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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**

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## **I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 43 of document A/CN.9/WG.I/WP.41, which will be before the Working Group at its ninth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group requested the Secretariat to prepare a note on the use of framework agreements, including guidance materials where appropriate (A/CN.9/568, para. 78). The Working Group decided at its seventh session (New York, 4-8 April 2005), time permitting, to take up the topic of framework agreements at its next session (A/CN.9/575, para. 9), but, for reasons of time, subsequently deferred its consideration of the topic to its ninth session (A/CN.9/590, para. 10). This note has been prepared in response to the Working Group’s request at its sixth session, draws upon information provided to the Secretariat, and is submitted to the Working Group for consideration at its ninth session.

## **II. Background information**

### **A. Description**

3. Framework agreements can be described as transactions to secure the supply of a product or service over a period of time, which involve:

(a) An invitation to potential suppliers to participate in a procurement (using the method of procurement appropriate for the goods, construction or services concerned, for example by way of publication of an invitation to tender);

(b) The selection of one or more suppliers on the basis of their responses to the invitation in accordance with the procurement method chosen (the “first phase” of the award process), following which the supplier(s) enter into a framework agreement with the procuring entity; and

(c) The subsequent placing of periodic orders with the supplier(s) chosen as particular requirements arise (the “second phase” of the award process).

4. Framework agreements are most commonly used for goods, services or construction for which a procuring entity has a repeat need, such as stationery, spare parts, information technology supplies and maintenance, but for which delivery times and quantities are not known at the time of the initial invitation. Other uses include the purchase of items from more than one source, such as electricity and medicines, and centralized purchasing for several procuring entities.

5. Framework agreements have become an increasingly popular procurement tool, particularly with the rise of electronic procurement. For example, it is estimated that by 2003, framework agreements accounted for nearly 30 per cent of federal contracting in the United States.<sup>1</sup>

6. Framework agreements can be concluded with one supplier (single-supplier agreements), or with more than one supplier (multi-supplier agreements), and may or

may not take the form of a binding contract. Both types of agreements may enhance the security of supply, either through agreements under which a supplier is bound to fulfil orders placed, and additionally in the case of multi-supplier agreements in that a procuring entity even with non-binding agreements with several purchasers is likely to be able to find a supplier or suppliers that can fulfil orders. Certain types of multi-supplier agreements allow a procuring entity flexibility in the selection of a supplier for a specific order by allowing the specification in the framework agreement to be tailored to the precise needs of the procuring entity for a particular purchase order.<sup>2</sup>

## **B. Terminology**

7. The term “framework agreement” is used for the type of arrangement discussed above in some systems (including the United Kingdom and countries in Africa and Asia that follow the British legal system), and in the 2004 European Union procurement directives.<sup>3</sup>

8. Other terms used to cover one or more of this type of arrangement include indefinite-delivery/indefinite quantity (IDIQ) or task-order contracts in the United States, and, more generally, umbrella contracts.<sup>4</sup>

9. Given that using any of the above terms outside their home system in the UNCITRAL context may lead to some confusion as to the nature of the arrangement concerned, an initial issue for the Working Group to consider is how to refer to such agreements. If the Working Group considers that the Model Law should adopt a system close to that under another regime, it may wish to use the term from that regime. Alternatively, terms that are not closely identified with any particular system include “periodic purchase arrangement”, “recurrent purchase arrangement”, “periodic requirements arrangement” or “periodic supply vehicle”. For the purposes of this note, and consistent with earlier documents presented to the Working Group on the topic, however, the term “framework agreement” will be used.

## **C. Relationship with other procurement tools**

10. Framework agreements are related to lists of suppliers drawn up in anticipation of procurements. Both identify suppliers for future awards of procurement contracts, and although they have been described from a commercial point of view as shades on a single spectrum,<sup>5</sup> there are significant differences between the two.<sup>6</sup> They can be distinguished in that in the case of a framework agreement, but not in the case of a suppliers’ list:

(a) There is an initial invitation to tender or other invitation to participate in a procurement;<sup>7</sup>

(b) The invitation contains:

(i) A specification of the goods, construction or services to be procured and other requirements for the procurement; and

(ii) The terms and conditions upon which the various suppliers will supply the goods, construction or services (such as price and delivery charges and times).

## **D. Main benefits and concerns arising in the use of framework agreements**

11. The main purposes of framework agreements include the reduction of transaction costs and transaction times, and assuring the security of supply. As in framework agreements the suppliers are identified, their qualifications assessed and the specification, terms and conditions of the future procurement established before an order is placed, recurrent costs can be avoided and purchases can be made with lower overall transaction costs and shorter delivery times than would be the case were each purchase procured separately. The types of framework agreement in which all competition takes place in the first phase of the award process are straightforward to operate in the second award phase, and thus the potential for savings in transaction costs and times is significant. Empirical evidence suggests that the advantage is highest where individual purchase orders under the framework agreement are made electronically.<sup>8</sup> In addition, observers have commented that framework agreements can also lower inventory costs (as supplies are ordered only when needed), and allow the procuring entity greater flexibility in scheduling requirements, both in terms of timing and quantity.<sup>9</sup>

12. Framework agreements may be useful to ensure rapid and secure supply of items to be procured (for example, the agreement may require the supplier to fulfil all orders placed and to keep a permanent stock of a product available even on the procuring entity's premises),<sup>10</sup> and where a close long-term relationship between procuring entity and supplier(s) is beneficial (for example, joint research and development programmes).

13. It has also been observed that one of the benefits of the use of framework agreements in the procurement process is that successive competitive phases in the process may lead to better value for money. Framework agreements should allow a procuring entity to realize "the benefits of an ongoing competitive environment throughout the duration of the contract,"<sup>11</sup> and to seek price reductions through the anticipated volume of orders.

14. Framework agreements thus have the potential to enhance the objectives of the Model Law as set out in its preamble, including maximizing economy and efficiency in procurement.

15. Observers also have commented that framework agreements can provide enhanced access to government work for smaller suppliers and small- and medium-sized entities, though this view is contradicted by others who state that larger-scale contracting that tends to arise through the use of framework agreements favours larger suppliers.<sup>12</sup>

16. However, other observers have commented that framework agreements may pose a risk to effective competition, in that in exempting the placing of individual purchase orders from full and open competition requirements, they may exclude potential suppliers from the procurement concerned, because the competition at the individual purchase order stage may not be adequate, because there may be a risk of collusion between suppliers, and because there may be no effective oversight of the operation of framework agreements in practice.

17. Further, a framework agreement may be of long duration and wide in coverage, closing off markets from the periodic competition contemplated by the

procurement regulations (for example, effectively securing the market for a national supplier). To this extent, framework agreements could compromise the Model Law's stated objectives of fair and equitable treatment, integrity and public confidence in the procurement system if their operation is not appropriately regulated and overseen.

18. The benefits and potential risks in the use of framework agreements are discussed in more detail in chapter V of A/CN.9/WG.I/WP.44/Add.1.

### **III. Extent of regulation and use**

#### **A. Framework agreements**

19. Observers have commented that framework agreements can be operated under many existing procurement regimes, at both the international and national level. Some states in the civil law tradition that have procurement laws provide expressly for framework agreements, generally through enabling provisions,<sup>13</sup> but with more detailed legislation in some cases.<sup>14</sup>

20. Framework agreements are also in use even in the absence of specific regulation. Although there is no express provision in the World Trade Organization (WTO) Agreement on Government Procurement (GPA)<sup>15</sup> and North American Free Trade Agreement (NAFTA), commentators consider that the GPA and NAFTA recognize the possibility of award procedures that have more than one phase, and thus framework agreements can be operated in systems subject to those agreements. In those countries that do not have a tradition of procurement regulation per se (such as those following the British legal system), framework agreements have also been operated for many years without specific regulation. However, recent procurement legislation in many systems demonstrates a trend towards making provision for framework agreements. The Model Law does not currently make provision for framework agreements, and its current provisions that may prevent their use are noted in the discussion of their operation and use, in chapter IV below and in A/CN.9/WG.I/WP.44/Add.1.

#### **B. Africa**

21. Out of the systems reviewed, over two-thirds made provision for IDIQs or framework agreements. The jurisdictions with such provision include both common law systems (such as Malawi and Tanzania) and civil law systems (such as Burkina Faso, Ethiopia, Mali, Niger and Senegal).<sup>16</sup> In the civil law systems, the framework provisions are generally limited in scope to single-supplier framework agreements, but in common law systems, multi-supplier framework agreements are also provided for.

22. For example, in Malawi, provision is made for both "IDIQ contracts" and "framework agreements".<sup>17</sup> The former are concluded with one supplier, but the latter can be concluded with at least three suppliers, in which case competition at the second phase is required. Ethiopia and Tanzania have outline provision for framework agreements.<sup>18</sup>

23. In Burkina Faso, the terms of IDIQs or framework agreements must specify the goods or items to be procured, their price, a minimum and maximum contract amount or quantity.<sup>19</sup> Similar provisions apply in Niger.<sup>20</sup>

24. In Senegal, a procuring entity whose future requirements are uncertain may conclude, following normal procurement procedures, a “*marché à commande*” which fixes maximum and minimum amounts (by reference to value or quantities), or a “*marché de clientèle*”, under which the types of goods are specified, but not their amount or quantity, with a market-determined formula setting the price.<sup>21</sup> Similar provisions are found in Algeria,<sup>22</sup> Mali,<sup>23</sup> Morocco,<sup>24</sup> Tunisia,<sup>25</sup> and the West African Economic and Monetary Union system.<sup>26</sup>

## C. Asia

25. Chinese legislation provides for both single- and multi-supplier framework agreements, following an initial open competition. As regards multi-supplier agreements, negotiations with suppliers are permitted if the subsequent purchase order is relatively large, or further quotations can be requested. Details of the suppliers and their offers are posted on the Ministry of Finance government procurement website. Single-supplier agreements are permitted, in limited circumstances, for services procurement. The regulation concerned does not address the details of operation of the agreements.<sup>27</sup> In Hong Kong Special Administrative Region,<sup>28</sup> framework agreements have operated in the absence of specific provision.

26. No provisions were found in Indonesia, Lao People’s Democratic Republic, Papua New Guinea, Syria and Viet Nam.<sup>29</sup> Singapore,<sup>30</sup> like Hong Kong, has long used framework agreements in the absence of specific provision.

## D. Europe

27. The recent European Union procurement directives include explicit provisions on framework agreements.<sup>31</sup> The Directives provide that the member states “may” make provision for the use of framework agreements (that is, there is no obligation to do so), and that the Directives set out the minimum standards for their operation. Accordingly, individual member states may enact legislation that is more restrictive than the Directives themselves, and pre-existing legislation that is also more restrictive than the provisions of the Directives may also be encountered.

28. The new EU Directives came into force following consultations with member states, and are not dissimilar to provisions or practices that have been in operation in certain member states, such as France,<sup>32</sup> Sweden,<sup>33</sup> and the United Kingdom (which has operated framework agreements in the absence of specific regulation).<sup>34</sup> (These countries are updating their legislation in order to take account of the provisions of the new Directives.) Under EU Directive 2004/18/EC, a procuring entity may conclude a framework agreement (after having followed the provisions of the Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders), and then issue individual purchase orders for each purchase.<sup>35</sup>

29. Other European Union countries that have passed legislation specifically providing for framework agreements in a manner consistent with the Directives include Denmark,<sup>36</sup> Estonia,<sup>37</sup> Finland,<sup>37</sup> Poland<sup>38</sup> and Slovakia.<sup>39</sup> Among non-EU

states reviewed, Norway<sup>40</sup> and the former Yugoslav Republic of Macedonia<sup>41</sup> have made provision for the operation of framework agreements.

30. In Armenia, a list of goods, works and services that are to be procured by “Regular Competitions” is prepared and approved by the Ministry of Finance and Economy, and the procuring entities thereafter set specifications and conduct a normal procurement procedure for the items concerned.

## **E. Latin America**

31. The use of IDIQs is common in this region, often operated through a central procurement entity (such as Chile’s *Dirección de Compras y Contratación Pública*)<sup>42</sup> or by one entity on behalf of several procuring entities (such as in Peru).<sup>43</sup> In Mexico, IDIQ contracts are permitted with minimum and maximum quantities, and timing of purchases.<sup>44</sup>

32. In Brazil, the rules on framework agreements<sup>45</sup> make limited provision for multi-supplier framework agreements, showing a preference towards single-supplier agreements where recurrent purchases are concerned. Multi-supplier agreements are generally used only if a requirement cannot be covered by a single supplier, in which case the other suppliers are usually required to lower their prices to that of the winning supplier.<sup>46</sup> The requirement can be waived only in exceptional situations. Framework agreements are also limited to one year for goods and normally one year, but with a possible extension of up to one year, for services.<sup>47</sup>

## **F. North America**

33. In the United States, framework agreements are generally referred to as task-and-delivery order or multiple-award IDIQ contracts, permitted under two items of procurement legislation (the Federal Acquisition Streamlining Act of 1994 (FASA), and the Federal Acquisition Regulation (FAR)). The FAR requires all task-and-delivery order contracts to specify the period of the contract, the maximum quantity of goods or services to be purchased, and a statement of the work to be performed.<sup>48</sup>

34. The majority of IDIQ contracts are operated by the General Services Administration (GSA)’s Federal Supply Service (FSS), and are known as “Multiple Award Schedules” (MAS) contracts, for which the FAR specifies minimum competition requirements (but which are not regulated by the FASA).<sup>49</sup>

35. Also in the United States, procuring entities may use MAS contracts as an alternative to standard competitive award procedures.<sup>50</sup> Any interested supplier, at any time, may submit a tender to become an MAS contract supplier.<sup>51, 52</sup> Other IDIQ contracts offered are open for tender only for a limited period.

## **G. Systems with features comparable to framework agreements**

36. Australia makes no provision for framework agreements, but an analogous system, “panel arrangements”, is operated. Under such arrangements, a procuring entity may enter into multi-supplier “deeds of standing offer” for the provision of identified property or services. Suppliers are selected under open or restrictive



tendering proceedings and the panel arrangements must contain the minimum requirements for the procurement, including an indicative or set price or rate for the procurement. There are no specific provisions regulating the conclusion of a panel arrangement although the normal procedural and substantive requirements (including ethics, transparency and non-discrimination) apply to its conclusion. There is no obligation on the procuring entity to accept any standing offer and the standing offer can be withdrawn at any time prior to acceptance.

37. The details of the deed of standing offers or contracts may vary between panel members. When effecting purchases through a panel arrangement, a procuring entity must assess the value for money of any competing standing offers. A further competition within a panel arrangement may be held where so doing would provide value for money, but only if the initial approach to the market indicated that the panel might be utilized in this way.<sup>53</sup>

38. Canada also uses an analogous non-binding system, including supply arrangements (a method of supply where procuring entities, under the arrangement, may solicit bids from a pool of pre-screened vendors)<sup>54</sup> and standing offers (an offer made by a supplier for the provision of certain goods and/or services at prearranged prices or a prearranged pricing basis, under set terms and conditions, that is open for acceptance during a specified period).<sup>55</sup> These arrangements are regulated by the Public Works and Government Services Canada (PWGSC),<sup>56</sup> under two main policy instruments: the Supply Manual, which is a policy manual,<sup>57</sup> and the Standard Acquisition Clauses and Conditions manual.<sup>58</sup> However, neither supply arrangements nor standing offers are considered to be a direct equivalent to European framework agreements (they may be closer in some respects to suppliers' lists, as a list of qualified suppliers is generated without fully defining the scope of work and the terms and conditions, and the second phase of the procurement would be completed in accordance with the rules on selective tendering).<sup>59</sup> There may be a number of different variations on both standing offers and supply arrangements in practice.

39. In India,<sup>60</sup> the Central Purchase Organisation (CPO) may conclude "rate contracts" with registered suppliers, for goods and items of standard types (common use items, needed on recurring basis by various Central Government Ministries). The CPO publishes and updates all relevant details on its website. Suppliers must apply periodically for renewal of registration. New supplier(s) may also be considered for registration at any time, provided they fulfil all the required conditions. The performance of all suppliers is monitored, and blacklisting is a possibility.

## **IV. General conditions for use of framework agreements**

### **A. Scope of framework agreements**

40. A procuring entity may or may not be bound to place any orders at all under the agreement.<sup>61, 62</sup> A European Commission guidance paper on the operation of framework agreements under EU Directive 2004/18/EC notes that whether or not the procuring entity is bound to place orders under the framework agreement, and the supplier to fulfil them, is a matter of national law.<sup>63</sup> Where the terms of framework agreements do not oblige the procuring entity make purchases under the framework agreement, the entity can purchase outside the agreement if more favourable terms are available elsewhere.<sup>64</sup> The procuring entity may consequently need to pay a

retainer in return for the supplier's making itself available, or if there is uncertainty as to the likelihood or extent of anticipated orders.<sup>65</sup> However, there will be a balance to be drawn in each case between ensuring security of supply, receiving price discounts for firm or anticipated orders, and retaining the flexibility to purchase elsewhere.

41. Many systems require framework agreements to set minimum and maximum quantities or values of purchases under the framework, and to this extent, the framework agreements are binding on the procuring entity. These include Burkina Faso, Mexico, and Senegal. In the United States, the FAR requires all task-and-delivery order contracts to specify the period of the contract, the maximum quantity of goods or services to be purchased, and although the agreement must also stipulate a minimum monetary value that will be purchased under the agreement, the amount is typically low and of little real significance.

42. The Model Law's provisions define "the successful tender" (article 34 (4)(b)) and state that that tender "shall be accepted" (article 36 (1)). As article 27 (d) of the Model Law also requires the solicitation documents to state the quantity of goods to be procured,<sup>66</sup> the Working Group may consider that the Model Law would not permit a non-binding framework agreement.<sup>67</sup>

## **B. Restrictions on the type of items to be procured**

43. Restrictions on the types of goods or services that can be procured under a framework agreement are rarely encountered in practice. It is more common for provisions to set out the circumstances in which procurement using framework agreements are appropriate. Provisions in France, for example, have specified the circumstances in which framework agreements, both single- and multi-supplier, can be used—essentially, when the timetable or scope of work cannot be fully provided for in the procurement contract.<sup>68</sup> In the United States, IDIQ contracts can be used for all types of goods and services. However, they have most commonly been used for commercial items.<sup>69</sup>

44. The World Bank's Consultant Guidelines, restrict the use of framework agreements to single-supplier consultancy services, as follows:

"Indefinite Delivery Contract (Price Agreement). These contracts are used when Borrowers need to have 'on call' specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance. These are commonly used to retain 'advisers' for implementation of complex projects (for example, dam panel), expert adjudicators for dispute resolution panels, institutional reforms, procurement advice, technical troubleshooting, and so forth, normally for a period of a year or more. The borrower and the firm agree on the unit rates to be paid for the experts, and payments are made on the basis of the time actually used."<sup>70</sup>

45. The guidelines do not otherwise address framework agreements specifically. National systems with similar provisions include Mongolia<sup>71</sup> and Thailand.

### **C. Duration of framework agreements**

46. In many systems reviewed, provisions set a maximum duration for framework agreements, the most common of one year, or ranging from three to five years. In Malawi, for example, the duration of the framework agreement is limited to one-year in normal circumstances, and a maximum of five years with justification.<sup>72</sup> In Burkina Faso, the framework agreement must be limited by reference to budgetary periods and in any event cannot exceed three years.<sup>73</sup> In Senegal, framework agreements are concluded for an initial period of one year, but they can be renewed to a maximum of three years' total duration.<sup>74</sup> Similar provisions are found in Morocco,<sup>75</sup> Algeria<sup>76</sup> and Tunisia.<sup>77</sup>

47. EU Directive 2004/18/EC, in article 32 (2), provides that "[t]he term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement." In France, the duration is fixed under article 71.I of the Code on Public Procurement at four years apart from exceptional and justified cases,<sup>78</sup> and in Armenia, their duration is limited to three years.<sup>79</sup>

48. The United States provisions, on the other hand, do not limit the duration of task-and-order or IDIQ contracts.

### **D. Financial thresholds and other rules determining the application of procurement rules and regulations**

49. Financial thresholds may determine whether or not certain procurement rules and regulations apply,<sup>80</sup> and in the context of framework agreements, whether individual purchases under the framework are added together, or aggregated, for threshold purposes becomes an important consideration in this regard.

50. Certain systems, for example, have rules requiring aggregation of all purchases made by an entity in a particular time period, purchases made under the same framework, even if the purchases are made under separate contracts, and prohibiting entities from splitting up purchases in order to avoid financial thresholds. For example, under article 9 (9) of EU Directive 2004/18/EC, the estimated value to be taken into consideration in assessing whether the framework agreement falls within the thresholds is the maximum estimated value of all the contracts envisaged for the total term of the agreement or system.

51. If financial thresholds for formal competitive procedures depend simply on the value of each contract and there are no special rules for frameworks, procurement under framework agreements may fall outside the procurement regime. For example, a non-binding framework agreement may not involve a procurement proceeding or contract, and individual purchase orders may fall below financial thresholds (where each order placed under a framework is the only purchase contract).<sup>81</sup>

### **E. Advertising and publication requirements**

52. The advertising and publication requirements under some procurement regimes do not apply to framework agreements, or in some cases to parts of the award procedures, such as the publication of notices of contract awards under

article 14 of the Model Law (which permits the enacting State to set a minimum threshold below which such notices are not required).

53. For example, if the first award phase of framework agreements is advertised and awarded in accordance with the provisions of EU Directive 2004/18/EC, individual purchase orders (“call-offs”) made pursuant to the framework agreement need not be further advertised.

54. In the United States, requirements or individual purchase orders made under framework agreements need not be published. A list of inter-agency framework agreements is required to be published but, however, is not currently available.<sup>82</sup>

55. Under the GPA, the standard requirement for a procuring entity to publish a notice of each award in theory could require purchasers to publish a notice for every order placed under a framework agreement.<sup>83</sup> However, the WTO has held that second phase awards are exempt from the GPA’s advertising and publicity requirements.<sup>84</sup>

56. Commentators have observed that publishing notices of orders placed or contracts awarded is of significant value in relation to framework agreements, providing for the possibility of some control over whether single-supplier frameworks are being operated in accordance with the rules, and over the way in which orders are placed in the second award phase of multi-supplier frameworks. It has been observed that providing for the aggregation of contract amounts under a framework agreement for publicity purposes may ensure a more transparent procedure than may otherwise exist for small purchases, because the framework agreement itself must be advertised, even if individual purchase orders need not.<sup>85</sup>

## **F. Review**

57. Many systems provide that the second award phase is exempt from a review mechanism such as that contemplated in chapter VI of the Model Law.

58. For example, the WTO has also held that second phase awards are exempt from the GPA’s review mechanism procedures.<sup>86</sup> Similarly, EU Directive 2004/18/EC provides that, once a framework agreement is in place, “call-offs” under that framework agreement will not be subject to review mechanisms. Accordingly, observers have commented that there may be risks to meaningful competition in the second phase.

59. In the United States, the Government Accountability Office (GAO) undertakes the federal review function (termed “bid protests”). Suppliers may not, in most cases, seek review of individual purchase orders placed under a framework agreement because the review is exercised over the framework agreement itself.<sup>87</sup>

### *Notes*

<sup>1</sup> As a percentage of U.S. federal government-wide procurement dollars obligated, 1997 to 2002. See United States Government Accountability Office, *Civilian Agency Compliance with Task and Delivery Order Contracts*, GAO Rep. No. 03-983, at 6 (August 2003).

<sup>2</sup> The supplier offering the best value for money may therefore vary according to the nature of the purchase order, taking into account any or price reductions on the basis of the purchase order, the availability of suppliers’ personnel to carry out particular work, developments in a supplier’s

products between the conclusion of the framework agreement and the placing of the purchase order, or other factors.

- <sup>3</sup> Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004: Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, respectively (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 1 and 114 et seq, also available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)). Directive 2004/17/EC permits framework agreements in its article 14. Directive 2004/18/EC contains more detailed provisions on framework agreements in its article 32, and this note will have regard to the latter provisions when considering the use of framework agreements in the European Union and its member states.
- <sup>4</sup> In French, for example, they are called variously *accords-cadres*, *marchés de clientèle*, *marchés à commande* and *marchés fractionnés*, and in Spanish *acuerdos marco*, *acuerdos de suministro* and *contratos con fecha de entrega indefinida o de suministro cuantitativo indefinido*.
- <sup>5</sup> Arrowsmith S., “Framework purchasing and qualification lists under the European Procurement Directives: Part I”, (1999) 8 P.P.L.R., 115.
- <sup>6</sup> It is true, however, that some types of framework agreement and some types of suppliers’ lists can be difficult to classify. Document A/CN.9/WG.I/WP.45 and Add.1 discusses the use of suppliers’ lists.
- <sup>7</sup> In the United States, “[t]o become a [General Services Administration (“GSA”)] Schedule contractor [to hold an equivalent to a framework agreement], a vendor must first submit an offer in response to the applicable GSA Schedule solicitation. GSA awards contracts to responsible companies that offer commercial items falling within the generic descriptions in the GSA Schedule solicitations”. See, further, <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%2Fep%2Fchannel%2FgsaOverview.jsp&channelId=-13464>.
- <sup>8</sup> Observers have commented that a second-phase award can be made, using electronic technologies, in hours, rather than the several weeks or months required for other procurement methods.
- <sup>9</sup> Framework agreements are considered by some commentators to be better than suppliers’ lists for urgent procurement in cases such as utilities (which might otherwise be conducted using the Model Law’s request for quotations method, also known as “shopping”). However, particularly so far as utilities are concerned, other commentators stress the quality risks that arise in such outsourcing.
- <sup>10</sup> The security may be enhanced if the agreement gives some expectation of future orders to the supplier(s), such that they are more likely to invest in the requisite plant and machinery, particularly where a bespoke product is concerned. A maximum quantity may be stipulated in the agreement, so as to allow for unforeseen high demand – either to protect suppliers from unanticipated order levels, or to allow procuring entities to seek more advantageous sources of supply with a larger operator.
- <sup>11</sup> U.S. Office of Management & Budget, Office of Federal Procurement Policy, “Best Practices for Multiple Task and Delivery Contracting”, 7 (Washington, D.C.: July 1997), available at [www.acqnet.gov/Library/OFPP/BestPractices/BestPMAT.html](http://www.acqnet.gov/Library/OFPP/BestPractices/BestPMAT.html).
- <sup>12</sup> Framework agreements of this type could theoretically be used for purchases that could conveniently be made in a single lot, but which the procuring entity separates into lots to enable the participation of SMEs. However, information provided to the Secretariat has shown no instances of their being used in practice for this purpose.
- <sup>13</sup> Such as Burkina Faso, Chile, China, Ethiopia, Mexico and Niger.
- <sup>14</sup> See, for example, Brazilian Law No. 8.666 of 21 June 1993, section V, and Decree No. 3.931 of 19 September 2001, and, in France, the Code on Public Procurement, article 71.
- <sup>15</sup> The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA) (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf)), which may be amended to include a

specific provision on framework agreements, though some member states consider that such a provision would not be appropriate.

- <sup>16</sup> Countries without provisions included Cameroon, Egypt, Nigeria and Sierra Leone.
- <sup>17</sup> Articles 29 and 30, respectively, of the Malawi Public Procurement Act No. 8 of 2003.
- <sup>18</sup> Article 5.2 of Ethiopia's Public Procurement Law, and article 57 of Tanzanian Procurement Regulations, 2005, passed under the Public Procurement Act (No. 3 of 2001).
- <sup>19</sup> *Decret N°2003-269/Pres/Pm/Mfb*.
- <sup>20</sup> *Code des marchés publics*, article 65.
- <sup>21</sup> See *Code des marchés publics, décret n°2002-550*, July 2002, Chapter 6 - *Marchés de clientèle ou à commande*, article 26.
- <sup>22</sup> *Décret présidentiel n° 02-250 du 13 Jomada El Oula 1423 correspondant au 24 juillet 2002 portant réglementation des marchés publics*.
- <sup>23</sup> *Décret n° 95-401/p-rmportant code des marches publics*.
- <sup>24</sup> *Décret n° 2-98-482, fixant les conditions et les formes de passation des marchés de l'Etat ainsi que certaines dispositions relatives à leur contrôle et à leur gestion*, article 5.
- <sup>25</sup> *Article 8, Décret n° 2002-3158 portant Réglementation des Marchés Publics*, December 2002.
- <sup>26</sup> *Projet de Directive*, articles 7, 36 and 37.
- <sup>27</sup> Ministry of Finance Regulations, "Government Procurement Management Implementation for Central Agencies", clauses 31 and 32.
- <sup>28</sup> Information provided to the Secretariat from Hong Kong Special Administrative Region Government, China.
- <sup>29</sup> See paragraph 45 for provisions in Mongolia and Thailand.
- <sup>30</sup> Information on this practice is provided to the Secretariat. The "Terms and Conditions for Use of the Government Electronic Business (GeBIZ)", which operates a system in which suppliers register for conducting business with government electronically, refers specifically to the possibility of using framework agreements, including those involving quotations from suppliers (clause 12 and Definition of Framework Agreements).
- <sup>31</sup> See, in particular, article 32 of Directive 2004/18/EC.
- <sup>32</sup> *Code des marches publics, Decret No.2004-15* of 7 January 2004, articles 70 and 71, currently being updated to take account of the new EU procurement directives. Practice under the current Code is as follows. The provisions distinguish between two types of framework agreements, which can be when the timetable or scope of work cannot be fully regulated in the contract. First, those with purchase orders, under which the procuring entity is bound to purchase a minimum amount stipulated, and all of its requirements for the relevant goods, construction or services from the supplier concerned, up to a maximum amount. This type of agreement is generally concluded as a single-supplier agreement, though a multi-supplier agreement is permitted if it is impossible for all the work to be done by one supplier or when a multi-supplier arrangement is needed for security of supply. (The second type of framework agreement operates using conditional purchase orders, under which the procuring entity is bound to purchase only a certain quantity, with an option to purchase more.) Competition is required in the first phase on the basis of the estimated maximum value of the anticipated procurements.
- <sup>33</sup> The Procurement Act (SFS 1992:1528), as amended, available at <http://www.nou.se/pdf/louenglish.pdf>.
- <sup>34</sup> The British Government's Office of Government Commerce considers that framework agreements were not incompatible with the former EU procurement Directives, in that the conclusion of the framework agreement could be made either in accordance with the Directives if the agreement were a binding contract with purchase obligations, or the agreements fell outside those directives as there were no obligations on the procuring entity to make any purchase at all. The purchases made under the framework agreement were contracts to which the Directives applied, and the European Commission was concerned that they were not awarded in compliance with the Directives if there were changes to the specifications at that phase. The position has now been addressed with the passing of the new EU procurement directives. See, further, Office of Government Commerce Information Note, February 2003, available at [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1000330](http://www.ogc.gov.uk/embedded_object.asp?docid=1000330), and Arrowsmith S., "Case Comment: Framework Agreements under the UK Procurement Regulations: the Denfleet Case," 2005 PUB. PROC. L. REV. NA86.

- <sup>35</sup> The individual purchase orders can be issued either by applying the terms set out in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by holding a further competition between the parties to the framework agreement. The Directives provide that the reopening of competition should comply with certain rules the aim of which is to guarantee flexibility and respect for the Directive's general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not normally exceed four years.
- <sup>36</sup> See the Public Procurement Act, of 19 October 2000, (RT I 2000, 84, 534; consolidated text RT I 2001, 40, 224), entered into force 1 April 2001, as amended, available at [http://www.rha.gov.ee/eng/?nav\\_PeaLink=Oigusaktid&id=15](http://www.rha.gov.ee/eng/?nav_PeaLink=Oigusaktid&id=15).
- <sup>37</sup> See <http://www.hansel.fi/index.php?id=286&action=empty>.
- <sup>38</sup> Act of 29 January 2004, the Public Procurement Law, available at <http://www.uzp.gov.pl/>.
- <sup>39</sup> See Act No. 523/2003 of 24 October 2003, available at <http://www.uvo.gov.sk/english/stat02a/stat02a.htm>.
- <sup>40</sup> Norway operates a procurement regime consistent with that of the European Economic Area, following two sets of regulations pursuant to Act No. 69 of 16 July 1999 (as amended), available at <http://www.dep.no/odin/english/norway/foreign/032091-991532/dok-bn.html>. The European Free Trade Surveillance Authority noted in 2003, however, that Norway had allowed certain framework agreements to be concluded without applying the then prevailing EU Directives (see <http://www.eftasurv.int/information/annualreports/dbaFile4066.pdf>).
- <sup>41</sup> See the Law on Public Procurement of the former Yugoslav Republic of Macedonia, March 2004, available at [http://www.sigmaweb.org/PDF/Laws\\_PUP/FYROM\\_PPL\\_Mar\\_2004.pdf](http://www.sigmaweb.org/PDF/Laws_PUP/FYROM_PPL_Mar_2004.pdf).
- <sup>42</sup> Operating under *Ley de compras 19.886, Capítulo VI, artículo 30, d*.
- <sup>43</sup> See Law No. 26850 of 9 July 1997 (the state procurement law), and the regulations issued thereunder, particularly articles 88-96.
- <sup>44</sup> See the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*), article 47.
- <sup>45</sup> Law No.8666 of 21 June 1993, section V, and Decree No.3.931 of 19 September 2001.
- <sup>46</sup> Decree No.3.931 of 19 September 2001.
- <sup>47</sup> Law No.8666 of 21 June 1993, article 57, and Decree No.3.931 of 19 September 2001, article 2.4.
- <sup>48</sup> FAR 16.504, available at [www.arnet.gov/far](http://www.arnet.gov/far).
- <sup>49</sup> The GSA awards three types of contracts: Single Award Schedule (SAS), Multiple Award Schedule (MAS) and the Maintenance and Repair Schedule. Under the SAS, there is one supplier, the items are manufactured under Federal Military Specifications or as commercial items, the purchases are for a specific geographic area, and are awarded as a result of sealed bidding. Under the MAS, there are multiple suppliers, with no guarantee of sales, the suppliers are holders of an indefinite delivery indefinite quantity (IDIQ) contract, and pricing is based on discounts from commercial price lists.
- <sup>50</sup> FAR 8.404, under which, orders placed against a multiple award schedule using the procedures set out are considered to be issued using full and open competition.
- <sup>51</sup> MAS contract solicitations, which are largely standardized across different product classes, are accessible through the GSA online database at [www.gsaelibrary.gsa.gov](http://www.gsaelibrary.gsa.gov). GSA generally will accept any supplier offering reasonable prices.
- <sup>52</sup> Pricing on the MAS contracts is based on the vendor's commercial pricing; under a most favoured customer clause, the vendor commits to drop its MAS prices if the vendor drops its prices to a class of commercial customers that GSA and the vendor have accepted as the vendor's benchmark class of customers. See Price Reductions clause, GSAAR 552.238-75, 48 C.F.R. § 552.238-75 (September 1999); U.S. General Services Administration, Office of Inspector General, "Special Report – MAS Pricing Practices: Is FSS Observing Regulatory Provisions Regarding Pricing?" (24 October 2001) (available at [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/masrpt\\_R2E-c7B\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/masrpt_R2E-c7B_0Z5RDZ-i34K-pR.pdf)).
- <sup>53</sup> Sections 8.67 and 8.68 of the Commonwealth Procurement Guidelines (CPGs), made under Regulation 7 of the Financial Management and Accountability Regulations 1997.
- <sup>54</sup> These contracts have been defined as "an agreement that includes both an offer from a potential

contractor and acceptance of that offer by government to enter into a future contract in accordance with terms and conditions prescribed in the standing agreement. With a standing agreement, there is an obligation on the part of government to access the services negotiated within the specified time period.” Government of British Columbia, Canada, Ministry of Finance, Office of the Comptroller General, Core Policy and Procedures Manual Glossary, available at <http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/Glossary.htm>.

- <sup>55</sup> Canadian agencies may use a standing offer when a Vendor of Record (VOR) is utilized directly for procuring goods and services. A Vendor of Record is “a procurement process where the municipality/local board seeks out bids or proposals from a select group of vendors with which it has already established a satisfactory business relationship. The goal of using a VOR is to have “a qualified, reliable, cost effective provider available when the need arises without facing the administrative costs of obtaining several quotes.” Government of Ontario, Canada, Ministry of Municipal Affairs & Housing, a Guide to Developing Procurement Bylaws, Meeting the Requirements of the Municipal Act, 2001, at 24 (July 2003), available at [http://www.mah.gov.on.ca/userfiles/HTML/nts\\_1\\_11349\\_1.html](http://www.mah.gov.on.ca/userfiles/HTML/nts_1_11349_1.html).
- <sup>56</sup> See PWGSC, Supply Manual, section 9J, especially 9J1, available at <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>.
- <sup>57</sup> Available at <http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html>.
- <sup>58</sup> Available at <http://sacc.pwgsc.gc.ca/sacc/index-e.jsp>.
- <sup>59</sup> Further detail on Standing Offers and Supply Arrangements can be found in Chapter 5 of the Supply Manual, starting at 5.153.
- <sup>60</sup> Further information, notably as regards e-procurement to automate the tendering and rate contract process, available on the website of the Directorate General of Supplies and Disposals (DGS&D) ([www.dgsnd.gov.in](http://www.dgsnd.gov.in)).
- <sup>61</sup> The agreement will be a binding contract in most systems provided that each party undertakes some obligation under it. In France, for example, the framework agreement is a contract binding on both parties, because both types of framework agreement contemplated by the code involve a binding minimum purchase obligation on the procuring entity. If the agreement has no minimum purchasing obligation on the procuring entity, legal steps may be taken in some systems to render the agreement nonetheless a binding contract, such as a deed in English law, or it may be left as a non-binding arrangement.
- <sup>62</sup> A framework agreement that does not commit a supplier to supply orders placed under it is unlikely to be of benefit to the procuring entity, and so it is unlikely to be encountered in practice. Non-binding arrangements do not ensure any security of supply, and so alternative sources of supply are important, and they are not suitable for critical products. The uncertain nature of the arrangement is also unlikely to maximise the possible costs and time savings of a binding agreement. However, there may be savings to procuring entities in concluding this type of arrangement, if there are realistic expectation of business, even in the absence of strict legal obligations.
- <sup>63</sup> European Commission Directorate General Internal Market and Services Public Procurement Policy, CC/2005/03\_rev 1 of 14.7.2005, page 3.
- <sup>64</sup> An example of a system where purchase outside the framework agreement are not permitted is found in the current Code on Public Procurement of France, articles 70 and 71.
- <sup>65</sup> Retainers are more commonly encountered in single-supplier frameworks and in contracts for professional services.
- <sup>66</sup> There are equivalent provisions for restricted tendering proceedings and the procurement of services.
- <sup>67</sup> Some commentators consider that the quantity could, however, be interpreted to include an estimate.
- <sup>68</sup> Supra, note 32.
- <sup>69</sup> The term “commercial item” is broadly defined at FAR 2.101, 48 C.F.R. § 2.101, to include goods and services that are generally commercially available, and items related to those broadly available. While regulations of “commercial items” are streamlined (see FAR Part 12, 48 C.F.R. Part 12), US regulators recently proposed reducing legal requirements even further for commercial items that are broadly and immediately available, known as “commercial off-the-shelf” items, including both supplies and services. 69 Fed. Reg. 2447 (15 January 2004).



- <sup>70</sup> “Guidelines: Selection and Employment of Consultants by World Bank Borrowers,” May 2004, paragraph 4.5, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266,00.html>.
- <sup>71</sup> See the Public Procurement Law of Mongolia, 14 April 2000, Ulaanbaatar, available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/monlaw\\_2000.doc](http://www.wto.org/english/tratop_e/gproc_e/monlaw_2000.doc).
- <sup>72</sup> Public Procurement Act No. 8 of 2003.
- <sup>73</sup> Article 9 of *Decret No 2003-369/PRES/PM/MFB*.
- <sup>74</sup> Articles 26 and 27 of *Code des marchés publics*, note 21, *supra*.
- <sup>75</sup> Décret n° 2-98-482, article 5, note 24, *supra*.
- <sup>76</sup> Décret présidentiel n° 02-250 du 13 Jomada El Oula 1423 correspondant au 24 juillet 2002 portant réglementation des marchés publics, note 22, *supra*.
- <sup>77</sup> Article 8 Décret n° 2002-3158, note 25, *supra*.
- <sup>78</sup> However, it is not excluded that an individual purchase order under the framework agreement could exceed the maximum four-year term of the framework agreement itself.
- <sup>79</sup> In Armenia, the duration is limited to July 1 of the year following that in which the contract is concluded, or a maximum of three years.
- <sup>80</sup> For example, the threshold in the EU for its procurement Directives to apply is, generally, EUR 249,000 (EUR 499,000 for most supply and service contracts and EUR 624,000 in the case of construction contracts) (article 16 of Directive 2004/17/EC and article 7 of Directive 2004/18/EC).
- <sup>81</sup> For example, the Model Law’s tendering procedure also does not contemplate arrangements that involve entering into a binding contract only when orders are placed. In particular, article 36(4) provides that a “procurement” contract arises when a tender is accepted.
- <sup>82</sup> See FAR, subpart 5.6. However, a notice on the website that should contain a list of interagency framework agreements referred to, <http://www.contractdirectory.gov>, states that “Interagency Contract Directory functionality temporarily suspended”.
- <sup>83</sup> GPA, article XVIII.1.
- <sup>84</sup> World Trade Organization, Committee on Government Procurement, “Review of National Implementing Legislation: United States,” Sec. V (GPA/50 (01-2999) (15 June 2001)), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/50.doc>.
- <sup>85</sup> The scale of a framework agreement may also justify the costs of advertising that would otherwise be prohibitive for small purchases.
- <sup>86</sup> World Trade Organization, Committee on Government Procurement, “Review of National Implementing Legislation: United States,” Sec. V (GPA/50 (01-2999) (15 June 2001)), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/50.doc>.
- <sup>87</sup> With limited exceptions.