

Financing infrastructure procurement and workers' rights: the role of regional development banks

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1. INTRODUCTION

Infrastructure development is crucial to every country's socio-economic development because it supports end-users with efficient, effective and affordable services.¹ Thus, every year, governments spend significant funds on the procurement of infrastructure projects, such as transport, energy and utilities, and social infrastructure projects.² Irrespective of the significant amounts spent in this sector, a gap exists in the infrastructure development of developing countries in Asia and Africa. For example, studies conducted by Oxford Economics suggest that between 2016 and 2040, approximately \$94 trillion investment is required to bridge the gap in infrastructure provision, with the largest infrastructure gap being in Africa.³ Similarly, the Asian Development Bank (ADB) notes that developing countries in Asia and the Pacific would need to invest \$1.7 trillion annually or \$26 trillion between 2016 to 2030 on infrastructure projects to "maintain growth momentum, eradicate poverty and respond to climate change" within the region.⁴

The gap in infrastructure development of developing countries undoubtedly requires funding. The main source of such funding comes from the World Bank and Regional Development Banks (RDB) such as the Africa Development Bank (AfDB) and the ADB. By financing infrastructure projects, the multilateral banks support economic growth, improve the health and lifestyle of people and the environment, while elevating many out of poverty in regions

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¹ See generally, Laura Treviño Lozano and Olga Martin-Ortega, Sustainable Public Procurement and Human Rights: Linkages and Gaps in Olga Martin-Ortega and Laura Treviño Lozano (eds), *Beyond Building Green: Linkages and gaps in sustainable public procurement of infrastructure and human rights* (Edgar, 2022). Chapter 1; Patrick Manu, Richard Ohene Asiedu, Abdul-Majeed Mahamadu, Paul Olaniyi Olomolaiye, Colin Booth, Emmanuel Manu, Saheed Ajayi and Kofi Agyekum, 'Contribution of procurement capacity of public agencies to attainment of procurement objectives in infrastructure procurement' (2021) *Engineering, Construction and Architectural Management* <https://doi.org/10.1108/ECAM-05-2020-0375> accessed 1 September 2021; For definition of infrastructure see, Darrin Grimsey and Mervyn Lewis, *Global Developments in Public Infrastructure Procurement* (Edward Edgar, 2017), 17-46.

² In 2019, a global estimated figure of \$1.3 trillion was spent on infrastructure development projects. See World Bank, 'Infrastructure Finance' (September 2019) <<https://www.worldbank.org/en/topic/financialsector/brief/infrastructure-finance>> accessed 15 August 2021.

³ Andrew Goodwin, 'Global Infrastructure Outlook - Infrastructure Investment Need, 50 Countries, 7 Sectors to 2040' (Oxford Economics, July 2017) <<https://www.oxfordeconomics.com/recent-releases/Global-Infrastructure-Outlook>> accessed 20 March 2021.

⁴ ADB, 'Infrastructure Development in Asia: 12 Things to Know' (8 May 2017) <<https://www.adb.org/news/features/infrastructure-development-asia-12-things-know>> accessed 4th August 2021.

including Africa and Asia. In this way, financing infrastructural projects in these regions is also likely to enable countries to achieve sustainability, as infrastructure development is linked to the UN Sustainable Development Goals (SDGs).⁵ For example, the construction of the Queen Mamohato Memorial Hospital in Lesotho resulted in the promotion of six SDGs, as detailed in Loot's chapter.⁶

Despite the crucial benefits that can arise from financing infrastructure projects, concerns exist around various issues, including human rights abuses in the execution of infrastructural projects.⁷ For example, the UN Office of the High Commissioner for Human Rights reported the murder, torture, state-sponsored vilification and repression on peaceful assembly of workers' involved in constructing Agua Zarca hydroelectric dams in Honduras.⁸ The European Investment Bank was accused of supporting infrastructure projects linked to human rights violations in Africa and Asia, while the World Bank was praised for withdrawing support as a result of human rights violations occurring in dam projects in India.⁹ More recently, the Pakistani Building and Wood Workers' Union filed complaints against the International Finance Corporation (IFC) for gross violation of workers' rights through poor workplace safety and working conditions, terms of employment, grievance mechanisms and retrenchment.¹⁰ Further, as noted by many of the authors in this book, the procurement of large infrastructure projects, bring to fore various human rights concerns, including breaches of workers' rights that occur during the procurement of such infrastructure. In chapters 5 and 6 of this book, Rook and Heerdt, and Quinot discuss these human rights abuses in the context of the construction of stadiums and supporting infrastructure for sporting events. Short turns our attention to these concerns in the construction of hospitals in chapter 8 of this book.

As these issues persist, we contend that financing infrastructure development without preventing human rights abuses, such as breach of workers' rights that may arise in the

⁵ Lozano and Martin-Ortega (n1); Manu et al (n1); United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, (25 October 2015), hereafter SDGs <<https://sdgs.un.org/goals>>; Graeme Newell, Kwong Wing Chau and Siu Kei, 'The significance and performance of infrastructure in China' (2009) *Journal of Property Investment and Finance* 27(2), 180-202.

⁶ Josua Loots, 'The use of human rights impact assessments in infrastructure public-private partnerships' in Olga Martin-Ortega and Laura Treviño Lozano (eds), *Beyond Building Green: Linkages and gaps in sustainable public procurement of infrastructure and human rights* (Edgar, 2022), chapter 7. In this chapter, Loots stated that the following SDGs were promoted in the building of the hospital: Good health and well-being (SDG 3), gender equality (SDG 5), industry, innovation and infrastructure (SDG 9), reduced inequality (SDG 10), peace justice and strong institutions (SDG 16) and partnerships for the goals (SDG 17).

⁷ World Bank and OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges* (3rd edn, World Bank and OECD, 2016); Michael Likosky, 'Mitigating Human Rights Risks Under State-Financed and Privatized Infrastructure Projects' (2003) *Indiana Journal of Global Legal Studies* 10(2), 65-85.

⁸ UNHRC, 'Human Rights trampled in push to build infrastructure' <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21322&LangID=E> accessed 4th August 2021.

⁹ See, Kalyeena Makortoff, 'EU bank supports projects linked to human rights violations, NGOs claim' <https://www.theguardian.com/global-development/2020/nov/09/eu-bank-supports-projects-linked-to-human-rights-violations-ngos-claim> accessed 30th July 2021; Likosky (n7).

¹⁰ Business & Human Rights Resource Centre, 'Pakistan: BWI & Pakistan Federation of Building and Wood Workers 'lodge complaint with Ombudsman after IFC-funded Karot Hydropower Project allegedly violates labour rights of 3000 workers' (17 June 2021) <https://www.business-humanrights.org/en/latest-news/pakistan-bwi-pakistan-federation-of-building-and-wood-workers-lodge-complaint-with-ombudsman-after-ifc-funded-karot-hydropower-project-allegedly-violates-labour-rights-of-3000-workers/> accessed 19 September 2021.

execution of infrastructure projects by a Borrower is counterproductive. Further, we argue that the immense benefits to be gained from infrastructure projects can be sustained by RDBs promoting workers' rights in financed infrastructure projects through explicit and adequate provisions on workers' rights in their public procurement frameworks. This is because projects funded in whole or in part by the RDBs are subject to each Bank's respective public procurement frameworks. Whether these rules directly offer protection to the rights of workers' (including subcontractors workers across the multi-tier supply chain) who execute RDB financed infrastructure projects in Borrower countries is questionable.

Thus, this chapter contributes to the discourse on workers' rights in RDBs financed infrastructure projects by analysing the AfDB and ADB public procurement frameworks.¹¹ Underpinning the chapter is the question: To what extent do the RDBs procurement frameworks protect workers' rights in financed contracts for infrastructure projects awarded to Borrowers? The rest of the chapter is divided into four sections. Section 2 discusses the meaning of workers' rights, including the legal obligation to protect such rights in international instruments and its relationship to public procurement. In section 3, we undertake a cradle-to-grave analysis of the selected RDBs procurement frameworks by discussing their approach to addressing workers' rights through a focus on the procurement principles and specific provisions relating to procurement planning, tendering, contract awards and contract management. While section 4 discusses some limitations in the RDBs' approach to addressing workers' rights and offers recommendations to support the promotion and protection of workers' rights in financed infrastructure projects, section 5 concludes the chapter. It should be noted that within the context of this chapter, the reference to promotion of workers' rights acknowledges the obligations for RDBs Borrowers to raise awareness of the existence of those rights, while protect refers to the impetus on these instruments to ensure that States comply with the obligation or duty to prevent the abuse of such rights in donor- financed infrastructural projects.

2. CONTEXT AND BACKGROUND: WORKERS' RIGHTS AND PUBLIC PROCUREMENT

2.1. Workers' rights and Human Rights: protection under human rights instruments

International and regional human rights instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter of Human and People's Rights (ACHPR) recognise a wide range of fundamental civil, political,

¹¹ While previous research has explored some relates aspects of this issue, see Sope Williams-Elegbe, "Human rights in the context of public procurements financed by the World Bank " in Olga Martin-Ortega and Claire O'Brien, *Public Procurement and Human Rights: opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019) chapter 3, this work extends the analysis by focusing on workers' rights in the procurement of infrastructures funded by two regional development banks the ADB and the AfDB. Furthermore, the originality of this work lies in the analysis of the Banks' procurement of infrastructure documents to determine the extent to which workers' rights are considered during the tendering and award process.

economic, social and cultural rights.¹² Workers' rights (also referred to as labour rights) refer to the economic and social legal rights afforded to workers engaged in a contract for service or contract of service, including employees, independent contractors, agency workers and other persons engaged in an economic relationship with an employer.¹³ Examples of workers' rights under international and regional human rights instruments include the right to freedom of association and assembly, right to work and freedom from discrimination, right to join trade unions, right to fair and safe working conditions and the prohibition against slavery and inhumane treatment.¹⁴

Promoting and protecting workers' rights has a long history that precedes these international and regional human rights instruments. Significantly, workers' rights historically gained international momentum when the International Labour Organization (ILO) was founded in 1919.¹⁵ The ILO Constitution emphasised ending workers' exploitation and adopting humane labour conditions through a tripartite system that sets labour standards, develops policies, and devises programmes on decent work practices.¹⁶ Over the century, 202 ILO conventions have established obligations for the respect, protection and promotion of workers' rights, with many still unratified by member states.¹⁷ Workers' rights under the ILO encapsulate labour conditions, trade union regulations, and social protection rights such as occupational health and safety, payment of decent wages, equal opportunity, working hours, anti-discrimination of workers, maternity and paternity allowances, and the prohibition of the worst forms of child labour.¹⁸

While the synergy between workers' rights and human rights is not the subject of this chapter, treating workers' rights as human rights is fundamental to understanding the significance of workers' rights.¹⁹ Additionally, while adopting and enforcing workers' rights is not an activity of the RDB; many of their Borrowers (and their contracting authorities) are bound by the international and regional human rights instruments, which explicitly mention workers' rights. Thus, RDB Borrowers have a legal obligation to ensure workers' rights are not violated when

¹² Universal Declaration of Human Rights (UDHR) 1945, the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter of Human and People's Rights (ACHPR).

¹³ Kevin Kolben, 'Labor Rights as Human Rights' (2010) 50 Va J Int'l L 449.

¹⁴ For example, the right to freedom of expression and ability to join or form trade unions are specified in Article 22 of the ICCPR, Article 8 of the ICESCR, and Article 9 of the ACHPR. Similarly, the right to fair and safe working conditions are prescribed in Article 4 of the UDHR, Article 7 of the ICESCR and Article 11 of the ACHPR.

¹⁵ International Labour Organisation, 'About the ILO' <<http://www.ilo.org/global/about-the-ilo/lang-en/index.htm>> accessed 19 September 2021.

¹⁶ ILO Constitution, preamble; <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm> accessed 19 September 2021. Examples of early labour standards include C001 - Hours of Work (Industry) Convention, 1919 (No. 1), C002 - Unemployment Convention, 1919 (No. 2); C008 - Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8) and C004 - Night Work (Women) Convention, 1919 (No. 4), C006 - Night Work of Young Persons (Industry) Convention, 1919 (No. 6).

¹⁷ ILO, *Conventions and Recommendations*, available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> accessed 23 September 2021.

¹⁸ *Ibid.*

¹⁹ Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) *European Labour Law Journal* 3(2), 151-172; Larry Savage, 'Workers' Rights as Human Rights: Organized Labor and Rights Discourse in Canada' (2009) *Labour Studies Journal* 34(1), 8-20; James. A Gross, *Workers' Rights as Human Rights* (ILR Press, 2005).

executing their activities, including public procurement. In this chapter, any reference to workers' rights refers to work-related rights enshrined in international human rights instruments and Conventions. Thus, the rights of all workers (including contractors and subcontractors across the supply chain) involved in the performance of a contract awarded by the RDBs are the main focus of the chapter.

2.2. Workers' rights and public procurement

Several international institutions recognise the need for governments to respect, protect and promote workers' rights through their public procurement frameworks and practices.²⁰ For example, Principle 6 of the United Nations Guiding Principles (UNGPs) on Business and Human Rights reiterates existing legal obligations to respect and protect human rights, even in government supply chains.²¹ The UNGP recognises that international institutions such as financial institutions can play a crucial role in supporting countries "to meet their duty to protect not hinder business enterprises from respecting human rights".²² Additionally, the UN SDGs sets various requirements for governments regarding workers' rights, including targets on decent pay, promoting a safe and secure working environment, removing discriminatory practices, eradicating abuses such as child labour, forced labour and adopting public procurement practices that promote sustainable development.²³

In addition to the UN, the ILO has long recognised the need to address workers' rights through public procurement. Relevant to this discussion is the Labour Clauses (Public Contracts) Convention.²⁴ This convention requires member states to include labour clauses concerning wages, hours of work and other conditions which are not less favourable than those established for work of the same character in the trade or industry" in construction contracts.²⁵ Furthermore, governments must establish and maintain adequate inspection systems to review suppliers' compliance with these requirements and sanctions suppliers that fail to protect workers' rights.²⁶ These international perspectives cement the need for countries and international institutions (including RDBs) to adopt adequate provisions that protect workers'

²⁰ OSCE, 'Ending Exploitation - Ensuring that Businesses do not contribute to Trafficking in Human Beings: Duties of States and the Private Sector' (OSCE, paper no 7, 2014); Olga Martin-Ortega, and Claire Methven O'Brien, 'Advancing Respect for Labour Rights Globally through Public Procurement' [2017] *Politics and Governance* 5(4), 69-79; John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains', in Kate Macdonald and Shelley Marshall (eds), *Fair Trade, Corporate Accountability and Beyond: Experiments in globalizing justice* (Ashgate 2010).

²¹ UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework' UN Doc. A/HRC/17/31, (21 March 2011 adopted 16th June 2011) (UNGPs) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>. UNGP 6 states that "States should promote respect for human rights by business enterprises with which they conduct commercial transactions"; See discussions from Olga Martin-Ortega and Claire M O'Brien, 'Public procurement and human rights: Interrogating the role of the state as buyer' in Olga Martin-Ortega and Claire O'Brien (eds), *Public Procurement and Human Rights: Opportunities risks and dilemmas* (Edwards Edgar Publishing, 2019); Claire O'Brien and Olga Martin-Ortega, 'The Role of the State as Buyer Under UN Guiding Principle 6' (University of Groningen Faculty of Law Research Paper Series No. 14/2018).

²² UNGPs, Principle 10.

²³ UN SDGs (n5), Target 8.7, Target 8.8, and Target 10.3 and 12.7.

²⁴ ILO, C094 - Labour Clauses (Public Contracts) Convention, 1949 (No. 94), Article 1(1).

²⁵ Ibid; Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart Publishing, 2017), 65 – 68.

²⁶ Labour Clauses (n24), Article 5.

rights in their public procurement frameworks. The extent to which the selected RDBs execute this in infrastructure procurement is analysed in the subsequent section.

3. RDBS AND THE PROMOTION OF WORKERS' RIGHTS IN THEIR PROCUREMENT FRAMEWORKS

3.1. Historical Development of the RDBs and their role in infrastructure development

The AfDB Group was established in 1963 with the mission to “spur sustainable economic development and social progress in its regional member countries (RMCs)”.²⁷ Reducing poverty, improving the living conditions of Africans and supporting the member’s economic and social development is at the heart of the AfDB’s mission and strategy.²⁸ One particular area recognised as having a significant effect on the three areas is the infrastructure sector. The AfDB acknowledges that infrastructure development in Africa accounts for 4% of its GDP and recognises a gap in Africa’s infrastructure development that should be remedied for economic growth to increase.²⁹ To remedy this gap in Africa, the AfDB’s strategy for 2013 – 2022 includes infrastructure development as one of its five operational priorities, with a plan to increase infrastructure projects’ financing to their regional member countries.³⁰

Similar to the AfDB, the ADB was established in 1966 to foster economic growth through rural development, provide assistance on food production and eradicate extreme poverty for its 68 members within Asia, the Pacific and further afield.³¹ Under the ADB strategy 2030, infrastructure development remains a key priority, with an annual estimate of \$1.5 trillion projected to be invested in infrastructure projects.³² Alongside financing infrastructure development is its increasing focus on social protection in ADB member countries.³³ We note that these areas of ADB’s priority (infrastructure development and social protection) are directly linked to the protection of workers’ rights in funded infrastructure projects.

²⁷ The AfDB was founded following an agreement signed by member states on August 14, 1963, in Khartoum, Sudan, which became effective on September 10, 1964. The AfDB group comprises of three institutions: the African Development Bank (ADB), the African Development Fund (ADF) and the Nigeria Trust Fund (NTF). See AfDB, ‘Mission and Strategy’ <<https://www.afdb.org/en/about/mission-strategy>> accessed 19 September 2021.

²⁸ Ibid.

²⁹ AfDB, ‘Operational priorities’ <https://www.afdb.org/en/about-us/mission-strategy/operational-priorities> accessed 19 September 2021. For example, between 1968 and 2021, the African Development Bank (AfDB) committed over \$ 10,522,393,466 on funding 498 water sanitation and supply infrastructure projects in several African countries. See AfDB, ‘Water Supply & Sanitation projects’, available at <https://projectsportal.afdb.org/dataportal/VSectorProject/show/E?query=&hi5Id=&offset=0&max=15&sort=starDate&order=desc> accessed 19 September 2021.

³⁰ Ibid.

³¹ ADB, ‘About ADB’ <https://www.adb.org/who-we-are/about> accessed 19 September 2021.

³² ADB, ‘Strategy 2030’ (July 2018) <https://www.adb.org/sites/default/files/institutional-document/435391/strategy-2030-main-document.pdf> accessed 7th August 2021. The ADB estimates an investment of \$22.6 trillion on infrastructure development between 2016 to 2030, with an annual average of \$1.5 trillion, split between water and sanitation (\$0.8 trillion), communication (\$2.3 trillion), transportation (\$7.8 trillion) and power (\$11.7 trillion).

³³ Ibid.

3.2. The AfDB Procurement Framework & Worker’s Rights

The AfDB procurement framework introduced in 2015 comprises four key documents: The Procurement Policy for Bank Group-Funded Operations (policy); Methodology for Implementation of the Procurement Policy of the AfDB (Methodology); Operations Procurement Manual for the AfDB (OPM); and the Procurement Toolkit (Toolkit).³⁴ As a mandatory requirement, all infrastructure projects financed in whole or part by the AfDB must comply with the procurement framework, except in exceptional circumstances when an alternative procurement framework may be used, if approved by the Bank.³⁵

3.2.1. The procurement principles

The AfDB procurement framework is underscored by its core principles of economy, efficiency, effectiveness, and equity.³⁶ Relevant to the discussion on workers’ rights is the principle of effectiveness, which is defined as “the ultimate achievement of specific results or outcomes taking into account Borrower socio-economic and other development objectives”.³⁷ While workers’ rights are not explicitly mentioned in this definition of effectiveness, it is a social objective that should be considered throughout the procurement process, especially in infrastructure procurements.³⁸

Additional considerations of sustainable procurement in the AfDB framework are outlined in Sections 8.10, 8.11 and 8.12 of the Bank’s procurement policy.³⁹ However, only Section 8.12 is relevant to workers’ rights. It states that Borrowers should:

develop and sustain demand for particular types of goods or production processes with characteristics that are considered necessary or desirable as part of their environmental and/or social policies...the Bank may agree, after assessment of the Borrowers’ environmental and social provisions in their procurement policies, bid qualification requirements and/or evaluation criteria that take into consideration requirements for ‘green’ or sustainable goods, works and consulting services and gender sensitivity.⁴⁰

A literal interpretation of the provision places the onus on Borrowers to implement relevant social and environmental objectives throughout the procurement process. This approach is advantageous as it does not limit the social objectives that Borrowers can promote, which may include racial inequality, gender inequality, human rights and, precisely workers’ rights.⁴¹

³⁴ AfDB, ‘New Procurement Framework’ (January 2016) <https://www.afdb.org/en/projects-and-operations/procurement/new-procurement-policy> accessed 1 August 2021.

³⁵ Ibid, AfDB Policy Section 4.3.

³⁶ Ibid, Section 3.2(c)

³⁷ Ibid; see other definitions of effectiveness in M Mbah, D Cahill and C Evans, ‘Tackling Human Trafficking in Governments Supply Chains: Legal Certainty & Effectiveness Issues Under the Australian Commonwealth Procurement Rules Model’ *Federal Law Review* (Forthcoming).

³⁸ Martin-Ortega and O’Brien (n21); Albert Sanchez-Graells, *Smart Public Procurement and Labour Standards* (Harts Publishing, 2018); Corvaglia (n25), 43 - 48.

³⁹ AfDB Policy (n34), Section 8.10.

⁴⁰ Ibid, Section 8.12.

⁴¹ Cristina Contreras, ‘A 360° Approach to Women’s Inclusion in Infrastructure’ in Olga Martin-Ortega and Laura Treviño Lozano (eds), *Beyond Building Green: Linkages and gaps in sustainable public procurement of*

Despite the flexibility of this provision, it is equally limiting because the lack of explicit reference to workers' rights could result in this social issue taking the backseat, with Borrowers focusing on green or environmental issues within the sector, or even other social issues, for example the rights of end-users, but not workers' rights.

Notwithstanding the limitation in Section 8.12, other provisions in the AfDB framework refer to workers' rights. For example, the Methodology indicates that Borrowers *may wish* to promote sustainable policies such as "labour laws to encourage fair wages" in projects funded by the Bank.⁴² While this is a positive step, the optional language of the provision detracts from its effectiveness as it does not take a mandatory approach in protecting workers' rights. It is also important to note that the AfDB sustainable procurement guidance (part of the Procurement Toolkit) explicitly refers to protecting human rights, decent work, living conditions and health and safety as part of the social objectives Borrowers *may* address through funded projects.⁴³ A holistic interpretation of these provisions arguably means that the reference to socio-economic' objectives under the principle of effectiveness indirectly encourages Borrowers to consider workers' rights in all funded projects, including infrastructure procurement.⁴⁴ However, as argued earlier, more could be achieved with tighter wording, making it mandatory for all funded projects to tackle the abuse of workers' rights in infrastructure procurements.

3.2.2. Procurement planning

Procurement planning is crucial to every procurement as it lays the foundations for the rest of the process.⁴⁵ For AfDB financed projects, planning aspects such as market analysis, project design and contents, and the consideration of sustainable procurement are developed during the project's identification, preparation, and appraisal cycle.⁴⁶ Borrowers intending to promote socio-economic objectives are encouraged to carry out a sustainable procurement assessment.⁴⁷ Compliance with the minimum health and safety standards and decent working conditions are examples of social objectives considered during the assessment.⁴⁸ This is significant to

infrastructure and human rights (Edgar, 2022), chapter 3; Teresa Medina-Arnaiz, 'Social considerations in Spanish public procurement law' [2011] P.P.L.R. 56; Teresa Medina-Arnaiz, 'Integrating Gender Equality in Public Procurement: The Spanish Case' [2010] J.P.P. 10(4), 541-563; Craig Carter, Richard Auskalis and Carol Ketchum, 'Purchasing from minority business enterprises: key success factors' (1999) *Journal of Supply Chain Management* 35 (1), 28-32; Rosemary Boyle, 'Disability issues in public procurement' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press, 2009), 310- 344; Martin-Ortega and O'Brien (n21).

⁴² AfDB Methodology (n34), Section 1.6.6.

⁴³ AfDB, 'Guidance Note on Sustainable Procurement', Available at https://www.afdb.org/sites/default/files/2020/12/18/guidance_note_-_sustainable_public_procurement.pdf, accessed 27 September 2021, para 25.

⁴⁴ Tim Stoffel, Carol Cravero, Annamaria La Chimia, Geo Quinot, 'Multidimensionality of Sustainable Public Procurement (SPP)—Exploring Concepts and Effects in Sub-Saharan Africa and Europe' (2019) *Sustainability* 11(22), 6352.

⁴⁵ Miriam Mbah and Ama Eyo, 'Beyond the 100 days: Strengthening subpart 22.15 prohibition of acquisition of products produced by forced or indentured child labor' *Public Contract Law Journal* (Forthcoming); Khi V. Thai, *International Handbook of Public Procurement* (Taylor and Francis, 2009), 11.

⁴⁶ OPM Part A (n34), Chapter C.

⁴⁷ Guidance Note (n43), para 23.

⁴⁸ *Ibid*, para 23 and 25.

workers' rights because health and safety and other working conditions form part of workers' right to fair and safe working conditions, which is crucial in infrastructures projects where workers' are exposed to dangerous equipment and environment. Carrying out a sustainability assessment during the project cycle means that the planning stage of the procurement process should not be the Borrower's first attempt at promoting workers' rights. Essentially, such an objective should have been considered, assessed, and approved by the Bank before Borrowers implementation in the bidding documents.

In addition to the Borrower's consideration of sustainability during the project cycle, workers' rights can be protected and promoted during the procurement planning process through the use of standard bidding documents (SBDs) developed by the AfDB. The SBDs contain crucial details such as instructions to bidders, qualification criteria, evaluation criteria, bidding forms, contracting conditions, and specific requirements.⁴⁹ Borrowers are prohibited from modifying the SBDs without prior consent from the Bank. With eight SBD templates provided by the Bank, five are relevant to the procurement of infrastructures.

Table 1 below outlines sections of the SBDs where workers' rights are directly or indirectly referred to.⁵⁰ A *prima-facie* glance at the table denotes that the AfDB actively addresses workers' rights in infrastructure procurement; however, the adequacy or effectiveness of such provisions is debatable. This section analyses the bidding forms (column D), with section 3.2.3 below discussing the qualification criteria, evaluation criteria, and contract conditions (column A-C).

⁴⁹ OPM (n34), A11.2.1- A11.1.3.

⁵⁰ The SBDs were assessed based on the explicit use of the following terms: workers' rights; Human Rights, Social provision or specific mentions of the type of labour conditions, e.g., child labour, forced labour, debt bondage, etc.

Table 1: Workers' rights in AfDB infrastructure SBDs.

Standard Bidding Documents (SBDs)	Sections of the SBDs that protect workers' rights			
	A	B	C	D
	Qualification criteria	Evaluation criteria	Contract conditions	Bidding forms e.g. ES form, Contractor's personnel code of conduct form.
Procurement for large works one envelope after pre-qualification	✓	✓	✓	✓
Procurement for large works one envelope without pre-qualification	✓	✓	✓	✓
Procurement for small works one envelope	✓	✓	✓	✓
Procurement for small works two envelope	✓	✓	✓	✓
Pre-qualification	✓	-	-	✓

Note:

✓ Means included

X Means not included in the SBD

- Means not applicable

The SBDs contain several bidding forms, which potential contractors are expected to submit alongside their technical and financial proposal. Relevant to the subject matter is the work requirement and the Code of Conduct for Contractor's Personnel' form.⁵¹ The work requirement specifies the scope of work, drawing, specification, and environmental and social (ES) requirements. Under the ES section, Borrowers must specify the environmental and social standards expected from contractors during contract performance. Social standards such as health and safety obligations, wages and conditions of labour, and management of hazardous materials are included in the ES section of the SBDs.⁵²

Borrowers must include the Contractor's code of conduct form, which regulates contractors' practices during contract performance.⁵³ The form stipulates that contractors must be committed to a healthy and safe working environment, be intolerant to gender-based violence, discrimination, report unsafe working environments and provide training courses related to these issues.⁵⁴ Beyond stipulating the conduct expected of contractors performing AfDB infrastructure contracts, the form outlines the consequences of violating the code, which include terminating the contract, and referral to an enforcement agency for criminal or civil proceedings.

The inclusion of these advantageous bidding forms in the SBDs strongly denotes that contractors which abuse workers' rights and thus, cannot certify such forms must be eliminated from the tendering process. Potentially, this reduces the abuse of infrastructure workers post contract award. It is critical to include these forms during procurement planning to ensure potential contractors self-eliminate upon reviewing the SBDs and for managing the practices or conducts of contractors during contract management.

3.2.3. Tendering

Borrowers must oversee the management of the tendering process, which includes the pre-qualification of bidders, evaluation of bids by following the evaluation criteria and the award of contract to the successful Contractor (s) based on the contract conditions. It is crucial to analyse these significant provisions within the context of workers' rights and infrastructure procurements.

Pre-qualification is used to limit the number of contractors invited to bid for an advertised opportunity, especially for large or complex projects such as infrastructures.⁵⁵ The sole purpose of this process is to determine the contractors that meet the Borrower's pre-disclosed qualification criteria, which involves assessing the firm's eligibility to participate, history of

⁵¹ See AfDB, *Standard Bidding Documents - Procurement for large works one envelope after pre-qualification*, <https://www.afdb.org/en/projects-and-operations/procurement/new-procurement-policy> accessed 20 September 2021, part 1 and part 2.

⁵² Ibid, 126.

⁵³ Ibid, 54.

⁵⁴ Ibid.

⁵⁵ Hemanta Doloi, 'Analysis of pre-qualification criteria in contractor selection and their impacts on project success' (2009) *Construction Management and Economics* 27(12), 1245 – 1263; Sue Arrowsmith, John Linarelli and Don Wallace Jr, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law 2000), 608.

non-performance, financial capability, and relevant experience.⁵⁶ The AfDB does not limit the number of pre-qualified firms that can be invited to bid. Thus, any contractor that meets the pre-qualification criteria must be invited to bid, with contractors that fail the criteria excluded from the process.⁵⁷ Under the eligibility criteria, applicants are required to disclose information on their non-compliance with any environmental or social obligations (including sexual exploitation and abuse and gender-based violence or health or safety standards) in the past five years.⁵⁸ It is argued that this provision can deter contractors who have violated labour laws from being qualified to participate in procurement for infrastructural projects.

Regarding the use of evaluation criteria to protect workers' rights, this is arguably the weakest aspect of the AfDB procurement framework because the provision only generically encourages Borrowers to include appropriate sustainable procurement criteria.⁵⁹ Despite the lack of explicit provisions, there is a flexibility that enables Borrowers to adopt criteria that address workers' rights in infrastructure procurements. For example, requiring contractors to submit social labels such as fairtrade labels, SA 8000 Social Accountability certification, ISO 45001 and other health and safety certifications that show contractors' development and maintenance of socially acceptable workplace practices.⁶⁰ Significantly, such labels and certifications should not restrict competition and should be relevant to the subject matter of the procurement.

The AfDB SBDs contain contract conditions relevant to infrastructure procurements and workers' rights.⁶¹ For example, the SBDs for large works prohibit contractors from engaging in forced labour, child labour, and discrimination of workers.⁶² Conditions also require contractors to recognise workers' rights to join or form a trade union and bargain collectively, institute a grievance mechanism, keep adequate records of hours worked, wages paid and personal details of all employees.⁶³ These clauses directly protect and promote workers' rights in infrastructure contracts. However, the effectiveness of the AfDB contract conditions is limited, as the protection offered is restricted to the contractors' workers and thus, excludes other workers in the supply chain. To address this limitation, we suggest that the contract conditions should contain a clause requiring contractors to include the same provisions in their subcontracts, irrespective of their level of involvement in the contract performance. .

3.2.4. Contract management

Contract management is the process of systematically and efficiently managing contract execution for maximum operational and financial performance.⁶⁴ Under the AfDB procurement framework, contract implementation and management provisions focus on the

⁵⁶ OPM (n34), D3.2.28.

⁵⁷ Ibid, D3.2.22- D3.2.24.

⁵⁸ See AfDB, *Standard Bidding Documents -Prequalification* (n34), pp 35 and 36.

⁵⁹ OPM (n34), A71.5 9(b), D4.1.

⁶⁰ Ibid, D4.2.31. Such label or certificate should be credible, internationally recognised and relevant to the subject matter of the procurement.

⁶¹ This is the SBD used by the Borrower to engage with the prime contractor.

⁶² See the SBD for large works (n51), Clause 9.4.13 – 20.

⁶³ Ibid.

⁶⁴ CIPS, 'Contract Management Guide' https://www.cips.org/documents/CIPS_KI_Contract%20Management%20Guidev2.pdf accessed 20th August 2021.

contracting arrangements and allocating risks and responsibilities.⁶⁵ There is no focus on monitoring contractors to ensure workers' rights are not abused during contract performance. This limitation to the AfDB framework arguably means that opportunities to protect workers' rights through contractual obligations, inspection and audit of contractors' performance are limited. We contend that this lacuna in the AfDB procurement framework could result in contractors adopting rudimentary standards of decency for workers performing infrastructural projects. Section 4.4 below discusses this issue further.

3.3. The ADB Procurement Framework & Worker's Rights

The procurement of goods, services and works financed in whole or in part by the ADB is regulated by the ADB procurement framework, which comprises of the procurement policy and the procurement regulation.⁶⁶ While the procurement policy generically outlines rules such as the core procurement principles, eligible countries, integrity, conflict of interest, and accountability, the procurement regulation details these issues and prescribes additional rules Borrowers must adhere to when procuring for goods, works, or services financed by the Bank. Similar to the preceding AfDB analysis, we discuss how the procurement principles, procurement planning, tendering, and contract management provisions in the ADB procurement framework address workers' rights and within the context of infrastructure procurements.

3.3.1. Procurement principles

Six core procurement principles underscore the ADB procurement framework. Borrowers must ensure that the procurement process is economical, efficient, fair, transparent, delivers quality outputs and promotes value for money.⁶⁷ Remotely relevant to the promotion of workers' rights is the principle of value for money. Essentially, when procuring under the ADB, Borrowers are required to "obtain optimal benefits through effective, efficient and economic use of resources...which may include life-cycle costing and socio-economic and environmental" objectives.⁶⁸ This ADB definition means that when determining value for money, Borrowers should consider financial and non-financial factors such as the human rights implications of the procurement, which include workers' rights.⁶⁹ Therefore, despite the lack of explicit reference to workers' rights in the ADB definition of VfM, this does not hinder Borrowers from promoting this objective, especially in infrastructure procurements.⁷⁰

⁶⁵ OPM (n34), D.5.

⁶⁶ ADB, *Procurement Policy: Goods, Works, Nonconsulting and Consulting Services* (July 2017); ADB, *Procurement Regulations for ADB Borrowers*, (July 2017). The procurement frameworks are supplemented by Guidance, standard bidding documents and instructions to staff amended in 2017. Available at <https://www.adb.org/business/operational-procurement> accessed 20 September 2021.

⁶⁷ ADB Policy and Regulation (n66), Sec.3 and Reg.1.4

⁶⁸ Ibid.

⁶⁹ Phoebe Bolton, 'Government Procurement as a policy tool in South Africa' [2006] JPP 6(3), 193-217.

⁷⁰ See discussions in section 3.2.1.

3.3.2. Procurement planning

Planning is essential in ADB financed procurements. For this reason, Borrowers must develop a procurement plan that carries out a full assessment of project activities, market analysis, project scale, risk assessment, capacity constraints, and the specific economic, social, and environmental objective the project purports to promote.⁷¹ The explicit inclusion of sustainable procurement at the planning stage suggests that Borrowers intending to protect workers' rights must, from the outset, specify this in the procurement plan submitted to the ADB for approval and included in the bidding documents issued to potential bidders. Despite this mention of sustainable procurement when developing the procurement plan, this is omitted in the guidance note issued by the ADB to guide Borrowers when developing the plan.⁷²

In addition to the provisions in the procurement framework, it is crucial to review how the ADB has prepared Borrowers to promote sustainability (specifically workers' rights) when tendering for infrastructure procurements. Similar to the AfDB analysis, we review the SBDs developed by the ADB to promote consistency and legal certainty for all funded acquisitions carried out by the Borrowers. The SBDs consists of nine documents, of which three of the SBDs are analysed in respect to infrastructure procurements. Table 2 below provides an overview of how workers' rights are addressed in the SBDs provisions, with further discussions on each provision in section 3.3.3.

⁷¹ ADB Regulation (n66), Appendix 1.

⁷²ADB, 'Guidance note on strategic procurement planning' (June 2018) Available at <https://www.adb.org/documents/guidance-notes-on-procurement> accessed 22 September 2021.

Table 2: Workers' rights in ADB infrastructure SBDs

Standard Bidding Documents (SBDs)	Sections of the SBDs that protect workers' rights			
	A	B	C	D
	Qualification criteria	Evaluation criteria	Contract conditions	Bidding forms e.g. employer requirements and works requirement
Procurement of works - Small works (single-stage one and two envelopes)	X	✓	✓	X
Procurement of Works (with or without pre-qualification)	X	✓	X	X
Prequalification	X	-	-	X

Note:

- ✓ Means included
- X Means not included
- Means not applicable

3.3.3. Tendering

The ADB tendering stage covers several issues relating to pre-qualification, evaluation criteria, and post-qualification requirements. Regarding pre-qualification, ADB potential contractors are assessed against a predefined and advertised qualification criterion to determine if they possess the experience, financial and technical capability to perform the contract successfully.⁷³ At the end of the pre-qualification process, contractors that do not pass the qualification criteria must be excluded from the tendering stage.⁷⁴ Unlike the AfDB framework, the ADB framework and SBDs do not assess contractors' integrity, ethical standards or social obligations.⁷⁵ Thus, contractors that violate workers' rights (and other human rights) can pass the qualification stage and potentially be awarded the contract if they possess the experience, financial and technical capability. The lack of adequate pre-qualification criteria that address workers' rights in infrastructure procurement is a limitation to the ADB framework and is discussed further in section 4.2 below.

Regarding evaluation criteria, ADB Borrowers must use criteria that will achieve value for money.⁷⁶ As value for money extends to promoting socio-economic objectives, this arguably means that relevant criteria that will enable Borrowers to protect workers' rights can, in principle, be used to examine bids.⁷⁷ However, such criteria must be proportionate, appropriate, advertised in the bidding documents and be quantifiable.⁷⁸ Additionally, ADB Borrowers are prohibited from using labels unless they are used to clarify an "incomplete specification".⁷⁹ Thus, labels that will indicate contractors adherence to health and safety and social standards and advocated in the AfDB framework should not be included in ADB procurement unless these satisfy the incomplete specification standard. From the analysis of provisions related to the evaluation criteria, it is evident that there is little indication of how workers' rights can be addressed in financed infrastructure procurement. This limitation to the ADB framework is discussed in section 4.3 below.

In addition to the pre-qualification and evaluation criteria, contract conditions are crucial aspects of procurement. These define the scope of work to be performed and specify the rights, obligations, and liabilities of the Borrower & Contractor.⁸⁰ The ADB adopts an inconsistent approach to workers' rights in infrastructure contracts, as reflected in the analysed SBDs.⁸¹ Essentially, only the SBD for small works includes contract conditions that prohibit child labour and forced labour, promotes equal opportunity, fair treatment of workers, non-

⁷³ ADB Regulation (n66), Appendix 3.

⁷⁴ Ibid.

⁷⁵ See discussions in section 3.2.3.

⁷⁶ ADB Regulation (n66), Appendix 5.

⁷⁷ See discussions in section 3.3.1.

⁷⁸ ADB Regulation (n66), Appendix 5.

⁷⁹ Ibid, Appendix 3.

⁸⁰ Ibid, Para 52 and 53.

⁸¹ See Table 2 above.

discrimination, and workers' right to form and join trade unions.⁸² The SBD for large procurement of works (with or without pre-qualification) does not include such contractual conditions.⁸³ This inconsistent approach could result in the abuse of workers' rights by contractors and subcontractors awarded substantial contracts to build large infrastructures. It is, therefore, recommended that the ADB amend the SBD for large works to include clauses provided in the SBD for small works. This would ensure that contractors and subcontractors are contractually bound to comply with the clauses when performing infrastructure contracts.

3.3.4. Contract management

The management of ADB financed contracts is crucial in achieving value for money, especially for infrastructure contracts, which require a large sum, different construction workers, several contract requirements and must be performed according to national and international construction standards.⁸⁴ Similar to the AfDB, promoting workers' rights at this stage of the procurement process is not adequately addressed in the ADB framework. This limitation could result in contractors violating workers' rights in several ways.

4. LIMITATIONS IN THE RDBS PROCUREMENT FRAMEWORKS REGARDING WORKERS' RIGHTS AND HOW TO ADDRESS THEM

The analysis of the RDBs procurement frameworks through the procurement process has identified measures that require Borrowers to protect and promote workers' rights, especially in infrastructure procurements. While the AfDB and ADB procurement frameworks vary in their approach, the analysis carried out in section 3 has identified several limitations in both frameworks that hinder the protection of workers' rights in funded infrastructure procurements. Below, we discuss four significant limitations and offer recommendations to improve the RDBs frameworks and SBDs.

4.1. The impact of discretion

Like many multilateral financial institutions, the RDBs have significantly influenced Borrowers to reform their public procurement systems.⁸⁵ This is often a result of conditions attached to the financial agreement or the institutions providing leadership through their procurement frameworks. For example, RDBs frameworks prohibiting unethical and illegal practices such as corruption, fraud and collusion has led to some Borrowers adopting the same standard.⁸⁶ The influence that RDBs have on Borrowers makes it crucial that their procurement frameworks lead by example.

⁸² See ADB, *Bidding Documents for Works (Single-Stage: One-Envelope)*, section 7. Available at <https://www.adb.org/documents/procurement-small-works-guide> accessed 22 September 2021.

⁸³ See ADB, *Bidding Documents for Works following Prequalification*, section 7 and 8. Available at <https://www.adb.org/documents/procurement-large-works-guide>. Accessed 22 September 2021.

⁸⁴ ADB Regulation (n66), Appendix 8.

⁸⁵ Williams-Elegbe (n11).

⁸⁶ Sope Williams-Elegbe, 'A perspective on corruption and public procurement in Africa' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), 336-369.

While the RDBs exhibit a firm approach against corrupt practices, similar attention has not been afforded to addressing workers' rights, as discussed in section 3. Interestingly, the RDBs procurement frameworks appear to take a discretionary approach by broadly encouraging Borrowers to implement sustainable objective(s) in funded projects.⁸⁷ Essentially, this means that protecting workers' rights in infrastructure funded projects is at each Borrower's discretion. The discretion afforded to Borrowers resulted in vague RDBs provisions that offer little guidance throughout the procurement process, from planning to contract management. Notably, the AfDB framework offers some guidance through its sustainable procurement note and, the ADB framework provides generic and vague provisions.⁸⁸ While the RDBs discretionary approach may offer some flexibility to Borrowers in choosing which national objective to promote in funded acquisitions, arguably, this hinders the consistent protecting of workers' rights in infrastructure procurements. This is because the discretionary power will result in disparities, with some Borrowers prioritising workers' rights while others may not.

A firmer and consistent approach to protecting workers' rights in funded projects is needed, especially in infrastructure projects, which have unique peculiarities. This approach will contribute to the RDBs and their Borrowers' aspirations to achieve the SDGs, mainly, Goals 8, 9 and 12, thereby reducing human rights abuses in the global supply chain.⁸⁹ Doing this will also support the RDB's collective goal of eliminating poverty and increasing the social protection of citizens, as protecting workers' rights could increase contractors payment of decent wages and fewer occupational injuries due to better working conditions.

In taking a firmer approach, the RDB's procurement frameworks should explicitly refer to workers' rights as an example of sustainable objectives Borrowers should promote in funded projects, including infrastructure projects. The explicit provisions could be supported by guidance to assist Borrowers in implementing this objective throughout the procurement process. We offer examples of how the RDB frameworks can explicitly address workers' rights in sections 4.2, 4.3 and 4.4 below.

4.2. Addressing workers' rights through Prequalification Criteria

The chapter's analysis of the RDBs procurement frameworks identified gaps in the promotion of workers' rights in the qualification stage. As shown in Tables 1 and 2 above, the RDBs have not fully utilised the pre-qualification criteria to effectively address workers' rights.

Currently, the RDBs pre-qualification of bidders focuses primarily on the bidders' financial capability, non-performance and experience.⁹⁰ Consequently, bidders' violation of labour laws, human rights law or involvement in criminal activities other than fraud and corruption is omitted from the frameworks.⁹¹ The missed opportunity to exclude contractors with judicial or administrative orders for engaging in modern slavery or violating labour laws and/or

⁸⁷ ADB Regulation (n66), Appendix 9; AfDB Guidance (n43), para 10.

⁸⁸ See discussions in section 3.2.1 and 3.3.1.

⁸⁹ UN SDGs (n5).

⁹⁰ See discussions in section 3.2.3 and section 3.3.3.

⁹¹ AfDB Policy (n34), Section 6; ADB Regulation (n66), Appendix 7 & 8.

collective agreements means tainted contractors may be awarded contracts where such practices continue.

The RDBs can draw inspiration from a regional procurement framework such as the European Union.⁹² For example, Article 57 of Directive 2014/24/EU permits member states to exclude contractors convicted of human trafficking and child labour and have violated Article 18(2).⁹³ Article 18(2) requires member states to ensure “economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X”.⁹⁴ While the EU Directives do not list the applicable Union and national labour law, international labour provisions such as ILO convention 87, 98, 29, 105, 138, 111, 100 and 182, are listed in Annex X.⁹⁵ Additionally, contractors that have violated collective agreements are excluded under Article 57.⁹⁶ The EU approach is advantageous because it offers a direct and explicit consideration of workers’ rights (in infrastructure procurements) and, extends beyond national and regional measures.

As workers’ rights are directly considered in the EU framework, arguably, nothing precludes the RDBs from prescribing that Borrowers implement pre-qualification criteria can assess contractors’ and subcontractors commitments to workers’ rights. For this reason, it is recommended that the RDBs procurement frameworks be amended to explicitly include pre-qualification criteria that assess compliance with national, regional and international labour laws or conventions. This amendment should also be reflected in the pre-qualification section of the RDBs Standard Bidding Documents. While Borrowers could adopt any appropriate means of proof to exclude contractors under this ground, they could require contractors to certify that they have not violated any national, regional or international labour laws promoting workers’ rights. Alternatively, contractors can submit health and safety certificates or/and obtain a letter of clearance from their national administrative body to prove compliance with labour laws. Such certification should be extended to any subcontractors engaged in the contract performance, irrespective of their level of performance.

4.3. Addressing Workers’ rights through Evaluation Criteria

Despite the RDBs encouragement of Borrowers to promote sustainable objectives through relevant evaluation criteria, the frameworks do not provide examples of criteria that can promote the various objectives. This should be addressed by providing detailed examples of appropriate evaluation criteria to promote social objectives such as workers’ rights. Regarding workers’ rights in infrastructure procurements, in addition to or instead of using social labels accompanied by ‘or equivalent’, Borrowers should adopt award criteria that evaluates

⁹² Directive 2014/24/EU.

⁹³ Ibid, Article 57(4) (a) and Article 18(2).

⁹⁴ Ibid, Article 18(2). See Albert Sanchez-Graells, ‘Regulating Substitution Between Labour and Public Procurement Law: The EU’s Shifting Approach to Enforcing Labour Standards in Public Contracts’ (2018) *European Public Law* 24(2), 229 – 254.

⁹⁵ Directive 2014/24/EU, Annex X.

⁹⁶ Ibid, Article 57.

contractors trading conditions and occupational health and safety practices.⁹⁷ These workers' related evaluation criteria were adopted in the case study of Australian cleaning contracts and could be extended to infrastructure procurements.⁹⁸ In that case study, all contractors intending to provide cleaning services to the Victorian Government Schools were required to demonstrate that they meet the labour standard criteria.⁹⁹ The criteria required each contractor to provide evidence that it meets occupational health and safety standards, adopts adequate human resource practices, and complies with the relevant industry awards.¹⁰⁰ The assessment of labour and additional criteria determined contract award. Implementing similar criteria in infrastructure contracts is advantageous as it will deter contractors with unethical trading/labour conditions, poor health and safety practices and those that does not meet the industry standard from participating or succeeding in the contract opportunity.

While using evaluation criteria in this manner is highly advocated, it could be problematic for Borrowers to assess contractors' trading conditions outside their jurisdiction.¹⁰¹ Additionally, the requirement may indirectly restrict competition as contractors in countries with lower labour standards than the Borrower may be deterred from participating in the RDBs opportunities.¹⁰² With these potential difficulties noted, we argue that Borrowers should require a description of contractors trading conditions to be certified by a statement of truth. Furthermore, social labels must be used with the term 'or equivalent', as stated in the RDB procurement frameworks. Concerning the restriction of competition, it is accepted that a trade-off can occur due to Borrowers promoting sustainable objectives.¹⁰³ In this instance, the trade-off is between the promotion of competition and promoting workers' rights. We argue that the latter should take precedent as it involves the livelihood and rights of workers. Moreover, this recommendation will indirectly encourage contractors to adopt a higher standard of trading conditions than stipulated in their host country.

4.4. Addressing Workers' rights during contract management

The discussions in sections 3.2.4 and 3.3.4 highlighted that during contract management, the RDBs procurement frameworks do not offer sufficient on protection and promotion for workers' rights during contract performance. Despite this position, we recognise that the RDBs may have other mechanisms which attempt to protect workers' rights, including during the execution of infrastructural projects.¹⁰⁴ However, RDBs can do more to improve these

⁹⁷ These award criteria are permitted under Directive 2014/24/EU, Article 67; Abby Semple, 'Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements' (2017) 12 *Eur Procurement & Pub Private Partnership L Rev* 293.

⁹⁸ John Howe and Ingrid Landau, 'Using public procurement to promote better labour standards in Australia: A case study of responsive regulatory design' (2009) *Journal of Industrial Relations* 51(4), 575–589.

⁹⁹ *Ibid.*

¹⁰⁰ Howe and Landau (n 98)

¹⁰¹ Sanchez-Graells (n94).

¹⁰² *Ibid.*

¹⁰³ Geo Quinot, 'Promotion of social policy through public procurement in Africa' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), 370 – 390.

¹⁰⁴ See generally, Daniel Bradlow and Andria Fourie, 'The Multilateral Development Banks and the Management of the Human Rights Impacts of their Operations', in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business*, (Edward Elgar, 2020), 315-333; International Trade Union Confederation, 'The

measures. First, similar to what occurs in relation to sanctions for integrity issues, RDBs could take a cross-debarment/sanction approach towards contractors for breach of worker's rights, identified during the contract management of infrastructural projects.¹⁰⁵ Further, Borrowers should encourage contractors and subcontractors to educate workers on their rights, as this will provide workers with improved knowledge on their rights and hold employers accountable where such rights are violated. Such training may also lead to improved monitoring and detection of violations of such rights (through whistleblowing), during contract management, thus enhancing protection for workers' rights.

5. CONCLUSION

The RDBs recognise the significance of sustainability and infrastructure development in improving the lives of citizens through economic growth, improvement of services and social protection that results in the elevation of poverty and a better society. However, promoting workers' rights as a sustainable objective in funded infrastructure procurements has not been effectively addressed in the RDB's procurement frameworks. While the AfDB procurement framework has adopted some provisions that directly address workers' rights during pre-planning, pre-qualification, and contract award, significant limitations remain in using evaluation criteria and contract management in infrastructure procurements. In contrast to the AfDB framework, the ADB procurement framework offers few provisions that protect workers' rights as many provisions generically call for Borrowers to promote sustainable procurement. To remedy these limitations in the RDB procurement frameworks, the chapter has offered recommendations that will contribute to protecting and promoting workers' rights in all funded acquisitions, including infrastructure procurements.

Unfortunately, the examined RDBs are not alone in the inadequate protection of workers' rights in funded acquisitions. Other RDBs such as the Inter-American Development Bank and the European Bank of Reconstruction Development may offer similar protection.¹⁰⁶ Further studies on these international financial institutions are needed to highlight specific limitations to their procurement frameworks. However, it is certain that for the RDBs to achieve their mission of eliminating poverty through infrastructure development, protecting and promoting workers' rights is critical to the mission. Therefore, the limitations exposed in this chapter must be addressed for success to be met.

labour standards of the multilateral development banks: A trade union guide, https://www.ituc-csi.org/IMG/pdf/2019-12_labour_standards_multilateral_development_banks-en.pdf; AfDB, 'Independent Review Mechanism', available at <https://www.afdb.org/en/about-us/organisational-structure/independent-review-mechanism-irm>; AfDB, 'Integrated Safeguards System - Policy Statement and Operational Safeguards', available at <https://www.afdb.org/en/documents/document/afdb-integrated-safeguards-system-policy-statement-and-operational-safeguards-34993>; ADB, Accountability Mechanism, available at <https://www.adb.org/who-we-are/accountability-mechanism/main> accessed 29 September 2021.

¹⁰⁵ AfDB, ADB, EBRD, IDB and World Bank, *Agreement for Mutual Enforcement of Debarment Decisions*, available at [http://crossdebarment.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/\\$FILE/cross-debarment-agreement.pdf](http://crossdebarment.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/$FILE/cross-debarment-agreement.pdf), accessed 23 September 2021.

¹⁰⁶ Williams-Elegbe (n11).