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Procurement

Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services

Proposal by the United States

Note by the Secretariat

In preparation for the twelfth session of Working Group I (Procurement), during which the Working Group is expected to proceed with its review of documents A/CN.9/WG.I/WP.52 and Add.1 (see the report of the eleventh session, A/CN.9/623, para. 12), the Government of the United States, on 14 June 2007, submitted a proposal regarding issues for discussion at the Working Group's twelfth session of framework agreements, dynamic purchasing systems, and anti-corruption measures. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat with formatting changes.



Annex

Paper of the United States' Delegation to Working Group I (Procurement) of the United Nations Commission on International Trade Law (UNCITRAL) Regarding Issues for Discussion at the Working Group's September 2007 Meeting: Framework Agreements, Dynamic Purchasing Systems, and Anti-Corruption Measures

1. Working Group I of the United Nations Commission on International Trade Law (UNCITRAL) is scheduled to meet in Vienna during the week of September 3-7, 2007 to address proposed revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law"). The United States' delegation to the Working Group submits this paper in order to facilitate the Working Group's discussion of two topics likely to arise in the September 2007 meeting: (1) framework agreements and dynamic purchasing systems, and (2) the Model Law's provisions regarding conflict of interest in public procurement.

I. Framework Agreements/Dynamic Purchasing Systems

2. At Working Group I's meeting of May 21-25, 2007, *see* A/CN.9/WG.I/WP.49 (agenda), the Working Group made an initial review of, among others, Working Papers 52 and 52 Addendum 1 (respectively, A/CN.9/WG.I/WP.52 (Mar. 13, 2007) and A/CN.9/WG.I/WP.52/Add.1 (Mar. 13, 2007)),¹ which presented drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement.

3. Working Paper 52 focused on framework agreements, which for reference we would note are defined by a European procurement directive as follows:

4. 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.

5. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, Art. I.5.² These "framework agreements" are very similar to "Indefinite-Delivery/Indefinite-Quantity" ("ID/IQ") contracts used by the U.S. government, *see, e.g.*, Federal Acquisition Regulation³ (FAR) 16.504-16.505, 48 C.F.R. §§ 16.504-16.505, including the related "Multiple Award Schedule" contracts principally sponsored by the U.S. General Services Administration, *see* FAR Subpart 8.4, 48 C.F.R. Subpart 8.4.

¹ Available at www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html).

² The directive is available at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

³ A copy of the Federal Acquisition Regulation is available at www.acquisition.gov/far.

6. We have two comments regarding the referenced working papers, WP52 and WP.52 Add. 1, which are likely to be taken up again at the September 2007 meeting of the Working Group in Vienna.

7. *Allowing for Multiple Framework Agreements*: First, we recommend that the Working Group consider more flexibility in the proposed legislative language regarding the structure of framework agreements. Working Paper 52, at paragraph 10, proposes legislative language that contemplates the award of a *single* framework agreement to *multiple* suppliers. This approach seems to draw from Article 32, paragraph 4 of the European procurement directive cited above. Our recommendation is that the Model Law also allow procuring entities to enter into *multiple*, parallel framework agreements with multiple suppliers, rather than requiring procuring entities to enter into only a single framework agreement with many suppliers. Under this proposed approach, procuring entities would have the flexibility to enter into multiple agreements with essentially parallel language.

8. This more flexible approach would seem to enhance purchasing entities' ability to achieve best value in procurement. Framework agreements are designed to allow procuring entities to launch "mini-competitions" among the subscribing vendors, as requirements arise. *See, e.g.*, Working Paper 52, para. 6. Forcing all the vendors to subscribe to a single master agreement would mean less genuine competition in those "mini-competitions," for vendors would be forced to conform to identical terms at the outset. This would heighten concerns, similar to those raised by the European Commission approximately a decade ago, that framework agreements may foster anti-competitive behavior in procurement. *See* European Commission, Press Release: "Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal," IP/97/1178 (Brussels Dec. 19, 1997).⁴

9. An alternative approach, which is used in the United States, is to favor *multiple* awards to *multiple* vendors, under a single solicitation. *See, e.g.*, FAR 16.504(c), 48 C.F.R. § 16.504(c). This approach yields multiple, nearly identical master agreements with the various vendors, but allows the procuring entity and the vendors to negotiate slightly different terms -- such as different licensing terms -- in each vendor's master agreement. These differences can increase the level of competition in subsequent "mini-competitions" under the master agreements. The separate agreements also allow the procuring agency more flexibility should, for example, it decide to terminate one agreement with one vendor because of concerns regarding corruption or malfeasance.

10. *Closing the Divide Between Framework Agreements and "Dynamic Purchasing Systems"*: Working Papers 52 and 52 Add. 1 follow the European procurement directives and create a conceptual divide between "framework agreements" and "dynamic purchasing systems." Indeed, paragraph 7 of Working Paper 52 Add. 1 explicitly cites the European procurement directive's definition of "dynamic purchasing systems," as follows:

"A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available

⁴ The European Commission's press release is available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/97/1178&format=HTML&aged=1&language=EN&guiLanguage=en>.

on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specifications.”

11. The experience of the United States’ federal procurement system, however, has been that “framework agreements” and “dynamic purchasing systems” (at least as contemplated by the Model Law) are not distinct, but rather that “dynamic purchasing systems” are merely a logical extension of framework agreements.

12. A practical illustration may assist the Working Group in its consideration of this point. For many decades, the U.S. General Services Administration (“GSA”) (a centralized purchasing agency) has sponsored “Multiple Award Schedule” contracts. These are essentially framework agreements, which may be entered into *at any time* by any qualified vendor interested in selling the subject goods or services to the U.S. government. There are many different classes of these standing agreements, such as classes of contracts for information technology and for management services. The GSA Multiple Award Schedule contracts give U.S. agencies ready access to thousands of vendors, and literally millions of commercial goods and services. *See* www.gsa.gov (“GSA Schedules”).

13. To enter into a Multiple Award Schedule contract with the GSA, a vendor may *at any time* prepare and submit a proposal against a standing GSA solicitation. The GSA contracting officer will then work to negotiate an agreement with the vendor for the proffered goods and services. *See* FAR Subpart 8.4, 48 C.F.R. Subpart 8.4. The terms of that agreement are generally based on the vendor’s commercial sales practices; typically, the GSA Multiple Award Schedule contract ultimately will be based upon a discount against the vendor’s commercial prices, and will incorporate at least some of the vendor’s standard commercial terms.

14. The vendor’s Multiple Award Schedule agreement with the GSA may be one of hundreds, if not thousands, of other such GSA agreements in the same industry. There are, for example, thousands of information technology vendors that hold GSA Multiple Award Schedule contracts for hardware, software and information technology services. This rich field of potential vendors allows buying agencies to launch robust “mini-competitions” amongst many eligible vendors -- the eligible Multiple Award Schedule contract holders -- when requirements later arise. As with the “dynamic purchasing systems” contemplated by the European procurement directive, these “mini-competitions” may be held through an electronic marketplace. There is no requirement in the U.S. system, however, that the system be fully electronic.

15. As this example illustrates, the U.S. experience is that a “dynamic purchasing systems” can perhaps best be understood as a unique form of framework agreement -- a third model,⁵ under which vendors may join an “always open” standing system of agreements.

16. There are advantages and disadvantages to this approach. Among other things, this “always open” model allows vendors to join existing framework agreements as

⁵ “Model 1” framework agreements (with fixed terms for purchase orders) and “Model 2” framework agreements (which allow for “mini-competitions” among vendors under the agreement) are described in Working Paper 52, at paragraph 6.

market conditions and technologies evolve; as a result, there is less chance that framework agreements will protect locked sets of incumbent vendors, and agencies are more likely to have easy access to new vendors and new technologies. On the other hand, this “always open” approach means that vendors, when initially entering into such agreements, will probably not be competing directly against other vendors, and thus may feel less acute competitive pressures to offer the government favorable prices and terms. To protect against this, the law must ensure that the “mini-competitions” subsequently held among vendors are indeed robust.

17. As a drafting matter, many of these concerns are addressed by Working Paper 52 Add. 1, which describes proposed provisions to ensure that procuring entities use careful procedures for entering into, and implementing, “dynamic purchasing systems.” Our recommendation therefore goes mainly to the conceptual structure of the proposed revisions. Instead of dealing with “dynamic purchasing systems” as a distinct concept, we would recommend that the Working Group treat such systems as another model for framework agreements, perhaps renamed “dynamic framework agreements.” This would, it seems, clarify the intent behind these unique agreements.

II. Anti-Corruption Measures: Conflicts of Interest in Procurement

18. In previous sessions, the Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the ongoing revision of the Model Law. *See, e.g.*, A/CN.9/WG.I/WP.49, paras. 8 & 64 (Mar. 2, 2007).

19. In this regard, we would note that the United Nations Convention Against Corruption, which entered into force in December 2005,⁶ specifically calls for anti-corruption measures in procurement to address conflicts of interest. The Convention calls, in relevant part, for “measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”⁷ We would

⁶ Information on the UN Convention Against Corruption is available at http://www.unodc.org/unodc/crime_convention_corruption.html.

⁷ Article 9, paragraph 1, of the UN Convention Against Corruption reads, in total, as follows:

Article 9

Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures

recommend that the Model Law include such conflict-of-interest provisions, so that nations implementing the Model Law have, included in their procurement systems, provisions in place in accord with the UN Convention Against Corruption.⁸

20. In addressing this topic of conflicts of interest in procurement, we would refer the Working Group to the substantial work that has been done in this field, including studies done by the Organisation for Economic Cooperation and Development (OECD) (available at http://www.oecd.org/departement/0,3355,en_2649_34135_1_1_1_1_1,00.html), and the United Nations' own *Standards of Conduct for the International Civil Service*, which specifically highlight the dangers of conflicts of interest in procurement, at paragraph 22. The United States has developed extensive laws regarding conflicts of interest in procurement, and work continues in expanding and improving that body of laws. We look forward to discussion of this important topic in future sessions of the Working Group.

established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

⁸ Nations adopting the Model Law may have joined the UN Convention Against Corruption already. For a list of nations that have signed, and then ratified, accepted, approved of, acceded to, or succeeded to, the Convention, see http://www.unodc.org/unodc/crime_signatures_corruption.html.