GUIDANCE

Project implementation considerations during armed conflicts or wars

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Section I: Purpose

Project implementation, including procurement, during armed conflicts or wars presents distinct additional challenges and risks that require particular attention to ensure timely execution of projects in accordance with the Bank's policies and procedures and to mitigate the risks of misuse of Bank funds.

This Guidance aims to (i) highlight the most prevalent challenges and risks concerning public sector investments arising out of ongoing armed conflicts or wars or the imposition of martial laws and (ii) provide guidance to stakeholders involved in implementation of Bank financed projects, on relevant procurement and project implementation considerations and how to mitigate or avoid such challenges and risks.

Although the focus of the Guidance is on Public Sector Operations, many challenges and solutions described herein may be applied to Private Sector Operations with various degrees of relevance.

Section II: Definitions

Terms used in this Guidance have the following meanings:

Contractor	means a party to a Bank-financed Contract signed by the Client and includes contractors, suppliers, consultants, as appropriate.
Dual-Use Items	means goods and technologies that can have both civilian and military application.
ECEPP	means the EBRD Client E-Procurement Portal.
PPR	means the Bank's Procurement Policies and Rules.

Terms not defined in this Guidance have the same meaning as set out in the PPR.

Section III: Scope

Introduction

Implementation of projects during armed conflicts or wartime presents substantially increased number of challenges than during peaceful times. Challenges and disruptions to the implementation of projects may arise not only due to the proximity of project sites to war zones, but also from the knock-on effect of armed conflicts or wars on supply chains or any restrictions resulting from imposed martial laws and war-related risks. The most common examples of such challenges and disruptions are:

(i) market disruptions potentially limiting competitiveness of a procurement process, thus impacting achieving value for money;
(ii) health and safety risks for Contractors' personnel working on Bank-financed contracts in or near war zones;
(iii) difficulties for Contractors to obtain bank securities or insurance coverage;
(iv) logistical challenges, including supply chain disruptions and delivery constraints;
(v) significantly increased risk of fraud and corruption; and
(vi) inability to ensure adequate monitoring of project implementation.

In this Guidance, challenges related to armed conflicts or wars and considerations are grouped in three phases in a project life-cycle:

- **Project Scoping and Preparation**: covering the phase from project identification up to approval by the Bank and the signing of the project legal agreement;
- **Selection Process**: covering the phase from project planning and conducting a selection process (including Direct Contracting) up until contract award; and
- **Contract Implementation**: covering the contract implementation phase up to completion.

There is a heightened fraud and corruption risk during armed conflicts or wars as further described in the last paragraph. It can occur throughout the project cycle, so vigilance is required from Clients to ensure that EBRD funds are not misused.

Project Scoping and Preparation

1. Project identification

When requesting Bank's financing for potential projects, it is recommended for Clients to place particular focus on their feasibility and implementability within the context of the ongoing armed conflict or war. The financing of OPEX may be a preferred option: assisting Clients, especially those having ongoing projects with the Bank, to maintain their businesses with as minimal disruptions as possible and to survive the conflict. When CAPEX financing is sought, it is advisable for Clients to prioritise, whenever possible, projects focused on procurement of goods, because such projects generally have a lower risk profile than projects involving works and therefore structuring and implementation of such projects can be streamlined.

Financing of works contracts should only be considered in exceptional cases and only when health and safety risks for the Client's and Contractor's personnel as well as other implementation risks can be adequately mitigated.

2. Due diligence

During project preparation and structuring, enhanced due diligence would be required to identify procurement and implementation risks. This should be mainly done through an assessment of internal (including the Client's capacity) and external risks (including market assessment). The resulting project implementation strategy shall include appropriate mitigation measures for the identified risks.

2.1 <u>Client's Capacity</u>

Client's capacity is usually one of the first and most important aspects in the project implementation cycle that gets negatively affected by armed conflicts or wars. The question of the availability of adequate human resources for a specific project becomes a larger issue during armed conflicts or wars as Clients lose part of their staff due to displacement, conscription, injuries or deaths. Therefore, it is critical to accurately assess capabilities of the executing agency and plan the project accordingly and under the assumption that the situation may aggravate (thus considering alternative arrangements).

Clients are urged to review their capacity conservatively and flag any needs and gaps as early as possible to ensure that the project delivery strategy is designed with relevant mitigation measures in place. When addressing the issue of the Client's limited capacity, the engagement of consultants to bridge the gaps shall normally be considered as the primary option. Financing of Client's project implementation unit (PIU) may also be envisaged for financing by the Bank, if critical and appropriate.

Alternatively, Clients may consider the option of engaging a procurement or project implementation agent for the project. This approach has certain benefits and could be taken into account during project planning. Use of procurement agents may prove particularly useful when:

(i) the Client's capacity has diminished significantly due to the abovementioned issues. In such cases, a procurement agent may de-facto replace the Client's project implementation unit and provide all necessary project management services;

(ii) the Client's project implementation unit is operational, but it requires hands-on support in procurement processes which may be urgent or having complex interfaces. Agents often benefit from having an established local office in the country and a strong support from their headquarters, which gives them quick access to a large pool of experts. Furthermore, specialised agents may have an established system for crisis management as well as bespoke procurement systems that are designed for crisis situations. These may be considered by the Bank as acceptable alternative project implementation arrangements in the given circumstances;

(iii) depending on the situation, certain specialized UN agencies (UNOPS or UNDP, for example) may be considered as the best fit for purpose in crisis situations which can be hired through direct contracting arrangements, thus further decreasing the procurement lead time and ensuring efficiency of the provided support.

2.2 Market analysis

Conducting market analysis to develop a project delivery strategy is a mandatory requirement under the PPR during due diligence. It becomes even more important during armed conflicts or wartime due to the emergence of the risks described in the introduction section of this Guidance. Therefore, Clients must ensure that market analysis is always conducted during the due diligence phase to test the envisaged project delivery strategy and procurement plan. The results will enable the Client and the Bank to adjust the project delivery strategy and procurement plan in line with the existing market requirements, constrains and capabilities. The Bank may assist Clients with the market analysis for a broad range of projects.

2.3 Contracting strategy

Whilst in normal circumstances, turnkey and single point of responsibility type of arrangements may be preferred, the practice has shown that this is often unfeasible in wartime. In order to ensure successful delivery of the project objectives, Clients need to step in and closely analyse supply chain with the aim of segregating the project into digestible pieces for the private sector in high-risk environments. This includes careful consideration of combining or dividing potential contracts into lots to optimise the participation rate.

The overall project structuring approach rests on application of strategic and critical thinking, often requiring assessment of the situation beyond the boundaries of a particular project. The Bank may often be in a position to provide necessary support due to its "helicopter view" of the situation in the country and other similar projects in the region, as well as its access to a wealth of knowledge and resources such as procurement agents, experts and/or consultants.

3. Health and safety considerations

Preservation of life and the protection of health, safety, and the well-being of people involved with the Bank Operation, including the Client's and Contractor's personnel and the communities that may be affected by a project, is the utmost priority for the Bank. It shall be ensured that relevant guidance from the Bank is followed and that necessary mitigation measures are put in place.

4. Dual-Use Items

In accordance with its policies, the Bank does not finance activities relating to production and/or trade of arms or military equipment, therefore the project scope shall not involve any works or equipment, including Dual-Use Items, that could potentially be used for military purposes.

5. Contingencies

Wars, particularly, often result in significant regional and global market disruptions. These disruptions can lead to increased price volatility and heightened inflationary pressures. It is therefore strongly recommended to incorporate substantial contingencies into each project, whenever feasible (15-20% of the estimated CAPEX costs should be considered, as the minimum). These contingencies shall be used to cover potential cost increases, as compared to the original peace time estimates, due to high-risk mark up. The funds may also be utilised to cover potential price escalations under the signed contracts, which shall always be provided for under the circumstances.

Clients' financing resources are likely to be strained during wars. Therefore, it is recommended to include such contingencies in the loan and/or grant proceeds.

Selection Process

1. Disclosure of risks related to armed conflicts or wars

It has been reported that the fact that the Bank is providing financing for projects in countries affected by armed conflicts or wars, communicated via public announcement of procurement opportunities, may provide a false sense of security for Participants.

To prevent inadvertently misleading the market on the extent of the risks for Participants, and the Bank's ability to mitigate such risks, Clients are obliged to disclose conflict/war-related risks in the documents supporting any procurement process, as appropriate, in particular with regard to health and safety issues pertinent to contract(s).

The following wording shall be included on mandatory basis in any invitation of procurement opportunities:

"*The Client and the Bank jointly urge interested parties to independently assess risks associated with the implementation of the contract, including but not limited to the risks resulting from the ongoing conflict. Parties should seek their own legal, financial, risk management as well as health and safety advice.*

The Bank does not provide any security or safety guarantees pertaining to risks resulting from the ongoing conflict in relation to this tendering process or the implementation of the resulting contract. Please refer to the applicable procurement documents for any specific arrangements provided by the Client in this respect."

Similarly, Clients shall adequately reflect conflict/war-related risks in contract conditions. Wherever necessary, the procurement documents shall describe identified risks and disclose the planned or undertaken mitigation measures.

2. Market consultations

Given the rapid changes of the market environment and related risks dynamics, fast track market consultations shall be used as broadly as possible. Market consultations can be conducted independently by the Clients with support of their consultants or with the support and participation of the Bank, if deemed necessary. Wherever possible, they shall be arranged online. Engaging in market consultations can generate interest from the market and increase the level of trust and confidence among potential Participants, particularly in a high-risk environment.

The Bank has extensive experience in conducting online market consultations and can provide guidance and hands-on support to Clients during such process. The presence and support of the Bank in the consultation process provides an additional layer of comfort to Participants.

The market consultation should normally cover, as a minimum, the following aspects:

(i) key parameters for the Goods, Works and Services to be provided;
(ii) logistics considerations, including supply chain and delivery arrangements;
(iii) financial aspects, such as currency, payment and price adjustment terms for the contract;
(iv) risk sharing arrangements between the parties;
(v) insurance requirements associated with the contract; and
(vi) measures to be undertaken by the Client to provide assurances and comfort to prospective Contractors.

Addressing these will make the subsequent procurement process more transparent, efficient, and tailored to the specific needs and challenges of the project, thus driving the potential costs down due to lower risk premiums envisaged by the Participants. In addition, this informal exercise allows to test and optimise the envisaged procurement and contracting strategy with the market, thereby mitigating the risk of a failed tender.

Following comprehensive consultations with the market, focus groups of potential Participants shall be identified and the procurement process and contract conditions designed accordingly.

3. Risk sharing

Given that during wars a project's risk profile usually deteriorates, it is important to ensure that contracts contain adequate risk sharing mechanisms. The guiding principle in this respect is that risk should be allocated to the party best positioned to manage or control it and minimise its impact.

While it is acknowledged that public sector Clients normally prefer to minimise their risk profile by transferring a large portion of risks to Contractors, such approach during times of armed conflict or war may overwhelm Participants and exceed their risk appetite, thus resulting in failed tenders and abnormally inflated proposal prices. Therefore, it is essential to ensure that findings of market consultations are taken into account when formulating contract conditions in order to keep the risks adequately balanced between the parties. This approach has proven to result in optimised value for money and fit for purpose solutions.

4. Timeframe

Under normal circumstances, the standard duration for the preparation of proposals is described in the PPR and generally aligned with the WTO GPA recommendations. However, during an emergency or armed conflicts/wars, the Bank is prepared to support a shorter timeline for competitive processes. The nature and complexity of a given contract, the results of market consultations and the position of Participants as well as other specific circumstances in each case shall be taken into account when considering a shortened timeline. However, unreasonably reduced time for the preparation of Proposals can have an adverse effect on the procurement process, resulting in low or lack of competition and/or poor-quality Proposals. This may subsequently lead to a prolonged evaluation process due to the need for extensive clarifications during evaluation, or even cancelling and restarting the procurement process, thus extending the overall implementation time.

The Clients must ensure that an appropriate balance is struck between time efficiency and the need to ensure the required quality.

5. Minimising transactional costs to Contractors

Wherever possible, efforts shall be made to reduce the costs of participation in a procurement process. This can be achieved by reducing the value of the required tender securities or removing the requirement altogether, reducing the number of documents to be submitted by Participants to an essential minimum, and using digital means and platforms for communications, meetings and site demonstration.

6. Use of national procurement systems

Broader use of competitive procurement procedures under national laws with the use of, where available, national e-procurement platforms, shall be considered within the thresholds and in accordance with the applicable PPR provisions.

For any procurement process conducted under national laws, mandatory provisions of the Bank's Environmental and Social Policy and the Enforcement Policy and Procedures, as well as the Bank's inspection and audit rights must still be included in the procurement documents and any resulting contracts.

7. Direct contracting

Use of direct contracting shall be minimised even during wartime. Competitive procedures, as defined in PPR, or their acceptable alternatives, remain a default option and shall be used as broadly as possible. Direct contracts pose a high risk of corruption and do not guarantee the achievement of value for money or intended timely delivery of the results. However, use of direct contracting may be considered, where appropriate, strictly in accordance with the PPR.

Appropriate and timely planning of contracting activities and proactive project management are the key mitigating factors in an effort to reduce reliance on direct contracting. Lack of due planning by the Client shall not be considered sufficient justification for direct contracting.

When direct contracting is considered, early consultations with the Bank are required. These shall focus on the following three key aspects:

(i) **Why** – why competitive selection process is not possible (justification for the use of direct contracting);

(ii) **Who** – why a particular Contractor is proposed, and

(iii) **How much** – why the proposed contract price is perceived to provide good value for money.

Independent third party technical and financial due diligence may be requested by the Bank.

8. Specific Considerations relating to Goods, Works and Consultancy Services

8.1 Goods

When planning the procurement of Goods, it is imperative to take into account current market capabilities to manufacture and deliver the required Goods. This may require division of Contracts into lots to optimise the participation rate and ensure that manufacturing and supply capacities constrains are addressed.

For many types of Goods, it may be prudent to focus on foreign markets, where manufacturing and supply chains may not be affected by war. At the same time, to address the likely unwillingness or inability to obtain necessary insurance coverage for war-affected areas, the Bank recommends consideration of delivery of Goods based on Delivered At Place - DAP (frontier) Incoterms, whilst separately arranging the transportation of Goods to project sites using routes and secure means available within the country. This will ensure seamless supply, as well as facilitate obtaining of insurance coverage for the Goods en-route to frontiers, excluding or making separate arrangements for insurance to cover war-affected areas.

In case of a large investment program, it is advisable that Client may wish to escalate the topic to the relevant authorities and discuss potential nationwide inland transportation and logistics schemes to avoid costly arrangements for a specific project and to take advantage of the economy of scale through a comprehensive supply-chain analysis and planning, as well as special insurance arrangements.

8.2 Works

Works contracts require mobilisation of significant manpower and heavy equipment, which would be concentrated on-site and may be targeted by military or armed combatants. The Contractors' personnel may also inadvertently fall victim to hostilities. As a result, construction sites are particularly susceptible to risks associated with an ongoing war or armed conflict and require additional mitigation and protection measures. Tailored health and safety arrangements shall be considered, e.g. to provide for an alert system and safe bomb shelters for Contractors' personnel on-site or within close reach.

Works contracts normally include associated activities requiring on-site presence, e.g. surveys and investigations for design preparation (prior to the commencement of works) or supervision activities during the works. These shall be also taken into account when considering health and safety concerns.

Any health and safety measures to address specific risks associated with on-site presence shall be considered during project and procurement planning in consultations with the Bank and the market.

Proximity to an (actual or potential) front line, military or strategic infrastructure facilities shall always be taken into account and given special consideration given that it is very high risk. Procurement of any Works in proximity to a front line (depending on the type of warfare and dynamics of military actions, but as a rule, less than 50 km) or in short range of military or strategic infrastructure facilities (as a rule, in a radius of 5 km) shall be avoided.

Sites, where Bank-financed Works contracts are implemented, shall not be used for hosting military equipment or personnel, even on a temporary basis.

8.3 Consultancy services

Some consulting services can be provided remotely, either fully or partially (e.g. corporate development programs, capacity building, procurement support etc.). The Bank actively promotes the use of remote services and encourages its Clients to facilitate such arrangements to create an enabling environment. This can be achieved through the utilisation of modern technologies and the provision of enhanced support to consultants, by Clients providing documents and information in a digital format.

Contracts that require on-site presence (e.g. surveys or construction supervision) shall be approached in line with the health and safety considerations discussed above in the Works section of this Guidance. In these instances, the engagement of experts and sub-consultants located in the Client's country should be maximized. Their involvement will support international teams, capitalising on their in-country presence as well as their knowledge of rapidly changing operating environment in wartime conditions in the country.

Any health and safety measures to address specific risks associated with consultants' in-country or on-site presence shall be considered during project and procurement planning in consultations with the Bank.

9. Market price volatility

Wars usually lead to significant volatility of prices within the country, but also regionally and in certain cases world-wide. The associated risks can be addressed by including price adjustment provisions in contracts.

All Bank-financed contracts in war and crisis environments shall incorporate price adjustment provisions by default, irrespective of the anticipated duration of the contract. In consultation with the Bank, a fixed price period may be considered, dependent on specific circumstances of the contract including its nature, location, and duration.

10. Eligibility restrictions and sanctions

Participants from any country are eligible for participation in a Bank Operation. However, during wars or armed conflicts, countries may impose nationality-based eligibility restrictions or other restrictions on specific companies and individuals from countries involved in the war or conflict. In addition, it is important to be aware of sanctions imposed by the UN Security Council under Chapter VII of the UN Charter as well as third country sanctions that may impact the resulting contracts.

The PPR includes the so-called “fire exit clause” (Section III, Article 3.52(d)) which is designed to provide an additional layer of comfort to Clients, ensuring that the contracts will only be awarded to Contractors who are capable of performing under the respective contract.

Contract Implementation

1. Rapid contract modifications

During contract implementation, the Client and the Bank shall be open to consider rapid modifications to the contract conditions in order to reflect the negative changes triggered by market volatility or war-linked developments. However, any material modification of a contract shall be appropriately justified and recorded. Any modification shall be aimed to deliver the initially intended results and not include new objectives.

2. Price adjustment

Some ongoing contracts signed pre-war may not contain price adjustment provisions (as set out in paragraph 9 above). If relevant market circumstances change, the Bank is prepared to support incorporating price adjustment provisions into such contracts to ensure a fair reflection of substantial changes to market conditions relevant to the contract and facilitate the uninterrupted contract implementation.

3. Force majeure and contract termination

Force majeure clauses in Bank-financed contracts may be triggered by ongoing wars and declaration of martial law. Invoking force majeure provisions is a complex process that entails various contractual and financial implications. It typically requires careful consideration of the provisions outlined in the relevant local legislation that governs the respective contract. As such, it is imperative for Clients to seek local legal advice and consult with the Bank before making any decisions about invoking force majeure. The same applies to contract terminations.

Normally, difficulties in making payments due to the changed circumstances would not be considered sufficient justification to invoke force majeure clauses.

At the same time, the Clients shall be open to pay appropriate compensation to Contractors when termination is triggered by force majeure circumstances, and the Bank shall be open to finance such compensation from the loan or grant funds.

4. Dispute resolution mechanism

Wars and armed conflicts bring uncertainty and rapidly changing circumstances, which may impact the ability of parties to perform their contractual obligations. This will increase the likelihood of disputes between the parties. It is therefore essential that the contract contains a comprehensive and clear dispute resolution mechanism so that parties can resolve disputes efficiently and effectively.

When considering the appropriate dispute resolution mechanism, the Client must take into account that a war or conflict may impact the functioning national courts. They may be closed or opened intermittently or not reachable for foreign Contractors (who may have difficulties finding and instructing national legal representatives or lawyers). Furthermore, foreign Contractors generally wish to avoid proceedings before national courts due to perceived partiality.

In case it will be likely that Goods, Works or Consultancy Services will be provided by foreign Contractors, it shall be advisable for the Client to choose for the resolution of disputes by recognised arbitration institutions (e.g. International Chamber of Commerce, London Court of Arbitration) in accordance with internationally recognised arbitration rules (e.g. ICC Arbitration Rules, UNCITRAL Arbitration Rules). Alternative arrangements can be considered, such as mediation or conciliation (e.g. respective ICC Rules), but the Client should assess if these arrangements can legally be enforced in case the other party is unwilling to accept the presented solution.

Increased Risk of Fraud and Corruption

It is common knowledge that wars or armed conflicts, like other extreme circumstances (e.g. pandemic, natural disasters) bring with them an increased risk of fraud or corruption occurring. The normal systems and controls to mitigate such risk may be less effective during wars or conflicts or less attention is given to implement measures to mitigate fraud and corruption, because priorities may have shifted.

Fraud and corruption can occur at any stage, from project scoping and preparation, to selection process as well as contract implementation. It is therefore essential that the Client remains vigilant during all stages of the project and ensures that they take appropriate measures to reduce the risk of misuse of EBRD funds. In case the Client becomes aware of possible indications of the Client's employees, agents, representatives or the Contractor engaging in fraud or corruption (or any other Prohibited Practices under the EBRD's Enforcement Policy and Rules) in relation to EBRD funds, the Client must inform the Bank promptly thereof. Furthermore, the Client, their employees, agents and representatives as well as their Contractors are obligated to cooperate with an investigation into allegations of Prohibited Practices in relation to EBRD funds by the EBRD's Office of the Chief Compliance Officer.

Section IV: Disclosure

This Guidance will be disclosed on Bank's external website.

Section V: Effective Date

This Guidance is effective as of 1 April 2024.

Section VI: Decision Making Framework

Director, Procurement Policy and Advisory Department, is accountable for this Guidance.

Associate Director, Procurement Policy Advisor, Operations is responsible for this Guidance.

Section VII: Related Documents

- Procurement Policies and Rules (POL/2022/8).
- Environmental and Social Policy (POL/2019/7).
- Enforcement Policy and Procedures (POL/2017/01).