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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—the use of framework agreements in public procurement

Note by the Secretariat

Addendum

Contents

[*Chapters I to IV are published in A/CN.9/WG.I/WP.44*]

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V. The operation of framework agreements

A. Procedures for concluding framework agreements

1. Further details of issues arising in the use and operation of framework agreements are set out below. However, research indicates that these matters are addressed in many cases by regulation and other delegated legislation, which in many cases is not publicly available. This review therefore focuses on those systems for which the main detail and commentary are publicly available.

2. If framework agreements are concluded under general procurement legislation, the procurement method to select the suppliers for admission to the framework agreement will be chosen in accordance with the normal rules governing the award of procurement contracts. Provisions can also be made in a procurement system for framework agreements as a separate procurement method, as is the case, for example, in the United States.[1]

3. It is likely, however, the types of recurrent purchases for which framework agreements are commonly used will dictate the use of an open and competitive procurement method (that is, under the Model Law, tendering proceedings or the main method for the procurement of services). The conditions for restricted tendering proceedings may sometimes apply, but those for the other methods of procurement set out in the Model Law (two-stage tendering, request for proposals, and competitive negotiation, or their equivalents in other regimes in either case) may be less likely to do so, since they are designed for situations in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings.

4. Following the conclusion of the procurement proceedings, the procuring entity and supplier(s) enter into a framework agreement with one or more suppliers. The agreement may take the form of a contract divided into lots. There may be one contract concluded with all suppliers, or individual agreements between the procuring entity and each supplier (the latter case would allow for different terms, such as prices, among the suppliers).

5. Although there is competition in most systems to be admitted to the framework agreement, the extent of the competition (in the sense of how much competition) varies from system to system.

6. Similarly, whether or not there is competition when subsequent purchase orders are placed also varies from none to the equivalent of a tendering proceeding. Framework agreements fall into two main categories: those that involve a competitive selection of suppliers in the first phase but not in the second phase of the award process, and those that involve some degree of competitive selection of suppliers in both phases.

7. Further differences arise in the extent to which the various regimes in existence permit (a) amendments to the terms, conditions and specifications set out in the invitation to tender, and (b) the admittance of further suppliers to the framework agreement during its term.

B. Single-supplier agreements

1. Phase one of the award process

8. The simplest form of a framework agreement is one that is concluded with one supplier following tendering proceedings, and orders are subsequently placed in accordance with the terms and conditions laid down in the framework agreement. The framework agreement therefore resembles a normal procurement contract, except that there will be an interval between the awarding of the framework itself and the placing of orders for the goods, works or services under it. This type of framework is close to the definition of an IDIQ.

9. The selection of the supplier will therefore be made using the normal criteria in accordance with the relevant procurement procedure. This requirement is found in many of the jurisdictions in Africa, Asia and the Americas described in section III of A/CN.9/WG.I/WP.44, and in article 32 (2) of EU Directive 2004/18/EC, which provides that the first phase award under a framework agreement must be effected using the award criteria required under the provisions of article 53 of the Directive.

2. Phase two of the award process

10. Article 32 (3) of EU Directive 2004/18/EC continues that the second phase award should be made "within the limits of the terms laid down in the framework agreement" without reopening competition, but that the procuring entity "may consult" the supplier in writing, "requesting it to supplement its tender as necessary" at phase two of the award process. This provision seeks to enable more precise terms for a particular purchase order to be established—for example, the deadline for completing a consultancy project, or the methodology to be used.[2] This type of agreement may include a framework agreement that provides for revision of tender prices according to a pre-established mechanism or formula, but which does not involve discretion on the part of the supplier, for example where prices can be revised by the amount of inflation or other external benchmark.

11. The Directive expressly adds, however, that particularly in this circumstance, "[w]hen awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement". Any such amendments must therefore be based on the original specification (which might, in the above examples, refer to a requirement to complete in a reasonable time, or to the need for the procuring entity's approval of the supplier's proposed methodology).[3] In other systems (including that in Burkina Faso, for example), orders placed under the framework agreement may refine specifications as necessary.

3. Issues arising in single-supplier agreements

12. Concerns expressed relating to single-supplier agreements include the potentially anti-competitive effect of excluding the procurement that is covered by the framework agreement from further competition during the course of the agreement, and that the security of supply may not be assured.

13. The flexibility given to amend specifications in the second award phase could also be at risk of abuse.

14. These issues, which also arise in the context of multi-supplier agreements, are discussed in paragraphs 36 to 43 below.

C. Multi-supplier agreements

1. Introduction

15. Multi-supplier agreements may be closed (that is, no further suppliers may be admitted to the framework agreement after phase one of the award process, which is the position in the EU), or open (that is, further suppliers may be admitted to the framework agreement after phase one of the award process, which is the position in the United States). In the case of closed framework agreements, phase two of the award process may or may not be competitive.

16. The initial invitation to tender in such multi-supplier framework agreements may include a request for a concrete proposal for anticipated orders, the assessment of which will form part of the evaluation of the tenders or responses concerned.

2. Phase one of the award process

17. Procurement regimes making provision for multi-supplier framework agreements vary widely as regards the selection of suppliers at this first phase of the award process. The main difference is whether all or merely some qualified suppliers should or may be admitted to the framework agreement.

18. In the EU, for example, article 32 (2) of Directive 2004/18/EC provides procuring entities "shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53."

19. This provision implies that the procuring entity may not admit all compliant suppliers to the framework, regardless of the number, but must make a selection based on the award criteria. It then continues in article 32 (4) that at least three suppliers must be admitted to the framework, where there are sufficient suppliers that satisfy the selection criteria and/or sufficient "admissible tenders which meet the award criteria". Similar provisions are also found in other systems (such as in Malawi). This type of framework agreement is closed after the framework agreement is concluded.

20. In the United States, on the other hand, there is a statutory preference for multi-supplier framework agreements, awarded following a competition under the FAR or general federal procurement system. Tenders are assessed in terms of price, quality and the qualifications of tenderers when the framework agreement is awarded, but the legislative regime seeks to maximize competition for individual purchase orders (known as task and delivery orders) that are issued under IDIQs.[4]

3. Phase two of the award process

(a) General remarks

21. It is common under more complex framework agreements with several components or variables that the identity of the supplier whose offer will turn out to be the lowest-priced or lowest evaluated when a purchase order is placed not to be known at the time the framework agreement is concluded. For example, where the framework agreement covers more than one product (for example, a range of computer equipment), not all suppliers are able to offer all products, and the best price for each product may be offered by different suppliers. Further, in the case of last-minute services such as travel services, speed of delivery can be vital. For practical reasons, it may also be desirable to allow suppliers to revise their prices and other terms of their tenders, and to allow the procuring entity to refine the specification to provide details that were not known at the time the framework agreement was made (such as the time of completion of a consultancy project), or to accommodate changing requirements. There will, in such circumstances, be a review of offer components or a second phase competition to identify the best supplier when the individual purchase order is made.

(b) Award of purchase orders without second phase competition

22. Article 32 (4) of EU Directive 2004/18/EC envisages two alternative procedures for the call-off of suppliers for a multi-supplier framework agreement. Under the first alternative, it is provided that the call-off is made "by application of the terms laid down in the framework agreement without reopening competition."[5] (The second alternative involves second phase competition, and is examined in the next section, below.) As is the case with single-supplier agreements set out above, the procuring entity may allow the supplier to supplement its tender in writing.

23. In the United States, under the MAS, suppliers are selected from those admitted to framework agreements using either competitive approaches (discussed in paras. 29 and 30 below), or one of two main non-competitive approaches for purchases under certain thresholds:[6]

(a) For very small purchases—those under US$2,500—"micro-purchase" orders may be placed with any vendor admitted to the framework agreement.[7] Although the rules call for agencies to use MAS vendors when making purchases under $2,500, in principle buying agencies can use any supplier, whether or not admitted to the framework agreements, as these "micro-purchases" generally fall outside almost all regulatory requirements;[8]

(b) For orders above the micro-purchase threshold noted above, purchasing entities must choose the framework agreement supplier offering the best value, per a very broad set of evaluation criteria.[9] For MAS purchases, generally entities must review the prices of at least three schedule suppliers—chosen by the procuring entity—or may review the General Services Administration's electronic catalogue (see, further, para. 34 below).

24. Other systems for the selection of suppliers without second-phase competition include rotation of suppliers and unspecified means. A further system is a cascade system, an example of which is found in Brazil, where purchases must be made from the original winning supplier unless that supplier cannot supply the

requirement.[10] These means of selection may involve risks to competition and transparency, particularly if the second-phase selection method is not required to be set out in the solicitation documents.

(c) Award of purchase orders with second phase competition—systems not permitting ongoing revision of offers and the changing of specifications

25. EU Directive 2004/18/EC, in article 32 (4), provides for competition in the second phase, "where not all the terms are laid down in the framework agreement".[11] It has been observed that it is possible that such terms might even include the price: under the EU Directive 2004/18/EC the price need not necessarily be established in the framework agreement itself.[12]

26. The parties admitted to the framework agreement are invited to compete for the purchase order concerned "on the basis of the [terms laid down in the framework agreement] and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement".[13] Although all those suppliers within the framework agreement "capable of performing the contract" are to be invited in writing to participate (article 32 (4)(a)), procuring entities are not obliged to include all those admitted to the framework agreement—for example, if particular suppliers cannot supply the precise products at issue or in the time-frame envisaged. (The suppliers' offers in response are also to be presented in writing, unless the procuring entity decides to hold the second phase competition using an electronic reverse auction, as envisaged under article 54 (4)).

27. Whatever the method of conducting the second phase of the award process under the Directive, the basic terms of the framework agreement cannot be renegotiated, and nor can the specifications used in setting up the framework be substantively changed. What is permitted is to supplement or refine the basic terms or specification to reflect particular purchase orders.[14] Importantly, procuring entities must "award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement" (emphasis added), and not on the basis of the revised specifications (article 32 (4)(d)). How the award criteria are to be applied to the refined specifications is not specified.[15]

28. In France, multi-supplier frameworks with competition in the second phase have been used where necessary because of volatile product prices, rapid obsolescence of products, certain cases of urgency and certain cases involving research.[16] In general, these frameworks have been operated in accordance with the usual rules of the Code on Public Procurement (and the then current EU Directives). It was specified that entities might limit the number of suppliers selected at the first phase. For individual purchase orders that fell outside the relevant EU thresholds (applying the aggregation rules, or arrangements intended generally only for occasional or very low-value purchases), procuring entities could select from between the suppliers without second phase competition. It is not clear whether these provisions will be retained when France implements the new EU Directives.

29. In the United States, when U.S. Defence Department agencies purchase services worth over $100,000 under IDIQ contracts, they must follow more extensive competitive rules. For General Services Administration MAS contracts,

for example, purchasing entities must gather at least three quotations before selecting a vendor—simply reviewing three competitors' price lists is not sufficient.[17]

30. The procuring entity in the United States may alternatively hold a "mini-tender" competition among framework contract holders (on both MAS and other IDIQ contracts); if so, the suppliers admitted to the framework agreement must be afforded a fair opportunity to compete.[18] Alternatively, the acquiring agency may simply demand deeper discounts or other concessions from the likely vendor. For orders above a certain level (the level varies by contract), procuring entities must generally seek offers and deeper discounts from additional suppliers. The procuring entities must then negotiate with the supplier that appears from the mini-tender to offer the best value.[19] There is no equivalent to the European Union's prohibition on significant changes to the terms or conditions or specifications in the initial tender, and so the system is also close to that described in the next section.

(d) Award of purchase orders with second phase competition—systems permitting ongoing revision of offers and the changing of specifications

31. Under such framework agreements, which are in essence a refinement of the type set out in the previous section, suppliers may revise their tenders at any time (without a new tender phase), and the procuring entity chooses the best offer existing at the time of a particular order, possibly refining the specification as it does so.[20] Observers have noted the advantages of such systems, including that the costs of full re-tendering in such circumstances might be disproportionate and the use of frameworks consequently could be seen to be cost-effective. It is also common that this type of system is open, such that new suppliers can be admitted to the framework agreement at any time, similar to the regime under the MAS in the United States.

32. This type of system may take the form of an electronic catalogue, or a electronic purchasing system, in which procuring entities can search for suppliers' current prices. Such facilities enable prices to be changed regularly, and their increasing use (which also help reduce the transaction costs involved in changing suppliers) has provided more impetus for the use of framework agreements generally. Electronic catalogues therefore allow procuring entities to select goods and services swiftly, while still exerting competition.[21]

33. Such systems may also be useful in the procurement of commodities, for which the price is determined by the level of demand, such as electricity, and for information technology products, which constantly change and for which improvements are frequently brought out. In these circumstances, the best value for money can be obtained by assessing the current prices of different suppliers at regular intervals, without the costs of full-scale competition for each purchase order. Similarly, these systems may be useful for urgent purchase orders, as a preferential method to competitive negotiation or single-source procurement, and one that may ensure security of supply (such as accommodating "back-up" suppliers for urgent needs).

34. An online electronic catalogue known as GSAA advantage operates in the United States, and is also used for some MAS contracts.[22] Suppliers are admitted to the system on the basis of generic specifications at any time, and thereafter

procuring entities can compare features, prices, and delivery options for the items to be procured, configure products and add accessories. Suppliers are required to upload their schedules pricelist and their discounts from those prices for GSA purchases to the system, and can lower their contract prices at any time.

35. EU Directive 2004/18/EC also makes provision for what are referred to as "dynamic purchasing systems",[23] which must be operated through electronic means, for commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority.[24] These systems differ from classical framework agreements under the Directives in that they permit a system that is ongoing (subject to a four-year duration in normal circumstances), open to all qualified suppliers, and to which new suppliers can be added (which means that the systems is not binding as between the procuring entity and the initial suppliers). The rules provide that tenders can be altered at any time, and that there must be a second phase competition for each specific contract. Also, unlike in framework agreements, before issuing the invitation to tender, a procuring entity must publish a simplified contract notice inviting all interested suppliers to submit an indicative tender and a procuring entity may not proceed with tendering until it has completed evaluation of all the indicative tenders received within a fixed time limit. Only then a procuring entity may invite all tenderers admitted to the system to submit a tender. The dynamic purchasing system is a recent introduction, and is in the process of implementation, so that its operation in practice has not yet been tested. However, initial comments have indicated that the transparency advantages of the procedural requirements for the second phase of the award process may operate as a disincentive to their use.[25]

4. Issues arising in the operation of multi-supplier framework agreements

36. As regards framework agreements without second phase competition, observers have commented that although these types of frameworks are efficient, as they involve the application of the terms of the framework agreement in the second phase without further competition (or further formality, such as advertising under many regimes), risks to competition do arise. Specifically, competition and the number of suppliers are artificially restricted and there is a risk that prices are kept artificially high and inflexible, and there are risks to transparency as set out above.[26]

37. As regards framework agreements with second phase competition, regulations do not provide for how to ensure competition in the second phase of the award both under the EU Directives and in the US system. The EU Directives do not make detailed provision for procedures to award of individual purchase orders, though there is a general duty on procuring entities to treat suppliers equally and without discrimination.[27] In the United States, regulations simply state that suppliers at the second phase must be afforded a "fair opportunity" to compete.[28]

38. Under the EU Directives, no minimum time limit for seeking offers from suppliers admitted to the framework is specified. The text states that this time limit must be "sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders" (article 32 (4)(b)).

39. In Armenia, for example, regulations address the procedural aspects of the second phase: the period for each stage are set in numbers of days, under which the procuring entity places order electronically or using traditional means of communication, and supplier responds with a confirmation of the order, which is then effected.[29]

40. Also, assessing the lowest-priced or evaluated offer may be complex. Under the EU Directives, flexibility is provided such that the award is made "on the basis of the award criteria set out in the specifications of the framework agreement." EU guidance on the interpretation of this provision notes that award criteria do not have to be the same as those used for the conclusion of the framework agreement itself.[30]

41. Observers have therefore commented that the theoretical advantages of second-phase competition are not always present in practice and, indeed, that second-phase competition may be inadequate. For example, an audit conducted in the United States in 1999, found that 53 per cent of purchase orders were awarded without competition and only 12 per cent of those orders would justify a lack of competition.[31] A further report found that efforts to provide a fair opportunity to compete at the second phase of the award process as the system requires varied considerably across six organizations reviewed (with single source awards being made in nearly two-thirds of cases by volume and one-fifth by value in one case, and a recommended or suggested supplier being nominated in others, with the result that only that supplier presented an offer). Observers have cited various reasons for such non-competitive second-phase awards, including continuity of supplier (initial low-value awards being followed by others of greater value), practical considerations such as timing and lack of adequate notice favouring incumbent contractors, collusion, biased or inadequate technical specifications and inadequate assessment of prices submitted.[32]

42. Further, where a few suppliers participate in the second phase of the award process, there is a risk of collusion that has been observed to take effect as suppliers "taking their turn" to compete or not compete.

43. Observers have also commented that the ability to vary specifications increases the risks of improprieties. They have also cited instances of purchases made beyond the scope of the framework agreements as specifications change, and also in that rendering outline terms of a specification more precise may in fact involve a substantive amendment to the original terms. In either case, the Working Group may consider that a new procurement with full competition should be conducted, but under current systems that allow amendments to specifications, there is no provision setting out the circumstances in which a new procurement would be required. Exempting the second-phase award from the publicity requirements and the review mechanism is often considered as compounding such issues.

D. Framework agreements operated by centralized purchasing agencies

44. Commentators have noted that framework agreements also enable a central procuring entity or an external purchasing body to undertake procurement on behalf of or for a number of entities. Such aggregated purchasing can lead to bulk purchase discounts, enhancing value for money in accordance with the Model Law's

objectives, and offering freedom of choice for end-users where contracts are entered into with several suppliers with differing products.

45. However, some commentators have expressed concerns about such arrangements—an external body may have an interest in keeping its fee earnings high by keeping prices high, over-specification, making purchases up to budget allocation without strict needs assessment, and placing orders that go beyond needs generally or favouring particular suppliers so as to please end-users. It has also been observed that the separation of the end-user and the procuring entity increases such risks, as there is generally inadequate oversight of needs assessment and application of flexible procedures.

46. A central or external purchasing body may accommodate customer agencies by reducing competition, and that may, in turn, mean using competitive techniques, or technical requirements, or prequalification requirements,[33] which favour a specific firm and which unreasonably restrict competition, and may lead to suppliers gaining effective monopolies.[34]

VI. Provision for framework agreements in the Model Law

47. If the Working Group considers that the potential benefits of framework agreements are such that provision should be made in the Model Law to allow for their operation, the Working Group may wish to address the type of system or systems and the extent of regulation that is appropriate.

48. In summary, the higher the number and importance of qualitative criteria in selection or suppliers and bid, offer or tender evaluation, the greater the degree of professional judgement required to interpret and resolve the technical specifications and terms of reference, the greater the complexity of the procurement and the risk of abuse in the proceedings. To the extent that framework agreements do not necessarily set prices or other important terms and conditions at the first phase of the award process, the second award phase has been observed to be potentially complex, non-transparent and open to abuse, and the Working Group may therefore consider that detailed guidance as to the operation of such framework agreements is appropriate.

49. However, it has been observed that the time and cost advantages of framework agreements may be lost if regulation itself is excessive (for example, where the first award phase operates by tendering proceedings, and then further publication, lengthy response times and full competition are also required in the second phase).

50. Accordingly, the Working Group may consider that provision in the Model Law may be required to address the conditions for use of framework agreements, the method(s) of conducting the first phase, procedures for, and any use of discretion in the selection of suppliers in, the second phase, advertising and publicity requirements, and review, but that detailed procedures to ensure effective transparency and oversight should be addressed in other texts.

A. Types of framework agreement for which the Model Law may make provision

51. The Working Group may consider that some or all of the following types of framework agreement procedure could be specifically provided for in the Model Law:

(a) Single-supplier agreements under which all terms and conditions are specified in the first phase (with all competition at the first phase, operating effectively as a contract in lots). The Working Group may consider that such arrangements can be concluded under the current Model Law, as a contract divided into lots (as contemplated in article 27 (h) of the Model Law), though the lots are awarded at different times. However, specific provision to clarify any such ambiguity regarding the use of estimated rather than precise quantities of items to be procured may be of assistance.

(b) Multi-supplier agreements, under which all terms and conditions are specified at the first phase (with all competition in the first phase). (Although these arrangements may appear to be possible under the current Model Law, as a contract in lots, the Working Group may consider that the requirement to select "the successful tender" or its equivalent under other procurement methods means that a multi-supplier agreement is not permitted under the Model Law.) The terms of the framework would then be applied at the second phase. One way of making the second phase award would be to provide that the best-ranking supplier is offered individual purchase orders, and other suppliers subsequently only if the first-ranking cannot fulfil the order, or the Working Group may wish to consider other ways, such as those set out in paragraph 24 above; and

(c) Multi-supplier agreements, under which not all conditions are specified in the first phase, and price and other terms and conditions are variable to some degree in the second phase, which is competitive. The Working Group may consider that such arrangements are not possible under the Model Law's tendering procedure, which envisages only one round of tenders (they might be possible under the principal method for procurement of services under article 43 or article 44, though such provisions were obviously not designed with frameworks in mind). They are also not possible if the procuring entity cannot set the exact specification at the outset, and wishes to seek technical proposals from suppliers for each task that arises (as the Model Law does not make provision for on-going alteration of tenders or proposals). (A variation of this type of agreement would be a dynamic system, using an electronic or similarly cost-efficient and transparent system, which may be used for some products, such as those referred to in article 1 (6) of EU Directive 2004/18/EC ("commonly used purchases, characteristics of which, as generally available on the market, meet the requirements of the contracting authority"), but which may be less suitable where security of supply is a significant consideration. The Working Group may also consider that this type of system should be "open" such that new suppliers can be admitted.)

52. Issues arising from the above types of agreement that the Working Group may consider should be included in the text of the Model Law, model regulations or Guide to Enactment, are set out in the following sections, together with possible

regulatory solutions and drawbacks that those possible solutions may themselves involve.

B. General conditions for use

53. The Working Group may wish to consider:

(a) Whether framework agreements should be permitted for all procurements, or whether a minimum threshold based on estimated aggregate value should be set so as to ensure cost-effectiveness, and whether they should be permitted only for recurrent purchases for which individual purchase orders will be issued over a period of time. Alternatively, the Working Group may consider that very small and repeated purchases, and urgent purchases, could efficiently be made through framework agreements;

(b) Whether the type of item that can be purchased under a framework agreement should be restricted, so as, for example, to exclude certain services and construction, for which specifications may not endure. For example, the Working Group may consider that "intellectual services" and complex construction procurement would be less suitable for framework agreements than measurable services such as janitorial services and maintenance contracts;

(c) How purchases under frameworks should be aggregated so as to ensure they are regulated;

(d) Whether the duration of framework agreements should be restricted;

(e) How to address advertising and publicity requirements, particularly as regards the second phase of the award process. For example, the quantity of orders placed with each supplier periodically could be subject to publication. Further, the Working Group may wish to consider whether a procuring entity should be obligated to notify other potential suppliers when an order is to be placed, and to publicize any amendments to specifications during the course of a framework agreement;

(f) Whether both phases of the procurement should be subject to review (even if only ex post facto);

(g) Whether framework agreements should be permitted only in circumstances in which the specification is precisely drafted at the outset, and the extent to which specifications may be modified. A subsidiary issue then arising is the extent to which an amendment to specifications should necessitate a new procurement, and whether generic specifications may be considered, with guidance as to the extent of amendment or refinement permissible;

(h) Whether aspects of the procurement contract (setting out maximum or minimum quantities or amounts, whether one agreement on identical terms with all suppliers should be required) should be addressed in some form.[35]

C. First phase of the award process

54. The Working Group may wish to consider whether:

(a) Tender proceedings should be required at the first award phase for all framework agreements, or whether other methods of procurement should be permitted (two-stage tendering, request for quotations, and competitive negotiation may be used, for example if it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, or for urgent procurement). The Working Group may wish to consider whether the competitive and transparency advantages of a dynamic system that remains "open" to new suppliers may be suitable for procurement of such types, but it would be inconsistent with the alternative procurement methods under the current Model Law;

(b) Whether the number of suppliers admitted to the framework agreement at the first stage could be restricted. If there are to be restrictions, provision may be needed to govern how the ranking is to be made, and whether the criteria are to be disclosed; and

(c) That even if a framework agreement is not a binding contract, the proceeding at the first award phase should be subject to the normal procedural requirements, including publicity and review.

D. Second phase of the award process

1. Single- and multi-supplier frameworks without second phase competition

55. The Working Group may wish to consider the following possible manners of ensuring that prices under this type of framework remain current:

(a) Whether to limit the duration of the framework agreement, so as to allow new competition periodically;

(b) Whether to allow the procuring entity to purchase outside the framework agreement even for items identical to those under the framework agreement. In this regard, procuring entities could be required to conduct an element of market research and to make contact with supplier(s) to permit them to reduce their prices, on a periodic basis or as individual purchase orders are placed. The World Bank Guidelines referred to in paragraph 44 of A/CN.9/WG.I/WP.44 commonly include a price adjustment mechanism in the relevant contract, so as to ensure that the price remains competitive. However, although procuring entities may in some systems make individual purchases outside the framework agreement, empirical evidence suggests that in many cases, they fail to assess price and quality sufficiently when placing a particular order, as it is easier simply to apply the existing framework agreement than to tender or to reopen tendering for the purchase order concerned;

(c) Whether to set ceiling prices in the framework agreement, so as to allow for volume discounts in the second phase (in Armenia, for example, the framework with the suppliers sets out a maximum (but not a minimum) price). The advantages of so doing would be clarity as to price, and transparency as to its constituent elements - units, time, and any index or formula applied. Alternatively, or in addition, the possibility of first phase bid prices being set as percentage discounts from commercial prices could be considered. However, it has been observed that the ability to bid downwards may undermine the basic discipline of tendering and risks that the best price may never be achieved.[36]

2. Single- and multi-supplier frameworks with second phase competition

56. The main issue arising is the observed lack of meaningful competition in the second phase, either because of closed framework agreements or the practical difficulties in ensuring new suppliers can join open agreements in a time-effective manner.

57. The Working Group may wish to consider the following possible ways to improve second-phase competition:

(a) Setting procedures to regulate the second phase competition (for example, adapting the competitive negotiations or request for quotations procedures, and setting out minimum requirements in terms of numbers of suppliers to be invited and time limits);

(b) Ensuring that the second phase of the award process is subject to appropriate publicity and review procedures, even if only ex post facto;

(c) Reducing the risk of collusion by binding the suppliers under the framework agreement to supply individual purchase orders placed under the framework agreement. However, there may be a cost of so doing, such as higher prices and the need to pay a retainer;

(d) Providing incentives to improve levels of participation, such as an optional minimum purchase commitment under the framework agreement, so as to provide suppliers with some certainty as to future orders. Suppliers could also be committed to a percentage of the anticipated total contract value only, so as to reflect their realistic ability to supply.

58. Although full second-phase competition may eliminate the competitive advantage of a framework agreement, it may be needed in case of frameworks for items whose prices or specifications are likely to change (such as technologically advancing products). The Working Group may therefore wish to consider whether amendments to specifications, or the use of generic specifications which can be supplemented, should be permitted only under a dynamic system that allows the admittance of new suppliers at any time, so as to avoid the risks of abuse described above.

59. Alternatively, the Working Group may wish to consider whether specifications may be modified in all types of framework agreements if there is a combination of regulation as regards the extent of such a possibility, and rigorous publicity and review mechanisms. At the more general level, for example, provisions could state that procuring entities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.[37] More detailed provisions or regulations could address the degree of specification and detail of prices required in the first award stage, and could limit second-phase modifications to the specifications to those that are consistent with the initial specifications (so that the modifications are aimed at precision, not expanding the types of items to be procured).

60. In addition, framework agreements could include core and variable components, so that the main terms and conditions can be set out in the first phase, and some can be refined in the second. In this regard, the Working Group may consider that suppliers should not be able to change prices or other terms and

conditions other than to the advantage of the procuring entity and only, as in France, for example, when they are responding to inquiry

61. A further practical issue arises in that, if the specification is not sufficiently precise and prices are variable, it may be difficult to compare suppliers in the first award phase, and so to select those that should be admitted to the framework. In such cases, as in the MAS in the United States, for example, the end result may be a framework agreement that is more akin to a suppliers' list, and full second-phase competition would then be required.[38]

62. Possible solutions to these issues could include allowing new suppliers to be admitted to the framework agreement at any time, and the ongoing revision of offers whether or not specifications are modified, but providing that the lead time for phase two of the award process would be suited to the original suppliers, not newcomers.

63. As regards admission of suppliers to the framework agreement after the conclusion of the first award phase, regulations may be needed to ensure that the original suppliers are not placed at any disadvantage vis-à-vis the newcomers, and the newcomers are subject to qualification requirements identical to those applied to the original suppliers, such that all suppliers have an equal opportunity to participate, and so as to avoid a long-term disincentive to suppliers to enter the market.

Notes

1 Under the Federal Acquisition Regulation (FAR subpart 8.4) (available at www.arnet.gov/far).
2 An equivalent provision is also found in article 71 of the Code on Public Procurement of France.
3 The need to supplement tenders in this way does not generally arise between the phases of choosing the winner and concluding the contract in non-framework procedures.
4 41 U.S.C. § 253h; FAR 16.504 (c), 48 C.F.R. § 16.504 (c); WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750-51 (1998).
5 Observers have commented that if the supplier offering the best tender in accordance with the award criteria cannot or will not deliver the order, it is likely that the procuring entity can then select the next best tender, but there is no provision to such effect in the text of the Directives.
6 Purchasing techniques may vary widely for different IDIQ vehicles; the discussion here focuses on procedures for the General Services Administration MAS contracts, which are more regularized.
7 FAR 8.404 (b)(1).
8 FAR, subpart 13.2.
9 FAR 8.404 (b).
10 In Sweden, until approximately 2003, the procuring entity was able to select the supplier of his choice when placing individual purchase orders under the framework agreement. Thereafter, case law established that the individual purchase orders under a multi-supplier framework should be placed with the first-ranking supplier, and only with the next-ranking supplier if the first were not able to perform. This case law is disputed and is not universally applied.
11 Observers have commented that this provision should be interpreted to mean that a second phase competition should be held only where it is not possible simply to apply the terms of the framework agreement.
12 Although article 1 (5) of the Directive may seem to imply that the price is to be fixed in the framework agreement, as it provides that "[a] 'framework agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged", the price does not

necessarily have to be established in the form of a fixed amount—it is possible to set it by reference to a price index or other benchmark.

[13] The procuring entity in such cases must "fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders" (article 32 (4)(b)).

[14] Examples given by the OGC include "particular delivery timescales; particular invoicing arrangements and payment profiles; additional security needs; incidental charges; particular associated services, e.g. installation, maintenance and training; particular mixes of quality systems and rates; particular mixes of rates and quality; where the terms include a price mechanism; individual special terms (e.g. specific to the particular products/services that will be provided to meet a particular requirement under the framework)" (see, Office of Government Commerce Information Note, February 2003, available at http://www.ogc.gov.uk/embedded_object.asp?docid=1000330).

[15] However, a UK Government paper notes that "[t]he EC has produced an interpretation that the award of an individual contract (under the umbrella of a framework arrangement) can only be made on the basis of the terms and conditions (including the pricing mechanism) established in the framework arrangement itself. No negotiation of price or the pricing mechanism already established in framework arrangements can take place at call-off (including S-CAT, G-CAT and other framework arrangements available for Government Departments and Agencies to use). Where, in either framework arrangements or framework contracts, there are multiple suppliers and it is intended to mount a mini-competition between two or more of them, it follows that the mini-competition must not involve negotiation on the prices and pricing mechanism already established in the framework arrangement or framework contract. The award criteria for these mini-competitions should be a combination of (i) quality/methodology and (ii) resources/costs. During the mini-competition suppliers will have the opportunity to state the type of resources they would deploy and the daily rate or fixed price that they would charge to undertake the proposed task. The quoted price must relate to the rates in the relevant framework but may take into account any price mechanism (e.g. discounts) established within it. Negotiation on price outside these parameters is not permitted, even if offered by suppliers." See, further, http://www.dti.gov.uk/about/procurement/procue8-8.htm. On the other hand, in Sweden, for example, a second round of tenders, or the use of mini-tenders, has historically not been permitted under the Procurement Act (SFS 1992:1528), as amended, available at http://www.nou.se/pdf/louenglish.pdf.

[16] Under the current Code on Public Procurement.

[17] 67 Fed. Reg. 65,505 (Oct. 25, 2002) (final rule implementing additional competition requirements imposed by Section 803 of the National Defence Authorization Act for Fiscal Year 2002 (Public Law No. 107-107).

[18] FAR 16.505(b) ("fair opportunity" requirement for IDIQ contracts); Digital Systems Group, Inc., Comp. Gen. Nos. B-286,931, B-286931.2, 2001 CPD ¶ 50 (2001) (if competition under MAS structured like negotiated procurement, each offer or must be afforded fair opportunity).

[19] FAR 8.404.

[20] In Sweden, for example, a procuring entity may accept an offer from the supplier to lower the prices previously offered, but procuring entities cannot request or require prices to be revised during the operation of a framework agreement.

[21] See United States Office of Management and Budget, Office of Federal Procurement Policy, "Best Practices or Multiple Task and Delivery Contracting 7", (Washington, D.C., July 1997, available at www.acqnet.gov/Library/OFPP?/Best practices/BestPMAT.html).

[22] See the catalogue at www.gsaadvantage.gov.

[23] See article 1 (6) (definitions) and article 33 of Directive 2004/18/EC. Similar provisions are found in Directive 2004/17/EC, article 1(5) (definitions) and article 15.

[24] As with framework agreements, its use is not confined to specific goods or services.

[25] Some commentators have suggested that the requirements for advertising and a mini-tender phase may operate as a disincentive to use this system. Its novelty is such that there is as yet no evidence to confirm or disprove that opinion.

[26] In Canada, it was observed that a "comparison of the … standing agreement prices for the same

or very similar equipment available from other sources indicated that the standing agreement prices were often not the most economical available" and that "in most cases considerable savings could have been achieved if purchases had been made from sources other than those of the … standing agreements," (Government of British Columbia, Canada, Ministry of Finance, Office of the Comptroller General, Core Policy And Procedures Manual, available at http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm#1).

[27] The award of procurement contracts in general is, however, subject to overall treaty obligations and to article 2 of the Directive, which "states as regards the principles of awarding contracts, "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way". The "cascade' method, selecting suppliers according to their ranking and availability, would comply with those obligations.

[28] FAR 16.505 (b)(1). See, further, paragraph 30.

[29] Procedure of Functioning of the State Procurement Agency (decree implementing the Procurement Law of Armenia, passed in June 2000).

[30] Article 32 (4)(d) of Directive 2004/18/EC, as explained in European Commission Directorate General Internal Market and Services Public Procurement Policy, CC/2005/03_rev 1 of 14.7.2005.

[31] A subsequent audit in 2001 found that non-competitive awards had increased to 72 per cent of awards.

[32] U.S. General Accounting Office, "Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule" Report No. GAO-01-125 (Nov.28, 2000); Benjamin, "Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies," 31 Pub. Cont. L. J. 429 (2002).

[33] See GPA, article VIII (limits on restrictive prequalification requirements).

[34] It should be noted that certain systems, such as the EU under Directive 2004/18/EC, do not permit contracts between entities other than parties to the initial framework agreement (article 32 (2)), and therefore *ad hoc* centralised purchasing is not possible. However, in the United States, for example, many government agencies permit other organizations to place orders on their multiple-award contracts.

[35] The Working Group may wish to consider in this regard that the Model Law currently does not address the terms of the procurement contract itself.

[36] The Working Group may consider that this issue also arises in the context of electronic reverse auctions. For the latter, see documents A/CN.9/WG.I/WP.35 and Add.1, A/CN.9/WG.I/WP.36 and Corr.1, A/CN.9/WG.I/WP.40 and Add.1 and A/CN.9/WG.I/WP.43 and Add.1.

[37] Such a provision is found in EU Directive 2004/18/EC, article 32 (2), and Malawi's provisions.

[38] Indeed, such an arrangement could operate as a mandatory pre-qualification requirement under article 7 of Model Law.