NONCOMPLIANCE IN PROCUREMENT

GUIDANCE NOTE ON PROCUREMENT

JUNE 2018

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Notes:

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FIGURE

ADB’s Procurement Cycle

ABOUT THIS PUBLICATION

In April 2017, the Asian Development Bank (ADB) approved its new procurement framework, the ADB Procurement Policy: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time); and the Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time). These replace the former Guidelines on the Use of Consultants (2013, as amended from time to time) and Procurement Guidelines (2015, as amended from time to time). The procurement policy and the procurement regulations address the procurement activities of project executing agencies and implementing agencies on projects financed in whole or in part by a loan or grant from ADB, or by ADB-administered funds. ADB designed the 2017 procurement policy to deliver significant benefits and flexibility throughout the project procurement cycle, as well as to improve project delivery through a renewed focus on the concepts of quality, value for money (VFM), and fitness for purpose.

This note is part of a series of guidance notes published by ADB in 2018 to accompany the 2017 procurement policy and the procurement regulations. Each note discusses a topical issue for borrowers (including grant recipients), bidders, and civil society under the new framework (see list below). The guidance notes cross-reference each other frequently and should be read in conjunction. All references to “guidance notes” pertain to these notes. The notes may be updated, replaced, or withdrawn from time to time.

List of Guidance Notes for the 2017 ADB Procurement Policy and the Procurement Regulations

1. Value for Money
 2. Procurement Risk Framework
 3. Strategic Procurement Planning
 4. Procurement Review
 5. Alternative Procurement Arrangements
 6. Open Competitive Bidding
 7. Price Adjustment
 8. Abnormally Low Bids
 9. Domestic Preference
 10. Prequalification
 11. Subcontracting
 12. Consulting Services Administered by ADB Borrowers
 13. Nonconsulting Services Administered by ADB Borrowers
 14. High-Level Technology
 15. Quality
 16. Bidding-Related Complaints
 17. Noncompliance in Procurement
 18. Standstill Period
 19. State-Owned Enterprises
 20. E-Procurement
 21. Framework Agreements for Consulting Services
 22. Public-Private Partnerships
 23. Contract Management
 24. Fragile, Conflict-Affected, and Emergency Situations
-

ADB procurement reforms intend to ensure VFM by improving flexibility, quality, and efficiency throughout the procurement cycle (see illustration below and the *Guidance Note on Value for Money*). VFM is part of a holistic procurement structure with three support pillars: efficiency, quality, and flexibility. The two key principles of transparency and fairness weave across all elements of the structure.

Time

Time is an important element of VFM. When a project is delivered promptly or when a process is completed rapidly, greater value is created for all stakeholders. For example, a road project completed early provides economic benefit, security, or other value to the community it serves. It increases the return on investment to the executing agency and accelerates the project and payment cycle to the successful bidder. Likewise, a project delivered late loses significant value.

When considering VFM in the context of procurement, pay attention to anything that (i) shortens the procurement cycle time frame or (ii) accelerates delivery of the development project.

Objective

This guidance note is intended to assist readers by elaborating on and explaining ADB's 2017 procurement policy and procurement regulations for borrowers (including grant recipients).

This note identifies additional information for the reader to consider when applying ADB's procurement policy and procurement regulations to their circumstances.

Living Document

This guidance note is intended to be a living document and will be revised as required.

Be sure to check the ADB Business Center website for the latest version and updates, <https://www.adb.org/business/main>.

The Reader

In many circumstances, readers are expected to use this guidance note in a manner unique to their needs. For consistency throughout the suite of guidance notes, the following assumption is made about the reader:

The reader is a professional involved in activities financed in whole or in part by an ADB loan or grant, or by ADB-administered funds.

FAQs

Frequently asked questions, clarifications, examples, additional information, links to training, and other useful resources will be made available on the ADB website.

Be sure to check the ADB Business Center website for more information, <https://www.adb.org/business/main>.

Legal and Order of Priority

This guidance note explains and elaborates on the provisions of the Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time) applicable to executing (and implementing) agencies under sovereign (including subsovereign) projects financed in whole or in part by an investment loan from ADB (i.e., excluding ADB results- or policy-based loans), ADB-financed grant (excluding ADB-administered technical assistance and staff consultancies), or by ADB-administered funds.

In the event of any discrepancy between this guidance note and the procurement regulations, the latter will prevail. The financing agreement governs the legal relationships between the borrower and ADB. The rights and obligations between the borrower and the provider of goods, works, or services are governed by the specific procurement document issued by the borrower and by the contract signed between the borrower and the provider, and not by this guidance note.

ABBREVIATIONS

ADB	—	Asian Development Bank
APA	—	alternative procurement arrangement
MRA	—	mutual reliance agreement
OAI	—	Office of Anticorruption and Integrity
VFM	—	value for money

EXECUTIVE SUMMARY

The 2017 ADB procurement policy and procurement regulations provide a more flexible and proportional approach in the handling of situations where borrowers (including grant recipients) have not complied with the financing agreement.

This guidance note gives detailed information to borrowers on addressing noncompliance in operations governed by the procurement policy and procurement regulations. It also discusses factors that guide contractual remedies (in more serious situations of noncompliance) or other remedial actions (where noncompliance is deemed less serious).

Timely and appropriate handling of noncompliance may

Increase Efficiency and Reduce Procurement Time

- Avert additional delays that may result from inadequate handling of noncompliance.

Ensure Quality

- Result in better procurement and project outcomes.

Reduce Risk

- Reduce risk of bidding-related complaints and/or litigation.
- Improve compliance to audit requirements (both national and ADB).
- Result in lower risk of failed bidding processes.

I. Introduction

1.1 This guidance note is intended to assist borrowers (including grant recipients) with factors they need to consider when faced with actual or potential noncompliance in procurement for projects financed in whole or in part by a loan or grant from the Asian Development Bank (ADB), or by ADB-administered funds, and the actions that can be taken in such cases. The note also aims to clarify the roles and responsibilities of ADB and borrowers with a view to speedier and more efficient resolution of situations of noncompliance.

1.2 Procurement for projects financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, is governed by the terms and conditions set out in the financing agreement. The financing agreement provides that procurement of goods, works, and services required by the borrower are subject to and are governed by the Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time). Borrowers are responsible for carrying out procurement in compliance with the provisions of the financing agreement, which governs the legal relationship between the borrower and ADB.

1.3 Procurement noncompliance relates to potential or actual situations where the borrower (including other parties involved in the procurement process)¹ fails to follow the applicable provisions of the 2017 procurement regulations—through their actions or inactions—or, when applicable, the agreed alternative procurement arrangements (APAs) between or among ADB and other development partners and/or the relevant borrower.

1.4 Noncompliance may be identified at any stage of the ADB procurement cycle (see Figure).

¹ The term “borrower” designates recipients of project loans or grants financed in whole or in part by ADB, or by ADB-administered funds, and refers to the executing agency for the project in the context of ADB’s sovereign operations. The borrower may include other agencies or entities (e.g., implementing agencies) responsible for carrying out the project, or sub-borrowers under on-lending arrangements (para. 1.1 of the procurement regulations).

Figure: ADB's Procurement Cycle

Source: Asian Development Bank.

II. Determination of Noncompliance

A. Key Considerations

2.1 Situations of noncompliance may be identified

- (i) by the borrower and reported to ADB;
- (ii) by ADB during ADB's review or supervision;
- (iii) following a procurement review or audit;² or
- (iv) through consideration of a bidding-related complaint, or post-award communication, notification, or representation.

2.2 Determination of noncompliance will be made by ADB, based on the applicable project procurement documents (e.g., procurement plan and project administration manual) and the specific procurement covenants in the financing and related agreements undertaken with the borrower. In accordance with the ADB Procurement Policy: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time), ADB may exercise contractual remedies in the case of documented noncompliance that are consistent with its implementation role and fiduciary obligations. In certain circumstances, ADB may also prescribe other remedial actions.

2.3 The procurement framework, under both the 2017 procurement policy and procurement regulations, permits ADB to take a proportional and incremental approach to situations of noncompliance, depending on the nature and seriousness of the relevant deviation and the level of commitment of the borrower to remedy the situation.³

² As one example, ADB's Office of Anticorruption and Integrity conducts proactive reviews, referred to as project procurement-related reviews, on active and ongoing projects to promptly identify and address potential vulnerabilities and situations of noncompliance, particularly integrity risks.

³ Para. 13 of the procurement policy and para. 1.30 of the procurement regulations.

B. Procurement Transactions under the Procurement Regulations (Excluding Alternative Procurement Arrangement Situations)

2.4 In all cases in which the 2017 procurement regulations apply, excluding APA situations, ADB will determine if a factual situation of noncompliance has arisen and, if it has, the remedial options available to correct the situation following an assessment as described in section III.

2.5 Typical situations of noncompliance may include, among others

- (i) borrower issuing a specific bidding document that has not been endorsed by ADB,
- (ii) borrower implementing a specific bid evaluation recommendation that has not been endorsed or approved by ADB,
- (iii) borrower responding to a bidding-related complaint in ways contrary to those recommended by ADB,
- (iv) borrower omitting to undertake specific required steps under a procurement method prescribed in the project procurement plan,
- (v) borrower providing ADB with an incomplete or misleading record of a procurement transaction, and
- (vi) borrower failing to take appropriate action when a party awarded the contract has breached its contractual obligations.

2.6 Matters involving the allegation of integrity violations, such as fraud, corruption, coercion, collusion, among others, must be reported to ADB's Office of Anticorruption and Integrity (OAI) and will be handled in accordance with ADB's Anticorruption Policy (1998, as amended to date)⁴ and ADB's Integrity Principles and Guidelines (2015, as amended from time to time).⁵

C. Procurement Transactions under Alternative Procurement Arrangements

2.7 If an APA is applicable,⁶ determination of noncompliance will depend on the applicable procurement regime, whether it be with the lead cofinancier or an accredited agency of the borrower. In APA situations, in the absence of the allegation of integrity violations,⁷ the determination of noncompliance will be made by either the lead cofinancier, under the relevant mutual reliance agreement(s) (MRA), or by the accredited agency of the borrower under the relevant project agreement and applicable local procurement rules and procedures.

⁴ ADB. 2010. *Anticorruption and Integrity*. Manila. <https://www.adb.org/sites/default/files/institutional-document/31317/anticorruption-integrity-policy-strategy.pdf>.

⁵ ADB. 2015. *Integrity Principles and Guidelines (2015)*. Manila. <https://www.adb.org/sites/default/files/institutional-document/32131/integrity-principles-guidelines.pdf>.

⁶ Paras. 1.9 and 1.10 of the procurement regulations.

⁷ For transactions under APA, ADB's anticorruption policy and integrity principles and guidelines continue to apply.

2.8 Any allegation of integrity violation in APA situations must be reported to OAI and will be handled in accordance with ADB's anticorruption policy and integrity principles and guidelines. In such cases, ADB will request the borrower, or the cofinancier or accredited agency, to provide detailed information about the alleged integrity violation. ADB reserves the right in such cases to determine whether ADB policies and procedures have been violated, including independently investigating integrity violations under such APA procurement. In such circumstances, ADB's findings of noncompliance with its anticorruption policy and/or integrity principles and guidelines may result in remedial action, including sanctions imposed by OAI. ADB may also exercise its right to withdraw, suspend, or terminate its own participation or financing under the relevant MRA and/or financing agreement.

III. Assessment of Noncompliance and Remedial Actions

A. Assessment of Noncompliance

3.1 The assessment of noncompliance discussed in this guidance note covers transactions under the 2017 procurement regulations only, and excludes transactions conducted using APAs. Under APA situations, barring allegations of integrity violations, the cofinancier or accredited agency will undertake the assessment of noncompliance.

3.2 The first step in assessing noncompliance is to undertake a detailed written description of the relevant facts. The purpose of this is to document the circumstances of the noncompliance and provide a basis for determining the recommended remedial actions—in any case, without prejudice to paras. 2.6 and 2.8 of this guidance note.

3.3 Whether the assessment is initiated by the borrower or by ADB, it must document and analyze the extent of any noncompliance that has occurred. It will address, at a minimum, the details of each instance of possible noncompliance in terms of

- (i) the procurement requirement that was not satisfied or was violated,
- (ii) the nature and scope of the procurement irregularity,
- (iii) the known or suspected reasons that led to such noncompliance,
- (iv) past instances (if any) of similar or related types of noncompliance under the project or other projects involving the same borrower,
- (v) the impact of the noncompliance on the integrity of the procurement process, and
- (vi) the potential or actual impact of such noncompliance on achievement of targeted project outcomes.

3.4 When noncompliance is identified, normally, the borrower will prepare the initial assessment and submit it to ADB for review, validation, and further action. The Appendix gives a sample noncompliance assessment memorandum template that borrowers can use. If ADB initiates such assessment, it will share the draft noncompliance assessment report with the borrower and consider the borrower's comments in finalizing the document.⁸

⁸ In any such noncompliance assessment initiated by ADB (as part of ADB's oversight role in prior or post review [sampling]), the degree of borrower's due diligence and responsiveness will be reviewed, as will the possible reputational risk to ADB that may result from the identified noncompliance.

3.5 Recommendation(s) for remedial actions (which will be included in the written assessment) will consider the following:

- (i) actions, inactions, or omissions by the borrower, and/or any party involved in the procurement process, including ADB staff;
- (ii) severity of the noncompliance;
- (iii) degree of harm to the successful completion of the procurement process or project;
- (iv) impact on the development objectives;
- (v) if the noncompliance can be remedied by corrective action;
- (vi) the borrower's history of procurement compliance and implementing corrective actions; and
- (vii) any mitigating circumstances, including voluntary corrective actions already taken or proposed to be taken by the borrower.

B. Remedial Actions

1. General Considerations

3.6 If ADB determines that the goods, works, or services⁹ were not procured by the borrower in accordance with the requirements of the financing agreement, ADB may undertake contractual remedies as set out in the relevant financing agreement or noncontractual remedies, depending on the nature and magnitude of the procurement noncompliance.

3.7 Whatever the circumstances of the identified noncompliance may be, the severity of the noncompliance will define the nature of the required remedial measures (i.e., contractual or noncontractual). The severity or magnitude of noncompliance is a function of the assessment of the following:

- (i) whether the action of noncompliance was intentional or inadvertent;
- (ii) whether such noncompliance materially or only marginally undermines the integrity of the procurement process;¹⁰
- (iii) if fit-for-purpose outcomes and optimal value for money (VFM) were compromised by the noncompliant bidding process;
- (iv) if the noncompliance carries a reputational risk to ADB; and
- (v) whether the noncompliance is accompanied by, or includes, an integrity violation.

⁹ "Services" include nonconsulting and consulting services.

¹⁰ The integrity of the procurement process refers to correct application of the six core procurement principles and related considerations, as set out in the 2017 procurement policy and procurement regulations.

2. Contractual Remedies

3.8 In cases where the noncompliance materially undermines the integrity of the procurement process and results in an outcome that is less than optimal in terms of VFM, contractual remedies may be invoked. These may include (i) cancellation of any funding for the improper procurement; and/or (ii) suspension of further loan or grant funding until adequate new commitments and/or remedial measures are undertaken by the borrower that provide sufficient assurances that such noncompliance will not occur again under the project. In extreme circumstances, loan cancellation (as distinct from a partial loan cancellation relating only to the value of the irregular procurement award) may be the appropriate legal remedy.

3. Other Remedial Actions

3.9 If a borrower shows willful intent not to comply with either the terms of the project procurement arrangements as set out in the relevant project documents¹¹ or ADB's project-level guidance or direction,¹² ADB may consider endorsing a noncomplying approach in exceptional circumstances. However, ADB may take further action, as it deems necessary, such as issuing warnings to the borrower that, if such action is repeated, it reserves the right to exercise contractual remedies that may include a suspension of ADB's loan or withdrawal of ADB financing for that procurement award.

3.10 If the relevant noncompliance is inadvertent and only marginally undermines the integrity of the procurement process, but results in an outcome that does not provide optimal VFM, noncontractual remedies may be appropriate. These may include targeted capacity building, revisions to procurement and review arrangements, and/or issuance of warnings.¹³ If the noncompliance at issue is inadvertent but results in an outcome that materially undermines the integrity of the procurement process, a rebidding exercise would be the typical remedy, coupled with targeted capacity building.

3.11 In the case of post review (sampling), other remedies may include initiating changes to project procurement arrangements (through amendments to the procurement plan or otherwise), including increased frequency of sampling and changes to the nature or size of sampling. For more serious noncompliance, ADB may introduce prior review for those categories of procurement transactions and processes previously subject to post review (sampling).

¹¹ The procurement plan, financing agreement, and, if relevant, project agreement, project administration manual, etc.

¹² For instance, the borrower changing a particular procurement method set out in the project procurement plan without obtaining prior ADB approval.

¹³ It is possible that the relevant procurement transaction may even be condoned, at the option of the executing agency concerned.

3.12 In such situations, the borrower is responsible for retaining all documentation regarding each contract where post review (sampling) applies, during project implementation and for at least 1 year after the project closing date.¹⁴ The borrower must facilitate all ADB post review (sampling) of transactions and ensure that ADB is provided with a complete understanding of the relevant procurement transactions, including the borrower's role in completing, awarding, and managing the procurement.

4. Postcontract Award

3.13 There may also be situations of noncompliance that arise postcontract award during implementation of the relevant procurement contract based on a bidding process. While such situations are governed by the terms of the relevant contract, there may be circumstances that involve noncompliance with the terms of the relevant contract management plan entered between the borrower and ADB.¹⁵

3.14 In such cases involving contract management plans, a similar approach to noncompliance by the borrower will be followed and will consider (i) if the action of noncompliance in relation to the applicable contract management plan was intentional or inadvertent; (ii) if such noncompliance, materially or marginally, undermines the integrity of the actual contractual administration and implementation process followed under such contract management plan; and (iii) whether such contract management with identified noncompliance will still result in outcomes that are adequately fit for purpose or provide optimal VFM for the borrower.

5. Alternative Procurement Arrangements

3.15 In APA situations, ADB will adhere to the determination of noncompliance by the lead cofinancier or accredited agency, and their contemplated contractual or noncontractual remedies, unless the relevant MRA or agency accreditation approval permits ADB to take alternative action, and, in any case, without prejudice to paras. 2.6 and 2.8 of this guidance note. Such alternative action may include, for example, ADB's withdrawal from the relevant MRA or revocation of the relevant agency accreditation, if ADB concludes that the findings and proposed remedial actions of the lead cofinancier or accredited agency are inappropriate or unsatisfactory. The MRA or project agreement concerned will specify these situations to the extent reasonably possible to provide concrete project-specific benchmarks for operational guidance.

¹⁴ Appendix 6, para. 11, of the procurement regulations.

¹⁵ The *Guidance Note on Contract Management* and Appendix 8 of the procurement regulations have more information.

Appendix: Noncompliance Assessment Report Memorandum Template

Borrower's Noncompliance Assessment Report Memorandum Template

[BORROWER (OR EXECUTING AGENCY) LETTERHEAD]

[Date]

*[Name of Asian Development Bank (ADB) Project Officer]
[Address]*

*[SUBJECT:] Loan/Grant No.—[Country]: Project Title
—Noncompliance Assessment Report*

1. We refer to the following procurement package for the subject project:
[details of relevant procurement package and transaction giving rise to the observed noncompliance]
2. In our assessment, the actions described below have resulted in a failure to adhere to the procurement procedures and processes required under the project procurement plan and/or have violated ADB's Procurement Policy: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time) and/or Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time):
[details of the specific impugned actions, actual parties involved and the nature and extent of the observed violations of the project procurement plan, procurement policy, and/or procurement regulations]
3. The impact of the noncompliance with applicable procedures on the integrity of the procurement process and on project implementation has been as follows:
[details of impact of identified noncompliance on project]
4. In these circumstances, we propose the following corrective measures for consideration and approval by ADB:
[provide specific recommendations on nonlegal or legal measures that should be taken]
5. We wish to schedule a meeting with you to elaborate further on such noncompliance and our suggested recommendations to correct the situation.

Yours faithfully,

*[Name of Borrower's Official]
[Designation]*

Noncompliance in Procurement

Guidance Note on Procurement

ADB's 2017 procurement policy and procurement regulations offer a more flexible and proportional approach in the handling of situations where borrowers have not complied with the financing agreement. This guidance note provides detailed information on addressing procurement-related noncompliance issues and factors that guide remedial actions. Dealing with noncompliance in an appropriate and timely manner has several benefits, including increasing efficiency and reducing procurement time, reducing risk of complaints and bidding process failures, and fostering better project outcomes.

About the Asian Development Bank

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to a large share of the world's poor. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

ASIAN DEVELOPMENT BANK

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