Procurement Administration Board. This distinction is important, given that creation of the National Commission is an ongoing debate.

<sup>19</sup> State Contract and Procurement Regulation Office (Oficina Normativa de Contratación y Adquisiciones del Estado, or ONCAE): [www.honducorpras.gob.hn/](http://www.honducorpras.gob.hn/).

<sup>20</sup> Ministry of Finances (Ministerio de Finanzas): [www.mof.gov.jm](http://www.mof.gov.jm).

<sup>21</sup> Civil Service Secretariat (Secretaría de la Función Pública, or SFP): <http://www.funcionpublica.gob.mx>.

<sup>22</sup> Directorate General for Public Procurement (Dirección General de Contrataciones Públicas): [www.dgcp.gob.pa](http://www.dgcp.gob.pa).

<sup>23</sup> Supervising Agency for Government Procurement (Organismo Superior de Contrataciones del Estado, or OSCE): [www.osce.gob.pe](http://www.osce.gob.pe).

<sup>24</sup> Ministry of Planning (Ministerio de Planificación): [www.governoeletronico.gov.br/o-gov.br/secretaria-de-logistica-e-tecnologia-da-informacao](http://www.governoeletronico.gov.br/o-gov.br/secretaria-de-logistica-e-tecnologia-da-informacao).

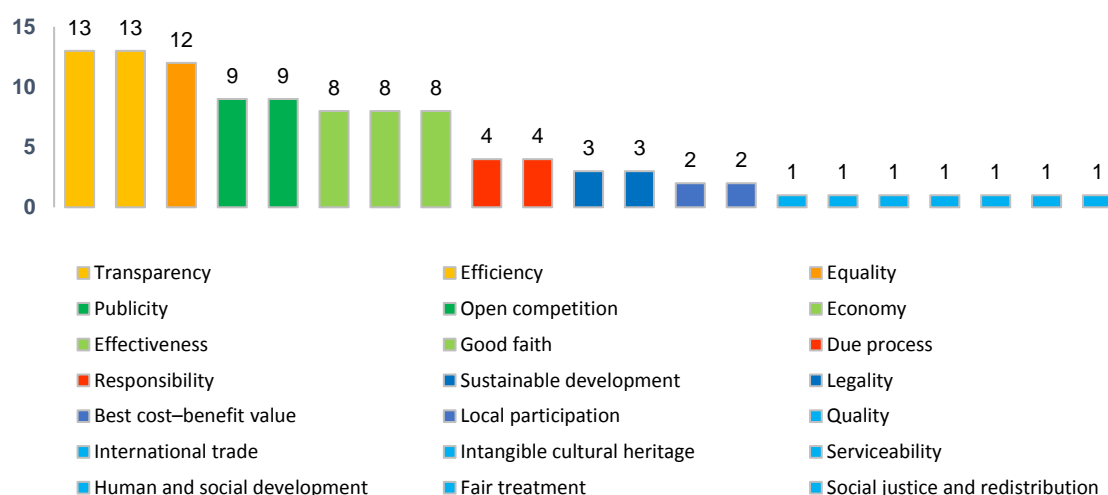
to the contracting agencies. In Jamaica, for example, the procurement agencies are subject to the supervision of different authorities, representing a significant loss of autonomy. In Mexico, the Civil Service Secretariat (Secretaría de la Función Pública) has the power to define, in legally binding terms, the situations that may create doubts regarding the regulation that applies or the procedure to be followed. This circumstance also limits the procurement agencies' independence. In Costa Rica, the Comptroller General (Contraloría General de la República) exercises preventative controls with important powers; for example, it has the authority to initiate procurement procedures without having the necessary funds available, authorize direct contracting where the public interest is deemed to be at stake or to avoid damage or injury to public interests, and declare a person ineligible to carry out procurement processes. In Chile, the General Comptroller (Contraloría), with its preventative control mechanisms, generates additional requirements that may cause considerable delays in procurement and bidding processes.

## II.2. Guiding Principles of Public Procurement

### Guiding principles of public procurement in sample countries.

the principles governing public procurement are clearly expressed in 11 of the 12 sample countries. Although these principles are not regulated in Guyana, the provisions of the Procurement Act (2003) imply that public procurement is based on principles that are, at the same time, procurement objectives. In some countries, the same set of principles that governed the activities of public agencies are applied to public procurement, or to tasks carried out by the State administration (Chile), the expenditure of public funds (Mexico), or the management of the State (Bolivia). In Honduras, in addition to these general principles, specific principles are considered for e-catalogue procurement. Figure 1 shows the regulatory principles present in the analyzed countries regulations.

Figure 1. Principles Embodied in the Regulatory Frameworks



The principles mentioned are included (see Figure 2), in some cases, both in the Constitution and in legal and/or regulatory texts (Ecuador,<sup>25</sup> Mexico,<sup>26</sup> Bolivia,<sup>27</sup> Chile,<sup>28</sup> Argentina, Brazil, and Peru). In the remaining cases, they are included only in the latter (Costa Rica, Jamaica, Guyana, Honduras, and Panama).

<sup>25</sup> The Ecuadorian Constitution sets out the criteria that govern public procurement.

<sup>26</sup> The Mexican Constitution sets out the guiding principles for the expenditure of public funds.

<sup>27</sup> The Bolivian Constitution sets out the guiding principles for management of the State.

<sup>28</sup> The Chilean Constitution sets out the principles that constitute the guidelines for the activities of public agencies.



**Figure 2. Principles Expressed in the Regulatory Framework**



Only in Costa Rica, Bolivia, Honduras, and Jamaica principles are defined including their content and scope. In the other countries, their definition is found in regulations dispersed throughout the public procurement framework. Figure 2 presents the regulatory definition of principles in the different countries. The definitions are explained in detail in the conclusions that follow.

- The principle of **transparency** is observed in all the countries; this usually includes guaranteeing the publicity of selection procedures, despite being it considered as the principle of publicity in most of the countries (excluding Bolivia, Guyana, and Mexico).
- All countries consider the principle of **efficiency**. In some, this principle takes the name of principle of simplification, celerity, or planning. Chile and Ecuador also consider the principles of opportunity and coordination respectively; Honduras includes the principle of optimum use of State funds by applying electronic technology, and Ecuador and Peru, technological innovation; in Argentina, moderate informality and material truth, referring to the correction of formal errors (non-substantial). In Argentina and Chile, *ex officio* is also considered. All these principles, refer to the notion of efficiency in the countries listed.
- The principle of **economy** is observed in Argentina, Bolivia, Guyana, Honduras, Jamaica, Mexico, and Panama. However, in Bolivia and Honduras, its content corresponds to the principle of efficiency (celerity and saving, simplicity, austerity, and concentration), and in Jamaica, to getting the best value-for-money(cost-benefit), which, at the same time, is defined as an autonomous principle both in Jamaica and Honduras.
- In most of the countries, the principle of **effectiveness** (relative to achieving objectives) is included, and in Honduras is referred to as “effectiveness and good governance.” Not included in Brazil, Ecuador, Jamaica, or Guyana. Argentina and Peru also observe the principles of rationality and rationality of the project, respectively, which allude to the same concept.
- The principle of **equality**, also described as equality of opportunities or equity, is observed in all the countries except Panama. In Chile, this principle prohibits economic discrimination by the State. Similarly, in some countries (Brazil, Chile, Mexico, and Peru), the principle of impartiality is included, and receives the name of objective selection or objective judgment. In Brazil, Argentina, and Bolivia, the principles of impersonality, justice and proportionality, and equilibrium respectively, are also considered.
- The principle of **free competition**, also described as competition, participation, or free participation, is observed in Argentina, Bolivia, Chile, Costa Rica, Ecuador, Guyana, Honduras, Jamaica, and Peru. However, its scope has some significant exceptions in some of these countries.

- In Jamaica, the principles of **integrity and trustworthiness** are considered. In Mexico, **honesty**; in Chile and Brazil, **probity** and, in Brazil and Peru, **morality** are the names by which this principle is considered. In Bolivia, Costa Rica, and Guyana, this principle is defined as the principle of **good faith**. Regardless of the different terminology, they all refer to the same concept.
- The principle of **due diligence**, also called the right to counsel, accountability, contesting, or challenging administrative decisions, is observed in Argentina, Chile, Jamaica, and Panama.
- The principle of **responsibility** is observed in Argentina, Bolivia, Chile, and Panama, while Bolivia additionally recognizes it as social control and Chile as control.
- The principle of **promoting sustainable development**, also known as environmental responsibility or sustainability, is observed in Brazil, Ecuador, and Peru (Cabrera, 2012).
- The principle of **legality or legitimacy** is established in Ecuador, Argentina, and Brazil. The latter country recognizes the invitation to bid as a principle, while Argentina recognizes the principle of legal reserve.

**The guiding principles of IDB Policies.** IDB Policies do not define principles as such. General considerations, however, are set out in a way that, in the case of PGW, define the requirements from the Bank within the procurement process, in the case of PC, they guide the Bank's policy during the selection process. Nevertheless, these considerations may be understood to be guiding principles for such processes. In this sense, the IDB's situation is similar to Guyana's, which highlights the fact that in the other countries, specific reference is made to the concept of principle, which is of a higher regulatory order than that of a "general consideration." More than a guiding criterion, a principle constitutes a truly fundamental rule that fully governs a certain activity and, therefore, it binds each of the arrangements that regulate it. This observation provides the basis for identifying the issues that require further analysis and study, which are found in Section III of this study.<sup>29</sup>

Among the considerations expressed in the PGW and PC, are economy and efficiency (in procurement and in project execution), transparency, promoting development of suppliers and manufacturers in the borrowing country and development and employment of local consultants in the borrowing country.

Specific considerations of the PGW include equality (between bidders, both from borrowing and non-borrowing member countries of the Bank, regarding information and the equal opportunity to compete) and free competition, with the concession of appropriate preferences for locally manufactured goods.

The PC also includes specific considerations relating to the need to contract high-quality services and the need to offer qualified consultants the opportunity to compete to offer services financed by the Bank.

As previously expressed, it is noteworthy that the sample countries define principles applicable to all kinds of procurement. However, in IDB Policies, although there are certain common considerations, specific considerations in the PGW and of the PC are observed. These special considerations reveal, on the one hand, the limitation of equality in the processes of selecting

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<sup>29</sup> This observation coincides with one of the "principal messages" or "recurring themes" identified by the World Bank during the consultation processes it conducted between 2012 and 2015 to evaluate the need to adjust its policies, in which, as in the IDB's PGW and PC, general considerations are established that do not allude expressly to principles. See, in this respect, the following link: <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.



goods and construction works when it comes to the bidders from Bank member countries and, on the other, the prevalence of the criterion of quality in the selection of consultants.<sup>30</sup>

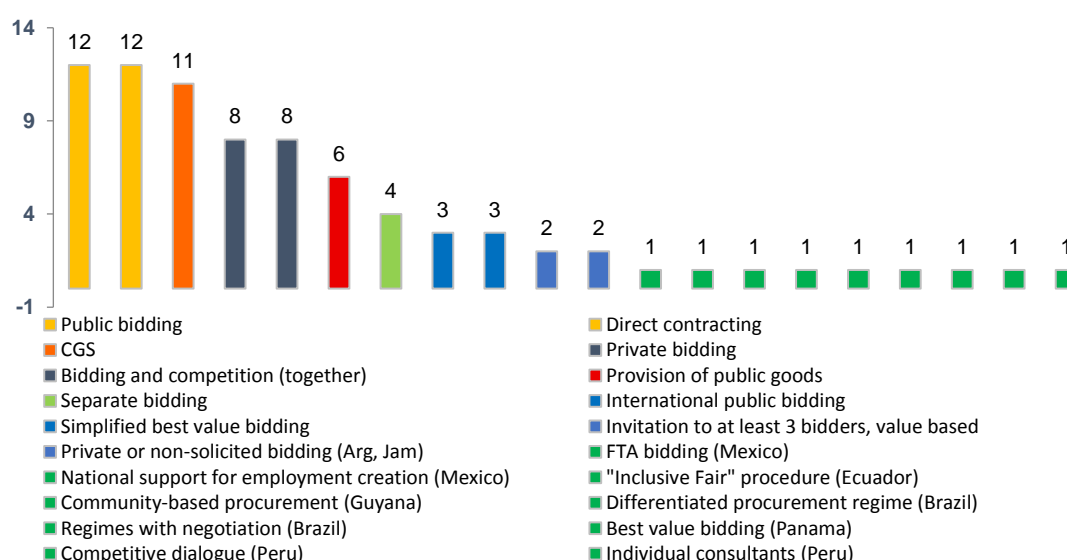
The IDB Policies do not expressly establish considerations relative to other principles observed by all or several of the sample countries. These include the principles of legality, integrity, responsibility, effectiveness, promotion of sustainable development, and due process. With regard to the latter, it is noteworthy that the PGW and PC, as well as the regulation of prohibited practices, which is complementary to these policies ([www.iadb.org/integrity](http://www.iadb.org/integrity)), regulate this matter in such a way that, in some aspects, its integrity could be jeopardized. This point will be discussed further in the section on opportunities for further analysis of Bank Policies.

Finally, although integrity is not mentioned in the PGW or the PC, it is correct to say the regulation of prohibited practices refers to it. Even though there is also no reference to promoting sustainable development or environmental sustainability, a related, though limited, reference is found in the PGW. For the procurement of goods and equipment by international public bidding, environmental benefits may be considered as selection criteria.

### II.3. Methods of Procurement

The methods of public procurement are described differently in the regulatory frameworks of the analyzed sample countries. However, comparing the different methods in all sample countries yields common elements and confirms that some stages are defined consistently (see Annex 1, Table 1.1). This contrasts with the IDB Policy, determined separately by the regulation of the selection methods and defined according to the **objective of the contract**. These are: consultancy (PC) on the one hand, and construction works, goods and services other than consultancy (PGW) on the other. Figure 3 summarizes the use frequency of the methods organized according to their description in the sample countries.

Figure 3. Frequency of Procurement Methods



<sup>30</sup> However, in the PC there are arrangements that, in specific cases, encourage participation by consultants from the borrowing country or from Bank member countries (see paragraphs 2.6 and 2.7 and the footnotes 20 to 22).

**International Competitive Bidding (ICB) as general rule.** Figure 3 shows the homogeneity in the identification of the most commonly used methods. General legislation laying the basis for regulating ICB are available in all the sample countries. However, only six of them explicitly identify ICB as a specific procurement method. In the other countries, international participation is not excluded. This general rule does not exclude the application of other forms of international participation, such as those related to bidding processes set out in free trade agreements (FTAs) (Mexico), bidding with private financing (Costa Rica), competitive dialogue (Peru) influenced by European community law, as shown below, or two-stage bidding with prequalification (Argentina, Brazil) or with a separate valuation of technical bids and economic bids (Panama). None of these forms alter the essence of public bidding (see Annex 1).

It is therefore important, as in the case of Argentina, to leave some room for discretion for public agencies to select a procedure that may be adapted to a specific project, rather than establishing an automatic identification of the proper method. Also, limited bidding processes (eight countries) are frequently used. In this case, the low value of the project makes open bidding unnecessary, and competition is limited to registered suppliers. It is also possible that the contract's complexity naturally limits the number of bidders (Guyana) where open invitation, as in public bidding, would be inappropriate. The restriction on the invitation to bid must be made via an objective identification of the ideal suppliers, based on their technical and financial qualities, their experience, and good contractual performance, which are among the criteria considered for the bidders and suppliers included in the registries which are created to improve the efficiency of the process and reduce transaction costs. The registries should always be transparent, accessible and free of charge. Limited bidding is also illustrative of the characteristics related to consultant selection processes. Eight of the twelve sample countries include the selection of consultants as part of the bidding processes, whereas the other four identify specific methods for it.

**Direct contracting.** Situations in which direct contracting may be advisable as an exceptional procurement method are analyzed below.

**Electronic procurement.** The frequency and homogeneity of the methods devoted to the procurement of goods and services in standard conditions (BSCU) using ICTs (which in Brazil includes procurement of standardized works), electronic procurement and the advances in electronic procurement portals are of great relevance and have contributed to greater transparency, efficiency, and effectiveness in public procurement. Section II.7 analyzes in detail BSCU procurement.

[Section II.6 on Selection of consultants](#) analyzes how consultants are selected considering a selection criterion rather than a specific procurement method or procedure. Local legislation may include the selection of consultants in a comprehensive manner within the general methods. When this is not the case, the selection of consultants may be regulated by special methods that imitate the dynamic and stages of general procedures, as it occurs in Brazil and Peru. Under these conditions, the selection of consultants is usually included in limited bidding, when it may appropriate to make a restricted invitation to certain candidates (Ecuador, Honduras), or integrated into the open two-stage procurement processes which includes a pre-selection stage (Ecuador, Guyana, Honduras, and Jamaica). The Bank's PC follow this mechanism, regardless of having specific procedures for the hiring of consultants.<sup>31</sup>

The harmonization and integration of procurement methods in the sample countries makes their classification similar to the IDB policies. These policies contain regulations that refer to specific situations. However, these situations can be perfectly integrated with the general methods set out in the regulations of the sample countries. Thereby, any divergence from Bank rules may be a question of presentation and form rather than content. A recommendation

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<sup>31</sup> See N°. [II.6 Selection of Consultants](#).

is made in Section II to conduct an analysis that considers reorganizing the policies to eliminate the division into PGW and PC, thereby integrating the different methods in a single policy and distinguishing them from the selection criteria.

These characteristics enable the methods to be grouped in five groups, which are compared in the following section:

1. General rule on public bidding and its restrictions.
2. Exceptional and restricted Direct contracting, its classification and valuation.
3. Criteria for selection of consultants in public bidding and restricted bidding.
4. Electronic contracting, procurement of goods and services with standard conditions.
5. Hiring of consultants, and their integration in the general methods.

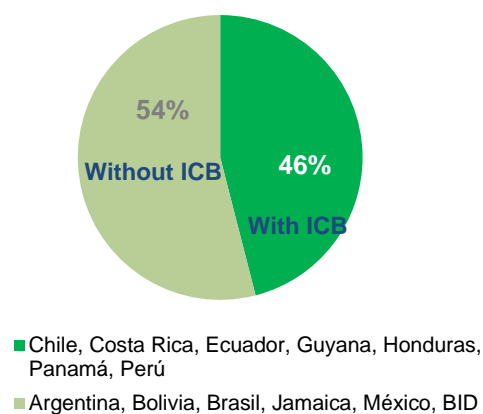
### II.3.A. General Rule on Bidding and its Restrictions

The rules on bidder selection in the sample countries and the IDB Policies outline the general rule on public bidding. Half of the analyzed countries include the rule in their constitutions (Brazil, Costa Rica, Mexico, Panama, Peru, and Argentina<sup>32</sup>). The restrictions to this general rule are examined under this heading and have a common denominator in the limitation of competition for different reasons, as will be analyzed in Section 4.1.2.

#### II.3.A.1. Public Bidding

Thanks to the wide development of public procurement Internet portals, with the propensity to define rules that foster broad participation by suppliers, with the only limitations being technical demands and the experience and economic solvency of the suppliers, bidding regularly imply an open invitation for everyone to participate. The PGW of the IDB identifies ICB as the general rule, with national competitive bidding (NCB) to be employed as a method when foreign bidders are not expected to participate in the process. ICB, however, is not the general rule in the sample countries (except in Jamaica). It is expressly considered in Argentina, Brazil, and Bolivia, on the grounds that relate to the value of the project or interest in its international diffusion, as illustrated in Figure 4. Although, foreign participation is not foreseen as the default method of procurement in the other countries, this does not mean that its employment as such is restricted. On the contrary, it is allowed by extended bidder eligibility.

Figure 4. ICB in Regulatory Regimes



Most countries (eight) define a single category for bidding and public competition. These two methods are only distinguished by the supplier selection criterion: bidding centers on economic factors only while, public competition also considers non-economic factors, such as technical, scientific, artistic, or other capacities (Argentina, Bolivia, Brazil, Chile, Costa Rica,

<sup>32</sup> Although, in contrast to the other countries, the Argentine Constitution makes no explicit reference, a wide sector of the doctrine gives the general rule a constitutional base. See also Comadira (2006). For Cassagne (2009), public bidding is the rule inherent in the legal system and is based on two general principles of law: the principles of competition and of equality.

Jamaica, Mexico, and Panama). This categorization is not final. In fact, the Panamanian best value bidding model is an interesting case for analysis.<sup>33</sup> Considering the complexity of the construction work or the goods acquired (rather than just provision of consultancy services) it may be necessary to center the evaluation on technical, economic, administrative, and financial aspects, without price being the determining factor. In Ecuador, the concept of “best overall cost” is applied as a general rule, a result obtained by considering different technical, economic, and legal aspects, without price being the main factor.

When it comes to bidding, Brazil includes a specific appraisal on eligibility, in which bidder compliance with the requirements are validated considering their legal standing and their technical, economic, and financial qualification. Bidders which fail to meet the eligibility requirements are unable to participate in the following stages. This is also considered in the PGW of the Bank and in Argentina, where the project’s complexity degree or its extended time frame justifies carrying out two or more evaluation phases.

Other types of bidding include simplified bidding. Based on contract value rather than the purpose of the contract, this method is known in Costa Rica as “abbreviated bidding” and as “simplified award notice” in Peru. Both conserve the full bidding structure, but with shorter time frames.

### II.3.A.2 Restricted or Limited Bidding

Restricted bidding is characterized by a limited invitation to competitors to bid, on the grounds that it would be time-consuming and, eventually inappropriate when few bidders possess the required conditions, thus the eligibility to submit a credible bid (see Figure 5). Among the specific types of restricted bidding, three well-defined types can be identified in the legislation of the sample countries and in the IDB’s Policies. In principle, these include [two-stage processes](#) (with prequalification), [limited bidding](#) (with restricted invitation), and [procedures with project definition](#), in line with international trends.

Figure 5. Restricted Bidding Methods in Regulatory Regimes



### II.3.A.3. Two-Stage Processes

The PGW considers a “prequalification of bidders”<sup>34</sup> for projects of considerable size or complexity that would normally require significant preparation costs and for which the invitations to bid must be directed only at those with the genuine capacity and resources to carry out the project. This option is also available in several of the sample countries, such as Argentina, Chile, Guyana, and Peru, where prequalification is based on academic background, employment history, consultations with previous clients, and even interviews to determine knowledge or abilities. On a more general basis, Costa Rica allows prequalification

<sup>33</sup> Procurement procedures in which the price is not necessarily the determining factor: these can be employed when the goods, construction works, projects or services to be contracted have a high level of complexity and in which quality and/or functionality are determining factors.

<sup>34</sup> Prequalification is not necessarily equal to two stages but they are different subjects. Two- stage bidding implies submission of technical bids in a first phase after which, the procuring agency establishes the definitive specifications and characteristics and invites bids during a second phase.

when considered favorable. Prequalification is sometimes not limited to a single procurement process. The pre-selected suppliers are thus considered eligible to bid in different processes, making the selection process more efficient. Although these mechanisms represent a good practice, the risk of collusion must be taken into consideration.

In Guyana and Jamaica, the two-stage process not only enables the evaluation of the suppliers' technical conditions (during the first stage); but they also define the necessary adjustments for such conditions. In the second phase, the bidders submit both their technically adjusted bids and their economic bid. This option is also considered in the IDB's PGW. This concept introduces some flexibility, in contrast to other procedures that do not conduct a detailed analysis of the two stages. This limits the possibility of making changes during the second phase and thereby reduces the efficiency of the procedure.

In Argentina, the *multi-stage process* can be applied both to open bidding and to public competition. In Panama, the least-cost bidding *with separate valuation*, and in Jamaica, *single-stage bidding* considers the simultaneous presentation of two envelopes: one containing the technical proposal (general information general about the bidder, business background and technical, economic, and financial capacities, plans, programs, and projects designed to execute the contract, the bid maintenance guarantee) and the other containing the economic proposal. This allows a separate and independent evaluation of the two bids, without establishing a prequalification as such which, in certain projects with a broad market of possible bidders, might represent a method that fosters effectiveness, due to the specialized valuation of technical and economic factors.

The Differentiated Procurement Regime (Régimen Diferenciado de Contrataciones, or RDC) established recently in Brazil, which was designed to get the construction works for the FIFA World Cup and Olympic Games, enables the integrated design and construction of works. The system requires the prequalification of bidders, independent of the bidding process, by which a certificate is issued and expires after one year. This procurement method also enables sequential proposals (combined with or without a financial proposal in a closed document), and the estimated budget for the contract is confidential, to stimulate competition. This mechanism, justified by the characteristics of the projects for which it was created, has been extended to other areas. However, this system has not been exempt from criticism.<sup>35</sup>

#### II.3.A.4. Limited Bidding

Although described differently in each country, this method is characterized by having a restricted invitation to bid, due to the complexity of the object of the contract or its specialized nature, which thereby limits the number of competent suppliers, as it happens in Guyana (restricted bidding). Notwithstanding, in most of the sample countries, limited bidding is used for low-value projects where extended public bidding procedures are deemed unnecessary. Furthermore, limited bidding might also occur when public bidding is declared void (Chile, Costa Rica [listing process], Jamaica [restricted bidding]), or Chile [prematurely terminated contracts]).

In the IDB Policies, the general rule for defining shortlists for consultant selection is the rationale of limited bidding, although it might be called differently. Similarly, although in Chile there is no specific procedure for consultant selection, the law demands prequalification for participation in procurement processes for the provision of "specialized personal services," architecture, and town planning projects.

The IDB Policies set out in more detail the reasons that justify restricting the call to bid. The criteria for drafting the shortlists in the consultancy processes relate to aspects that determine

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<sup>35</sup> See Justen Filho (2014) and Portugal Ribeiro (2013).



the different modes of selection. In quality- and cost-based selection (QCBS) there is a significant choice of possible consultants, which explains the combination of the criteria of quality and cost. In quality-based selection (QBS), the complex or highly specialized services or with significant future repercussions, or whose implementation might be executed in substantially different ways, restrict and limit the profiles of “appropriate” candidates and, consequently, the names on the short list subsequently drafted. Similarly, the nature of the short list is determined by the simple task of defining a fixed budget (selection based on a fixed budget, or FBS), standard or routine services (least cost selection, or LCS) or minor services (selection based on consultants’ qualifications, or CQS). The PC might be considered to offer a more technical definition of the restricted invitation to bid, which is closer to limited bidding.

In contrast to public bidding and two-stage procedures, in limited bidding there is no open invitation to tender, but rather an invitation to participate of the process. Often, only those registered in the suppliers’ registry are invited. In Brazil (price taking and invitation) and Argentina (limited bidding), other suppliers are also permitted to take part.

The examples cited constitute a limitation on publicity, rather than on competition, which distorts the purpose of restricting the invitation for technical reasons such as bidder profiles and hampers the dynamic of the process as the eligibility conditions of the suppliers that bid without being invited must be demonstrated (Reis and Jordão, forthcoming). These failures are exacerbated in other regulatory frameworks in which there is even greater discretion when selecting the bidders to be invited, as occurs in the case of “abbreviated bidding” in Costa Rica where the administration selects a minimum of five suppliers listed in the registry and, when fewer than five satisfy the required conditions, publicly calls for bids via the official gazette. In Chile and Mexico, three suppliers not necessarily listed in the official electronic suppliers’ register are invited.

In the IDB’s modified ICB, a list can be drawn up of pre-qualified bidders for the procurement of basic products with fluctuating prices in the market. One of the IDB’s criteria for employing limited bidding (LIL) is the identification of a small number of bidders in the market. The LIL does not require a public announcement and considers a direct invitation to the identified suppliers.

#### **II.3.A.5. Procedures with Project Definition**

Bidding procedures are based on a full definition of the needs of the administration, which determines the key objective of procurement. This specification depends on an accurate description of the need and a good planning of the entire concept of the project. However, there are projects in which its scope and characteristics are difficult to determine. This happens when the contracting entities do not have full knowledge of the latest technologies or construction solutions available in the market. In other cases, the supplier itself is expected to define the project.

This is sometimes the case for construction works, industrial facilities, or complex infrastructure, in which it is expected from the supplier to contribute in defining the project, whether by combining the activities of consultancy and construction or supply models, such as so-called turnkey contracts. These types of contracts include different models of concession, whose dividing lines with public procurement might be blurred. Leasing, BOT (Build-Operate-Transfer), BOOT (Build, Operate, Own, Transfer), BOO (Build-Operate-Own), BRO (Buy-Rehabilitate-Operate), LRO (Lease-Rehabilitate-Operate), and other forms of project finance are some examples of the latter (Lyonnet du Moutier, 2012; Symchowicz, 2012; Tafouti Youmsi, 2013).

These models do not usually correspond to public procurement and have traditionally been classified as different concession models. However, the distinction between them and public procurement is becoming increasingly vague as public–private partnership models become more generalized. Although countries usually have special legislation exempting them from general procurement rules, their influence on public procurement is growing. As can be clearly seen in Brazil, and the synergies with the general rules of procurement are beginning to affect certain methods of procurement. This is true of the processes with private initiative, originally considered for concessions, but that today enjoy a generalized status, applicable to any model of contract in Argentina and Jamaica, when the procurement type is new or original, or when they involve technological or scientific innovation. In the same way, new regulations in Peru have introduced the European model of competitive dialogue, enabling proposals to be adjusted and improved throughout the selection process, thus preserving the principles of competition and equality between bidders (Moreno Molina, 2008; Nores Escobar, 2007).

This method is designed for contracts that are particularly complex and in constant evolution, such as those requiring high technology or the building of complex infrastructure, or those in which progress is difficult to be initially established, or where the financing options for the project are not clear and therefore, it is difficult to determine the best technique for carrying out the project and it requires setting up a dialogue between buyers and suppliers. These cases present themselves in the strategic sectors linked to public services (water, gas, electricity, transportation, telecommunications), where innovation and market regulation mechanisms encourage the establishment of dynamic contacts between the suppliers of these services.

A **competitive dialogue** responds to this need, as an intermediate solution between the absolute rigidity of bidding, which proscribes any negotiation and a direct negotiation, commonly employed in past concession processes requiring complex services or constructions (e.g., railways).<sup>36</sup>

In the explanatory note to the European Directive 2004/18/EC, the European Commission indicates:

(...) competitive dialogue can be described, in simple terms, as a specific procedure that shares some aspects with both a restricted procedure and a publicly negotiated procedure. The dialogue is fundamentally distinguished from the restricted procedure by the fact that negotiations are authorized on various aspects of the contract and from the negotiated procedure insofar as, essentially, the negotiations focus on a specific phase of the procedure.

The procedure starts with an invitation to bid that advertises the needs that the project seeks to satisfy. Establishing a dialogue includes the ways of achieving the project objectives, defining the risks and responsibilities inherent to it and their suitable distribution among all stakeholders, the possible monetary incentives for achieving the objectives, or the sanctions imposed in the event of failure. The procedure involves successive rounds of dialogue with the objective of progressively reducing the number of alternatives to be examined and to gradually characterize the project until a satisfactory definition has been reached, without considering the technical models publicized throughout the process as true proposals. Once the dialogue is over, the pre-selected bidders are invited to submit their final bid, which will be evaluated according to the criteria established when the invitation to bid is made, thereby defining the most economically advantageous tender.

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<sup>36</sup> In Colombia, Public Enterprises of Medellín (Empresas Públicas de Medellín, or EPM), establishes in its procurement regulations the non-binding competitive bidding method, which includes competitive dialogue and has resulted in successful procurement processes.

Similarly, in the PGW and the current legislation in Guyana and Jamaica, two-stage bidding is considered for complex projects or turnkey contracts in which it is either impossible or not advisable to prepare the full technical specifications beforehand. During the first stage, stakeholders submit technical proposals without prices, based on a general conceptual design, to be thereafter specified and defined in the modified bidding documents. An invitation is made to submit final technical proposals and price bids. It is worth mentioning that the employment of certain novel methods in the sample countries, such as competitive dialogue and private initiative, among other methods, should be considered for inclusion in the IDB Policies.

### **II.3.B. Direct Contracting**

In the 12 countries analyzed direct contracting is considered an exceptional method considered only in specific cases. In eight of them,<sup>37</sup> the origin of direct contracting is determined based on two general criteria: the (low) estimated or referential amount of the contract,<sup>38</sup> outside of its purpose (goods, non-personal services, works or consulting), and convenience, determined by special circumstances that justify the application of this method of contracting ([see Annex 3](#)).

### **II.4. Selection Criteria for Consultants**

With regard to the dominant selection criteria in the procurement methods derived from public bidding, it is clear that, in processes relating to contracts other than for consultancy services, the conditions of bidder eligibility, as well as the bidder's legal conditions, financial capacity, experience and business organization, are usually separated from the evaluation and weighting factors that enable the best bid to be selected. The eligibility conditions are simply verified. Brazil's Differentiated Procurement Regime (RDC) considers a pre-eligibility stage, irrespective of the bidding processes, which grants eligibility for one year for different processes. Similarly, in Costa Rica, multiple prequalification is possible, for two-stage contracts, which means that prequalification can be employed in various public or private bidding processes (abbreviated).

The sample countries establish the need to define the evaluation factors, the degree of importance of each one, and the method used to evaluate them in the bidding terms and conditions. They also allow a mixture of economic, technical, and possibly non-monetized factors, contrasting with the focus of IDB Policies which, despite including diverse factors, still demand a monetized valuation, and only exceptionally consider a non-monetized valuation.

In Mexico, the general rule establishes criteria for points and percentages or cost-benefit, and whenever this is impossible, for using the binary method by which the contract is awarded to whoever meets the requirements established by the procuring agency and submits the lowest bid. Conducting a cost-benefit analysis is thereby encouraged whenever measurable and comparable variables can be determined. The regulations specify ways of appraising the technical factors in infrastructure construction works and evaluating total price contracts and unit price contracts.

In Panama, a range of percentages is established (between 30 percent and 55 percent) that defines the weighting given to price criteria in the bids. Best-value bidding with separate evaluation has a different range (between 30 percent and 49 percent). In best-value bidding, in which technical factors are essential, the official estimated price remains a secret.

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<sup>37</sup> Argentina, Brazil, Chile, Costa Rica, Ecuador, Honduras, Jamaica, and Mexico.

<sup>38</sup> In some cases, it will be set according to budget period or fiscal year of the state/federal contracting agency (Brazil, Costa Rica, Ecuador, Jamaica, Mexico).



In Peru, the regulations provide a detailed definition of the evaluation factors as guidelines for the bidding terms and conditions, demanding their application according to the object of the contract (general services, consultancy services, construction works, or goods) (Morón Urbina, 2006). The recent decree is less rigorous in this definition and establishes only guidelines; price is established as the dominant factor for the procurement of goods, services in general, and construction works (between 60 and 100 points out of a possible 100), whereas for consultancy services, technical and economic criteria are given equal weighting.

In Chile, downgrading the price as the preponderant bid value has meant that the bidding terms and conditions define, in each case, the factors that lead to a good cost-benefit balance. Specific weighting guidelines are determined to encourage effectiveness, efficiency, and savings in procurement, bearing in mind the factors that must be considered prior according to the object of the contract, which cannot be limited to bid prices, with the aim of ensuring effectiveness, efficiency, and savings in hiring. These factors address the growing importance of social and environmental and disabled persons' issues which are also present in Costa Rica (Cabrera, 2012) and Argentina (Halperín and Bogut Salcedo, 2013), and that are in line with international practice (Pernás, 2014; Pernas García, 2015).<sup>39</sup>

In Costa Rica, non-price factors are sometimes used, if they bestow a comparative advantage when it comes to selecting the most appropriate bid. There may also be two-stage processes which first analyze compliance with the technical, legal, and financial aspects before moving onto the second phase, in which the economic bid is evaluated. Despite these arrangements, however, selection still usually centers on price, insofar as the technical and financial factors and bidder experience are minimum requirements demanded from all. Only in the procurement of technical or professional services are the personal, professional, and business conditions of the bidders appraised.

Regulations in Guyana and Jamaica, as well as those of the IDB's PGW, consider the costs of the bids as an essential evaluation criterion, insofar as they establish the general rule on selection of the bid with the lowest evaluated cost, although this does not necessarily mean the lowest cost. The IDB's rules describe examples of determining factors for the procurement of goods and equipment, such as the payments schedule, delivery time, operating costs, effectiveness and compatibility of the equipment, the availability of service and spare parts, and even environmental benefits. However, it is recommended to give a monetary value to these factors in such a way that their weighting, defined in the bidding documents, enables to determine the "lowest bid." More emphatically, the PGW states "evaluation of the bids for construction works should be made in strictly monetary terms."

This could refer to the "most economically advantageous tender" available in European law and considered to be a less rigid notion than the "lowest bid" concept. This notion however, should allow the evaluation to be translated and made into purely monetary terms. The introduction to the new [Directive 2014/24/EU](#) points out a trend toward evaluation in monetary terms, even with regard to services (not necessarily with consultancy services). The Directive defines the notion of the "most economically advantageous tender" as the one with the best quality/price ratio. Thus, it "will be evaluated according to criteria that include qualitative, environmental and/or social, and innovative aspects, linked to the public contract objective" (Art. 67.2). Moreover, it introduces the concept and the development of "life-cycle cost analysis" of the good, service, or construction work contract objective (Art. 68). The specific valuation of these factors cannot easily be translated into "monetary terms." The Directive establishes that the bidding terms and conditions will require the relative weighting of each of the chosen criteria, for which a "range of values with the necessary maximum spread" can be

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<sup>39</sup> On the growing use of social and environmental preferences, see Beláustegui (2011: 14–28).

established. When weighting is not possible, it will indicate “the decreasing order of importance attributed to the criteria” (Fernández and Valcárcel, 2014).

This conception makes greater demands from those in charge of evaluating the proposal (the evaluators), as they are obliged to carry out a precise analysis of the qualitative factors and justify their conclusions. This also requires a greater understanding and assessment of the essential selection criteria, which are increasingly determined by contemporary factors such as social and environmental sustainability and innovation.

The remaining contracting methods, often restricted to a single country, reveal the existence of conditions and conceptions that are unique to each country. Some methods reflect social policies and are expressed as preferential measures toward certain social sectors.

In Brazil, these methods are only applied to break a tie with an international provider. Nevertheless, there is exclusivity of MSMEs in contracts of small amounts (less than US\$21,000) and preference in case of a tie. Guyana and Jamaica have a national preferential factor, through the granting of a weighting of 10 percentage points. Bolivia has established preferences with differentiated percentages in pricing by products, inputs, national companies, MSMEs and, agricultural and farm organizations (Serrate, forthcoming). In Bolivia, moreover, there are sectors reserved for national production, such as medicine supply. The Constitution of Ecuador establishes “prioritization of national products and services, especially those coming from the popular and solidarity economy, and from micro, small, and medium productive enterprises,” which is carried out through novel procedures, such as inclusive procurement, technological disaggregation, and Inclusion Fairs. For its part, Honduras grants preference to national production that competes with foreign production of countries with which it does not have an agreement with a national treatment provision. With respect to Mexico, its preferences are subordinated to the conditions in FTAs.

To stimulate companies in its member countries, IDB rules are conceived differently. PBOs establish as a rule of eligibility that funds can only be used to pay contracts with contractors from Bank member countries and that they must all have equality of opportunity to acquire goods that originate in the countries themselves. The same policies enable a margin of preference for domestic goods with respect to goods produced in a borrowing-member country, nonetheless following international practices for public bids. See Annex 2 of PBO.

## **II.5. Duration of Public Bidding Processes**

Regulations in the different sample countries regarding the duration of the public bidding process and its stages are characterized by setting mandatory time periods for: the invitation to bid or for submitting bids, ranging between 15 and 45 days, approximately. Setting longer time frames for this stage of the process can be justified by the following factors: (i) foreign bidders participating in the process (Argentina, Bolivia, Honduras, and Mexico) or (ii) the volume of procurement (Brazil, Chile, Costa Rica, Ecuador, Jamaica, Panama, and Peru). In Guyana, no time is set for either the invitation to bid or for bid submission.

The duration of every stage of the public bidding process is not specifically regulated in any of the countries. Argentina and Costa Rica have the most detailed regulations in this sense. In addition to the periods for the invitation to bid or bid submission, they also establish mandatory periods for the analysis and evaluation of proposals. Periods are also specified to publish the invitation to bid, and to issue and notify the selection of the bidder. Ecuador,<sup>40</sup> Honduras, Guyana, Jamaica, Mexico, and Panama have also set time frames for the evaluation of bids, which range between 5 and 90 days.

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<sup>40</sup> Only certain procedures include regulations for the time taken during different stages of bid submissions.

The same applies to simplified bidding for small contracts, in which the legal or regulatory time frames are reduced. The duration of the invitation or the submission period for simplified bidding for small contracts—in the countries that recognize this as a selection method (Chile, Costa Rica, Jamaica, Mexico)—ranges between 2 and 30 days, and the evaluation of the bids, between 5 and 20 days.

For restricted or limited bidding, the periods do not tend to be regulated in any special way, which means that the duration of their various stages must be determined by the documents governing each selection process. Only Argentina and Peru have specific rules. In Argentina, a period of two days is considered to examine the bids from other bidders and a similar period to make comments on these observations. Peru expressly regulates the period for submitting an application for prequalification (14 days, counting from the invitation to bid) and the period in which the aforesaid prequalification must be published, which is fixed at 14 business days. In most countries, the total amount of time required for initiating and culminating a selection process can be established in each specific case.

In IDB Policies, the regulation of the duration of the selection process<sup>41</sup> is similar to that of the sample countries. The PGW establishes the following periods in ICB: (i) for bid submission, the period might be six weeks if no large-scale civil construction works are involved, or 12 weeks if construction works with elements requiring complex equipment are involved; and (ii) for the publication of the notice of award, the period is two weeks, or 14 days from receipt of the IDB's non-objection to award the contract. In turn, the period for submitting bids under the modified ICB is set at four weeks.

## **II.6. Procurement of Consultancy Services**

### **II.6.A. Determination of the Method and Structure**

The concept of consultancy services includes all types of services whose implementation implies the performance of intellectual activities by either legal or natural persons, regardless of their degree of complexity.<sup>42</sup> This comparative analysis considers services that are expressly considered as consultancy, as well as those not considered as such in any given country, as long as they presuppose the performance of intellectual activities.<sup>43</sup> Such is the case of professional services provided by independent suppliers.

Most of the sample countries contract consultancy services according to the general rules and selection methods already presented (Argentina,<sup>44</sup> Bolivia, Brazil,<sup>45</sup> Chile, Costa Rica, Jamaica,<sup>46</sup> Mexico, and Panama). Only Ecuador, Honduras, Guyana and Peru—as well as the IDB, establish special methods with a similar structure to that of the general method.

In most of the legislative frameworks analyzed, selecting the method applicable to consultancy service procurement is determined by the same criteria that govern the selection of the method for procuring other types of services, goods, and construction works, among them, the contract value and the objective.

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<sup>41</sup> The time limits are not fixed times, but rather can be amended in accordance with professional criteria following authorization from the Bank.

<sup>42</sup> This scope is established according to the content of the IDB's PC.

<sup>43</sup> In Ecuador and Honduras, consultancy contracts are expressly defined and, in the latter country, consultancy is clearly distinguished from the professional services contracted according to the general rules for selection methods.

<sup>44</sup> Although mention is made of public competition for the procurement of consultancy services, all of the regulations and stages are identical to those of bidding.

<sup>45</sup> It is worth highlighting that Brazilian legislation considers the contracting of consultancy services through public bidding, but this has different modes, such as public competitions (for service projects), which reveals that this is not a specific method, in the strictest sense, but rather a sub-method of the general method. See Annex 5. Legislative analysis. Brazil, No. 4.

<sup>46</sup> In Jamaica, there is a specific heading for the procurement of consultancy services, but this establishes the use of the same methods for goods or construction works, according to the value of the contract.

In six of the eight countries, no specific methods are defined for the procurement of consultancy services. The contract value is the determining factor for establishing the applicable selection method. This occurs in Argentina (public or private competition); Bolivia (public bidding, ANPE and minor procurement); Chile (framework agreement, except in cases of specialized personal services, public bidding, private bidding, or direct contracting); Costa Rica (public bidding, abbreviated bidding, or direct contracting); Jamaica (international bidding, local bidding, and direct contracting), and Panama (lowest bid wins bidding). In Panama, the best-value bidding procedure considers the high level or complexity of the consultancy service without considering the price. In Brazil and Mexico, the consultancy's object of the contract defines the selection method to employ, which does not apply exclusively to these types of services, but for contracting other kinds of services, goods, and construction works as well.

For the stages to be followed during selection methods for procuring consultancy services, the methods especially designated for this purpose, and the general methods used, moreover, for the procurement of other types of goods, services and construction works, generally follow the same structure.

For [limited bidding](#), the procedures are common to the ones of the general structure: the request of expressions of interest beforehand a short list of eligible candidates refers to a [two-stage procedure](#), whereas the direct preparation of the short list corresponds to [private tendering](#).

## **II.6.B. Selection Criteria for Consultants**

Regarding the selection criteria for consultants, it is noteworthy that in the 12 sample countries, technical factors are combined with considerations of quality and price.<sup>47</sup> In three countries, in some cases expressly identified, only the quality aspect is considered (Chile, Guyana, and Jamaica). Nevertheless, there is undoubtedly a majority preference for quality. In eight countries (Argentina, Brazil, Costa Rica, Ecuador, Guyana, Mexico, Panama, and Peru), quality is weighed against other factors such as price, but the former is given precedence. In all countries, the way in which the weighting is made between quality and price is established in each case, except in Jamaica, where there is a detailed regulation in this regard. All countries except Jamaica and Peru establish rules to protect local goods and services and MSMEs.

The Bank's PC sets out six specific methods for the selection of consultants, among which the most recommendable is QCBS. Its stages must be followed in the other procedures,<sup>48</sup> without detriment to the characteristics of method and which relate to the form in which the bids are submitted and how they are evaluated. The criteria to be considered before the selection of one method over another are descriptions of the aspects that should be evaluated.

The detailed analysis of the stages to be followed in QCBS and, consequently, in the other selection methods of the PC, reveals that, as happens in the three countries that deviate from the general trend, the sequence in which these must be followed is very similar to that foreseen in the selection methods established in general for procuring all types of goods and services. These stages include preparing the terms of reference and estimating the budget, publishing the invitation to bid, followed by the request for proposals,<sup>49</sup> the receipt of proposals, their

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<sup>47</sup> Only in Honduras is the weighting of factors that, as a whole, are intended to appraise the technical aspects of the proposal and the bidder fixed as a general rule, while the bid price can be considered only exceptionally.

<sup>48</sup> Quality-based selection (QBS); selection based on a fixed budget (FBS); least cost selection (LCS); selection based on consultants' qualifications (CQS); single-source selection (SSS).

<sup>49</sup> The request for proposals is preceded by the inclusion on a short list in certain countries; it is only seen in Ecuador, as an autonomous selection method, and in Guyana and Jamaica, as a stage of the selection processes.

evaluation,<sup>50</sup> and the process outcome, which might then lead to a negotiation, as also occurs in Brazil, Chile, Ecuador, Guyana, and Jamaica.

The Bank's PC deviate from the 12 countries analyzed regarding selection criteria regulation, in which the criteria must be considered for qualification of consulting services and, moreover, guidelines that give priority to the appraisal of quality in this type of services. The fact that specific methods are set out in the PC, which are applied in consideration of the way in which bids must be evaluated, reveals that, more than selection methods, the PC contain exhaustive and detailed regulations on bid qualification criteria. The latter, although it presupposes the adoption of more technical rules for selection, given that it takes into account the project characteristics and the fluctuating need to appreciate the consultants' qualities and experience, does not seem to justify the regulation of fully independent methods (procedures) for contracting consultants.

### **II.6.C. Duration of Consultant Selection Processes**

It is worth highlighting that only in exceptional cases the duration of the stages of the process is regulated. In most of the countries, the deadline for the final submission of proposal is the only regulated stage.

In Argentina, Bolivia, Brazil, Chile, Costa Rica, Jamaica, Mexico, and Panama, the procurement of consulting services is carried out using the same methods considered for the procurement of goods, construction works and other types of services. Regulation in this case is the same of the public bidding and restricted bidding. In other words, only the minimum time frames for the invitation to bid or for bid submissions are regulated. In Jamaica, deadlines in the selection process are exclusively set for the procurement of consultancy services.<sup>51</sup> In Ecuador, Guyana, Honduras, and Peru, which all establish a special method for consultant selection, there is no detailed regulation regarding the duration of the selection process.

Only in Ecuador, a minimum of 10 and a maximum of 20 days are established between the invitation to bid and the bid opening. However, there is no definition that refers to the deadline for processing the bid opening and evaluation, and the negotiation does not have a single limit of five days. If the contract is not signed successfully with the best evaluated bidder, a similar period begins with the second or thereafter successively until the process is successfully concluded.

In Honduras, evaluation must take place during the bid's validity period. In Guyana and Peru, there is no special regulation on public competition time frames, other than the one available for public bidding.

The IDB's PC are aligned with the trend of only regulating the deadline for the submission of proposals for a bid. The IDB's PC sets a minimum of four weeks and a maximum of three months.

### **II.7. Use of Technology for the Procurement of CGS**

The concept of CGS refers to the procurement of goods or services that have the same or similar technological specifications and that share objectively defined patterns of performance and quality that can be standardized. These goods or services have different names: regulated, generic, standard, and common, among others.

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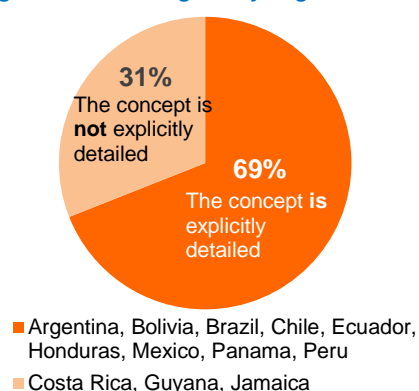
<sup>50</sup> This is carried out in phases, as in six of the 12 countries analyzed: Argentina, Brazil, Guyana, Jamaica, Panama, and Peru.

<sup>51</sup> In the case of international or local public bidding, whose value is equal to or above JMD 150 million, the period is set at 45 days, whereas for other types of services, goods or construction works, it is 30 days. In the other selection processes, the deadline for submitting bids for consultancy services, construction works, goods and other types of services are the same.



The PGW of the IDB do not include the precise concept of CGS, the treatment of which is restricted to specific cases: procurement of basic products (cereals, forage, oil, fuel, etc.) and bulk products with standard specifications that are typically considered uniform goods. In the

**Figure 6. CGS in Regulatory Regimes**



first case, through modified ICB (PGW, Par. 2.68), multiple procurements can be carried out for partial quantities and multiple purchases during a certain period. In the second case, the selection is carried out through the method of price comparison (OGW, Par. 3.6). This precise treatment highlights the inexistence of IDB Policies of a special method for the procurement of CGS, conceived in consideration of the special characteristics of these goods. This makes the procedure agile, making the use of electronic mechanisms a useful tactic.

On a different note, the countries in the sample have a generalized regulation in these types of procedures (Dellpiazzo, 2011). In total, 11 of the 12 countries (except Guyana) provide the concept of CGS or the possibility of entering into framework agreements to obtain efficiencies in procurement. The concept of CGS is not explicitly detailed in the legislation of all countries. As seen in Figure 6, this procurement is carried out through electronic catalogs established through framework agreements and/or reverse auctions.

### **II.7.A. Established Methods for the Procurement of CGS**

Methods of procurement involving framework agreements are generally signed and administered by the procurement regulatory agencies. Of the countries that only use framework agreements for procurement of CGS (Argentina and Chile) procurement by e-catalogue is mandatory,<sup>52</sup> whereas in Bolivia, Jamaica, and Mexico, it is optional. In Costa Rica and Jamaica, the possibility of signing framework agreements is considered, but no specific mention is made of CGS. Use of the agreement is mandatory, unless the possibility of obtaining better conditions via another procedure. In Ecuador, the National Public Procurement Service (SERCOP) periodically signs framework agreements, following a selection process through which the procuring agencies purchase goods and services directly from e-catalogue of standardized goods and services.<sup>53</sup>

Honduras uses a method known as purchase by catalogue, which is based on the availability of an e-catalogue for procuring CGS. For suppliers to be listed in the catalogue, framework agreements, joint purchasing, or reverse auctions are required. If the necessary good is included in the catalogue the employment of this procurement method is mandatory. In these cases, the price is accepted as the main selection criterion, but it must be analyzed alongside an appraisal of the cost–benefit criteria.

In Peru, CGS must be included in the electronic catalogue from the framework agreements signed. If the good is not included, the procuring agencies must purchase CGS by electronic reverse auction. When the value of the goods and services to be procured corresponds to 10 percent of the value applicable to the public bidding, a price comparison can be made.

<sup>52</sup> However, Chile does not enforce this obligation when it comes to procurement by the Armed and Security Forces (Fuerzas Armadas y de Seguridad).

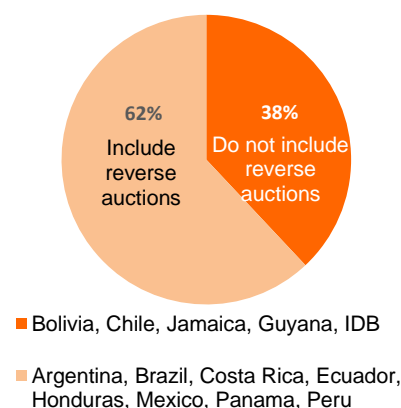
<sup>53</sup> If the standardized goods and services are not found in this catalogue, then procuring agencies must hold a reverse or “Dutch” auction. As these are standardized goods, not included in the electronic catalogue and whose value is under a certain amount, then direct small-value procurement follows. Moreover, the Inclusion Fair procedure is established as the preferred mechanism for all kinds of goods and services, including standardized goods, in which only organizations from the populist and solidarity-based economy, popular economic units, artisans, and the micro and small productive units can participate.

Although included in the internal regulations, the specific description of the framework agreements is inconsistent.

**Reverse or Dutch auctions** are employed in eight of the sample countries: Argentina, Brazil, Costa Rica, Ecuador, Honduras, Mexico, Panama, and Peru. These auctions often coexist with the framework agreements.

Irrespective of the value, the “pregão” (a variation of bidding) is the default employed procurement method for the acquisition of CGS in Brazil. This procedure takes place in two stages, which can be undertaken either physically or electronically. First, the bidders must submit their proposals in a sealed envelope. A price dispute phase in an auction with decreasing values (Dutch or reverse auction) follows the submission of proposals.<sup>54</sup>

**Figure 7. Procurement of CGS by Reverse Auction**



The systematic regulation of CGSs in the sample countries and their growing importance means that the Bank’s Policies should explicitly take on board methods such as framework agreements and reverse auctions for CGS procurement. The Inter-American Network on Government Procurement (Red Interamericana de Compras Gubernamentales) ([www.ricg.org](http://www.ricg.org)), sponsored by the IDB, encourage and support the trends toward regulatory harmonization and use of these methods as best practices.

## **II.7.B. Supplier Selection Criteria and Duration of CGS Procurement Procedures**

To identify the technical characteristics and specific conditions of the goods and products to procure as a base to establish their common conditions constitutes the essence of these procedures. This substantially simplifies the procedure, favoring the use of electronic media, and allows the price to be used as the selection criterion of the supplier.

The duration of the processes is not systematically established throughout the sample countries. As an example, in Brazil’s “pregão” system, the period for bid submission cannot be less than 8 days and must run for at least 60 days, unless a different period is established. In Ecuador, for reverse auctions, it is stipulated that bidding can last between 15 and 60 minutes and that the period for bid submissions will be between 7 and 20 days. With regard to the bid stages, these follow this order: lowest-bid wins (various bidders) or negotiation (one bidder), contract awarded or declared void, and procurement. In Peru, no specific times or stages are foreseen for drafting the framework agreements. Time periods are not set for the reverse auction; however the various stages are mentioned: invitation to bid, supplier registry and bid submission, opening the bids, the counter-offer period, and award of contract (adjudication). In the case of Honduras, no reference is made to the length of the process, although a full description of its different phases is made.

## **II.8. Dealing with Complaints**

The 12 countries in the sample establish in their regulatory frameworks the right to submit claims or complaints during the public procurement process. This assures the due process in public financed projects. In the national legislation, differences have been observed with

<sup>54</sup> Another characteristic of the “pregão” bidding method is the fact that the eligibility phase is carried out after the competitive bidding phase, in such a way that only the eligibility credentials of the winning bidder are examined.

respect to the periods to present complaints, administrative requirements, and the suspension of the awarding process (see Annex 1, Table 1.3).

In Costa Rica, there are several ways to contest various selection process actions (appeal against or revocation of the prequalification decision; objection to bidding cartels, process extensions or amendments; appeal against or revocation of the award notice or against a competition being declared void or unsuccessful; appeal against subsequent award notices, and so on). In Ecuador, bidders can demand the amendment, substitution, or overturning of administrative decisions related to procurement procedures, and the decision is subject to appeal for reversal. Appeals can also be made against SERCOP, which can suspend the process definitively if it directly affects the bidders' subjective rights. In Jamaica, bidders can call on the procuring agency to review the procurement process and the NCC can review its decisions. This decision can also be appealed to the Procurement Appeals Board. In Brazil, the bidding documents can be questioned due to irregularities in the application of the law. Administrative appeals are admitted against various decisions during the selection process. This also occurs in Bolivia, where those affected can lodge an appeal for annulment. In Panama, the bidder can make a full rejection before the Directorate General for Public Procurement, and can also lodge appeals with the same body for any irregularities it may have committed before the award of contract. In contrast, Guyana has established administrative monitoring restricted to the prequalification decision. The disqualified supplier can appeal this decision. In Honduras and Peru, only annulment of the award or the award notice is considered. In the case of Chile, the Law 19.886 and its regulations do not consider administrative appeals against decisions made during the selection process.

Although appeals and interventions are designed to monitor the selection process to guarantee its integrity and the right to due process for those taking part, in some cases they can excessively extend the stages of the procurement process and, therefore, its time frames, thus affecting the process inefficiency and ineffectiveness. Furthermore, in some of the sample countries (Bolivia, Chile, and Jamaica), legal monitoring of the administrative decisions to award, to declare void or take preventive actions is allowed. Detailed country-by-country treatment of complaints is shown in Annex 1, Table 1.3.

## **II.9. Aspects that Could Enhance the Efficiency and Effectiveness of the Procurement Process**

The previous sections have highlighted various aspects of the legal procurement framework of the sample countries and of IDB Policies that can have repercussions on the effectiveness and efficiency of selection processes.

In this regard, it is noteworthy that the Bank considers a *two-stage bidding process* for project definition. Although this represents a strength, further analysis might complement it by considering the regulations in certain countries. For example, Argentina allows widespread private initiative, which stimulates the private sector to actively contribute to project proposal and definition.

In the search for greater efficiency, certain local legal frameworks have summarized the prequalification stage into a one-step process, by considering simultaneously the presentation of a proposal in two separate envelopes: one containing the technical proposal and the other the economic proposal. This system is in place in Argentina, Jamaica, and Panama, and it is used widely for the procurement of consultancy services in Ecuador and Peru. This approach could be efficient when market conditions indicate that there will be strong competition. The submission of a dual proposal considering technical and economic factors could eventually encourage competition. However, if market demand is not widespread, due to the project's technical or economic requirements, the separation of pre-selection process into two successive stages is advisable, as it could enable firms with real capacity to implement the



project to then restrict competition to the short-listed firms. This staggered submission process could help avoid the distortion of economic calculations caused by smaller companies that formulate proposals that may be unrealistically low.

The search for greater effectiveness in supplier selection has meant that so-called turnkey projects have evolved toward the specific concept of competitive dialogue. In these projects, attention is focused on the project itself and the tasks to be performed by the supplier. The supplier is expected to manage the entire project cycle, from the conception of the project to the commissioning of the facilities. This gives the supplier a higher degree of responsibility and is considered a trend towards agreeing a total price. This may not be desirable in complex projects due to their nature, the technological development they demand, or the required legal-financial structural model, in which case it may be more beneficial to hold a competitive dialogue focused on developing the project via a supplier selection process.

Employing this method is a challenge, for the procuring agency, which needs a high level of governance, as well as the bidders. For the procuring agency, the scope of the “dialogue” must not affect the conditions of the competition, by amending or introducing the definition of elements essential to the project as the process progresses, and it is crucial to evaluate the viability of the technical proposals, guarantee their confidentiality, and protect industrial property rights. For the bidders, significant investments are needed to prepare the proposal of technical solutions, with no guarantee of being chosen to deliver the project.

Given the characteristics of the competitive dialogue as a procurement method, its employment should be considered carefully. Its costs at all levels require, as already established in the guidelines set out in the European Directive 2004/18/EC, a prudent cost-benefit valuation that contrasts with other methods of procurement. Thus, this method should be only employed when the project is complex and the market conditions justify it, as well as when the administration can guarantee that its use will satisfy the demands of the project. Otherwise, the solution could become expensive and, therefore, inefficient.

A further expression of efficiency and effectiveness in the legal frameworks analyzed is restricted competitive processes with limited bidding, which is manifested in the system of short lists considered in the IDB Policies. In most of the countries, the contract objective is not the determining factor when it comes to applying these procedures (Argentina, Brazil, Costa Rica, Guyana, Honduras, Jamaica, and Mexico). This is logical, bearing in mind that their objective is to restrict the call to bid, when a generalized open invitation is not justified, for various reasons unrelated to the object of the contract. Therefore, the restriction found in the IDB Policies and in the Ecuadorian regulations invite further analysis, specifically of its application to the selection of consultants.

Technically, IDB’s PC allow for restricted bidding for: complex or highly specialized services; when there may be significant repercussions in the future (QBS);<sup>55</sup> when the contracted labor is not complex and the selection is based on a fixed budget (FBS); for the procurement of a standardized service (LCS); or for the hiring of simple services (CQS). This does not mean that the events indicated could not be complemented with others in which a limited invitation also seems advisable, for efficiency reasons. Therefore, examples are dispersed throughout the local legislation in the sample countries: when the project budget is insignificant (Brazil and Jamaica); when the bidding is declared void (Chile, Honduras, Jamaica, and Mexico); when the continuation of a prematurely terminated contract must be guaranteed (Chile and Mexico); in the urgent cases that allow a competitive procedure to be organized (Chile, Honduras, and Mexico); when the number of suppliers is limited (Honduras); when the availability of supplies is restricted due to unexpected changes in the market (Honduras); and when purchases can be made under exceptionally favorable conditions (Jamaica).

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<sup>55</sup> The complexity of the project is also the basis of restricted bidding in Guyana.

Furthermore, in Costa Rica, use of the restricted invitation to bid is applied exclusively based on the value of the contract.

The a priori definition of selection methods based on the object of the contract, as expressed in IDB Policies, is an area of opportunity for further analysis. It seems advisable to make an analysis that considers the inclusion of a more flexible regulation, which can take into consideration the project characteristics to choose the method that offers the best conditions for guaranteeing a proper selection. Therefore, the degree of definition of the scope of the project, its technical complexity, the market breadth or restriction, or the balance between costs and benefits, for example, will provide essential information for the definition of the most appropriate selection method. The cases of Chile and Mexico are illustrative in this respect, where the events that justify direct contracting coincide with those that justify limited bidding, meaning that the administration must evaluate the specific conditions of the procurement to choose one or the other on the basis, in any case, of the need to foster competition, whenever possible. Furthermore, in the Mexican legislation, which establishes the general rule on bidding, the administration is allowed to make a specific assessment to define the pertinent method in each case.

Evaluations of cost–benefit and, in general, of effectiveness and efficiency that the different methods of supplier selection offer are an international trend, expressed in the reflections of the World Bank contained in the document *New Framework for Procurement*,<sup>56</sup> as well as in the new European Union directives on public procurement (Moreno Molina, 2015).

Regarding the selection criteria, the trends in the sample countries are leaning toward greater flexibility. On the one hand, the definition of the determining selection factors is the result of weighing up costs and benefits in each project, instead of monetizing all the factors. On the other, certain selection criteria of certain procurement methods are dropped. The permanent search for greater efficiency and effectiveness also implies making criteria more flexible and conducting a specific analysis of each project.

One specific and important point that relates to selection criteria is the possibility of excluding artificially or abnormally low bids. This helps guarantee the effectiveness of the procurement process. However it raises the risk that the administration's requirements will not be satisfied. In Mexico, when it comes to the procurement of movable goods, leases, and services, bids that are priced below a suitable level are discarded, when the combined evaluation of points and percentages or cost–benefit has not been used; equally, bidding must be declared void when the prices of all the goods, leases, or services bid are unacceptable. The procedure for determining whether a price is unsuitable or unacceptable is considered in the countries' regulations. In Peru, the bids are rejected for *price vil*, when, after demanding the respective guarantee, reasonable doubt remains regarding the risk of non-compliance or, in other words, when the bid is substantially below the estimated value and, after reviewing its constitutive elements, it transpires that certain provisions have not been included or are insufficiently budgeted. In Honduras, any bid that is abnormally low relative to the others or to the budget estimated by the procuring agency must be rejected when there is evidence that it is without foundation or is speculative. It is noteworthy that in this country, beyond giving the administration the power to demand additional information from the bidder to establish the bidder's true capacity to achieve the contract objective, the bidder can also be asked for an assurance of compliance equivalent to 30 percent of the contract value, and warning is given that *special care* must be taken to stop anyone from offering a considerably low price as a way of speculating with the price review clause, if there is one, in the event that the contract is awarded. The latter arrangements seem somewhat hazardous, alluding that a bid might still be selected even though its price is very low. Finally, in Brazil, the law prohibits acceptance of proposals that submit derisory overall or unitary prices, or with zero value, which are

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<sup>56</sup> See <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.

incompatible with the market prices for inputs and salaries, even though in the bidding terms and conditions minimum limits have not been established, except those that refer to the materials or plant belonging to the bidder itself, according to which the bidder foregoes a part or all of the total remuneration.

The IDB's PGW (Par. 2.58) establishes that, if there has been no bidder prequalification process, the borrower must determine whether the bidder whose bid has been considered as the lowest evaluated bid has the capacity and the financial resources necessary to satisfactorily execute the contract for which the criteria specified in the bidding documents must be applied. A negative result of this test justifies rejection of the bid. This arrangement does not specifically refer to the artificial or abnormally low nature of the bid, nor does it seem to cover this eventuality, given that the capacity and the financial resources needed to satisfactorily execute the contract refer to the bidder's conditions rather than the bid itself. Moreover, it does not make specific reference in the PC to abnormal or artificially low bids.

The possibility should be thus examined in detail of including relevant provisions in Bank Policies, by taking into account the regulations of the countries mentioned above, while bearing in mind the exceptions mentioned in the case of Honduras.

The greater autonomy of the public procurement manager finds its ultimate end and, at the same time, its control in the effectiveness of the aforesaid principles, which enable increasingly complex weighting of considerations such as general interest, economic viability, technical complexity, specialization, and administrative neutrality.

Finally, it is worth remembering that, when it comes to certain procedures to restrict competition, well-drafted suppliers' registries represent an important tool for guaranteeing the selection process efficiency and effectiveness, insofar as they offer pertinent information not only regarding supplier profiles, but also their previous contractual performance. Therefore, while accepting that it is the countries' exclusive responsibility and purview to draft them, the Bank should reflect whether IDB Policies could make express reference to these national registers, whenever this is appropriate.

### III. Results of the Legislative Analysis: Strengths, Weaknesses, and Risks

This comparative study is based on the legal analysis of the of the sample countries and of the IDB Policies.<sup>57</sup> This chapter summarizes the main strengths, weaknesses, and risks. Later the study presents the main aspects related to the guiding principles of public procurement, procurement methods, the use of ITCs, the selection criteria of suppliers, and contract execution.<sup>58</sup>

#### III.1. Strengths

1. The PC presents a technical description of the restricted invitation to bid, characteristic of limited bidding for the selection of consultants. In these policies, the different modes of selection define the bidder profile, which determines the suitability for shortlisting and, at the same time, the specific criteria for bid evaluation. This strength is also present in Jamaica. In the other sample countries, the criteria for selecting consultants are expressed in general terms (bidder profile, experience, technical procedure, price, etc.), without offering elements for specific application.
2. The PGW considers a two-stage bidding process for the definition of a project.
3. In the PGW and with regard to ICB, which rules are applicable to other selection processes, a distinction is drawn between the lowest estimated price and the lowest evaluated cost, and additional factors other than the price are considered that might help to determine the latter (Par. 2.49, PGW). However, only monetized factors applicable especially to construction works are used.
4. The PC considers that a committee of civil servants representing the pertinent departments (technical, financial, legal, according to responsibility), made up of three or more specialists from each sector (Par. 2.13, 2.15. PC), must evaluate the technical proposals.
5. The PGW mentions an important direct contracting event that is unforeseen in the regulations of the sample countries. It refers to when the contractor responsible for a process design requires the purchase of critical items from a particular supplier as a condition of a performance guarantee.
6. In what might be considered an example of the principle of efficiency, in the PGW when referring to ICB, which rules are applied to other selection processes, the borrower is enabled to use an electronic system to distribute the bidding documents. This is possible only when the Bank is satisfied with that system's functionality (the system must be secure to ensure that the bidding documents are not tampered with, while keeping bidders' access to the bidding documents open) (Par. 2.11. PGW). Similarly, in the PC it is permitted that, in the QCBS, whose rules are also applicable to other methods of consultant selection, the borrower can distribute the request for proposals (RFP) electronically. This is possible only when the Bank is satisfied with the effectiveness of the system, which must be secure enough to ensure that the RFP is not altered and that access to the system is restricted only to the firms on the short list (Par. 2.9. PC).

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<sup>57</sup> Likewise, the OECD-DAC Methodology for Assessing Procurement Systems (MAPS), the OECD Recommendations on Public Procurement, and the European Union Directives on Public procurement were considered.

<sup>58</sup> Annex 2 compares the strengths, weaknesses, risks, and opportunities for further analysis.

### III.2. Weaknesses

1. The IDB Policies do not include principles as such to guide public procurement financed with its resources. However, it must be understood that the general considerations of the PGW and the PC and other specific arrangements contained therein do refer to them. These general considerations fail to cover all the relevant principles, such as effectiveness, integrity, due process, sustainable development, and legality. In this regard, most of the sample countries exhibit comparative advantages relative to the IDB Policies as these principles are expressly stated and even, in some cases, their content and scope is established in their regulatory frameworks.
2. The PGW describes certain methods of procurement that are contract models with particular characteristics. This is true of “Performance-based procurement” (Par. 3.14), or “Inspection agencies” (Par. 3.11). In other cases, the procurement method described is restricted to certain characteristics of the selection criteria, as in “Procurement via the BOO/BOT/BOOT system. Private sector concessions and models” (Par. 3.13), or regulation is limited to sponsoring participation for certain categories of suppliers, as in the case of participation by NGOs and local communities to achieve certain social objectives (Par. 3.17).
3. The PC considers six consultant selection methods, but their independent existence is unjustified, as the stages required are like those considered for the procurement of goods and construction works. Their characteristics refer to the way in which bids must be evaluated and to the events in which selection factors must be considered. In a more technical manner, in Jamaica the consultant selection methods included in the PC are considered as evaluation criteria for consultancy service bids.
4. Publication is only considered in certain actions of the selection process in the single open access portal, wherein the borrowing country publishes all its business opportunities or “on the country’s only official website dedicated to publishing notices of public bidding”. In the case of PGW, specific reference is made to the invitation to prequalification and to bidding (Par. 2.8. PGW) and to publicity in NCB (Par. 3.4. PGW). In the PC, reference is made to the general notice, to the specific procurement notices, and to the documents corresponding to the award of contracts (Par. 2.5., 2.28., 3.8., and 3.13. PC). This does not satisfy the general demand that all countries should disclose their procurement processes in such portals or websites, irrespective of the regulatory regime. Although it might be considered that the countries should follow their own internal rules regarding publicity, partial regulation by the Bank may cast doubts for interpretation.
5. In the PGW and the PC, direct contracting is not authorized in some cases in which it might be advisable:
  - (i) In situations that refer to the occurrence of certain events during a previous selection process (cases in which a previous competitive process was declared void or in which there were no bidders). In these events, open competition has been sufficiently guaranteed beforehand, and the need for the service usually justifies an expeditious conclusion of the contract.
  - (ii) In situations in which a contract is rescinded, prematurely terminated or annulled. In these events, the need to rapidly achieve the contract objective justifies direct contracting.
  - (iii) In situations in which there are inter-institutional contracts (when all parties are public agencies). In these cases, the nature of the suppliers, whose objective

should have a direct bearing on the proposed contract, justifies direct contracting.

6. In the PGW and the PC, no arrangements are included that refer to suppliers' registries at the local level.

### III.3. Risks

1. In the PGW and the PC, there are no provisions that oblige bidders and suppliers to comply with the local arrangements of the borrowing country regarding prohibitions and restrictions on contracting. Paragraph 1.22. of the PC considers that in the RFP the Bank can demand the consultant to commit, in its proposal, to abide by the laws of the country concerning prohibited practices (such as bribery), a rule that, on the one hand, does not create a general obligation, and on the other, does not refer to the general rules on prohibitions and restrictions for procurement. The similar rule contained in Paragraph 1.15. of the PGW is even more limited as it refers only to high-value contracts. Given the restrictive nature of the interpretation and application of the prohibitive rules, this creates a risk that the borrowing countries consider themselves bound only by the specific rules of the PC and the PGW and sign contracts in ignorance of local arrangements (violating the principle of transparency), which might subsequently be open to legal challenges. This requires a careful legal analysis of each country's provisions and its compatibility with the IDB Policies to pinpoint inconsistencies and resolve them appropriately. The Bank could eventually accept the national provisions if they are found to be adequate. In any case, it is appropriate to review the existing provisions in the PGW and the current ones, with the aim of aligning them and making explicit the conditions under which national norms and the order of precedence among them and the policies would be accepted.
2. The a priori definition of the selection methods of IDB policies, based on the contract objective, is not always justified and can lead to inefficiency and ineffectiveness in the procurement process.
3. In the PGW, it is considered that for ICB, the rules of which are applied to other types of bidding, that the different price factors used to determine the lowest evaluated bid must be expressed, as far as possible, in monetary terms. Similarly, it considers that the evaluation of bids for construction works must be made strictly in monetary terms (see Par. 2.52. and 2.53. PGW). The specific valuation of all the factors is difficult to assess purely in monetary terms. The monetary assessment may lead to an automatic response in the qualification process that is both artificial and reductionist. In this way, the necessary flexible consideration of other factors, which is supported by contemporary international evaluation criteria, is ignored.
4. The a priori definition of the selection criteria in the IDB Policies is too rigid and can sometimes hamper achieving a balance between the costs and benefits of each project.
5. In the PGW, there are no restrictions on procurement similar to those set out in Paragraph 1.9. (c) and 1.11. (d) of the PC, which is unjustified and creates the risk that suppliers are selected for the procurement of goods and construction works and for providing services other than consultancy, even though their conditions would suggest they are ineligible. Moreover, this might imply a violation of the principle of equality when these suppliers' situations are compared to those of bidders for consultancy services.

6. In the PGW, there is no concept of CGS, nor is a specific and expeditious selection method regulated for the procurement of these types of goods and services. Consequently, such procurement is conducted via general methods that might be inefficient, considering the nature of the contract objective. Furthermore, the absence of such rules in the PGW fails to include the general trend and experience of the sample countries in which, by contrast, procedures and mechanisms do exist that enable CGS to be procured in a transparent and expeditious manner.
7. Regulation of direct contracting relating to standardization of equipment or purchase of spare parts, for reasons of compatibility with existing equipment that justifies additional purchases from the original supplier, discussed in Paragraph 3.6. of the PGW, does not include the case of procurement of technology nor the justification for the bid maintenance guarantee. This might jeopardize, in some cases, the maintenance of technological compatibility or the necessary guarantee.
8. In the PC, direct contracting of very small services is justified, but their value is stipulated in identical fashion for all countries (according to the thresholds in USD that define the concept of “very small,” which will be determined in each case, taking into account the type and complexity of the services, but should not exceed US\$100,000), which does not allow the particular economic conditions of each borrowing country or procuring agency to be considered (Par. 3.10 c of the PC). The PGW states that if the bidder “fails to satisfy the required conditions” in accordance with the bidding documents, then the bid must be rejected. Additionally, the case of artificially low bids is not regulated (Par. 2.62, PGW).
9. In the PGW, in the case of prequalification for groups of contracts, no fixed term is established; rather, additional procedures are considered, such as the confirmation, when a contract is awarded, of the prequalification data provided by the stakeholders. On the other hand, the problem of terms is related to the fact that the situation of a firm may change suddenly. This can be remedied with an affidavit that the firm can present indicating that its situation has not changed materially since the moment in which it was certified, or, optionally, it could update its qualifications.



## IV. Conclusions and Recommendations

The results of the comparison of the different procurement methods of the sample countries with the IDB Policies and good internationally recognized practices emphasize the need to carry out a more detailed analysis to maximize the efficiency and effectiveness of IDB-financed projects. The main conclusions derived from this study are the following:

1. **Explicitly define the principles.** The principles of public procurement should be expressly, rigorously, and completely regulated in Bank policies. This, on the one hand, would mean including, in addition to the principles that are deduced from the current general considerations, others such as legality, integrity, responsibility, due process, effectiveness, and sustainable development. Furthermore, it would require a definition of the stated principles to determine their scope and content, which would enable true criteria to be established for interpreting the rules contained in the policies. Some of the opportunities for further analysis mentioned in the following paragraphs refer to specific pertinent cases.
2. **Goods and construction work policies should be structured based on the procurement methods.** Define and structure procurement methods in the PGW that are based on their general conditions and characteristics rather than on isolated aspects, which owe more to specific requirements caused by particular demands. The general classification of methods produced by comparing the sample countries must be considered, so that the different methods considered by Bank rules can be understood in a more structured way.
3. **Harmonize procurement policies for construction works, goods, and consultancy in a single document.** Consider the separation between methods for procuring goods and construction works and methods for selecting and contracting consultants. Regulation of the latter methods corresponds to defining selection criteria for consultants that can be integrated with the different general methods of the PGW. Thus, in the cases of QCBS and QBS, which presuppose a public invitation to bid to draw up a short list, two-stage bidding methods could be applied and, in other cases (except in the case of individual consultants) that follow the rationale of limited bidding, the method appropriate to the latter could be applied.
4. **Broaden the restricted bidding options.** The range of events in which the restricted invitation to bid is suitable should be extended by considering other relevant case studies (see the cases of Brazil, Chile, Honduras, Jamaica, and Mexico).
5. **Introduce more flexible procurement methods that enable each project's characteristics to be considered.** Introduce a more flexible regulation that considers the project's features (its scope, complexity, market restrictions, the balance between costs and benefits, and so on) to define the method of selection (see the cases of Chile and Mexico).
6. **Include methods with multiple stages and competitive dialogue.** Complement the two-stage bid regulation, taking into account the regulatory frameworks of some of the countries. For example, Argentina, which provides for private initiative in a general way, and Brazil, where the Differentiated Procurement Regime (DPR) is allowed. Likewise, competitive dialogue systems should be available for complex projects when it is appropriate (see the case of Peru), as well as alternatives that enable the participation of stakeholders and civil society in the technical definition of the projects, as well as informal technical dialogues promoted by early

encounters with specialized firms, forums, and encounters (see the cases of Brazil and Chile).

7. **Introduce non-monetary selection criteria.** Remove from the PGW the clause in Paragraph 2.52 referring to the obligation to express the different price factors that must be employed when determining the lowest evaluated bid, as far as possible, in monetary terms, as well as the rule in Paragraph 2.53, according to which the evaluation of bids pertaining to construction works must be made strictly in monetary terms. The rule of [Directive 2014/24/EU](#) should be taken into consideration, according to which the bidding terms and conditions will require the relative weighting of each of the chosen criteria, for which purpose “the widest possible range of values” can be set and, when weighting is impossible, will indicate the “importance attributed to the criteria in decreasing order.”
8. **Use e-procurement methods for common goods and services.** Include new arrangements in the PGW that ensure that efficiency is achieved in CGS procurement. In this respect, a definition of CGS should be added, as well as guidelines considering application of local procurement methods, when they comply with good practice principles and certain minimum technical parameters.
9. **Include references to local legislation regarding the ineligibility to contract.** In the PGW and the PC, add references to the rules concerning restrictions and prohibitions on contracting (ineligibility, incompatibility, conflict of interest) considered in the local rules, to include individual consultants. Likewise, references should be made when the IDB (or, alternatively, MDBs), provides financing, that the IDB will always retain the power to investigate and sanction even when the local systems have been used.
10. **Include conflicts of interest and civil servant eligibility in the PGW.** Add restrictions in the PGW on procurement similar to those considered in paragraphs 1.9. (c) family relationships and 1.11. (d) eligibility of civil servants to become sub-contractors or consultants of the PC. Furthermore, the arrangements governing conflicts of interest should be extended to contract execution. Conflicts must be declared not only when it comes to bid evaluation but rather at any stage of the contract cycle, including execution, as soon as they are identified. It must be clearer that failing to disclose a conflict of interest may represent fraud.
11. **Include references to local legislation regarding publication of the stages of the process.** In the PGW and the PC, add references to the local rules regarding publication of the relevant acts of the selection process (whether goods and services or consultants) in each country’s single open access portals, if they exist in the borrowing country.
12. **Include treatment of abnormally low bids.** Establish clear protocols for rejecting bids in the PGW. Likewise, the evaluation committees must also have access to the relevant market information that enables them to reach an informed decision and thereby avoid contradicting the principle of economy.
13. **Include flexible mechanisms to deal with premature termination of contracts.** Authorize direct contracting in situations related to the occurrence of certain events during a previous selection process (cases in which a previous competitive process has been declared void) or during the execution of a previously signed contract (when the contract is rescinded, prematurely terminated, or annulled), both in the case of the procurement of goods and construction works and in the selection of

consultants. Similar mechanisms should be considered for inter-institutional contracts.

14. **Review the amount defined for low-value procurement in each country.** Analyze direct contracting of goods and construction works, as well as consultancy, for cases in which the procurement or contracting is for very small amounts, for which the respective values must consider a reference criterion, such as the context of the country or of the market.
15. **Extend direct contracting related to patents.** Extend the grounds for direct contracting to the procurement of patented or trademarked equipment, which can be obtained from a single source, as considered in Par. 3.6. of the PGW, to include the case in which procurement can be made from a single source, for reasons related to license ownership, considered in the Chilean regulations.
16. **Extend technology-related direct contracting.** Expand the grounds for direct contracting for cases in which additional purchases from the initial supplier are justified, with a view to standardization or for the compatibility of equipment or spare parts, considered in Par. 3.6. of the PGW, to include the case of procurement of technology, as considered in the legislation of Guyana and Jamaica, or when procurement is necessary to maintain the guarantee, considered under Bolivian regulations.
17. **Prequalification for a period and a group of contracts.** Amend the regulation in the PGW concerning prequalification of groups of contracts, to establish a time frame for prequalification and eliminate additional procedures to increase operational efficiency, maintaining the ability to verify that the conditions of those who prequalify have not varied.

These conclusions are aligned with practices and methods that many sample countries apply and which are as international best practices, while being direct consequences of introducing technology, the evolution of the countries, and the participation of suppliers in the market.

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## Annex 1. Methods of Procurement

**Table 1.1. Competitive Procedures**

Procurement methods that include a plurality of bidders.

Does not include the selection of consultants or the procurement of common goods and services.

	IDB	Argentina	Bolivia	Brazil	Chile	Costa Rica	Ecuador	Guyana	Honduras	Jamaica	Mexico	Panama	Peru
<b>DETERMINING FACTOR OF BIDDING</b>													
Project value		✓	✓	✓		✓	✓		✓	✓		✓	✓
A single category with public competition		✓	✓	✓	✓	✓							
General rule in the Constitution		✓		✓		✓			✓		✓	✓	✓
General rule, except special procedure	✓				✓			✓			✓		
<b>BIDDING METHODS</b>													
Open	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
International	✓	✓	✓	✓					✓	✓	✓		
FTA											✓		
Simplified by contract value (with public invitation)						✓ Abbreviated							✓
<b>PROCEDURES WITH PRE-SELECTION</b>													
In two stages (pre-selection)	✓	✓		✓	✓	✓		✓		✓			✓
Private bidding	✓	✓		✓	✓	✓		✓		✓	✓		
<b>Procedures with project definition</b>													
o Private initiative		✓								✓			
o Project presentation	✓												
o Competitive dialogue													✓ (Draft regulation)

	IDB	Argentina	Bolivia	Brazil	Chile	Costa Rica	Ecuador	Guyana	Honduras	Jamaica	Mexico	Panama	Peru
<b>SPECIAL REGULATION FOR DISPOSAL OF PUBLIC GOODS</b>													
Special procedure in the general law (auction)		✓	✓	✓			✓					✓	
Special law					✓				✓	✓			
<b>SELECTION CRITERIA</b>													
Most convenient bid: multiple criteria (price, quality, bidder suitability, etc.) weightings (points and percentages) in the bid terms and conditions			✓	✓	✓ Regulation of criteria according to contract objectives		✓ Regulation of determining factors of different selection criteria				✓ Regulation of factors	✓ Definition of weighting ranges for different criteria	✓ Certain factors are defined
Separation of technical and economic evaluation		✓			✓					✓		✓	✓
Criteria focused on monetary values	✓				✓			✓	✓	✓			
Complementary criteria (social or ecological)					✓	✓ In special rules and in procurement policies (Compra Red)						✓ Only in policies; not regulated in legislation	
Multiple weighted criteria, distinguishing between consultants and common goods and services	✓	✓											✓
Separation of eligibility factors (experience, minimum technical, financial, legal conditions) and weighting factors						✓							

**Table 1.2. Criteria to Justify Direct Contracting in the Different Legislative Regimes**

	Argentina	Bolivia	Brazil	Chile	Costa Rica	Ecuador	Guyana	Honduras	Jamaica	Mexico	Panama	Peru	IDB
Urgency/ emergency situations	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nature or conditions of the suppliers	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Practical impossibility of a competitive process	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓
Security reasons	✓	✓	✓	✓	✓		✓	✓	✓		✓	✓	✓
Low value contract	✓		✓	✓	✓	✓		✓	✓	✓			✓
Nature or characteristics of the goods, services or construction works		✓	✓	✓	✓	✓			✓		✓	✓	✓
Events occurred during the selection process or contract execution	✓	✓	✓	✓	✓	✓				✓		✓	
Other reasons			✓	✓	✓				✓				✓

**Table 1.3. Characteristics and Protests procedures in the Different Legislative Regimes**

PROTESTAS													
	Argentina	Bolivia	Brazil	Chile	Costa Rica	Ecuador	Guyana	Honduras	Jamaica	Mexico	Panama	Peru	IDB
Second hearing	✓		✓		✓		✓	✓	✓	✓	✓		
No limitation on the types of actions that can be challenged	✓			✓ ✓		✓	✓	✓				✓	✓
Administrative requirements (limiting)	✓	✓		✓			✓				✓	✓	✓
Protest period greater than 5 days	✓		✓	✓	✓		✓	✓	✓	✓	✓		✓
Protest period less than 5 days		✓				✓							
Automatic suspension on protest		✓					✓				✓	✓	
Protest processed by the bidder (on first hearing)	✓	✓	✓			✓		✓					✓
Independent court (for first or second hearing)				✓	✓				✓	✓	✓	✓	
Regulations on moratoria, or similar	(Viewing of original bids)											Adjudication on review period	

## Annex 2. Strengths, Weaknesses, Risks, and Opportunities for Further Analysis

Table 2.1. Strengths, Weaknesses, Risks, and Opportunities for Further Analysis Common to the PGW and PC

STRENGTHS	WEAKNESSES	RISKS	OPPORTUNITIES FOR FURTHER ANALYSIS
Admission of secure electronic systems for distributing DDL and SP.			Broaden the provisions to encourage the use of electronic systems during the course of the selection processes.
	Lack of public procurement principles as such and no overt mention of the notions of legality, effectiveness, integrity, due process, responsibility, and sustainable development.		Regulate proper public procurement principles in an overt, rigorous, and comprehensive manner; on the one hand, including those that are derived from current general considerations and, also, the principles of legality, effectiveness, integrity, due process, responsibility, and sustainable development, and on the other, defining all the principles mentioned to determine their scope and content.
	Insufficient protection of due process for those investigated for prohibited practices, with regard to opportunities for defense and categorization of the sanctions.		Include, in the regulation of prohibited practices, complementary to the Bank's policies ( <a href="http://www.iadb.org/integrity">www.iadb.org/integrity</a> ), rules that guarantee the right to defense for those investigated before the decision of the first hearing, and categorization of the sanctions.
	A priori definition of the selection methods, based on the contract objective.		Introduce a more flexible regulation, which enables project characteristics to be considered before defining the method of selection (see the cases of Chile and Mexico).
	A priori definition of the selection criteria in the Bank's policies is too rigid and can hamper weighing up the costs and benefits pertinent to each project.		Introduce a more flexible regulation, which enables the costs-benefits balances of each project to be taken into consideration to define the selection criteria.
		Lack of rules to oblige bidders and suppliers to	

<b>STRENGTHS</b>	<b>WEAKNESSES</b>	<b>RISKS</b>	<b>OPPORTUNITIES FOR FURTHER ANALYSIS</b>
		comply with borrower arrangements regarding the prohibitions and restrictions on contracting.	Include general references to the local rules governing restrictions and prohibitions on contracting (ineligibility, incompatibilities, and conflicts of interest).
		Subjective and insufficient regulation of the cases in which a bid should no longer be considered or must be rejected.	Consider clear grounds for rejecting bids, eliminating subjective criteria (such as those established in Pars. 2.48., 2.58., and 2.61. of the PGW), and regulate, with the necessary precision, in the case of abnormally or artificially low bids.
		Stipulate the grounds for excluding bidders that refer solely to firms rather than to individual contractors.	Extend to individual suppliers the application of the grounds for exclusion considered for enterprises.
	No mention of grounds for direct contracting in cases of failed selection processes, premature termination of contracts, and inter-institutional contracts.		Include authorization of direct contracting in cases of failed selection processes, premature termination of contracts, and inter-institutional contracts.
		Excessively broad authorization of direct contracting in exceptional cases.	Adjust Par. 3.6. (e) of the PGW, which mentions direct contracting "in exceptional cases, such as the response to natural disasters," to refer to specific emergency and urgency situations (see examples in the rules found in Bolivia, Brazil, Chile, Costa Rica, Guyana, Jamaica, Mexico, Panama, and Peru).
	Only with respect to certain actions of the selection process and the publication in the borrowing country's official public e-portal.		Include general references to the local rules on publication of the actions of the selection process in the borrowing country's official public e-portal, if there is one.

**Table 2.2. Strengths, Weaknesses, Risks, and Opportunities for Further Analysis Specific to the PGW**

<b>STRENGTHS</b>	<b>WEAKNESSES</b>	<b>RISKS</b>	<b>OPPORTUNITIES FOR FURTHER ANALYSIS</b>
Concept of two-stage bidding for project definition.			Complement regulation of two-stage bidding, taking into account the regulatory frameworks in certain countries (see, for example, the cases of Argentina and Brazil). Likewise, consider competitive dialogue systems for complex projects whenever convenient (see the case of Peru), as well as alternatives that permit participation by stakeholders and civil society in the technical definition of projects (see the cases of Brazil and Chile).
Distinction between lowest quoted price and lowest evaluated price.			
Permits direct contracting of critical elements from a supplier if demanded by the contractor responsible for designing the process, in order to maintain the bid guarantee.			
Secure regulation of bid maintenance guarantees.			
		The demand to express in monetary terms the different pricing factors other than the price itself to determine the lowest evaluated bid, and to make evaluations of bids pertaining to construction works under the same terms.	Eliminate the corresponding provisions set out in Pars. 2.52. and 2.53 of the PGW and take into consideration the rule of Directive 2014/24/EU, according to which the bid terms and conditions will require the relative weighting of each of the chosen criteria, for which purpose "the widest possible range of values" can be set and, when weighting is impossible, will indicate the "importance attributed to the criteria in descending order."



STRENGTHS	WEAKNESSES	RISKS	OPPORTUNITIES FOR FURTHER ANALYSIS
		<p>In the PGW, there are no restrictions on procurement similar to those set out in Pars. 1.9. (c) and 1.11. (d) of the PC, which is unjustified and creates the risk that suppliers are selected for the procurement of goods and construction works and for providing services other than consultancy, even though their particular conditions would suggest they are ineligible. Moreover, this might imply a violation of the principle of equality, when these suppliers' situation is compared to that of bidders for consultancy services.</p>	<p>Include in the PGW restrictions on procurement similar to those considered in Pars .1.9. (c) and 1.11. (d) of the PC.</p>
		<p>No regulation of the concept of common goods and services (CGS), or specific and expeditious selection method for their procurement.</p>	<p>Define CGS and refer to the application of the local methods for their procurement, if they comply with minimum technical parameters.</p>
	<p>The PGW describe certain methods of procurement that, in reality, are contract models with particular characteristics. This is true of "Performance-based procurement" (Par. 3.14), or "Inspection agencies" (Par. 3.11). In other cases, the procurement method described is restricted to certain characteristics of the selection criteria as in "Procurement via the BOO/BOT/BOOT system. Private sector concessions and models" (Par. 3.13), or regulation is limited to sponsoring participation by certain categories of suppliers, as in the case of participation by NGOs and local communities to achieve certain social objectives (Par. 3.17).</p>		<p>Define and structure procurement methods founded on conditions and on their general characteristics rather than on isolated aspects, which owe more to specific requirements caused by particular demands. The general classification of methods engendered by comparing the sample countries must be taken into account, so that the different methods considered under Bank rules can be understood in a more structured way.</p>

**Table 2.3. Strengths, Weaknesses, Risks, and Opportunities for Further Analysis Specific to the PC**

<b>STRENGTHS</b>	<b>WEAKNESSES</b>	<b>RISKS</b>	<b>OPPORTUNITIES FOR FURTHER ANALYSIS</b>
Technical characterization of the restricted call to bids including bidder profile descriptions.			Extend the events in which a restricted call to bid is appropriate, by considering others in which it might also be advisable, for reasons of efficiency (see the examples of Brazil, Chile, Honduras, Jamaica, and Mexico).
Occasional direct contracting of individual consultants.			
Evaluation of technical proposals by interdisciplinary expert committees.			
	Unjustified regulation of consultant selection methods that should really correspond to selection criteria.		<ul style="list-style-type: none"> <li>- Abandon the separation between methods for procuring goods and construction works and the methods for selecting and contracting consultants, integrating them with the methods used for the procurement of goods and construction works, with due regard for regulating the specific characteristics of bid evaluations. For example, in the cases of QCBS and QBS, two-stage bidding may be applied and, in the other cases (except the case of individual consultants), the specific method for private bidding may be used.</li> <li>- Clarify that QCBS, QBS, FBS, LCS, CQS, and DS correspond to the regulation of criteria rather than to selection methods.</li> </ul>

STRENGTHS	WEAKNESSES	RISKS	OPPORTUNITIES FOR FURTHER ANALYSIS
	Lack of general consideration of the principle of equality and restricted admission of enterprises during QCBS.		Include the principle of equality in the PC and eliminate the provision whereby the processes in which QCBS is applied are only open to enterprises rather than to individual consultants (paragraphs 2.1. and 2.8. PC).
		Authorization of direct contracting of individual consultants, whose services are needed for less than six months.	Eliminate authorization for direct contracting of individual consultants whose services are needed for less than six months (Par. 5.4. PC).
		The value of "very small services," which can be directly contracted, is estimated in a uniform way for all countries.	Estimate the value of the "very small services" based on criteria that enable the particular situation in each country to be assessed, such as, for example, reference to a percentage of the budget of the country or of the procuring agency.
		Excessively restrictive authorization of direct contracting in cases of emergency.	Adjust the regulation of exceptional cases in which direct contracting of consultants is appropriate for reasons of emergency, which currently refers only to the event of natural disasters (Pars. 3.10. and 5.4. of the PC), and extend it to other specific emergency and urgency situations (see examples in the rules of Bolivia, Brazil, Chile, Costa Rica, Guyana, Jamaica, Mexico, Panama, and Peru).

## Annex 3. Direct Contracting

### Identification of Direct Contracting Events in the Sample Countries and their Comparison with IDB rules

These special circumstances relate to reasons that can be categorized in the following way: (i) the practical impossibility of holding a competitive process, (ii) the existence of situations of urgency or emergency; (iii) the occurrence of certain events during a previous selection process or during execution of a previously signed contract;<sup>59</sup> (iv) the nature or specific conditions of the suppliers; (v) the existence of security considerations; or (vi) the nature or characteristics of the goods, services, or construction works to be procured.

The comparative analysis of the regulations of the 12 countries with the IDB policies reveals that, first, with respect to the first general criterion (low-value contract), only in the PC is the direct contracting of very small services justified.<sup>60</sup> Regarding the special circumstances that justify direct contracting, it is noteworthy that in the aforesaid policies there are no grounds considered for the occurrence of certain events during a previous selection process or during execution of a previously signed contract, or for security reasons. Nor are there grounds relative to the nature or characteristics of the goods, services, or construction works to be procured.

With regard to the events that make holding a competitive process a practical impossibility:

- In the PGW, there is no mention of the case in which there is a single supplier and no reasonable or convenient substitutes.
- The PGW do consider the cases in which a supplier is contracted from which the procuring agency entity has previously acquired goods, equipment, or technology, via a more restrictive rule than the one included in some countries.
- The cases of *intuito personae* contracts are considered in the PC of the IDB, in the event in which only a single enterprise is qualified or has the special experience needed to provide the services. Also, in the PC, the recruitment of individual consultants is considered when they are the only ones qualified for the task.
- Although in the PGW cases are mentioned in which there is no plurality of bidders, for reasons of copyright or industrial property rights (patented or registered equipment that can be obtained from a single source), there is no reference to the event in which the reasons allude to license ownership.
- In the IDB's PGW, an event is established that is not foreseen in the regulations of the sample countries, referring to cases in which critical elements are purchased from the supplier nominated by the contractor responsible for the design of a certain process, as a condition for maintaining the bid guarantee.

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<sup>59</sup> These are the cases in which: (i) a competitive process is declared void (in different ways according to the rules in each country), moved forward, or in which the stakeholders fail to participate (Argentina, Bolivia, Brazil, Chile, Costa Rica, and Mexico); and (ii) the process is rescinded, prematurely terminated, or a contract is annulled (Bolivia, Brazil, Chile, Ecuador, Mexico, and Peru).

<sup>60</sup> According to the thresholds in USD that define the concept of "very small," which will be determined in each case, taking into consideration the type and the complexity of the services but, in any case, must not exceed USD 100,000.

Regarding the situations relative to the nature or the specific conditions of the suppliers, IDB Policies do not consider cases of inter-institutional contracts.<sup>61</sup> It is, moreover, noteworthy that:

- In the PGW, cases are mentioned in which a person is contracted who has previously executed a contract and from whom the administration requires additional or similar supplies or services, while the PC allude to the case in which such services are a natural continuation of services provided by the enterprise or the individual consultant (selected on a competitive basis), whenever previous performance has been deemed satisfactory.
- Only in the PC is the direct contracting of persons considered, depending on their specific conditions. This is the case of individual consultants and specialized agencies.

The observations above reveal that, in some cases, it is advisable to include, in the IDB policies, additional grounds for direct contracting that are already considered in some countries and that can be sufficiently justified, or to extend already existing grounds, while, on the other hand, it is also advisable to eliminate authorization for direct contracting in other cases. Further reference is made to this matter in Letter B of this paper (see weaknesses 9 and 10, threats 7, 8, 9, 15 and 16, and the opportunities for further analysis 21, 22, 23, 24, 25, 26, 27 and 28).

### **Selection Criteria and Duration of the Processes**

The criteria are determined according to the same grounds that establish direct contracting. In some countries, direct contracting includes a request for bids. The stages and the duration of the process are established in exceptional cases and only partially.

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<sup>61</sup> Except as indicated in section No. 3.8 of the PGW and sub-paragraph (c) of No. 1.11 of the PC.