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Nepal Country Procurement Assessment Report

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Procurement Services
South Asia Region

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ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
AG	Auditor General
AGO	Office of the Auditor General
CAN	Contractor's Association of Nepal
CIAA	Commission for Investigation of Abuse of Authority
CPAR	Country Procurement Assessment Report
CPPR	Country Portfolio Performance Review
DDCs	District Development Committees
DOAG	Department of Auditor General
DOR	Department of Roads
FAR	Financial Administration (Related) Rules
FCGO	Office of the Financial Comptroller General
HMG	His Majesty's Government
ICB	International Competitive Bidding
ICR	Implementation Completion Report
IDA	International Development Association
IS	International Shopping
ITB	Instructions to Bidders
KFO	Kathmandu Field Office
MLD	Ministry of Local Development
MOF	Ministry of Finance
MOWT	Ministry of Works and Transport
NCB	National Competitive Bidding
NEPCA	Nepal Council of Arbitration
NS	National Shopping
PAC	Public Accounts Committee
PFHP	Population and Family Health Project
PIU	Project Implementing Unit
PQ	Pre-qualification
QCBS	Quality- and Cost-Based Selection
R&GC Act	Revenue and Government Contracts Act
RMRP	Road Maintenance and Rehabilitation Project
SBDs	Standard Bidding Documents
SCAEP	Society of Consulting Architect and Engineering Firms
TA	Technical Assistance
UNCITRAL	United Nations Commission for International Trade Law
VDCs	Village Development Committees
VO	Variation Order

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NEPAL
COUNTRY PROCUREMENT ASSESSMENT REPORT
(CPAR)

PREFACE

1. This Country Procurement Assessment Report (CPAR) is the product of a joint effort between a number of Government officials on the side of the Government and Mr. Narayan D. Sharma (Kathmandu, former Bank staff member, acting as locally hired consultant to the Country Director) and Mr. Christian H. Walser (Washington, former Bank staff member, acting as internationally hired consultant to the Regional Procurement Adviser) on the side of the Bank.
2. A CPAR-preparation mission took place from November 12 through 19, 1999, when Mr. Walser visited Kathmandu. During this week, Messrs. Sharma and Walser had meetings with numerous officials of various Government Departments and parastatal companies, as well as of national and international aid agencies (a list of the officials met is attached in Part II).
3. The major set of rules governing public procurement in Nepal (namely, the "Financial Administration (Related) Rules, 1999" [FAR'99]) was issued in 1999 and its translation into English became available in the spring of 2000; only then could a detailed review of FAR'99, and its relationship with other acts and rules dealing with public procurement in Nepal, be undertaken.
4. During a second mission in August, 2001, the draft CPAR was discussed with Nepalese government officials in Kathmandu and then finalized.
5. This Report presents an analysis of Nepal's procurement system, and a detailed set of recommendations for strengthening it. The Report consists of this Preface, an Executive Summary, a Part I containing the Major Findings and Recommendations, and a Part II which includes a series of Annexes providing detailed information.

EXECUTIVE SUMMARY

Major Findings

1. Of the 9 Bank-financed projects under implementation in Nepal during the year 2000, 4 are rated as problem projects, due mainly to implementation problems. The ratio of projects at risk is 44%, which is much higher than a 20% Bank-wide average. The main problems seem to be an insufficient capacity to undertake procurement efficiently and an outdated system of procurement rules, many of which do not provide for transparent and competitive public purchasing of goods, works and consultants' services.

2. Most countries in the world are doing their public procurement today under a public procurement law, enacted by parliament which alone can change it, dealing with public procurement of goods, works and services at all levels. Only very few countries today still follow the system followed by Nepal (as represented by the "Financial Administration (Related) Rules of 1999 [FAR'99]), under which public procurement is governed by a set of financial rules issued by the government. These rules – i.e., FAR'99 – describe the procedures various governmental authorities should follow in securing and disbursing the public funds required to discharge their functions, including the rules governing the procurement of public contracts. Having been issued by government, the rules can also be changed by government, which it is generally agreed is not in the public interest. Governing the use of large amount of public money, such rules should be difficult, rather than easy to change, and they should be changed in a public and transparent manner.

3. While representing some minor improvement over its predecessor (FAR'86), FAR'99 still includes many provisions, and permits practices, at odds with major principles of fair, transparent, competitive public procurement. Recognizing this fact, the Bank introduced a whole list of changes and improvements for National Competitive Bidding (NCB) for Bank-financed contracts, in order to properly reflect the interests of the public purchaser. In fact, this list indicates some of the main deficiencies of the rules. Essentially, this list requires:

- sufficient time for bid preparation;
- bidders' right to obtain bidding documents by mail or in person;
- evaluation of bids according to pre-disclosed criteria;
- bid opening in only one place, and immediately after deadline for bid submission;
- no preference to local bidders competing with foreign bidders;
- award to lowest evaluated bidder;
- no post-bidding negotiation with the lowest or any other bidder;
- no bid rejection on the basis merely of price estimates;
- no rebidding without IDA's concurrence;
- all bidders must provide bid and performance securities;
- no awards by lottery;
- extension of bid validity only according to Bank's ICB rules; and
- and no bidding on the basis of a percentage premium over estimated cost.

4. There are further aspects of FAR'99 that are not in the public interest, and that should be added to the NCB list in the procurement schedules of credit agreements. These items are the following:

- bidders must be allowed, prior to the deadline for bid submission, to amend or withdraw their bids;
- larger civil works contractors must not be prohibited from competing against smaller contractors; and
- a two-envelope system must not be used for the procurement of goods and works.

5. In addition to the problems related to the legal and procedural framework in which procurement is conducted in Nepal, there are other, perhaps more important, problems listed below:

- like in almost all borrowing countries of the Bank, there is a tremendous need to train public officials in the principles and practices of public procurement;
- the Auditor General's staff has been found, in the case of donor-financed contracts, to insist on the application of local procurement rules instead of the donor's procurement rules (although the applicable Nepalese rules make it clear that the latter should apply); and
- Nepalese laws and rules dealing with corruption seem to penalize only passive corruption (i.e., the soliciting or accepting of bribes by public officials), but not acts (just as dangerous) of active corruption (i.e., the offering or giving of bribes to public officials by private parties).
- There is a perception amongst the bidders and business community that corruption is a problem in public procurement in Nepal.

Principal Recommendations

6. The Report makes the following major recommendations:

- Enacting a modern, transparent and competitive public procurement law, based on the UNCITRAL MODEL LAW FOR PROCUREMENT, to apply to public procurement by all public entities in Nepal at all levels, as well as to parastatals;
- Creating a small, independent procurement agency, with functions defined by the Public Procurement Law (essentially policy, and not oversight or line clearances of procurement decisions);
- Pending the enactment of such a Public Procurement Law, amend FAR'99 in the sense of changing the anti-competitive rules and practices listed in this Executive Summary;
- Review and develop as needed standard bidding documents to be used for procurement financed by HM own government;
- Develop and accelerate procurement training at all levels of government, including the Auditor General's staff;

- Instructing the Auditor General's staff, in the case of donor-financed procurement, to insist on the application of the donor's procurement rules and not of local procurement rules; and
- Amending the anti-corruption legislation in such a way as to (i) impose harsh penalties (including blacklisting) on the acts of active fraud and corruption, particularly the offering/giving of bribes to public officials, and (ii) specifically allowing/inviting bidders to report acts of corruption by other bidders, as well as solicitation of bribes by public officials.

NEPAL
COUNTRY PROCUREMENT ASSESSMENT REPORT
(CPAR)

PART I

CHAPTER (A): LEGAL AND REGULATORY FRAMEWORK

Legal System

1. Nepal is a constitutional monarchy. The present Constitution, dating from 1990, provides for a bicameral legislature, with a National Assembly and a House of Representatives. Its legal system is similar to the British Common Law system from which it originated. As in most countries, the Constitution does not address the issue of public procurement, but in contrast to most countries, there is no law (in the sense of a generally applicable set of rules enacted by the legislature) about public procurement. In this respect, Nepal (like its neighboring countries Pakistan and India, and a very few other countries) is different from most other countries in the world. Most countries have introduced a public procurement law, enacted by parliament which alone can change it, which law deals exclusively with the public procurement of goods, works and services by governmental entities at all levels, and most often both for the central authorities as well as those on a provincial and communal level.

2. The system used in Nepal, as represented by the “Financial Administration (Related) Rules of 1999” (FAR’99) was originally introduced by the British but is not really used in the UK anymore today; this approach consists of the issuance by government (rather than by the legislature) of a set of financial rules which essentially describe the financial powers of various governmental authorities, and in particular the procedures they should follow in securing and disbursing the public funds required to discharge their functions, including the rules governing the procurement of public contracts. Having been issued by government, these rules – i.e., FAR’99 – can also be changed by government, without any approval by the legislature, which it is felt in most countries is not in the public interest. Rules of this nature, which govern the use of huge amounts of public funds, should be difficult rather than easy to change, and they should be changed only in a public and transparent manner.

Financial Administration Rules 1999 (FAR’99)

3. As explained in more detail in Annex J hereto, in addition to the form in which it was issued (Administrative Rules rather than a Law), there are a number of problematic provisions in FAR’99, which are not accepted as good public procurement practices. Also, what is not clear is whether FAR’99 applies to procurement by all public entities or only by the central government (see Annex A, para. 10, and Annex J, para. 6). On the positive side, it should be mentioned that FAR’99, in its Clause 96, includes a clear recognition of the fact that procurement rules set forth in loan and grant agreements with foreign governments, or institutions owned by them or international agencies, will take precedence over the procurement rules of FAR’99, at least with respect to the procurement of “technical service, construction and other works”. It is not clear whether this rule also applies to the procurement of goods, and it would be advisable, pending the introduction of a new Public Procurement Law, to amend FAR’99 in order to specify that the procurement of goods is included in this rule. Finally, as pointed out in Annex I hereto, in some respects, FAR’99 does indeed represent an improvement over its predecessor, FAR ’86.

Other Acts Governing Public Procurement - How do they relate to FAR'99?

4. Another set of problems results from the fact that there are at least two other Acts that seem to govern public procurement – or certain parts of public procurement – in Nepal, without there seeming to be any conflict rules which would delineate the respective fields of application of FAR'99 and the other two Acts. The first of these Acts – and apparently the oldest set of procurement rules still in force in Nepal – is the “Revenue and Government Contracts Act, 1963 (First Amendment, 1968)”, which, according to its preamble, is supposed to deal with “revenue administration, revenue collection, and government contracts for the economic benefit of the public”. As pointed out in para. 6 of Annex A hereto, the essential purpose of the Act seems to be to regulate revenue collection from defined sources of revenue, such as forest clearing, sale of timber through auctioning, operation of quarries, etc., but it might be read to apply also to other government contracts. In the interest of clarity and transparency, it might be advisable, pending the enactment of a new Public Procurement Law, to introduce an amendment into the Act, specifying that it does not apply to the procurement, by the government, of goods, works and services.

5. The “Construction Enterprises Act, 1999” seems to have as its main purpose the protection of the interests of local contractors by all kinds of preferences and the requirement of licenses. Not only are local contractors protected against the competition of foreign contractors, but smaller local contractors are protected against the competition of larger local contractors; this is being done by classifying local contractors into 4 classes, depending on their size, for defined values of works contracts put out to tender, with the proviso that no contractor can bid outside his class. Obviously, this results in a massive restriction of competition, which can hardly be in the public interest or favor the development of a healthy local construction industry.

6. Finally, there are the “Construction Enterprises Rules, 2000”, which came into force on December 31, 1999, and which deal with the more detailed aspects of licensing and classification of Contractors.

Settlement Mechanisms for Bidders' Grievances and for Contractual Disputes

7. Neither FAR'99 nor any of the other Acts and Rules above mentioned seem to provide for a speedy settlement mechanism allowing aggrieved bidders to complain about violations of procurement rules by the government's procurement officials, something that is essential in order for bidders to have confidence in the fairness of the procurement process. On the other hand, the Arbitration Act, 1999, seems to be generally in line with established arbitration principles, as represented, e.g., in the UNCITRAL Model Law for Arbitration, and in some respects even includes improvements over the Model Law (for more details, see para. 21 of “General Features” in Annex A hereto). Also, there are the “Nepal Council of Arbitration Rules for Domestic Commercial Arbitration Proceedings”, which are well drafted and would seem to provide a useful framework for domestic commercial arbitration.

Chapter (B): Procedures and Practices

1. As was pointed out in Chapter (A), public procurement in Nepal is largely governed by the “Financial Administration (Related) Rules of 1999 (FAR’99)”, which includes numerous procedures that do not seem to reflect accepted, good public procurement practices (for more details about problematic provisions in FAR’99, see Annex J hereto). In the context of Development Credit Agreements with Nepal, IDA has recently begun to include a detailed list of rules in the Procurement Schedule (Schedule 3) to the Credit Agreement which, for the purpose of National Competitive Bidding of contracts financed by the Development Credit, provide for changes and improvements in a whole range of procedures provided for by FAR’99 and its predecessors, which are not of a transparent nature and, in the view of the Bank, do not seem to properly represent the public interest (see as an example of such a list, an excerpt from Schedule 3 to the Development Credit Agreement for Credit 3293-NEP, Road Maintenance and Development Project, dated December 22, 1999, attached hereto as Annex K). Very briefly, these changes, as agreed with the Government during negotiations of the Credit Agreement, cover the following issues:

- there must be sufficient advertising, and sufficient time for bid preparation;
- bid documents must be made available to prospective bidders by mail or in person;
- bids must be evaluated in accordance with the disclosed criteria;
- bids must be opened in one place, and immediately after the submission deadline (this is particularly important since, under FAR’99, they may be - and in practice often are - opened in more than one place, and as late as a day after the submission deadline);
- in competition with foreign bidders, no preference must be given to local bidders;
- qualification criteria must be stated in the bidding documents;
- contracts must be awarded to the lowest evaluated bidder;
- post-bidding negotiations with the lowest or any other bidder are prohibited;
- bids must not be rejected merely on the basis of a price estimate, without IDA’s approval, and awards must not be made on the basis of nationally negotiated rates;
- no re-bidding without the prior concurrence of IDA;
- all bidders must provide the required bid- and performance securities;
- no awards by lottery;
- extension of bid validity only in accordance with the Bank’s ICB rules;
- bids must not be invited on the basis of a percentage premium or discount over the estimated cost; and
- there must be no restriction on the delivery of bids.

3. The Bank and the government should agree, until a new Public Procurement Law is enacted which deals with these matters in a satisfactory manner, to add the following additional provisions to the above mentioned list (para 2 above) in the Procurement Schedules for future projects in order to deal with unacceptable provisions in FAR’99 :

- prior to the deadline for bid submission, a bidder shall be free to amend or withdraw a bid already submitted, including the bid security (see also para. 7 (h) of Annex J hereto, and Clause 66 (11) of FAR'99);
- larger civil works contractors shall not be prohibited from competing against smaller civil works contractors (although the Bank, in bidding documents for NCB, seems to have accepted this in the past) - (see para. also 5 of Chapter (A) and para. 7 (i) of Annex J hereto);
- a two-envelope system shall not be used for the procurement of goods and works (see para. 7 (j) of Annex J hereto and Clauses 66 (14) and (15) of FAR'99);
- commissions paid by foreign bidders to Nepalese agents shall not be taken into account in bid evaluation (see para. 7 (k) of Annex J hereto, and Clauses 69(a) and (b) of FAR'99); and

CHAPTER (C): BIDDING DOCUMENTS

1. Procurement in Bank financed projects use Bank-cleared country-specific Standard Bidding Documents (SBDs), i.e., Bank-mandated SBDs for International Competitive Bidding (ICB) and Bank-cleared SBDs for National Competitive Bidding (NCB). The country-specific documents for ICB for works and goods, and standard contract forms for consulting services were developed through joint efforts of HMGN and the Bank and mandated for use with effect from August 1996. Similarly, the NCB documents for works and goods were also developed jointly for IDA financed procurement and mandated for use with effect from October 1996 and November 1997, respectively. The same set of NCB documents for works and goods, with minor modifications in the form of two separate addenda applicable to HMG's own and ADB-financed procurement, were also mandated for use. Separate sets of bidding documents in Nepali vernacular are in use for very small works in the rural infrastructure works under ADB- and World Bank-financed programs. There are other sets of bidding documents in use under different foreign grant programs.

2. Financial Administration Rules, 1999 (FAR'99), under Rule 62, entrust the Ministry of Works and Transport (restructured and renamed as Ministry of Physical Planning and Works) to prepare public works Guidelines and a Manual to maintain uniformity in respect to public works and the consulting services. The Guidelines and Manual are required to include, inter alia, the preparation of sample bid invitation, bidding documents and formats for technical and financial proposals for consulting services, bid evaluation criteria, weightage, evaluation procedures, etc. Similar provision existed in FAR '86, but Guidelines and Manual were not developed during more than a decade and a half. Until the introduction of NCB documents, as mentioned under para. 1 above, the different project authorities and the departments, executing public works, were using different sets of the documents which were outdated, inadequate, one-sided favoring the employer and encouraging him to act irrationally to safeguard only his interest at the cost of the contractor. That was not only being unfair to the contractor but created an environment conducive to producing higher cost and promoting corruption.

3. It is understood that the Asian Development Bank (ADB) has provided a Technical Assistance (TA) for institutional development, which includes preparation and development of

these documents, a manual and guidelines for public procurement. The TA Consultant has as reported, has produced draft documents.

4. The post reviews of the contracts reveal that even after mandating the use of the Standard Bidding Documents, these are often not properly prepared for specific contracts. In several cases the qualification criteria were not specified or disclosed as required. It is also noted that the provisions of SBDs for NCB (also used now for HMG-financed contracts) and FAR'99 are in conflict. Some of these conflicts are:

- minimum time for bid preparation period as provided in the SBDs is 30 days against 15 days provided in FAR'99;
- the SBDs specify that contracts shall be awarded to the bidder whose bid has been determined to be substantially responsive to the bidding documents, and who has offered the lowest evaluated bid, provided he is eligible and qualified in accordance with the relevant provisions in the bidding documents (Sub-clause 31.1 of the Instructions to Bidders (ITB)). FAR'99, however, under Sub-clause 73.2 (b), specifies that, generally, the lowest priced responsive bid shall be accepted. It further states that other criteria like financial position, experience, capacity, and the reliability of the bidder (which are all subjective and not quantifiable, and which, under the ITB, should be qualification criteria and not evaluation criteria) shall also be taken into account, in addition to the price. Also, the decision-maker is required to record his reasons in case he should decide to accept a bid other than the lowest priced bid. This may well encourage an award to the lowest priced rather than the lowest evaluated bid;
- the bid security of the unsuccessful bidder is, as provisioned in the SBDs, to be returned within 28 days at the end of the bid validity period, whereas the rules provide that the bid security of the three lowest bidders shall be released only after a contract is signed;
- SBDs provide that the bidders may modify or withdraw their bids by giving a notice in writing before the deadline for bid submission (ITB 22.1), whereas the rules, under FAR'99 Sub-clause 66.11, state that the bid once submitted may not be given or taken back; and
- unless the rules are amended, the HMG officials responsible for making procurement decisions, may defy the implementation of the provision of the SBDs, thereby rendering these ineffective.

CHAPTER (D): HUMAN RESOURCE DEVELOPMENT

1. Procurement is not a recognized profession in Nepal. Procurement function is usually carried out by Project Managers/Senior Engineers and the Accountants. These officials are transferred to other duties which may not involve procurement function and vice versa. The career path is no different for staff carrying out procurement function from other public servants, which is based on seniority, performance and educational qualifications.

2. Lack of expertise has *led to* considerable delays in the project implementation due to poor procurement planning and implementation. By and large, the majority of the working staff lack knowledge of efficient procurement concepts, rationale for procedures and ethics. The members of the evaluation committees and approving authorities equally lack adequate exposure in this area. This has resulted in the following:

- poor documentation;
- mismanagement;
- delays in decision making; and
- overall lack of efficiency.

3. A few parastatals have *what they call* procurement cells. These cells are again manned by general staff having no relevant education and training.

4. There are no procurement programmes at the local institutions. The World Bank Field Office provides limited Basic Procurement Training, mainly at the Central and sometimes at the Regional Level.

CHAPTER (E): AUDIT

1. Under the Nepal constitution, the Auditor General (AG) is required to carry out an independent audit of all expenditure to ascertain whether monies disbursed were legally available for the purpose intended and were duly authorized. The Audit Act empowers the Auditor General to inspect and carry out auditing of accounts and related documents with due consideration given to the regularities, economy, efficiency, effectiveness, and the propriety of thereof. The constitution and the Audit Act guarantee the AG to have at all times access to all records and documents. In case of organizations owned/controlled by His Majesty's Government Nepal (HMGN), the auditing is carried out by registered auditing firms, appointed in consultation with the AG.

2. The AG is required to carry out annual audits and submit the result of such audits to His Majesty's the King who causes such reports to be led before the parliament. The AG's reports are discussed with the AG and implementing agencies by the Public Account Committee (PAC) of the parliament, and they agree on appropriate actions.

3. The AG's audit is mainly related to financial auditing. However, it is understood that the audit team also audits the procurement-related documents and processes. The audit reports have reported minor irregularities and unauthorized expenditures and not major irregularities, malpractice or corruption. The main thrust of audit teams is found to be towards the award of the contract to the bidder bidding the lowest price, something the Bank has recently found also during the preparation of a CPAR in another country in the area. The reports and the audit objections contained therein also reveal that even in the case of World Bank-financed procurement the reference to the local rules is invariably made rather than to Bank Guidelines, legally governing the procurement process.

4. The AG is required to carry out performance auditing as well, but his office does not have expertise in the field of procurement and performance auditing.

CHAPTER (F): ANTI-CORRUPTION MEASURES

1. It appears that there are two laws in Nepal that deal with anti-corruption matters, namely, first, the “Anti-Corruption Act, 1961, together with its Third Amendment Act, 1987”, and the “Commission for Investigation of Abuse of Authority (CIAA) Act, 1992, with its First Amendment Act, 1992”. Little seems to be known about enforcement measures, if any, under these Acts.

2. A careful review of English translations of these Acts and their Amendments seems to show that all manner of corrupt activities by public servants, including the acceptance of bribes, as well as cases of abuse of power by public servants, may be investigated and prosecuted under these Acts, and criminal penalties may then be imposed on public servants found guilty. What is surprising, however, is that these Acts seem to be exclusively directed at the activities of public servants. In other words, while for corruption to take place it regularly takes both a public servant soliciting or accepting a bribe in order not to act in accordance with the law, as well as a person or firm offering or giving such a bribe in order to bring about the unlawful action/inaction of the public servant, the applicable Nepalese Act seem to deal only with the former. (It should be noted, though, that para. 16A of the Anti-Corruption Act, 1961, includes a vague little provision about “Punishment for Instigation” which states that a person that “has offered or accepted money for instigation the offender commit the offense shall be sentenced to the same punishment as the offender”. Since the “punishment of the offender” is regularly a prison term, the provision would seem to be of no use in combating bribery by corporations, particularly foreign corporations, which should be fought, e.g., by the imposition of heavy fines, and particularly by temporary or permanent blacklisting). Also, there seems to be no provision allowing bidders to report to the authorities acts of bribery by other bidders and/or solicitations of bribes by public officials. Unless these impressions turn out to be incorrect (i.e., unless there are indeed other acts or rules penalizing active corruption, as opposed to the passive corruption addressed by the above Acts) and/or allowing or inviting bidders to report acts of bribery by other bidders and/or solicitations of bribes by public officials), there would indeed be a serious gap in the Nepalese anti-corruption legislation. It is increasingly being recognized all over the world that corruption is indeed a two-way street, and that little progress in combating it can be expected unless both the active and the passive form of corruption are addressed in the relevant anti-corruption legislation and then vigorously enforced.

3. This having been said, it seems useful to remind ourselves that, from the point of view of public procurement, it is less important that the “wrongdoers” are caught and punished (which is essentially an issue of criminal law and criminal procedure), but that, to the extent possible, the “wrongs” – corrupt and fraudulent activities in public procurement – are prevented from occurring. It is here that the need for a modern, transparent and competitive procurement law again must be emphasized (see also Chapter (A)). While not totally eradicating corruption (nothing ever will), the introduction of such a law (through the law’s transparent and competitive

features) will certainly make corrupt and fraudulent practices in public procurement substantially more difficult and encourage the use of open procedures to address grievances.

4. Again, as was pointed out in Chapter (B), if it is expected that the introduction of a new procurement law will take some time, the government would be well advised in the meantime to amend FAR'99 (and other applicable Acts and Rules) in such a way as to deal at least with those among the issues listed in Chapter (B) which seem particularly likely to facilitate corruption. This would mean to provide for the following rules to apply to public procurement in Nepal :

- bids must be evaluated in accordance with the disclosed criteria;
- bids must be opened in one place and immediately after the submission deadline;
- qualification criteria must be disclosed in bidding documents;
- contracts must be awarded to the lowest evaluated bidder;
- post-bidding negotiations with the lowest or any other bidder are prohibited; and
- a two-envelope system shall not be used for the procurement of goods and works

CHAPTER (G): PRIVATE SECTOR

1. The manufacturing sector is not well developed. The private sector comprises mostly commodity traders and local agent and foreign manufacturers.

2. The local construction industry is weak partly due to the business environment and partly due to unsound and corrupt practices followed by employers. The contracting firms are categorized by highly personalized management structures. Most of the firms are owned and operated by a family. Typically, the proprietors are involved in the day-to-day operations of the business.

3. Barring a few, construction contractors operate generally in a labor-intensive manner, they lack finance and equipment, and they depend mostly on government contracts.

4. Contractors experience considerable difficulty in recruiting qualified engineers and technicians into their organizations. The main reason for this seems to be that the engineers enjoy security of tenure and a higher social status in the public sector.

5. The contractors need training in the area of planning and the bidding strategies and contract management. There is no arrangement so far to provide such training in the country.

6. The consulting industry is in comparatively better shape, although the staff of the consulting firms need training, as do the staff of contractors and the staff of the implementing agencies. If the public procurement is to work effectively and to the benefit to the people, the business community of suppliers, contractors and consultants must be trained in the concepts of public procurement, made technically and professionally competent, given access to finance and construction equipment, made to adopt a strict code of ethics and made to complement the efforts of the public purchaser to make the whole process economic, efficient and free of corruption.

CHAPTER (H): GENERAL RISK ASSESSMENT

1. As pointed out in Chapter (I) about “Performance on Bank-Finance Projects”, the proportion of projects at risk is high in Nepal, and often the problems are procurement-related. Also, as explained in Chapters (B) on “Procedures and Practices” and (F) on “Anti-Corruption Measures”, many of the applicable rules governing public procurement are not in the public interest and may indirectly encourage corrupt practices (as was also pointed out in Chapter (B), for IDA-financed NCB procurement).
2. Chapter (A) on “Legal and Regulatory Framework” recommends that a modern, transparent and competitive procurement law be introduced in Nepal. Until that happens, and unless it is followed by a substantial effort to train public officials in the application of the new law, major improvements in public procurement can hardly be expected, and Nepal will continue to be ranked as a high risk country for procurement purposes.

CHAPTER (I): PERFORMANCE ON BANK-FINANCED PROJECTS

1. Since 1969, the Bank has provided over US\$1.41 Billion in concessional loans and commitments for 73 development projects in Nepal. Sixty four projects have been completed with a total disbursement of US\$1.23 billion, as of June 30, 2000. Credit amount of the 9 projects currently under implementation totals to about US\$261.00 Million, of which US\$180.50 Million is undisbursed as of July 1, 2000. Of these 9 projects, 4 are rated as problem projects due mainly to implementation problems. The ratio of projects at risk is 44% - very high as against 20% Bank-wide average.
2. The main problems are related to inadequate institutional capacity to undertake procurement efficiently. They include poor project and contract management capability due to inability to recruit competent staff because of low public-sector salaries; inadequate record-keeping that makes it difficult to trace history to ascertain quality in infrastructure contracts; external pressures brought to bear prior to contract awards; poor quality of evaluation reports and inordinate delays in deciding to award contracts due to government’s protracted internal procurement approving procedures.
3. In projects subject to ex-post reviews, ongoing limited reviews by the Kathmandu Field Office (KFO) office and recent auditing by external auditors have identified problems due to restrictive bidding, to inadequate bidding periods, to price negotiations with the lowest priced or all bidders and to the failure of the bidding documents to provide for post qualification and evaluation criteria. In 30 contracts within the Agriculture Research and Extension Project (Credit/Loan Number 2977), a review found procurement flaws in every one, including 4 cases where violations were of very serious nature.
4. In addition to discussing these issues with the government to advise them on procurement policies and to highlight the improvements required especially in the area of bid validity,

procurement planning and due diligence, the Bank is taking action to ensure that proper evaluation of Borrower's capacity is carried out at appraisal. The focus is on handling procurement efficiently and strengthening capacity by hiring procurement agents or consultants/advisors.

5. To achieve sustainable improvement in procurement performance, thereby enhancing the country's aid absorption capacity, institutional capacity building-cum-reforms to streamline procurement procedures are needed.

RECOMMENDATIONS

1. To deal with the issue of poorly organized and substantially problematic procurement rules in FAR'99, co-existing with other Acts and Rules seemingly applicable in the field of public procurement, without clear rules defining the application of each, it is recommended that

- a modern, transparent and competitive Public Procurement Law be enacted in Nepal, based on the Model Law for Procurement published by the United Nations Commission for International Trade Law (UNCITRAL) in Vienna, and that this Law be made applicable to public procurement by all public entities in Nepal at all levels, as well as to procurement by parastatals;
- that a small, independent procurement regulatory agency with functions defined by the Procurement Law (which should essentially be confined to procurement policy matters and not to oversight) be created concurrently with the enactment of the procurement law; and
- that, upon enactment of this Public Procurement Law, all the Acts and Rules on public procurement above mentioned, and any others that might still exist, be formally abolished.

2. To deal with the lack of a mechanism for speedy settlement of bidders' procurement grievances and of provisions for blacklisting of suppliers, contractors and consultants for acts of fraud or corruption, it is recommended that, pending the enactment of a Public Procurement Law, FAR'99 be amended to provide (i) for a speedy settlement mechanism for bidders' procurement grievances, and (ii) for blacklisting of contractors/suppliers/ consultants who have engaged in acts of fraud or corruption, these matters to be later covered by the law.

3. To ensure that public procurement is governed by principles of transparency, economy and efficiency, pending the enactment of a Public Procurement Law, it is recommended that as many as possible of the items listed below (already introduced in Bank-financed projects) be introduced into FAR'99 (or other Acts and Rules) through specific amendments.

- there must be sufficient advertising, and sufficient time for bid preparation;
- bid documents must be made available to prospective bidders by mail or in person;
- bids must be evaluated in accordance with the disclosed criteria;
- bids must be opened in one place, and immediately after the submission deadline (this is particularly important since, under FAR'99, they may be - and in practice

often are - opened in more than one place, and as late as a day after the submission deadline);

- in competition with foreign bidders, no preference must be given to local bidders;
- qualification criteria must be stated in the bidding documents;
- contracts must be awarded to the lowest evaluated bidder;
- post-bidding negotiations with the lowest or any other bidder are prohibited;
- bids must not be rejected merely on the basis of a price estimate, without IDA's approval, and awards must not be made on the basis of nationally negotiated rates;
- no re-bidding without the prior concurrence of IDA;
- all bidders must provide the required bid- and performance securities;
- no awards by lottery;
- extension of bid validity only in accordance with the Bank's ICB rules;
- bids must not be invited on the basis of a percentage premium or discount over the estimated cost; and
- there must be no restriction on the delivery of bids.

4. To deal with poor ad-hoc versions of bidding documents for very small civil works, it is recommended that a set of bidding documents for contracts costing less than NRs.5 Million be developed. Currently mandated documents should be used for contracts valued more than NRs.5 Million.

5. To deal with the lack of qualified procurement staff in Nepal, it is recommended that :

- a separate procurement cadre be established in the government and parastatal organizations;
- training at all levels be introduced in order to improve the quality of the procurement process including a training of trainers approach; and
- universities be persuaded to include public procurement related topics in their commerce and business management and engineering basic degree programs.

6. To remedy the problem caused by Auditors, at the operation level, not always following the applicable procurement rules in the case of Donor-financed projects, despite clear understanding of this issue at the top level in the AG's office, it is recommended that the AG's staff (a) be trained in procurement concepts and rationale for procedures, and (b) be instructed, in the case of Donor-financed contracts, to insist on the application of the Donor's procurement rules and not on the application of local procurement rules.

7. Because Nepal's anti-corruption legislation seems to penalize only passive corruption (the soliciting/receiving of bribes by public servants) but not the equally dangerous active corruption (the offering/giving of bribes to public servants), and there seem to be no provisions allowing bidders to report acts of bribery by other bidders, and/or solicitations of bribes by public officials, it is therefore recommended that Nepal's anti-corruption legislation be amended so as to (a) impose penalties also on acts of active corruption, i.e., the offering/giving of bribes to public servants, and (b) allowing/inviting bidders to report acts of fraud or corruption by other bidders, as well as solicitations of bribes by public officials.

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PART II

Annex A - Legal Framework

GENERAL FEATURES

1. Legal System (i.e. Common/Civil Law; Socialist; Shari'a; other)

Nepal's legal system, strictly speaking, is based more on the British pattern (Common Law). However, it has civil law ingredients too. It can, therefore, be termed a mixed system.

2. Form of government (i.e. federal or centralized)

Nepal has a centralized structure of government. The recent decentralization Act, named 'Local Self-Governance Act, 1998', decentralizes certain functions in the 75 administrative districts.

Nepal has a constitutional monarchy and parliamentary type of the government. Legislative power rests in the House of the Representatives consisting of 205 members elected through franchise granted by the Constitution. The election to membership in the House of the Representatives is held on the basis of one-man one- vote through secret ballots.

There is a National Assembly (a permanent House) which has 60 members. His Majesty, from amongst persons of high reputation, nominates ten members. Thirty-five, including at least three women members, are elected by the House of the Representatives. Of the remaining fifteen, three from each of the five Development Regions are elected by an Electoral College consisting of Chiefs and Deputy Chiefs and the members of the district, village and the town level Local authorities.

The executive power is vested in the Prime Minister and his cabinet. There is a Minister for Law and Justice in the cabinet.

The highest court of the land is the "Supreme Court" whose members His Majesty appoints on the recommendation of the Judicial Council.

3. Does the Constitution contain any provision directly bearing on public sector procurement? (If so, describe)

The Constitution does not have any specific provision which has any direct bearing on public procurement except that it, under its Article 83, specifies that financial procedures shall be regulated by an Act. The provision reads as "Matters relating to transfer of appropriated moneys from one head to another and other financial procedures shall be regulated by an Act" (see par. 6 below).

4. Is the country a signatory to the Agreement on Government Procurement of the World Trade Organization?

No.

5. Does the basic contract law contain any provision directly bearing on public sector procurement? (If so, describe)

The basic contract law (Contract Act 2057 [2000]) does not have any provision directly bearing on the public sector procurement.

6. Is there a separate body of law which regulates public sector procurement, or is it governed by regulations issued under an organic finance act?

The public sector procurement is governed mainly by the following two instruments, namely, the Financial Administration (Related) Rules (Regulation), 1999, (FAR, 99), issued under the organic finance act, namely the Financial Procedures Act, 1998.

There are the following two other Acts which partly govern public sector procurement: 1) The Construction Enterprises Act, 1999 and 2) The Revenue and Government Contracts Act (1963 amended in 1968).

The Construction Enterprise Act, 1999 is the specific law designed to regulate the procurement of works (public works) contracts. The act, under chapter 4, clause 13, provides for formation of a Construction Enterprise Development Council with the mandate to prepare necessary policies for operating construction enterprises in a clear and systematic manner, and to issue directives to the concerned agencies. The Minister of Works and Transport heads the Council with seven other members. These include the concerned Member of the National Planning Commission, secretaries of 3 ministries (Ministry of Works & Transport, Ministry of Water Resources and Ministry of Physical Planning and Works). Representatives from the contractors' and the consultants' associations, and a joint-secretary from ministry of works as its Member-secretary. The function of the Council (clause 14), inter alia, include:

To prepare necessary norms for maintaining the standard of public works.

To frame and develop specimen drafts of contract agreements, conditions of contract and specifications to be signed between the proposers and approvers in public works.

To frame and develop necessary codes on the environmental and other aspects related to public works.

Some of the above functions are stated to be carried out by the above three ministries and the Office of the Financial Comptroller General (FCGO), under clause 62 of FAR, 99. Since FAR, 99 came into force about six months later, it should have taken note of the provisions in this relevant Act and provided cross-reference to avoid duplication and uncertainty.

The Act also provides for the formation of an Implementation Committee, whose functions are stated under clause 16 of the Act.

The Act, on its applicability to the externally financed works, has the following provision under clause 21:

“Notwithstanding anything contained elsewhere in this act, action in respect to public works to be executed according to grant or loan assistance agreements signed between HMG and any foreign government or any agency owned by a foreign government, or any international organization, shall be taken as provided for in the concerned agreements”.

Similar provisions are incorporated in FAR, 99 under rules 73(2)(m) and 96, which read as follows:

“73(2)(m). While carrying out the procurement of goods and construction works of the project operated by the foreign aid, it shall be done in accordance with the agreement concluded with the Donor Party or procurement guidelines of the Donor Party.”

“96. To Do According to the Agreement in Foreign Aid: Notwithstanding anything contained elsewhere in this Regulation, while obtaining technical service or procuring construction and renovation and performing other works under the grant or loan agreement concluded between His Majesty’s Government and foreign government, or an institution ownership of which is held by the foreign government or international institution, it shall be done in accordance with such agreement.”

As for the Revenue and Government Contracts Act, 1963 (First Amendment, 1968), it states in its preamble that the aim of the Act is to consolidate current Nepalese laws relating to revenue administration, revenue collection and government contracts for the benefit of the public. Contracts awarded under the Act mainly relate to revenue collection from defined sources of revenue such as forest clearing and sale of timber through auctioning, operation of quarries and time framed licensing for production of consumable items such as alcohol. Contracts awarded also include supply of rations to the police or army. The Act, strictly speaking, should apply to all government contracts, but in practice, FAR 99 is seems to be followed for all public investment contracts.

Some of the conflicting provisions in these Acts and Rules are discussed in more detail in par. 8 below.

7. Do other bodies of law regulating associated aspects of procurement contain provisions, which are directly related to problems identified within the local system? (e.g., Labor, tax, customs, insurance, and banking laws, foreign exchange controls or laws defining national standards - If so, describe)

Other bodies of the law regulating the procurement-associated aspects are: Taxes, Customs, Export & Import Control, Foreign Exchange Regularization.

8. Is the system clear, comprehensive and consistent? Does it cover all essential aspects with no unduly complicated, unnecessary, conflicting or outdated regulations and are rules found in various distinct sources or within a well-coordinated legal framework?

The system is reasonably clear. There are, however, inconsistencies. For instance some provisions of Revenue and Government Contract (R&GC) Act, 1963, amended on September 11, 1968, and FAR, 99 (more relevant and, in practice, always followed for public procurement are conflicting. Similarly, some of the provisions of Construction Enterprises Act, 1999 and of FAR, 99 are also inconsistent. Following are some of the conflicting/inconsistent provisions:

a) Definitions:

The R&GC Act, 1963 makes a distinction between Tenders and Bids whereas the FAR, 99 defines only the Tender, although the word “public bidding” has been used in the FAR (sub-rule 73.2(f) and 75) to denote offers received through public auction as in the case of the R&GC Act.

b) Notification and Advertising:

The Act prescribes three different methods on publication of notice for three different activities, namely: to give out any source of revenue or other function on contract, inviting tenders for the purpose of issuing contracts and for inviting bids (auction). It does not state how, where and in which publications the tender or bid invitation would be advertised. FAR, 99 require tender notice to be published at least twice in the National level Newspaper and magazine, displayed at the office of tender inviting agency and also forwarded to the other offices for displaying at those offices for all works costing more than five million rupees. (FAR, sub- rule 66. (5))

c) Tender Preparation Time:

The R&GC Act does not, under the heading tender invitation, prescribe any timeframe for tender preparation and submission in the case of what one might call “regular tenders”. Minimum period, however, is prescribed as seven days. The relevant provision under sub-clause 5.4 of the Act is reproduced below:

“5. (4) Notwithstanding anything contained in sub-section (1), in case His Majesty’s Government deems it necessary to issue a contract on short notice, or to invite fresh tenders or call fresh bids, even though tenders have already been submitted or bids called after having once published the notification, or to revive a contract which has been discontinued, a notification prescribing a minimum time-limit of seven days may be issued.”

FAR, 99 under sub-rule 66(8), states that the time-limit for the tender submission should appropriately be prescribed between 15 to 90 days depending upon the nature of the work and its cost. FAR, 99, sub-rule 75(2), however, allows only fifteen days notice for public bidding (through auction) for all works costing more than 5 million. [Note: English version of the FAR, 99 has omitted the phrase “ giving fifteen days time –limit and” between words “newspaper,” and “specifying” in the last line of para 1 of sub-rule 75(2)].

d) Bid Security:

The R&GC Act (sub-clause 5) provides for submission of bid security equivalent to 5% of bid value by a Nepalese and 10% by a non-Nepalese Bidder as deposits, to be refunded within 30 days from the date of rejection of his tender or bid.

The FAR, 99 prescribes a sum equivalent to 2.5% of the estimated amount, rounded to next five hundred or thousand, as bid security. {FAR sub- rule 66 (10)}.

e) Rejection of Tenders or Bids and Their Re-invitation:

The Act, under sub- clauses 9-(1), (2) and (3), deal with this aspect. Sub-clause 9(1) states that His Majesty’s Government may, with or without indicating any reason, accept or reject any or all of the tenders submitted or bids offered according to the notification. Sub-clause 9(2) provides for re-invitation of tenders or bids if rejected as above.

Further, sub-clause 9(3) of the Act states that His majesty’s Government, in case it so deems proper, may invite fresh tenders or bids at the same time retaining the previous tenders or bids (even opened) and may issue contracts to any previous or later tenderer or bidder, after having evaluated the earlier and later tenders together. Any previous tenderer wanting to treat his already submitted tender cancelled could do so within the prescribed time limit.

FAR, 99, under sub-rule 73(2)(f), states that in case the quoted tender price is in excess by more than 10% over the estimated cost, and there are at least three tenders, negotiation (public bidding/auction/ghataghat) with all bidders can be conducted. If the tender price, even after such negotiations (public bidding/auction), remains in excess of the estimated cost by more than 20%, such contract shall not be awarded (re-tendering will have to be resorted to). Sub-rule 73(2)(g) states that in case no or only one tender is received, fresh tenders should be invited, with seven days notice, keeping the single tender unopened.

Most of the provisions in the R&GC Act are outdated. Even FAR, 99 has such provisions, some of these are:

- Provision on re-bidding/auction as above.
- Provision under sub-rule 66 (11) that a bid once submitted may not be taken or given back (even before deadline for submission). This, in substance, is against the Contract Act, 2000, provision Clause 8 (1), which reads as follows:

“8 Cancellation of Proposal or Acceptance:

(1) The proposer may cancel his proposal by means of a notice.

Provided that in case the person to whom the proposal is advanced has already given his acceptance thereto before receiving a notice of cancellation thereof, it shall not be deemed to have been cancelled.”

9. Is the hierarchy of the sources of procurement rules well established?

The hierarchy of the Financial Administration (Related) Rules (Regulation), 1999 (FAR' 99) is well established. These are framed under the Financial Procedures Act, 1998, enacted in accordance with the provision under Article 83 of the Constitution (quoted above under answer to question 3).

10. Do the same rules apply to central and local governments?

The current Financial Administration Rules, 1999, hitherto, were uniformly applied to the central as well as the local governments. However, a new set of “Local Entity (Financial Administration) Regulations” have recently been published in the Gazette and came into force with effect from December 30, 1999, the date of publishing. These will govern all related financial transactions, including procurement, of Village Development Committees (VDCs), District Development Committees (DDCs) and the Municipalities.

11. Are there procurement rules established for parastatals? Describe.

The parastatals have their own rules for their procurements. These are mostly based on Governments' public procurement rules.

12. Is the procurement function decentralized? If so, describe basic structure, name the main decentralized procuring entities and indicate whether their role, rights and responsibilities are clearly delegated in writing.

The procurement function is decentralized. The National budget passed by the Parliament lists all authorized expenditures and the investments. Following the approval of the budget, the Secretary, Ministry of Finance is required to forward to the Secretary of the concerned line ministry the details of the budget reflecting budget head, sub-head, amount and resource description for the expenditure for projects included in the development budget and authorization letter to incur expenditure. A copy of the above communication is required to be forwarded to the Department of the Auditor General (DoAG) and Office of the Financial Controller General (FCGO) - (Rule 31 of chapter 5 of FAR, 99). The Secretary of the line ministry, within 15 days of the receipt of the above communication, is required to forward the same and the annual program to the subordinate departments, offices, who are authorized by the Financial Administration Rules to independently procure works, goods and the services within the prescribed thresholds. (Sub-rule 31.2 of FAR 99).

More details are included in Chapter 7 of FAR' 99 entitled "Provisions concerning government procurement and public works". Generally, the Secretary of the concerned ministry is the final authority for entire procurement function.

13. Is there an entity (ies) with oversight responsibilities for procurement functions throughout public administration (e.g., with primary regulatory powers, responsible for harmonization of rules and monitoring of compliance)? If so, identify and describe responsibilities and structure. Is it operationally involved in procurement? Is it the Central Tender Board?

There is no entity like a Central Tender Board in the country which would have oversight responsibilities over the procurement functions. However, the Office of Financial Comptroller General (FCGO), under the Ministry of Finance (MOF), is entrusted with the regulatory powers. It, among other important functions, drafts and obtains government approval to the Financial Administration Related Rules including procurement related and the Standard Bidding Documents. It carries out internal auditing and releases funds through its district offices to the implementing entities. FCGO carries out internal and the Department of the Auditor General DoAG external auditing. FCGO would issue instructions to the procuring entities to regularize the transactions if found to be otherwise through the internal auditing. It would also issue instructions, if required, and advise if sought to interpret FAR, 99 provisions. FCGO is not operationally involved in procurement.

14. Is there a Central Tender Board or a similar institution? What are its duties and responsibilities? Do the procuring entities or the Central Tender Board issue the award recommendation?

There is no Central Tender Board but the HMGN has, under Rules 186 and 187 of FAR' 99, Chapter 17, related to "Provisions relating to Evaluation of Tender", rules providing for the establishment of Tender Evaluation Committees in each ministry, department and the subordinate offices. The formation of these Committees is as under:

1. In each Ministry the Secretary to form a Tender Evaluation Committee as follows:

- a) Special Secretary or a first class Gazetted officer (if possible a technocrat)Chairman
- b) A representative from the concerned department, at least Gazetted second class officer (specialist)Member
- c) Chief of the financial administration division/branch or any other official, but not below the rank of Gazetted second class, nominated by him Member
- d) Chief, office/project Member
- e) Legal officer (if available in the ministry) Member
- f) Subject related expert at least of the rank of Gazetted second class (specialist).....Member

<p>2. <u>In each department, the concerned chief to form a Tender Evaluation Committee as follows:</u></p> <ul style="list-style-type: none"> a) Gazetted first class officer (if possible a technocrat) and departmental head if such an official is not available Chairman b) Chief of the financial administration branch Member c) Chief of the concerned office/project Member d) Legal officer (if available in the department) Member e) An officer related to the subject (specialist) Member <p>3. <u>In each office, the concerned chief to form a Tender Evaluation Committee as follows:</u></p> <ul style="list-style-type: none"> a) Office chief or a senior officer nominated by him (if possible a technocrat)...Chairman b) Chief of the financial administration branch, of an officer level otherwise chief of the financial comptroller's office an officer nominated by him.... Member c) Technical specialist related to the subject (if possible of an officer level)...Member
<p>15. Does the system allow/facilitate the introduction of new and innovative techniques and contracting practices without compromising basic principles?</p> <p>The system is not so flexible as to allow introduction of new and innovative techniques and contracting practices. The system is more control-oriented.</p>
<p>16. Are there rules/procedures regarding bidder suspension and debarment?</p> <p>The Contractors' Rules, 1974, (now repealed by the Construction Enterprises Rules, 2000) under rule 9 (3) had provision for suspension debarment and blacklisting the contractors with unsatisfactory record but it was never enforced. The Construction Enterprises Act, 1999, under its sub-clause 6 (1) c, provides for non-renewal of the license of a contractors, in case the works executed by him are not of prescribed standards. Construction Enterprises Rules, 2000, under sub-rule 13(c) authorize the committee formed under clause of the Act to prescribe necessary procedure related to the cancellation of a license. However, the FAR, 99 [rules 90(1) and 95] provide for the blacklisting of the non-performing contractors. Thus there are three different provisions in the above three instruments.</p>
<p>17. Is the country a member of regional trade/customs agreements? (If so, specify)</p> <p>No.</p>
<p>18. Are there primary/secondary boycotts? (Specify)</p> <p>There are no primary or secondary boycotts.</p>

19. Are there provisions regarding preferences for particular categories of suppliers of goods and services? (Specify) Is the purchasing entity compensated by the government for awarding contracts to higher cost national or local firms?

The country's procurement rules provide for 7.5% preference to the supplies of goods produced in Nepal {FAR, 99, Sub-rule 58 (3)}. This does not apply to the Goods procured for the externally financed projects. In the case of works contracts, a Nepalese firm or a Joint Venture (JV), having Nepalese participation of 50% or more, would get preference of 7.5 %, and 5% if such participation is 25% or more but less than 50% (FAR, 99, Sub- rule 73(4)). The government does not compensate for awarding contracts to higher cost bids under the above preference mechanism.

20. Are provisions on domestic/international arbitration codified? (If so, specify in which statute) Are the arbitration rules applicable to procurement contracts? Do they incorporate international rules?

Arbitration Act, 2055 (1999) is of general nature. It is applicable to national (where parties in dispute are Nepalese nationals) and international (when one of the parties to the contract is a non-Nepalese) arbitration as well.

The Act authorizes the Supreme Court of Nepal to frame rules regarding the functions that Nepalese courts might have to discharge under the Act.

21. If domestic arbitration rules are in force, are they generally in line with established principles such as those embodied in the UNCITRAL Model Law for Commercial Arbitration (1985)? (Highlight major differences).

Although different from the UNCITRAL Model Law, the Act does seem to be generally in line with established principles. In addition, there is a possibility of following the rules of Nepal Council of Arbitration (NEPCA), which are based on ICC rules.

TWO SPECIFIC COMMENTS:

- While the UNCITRAL Model Law, in Article 11(3), has very clear rules about how the arbitrators are to be appointed if one of the parties fails to appoint its arbitrator, paragraphs 6 and 7 of the Act, dealing with the same subject, seem to be far from clear.

- On the other hand, the UNCITRAL Model, in Article 29, provides that the majority shall decide in case there is more than one arbitrator, leaving open the question as to what happens if there is no majority (e.g., if there are two arbitrators, and they are deadlocked, or if there are 3, and each has a different opinion). Here, the Act seems to provide for better answers: First, there can never be two arbitrators, because, under paragraph 5(2), if the number of arbitrators is even, they have to designate a further arbitrator to make it an odd number (this seems like an ingenious solution, particularly in view of the problems the Bank has encountered in other countries where there are indeed arbitration panels consisting of two arbitrators). Second, paragraph 26 of the Act provides that, if there are 3 or more arbitrators, and "the majority opinion cannot be

ascertained....”, then the opinion of the chief arbitrator shall prevail (unless, of course, the parties have otherwise provided in the arbitration agreement).

22. Is the country a member of the New York Convention on the Recognition of Foreign Arbitral Awards?

Nepal, since 1998, has been a member of New York Convention on Recognition of Foreign Arbitral Awards.

23. Are there laws or regulations governing policies and procedures for awarding concessions/contracts for private sector provision/operation of power, water or other infrastructure facilities? (BOO, BOT, etc.) Do any general conditions of contract apply as a matter of law or regulation?

No. However, such laws are being drafted.

BASIS OF TRANSPARENCY

1. Is there a legal or regulatory requirement for public disclosure of procurement legal texts?

Yes. The rules and the regulations, including on procurement, are required to be, and actually are, published in the official Gazette, which is available to the public for purchase.

2. Are there mandatory requirements for maintaining written records of procurement? Are they available to the general public?

Yes. The maintenance of procurement related written records is, as per the Government Documents Destruction Rules 2027, clause 3 and annex 2 to it, a mandatory requirement. Annex 2 reads as “The documents to be destructed after three years from completion of work: Except the data related to drawings and design, any plan for the construction work, contract agreement, grant related papers after completion of work or after completion of auditing, if required, including adjustment of all transactions.”

The Constitution of the Kingdom of Nepal (Article 100.2) reads as follows: “The Auditor-General (AG) shall be consulted in the matter of appointment of auditors for carrying out the audit of any corporate body of which His Majesty’s Government owns more than fifty percent of the shares or the assets. The Auditor-General may also issue necessary directives setting forth the principles for carrying out the audit of such corporate bodies”, and the Audit Act, 1991, empower the Auditor General to inspect and carry out auditing of the accounts and the related documents with due consideration given to the regularity, economy, efficiency, effectiveness and the propriety thereof. The Constitution and the Audit Act guarantee the AG to have all time access to all records and documents and require the AG to conduct annual audits, and submit the result of such audits to His Majesty who causes such reports to be laid before the Parliament. Only this

report is a public document and other procurement related records are not made public.

The Audit Act not only requires public offices to maintain records and provide an access to these but demands the same requirement from the private sector also. Sub-clauses 3.2 and 3.2(b) of the Act are reproduced below:

"3.2: The Auditor-General may act as follows in the course of audit in case he so deems necessary."

"(b) Direct contractors who have obtained contracts for government work to produce documents relating to such contracts or other evidence in their possession."

The term "contractors" also includes suppliers.

A contract is defined by the FAR, 99, as:

"'contract' means any contract obtained by fulfilling the procedures mentioned in this Regulation through tender or quotation, from His Majesty's Government of Nepal or any other person to carry out any works or provide any goods or services by profit motive with or without making highest and lowest bids".

To make it more clear a contract means any contract for the procurement of works, goods or services, obtained in accordance with this Regulation, from His Majesty's Government or others for the purpose of deriving profit, after call of bids or quotations, whether or not after conducting negotiations or auction.

A supplier, party to such contract, would be deemed to be a "contractor".

3. Are requirements for advertisement of contracting opportunities adequate? Is the country's national gazette published in a timely fashion? Is it available to the general public?

Sub-clause 66 (5) of FAR, 99, mandates that the invitation to tender be published twice in the "national level newspaper and magazine" and that it also be affixed at a conspicuous place at the office inviting tenders as well as at all district level offices including District Administration Office, Land Revenue Office, District Development Committee, Funds and Accounts Comptroller Office and at any office of the Construction Entrepreneurs Association, for all contracts of more than NRs. five million value.

Notice inviting tenders is not published in the Gazette which is available to the general public. This would seem to be a serious deficiency, particularly since the "national level newspaper" is not specified, which means that interested bidders cannot be sure where they should look for tender invitation notices.

4. Are requirements regarding public bid opening, if any, appropriate?

Except that the bids can be, as per Sub-rules 66 (6) and (7) of FAR, 99, received and opened at more than one place, the public bid opening is a rather rigorous exercise. All

those present in bid opening are required to sign all the bids. Sub-rule 66.(5) of FAR 1999 stipulates that the notice for inviting bid should, inter alia, state the last date and time for tender submission (item (d) of the Sub-rule) and under (g) of the same Sub-rule prescribes to specify tender opening date, time (which need not be the same the same date and time as provided for tender submission!) and place. Regarding the place, as stated above, Sub-rule 66(6) of FAR specifies that a notice may be published having made arrangements to purchase and submit a tender to the concerned Ministry or Department or Regional Directorate or also the office. (office would mean project office)

It is thus noted that the above Sub-rule 66.5(g) has not prescribed the opening of bid immediately after the deadline for submission and Sub-rule 66(6) states that the bids are to be purchased and received at more than one place. It is not uncommon that the bids are opened on the following day of their receipt, which is not good public procurement practice and would not be acceptable under the Bank's Guidelines.

It is noted that these days, including for donor assisted projects, the time gap of one hour is often provided between the deadline for submission and opening of bids.

5. Are negotiations after bid opening or award selection generally forbidden?

Such negotiations are not forbidden. Sub-rule 73.2(f) provides for conducting negotiations (ghataghat). The Sub-clause states that in case at least a 3 tenders quoting an amount 10% higher than the estimated cost are received, negotiations (ghataghat – a sort of auctioning) with all the bidders can be conducted after considering the reasons and justifications for the same. If such ghataghat produces the bid prices not exceeding 10% over the estimated cost, the lowest bidder should be awarded the contract.

To summarize, for bid prices not exceeding 10% over the estimated cost, no negotiations/auctions are required (though, it is not unusual to have negotiations in such situations too). For bid prices, determined to be above 10% of the estimated cost, received at least from 3 bidders, negotiations are possible by rules and mandatory by practice. If the prices are more than 20% above the estimated cost even after post bid negotiations, a contract shall not be awarded and the bidding will be cancelled.

6. Do rules on negotiated procurement, if any, provide the basis for a fair and transparent process? Detail.

Since there is no process prescribed in the current rules, the rules do not provide or promote a fair and transparent process for negotiations.

7. Are conditions for use of various procurement methods clearly established and is there an explicit requirement that open competitive bidding is the preferred or default method?

Conditions for different procurement methods are established in FAR' 99. The following are the methods of public procurement other than open competitive bidding:

- a) Through obtaining quotations (at least three) from the contractors or the suppliers as the case may be.
- b) By inviting sealed quotations from potential suppliers or contractors through notices published, depending upon the value of the procurement, in the national and local newspapers and affixing at the local offices as explained in item 3 of this chapter (Basis of Transparency) document. This method is different from the regular call for bids in the following manner: 1) the time prescribed for submitting the offer is 10 days against 15 to 90 days; and 2) earnest money in the form of bid security is optional at the discretion of the office chief.
- c) By public call (auction) on fifteen days short notice (to be resorted to only if the regular invitation of bids would cause delays and loss to the government).

The conditions for the use of the above methods are fairly clear, and the open competitive bidding is the preferred method envisaged by the rules, which is evidenced by the provision under Sub-rule 64 (d), of FAR, 99 reading as follows: "While carrying out a work costing more than five million rupees and thereafter, it shall have cause to be done inviting bidding." In other words works, costing more than NRs.5 million, shall be procured through call of tenders. Sub-rule 64 (d) of FAR' 99 includes a similar provision for the procurement of goods.

Sub-rule 64 (e) reads as " In carrying out the work by contract under quotation or bidding or public bidding pursuant to this Regulation, it shall be done by the contractors registered under the Contractors' Rules (Regulation), 2031 (1974). Thus, for works contracts there is no open competitive bidding in the sense that only registered contractors, and in fact only those registered for a specific Class, may bid for works contracts falling within that specific class. In other words, contractors registered in any particular class are fully protected against competition from contractors registered in any other class. This is a very serious anti-competitive restriction, which is perpetuated in the Construction Enterprises Act, 1999.

8. Is there a requirement for public notice of contract awards?

Participating tenders have a right to obtain the relevant information: Sub-rule 73.2 (n) of FAR, 99 related to this matter, reads as follows: "In accepting the tender under this Regulation, a tender shall be accepted having prepared a comparative chart of the tenders. After accepting a tender, it shall be published having specified name and address of the tenderers, figure of the amount quoted by all tenderers and also basis of acceptance of the accepted tender and its quoted amount. A chart so prepared shall be made available on demand of the tenderer by charging required fee." However, it does not seem that there is a requirement for public notice of such information.

9. Are requirements for bid and contract securities clear and appropriate? Are they required of all bidders?

Requirements for bid and contract securities are clear in the relevant laws and rules. Sub-rule 66(9) of FAR, 99 states that the tender shall be accompanied by cash security or bank guarantee (bid bond). Further, Sub-rule 66(10) of FAR provides that "the notice inviting

tender shall be published having indicated two and half percent of the estimated cost payable as guarantee under this Regulation by increasing the figure up to five hundred or thousand at ceiling. If it is not possible to specify the estimated cost, necessary amount as guarantee shall specify in the notice concerning tender, cash security or bank guarantee of such amount shall submit with each tender separately. The notice concerning tender shall specify that a performance bond or cash security at the rate of five percent of the contract price shall deposit after accepting the tender.”

SBDs for NCB (currently in use) mandated for use by the Office of the Financial Comptroller General (FCGO) however, prescribe performance guarantee as 10% of the contract sum. FAR, 99, clause 62 refers to a manual for “Public Construction, Consultancy Service etc. ...”, to be prepared by the Ministry of Works and Transport, which would, inter alia, include Sample (standard) Bidding Documents. It also states “Works shall be performed pursuant to the model document issued by the Office of the Financial Comptroller General until the manual is issued”. Thus, provisions on performance security are conflicting for works contracts.

10. Are qualification requirements for bidders, if any fair and appropriate for the purpose of the contract?

FAR, 99 {Sub-rule 73.2(b)} provide that generally lowest priced bid shall be accepted. However, the rules also suggest that in addition to the price consideration, the financial position, experience, capacity and the reliability of the bidders should be taken into account while considering the bid for acceptance. These criteria are however not prescribed in a quantifiable manner. Theoretically, a bid other than lowest priced could be accepted if the bidder of the lowest priced bid did not meet the above criteria judged subjectively. The responsibility for recording the reasons for accepting higher priced bid rests on such decision-maker. However, such contract awards are only exceptions.

FAR’ 99, under Sub-rule 66(5), specifies that the tender notification should, inter alia, contain information on the “financial condition, technical experience and expertise of the contractor eligible to submit a tender...”

It has, during the post-review exercises, been noted that the blank spaces provided for inserting contract specific criteria requirements for qualification and the bid evaluation are left blank in several instances even for IDA financed works, not to speak of HMG financed. Thus the practice in vogue hardly provides a fair and rational basis for the determination of a bidder’s qualification. Also, from the above provisions, it remains unclear whether qualification of a bidder is determined as an “in/out” decision as required, e.g., by the Bank’s Guidelines, or – which seems more likely from the above clauses – whether it is merely another evaluation criterion. In the latter case, an award to an unqualified low-price bidder might indeed be possible if the evaluation method makes it possible for the low bid price to outweigh the lack of qualification

11. Do requirements for bid examination and evaluation provide the basis for a rational and fair process?

Under HMG's own funded projects, requirements for bid examination is fairly well established but not for evaluation. The government had, jointly with IDA, developed and put to use NCB bidding documents for goods and works (*see par. 9 above*) which, with a few modifications, have been adopted for its own funded projects as well.

12. Are summaries of information about public procurement published (e.g. number of bids received, number of contracts awarded, names of successful bidders)? If so, describe scope and frequency.

No, procurement summaries are not published. However, FAR, 99, has, under Sub-rule 73.2(n), now makes publication of information regarding individual bidding exercises mandatory. The provision reads as "In accepting the tender under this Regulation, a tender shall be accepted having prepared a comparative chart of the tenders. After accepting a tender, it shall be published having specified name and address of the tenderers, figure of the amount quoted by all tenderers and also basis of acceptance of the accepted tender and its quoted amount. A chart so prepared shall be made available on the demand of the tenderer by charging required fee."

13. Does government hold regular meetings with the business community to discuss public procurement issues?

Not as a general practice. However, the government does hold meetings with the business community to discuss specific public procurement issues, at the initiative of the private sector and donors, including IDA.

The contractors' view is that the government is too conservative and does not openly come forward or seek consultations with them.

14. Is there a conflict of interest policy in effect? (If so, describe its essential features)

The procurement laws do not contain any specific provision regarding conflict of interest. The public officials, by the law related to the code of conduct (Civil Service Act 1993, with First Amendment 1998, and Rules), are prohibited from engaging themselves in any business. Thus, no public servants can work for or submit bid offers on behalf of any contracting firm.

15. Are the laws on bribery of government officials enforced? Do government bidding documents and contracts contain anti-bribery and anti-corruption conditions?

Enforced.

There are laws on bribery of government officials; these are: 1) Anti-Corruption Act, 1961, and (Third Amendment) Act, 1987 and; 2) Commission for Investigation of Abuse of Authority (CIAA) Act, 1992, and First Amendment, 1992. Both Acts deal with the acceptance of bribes by public servants and related matters. Track record on enforcement is said to be not satisfactory.

Copies of the Acts are attached to this report.

Current standard bidding documents have provision for anti-bribery clauses. Enforcement is said to be weak.

BASIS OF ACCOUNTABILITY OF PROCUREMENT OFFICIALS

1. Are government employees expected to follow a published code of ethics? If so, describe its basic features.

There is no specific code of ethic for procurement officials. However, for public servants in general, a code of ethics exists, which is included under the heading 'Conduct' in clauses 41 through 55A in Chapter 7 of Civil Service Act, 1993 and First Amendment 1998. Such code of ethics includes provisions on punctuality and regularity, discipline and obedience, prohibition to take part in politics, prohibition of obtaining or accepting donations, gifts, contributions and or loans, prohibition of carrying out any business, disclosure of property, and compliance with conduct befitting his service and post.

2. How easy is it for bidders to report bribes by others and solicitation/extortion of bribes by government officials?

Although this is not specifically stated in the Anti-Corruption Act, 1961, bidders might have the possibility of reporting the solicitation of bribes to the Special Police referred to in paras. 18 and 19 of the Act, or to the Commission for Investigation of Abuse of Authority (CIAA), under clause 8 of CIAA Act, 2048 (1992). Also, there seems to be no provision allowing a bidder to report bribes being offered and/or paid by other bidders (see Recommendations under Chapter (F), Anti-Corruption Measures).

3. Do bidders have adequate access to administrative or judicial review/appeal?

No. There are no provisions in the law that will allow bidders to seek administrative or judicial review about procurement decisions. However, the bidder, if aggrieved, can file a complain with CIAA under sub-clause 8(3) of the CIAA Act 2048 (1992), which reads as follows:

"In case any other person suffers any harm or adverse effect from any improper action by a person holding a public post, he may complain to the Commission in the prescribed form"

4. Are there measures/initiatives to curb/control corruption, e.g. anti-corruption statutes and/or bodies, whistle-blower statutes, comprehensive reforms of the civil service / judiciary, regional initiatives, provisions in the criminal law, anti-bribery provisions, etc.? (If so, describe)

The law called the Anti-Corruption Act was amended for the eighth time on September 25, 1987. The law, inter alia, provides for (1) penalties to be awarded in the event of any public servant accepting anything other than lawful remuneration in consideration of his

official work as bribe (2) penalties to be imposed in the event of any person accepting bribe for influencing public servant (3) penalties to public servants accepting any commodities free or at concessional prices from persons connected with business (4) penalties to public servants doing any work with the ma-la fide motive or gaining illegal benefit or causing damages (5) penalties to any person who acts with ma-la fide motives for causing unlawful benefit or loss.

Annex B - Trade Practices	
1. Are foreign firms engaged in trade with the country required to use a national agent?	<p>Although there is no specific legal requirement to have a local agent, the government policy, however, favors appointment of a local national agent by all foreign firms engaged in trade. About four years ago Parliament had passed a resolution directing the government to cause the foreign firms appoint their national agents. Such Parliamentary resolutions are however not legally binding upon the government, these are more of advisory nature, though Government instructed the line ministries to act in accordance with the said resolution.</p>
2. Are there indications that over-invoicing and/or under-invoicing are common practices? For which purposes?	<p>Under invoicing is not uncommon. This is done to evade Customs duties and other taxes. Over-invoicing is also common practice adopted mainly by some contractors to inflate their claims for price adjustment (escalation).</p>
3. Are goods frequently described incorrectly on the invoices?	<p>Not so frequently, but the importers do describe goods incorrectly on the invoices to import negative list goods and or pay less duties. Most of such incorrect statements go unchecked.</p>
4. Are there indications that import documents are falsely labeled?	<p>Not very frequently.</p>
5. Is there evidence of any other trade malpractice affecting public sector procurement?	<p>No.</p>
6. Is there a pre-shipment verification program? Who conducts the inspections? What goods are included?	<p>There is no general pre-shipment verification program. However, procuring entities themselves or through their agents inspect goods at the supplier's premises prior to shipment on ad-hoc basis occasionally.</p>
7. Is there a threshold for pre-shipment inspection? What is the amount?	<p>There is no such threshold.</p>

<p>8. If pre-shipment inspection is conducted by a private company, what is the duration of the contract with the company? Was the contract awarded following a competitive process?</p> <p>Pre-shipment inspection is conducted by the buyer himself or through his consultant/agent. Such contracts are awarded through competitive bidding as well as direct contracting from time to time. However, Nepal has no long-term contract for pre-shipment inspection for all goods.</p>
<p>9. Is pre-shipment inspection, if any, conducted according to generally established procedures? Are there indications that the inspection is not effective?</p> <p>Pre-shipment inspection conducted by international agencies such as Crown Agents was found generally to be in accordance with the established procedures. These are not very effective when conducted by the staff of the buyer. (No information is available)</p>
<p>10. Are goods also normally inspected upon arrival?</p> <p>Yes, they are inspected by Customs and the technical experts of the procuring entities at the border point and at the site of delivery respectively.</p>
<p>11. Are inspection procedures in conformance with established practice?</p> <p>No information was available.</p>
<p>12. Do pre-shipment/post-shipment inspection, if any, unduly increase the procurement lead-time?</p> <p>Not for pre-shipment, but delays, at the Customs offices at the border have often been seen and reported in the case of post-shipment inspection.</p>
<p>13. Is counter-trade used? Barter agreements? In which percentage of the country's total trade? For which commodities?</p> <p>No. Barter trade sometime takes place between traders of Tibet and Nepal.</p>
<p>14. Are the ICC's INCOTERMS generally understood and commonly used in the Country? Are other trade terms used? What are the most commonly used INCOTERMS used? FOB? CIP? CFR? DDP?</p> <p>INCOTERMS are generally used. The most commonly used INCOTERMS are Ex-works, Ex-factory, FOB, CIF and CIP.</p>

15. Are there indications suggesting price-fixing in open bidding?

Yes there are indications of collusion amongst the contractors in works contracts. Bid rates for same or similar item of works obtained from smaller number of pre-qualified contractors are invariably high compared with larger participated bidding under post-qualification mechanism. This has not been noticed in goods procurement.

16. Are licensing and customs procedures generally transparent and efficient?

Licensing is required only for negative list items (not related to development project requirements); the customs procedures are not very efficient and transparent. The Customs officers have discretionary powers, which could be misused. Abnormal delays in customs clearance has been reported a common phenomenon.

Action Plans agreed with the Government for CPPRs of February 11, 1997 and January 21, 1999 contained, under "Accelerated Procurement Action" the following action:

Government (MOF) to simplify customs procedures for admitting goods associated with IDA-funded projects- remains outstanding.

17. Are "facilitation" payments normally necessary to clear goods through customs, obtain work permits for expatriate labor, process monthly payment certificates/invoices?

It is often reported that facilitation payments are necessary for clearing goods through Customs. Likewise facilitation payments are not uncommon features in other dealings including processing monthly payments etc.

18. Are local staff familiar with shipping and other trade documents? With documentary credits?

Yes. Customs officers, Customs brokers, clearing and forwarding agents and audit officers are familiar with shipping and other trade documents.

19. Are local staff experienced in import planning and importation procedures?

Yes, of some procuring entities.

Annex C - Financial Framework**1. Are banks capable of issuing Letters of Credit?**

Yes. All the 9 Banks in Nepal issue letter of credits to customers both for domestic and international transactions. The Banks are also allowed to issue letter of credits for domestic transactions as well.

2. Are banks generally creditworthy?

Generally yes.

3. Can bid, performance and advance payment securities be obtained easily locally? What formats are permitted? Bank guarantees? Bonds? Other? Provide details on cost, if available.

Yes. The bid, performance and advance securities are available locally at all commercial banks in the form of the bank guarantee. The banks may ask the client to provide collateral (50 to 100%) as a condition for issuing the guarantee or security. The banks have their own formats for these guarantees or securities but most of them located in Kathmandu also issue unconditional guarantee on the standard formats as prescribed in the bidding documents. For issuing a bid guarantee the Banks ask to provide collateral for 15% and for performance and security against advance payment collateral of 50% to 100% is sought. The commission charges are 1.5 to 2 % of security sum per annum.

4. Are the requirements for issuance of bid, performance and other securities to local suppliers/contractors reasonable?

Yes.

5. Do local suppliers/contractors have reasonable access to credit?

Local suppliers and the contractors have no problem to obtain credit from the local banks and financial companies, provided they can furnish 100% collateral.

6. Do implementing agencies obtain budgetary authorizations for contract payments falling due beyond the current financial year?

No. Any unspent amount lapses at the end of the fiscal year. The budget is allocated against programmed items approved by the National Planning Commission for the current year. The budget allocation in the program may contain an item: "payment for the work done during the previous fiscal year".

7. Are major projects or programs clearly identified in government budget estimates?

Yes.

8. What procedures are followed to ensure the procuring entity obtains budget authorization prior to inviting bids?

Chapter 5, of the FAR, 99, deals with the procedure for budget release, authorization and public expenditure. Rule 31 of the above chapter reads as:

“Sanction of Budget: (1) After the promulgation of the yearly Vote on Account Act or Appropriation Act or Supplementary Appropriation Act or Vote of Credit Act, the Secretary of the Ministry of Finance shall send the concerned Secretary the budget statement indicating, inter alia, the budget heads, sub-heads and amounts, details of sources to bear expenditure for the projects included in the development budget and the letter of authorization to expend, or cause to be expended, the budget. A copy of such budget statement and the letter of authorization to make expenditure shall also be sent to the Department of the Auditor General and the Office of the Financial Comptroller General”.

9. Do procuring entities reliably receive the monies authorized? Or is the budget subject to revision during the year by a restrictive cash release system?

Generally they do. However there are instances when the timely budgetary releases are not made. Revision of the budget during the year is rarely done. Supplementary budget may, under very special condition, be placed before and passed by the Parliament. Restrictive cash release system is however not uncommon. Cases have been reported that the Ministry of Finance did not release full budgeted amounts.

Annex D - Public Sector Procurement of Goods/Works

GENERAL RISK ASSESSMENT

1. Is the public sector procurement profession held in high regard?

No. A public sector procurement profession, as such, does not exist in Nepal. It is generally considered a government function, but is not recognized as a separate career or profession. Experienced professionals mainly from the engineering faculty are involved in the procurement process, with some input from the account [accounting?] personnel.

2. Are pay levels for procurement professionals comparable to that for other public and private sector technical specialists? Give current range of monthly salaries.

The biggest problem in Nepal is that the Government does not recruit personnel in Ministries and Departments solely for procurement function. Instead, engineers and accountants are entrusted with the job of procurement. The salaries paid to them are same as for public sector technical specialists, which are very low (about one fourth) when compared with the salaries of the private sector. The salaries of these personnel range from Nepalese Rupees Seven to Ten Thousand (US\$100 – US\$150) per month.

3. Is the procurement profession generally staffed with honest and capable individuals?

In general, procurement staff is not efficient nor well trained. In some project executive agencies, including Department of Roads (DOR) and some of the public corporations, reasonably experienced and capable procurement experts are available, while the rest of the staff is neither qualified nor efficient. As regards the honesty of procurement staff, the general perception is not healthy.

4. Does a code of ethics exist that procurement professionals are expected to follow?

There is no separate code of ethics for the procurement staff. However, the Civil Service Act, 1993 has a separate chapter on conduct of civil public servants which deals, among other things, with punctuality, discipline, provision not to accept donations, gifts, contribution and loans from any person in a manner that is prejudicial to official functions in any way.

Please see also Item 1 above, under “Basis of Accountability of Procurement Officials”

5. Are the authorities relating to procurement clearly delegated to the entities carrying out the process? Are the applicable procedures clearly defined?

Yes, Rule 73 of FAR, 1999 delegates authority to various officials/project chiefs of

concerned ministries and departments. FAR, 99 have to be read in conjunction with Civil Service Act and rules. FAR delegate authority to office chiefs of various classes for approving the tender as follows:

Gazetted third - up to NRs.10 million, second- NRs.30 million, first - up to NRs.50 million, the departmental head – up to 100 million and the secretary of the concerned ministry NRs.100 million and above. Rule 73 of FAR 99 specifies the duties and the responsibilities of the authority accepting tenders and the procedures to be followed. The secretary of the concerned ministry is now the final authority for approving the tenders.

6. Are procurement decisions ever overridden by higher governmental agencies? If so, by whom? To what degree is the procurement decision-making process independent from politics?

The procurement decisions are not always accepted and at times overridden by the higher authorities. In some cases, evaluation reports and recommendations for award prepared and submitted by the evaluation committee to the Minister or Cabinet through hierarchy were rejected and in other cases, a re-tendering was ordered. In some cases, a new evaluation committee was formed to re-evaluate or review the evaluation report prepared by the first evaluation committee. It is not uncommon to find decisions made without any rationale.

7. Does the highest level of government encourage/support/enforce compliance with existing procurement regulations? Are violations investigated and procurement/other responsible officials held accountable?

Generally yes.

ORGANIZATION

1. Is appropriate information on procurement adequately disseminated (i.e. procurement staff are aware of updated rules and thresholds, and other issues relevant to their assigned responsibilities)?

Yes. Dissemination of rules and amended thresholds is generally adequate. FAR is widely available to every body, including procuring entity. For IDA financed works, the government and IDA have developed and agreed to use country specific standard bidding documents for ICB works, goods and the consultancy services and for NCB procurement of goods and works. The NCB documents used for IDA works have also been, with some modifications; mandated to use for government financed procurements as well. These documents are available to all levels of staff involved in the procurement in Public Works Depts. The experience, however, indicates that these documents are neither well understood nor followed properly by the staff, other than a few organizations responsible for carrying out public works.

2. Are the procurement and supply management functions clearly distinguished?

Procurement and supply management functions are not clearly distinguished in many cases. The same staff carries out the function of purchase of goods, their storage and record keeping, thus resulting in mixing of the two functions.

3. Is contracting authority reasonably delegated (i.e. there are no unnecessary levels of approvals or cumbersome procedures)?

Against the backdrop of Nepalese conditions, the delegation of contracting authority is considered to be reasonable. However, the time taken in the decision making is very lengthy because of the tendency on the part of public servants to avoid personal risk in decision-making, lack of technical knowledge, lengthy discussions and political pressure.

The FAR, 99 has reduced the levels of approvals. Now, the secretary of the concerned ministry is the final authority for approving the contract awards. Departmental head and other officials at different levels have also been given substantial authority as explained in the answer to question No. 5 under Annex D, General Risk Assessment, above.

4. Are thresholds for contracting powers regularly updated?

No. The threshold, prescribed in FAR, 1986, was first amended in 1992 and then in 1993. However, FAR, 99 have substantially increased the above thresholds.

5. Do procuring entities have internal quality control mechanisms? Are they regularly audited?

There are no well-defined technical or procurement audits and quality control mechanisms. There is an internal audit mechanism in place. Clause 144 of FAR under chapter 14 provides for such auditing to be carried out by the Office of the Financial Comptroller General. However, it is more relevant to the financial and inventory management rather than to procurement. The financial and performance audit is done on the annual basis by the Audit-General's office (Clause 145 of FAR'99). During auditing, all procurement documents including evaluation reports, correspondences and related purchase accounts are examined. This is restricted to the procurement process auditing and physical verification at times. Regarding internal quality control mechanism, there is a provision, a sort of responsibility to ensure quality, under FAR, Cause 84, which reads as follows:

“Responsibility of Technician: To prepare cost estimate of the construction work under this Regulation, to conduct test and to supervise whether a work is under quality standard as stipulated by the approved drawings, design and specification shall be the responsibility of a technician employee designated by the Office In-charge for such work.”

The Ministry of Works and Transport has a Chief Technical Examiner's unit (recently renamed as Foreign Cooperation and Quality Division) to regularly check the quality of procurement done by its departments (mainly DOR). The department of Roads has a materials testing laboratory for conducting the tests to verify the quality of procured goods

and works.
<p>6. Are procurement staff experienced in international procurement?</p> <p>Not all. In Nepal, since early sixties donors funded project have been actively executed in coordination with the donors or solely by HMG officers. This provided the procurement staff opportunity to get exposure to the international procurement procedures. Those not involved in such project/s lack experience in procurement as a whole including international.</p>
<p>7. Is career advancement primarily based on job-related accomplishments and factors?</p> <p>No. Career path is no different for procurement staff from other public servants which is based on seniority, performance, decorations (award by His Majesty for outstanding work), educational qualification and to some extent political influence.</p>
<p>8. Do adequate formal and on-the-job training programs exist for entry- and higher-level procurement staff that contributes to proper professional career development?</p> <p>Not at all. This is one of the serious shortcomings.</p>
<p>9. Are there additional training resources in the country which are currently utilized or that could be utilized to complement Government/donor-administered programs (e.g., universities and private institutions)?</p> <p>There is neither any specific program on procurement at the local institutions in Nepal nor there are resources that would compliment the government/donor programs. Nepal Engineering College, an institution in the private sector has, in collaboration with Pokhara University, recently launched M.Sc. Program in construction management, the curriculum of which includes procurement function. There is a pressing need for organizing training courses in the country on procurement. The Bank also organizes 2 to 3 short duration training workshops annually for the borrower's officials engaged in the IDA financed projects and limited related private sector (contractors/ consultants) personnel.</p>
<p>10. Did previous training programs lead to an obvious improvement in the quality/ productivity of procurement work?</p> <p>Only to a limited extent. The short duration workshops and seminars arranged by the Bank Office, and one to one discussion of Bank field office staff with the procurement staff of the borrower have lead to some improvement of quality and productivity of procurement work.</p>
<p>11. Do procurement staff have adequate project/contract management capabilities?</p> <p>Procurement staff of the Public Works Departments with engineering background is involved in contract administration as well. Such staff is better in capability of project management than procurement. This is however not the case in all the ministerial and</p>

departmental executing agencies.
<p>12. Are procurement agents used? Under what circumstances? How are they selected? Describe normal basis for compensation and contract duration.</p> <p>Yes. In social sector projects, mainly health and education, and in Earthquake Relief Project, the services of Crown Agents have been used as Agent for procurement of goods. Selection of procurement agent was done on single-source basis for all three projects. The contracts were for two to four year's period.</p>
<p>13. Is procurement monitoring and administration computerized? How adequately do procurement entities track the key steps in the procurement process and collect appropriate project-related cost and schedule information?</p> <p>Monitoring is not yet computerized specifically for procurement function. Some of the implementing agencies have computerized project monitoring which partially includes procurement function as well.</p>
<p style="text-align: center;">PROCESS – PLANNING</p>
<p>1. Are project implementation units adequately staffed with trained procurement, planning, scheduling, expediting and cost estimating personnel?</p> <p>No. The Project Implementation Units (PIUs) are generally not adequately staffed for the above functions. Some PIUs, responsible for the execution of foreign funded projects, are however, adequately staffed. The units would normally consist of project manager, specialized professionals, mostly in engineering, responsible for conducting functions including procurement. The procurement planning, scheduling and cost estimating are carried out mostly by the project director and the engineer (experienced in procurement). Firstly there is dearth of experienced procurement personal in the market. Secondly, the government, because of low salary paid to the staff, can hardly attract manpower to work as its staff in any specialized branch.</p>
<p>2. Is overall planning for complex goods, works and other contracts done in sufficient detail to produce realistic project definition, achievable completion schedules and accurate cost estimates?</p> <p>Normally, the Ministries and Government agencies would use consultants for the design and implementation of major and internationally funded, complex projects. At the design stage, detailed project cost estimates, implementation schedules and disbursement profiles are prepared, with the assistance of consultants. The estimates so prepared have many times proved to be inaccurate and planning also unrealistic.</p>
<p>3. Is the early technical and financial planning well coordinated so that projects are fully funded when work needs to begin, based on accurate cost estimates?</p>

<p>No. In most of the cases technical and financial planning are not well coordinated. In addition, for HMG own financed projects there are no assurances that funds would be available to complete the ongoing projects. There are several ongoing road projects under construction for last twenty years, yet not completed.</p>
<p>4. Are appropriate methodologies used to plan multiple inter-related procurement activities on large projects (e.g. the critical path method)?</p> <p>Yes for donor funded projects.</p>
<p>5. Are project components appropriately packaged for procurement purposes?</p> <p>Yes for externally funded projects, otherwise not. There is a tendency on the part of the field offices to break the work in to smaller pieces to avoid reference to the higher office for tender approval. This creates a situation where there are too many slices without packaging. FAR, 99 prohibits such action (Sub-rule 63(5)).</p> <p>The provision under this Sub-rule 63(5) reads as:</p> <p>“While preparing cost estimate under this Regulation, generally a work shall not be splitted into various pieces. If a work requires to be splitted into various pieces and cost estimate is to be prepared accordingly, technical justification thereof and also other grounds therefore shall specify and approval of the Departmental Head shall be taken.”</p>
<p>6. Are completion schedules generally met for goods, works and consultant services contracts? If not, what is the major cause for slippage? Is sufficient time generally allowed for external reviews/clearances?</p> <p>No they are invariably not. The completion schedule are generally not met because of (1) delays in procuring services, works and goods (2) delays in fund release by MoF (3) lack of commitment and dedication on the part of PIU (4) weak project monitoring (5) frequent transfer of PIU staff and (5) heavy reliance on consultants, who for serving their own interest, tend to extend project life. The evaluation process of the proposals or bids is the major problem. It takes eight months to a year from the time of bid opening to the time of award. There appear to be several causes for such delays, these include poor technical capability of evaluation committee members, lengthy consultations with different persons, time required to analyze and response to pre award complaints from bidders or outsiders, decision makers at the highest level disagreeing with the recommendation of the evaluation committee and asking to review or revise through yet another committee and finally most importantly possibly much of political interference. There are several recorded cases <i>documenting such delays</i>, including Butwal - Tansen, rehabilitation contract under RMRP (Cr.2578-Nep, closed on June 30, 1999).</p>
<p>7. Do procurement units regularly conduct market surveys to update their knowledge of prevailing prices for goods and works?</p>

No such practice exists.

For each district, a construction materials and labor wages fixation committee, formed under the provision of Sub-rule 138 (1) of the FAR' 99 and consisting of public officials and representatives of the private sector, is required to fix the rates of the construction materials and labor wages annually within the first month of a new fiscal year for the purpose of framing pre-bid cost estimates. It is implied that the rates are determined after conducting market surveys.

FAR, Sub-rule 138(3) states that "the committee referred to in sub-rule (1) shall, in fixing the rate of construction materials and price, fix it on the basis of the prevailing market rates as far as possible". These rates are used in the preparation of estimates.

8. Are procedures and methodologies for planning procurement of recurrent items (i.e., inventory control, forecasting of future requirements, classification, coding, accounting/financial management, spare parts management, and delivery systems) adequate?

No. Existing procedures are very outdated and those are not generally followed.

PROCESS - DOCUMENT PREPARATION

1. Do standard documents exist for goods, works and other types of contract? List. Are other international contract formats used? If so, identify.

Yes. Donor funded projects Project Implementation Units (PIUs) use specified Standard Bidding Documents. The government in cooperation with the Bank staff developed country specific bidding documents (SBDs) for ICB and NCB contracts. The government has mandated the use of these NCB, SBDs even for the contracts financed by HMGN with some minor changes. These have been forwarded to all the ministries. These have not however been disseminated to the district level offices by some of the ministries. The documents with the government-mandated date for their use are given below:

a) For ICB Contracts: Documents all of August, 1996, - mandated for use with effect from August 31, 1996

- Procurement of Works (Major)
- Procurement of Works (Smaller Contracts)
- Procurement of Goods
- Standard Form of Contract, Consultants' Services, Lump Sum Remuneration
- Standard Form of Contract, Consultants' Services, Complex Time-Based Assignment

b) For NCB, Contracts:

- Procurement of Works: October, 1996, - mandated for use with effect from April 13, 1997

<p>- Procurement of Goods: November 1997, - mandated for use with effect from December 31, 1997.</p>
<p>2. Are these documents, if any, readily adaptable to specific contract situations (i.e., by modifications made through a Bid Data Sheet, Special Conditions of Contract or similar)?</p> <p>Yes.</p>
<p>3. Are there separate documents for international and national competitive bidding not financed by the Bank?</p> <p>No. There is only one set of documents in use for government financed contracts. There would be very few International competitive bidding for such contracts.</p>
<p>4. Do Instructions to Bidders (ITBs) contain all information necessary to prepare responsive bids and clearly understand evaluation criteria and their method of application?</p> <p>ITBs of SBDs for NCB in Nepal contain all required information. However, even for the Bank financed contracts, below the prior review thresholds, the evaluation criteria are generally not specified. This holds good for HMGN own financed contracts as well.</p>
<p>5. Do they contain other necessary information, such as eligibility requirements, basis of bid, language and currency of bids, common currency for purposes of evaluation, source and date of the exchange rate, etc.? Are sample forms and other appropriate sections of the documents provided?</p> <p>Yes they do.</p>
<p>6. Are bidders required to provide bid security in an appropriate amount as a condition of responsiveness of their bid?</p> <p>Yes. Bid security, generally 2.5% of the bid price is required to be provided in the form of cash deposit or a Bank guarantee. Procuring entities have been found to accept bid securities in a form that differed from the one prescribed in the bidding documents, particularly, as a result of changes that made it more difficult for the employer/purchaser to enforce them (e.g., by requiring the employer/purchaser to prove a default by the bidder).</p>
<p>7. Is pre- or post-qualification provided for?</p> <p>Yes. Both pre or post qualification is provided for the Bank financed contracts. Post qualification in the case of locally financed contract is not common. Registration of the contractors with the Ministry of Works and Transport is mandatory. The committee entrusted with the job of evaluation of the contractors for registration in the respective</p>

<p>category/class against pre-set (gazatted) criteria carries out a sort of pre-qualification exercise. The procuring entity may, however, further undertake pre-qualification of contractors for a specific job, irrespective of their being registered in the eligible class.</p>
<p>8. Are qualification criteria appropriate and clearly described?</p> <p>Yes, under donor funded projects and otherwise not.</p> <p>FAR 99, under Rule 62, entrusts the Ministry of Works and Transport to prepare Public works Guidelines and the Manual which, inter alia, would include sample bidding documents and financial and technical proposal procedure and their weightages: bid evaluation basis and procedure. It is also stated under this clause that the sample bidding documents issued by the FCGO shall be followed till the above Guidelines are introduced. These documents are similar to the ones used for procurement of IDA financed NCB works and goods with some changes. (but not followed in preparing for specific contract, see item 10, under Basis of Transparency, above).</p> <p>The rules further under Sub-rule 66(5) prescribe that the bid invitation notice should include, inter alia, eligible class of contractor permitted to participate in the bidding and the details of his financial status, technical experience and efficiency.</p> <p>Ex-post reviews revealed that the international consultant assisted NCB procurement in IDA funded projects under Credits 1924 and 2144-NEP did not carry the qualification criteria in the bidding documents. Similarly some contracts under IDA Credit 3009-NEP did not stipulate the qualifying criteria.</p>
<p>9. Are conditions of contract equitable?</p> <p>Yes. The documents used for Bank financed NCB contracts are mandated by the government for using for its own financed projects as well.</p>
<p>10. Are conditions of contract generally equitable? Do they provide adequate coverage for most important commercial and legal issues (for the method of procurement, size, nature and type of contract used) and provide adequate protection to the Government, without putting undue risk on bidders?</p> <p>Yes, since SBDs for NCB in Nepal have been mandated for use by all agencies carrying out public procurement.</p>
<p>11. Are standard purchase orders used for shopping?</p> <p>No.</p>

PROCESS - PRE-QUALIFICATION

1. Is pre-qualification carried out when appropriate? What types of contracts is it used for? Works? Goods? Other?

Normally pre-qualification (PQ) is carried out for larger size civil works. Rule 65 of FAR, 99 allows this for works contract value exceeding NRs.10 million and for the procurement of heavy equipment and any other contract for which, in the opinion of the secretary of the concerned ministry, PQ is required to be resorted to. PQ criteria laid down by the rules are technical capacity, financial strength and experience. The secretary of the ministry concerned is required to fix the weights/marks (per criteria 20 to 60% depending upon the nature of the job) for these criteria and the minimum aggregate pass marks. PQ exercise is very time consuming. It is susceptible to misuse and also may lead to possible collusion between the smaller number of pre-qualified national contractors.

Pre-qualification of applicants, based on information provided in the Bank Standard documents, carried out by consultants for large works is generally satisfactory.

2. Is the pre-qualification process fair and transparent? Are decisions made promptly? Are foreign firms allowed to apply?

The process is not always fair and transparent. Decisions are not made promptly.

Under locally funded projects no foreign firm would be allowed to bid for works costing less than NRs.60 million (about \$09m).

3. Are standard pre-qualification documents used? Do they clearly and completely describe all the prerequisites for submitting responsive applications for pre-qualification? Is financial information routinely requested and critically evaluated to assess an applicant's financial capacity to perform?

Yes, under donor funded projects. Otherwise no.

Pre-qualification evaluations carried out by the consultants for the Bank financed projects are also sometimes found to be deficient in analyzing the financial statements and the information provided by the contractors as required by the standard pre-qualification documents.

4. Do pre-qualification documents clearly and completely describe all requisites for submitting responsive applications and the qualification requirements? Is financial information required and critically analyzed to assess financial capabilities to perform contracts?

Under donor funded projects the documents clearly specify requirements. The financial statement asked for are seldom analyzed to ascertain long term profitability of a firm. In

the case of contracts financed by the government itself, the secretary of the concerned ministry approves the documents and the criteria as stated under question 1 above. They do not have any standard PQ documents.

5. Do procuring entities verify prior to contract award if a successful bidder continues to meet pre-qualification requirements?

Yes, occasionally the successful bidder is asked to reconfirm the prequalification information, but the correctness of the information is seldom verified.

6. Are suppliers required to have a local agent in order to qualify to bid for goods or services?

No. However, foreign bidders are required to state in their bid whether or not they have appointed a local agent (see par 68 of FAR '99).

7. Do procuring entities maintain updated lists of qualified suppliers and contractors and updated market information on commonly procured goods, including spares and consumables? Is supplier and contractor performance routinely evaluated and are any standing lists of pre-qualified suppliers and contractors updated and modified based on this information. Can newcomers readily apply and be qualified?

Yes, they maintain list of registered contractors in the standard format provided under Schedule- 3 of the Contractors Enterprises Rules, 2000 (Sub-rule 9(1)). Similarly, FAR, 99 {Sub-rule 59(i)} has provision for keeping and updating the list of foreign suppliers annually. A newcomer can apply and be qualified.

Regarding updating of market information please see item 7 under the head "Process-Planning" above.

Regarding routine evaluation of contractors' performance FAR, 1999 under Rules 88 and 90 have following provisions:

"88. Work Progress of the Contract to Follow Up: (1) While awarding a contract, an agreement shall be concluded taking into account the programme and work schedule as well. The Office In-charge shall follow up, or cause to be followed up, continuously whether the work is being carried out or not, under the work schedule or conditions of the contract by the Contractor. An arrangement shall be made to submit a follow up result of the contract work of the project costing two million five hundred thousand rupees to the Departmental Head on trimester basis.

(2) The authority which has accepted the tender, shall periodically follow up the work whether it has been carrying out or not under the work schedule mentioned in the tender accepted by him and under the contract and a report thereof shall be submitted to the immediate higher authority on trimester basis. The authority receiving a report may give necessary instruction by studying it"

"90. Contract May not be Terminated until its Expiry: (1) After the contract agreement has been made pursuant to this Regulation, the contract may not be terminated or abandoned before the expiry of the contract period without an agreement between the authority awarding the contract and the person accepting the contract.

Provided that the authority awarding the contract may terminate the contract if the work is not started according to the contract agreement or the contract is abandoned after starting the work of agreement. If the contract is so terminated the amount of the money deposited by the contractor as security for that work shall entirely be forfeited and whatever amount more than the contract amount shall be required to complete the remaining work shall be realized from an amount deducted from the bills of the contractor and from any outstanding amount payable to him, and a written request shall be made to the concerned Ministry to include such a contractor into the black list and a notice thereof shall be communicated to all Ministries."

These provisions are rarely implemented.

There are 4 classes (A,B,C and D) of the contractors. Requisite criteria for getting registered in these classes are prescribed. New registrations and renewal of the licenses would be regulated under the above Construction Enterprises Act, 1999. Clause 11 of the Act is reproduced below:

"11. Public Works Which may be Executed Through Construction Entrepreneurs
Public works worth the following minimum and maximum amounts may be executed through the following construction entrepreneurs:

- (a) Public works worth any amount exceeding NRs.20 million, through Class A construction entrepreneurs.
- (b) Public works worth more than NRs.6 million but less than 30 million, through Class B construction entrepreneurs.
- (c) Public works worth more than NRs.2 million but less than NRs.10 million, through Class C construction entrepreneurs.
- (d) Public works worth not more than NRs.3 million through Class D construction entrepreneurs.

Explanation: For the purpose of this section, the term "amount" means the estimated amount."

The above provision forbids classes of contractors A, B and C from bidding for works of values less than 20 million, 6 million and 2 million respectively. This, in fact, means that contractors in all classes except the highest class are protected from competition by larger contractors, which cannot possibly be in the public interest.

PROCESS – ADVERTISEMENT

1. Are contracts to be awarded by competitive bidding publicly advertised?

Yes. Please see item 3, on advertisement requirement under “Basis of Transparency” above.

2. Is sufficient time allowed to obtain documents and prepare bids?

No, not for HMGN funded contracts.

Under current practices, the minimum bid preparation time allowed is as follows:

	<u>ICB</u>	<u>NCB</u>
a) Procurement of works and good for donor-funded IDA-funded (prior- review)	45	30
b) HMGN own funded	15	15
c) For emergency situation, (HMG funded)	--	7 days

FAR, 99 specify 15 to 90 days bids preparation time depending upon the size of the contract, without mentioning any thresholds.

PROCESS - COMMUNICATIONS BETWEEN BIDDERS AND THE PROCURING AGENCY

1. Are requests for clarifications answered promptly and completely in a written form?

Yes for donor-funded projects. Otherwise there are hardly any requests for clarification. Even when the contractors seek the clarification the responses do not come forth promptly. Replies are vague and tendency is to refer to the clauses themselves on which the clarification is sought.

Are clarifications, minutes of the pre-bid conference, if any, and modifications of the documents promptly communicated to all prospective bidders?

Not always.

2. Are bidders afforded sufficient time to revise their bids following a modification of

<p>the documents?</p> <p>Generally, yes for the externally funded project.</p>
<p>3. Do procuring entities maintain accurate records of all communications with the bidders (before and after the deadline for submission)?</p> <p>Generally, yes.</p>
<p>4. Are there communications between the procuring entities and the bidders, other than appropriate requests for clarification of a bid made by the evaluating committee?</p> <p>Yes, negotiations are permitted under the existing rules. See under item 5 of “Basis of Transparency” above. Summary reproduced below:</p> <p>“To summarize, for bid price not exceeding 10% over the estimate cost, no negotiations are required (though, it is not unusual to have negotiations in such situations too). For bid prices, determined to be above 10% of the estimated cost, received at least from 3 bidders, negotiations are possible by rules and mandatory by practice. If the prices are more than 20% of the estimated cost even after post bid negotiations, a contract shall not be awarded.”</p>
<p>PROCESS - RECEIPT OF BIDS AND OPENING</p>
<p>1. Are bids received prior to the deadline securely stored?</p> <p>Yes, but the bids are generally received on the deadline (last) day.</p>
<p>2. Are public bid openings conducted?</p> <p>Yes.</p>
<p>3. If so, are they conducted at a specified place closely following the deadline for submission? Generally how long after are they scheduled?</p> <p>Bids are generally opened after about an hour from the deadline for submission. For contracts other than Bank funded Bids are received and opened at more than one place. The old rules mandated this; the current rules allow this. The places could be about three: project office, regional and the head office.</p>
<p>4. Do bid opening procedures generally follow those specified in the Guidelines? What information is read out at the opening ceremony? Are minutes kept?</p> <p>Yes, followed for both the Bank and HMGN funded project contracts. The information read out is (i) bidder's name; (ii) Bid price; and (iii) any other information including</p>

conditions, discounts, etc.. Minutes of bid opening are kept.
<p>5. Do bid opening procedures differ for goods, works or other types of contracts? If so, how?</p> <p>No.</p>
<p align="center">PROCESS - BID EXAMINATION AND EVALUATION</p>
<p>1. Are evaluations conducted by qualified evaluating committees?</p> <p>Not always.</p> <p>Generally, the project officials: engineer, account officer and the project manager are individually involved in the bid evaluation exercise. The new rules have, however, mandated the formation of qualified evaluating committees in the ministry, department and the project/district offices. These committees are to be formed by the secretary, departmental head and the offices chief in their respective offices.</p>
<p>2. Are evaluating committees appointed ad hoc for each evaluation?</p> <p>Yes, in past, mainly for the evaluation of the consultant's proposals. The new rules (FAR, 99) provide for the appointment of permanent evaluating committees in each Ministry, Departments and district level offices. The provisions, under Sub-rules 187 (1) and (2) of FAR 99, for the committee formation at the ministry and the department is as under:</p> <p>At the ministry level:</p> <ol style="list-style-type: none"> Special secretary or Gazetted first class officer (as far as possible a technical employee) – chairperson Representative of the concerned department, at least a Gazetted second class officer (specialist) – member Financial administration division/section chief or a person nominated by him/her, at least of position of a Gazetted second class officer – member Office/project chief – member Legal officer (if available in the ministry) – member Subject related officer (specialist) - member <p>At the department level:</p> <ol style="list-style-type: none"> Gazetted first class officer (as far as possible a technical employee) if such official is not available, the head of the department - Chairperson Financial administration section chief - member Office/project chief - member Legal officer (if available in the department) - member Officer related to the subject - member

<p>3. Is responsiveness determined on the basis of the documentary requirements described in the documents and according to established practice?</p> <p>Yes, for donor funded project contracts. For locally funded, lowest price is generally given preference over any other criteria, i.e. responsiveness in respect of bidders qualification is often not checked.</p>
<p>4. Are bid evaluations carried out thoroughly and on the basis of the criteria specified in the documents?</p> <p>Generally, yes for donor funded projects. Otherwise lowest price prevails.</p>
<p>5. Is the successful bidder's qualification to perform the contract determined solely on the basis of the criteria stated in the documents? (See above) If not, what other criteria are considered?</p> <p>Yes, for the donor-funded works bidder's qualification to perform the contract is determined solely on the basis of the criteria stated in the documents. But in the case of locally funded works, price becomes the main consideration, i.e., qualification is often disregarded.</p>
<p>6. Are evaluations normally completed within the original bid validity period?</p> <p>Generally, yes, but delays are not uncommon.</p>
<p>7. Are bid evaluation reports prepared containing all essential information (i.e., a clear and complete description of the evaluation process, including the reasons for rejecting any bid as non-responsive, how the stated evaluation criteria were applied, and how the successful bidder's qualifications were verified)?</p> <p>Generally, the evaluation reports are incomplete. In some engineering departments the situation is better.</p>
<p>8. Describe any significant differences between goods and works procurement relating to the above.</p> <p>There are none.</p>
<p>PROCESS - CONTRACT AWARD AND EFFECTIVENESS</p>
<p>1. Are contracts required to be awarded to the lowest evaluated responsive bidder who has been determined to be qualified to perform the contract satisfactorily?</p> <p>Normally yes, for donor funded project contracts. For internally financed projects contract award to the least-cost bidder is preferred, although the rules allow to take into account</p>

other qualification factors such as: experience, technical capability and financial strength for the award of a contract.
2. Are negotiations conducted with bidders, before or after selection? Yes. The current rules permit to conduct negotiation to bring down the price. It is, in fact compulsory (Sub-rule 73.2 (f) of FAR, 99) if the bid price exceeds the pre-bid estimate by more than 10 percent. Please refer to item 5 of "Basis for Transparency" and also Item of "Process-Communications Between Bidders and the Procuring Agencies."
3. Are additional Government approvals required before contracts can be made effective? No.
4. Is performance security required in an appropriate amount and in an appropriate format? Yes. The performance security required is normally 5-10% of the contract value.
5. Describe any differences between goods and works relating to the above. There is no difference.
PROCESS - CONTRACT ADMINISTRATION
1. Are there manual or computerized procurement and/or contract monitoring systems? No, monitoring systems exist for locally funded projects. Manual systems were introduced in the Bank financed projects but those are not updated or regularly operated.
2. Are suppliers and contractors generally paid on time? What is the normal time lapse from invoice submission to final payment? Generally, yes. Normal time lapse ranges from 1 to 1.5 months.
3. Are there appropriate procedures to monitor delivery of goods and services to verify quantity, quality and timeliness? Yes, for donor-funded projects otherwise no.
4. Are contract changes or variations handled promptly in accordance with the contract conditions and established practice (i.e., change/variation orders are given and/or confirmed in writing, constructive change orders are avoided, unit rates in the contract are honored but the supplier or contractor is allowed to agree to any new

unit rates introduced and the completion schedule for each change or variation, etc.)?

Issuance of variation orders is a normal practice, but these are handled most inefficiently. Long delays and protracted negotiations with the contractors are normal features.

The executive body members of the Federation of Contractors' Associations of Nepal (CAN) informed that the VOs are not issued in writing and their approval and the payment is normally delayed substantially.

In one case related to Population and Family Health Project (PFHP), the Variation orders to the two consulting service contracts amounted to more than twice the original contract values. In these two cases, the Variation Order for the work performed during 1997 were approved in 1999. That means the consultants were not paid for over two years for the services rendered by them.

5. Do procuring entities normally make a good faith attempt to resolve disagreements through informal negotiations?

Generally, this would be the case.

6. If this fails, are the resulting disputes handled in accordance with the contract conditions?

Yes, but the employers invariably try to delay and avoid the settlement process, be it before the arbitral tribunal or in court. Most of the contracts carry arbitration clause and the number of arbitration cases are increasing.

The executive members of the contractor's association (CAN) stated that the contractors avoid litigation to avoid straining of relations with the employers. Delayed payment is stated to be one of the consequences of going for litigation.

7. Are supplier and contractor claims handled fairly based on a clear recognition of both parties' obligations under the contract?

Generally, no.

8. Are works contracts supervised by independent engineers? Does an employee of employer act as engineer in some cases?

On donor-funded large projects contracts, so called independent consulting engineers are appointed and they carry out supervision. Under locally funded projects, the staff of the borrower, particularly of the public works departments, supervises the contracts.

9. Are contract managers/administrators skilled in resolving problems in a timely manner and dealing with unforeseen circumstances arising during the life of the contract? Do they adequately document all actions of contractual import taken by the purchase/employer during implementation?

Most of them are not. Generally, documentation for contractual imports for donor-funded projects is reasonably in good shape. Contract management/administration skill development is urgently needed.

10. Are contractual remedies utilized only when appropriate and in accordance with the contract conditions?

Yes, for contracts funded by external agencies (donors) and supervised by consultants. Otherwise, parties, in particular the employer, avoid utilization of contractual remedies and handle the disagreements through informal negotiations or through the interventions by ministers.

11. Are contracts generally completed on schedule and within the originally approved contract price? Or, are cost and time overruns frequent? If so, in which sectors and for which particular kinds of contracts? Are fair final acceptance procedures used and certificates issued in a timely fashion?

Time and cost overruns are frequent. This is so in consultancy and other contracts mainly in the infrastructure (roads, buildings and power) projects. In the externally funded project contracts, final acceptance procedure through consultants is generally fair and timely. Otherwise not.

12. Are contracts generally administered in a fair and equitable manner (e.g., the purchaser/employer grants extensions of time when delays are attributable to its untimely action, fair compensation is provided to offset additional costs caused by its mistakes, etc.)

There is a lot of scope for improving the contract administration. Time extensions, are rarely issued on time. There are few known cases where the employer had granted extension of time and compensated for the extra cost to contractor caused by employer's mistakes.

The executive committee members of CAN stated that lack of fair and equitable contract administration has considerably slowed down the growth of the sector.

13. Are under-inspection, over-inspection and/or improper rejection of goods, materials or methods of carrying out the works a common problem?

Under-inspection is a common problem.

14. Are disruptions of the supplier's or contractor's orderly performance common?

Not very common. However, failure on the part of the employer to discharge its contractual obligations, including attending to issues related to: handing over of site, making payments, providing drawings and giving decisions when due etc., do cause disruptions in the contractor's orderly performance.

15. Can any of the improper contract administrative practices identified above, be attributable to a problem identified in the local procurement environment? Specify.

There are many cases where contractors had to go for arbitration and the awards were in their favor because the employers failed to administer the contracts as per its terms and the conditions.

16. Are procurement evaluations/audits conducted? If so, describe scope, frequency, who carries them out, etc.

There is no procurement audit mechanism as such. However, the Auditor General's Office, while carrying out financial audits, also check if the procurement procedure is correctly followed. The Auditor 's main concern is cost.

PROCESS - RECORD KEEPING

- 1. For contracts to be awarded on the basis of competitive bidding, does the procuring entity maintain a complete record of the process? This would include, e.g., copies of all public advertisements, pre-qualification documents (if used), the pre-qualification evaluation report documenting any decisions not to pre-qualify certain potential bidders, the bidding documents and any addenda, a record of any pre-bid meetings, the bid opening minutes, the final bid evaluation report (including a detailed record of the reasons used to accept or reject each bid, copies of bids, appeals against procedures or award recommendations, a signed copy of the final contract and any performance and advance payment securities issued, etc..**

Generally, records are well maintained, till the audit is completed.

- 2. Are adequate contract administration records maintained? (These would include contractual notices issued by the supplier, contractor, purchaser or employer; a detailed record of all change or variation orders issued affecting the scope, quantities, timing or price of the contract; records of invoices and payments; certificates of inspection, acceptance and completion; records of claims and disputes and their outcome; etc.).**

Generally, yes for the externally - funded project contracts.

3. For small contracts or purchase orders for goods procured using shopping procedures, is a database maintained showing the current market price for commonly needed items?

No.

4. Are periodic reports prepared on overall procurement activities? By and for whom?

Procurement status reports are prepared by the PIUs in the externally – funded projects, otherwise not.

Annex E - Public Sector Selection of Consultants

- 1. Are procuring entities generally well staffed, experienced and capable of carrying out a professional selection process for consultant services? Do they administer consultant contracts effectively?**

In case of PIUs responsible for implementation of externally funded projects yes.
Otherwise rarely.

- 2. Is the winning consultant firm normally chosen by comparing competitive proposals submitted by a short list of qualified firms? Where do implementing agencies obtain the information necessary to develop short lists? If not, specify what other methods are used and when they are used.**

Donor funded project implementing agency follow the procedures prescribed by respective donor. In accordance with Rule 81 of FAR'99, for consultants' contracts financed by HMGN and costing less than NRs.100,000.00 (\$ 1500/-), the contract is awarded through direct negotiations. For contracts larger than NRs.100,000/- and up to 300,000 (US\$1500-4400), technical and financial proposals are invited through call of quotations from the registered consultants with the department and having tax registration certificate in their possession and listed through invitation of interest annually. For contract valuing more than NRs.300.000, the notification giving 15-35 days proposal preparation time is published in a national newspaper proving TOR and the details of the scope of work. The proposals are evaluated. Those who secure more than 60% marks are declared qualified. To make the list of qualified to at least three firms securing less than 50% may also be picked up. The financial proposals of the qualified firms are opened evaluated and contract awarded to the one securing highest marks on combined evaluation of technical and financial proposals.

- 3. Do requests for proposals clearly describe the selection process and evaluation criteria?**

Yes, in case of donor-funded projects. Otherwise no.

- 4. Do the Terms of Reference describe the requirements of the assignment clearly and completely, including background, scope and objectives, deliverables, time frame, anticipated staff-time, and government contributions?**

Generally, yes.

- 5. Is selection based only on technical considerations or also on price?**

Both, for locally financed. Selection procedure, for donor-funded projects, is controlled by the Guidelines and procedure of the donor agency. ADB does not follow QCBS method.

<p>6. Are technical criteria detailed and appropriate and their relative weights reasonable?</p> <p>Yes for donor financed.</p>
<p>7. If price is also a selection factor, are technical evaluations completed before opening and consideration of price proposals? Are the relative weights chosen for each factor appropriate?</p> <p>Yes, for donor-funded projects.</p> <p>Sub-rule 81(13) of FAR, 99 provides 9 selection criteria and requires the implementing agency to assign weightage to each of the 9 criteria before opening the technical proposals. The technical and financial proposals are assigned 40 and 60% weightings respectively. Greater weight is given to the financial proposal. Furthermore, the consultants securing the contract award are required to provide 1% of their proposed total contract cost as performance security.</p>
<p>8. Are there standard conditions of contract? Are they fair and equitable to the consultant? Do they adequately protect the interests of the client?</p> <p>Yes, in case of Donor-funded projects. But there are no standard conditions of contract or any other format for HMGN own funded contracts. Form of agreement and conditions of contract are required to be drafted by the employer case by case.</p>
<p>9. What form of compensation is used? Unit rates? Lump sum based on milestones? Other?</p> <p>Both: lump sum and time-based for donor-financed contracts.</p> <p>New FAR, though silent, envisage lump sum contracts. The payments, as per the rules, are required to be made in four or more installments.</p>
<p>10. Are consultants required to submit proposal, performance and/or advance payment securities?</p> <p>Consultants are required to submit a performance security in the amount of “one percent of total amount of the accepted financial proposal in cash or bank guarantee” (see par. 81(15) of FAR '99). Consultants are also required to furnish advance payment securities in the form of bank guarantees (see par.123(1) of FAR '99).</p>
<p>11. Is there a conflict of interest policy provision included in the conditions of contract? (If so, describe).</p> <p>No, in case of locally funded contracts. Yes, for donor-funded.</p>

12. Are evaluations conducted by committees with appropriate expertise?
Generally, yes, incase of organizations responsible for Public works. Otherwise no.
13. Are general criteria broken down into appropriate detailed criteria agreed by the evaluating committee before conducting the evaluation?
Generally, yes.
14. Are all criteria applied consistently, fairly and impartially by the evaluators? Are the individual score sheets kept as part of the procurement record?
Not always.
15. Are evaluations conducted individually by each member of the committee and the results averaged?
Generally, yes for donor-funded contracts. Otherwise evaluation is carried out through reaching in consensus amongst the committee members.
16. Are new factors or weights added after the issuance of the request for proposals which are considered during the evaluation?
Generally, yes.
17. Are evaluation reports prepared containing essential details of the process, results, and matters to be taken up during contract negotiations?
Generally, yes.
18. Are evaluations normally completed within the time originally requested for the validity of proposals?
Procurement status reports are prepared by the PIUs in the externally funded projects.

Annex F – Procurement Performance		
VOLUMES		
<p>1. What are the approximate annual values of public procurement for goods, works, and consultant services, respectively? If possible, distinguish between procurement for projects and ongoing programs.</p> <p>The Sectoral Allocation for Development for the 9th Plan for the period (1997-2002) is as follows:</p> <p style="text-align: center;">Table 1: Sectoral Allocation of Development Outlay (at 1996/97 constant prices) (NRs in Million)</p>		
Sectors	Ninth 5 Year Plan (1997-2002)	
	Amount	Percentage
Agriculture, Irrigation and Forestry	51,284 (US\$ 895.00)	27.05
Non-Agriculture	138,296 (US\$ 2413.55)	72.95
Total	189,580 (US\$ 3308.55)	100.00

This would give an annual average development outlay of about NRs.661.00 million at the prevalent currency exchange rate of \$1= NRs.57.30 in 1997, at the beginning of the Plan. Since this is the fourth year of Plan, actual expenditure of the past 3 years and the budget of the current year would need to be accounted for.

Table 2: Development Expenditures, FY98 – FY2001
(NRs. in millions)

	US\$	FY98 Actual	FY99 Actual	FY 2000 Rev. Est.	FY2001 Budget
In Million of Rupees					
Social Services		10323	10265	11689	16895
Education		2037	1641	2257	3421
Health		2076	1677	1891	3021
Drinking Water		1670	1867	2198	3838
Local Development		3679	3969	4226	5167
Other Social Services		861	1111	1117	1448
Economic Services	626618	6386	6936	9249	11786
Agriculture		2144	1926	2490	3387
Irrigation		2437	2941	3511	4946
Forestry		410	481	490	645
Industry		477	289	934	839
Other Economic Services		918	1299	1824	1968
Infrastructure		11513	10389	11466	17728
Transportation		5620	5111	5294	6635
Communication		1189	466	483	521
Power		4705	4811	5688	10572
Others		722	942	887	1699
Total development expenditures		28944	28531	33292	48109
	US\$	467.20	460.50	463.34	668.00
Exchange rate \$1= NRs.		61.95	61.95	67.95	72.00

Of the total NRs.189,850 million outlay for five years, after deducting actual expenditure (NRs.90,767.00 million) of the last three years, an amount of NRs.99,083.00 million would be available for the remaining two fiscal years (including current) of the ninth 5 Year Plan. With the projected average exchange rate of \$1=NRs.75.00, an average annual outlay for these two years would be about \$660 million. Annual expenditure is about 80% of the budget and procurement is about 80% of the total expenditure.

Thus the annual volume of procurement would be about \$422.00 million.

2. What are the approximate percentages of goods, works, and consultant services financed by external donors?

The external agencies finance about 70% of the public procurement.

3. What percentage of public procurement follows competitive bidding procedures? Other methods? There are no specific data. However, based on the country experience, it can be assumed that about 90% contracts are awarded through competitive process.		
4. What percentage of competitively bid procurement is donor financed? About 70%.		
GENERAL EXPERIENCE		
1. Are government organizations generally perceived by suppliers/contractors/consultants/the public as fair and efficient in their procurement practices? Generally, No.		
2. Which of the following factors are considered to be problems by persons familiar with public procurement in the country?		
Factors	Yes	No
Inappropriate or outdated laws and regulations	x	
Poor compliance and enforcement of existing laws	x	
Poor information about procurement needs	x	
Shortage or experienced professional staff	x	
Poor training of procurement staff	x	
Low pay for procurement staff	x	
Poor procurement planning	x	
Poor procurement methods and procedures	x	
Lack of good standard procurement documents		x
Cumbersome contract approval procedures	x	
Lack of delegation of contracting authority		x
Inadequate appeal mechanism	x	
Interference by higher level officials	x	
Lack of anti-corruption measures and enforcement	x	

EXPERIENCE WITH WORLD BANK-ASSISTED PROJECTS	
1. How many Bank projects have been completed in the country? Are now underway? In which sectors? Seventy-five projects have been completed. There are nine active projects in the portfolio for total net commitments of US\$500.78 million and with an undisbursed balance of	

US\$208.29 million. There are four projects in the pipeline, of which one Credit of US\$54.5 in the road infrastructure has become effective from February 21, 2000. Project sectors included are: Telecommunication, Transport including Dry port, Tourism, Education, Water Supply-Urban and rural, Power, Irrigation, Agriculture, Forestry, Rural Development, Finance, Industry, Warehouse, Municipal Development and Earthquake, SAL and Population and Health.

2. Which organizations have been responsible for procurement on these projects?

Organizations responsible for procurement on these projects are: NTC, DOR/MOWT, MOC, DOT, MOE/DOE, NWSC, NEA/MOWR, DOI/MOWR, DOA DOF, MOLD, MOF, NRB, MOI, MOHP. And MOH.

3. What thresholds for ICB, IS, NS, prior review for goods, works and consultant services are currently in effect for ongoing projects? Are they the same for all projects? How long have they been in effect?

Prior review thresholds for the different categories are, generally, as below:

Methods	Threshold
ICB	Each contract of value \$200,000-250,000 and above for works, and \$50,000 - 100,000 and above for goods
NCB:	same as for ICB, as above
Shopping: IS or NS	Usually each contract of value \$20,000 or less: evaluation of quotations to be sent to IDA in some cases.
Consulting firms:	each contract valuing \$50,000-100,00 and above: TOR and RFP for all
Individual consultants	>\$10,000: in some cases all

4. Do project audits/completion reports/supervision reports indicate significant procurement problems? Have any cases of misprocurement occurred? Describe.

Significant problems are recorded. There is, so far, only one case of misprocurement declared.

ICR and Supervision reports have recorded procurement problems.

Relevant remarks from 4 Implementation Completion Reports (ICRs) that were prepared during the nineties are produced below:

(i) Agriculture Extension Project (Cr.1570-NEP)

"The serious delays in civil works programs which adversely affected project implementation were due to lengthy procedural process for design approval, tendering and dispute resolution".

(ii) Narayani Irrigation Project III (Cr.1715 - NEP)

"Borrower's consultant seriously underestimated the cost of main ICB civil work contract which caused delay due to need to retender".

(iii) Road Flood Rehabilitation (Cr.1922-NEP)

"- There is a need to improve procurement process
- Provide further training for consultants and contractors in the use of FIDIC based contract document"

(iv) Mahakali Irrigation Project II (Cr. 1924-NEP)

"-First ICB contract terminated due to slow progress (27% achieved against 72 % targeted)...

- PQ procedure in accordance with IDA Guidelines does not necessarily ensure the selection of satisfactory contractors in Nepal".

Road sub-sector Supervision Mission of February 8- March 3, 1996 recorded in its aid-memoire the following:

"The lengthy procurement review and approval procedures which delayed project start-up are giving rise to further delays in processing of the remaining works and consultancy services. Without a substantial change in the current review procedures, it seems likely that a number of project works components will not be ready for implementation before the project closing date. In other cases, road condition has deteriorated substantially between project identification and execution, causing unnecessary increases in costs and a need for revision of works specifications, sometimes after contract award. This causes particular problems for periodic maintenance works, which rely on timely action once initial pavement distress is identified.

To permit timely and effective project execution, it was agreed that MOWT will consider ways to speed up procurement decisions, possibly including the establishment of an empowered review committee and delegation of most procurement decisions from the ministerial level to the Department of Roads. Empowered committees have been very effective in improving implementation of bilateral projects within the agreed timeframe. An empowered committee for this project could, for example, be chaired by the Director General of Roads with members from MOWT, MOF and MLD where appropriate. An observer could be invited from IDA."

5. Have procurement issues caused serious implementation delays, cost overruns, disbursement delays? Describe.

Procurement issues have caused delays in project implementation in the Urban Water Supply and Sanitation Rehabilitation Project and in the Infrastructure projects funded by the Bank.

6. Does the Bank receive a large number of complaints about procurement procedures, selection decisions in the country?

Thirty-nine (thirty-one on procurement of consulting services and eight on procurement of goods) complaints were received during last eight months.

7. Are contracts generally awarded within the planned, usual time frame that would be required for similar operations by other experienced and efficient organizations?

Contracts are generally not awarded within the planned timeframe. FAR, 99 Sub-rule 73.2(l) states that “after opening the tenders submitted under this regulation, a tender shall be accepted within such time limit as prescribed for submitting a tender.” (Note: bid preparation time is, as per rules, 15 to 90 days depending upon the nature and value of the work. Contract award should be planned with reference to the bid validity period.)

8. Are there serious problems or conflicts between national and/or local practices and World Bank Guidelines, which should be addressed on an interim basis pending implementation of recommended long-term action plans?

There are, though not very serious, conflicts between the local rules (new) and practices and the World Bank Guidelines. These are:

Bid preparation time (minimum) as per new rule is 15(fifteen)- days against 30 acceptable to the Bank for NCB contracts.

Bid documents, by practice, are not made available, by mail, to those bidders who are willing to pay.

Bid documents sold only to the registered specified class of contractors.

The provision under clause 11 of the Construction Enterprises Act, 1999, forbids classes of contractors A, B and C from participation in the bidding for works of values less than 20 million, 6 million and 2 million respectively.

Please refer to item 7 under the head: “Process- Pre-qualification” above.

Conditional securities are accepted when unconditional are requested in the bidding documents.

“Bracketing” is allowed. The provision under sub- clause 73.2(f) of the FAR 99 reads as follows “... If the price offered by the tenderers is more than twenty percent (over the estimated cost) even by such public bidding, (unquote: negotiations/auction), such a contract shall not be awarded.”

The bid evaluation criteria are, by practice, not disclosed or specified in the bid documents, although Nepal Standard Bidding documents based on Bank documents have such provision.

Bids are received and opened at different places for a particular contract. In practice these are opened at two to three places, namely: at the Head, Regional and Project Offices.

Sub-rule 66.5 of FAR under its para (e) requires the Notice Inviting Bids to specify the date on which a decision on bids would be taken, whereas no mention is made of bid validity period.

The rules provide that the contracts for procurement of works, goods and services costing rupees sixty million or less, financed by HMG (N)’s own resources, shall be awarded only to Nepalese nationals. {FAR, 99, Sub-rule 73.2.K (2)}.

According to FAR Rule 73.2.(b), ordinarily the lowest priced bids are accepted. What the Bank would call “qualification criteria” also “shall be taken into account”, but it remains unclear how this is to be done, i.e., whether this is an “in/out” decision about qualification, or whether, in fact, some sort of merit point system is to be applied, under which both price and qualification criteria are to be evaluated. In either case, the rule would have to be clarified and details would have to be given on how it is to be applied.

FAR Sub-rule 73.2. (b) states:

"Generally, the tender which quotes the lowest rate from amongst the tenders which are duly submitted, shall be accepted. Provided that in considering the acceptance of tenders, the financial status in addition to the capacity, experience and the reliability etc. of the individual or institution submitting the tender shall be taken in to account and if it requires to accept the tender of the higher tenderer than the lowest tender may also be accepted having stated reasons therefor. Provided further that the decision maker shall bear the responsibility to state such reasons for acceptance of the tender."

Bid, quoting substantially low price compared to the pre-bid estimates, shall be accepted by the Secretary of the concerned Ministry only if the bid evaluation committee is satisfied that the bidder can perform the work maintaining the quality standard and recommends for contract award. This is done after seeking the rate analysis (cost breakdown) of work items from the bidder and the bid evaluation committee discusses it with the bidder {FAR, 99, Sub-rule 73.2 (c)}. It is implied that such bids would be rejected otherwise on the ground of very low bid price, which is not in conformity with Bank Guidelines.

Sub- rule 73.2 (g) of FAR 99, prescribes that if a single bid is received it should not be opened, instead bids should be re- invited within 7 days, keeping the single- bid alive (active) unopened.

Two-envelope system is allowed (FAR Sub-rule 66{14}), which is against Bank Guidelines.

In a two envelope system of bidding, a bidder submitting a lowest financial proposal is treated as synonymical to the lowest evaluated bidder {FAR, 99 Sub-rule 66(15)}, which is not correct. This, however, is not reflected in the FAR, English version.

Bid Security and Performance securities are treated as if they were the same thing. These Securities in the form of Bank guarantees issued by foreign banks are acceptable only if they are issued by the bank accepted by His Majesty's Government or counter-guaranteed by a Nepalese Bank. (FAR, 99, Sub-rule 66.9). Further, in case it was not possible to furnish performance guarantee (5% of the contract value) valid for the entire contract duration, the same is accepted provided it is renewed each year.

Bid once submitted cannot be withdrawn (FAR, 99, Sub-rule 66.(11)). This is not only unacceptable under the Bank's Guidelines but also a violation of the Contracts Act, par. 8.1.

For the procurement of consulting services, the FAR, 99, specifies 60% weight for cost as against 30% (max.) allowed by the Bank Guidelines.

Annex G - Private Sector Procurement	
1. Is there a reasonably well-developed private sector which freely trades goods and procures works and other services?	The domestic market is relatively very small. However, there are several manufacturers producing items of general consumptive use. Besides, the trading, farming and construction sectors are the prominent ones.
2. What is the approximate volume of such procurement? Are any private sector contracts comparable in size to those in the public sector? Are they for goods, works or other types of contracts?	Not known.
3. Who are the main importers of raw materials and finished goods? Are they traded/imported on the basis of the INCOTERMS? Do they allow payment through documentary credits?	Industrial units: steel re-rolling mills, carpet manufacturers and ready-made garments factories are the main importers of raw materials and the major trading organizations import the finished goods. Overseas import is processed on the basis of INCOTERMS. Yes, the payments are allowed through documentary credits.
4. Do private sector companies purchase commodities through brokers and/or by competition linking price to the international commodity market?	Yes, they use both mechanism, including direct purchase from the manufacturers.
5. What kind of procurement practices do private sector purchasers and employers generally follow? Do they differ for goods, works or services?	Procurement through market inquiries, calls of quotations, and direct contracting are commonly used practices. Not much.
6. Is private sector procurement planning adequate? Do firms carry out market surveys and use other available information when they prepare their cost estimates? Is packaging done well? What level of technical, schedule and other detail goes into their procurement plans?	Details not available. But procurement in general is competitive and efficient.

<p>7. Do firms ever carry out open bidding preceded by advertising?</p> <p>No.</p>
<p>8. Are bids invited from short lists (as for LIB)? If so, describe what criteria are used to develop the short lists. Are standing lists developed by use of periodic pre-qualifications? Are reasonable technical and financial criteria used? How often are standing lists updated?</p> <p>No.</p>
<p>9. Under what circumstances is sole source/direct contracting permitted?</p> <p>Direct contracting is a normal practice in the private sector.</p>
<p>10. How detailed are the bidding documents used to invite bids for goods, works or services?</p> <p>No information available.</p>
<p>11. What criteria are used to determine the winning bidder? Cost, quality/compliance with specs? Time of delivery or completion? Familiarity?</p> <p>Cost, quality and time of delivery are all considered for the procurement in the private sector.</p>
<p>12. Do private sector procuring entities usually carry out price negotiations with the apparent winner after bids are submitted?</p> <p>Yes, negotiation on the quotations is a usual practice.</p>
<p>13. Do private sector companies monitor procurement and contract implementation efficiently? Do they utilize modern computerized methods?</p> <p>Yes, some of them do.</p>
<p>14. Are employees required to follow corporate ethics policies and procedures? Describe.</p> <p>No information available.</p>
<p>15. Could some private sector procurement practices be adopted by the public sector? Indicate which.</p> <p>This seems unlikely.</p>

16. Has there been any experience with private sector contracts for the provision, operation, and maintenance of infrastructure for various public services (BOO/BOT/BOOT/etc.)? Describe.

None.

Annex H - Checklist comparing National Competitive Bidding Procedures and World Bank Policy			
	Yes	No	Bank Policy
1. Are the eligibility restrictions based on nationality of bidder and/or origin of goods (other than primary Boycotts)?	X		Not allowed
2. Are there primary boycotts which are established by law?		X	Only primary boycotts are acceptable
3. Are bidding opportunities advertised in the local press?	X		Required
4. Are prospective bidders allowed at least 30 days for bid preparation (except for commodities/small goods contracts)?		X	Required
5. Comment: the law specifies that 15-90 days, depending upon the sizes of the contracts, shall be allowed for bid preparation. There are cases (verified by the Bank mission during its visit) where only a week was allowed.			
6. Are contractors/suppliers pre-qualified for large/specialized contracts? Comment: Large/Specialized contracts are financed by International financing institutions, and therefore pre-qualification will take place. All small contracts, under HMG(N) responsibility, are locally announced and awarded to registered contractors of eligible class. Prequalification of firms is allowed by the rules for contracts expected to cost more than NRs.10 millions (\$150,000).	X		Required
7. Are minimum experience technical and financial requirements (for pre- or post-qualification) explicitly stated in the documents? Comments: Yes, for externally financed work contracts. New rules mandate such stipulation in the bidding documents. Implementation		X	Required

would need to be verified.			
8. Is an invitation to pre-qualify advertised for each procurement involving large or complex potential contracts? Comments: See item 5, above.	X		Required
9. Are joint ventures with local firms required for foreign Firms' eligibility? Comments: FAR Sub-rule 73(2).K(1) states that in the global tendering, a foreign firm proposing to work in a joint venture with a Nepalese firm shall be given preference in the award of the contract		X	Not allowed
10. Are joint venture partners jointly and severally liable?	X		Required
11. Are there set limitations to the number of firms who can bid for a contract?		X	Not allowed
12. Are parastatals allowed to bid? Comment: The parastatals are awarded the contracts on sole- source basis.	X		Acceptable only if they (i) are financially autonomous, (ii) operate under commercial law and (iii) are independent from borrowers or sub-borrower.
13. Are bidders required to register with a local or federal authority as a prior condition for bidding? Comment: Contractors, who wish to undertake contracts, are required to get themselves registered with the ministry of Works and Transport. The registration involves a classification system (by size of the contractor) under which contractors in any class are prohibited from bidding for contracts in any lower class, which is bound to result in a substantial reduction of competition.	X		Should be discouraged. Acceptable only if registration criteria, process and cost reasonable/efficient and qualified foreign firms not precluded from competing.
14. Are extensions to bid validity allowed?	X		Acceptable only if justified by exceptional

			circumstances
15. Are there restrictions on the means of delivery of bids? Comment: Hand delivery of bids by is expected and practiced.		X	Not allowed, except when bidders have to submit physical samples. Then they can be required to deliver bids by mail by courier, by hand, etc.
16. Is preference given to suppliers or contractors based on region or locality of registration, small size, ethnic ownership, etc.?		X	Not allowed
17. Are there restriction on sources of labor and material?		X	Not allowed, except for unskilled labor, if available locally
18. Is public bid opening required? Does it occur immediately or closely following the bid submission deadline? Comment: The rules are silent on the how soon after bid submission deadline bids must be opened. Receiving the bids by cob and opening on the following day is not uncommon	X		Required
19. Is a "two envelope" bid opening procedure permitted for procurement of goods or works?	X		Not allowed
20. Is automatic re-bidding required if too few bids are received? Comments: the rules mandate that if only one bid is received, re-bidding must be resorted to.	X		Acceptable, provided all responsive bidders are allowed to bid, the process is efficient and no serious delays result
21. Is "bracketing" used in bid evaluation?	X		Not allowed
22. Is award made to lowest evaluated qualified and responsive bidder?		X	Required
23. Are pricing negotiations conducted with "winning" bidders prior to contract signature? Comments: Negotiations are conducted:	X		Not allowed, except where the bid price is substantially above market or budget

<p>By practice when the bid price is between estimated and up to 10% above of the estimated amount.</p> <p>Public bidding (auction), or negotiations with all bidders mandatory, when bid price is higher than 10% of the estimated cost..</p>			<p>levels and then only if negotiations are carried out to try to reach a satisfactory contract through reduction in scope and/or reallocation of risk and responsibility which can be reflected in a reduction in Contract Price. (See Guidelines para 2.60)</p>
<p>24. Are price adjustment provisions generally used?</p>	X		<p>Not required, but recommended for works contracts of 1 year or more in duration when domestic inflation rate is high.</p>
<p>25. Are the terms and conditions used in goods and works procurement generally appropriate for the size and nature of contract?</p>	X		<p>Required (to be acceptable they should be balanced, reasonable and clearly address the most important issues that lead to problems during performance, e.g. risk allocation, payment, inspection, completion/acceptance . Insurance, warranties, changes, contract remedies, force major, governing law, termination, etc.).</p>
<p>26. Are contract scope/conditions modified during Implementation?</p>	X		<p>Acceptable, but advance Bank approval of changes subject to prior review needed if required under the Loan Agreement.</p>

ANNEX I - Major Difference Between FAR 1986 and 1999

SN#	Item	FAR 1986 (including amendments of '91/93)	FAR 1999	Remarks
01	Disclosure of pre-bid estimate in Notice Inviting Bids (NIB)	Required; if the amount exceeds NRs. 3 million {Sub-rule 22 (7)}	Required; if the amount exceeds NRs. 10 million {Sub-rule 66(4)}	It is against the Bank's GLs. No improvement.
02	Stipulation of qualification criteria in the NIB	No provision existed.	Required; NIB to include description of financial condition, technical experience and expertise of the Contractor eligible to submit tender.	A remarkable improvement.
03	Bid preparation time	15 days for contract costing less than NRs. 0.5 million 21 days for contract costing between NRs. 0.5 and 4 million 45 to 90 days for contracts costing over NRs. 4 million {Sub-rule 24(2)}	15 to 90 days depending upon the complexity and the cost of work {Sub-rule 66(8)}.	No improvement; discretionary provision more damaging.
04	Bids (tenders) approving authority Gazette 3 class Officer Gazette 2 class Officer Gazette 1 class Officer Department Head Secretary Minister	Contract Cost up to NRS 5 million 10 million 20 million 50 million 100 million above 100 million	Contract cost upto NRS 10 million 20 million 50 million 100 million more than 100million with no limit Not authorized	Another remarkable improvement. Theoretically, political interference is removed

SN#	Item	FAR 1986 (including amendments of '91/93)	FAR 1999	Remarks
05.	Issuance of Variation order to the contracts	No specific provision existed	No provision exists	No improvement
06.	Insurance	No provision existed	Provision similar to CAR is mandated (Rule 78)	Major improvement
07.	"Bracketing"	Bids priced below 30% of the estimated cost were required to be rejected unless proved to be reasonable and accepted by the immediate superior. (Sub-rule 29.2 (c) (1))	If considered appropriate in order to ensure the quality, the concerned Secretary may accept to stipulate a condition to check very low bid pricing. Bids priced lower than that fixed may also be approved if supported by rate analysis and recommended for approval by Bid Evaluation Committee (Sub-rule 73.2 c)	Some improvement but bracketing continues to exist
08.	Public notification of tender awards	No Provision existed	Disclosure through notification made mandatory. (Sub-rule 73 {2} {n})states: "In accepting the tender under this Regulation, a tender shall be accepted having prepared a comparative chart of the tenders. After accepting a tender, it shall be published having specified name and address of the tenderers, figure of the amount quoted by all tenderers and also basis of acceptance of the accepted tender and its quoted amount. A chart so prepared shall be	A major improvement towards ensuring transparency.

SN#	Item	FAR 1986 (including amendments of '91/93)	FAR 1999	Remarks
			made available on the demand of the tenderer by charging required fee."	
09.	Monitoring of contract work progress	No provision existed	Rule 88 specifies incorporation of work program schedule in the contract and provides for continuous follow up on progress and reporting to the Departmental Head trimsterly. The Project Manager shall be held responsible if implementation is delayed without valid reasons.	An improvement
10.	Extension of time of completion	Provision existed under Rule 35A of'93 amendment; Accepted reasons were not specified	New provision more specific and special conditions (sort of the nature of Force majeure) spelled out (<i>see par. 89 of FAR '99</i>)	Some improvement
11.	Consulting Services (National) fee not to exceed 3% of estimated cost [?] of the project/work	Sub-rule 23 {9} of 91 amendment stated : "Fees for the preparation of designs and estimates and supervision of construction works shall not exceed three percent of the total cost (excluding administrative expenses) of the project. In case it becomes necessary to pay more than that percent for other specialized work, HMG	Sub-rule 81 {17} states: "Except in the case where technical consultancy service is to be obtained having received the proposal under sub-rules {13}, no service fee shall be paid more than three percent of the total estimated cost of the project or work for design of general construction, preparation of cost estimate and supervision. Provided that if more than such percent requires to be paid in other matters	Ceiling can be raised by the concerned Secretary ; Some improvement

SN#	Item	FAR 1986 (including amendments of '91/93)	FAR 1999	Remarks
		may prescribe the percent by explicitly mentioning such work."	concerning various expertise, it shall be done in accordance with the decision of the concerned Secretary having specified reasons thereof."	
12.	Consulting services (International) fee not to exceed 10% of estimated use of the project/work	No provision existed	Sub-rule 81 {22} states: "Except in the case where any study or advice on opinion and suggestion is asked, the service fee of the foreign consultant should not, generally be more than ten percent of the total cost estimate of the construction. If it exceeds that amount, the Departmental Head shall form a committee and approval of the Ministry shall be taken, having obtained suggestion of that committee.	Additional provision. An improvement

**ANNEX J: FINANCIAL ADMINISTRATION (RELATED) RULES
OF 1999 (FAR '99)
DISCUSSION OF PROVISIONS RELATING
TO PUBLIC PROCUREMENT**

I) Background

1. FAR '99 is based on the Financial Procedures Act, 1998, and was issued by the Government on August 5, 1999. It replaced the Financial Administration (Related) Rules of 1985 (FAR '85), and it is the major - but not the only - set of rules applying to public procurement in Nepal.

2. For a list of the major differences between FAR '99 and FAR '85, see Annex I. For a discussion of the hierarchy among FAR '99 and other Acts and Rules relating to public procurement, see Chapter (A) on Legal and Regulatory Framework.

3. This Report proposes the introduction by Nepal of a modern and transparent Law on Public Procurement, which would replace FAR '99 and the other Acts and Rules applying to public procurement in Nepal. Pending the introduction of such a law, the purpose of this Annex is to discuss, from the point of view of what is the accepted norm for modern, transparent procurement legislation, some of the major problems the Bank's procurement law experts have found with the provisions of FAR '99.

II) Nature of FAR '99

4. As is pointed out also in Chapter (A), most member countries of the Bank have on their books a public procurement law, enacted by parliament which alone can change it, dealing with the public procurement of goods, works and services by governmental entities at all levels, and most often both for the central authorities as well as those on a provincial and communal level. Only very few countries today still follow a different approach, which is the one used in Nepal, as represented by FAR '99. Originally introduced by the British (but hardly used even in the UK anymore today because it was overtaken by the EU Procurement Directives), this approach consists of the issuance by government (rather than by the legislature) of a set of financial rules which essentially describe the financial powers of various governmental authorities, particularly the procedures they should follow in securing and disbursing the public funds required to discharge their functions, including the rules governing the procurement of public contracts. Having been issued by Government, these rules - i.e., FAR '99 - can also be changed by Government, without any approval by the legislature, which it is felt in most countries is really not in the public interest: Rules of this nature, which govern the use of huge amounts of public funds, should be difficult rather than easy to change, and they should be changed only in a public and transparent manner.

III) Organization of FAR '99

5. Being a set of financial rules, not only does FAR '99 address mostly matters other than public procurement, but where it does deal with public procurement issues, it covers the relevant matters not in one, logically organized and concise set of provisions, but instead in 3 widely scattered Chapters, namely Chapter 7, entitled "Provisions Concerning Government Procurement and Public Works" (which includes the bulk of the procurement-related provisions), Chapter 13, entitled "Provisions Relating to Construction Materials, Wages and House Rent", and Chapter 17, entitled "Provisions Relating to Evaluation of Tender". Obviously, this is not a very efficient nor a very functional approach.

IV) Field of Application of FAR '99

6. Modern procurement laws regularly define their field of application and, unless the form of government is a federal one (where the central government, on the one hand, and the states, provinces, etc., on the other hand, have their own fields of legislative authority), such laws most often state that they apply to procurement by all public authorities of the central, provincial and municipal governments, as well as by parastatals (i.e., enterprises that are wholly owned, or majority-owned by the government). FAR '99 includes no such statements since the Local Entity (Financial Administration) Regulation, 1999, deals with the procurement by local entities, it would seem that procurement by these entities is not covered by FAR '99. It is suggested that if and when a modern Law on Public Procurement is introduced in Nepal, it should govern public procurement by all public authorities at all levels in Nepal, as well as by parastatals (which now mostly have their own individual procurement rules). (See also par. 10 of Annex A, Legal Framework. General Features).

V) Problematic Provisions in FAR '99

7. Following the numerical order of the provisions of Chapter 7 of FAR '99 (Provisions Concerning Government Procurement and Public Works), set forth below is a list of the major provisions of FAR '99 that do not seem to be clear or do not seem to reflect the public interest (note that the government seems to have accepted that many of these provisions - dating back to the predecessor versions of FAR '99 - are of a problematic nature, by agreeing in the procurement schedules for IDA Credits [see, e.g., Credit Cr. 3293-NEP (Road Maintenance and Development Project), of December 22, 1999, Schedule 3, Part C, par. 1.(b)] that these provisions, "in order to ensure economy, efficiency and transparency", not be applied for the purposes of the procurement of IDA-financed contracts [see a copy of the provisions of that Procurement Schedule in Annex K hereto]):

- a) Clause 58(1)(d) mentions the bidding methods of "tender" and "public bidding", and subsequently, there are detailed provisions about how tendering works, but very few and essentially unclear rules (Clauses 75 through 77) about "public bidding". The latter method seems to consist of some sort of public auction for works contracts and for the procurement of construction materials, the detailed procedures of which do not seem to be described in FAR '99. This would seem to be a risky procurement method, and it is suggested that the procurement schedules in IDA Credit Agreement should also prohibit it.
- b) Countless are the anti-competitive provisions in FAR '99 where privileges and preferences of all kinds are given to various local (Nepalese, or even restricted to a district or designated "area") suppliers or contractors (or to those owned by the government when competing with private parties), either through price preferences or even through sole source or direct contracting rights. While it is true that most governments will feel compelled to grant some protection of this kind to locals as against foreigners, it is equally true that such measures increase the cost of public projects and are not in the public interest. Nepal seems to be going particularly far in providing such protection. Some of the many instances of such preferential treatment are the following:
- i. Clause 58(4): 7 1/2% price preference for local over foreign goods.
 - ii. Clause 59 lists situations "where quotation or tender shall not be required", Which seems to indicate that direct or sole-source procurement is permissible:
 - sales price fixed by a foreign government, or seller controlled by a foreign government,
 - seller is owned by Nepalese government, alone or together with a foreign government, or where Nepalese government controls more than 50% of the seller,
 - seller is a "registered cooperative organization",
 - seller is "the sole agency producing such goods and materials" in a specific district [which seems to mean that suppliers outside the district are excluded and the "insider" gets a monopoly].
 - iii. Clause 73(2)(k) lists further preferences for locals in the evaluation of foreign bids:
 - Where there are only foreign tenders for a works contract, "priority shall be given to" the tenderer who proposes to do the work in joint venture with a local contractor". No details are given as to how this "priority" would work, e.g., is it an absolute or merely a sort of price preference, what if there are several foreigners with a local j.v., etc.?
 - For contracts up to 60 million Rupees financed by government resources, foreigners are excluded.

- Unless prohibited by a foreign aid agreement, local tenders generally are entitled to a 7 1/2% preference. This applies also to foreign/local joint ventures where the local holds at least 50%.
- iv. Clause 81(2) includes various preferences for local consultants, like that a local firm majority-owned by the government may be hired on a sole source basis, that foreign consultants may be hired only in a j.v. with a local consultant, and that local consultants, in competition with foreign consultants, are entitled to a 7 1/2% preference (which would seem to make it practically impossible for foreign consultants to compete).
- v. While not a problem of FAR '99, reference should be made here to the very unusual preference smaller local contractors are being given against competition from larger contractors, which cannot possibly be in the public interest (see par. i below).
- c) Clause 66(2) seems to say that tender documents must be purchased in person and that, if such documents have been purchased in the name of one person or firm, the tender may not be submitted in the name of another person or firm. These are anti-competitive restrictions that again are not in the public interest.
- d) Clause 66(5)(e) and (d) seem to indicate that rather than opening tenders immediately after the deadline for submission (which is an absolute "must" in the interest of transparency, and a clearly accepted rule in most procurement laws), it would be permissible to open tenders at a different time than the submission deadline, and not even on the same date.
- e) Clause 66(7) seems to indicate that bids may be opened in more than one office, which - if correct - would be a serious violation of the transparency principle, and of generally accepted practice all over the world.
- f) Clause 66(9) requires that bank guarantees be issued or endorsed by local banks, which - if applicable also to bid securities, as it seems to be - would represent a serious disincentive for foreign bidders. IDA procurement schedules should prohibit the application of this rule for bid securities.
- g) On the other hand, Clause 66(9) seems to permit, even where a performance guarantee for the entire contract period was required, that a contractor/supplier submit instead a guarantee that is subject to annual renewal. This, for a change, is not an anti-competitive rule, but one that is too lenient and not in the public interest (what if the issuing bank refuses to renew the security?).
- h) Clause 66(11) provides that a tender, once submitted, may not be taken back by the tenderer or given back to him. Not only is this a violation of a basic principle of public procurement, and indeed of contract law, accepted all over the world, but it is also in clear contradiction with Clause 5(1) of the repealed Nepalese Contract Act,

1966 and clause 8(1) of the new Nepalese Contract Act, 2000 ("The proposer may cancel his proposal by means of a notice. Provided that in case the person to whom the proposal is advanced has already given his acceptance thereto before receiving a notice of cancellation thereof, it shall not be deemed to have been cancelled."). Thus, this provision should be amended to provide that, prior to the opening of tenders, tenderers are free to withdraw their tenders, including their bid securities. Pending such an amendment in FAR '99, a corresponding provision should be introduced in IDA procurement schedules.

- i) Clause 66(12) requires contractors to be registered. Contractors' registration in Nepal is being done in a manner that is even more anti-competitive than in other countries in the sense that smaller contractors are being protected against competition from larger contractors (for details, see par. 5 of Chapter (A) regarding a discussion of the Construction Enterprises Act, 1999). Such far-reaching restrictions are not in the public interest, and IDA procurement schedules should include a provision prohibiting them.
- j) Clauses 66(14) and (15) permit, for works contracts above 5 million rupees, a merit point evaluation with two envelopes, where there is an in/out threshold for the technical evaluation, after which the lowest price bid will win. This is a procurement method that may be adequate for the selection of consultants but certainly not for the award of works contracts. IDA procurement schedules should prohibit it.
- k) According to Clause 69(a), in evaluating a tender submitted by a foreign tenderer who has a local agent in Nepal, "the commission amount entitled by him shall also be a basis." It is unclear what this means: is the amount of the commission to be added or deducted from the foreign tenderer's tender price? Neither seems to make any sense, and IDA procurement schedules should prohibit the application of this provision.
- l) Clause 73(2)(b) provides that, in tender evaluation, account shall be taken, in addition to price, also of what are normally called "qualification criteria", namely "the financial status, in addition to the capacity, experience and reliability etc." of the tenderer. This is not a good provision. The criteria in question should be qualification criteria for an in/out decision (i.e., a tenderer not meeting them is out), and should then not even be considered anymore for those meeting them. Also, the provision does not specify that the way to evaluate such criteria would have to be prescribed in detail in the tender documents. The standard IDA procurement schedule, by specifying that bid evaluation shall be "made in strict adherence to the criteria disclosed in the bidding documents", at least partially addresses this point.
- m) Clause 73(2)(f) provides for a kind of bracketing in the sense that where "at least three tenders quoting more than ten percent of the estimated cost are submitted", a sort of auction (called "public bidding") among the tenders may take place. It is not clear how exactly this provision is supposed to work (what, e.g., if there are only two tenders above that threshold?), nor indeed how "public bidding" (covered in Clauses 75 through 77) is carried out. This is not a transparent way of evaluating tenders.

IDA procurement schedules deal with this matter by stating that "bids shall not be rejected merely on the basis of a comparison with an official estimate without the prior concurrence of the Association."

- n) Clause 83 and Clause 138 (the latter in Chapter 13 about "Provisions Relating to Construction Materials, Wages Rate and House Rent") seem to deal with rates for construction materials. It is not clear from these provisions whether these rates are also to be used for bidding for works contracts (as the Bank has seen, and advised against, in other countries), and how exactly this would work . Still, from a statement in the standard IDA procurement schedule to the effect that "contracts shall not be awarded on the basis of nationally negotiated rates" it would seem that in Nepal too such rates play a role in the bidding for works contracts.

**ANNEX K: AN EXCERPT FROM SCHEDULE 3 TO THE DEVELOPMENT
CREDIT AGREEMENT FOR CREDIT 3293-NEP, ROAD MAINTENANCE AND
DEVELOPMENT PROJECT (Rules for National Competitive Bidding)**

DATED DECEMBER 22, 1999

[The Excerpt is Section I, Part B, 2 of the Schedule which deals with National Competitive Bidding.]

“In order to ensure economy, efficiency, transparency and broad consistency with the provisions of Section 1 of the Guidelines:

- a) invitations to bid shall be advertised in at least one widely circulated national daily newspaper, at least 30 days prior to the deadline for the submission of bids;
- b) bid documents shall be made available, by mail or in person, to all who are willing to pay the required fee;
- c) evaluation of bids shall be made in strict adherence to the criteria disclosed in the bidding documents, in a format and specified period agreed with the Association;
- d) bids shall be opened in public in one place, immediately after the deadline for submission of bids;
- e) foreign bidders shall not be precluded from bidding and no preference of any kind shall be given to national bidders;
- f) qualification criteria (in case pre-qualifications were not carried out) shall be stated in the bidding documents, and if a registration process is required, a foreign firm declared as the lowest evaluated bidder shall be given a reasonable opportunity of registering, without let or hindrance;
- g) contracts shall be awarded to the lowest evaluated bidders;
- h) post-bidding negotiations shall not be allowed with the lowest evaluated bidders or any other bidders;
- i) bids shall not be rejected merely on the basis of a comparison with an official estimate without the prior concurrence of the Association;
- j) contracts shall not be awarded on the basis of nationally negotiated rates;

- k) re-bidding shall not be carried out without the prior concurrence of the Association;
- l) all bidders/contractors shall provide bid/performance security as indicated in the bidding/contract documents;
- m) a bidder's bid security shall apply only to a specific bid, and a contractor's performance security shall apply only to the specific contract under which it was furnished;
- n) split award or lottery in award of contracts shall not be carried out. When two or more bidders quote the same lowest price, an investigation shall be made to determine any evidence of collusion, following which (A) if collusion is determined, the parties involved shall be disqualified and the award shall then be made to the next lowest evaluated bidder and (B) if no evidence of collusion can be confirmed, then fresh bids shall be invited after receiving the concurrence of the Association;
- o) extension of bid validity shall not be allowed without the prior concurrence of the Association (A) for the first request for extension if it is longer than eight weeks and (B) for all subsequent requests for extension irrespective of the period;
- p) bids shall not be invited on the basis of percentage premium or discount over the estimated cost; and
- q) there shall not be any restrictions on the means of delivery of the bids."

**ANNEX L: A LIST OF OFFICIALS MET DURING THE MISSION
FROM NOVEMBER 15 THROUGH 19, 1999**

1. Ministry of Finance, Hari Bhawan, Kathmandu:

Mr. Madhav P. Ghimire
Joint Secretary

2. Office of the Financial Comptroller General (FCGO), Babar Mahal, Kathmandu:

Mr. Mukunda P. Arjyal
Financial Comptroller General

3. Ministry of Works and Transport, Babar Mahal, Kathmandu:

Mr. Hiranya Lal Regmi
Secretary

Mr. Birendra B. Dejua
Joint Secretary

Mr. Devendra Rimal
Joint Secretary, Planning

Mr. Ananda Prasad Khanal
Director General,
Department of Roads

4. Ministry of Law and Justice, Babar Mahal, Kathmandu:

Mr. Udaya Nepali Shrestha
Acting Secretary

Mr. Babu Ram Regmi
Joint Secretary

Mr. Bhesh Raj Sharma
Joint Secretary

5. Ministry of Tourism and Civil Aviation, Singha Durbar, Kathmandu:

Mr. Varun P. Shrestha
Secretary

Mr. Kashi Nath Sharma
Joint Secretary, Planning

6. Ministry of Education, Keshar Mahal, Kathmandu:

Mr. Jayaram Giri
Secretary

7. Office of the Auditor General, Babar Mahal, Kathmandu:

Mr. Bishnu B. K.C.
Auditor General

Mr. Basudev Lamichhane
Deputy Auditor General Officer

**8. Commission for the Investigation of Abuse of Authority (CIAA),
Babar Mahal, Kathmandu:**

Mr. Madhusudhan P. Gorkhali
Chief Commissioner

Mr. Daya Ram Shrestha
Officiating Secretary

9. Ministry of Water Resources, Singha Durbar, Kathmandu:

Mr. Bishwo Nath Sapkota
Secretary

Mr. Sarada P. Sharma
Joint Secretary

10. Department of Irrigation, Jawalakhel, Lalitpur:

Mr. Ratneshwor Lal Kayastha
Director General

**11. Ministry of Housing & Physical Planning, Singha Durbar,
Kathmandu**

Mr. Khagendra Basnyat
Secretary

12. Public Enterprises:

Mr. R.S. Pandey
Acting Managing Director
Nepal Electricity Authority
Kathmandu

Mr. Ram Raj Shrestha
Deputy Managing Director
Royal Nepal Airlines
Kathmandu

Mr. K.N. Bhattarai
General Manager
Nepal Water Supply Corporation
Kathmandu

13. Asian Development Bank (ADB), Kamaladi, Kathmandu:

Mr. Richard Vokes
Resident Representative

Dr. Chi Nai Chong
Project Admin./Imp. Officer

14. Swiss Development Cooperation, Ekanta Kuna, Lalitpur:

Mr. Anton Hagen
Resident Coordinator

15. Society of Consulting Architectural and Engineering Firms (SCAEF), Kathmandu:

Mr. Badan Lal Nyachhyon,
President

16. Federation of Contractors' Associations of Nepal (CAN), Kathmandu;

Mr. Ramesh Sharma
President

Mr. Sukunta Lal Hirachan
Secretary

17. International Contractors:

Mr. Chen Boyun
General Manager
China Int'l Water & Electricity Corporation (CWE)
Naxal, Devi Marg, Kathmandu