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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services— issues arising from the use of suppliers' lists

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-3	3
II. Background information	4-49	3
A. Scope of the subject	4-6	3
B. Types of lists	7-22	4
1. By effect of registration	8-13	4
2. By purpose	14-16	5
3. By degree of formality	17-18	6
4. By level of centralization and integration	19-22	6
C. The use of suppliers' lists in procurement proceedings	23-28	7
1. Procurement planning	23	7
2. Basis for the selection of suppliers	24-25	7
3. Qualification of suppliers	26-28	7



D.	Concerns over the use of suppliers' lists	29-39	8
1.	Exclusionary practices	29-32	8
2.	Non-transparent practices	33-34	9
3.	Market segmentation	35-36	9
4.	Difficulties with maintaining lists	37-39	10
E.	Extent of regulation	40-49	10
1.	Regulations at domestic and international levels	40-46	10
2.	Controls imposed on the operation of suppliers' lists	47-49	11

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 (hereafter “the Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5-43 of document A/CN.9/WG.I/WP.41 that will be before the Working Group at its ninth session.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group held a preliminary exchange of views on the treatment of suppliers’ lists in the revised Model Law or Guide to Enactment. It agreed that in the revision of the Model Law it would be appropriate to acknowledge the existence and use of suppliers’ lists. The Working Group deferred a detailed consideration of the subject to a future session (A/CN.9/568, paras. 61 and 67). At its eighth session (Vienna, 7-11 November 2005), the Working Group decided to take up the subject of suppliers’ lists at its next session, time permitting (A/CN.9/590, para. 10).

3. The present note and addendum thereto have been prepared with a view to facilitating further consideration of the subject by the Working Group. The present note provides background information on the use of suppliers’ lists, reviewing types of lists, their use in procurement proceedings, concerns arising from the use of lists, extent of regulation at domestic and international levels and controls imposed on their use. The addendum describes position with respect to suppliers’ lists under the Model Law, including the relevant drafting history, provides a summary of the Working Group’s consideration of the subject at its sixth session in 2004, examines various reform options that the Working Group may wish to consider for addressing the use of suppliers’ lists in the revised Model Law and/or the Guide and contains drafting materials on the subject.

II. Background information

A. Scope of the subject

4. The suppliers’ lists under review are those established for use as a pool of readily available information about listed suppliers in more than one procurement. In paper or electronic form, they are employed around the globe for various purposes. Electronic procurement systems and techniques have expanded and diversified the recourse to them for procurement and non-procurement purposes, and made their maintenance and operation more efficient and less costly for both procuring entities and suppliers.

5. Excluded from review are: (i) various types of professional and trade registers functioned for certifying and licensing companies for business activity generally or in a particular sector, as are lists of products that have been certified as meeting required standards and requirements (and thus deemed eligible for acquisition by public purchasers) and similar lists. Although linked to the operation of suppliers’ lists and to procurement processes,¹ these lists are not created for and do not operate specifically for procurement purposes; (ii) procurement registries intended to record procurement activities of public entities during certain period of time. Although some of them may have entries about participating suppliers, information therein is

not primarily intended for the use in future procurements; (iii) prequalification and qualification lists generated in the course of a specific procurement. Criteria for inclusion on these lists will be more specific to the advertised procurement and needs of the procuring entity than in the case of suppliers' lists. They are also not to be used, as is the case with the suppliers' lists, in future procurement proceedings, rather only in the specific procurement proceedings for which and during which they are specifically compiled; and (iv) lists employed in some flexible contract award procedures, such as multi-supplier framework agreements or dynamic purchasing systems (see A/CN.9/WG.I/WP.44 and Add.1).

6. The dividing line between suppliers' lists and the latter type of lists may be fine, especially if the terms of the arrangement between a procuring entity and a supplier or contractor are not substantially defined and binding on either party.² Nevertheless, in all these flexible contract award procedures, procuring entity would establish at least the minimum standard specification and terms for future purchases of a similar nature and the parties would reach an agreement at least over the minimum contract terms. In addition, through such procedures, the procuring entity is closer to the contract award stage than it is by establishing a suppliers' list. In most regulations reviewed (see paras. 40-46 below), the suppliers' lists and these award procedures are treated as distinct procurement arrangements, each subject to its own rules and controls. Prohibition on using procurement award procedures to operate suppliers' lists is effectively provided in some instruments reviewed, aiming to ensure that the express controls on suppliers' lists, most notably their publicity and continuous access to them by new suppliers (see paras. 47-49 below), are not undermined.³

B. Types of lists

7. Suppliers' lists differ one from the other in a variety of key aspects, most importantly in the impact that registration on them has on the eligibility of suppliers to participate in procurement. This aspect as well as the purpose for which the lists operate in turn significantly influence the formality and procedural aspects of the operation of the lists.

1. By effect of registration

8. Depending on how registration on the list affects the eligibility of suppliers to participate in a procurement, lists may be mandatory or optional.

9. Lists are mandatory when registration on them is required for participation in procurement covered by the list. Where the absence of registration on the list does not affect the right of suppliers to participate in procurement proceedings covered by the list, lists are optional.

10. In some systems, while the absence of registration cannot affect the eligibility of suppliers to participate in procurement proceedings covered by the list in general, a registration on the list may be specified in solicitation documents by a procuring entity as a condition for participation in a specific procurement.⁴ Procuring entities may also require registration on the list for the award of a contract.⁵

11. In the case of mandatory lists, procuring entities may be permitted or required by law or by agreement with registered suppliers not to advertise procurement to non-listed suppliers or accept their participation. Under other systems, registration may be mandatory for participation in procurement but procuring entities have to advertise the lists and accept participation of other suppliers, not on the list, subject to some conditions, for example, if new suppliers can reasonably be registered on the list in time.⁶ Under some circumstances, suppliers may be exempted from the requirement to register.⁷

12. Various types of lists may operate in any given jurisdiction. Mandatory listing is usual for participation in procurement (i) in certain sectors, most often construction,⁸ (ii) of certain categories of goods, works and services,⁹ (iii) when certain procurement methods/techniques, most commonly electronic bidding,¹⁰ are used, (iv) above certain value, and/or (v) by certain procuring entities.

13. In practice, the difference between the optional and mandatory lists is often blurred. Even those supposed to be optional could easily become compulsory in practice, if invitations to participate would be sent only to those on the list. In some systems, for example, restricted bidding based on shortlists developed from lists of registered suppliers, even optional, is the preferred procurement method, with the effect that in practice a supplier must be on the list to do business with the public sector.¹¹

2. By purpose

14. At the one end of the spectrum are lists that often operate as mailing lists, and registration on which does not involve any assessment of eligibility of suppliers to participate in procurement: all those suppliers with an interest in the contracts covered by the list are included in the list and qualification are checked in the context of specific procurements. Especially in the electronic domain, the use of some type of registration lists is to some extent indispensable for the operation, safety and security of electronic systems (e.g., so that the system can identify and register potential suppliers, provide them with access rights to the electronic procurement portal, differentiate those rights, communicate with suppliers by sending information to and/or validating the information received from them).

15. At the other end of spectrum are suppliers' lists which main purpose is to screen potential suppliers for future procurements. The degree of screening may vary from an initial assessment of minimum information on the eligibility of suppliers to participate in procurement generally,¹² to prequalification of all or some criteria that potential suppliers have to meet for participation in procurements covered by the list.¹³ These types of lists are often referred to as "qualified suppliers' lists" or "lists of approved or qualified suppliers".

16. In the electronic domain, the distinction between qualified suppliers' lists and simple registration lists may not necessarily be clear. For instance, some electronic registration lists, initially operating as a "yellow pages business catalogue" where suppliers were listed and identified by their basic data, such as name, address and types of goods and services offered, have evolved into more complex systems. Some of them are being linked to trade, professional or other registries and systems (in particular, tax and social security payment systems), which allows registration on the list with simultaneous automatic assessment of at least basic data.¹⁴ With more

technology possibilities, other more complex functionalities may be integrated into electronic suppliers' lists, allowing for automatic evaluation of other qualification elements, such as checking performance history and ranking suppliers accordingly.¹⁵

3. By degree of formality

17. Inclusion on lists may involve formal application for registration by potential suppliers, evaluation of their applications by authorized agencies, and approval for registration of those potential suppliers who have satisfied, and agreed with, the conditions for inclusion on the list (for example, in electronic procurement systems, suppliers are usually required to agree with certain terms of communication, ownership, use, confidentiality and security of information, and disclaimers of liability on the part of the registering authority¹⁶).

18. In contrast, some lists do not involve any formal application by potential suppliers. Such lists may be compiled informally by procuring entities on the basis of information on suppliers that participated in procurement proceedings held by the procuring entity or on the basis of responses to questionnaires submitted by potential suppliers or contractors.

4. By level of centralization and integration

19. Lists may be maintained in a centralized or decentralized manner. In centralized systems, a list is maintained by one designated authority and for procurements at all levels of government, central and local. In decentralized systems, a list maintained by a central government body may apply to only central government procurement while municipalities and other procuring entities may maintain lists for their own procurement purposes¹⁷ and may or may not require registration on a central registry. In other decentralized systems, no single central registry may exist. Lists may be maintained by several ministries at a central level as well as local authorities and various procurement entities. Suppliers' lists may be maintained by entities outside the public administration structure, for example, chambers of commerce.¹⁸

20. A list may be established for use by more than one agency. The requirement is often found that in such case this fact and the names of the agencies that may use the list must be disclosed.¹⁹ Procuring entities that do not maintain their own lists may be given a choice as to which list to choose among those in existence.²⁰ This type of system is criticized on the ground that the use of lists chosen arbitrarily often leads to favouritism and other abuses in procurement proceedings.

21. Lists may cover all types of procurement in all sectors of the economy²¹ or may be limited to a particular sector (e.g., construction, services) or to a type of goods, works or services.²² When limited to certain sectors, registration on the suppliers' lists is often seen as repetitive and duplicative of the registration and certification activities of sector/industry-specific regulatory bodies.²³

22. With the introduction of electronic procurement systems, more jurisdictions have transferred from decentralized and non-integrated to centralized and integrated registration systems.²⁴ The latter approach to maintaining suppliers' lists is also recommended by multilateral development banks (MDBs) as conducive to saving costs, avoiding overlap and achieving consistency between lists operating in any

given jurisdiction²⁵ and alleviating suppliers' concerns about the need for them to undergo repetitive and duplicative registrations.²⁶

C. The use of suppliers' lists in procurement proceedings

1. Procurement planning

23. Suppliers' lists may be indicative of market conditions and as such may be used in the procurement planning, for instance in the selection of a procurement method. The lists, for example, may clearly indicate at the outset of procurement that only one supplier or a limited number of suppliers has the proprietary rights to goods or services being procured (e.g., the procurement involving the protection of patents, copyrights or other exclusive rights or for other technical or artistic considerations), which would justify recourse to restricted or non-competitive procurement methods.

2. Basis for the selection of suppliers

24. As a general rule, in tendering proceedings, suppliers' lists can be used as mailing lists additional to other means of solicitation. At least one jurisdiction allows the solicitation documents to require registration on a suppliers' list as a prerequisite for participation in open tendering proceeding.²⁷

25. In non-open procurement proceedings, lists may be used as an additional or sole source for the selection of contractors or suppliers to participate in procurement proceedings.²⁸ In addition, where a professional license is essential to carrying out a procurement contract, procurement most likely will be conducted on the basis of a list of licensed (approved) suppliers.²⁹

3. Qualification of suppliers

26. The fact of registration may be invoked in qualification for a specific procurement to prove that a registered supplier meets one or more of the qualification requirements imposed upon registration on the list.³⁰ Thus registration on suppliers' lists may eliminate the need to ascertain some or all of the suppliers' qualifications in a specific procurement and consequently be additional to or replace qualification, prequalification or post-qualification in a specific procurement proceeding. This is often cited as a main advantage of qualified suppliers' lists, which would depend, however, on whether suppliers participating in a specific procurement have been registered on the list, since with optional lists this advantage is present only with respect to suppliers who choose to register, on the degree of assessment of suppliers' qualification upon registration on the list and on the relevance of that assessment to a specific procurement.

27. Registration on suppliers' lists may be sufficient to ascertain qualifications for participation in routine procurement of simple goods. In some procurement systems, it replaces prequalification on a case-by-case basis also for large and complex projects.³¹ In other cases, the general type of qualification information that may be required from applicants for registration might not adequately demonstrate their qualifications or capacity to perform a particular procurement contract. If the participation in a contract depends on a fact the establishment of which was not a

condition for registration on the list, a procuring entity may require proof of the additional requirement. Qualification in the context of a specific procurement proceeding may also be required for updating information that was provided for registration on the list.

28. In some jurisdictions, a sworn statement that a supplier holds currently valid registration is sufficient to prove registration and to certify the facts on which the registration has depended.³² In most cases, a valid certificate of registration establishes the fact of registration and specifies the information given to the authority to enable the provider to be registered on the list and any classification given.³³

D. Concerns over the use of suppliers' lists

1. Exclusionary practices

29. The operation of suppliers' lists may substantially restrict access to procurement and reduce competition by excluding from the procurement suppliers who are not registered. These concerns are expressed mostly about the operation of mandatory lists. However, they are also present with optional lists since, as was noted above (see para. 13), the difference between mandatory and optional lists is often blurred.

30. Depending on the registration rules and discretion given to registering authorities, not necessarily all applicants qualified for the sort of contracts covered by the list may be included on the list. Rather registration may be restricted to the best suppliers or those favoured by a registering authority. This could be either those which perform relatively better than others in relation to the general qualification criteria (for example, those with the most experience), or those which are likely to put forward the best offers (for example, those which consistently submit competitive bids). The latter criterion for inclusion on the list is quite common as lists are often compiled on the basis of the performance history of suppliers, resulting in exclusion of suppliers who are deemed to have poor past performance records.

31. Substantial discretion may also be given to a registering authority with respect to penalizing, including de-listing or blacklisting, those suppliers with deficient contract performance or involved in different types of improprieties (such as bribery or fraud). Under some regimes, de-listed companies are prohibited from reapplying for the list during substantial period of time. Such sanctions may also be applied for failure to comply with other obligations such as payment of social security taxes, workman's compensation, and income tax.³⁴ Often no adequate control and detailed conditions are imposed, resulting in excessive sanctions, discrimination among suppliers and other abuses.

32. Some exclusionary practices may also be employed when suppliers or contractors are selected for particular procurement. Not all suppliers on the list may be solicited in any given procurement proceeding and more stringent qualification criteria, standards or procedural requirements may apply to suppliers that are not on a list than to those who have qualified for the contract in question through registration on a list.

2. Non-transparent practices

33. The greatest risks for transparency and competition in procurement arise with the lists that operate in a disguised non-transparent manner. Concerns are often expressed that not all essential elements in the operation of suppliers' lists are disclosed to the public in general or to the suppliers concerned.

34. For instance, conditions for delisting and blacklisting are rarely set out in detail. In addition, under procurement regimes that authorize some but not all suppliers on the list to be solicited in any given procurement proceeding, systems employed for the selection from the lists (rotation, chronological order of registration on the list or other systems) are also rarely made public, leading to uneven distribution of procurement opportunities contradictory to the principles of transparency, equality and non-discrimination among potential suppliers. In other instances, no selection system may be in place but procuring entities may be required, for example, to vary the suppliers as frequently as possible, which effectively leaves it to the discretion of procuring entities to decide whom to consider for a particular procurement.³⁵

3. Market segmentation

35. The operation of qualified suppliers' lists as the basis for the selection of contractors or suppliers for a specific procurement may also cause market segmentation, as a result of which contracts of a given value may always be awarded to bidders with a corresponding classification level on the list. In qualified suppliers' lists, suppliers are often classified according to their contracting capacity, minimum threshold interest, goods and services offered and other information. Classification employed in some lists goes even further and allows categorization of suppliers according to their technical and economic qualification, timelines, quality, quantity and cost of performance, form of payment and other criteria.³⁶ As different evaluation process may apply for inclusion on the list under various classifications,³⁷ subsequent certification of the fact of listing is held according to a classification scheme used in listing and serves to prove that registered suppliers are deemed qualified to be awarded procurement contracts as per their classification on the list. In some systems, suppliers registered under one classification cannot participate in procurement under other classifications.³⁸

36. In addition, market segmentation may be increased by various State socio-economic and related market segmentation policies connected with the operation of lists (e.g., set-aside programmes), which may aim: (i) to identify target groups in need of assistance or for which preferences have been established and enable these groups to determine for which of assistance or other measures they may be eligible; (ii) to facilitate the allocation of contracts on regional basis; and (iii) to promote the rectification of negative patterns of distribution of resources and discrimination. For instance, under set-aside policies aimed at promoting small-business development, procuring entities may be required to include in the procurement procedure small and medium size companies to the extent possible. Access to smaller contracts by companies with a higher classification level for such purpose may be restricted so that to prevent larger companies from routinely outbidding smaller companies, thus depriving them of procurement opportunities.³⁹

4. Difficulties with maintaining lists

37. Concerns are also raised that qualified suppliers' lists are difficult to maintain in practice. In particular, it has been argued that a status record reflected in the list will have problems of obsolescence⁴⁰ and be a target of appeals; and rules applicable to the operation of the list will be found to be either highly restrictive (and therefore limit access, competition and transparency) or difficult to implement and maintain.⁴¹

38. Lists can also involve unnecessary administrative costs, which in some cases may be high,⁴² for both suppliers and procuring entities when suppliers that are not likely to win contracts register or seek to register. For example, combining open access to lists with screening that requires maintaining an ongoing status review for a long list of suppliers when only a few will be qualified for a specific procurement may be expensive. However, if such an ongoing review is not in place, the value of information on the list or submitted for registration on the list would be questionable as it would not reflect changes in capacity achieved by potential suppliers and in other data on which registration had relied. As a result, contracts could be awarded to bidders without adequate qualifications or qualified bidders could be excluded, particularly in the context of market segmentation.⁴³

39. Some jurisdictions also face difficulties in monitoring the effectiveness of various State socio-economic and related market regulatory policies connected with the operation of lists, and in scaling back or withdrawing such policies and programmes if they prove to be ineffective.

E. Extent of regulation

1. Regulation at domestic and international levels

40. Provisions regulating the use of suppliers' lists are found in both domestic and international instruments. Due to the potential discriminatory effect that the operation of suppliers' lists may have for foreign bidders,⁴⁴ a number of bilateral and multilateral free trade agreements that *inter alia* promote opening and integration of procurement markets address the subject.

41. The possibility of using mandatory or optional suppliers' lists in selective tendering procedures is recognised in the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO) that refers in this context to the "permanent lists of qualified suppliers".⁴⁵ The GPA imposes a number of controls on their operation. For limited tendering procedures, used when competition is not appropriate (such as for cases of urgency), the GPA rules on lists do not apply.⁴⁶

42. The North America Free Trade Agreement (NAFTA) allows for use of lists under rules and controls very similar to those of the GPA.⁴⁷ The Asia-Pacific Economic Cooperation (APEC) non-binding Principles on Government Procurement have little explicit on the subject but envisage a possibility for establishing "a register of suitable suppliers" subject to some specific control and the general principles of transparency, value for money, effective competition, fair dealing, accountability, due process and non-discrimination.⁴⁸

43. A dual regime exists under the European Union (EU) procurement directives, with a more stringent regime applicable to public procuring entities than to the entities operating in the utilities sector. The latter, including those that are part of the state or publicly owned, are permitted under the EU procurement directive applicable to them (directive 2004/17/EC) to use optional and mandatory qualification lists (the directive refers in this context to the “qualification systems”), subject to controls similar to those of the GPA.⁴⁹ The other EU procurement directive (directive 2004/18/EC), applicable to public procuring entities, allows member States to introduce only optional “official lists of approved economic operators” and “certification”. It regulates access to public procurement in a member State maintaining such a list or certification by suppliers from another member States who are not on the list or uncertified.⁵⁰

44. A number of bilateral free trade agreements explicitly address the lists.⁵¹ All of them subject the operation of the lists to the general principles of transparency, objectivity and non-discrimination and impose a number of explicit controls on their operation similar to those contained in the GPA. Some of them by reference make applicable to the parties the relevant provisions of the GPA or regional instruments (e.g., NAFTA).⁵²

45. The MDBs do not accept requirements for registration on a suppliers’ list in international competitive bidding procedures. There is general agreement among them and other international institutions dealing with public procurement reforms in countries of their operation, such as the Organization for Economic Cooperation and Development (OECD),⁵³ that registration of bidders as a condition for bidding is not a good practice. In those countries where registration system exists, they recommend that it should be de-linked from all aspects of pre-selecting suppliers for procurement. The best practice, according to them, is when prequalification is employed on a contract-by-contract basis where necessary for very large or complex contracts as usually it is expensive, burdensome and time-consuming process for both procuring entities and suppliers; otherwise post-qualification should be used to ascertain a winning supplier’s eligibility and suitability to undertake a particular contract. These and other principles for the operation of suppliers’ lists have been reflected in the OECD—World Bank international benchmarks and standards for public procurement systems in countries of their operation (the “OECD—World Bank international procurement benchmarks and standards”).⁵⁴

46. Domestic regulations on suppliers’ lists reviewed for the present study are those from Africa (Morocco, South Africa, Tanzania and Uganda), Asia (China, India, Indonesia, Malaysia, Mongolia, Philippines, Republic of Korea and Singapore), Australia, Canada, Latin America (Argentina, Brazil, Chile, Colombia, Costa Rica and Mexico), Eastern Europe (Bulgaria and Serbia and Montenegro), some EU countries (Austria, Estonia, Slovak Republic and the United Kingdom) and the United States.

2. Controls imposed on the operation of suppliers’ lists

47. Most of the regulations reviewed aim at mitigating concerns arising from the use of the lists, in particular, their potential anti-competitive effect and risks of corruption and collusion of suppliers and of protectionism and favouritism. Some of the regulations reviewed subject the operation of lists to such general principles as transparency, non-discrimination and non-restriction of competition, while some

others, in addition, to a number of procedural controls. The degree of control may depend on such factors as an entity using the suppliers' lists⁵⁵ and the type of lists (mandatory lists being subject to more explicit and stricter controls than optional lists).

48. Commonly found controls specify conditions for the use of suppliers' lists⁵⁶ and require: (i) open approach to market for the establishment of a list; (ii) continuous publicity of lists, rules regulating their operation, criteria for listing and delisting and amendments thereto; (iii) objective, non-discriminate, transparent and proportionate criteria for listing that are assessed in objective manner; (iv) open access to lists at any time; (v) regular updating, including by limiting validity of entries on the list; and (vi) due process (proper notifications of decisions related to listing, debriefing, reasonable timeframe for taking decisions and availability of appropriate challenge mechanisms).⁵⁷

49. Some regimes allow a notice on the existence of the suppliers' list to serve as the notice of all procurements covered by the list. In such cases, it is usually required that the notice on the establishment of the list must explicitly state this fact.⁵⁸ The GPA allows this for entities listed in its Appendix I, annexes 2 and 3 (mainly local and provincial entities and utilities) but not for those listed in annex 1 (most central/federal entities, except for some involved in utility activities and some state enterprises in other areas) that are required to advertise each procurement contract separately. Similarly, NAFTA allows this for entities listed in its annexes 1001.1a-2 and 1001.1a-3 (covering state enterprises and provincial and local entities) but not for central/federal government entities.⁵⁹ In contrast to the EU public procurement directive (2004/18/EC) that does not allow such use of lists for any entities covered by the directive, the EU utilities procurement directive (2004/17/EC) allows utilities sector entities advertising a qualification system in lieu of advertising specific contracts covered by the system and provides that the selection of suppliers for a particular procurement in such cases must be limited to those on the list.⁶⁰ The OECD—World Bank international procurement benchmarks and standards state that advertisement of a list should not be sufficient for open competition, which may imply that this is acceptable for non-open procedures.

Notes

¹ Evidence of general business registration or professional licensing may be required of suppliers to prove their eligibility to be included on a suppliers' list. See, e.g., § 32(1), read together with §§ 36-37, of the Public Procurement Act of Estonia (19 October 2000, amended as at 19 November 2003), and article 41 (2) 1, read together with article 92, of the Public Procurement Act (ZJN-1) of Slovenia (5 May 2000).

² E.g., in the United States, some standing "framework" agreements, known as "multiple award schedule contracts", are becoming, in essence, suppliers' lists: they are awarded to numerous contractors with no real competition at the time of award (any new contractor may always join) to provide a diverse range of goods and services. Gaining a schedule contract entitles the successful vendor to only a small guaranteed minimum order; in reality, under the schedule contract, mini-competitions among schedule holders are held when customer agencies publicize new requirements. Information provided to the Secretariat by a consultant. See also Nash R.C., Schooner S.L., and O'Brien K.R. "The Government Contracts Reference Book", 428, 2nd edition, 1998. See also document A/CN.9/WG.I/WP.44 and Add.1 for further discussion of US system and systems operational in Australia, India and Canada.

- ³ These controls, however, are blurred under some systems in the operation of suppliers' lists advertised in lieu of advertisement of all individual procurements covered by the list since in these instances suppliers' lists work more as mandatory closed arrangements, i.e., a procuring entity is obliged to procure from suppliers on the list (see para. 49). For the discussion of the differences between suppliers' lists and these flexible contract award procedures, see Arrowsmith S, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part II", Public Procurement Law Review, 1999, No. 8, starting from p. 161, see in particular pp. 172-180.
- ⁴ See, e.g., in Australia, Financial Management Guidance No. 13 on the Mandatory Procurement Procedures, January 2005, appendix A, p. 58, available at http://www.finance.gov.au/ctc/mandatory_procurement_procedur.html.
- ⁵ E.g., in Chile (under article 16 of Law 19.886 on Public Procurement, http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html).
- ⁶ See, in particular, articles VIII (c) and X (3) of the Government Procurement Agreement of the World Trade Organization (GPA) (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): the number of additional suppliers permitted to participate must be limited only by the efficient operation of the procurement process.
- ⁷ E.g., in Colombia, under article 42 of Law 598, an exemption from the registration requirement is granted in cases of urgency. In Malaysia, an exemption may be granted under some exceptional circumstances, but is subject to deposit of security. In Morocco, decrees regulating systems of qualification and classification for certain types of works and services exempt non-domestic suppliers from the requirement to register (article 18 of Decree No. 2-94-222 of 16 June 1994, and article 19 of Decree No. 2-98-984 of 22 March 1999).
- ⁸ See, e.g., article 22 of the Statutory Act on Public Administration Contracting of Colombia (http://www.secretariassenado.gov.co/leyes/L0080_93.HTM, also known as *Ley 80 de 1993*), and article 37 (2) of the Public Procurement Law of Mongolia (14 April 2000).
- ⁹ See, e.g., Australia, where inscription of bidders in the Endorsed Supplier Arrangement (ESA) is mandatory as regards Commonwealth procurement of IT and major office machines. See Financial Management Guidance No. 13, p. 27, "An Example of a Multi-Use List: Endorsed Supplier Agreement".
- ¹⁰ Our understanding is that, for example, in Chile and Mexico, a supplier or contractor has to be on a specifically designated list for participating in electronic bidding in general through ChileCompra and Compranet (<http://www.compranet.gob.mx/>), respectively.
- ¹¹ See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, para. 130.
- ¹² E.g., Compranet registration requirements in Mexico (<http://www.compranet.gob.mx/>), and CCR registration requirements in the United States (<http://www.ccr.gov/handbook.asp#info>). Requirements to provide minimum information for listing are also found, for example, in Argentina and in article 92 of the Public Procurement Act of the Slovak Republic (Act No. 523/2003 of 24 October 2003 on Public Procurement and on Amendment of Act. No. 575/2001 Coll. on the Organisation of Activities of the Government and on the Organization of Central State Administration, as amended). The information in these systems is usually limited to basic data about suppliers (e.g., identification information, legal form, goods supplied, contact information).
- ¹³ Requirements to provide more detailed information are found, for example, in Brazil (article 35 of Law No. 8.666 of 21 June 1993), China (article 5 of Interim Measures of the Public Procurement Centre for Central Government Authorities Regarding Registration of Suppliers' Qualifications), Chile (article 94 of Law 19.886), Costa Rica (article 59.2 of the Presidential Decree, of 6 March 1996, "*Decretos N° 25038-H, Reglamento General de Contratación Administrativa*", available at <http://www.l.hacienda.go.cr/proveeduria-financiera/reg%20gral%20de%20contratacion%20adva.html>). Criteria for listing in those

systems may extend to experience, technical, managerial and financial capacity, organization and availability of equipment, staff and skills.

- ¹⁴ E.g., SICAF in Brazil. A benefit of using lists for statistical purposes and improving, by way of financial check, collection of tax, social security and other state dues is cited by the Department of Public Works and Highways (DPWH) in the Philippines (FAQ's specific to DPWH, http://www.procurementwatch.org.ph/rules_related/related7.htm).
- ¹⁵ E.g., the Government Electronic Procurement System in the Philippines (GEPS, <http://www.procurementservice.net>), which operates on the basis of a registry of suppliers, includes a "performance tracking" mechanism (IRR-A, section 9.1.5). In Brazil, as well, under article 36 § 2 of Law No. 8.666, the supplier's conduct in the performance of its obligations shall be mentioned in the respective registry. Similarly, in Hong Kong, the Environment, Transport and Works Bureau, which maintains a list of approved contractors, also maintains a contractor performance report system.
- ¹⁶ See, e.g., a supplier agreement as an integral part of registration with the Philippines GEPS, found at http://www.procurementservice.net/English/SUPPLIER_Tc.asp?L=1.
- ¹⁷ E.g., in Brazil, SICAF is a central suppliers' registry for federal procurement; local authorities and procuring entities are authorized to maintain their own lists. In Chile as well, other registries may be maintained, in electronic or paper form, by procuring entities, or dealing with some types of goods or services. In China, certification of suppliers at the central level is carried out by the Public Procurement Centre for State Authorities of China, and at local levels by various finance authorities.
- ¹⁸ See, e.g., in Colombia, article 22 of *Ley 80 de 1993*, under which the classification and qualification of all potential bidders is done by local chambers of commerce and may be verified by the national government. See also article 92 of the Public Procurement Act of Slovenia.
- ¹⁹ See, e.g., in Australia, Financial Management Guidance No. 13, pp. 57-59; and article 28 (3) of the Public Procurement Act of the Slovak Republic.
- ²⁰ See, e.g., in Costa Rica, where law allows the use of the different registries by procuring entities that due to procurement volume or capacity do not have their own lists (article 59.4 of *Decretos N° 25038-H, Reglamento General de Contratación Administrativa*). § 37 (4) of the Public Procurement Act of Estonia permits a procuring entity to utilize a list compiled by another entity to the extent that the system used for compiling the list is in accord with the requirements of the procuring entity seeking to utilize the list and with the provisions of the Act. Article 22 (2) of the Public Procurement Act of Slovenia authorizes procuring entities in the utilities sector to use lists of qualified bidders of other procuring entities. In Uganda, lists are maintained by the Ministry of Work and the Ministry of Education and procuring entities may choose which to use for their purpose (see the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, para. 137).
- ²¹ See, e.g., SICAF in Brazil as per Law No. 8.666.
- ²² E.g., in Singapore, central registration is carried out by the EPPU (general goods and services), the Pharmaceutical Department of the Ministry of Health (medical supplies and healthcare-related goods and services), and the Construction Industry Development Board (construction and construction services).
- ²³ E.g., in the Philippines, the Registry of Civil Works Contractors is maintained by the Department of Public Works and Highways (DPWH), and a separate list is maintained by the Construction Industry Development Board (PCAB) handling licensing process (FAQ's specific to DPWH, http://www.procurementwatch.org.ph/rules_related/related7.htm).
- ²⁴ E.g., in the Philippines, the IRR-A (section 8.5.1) call for the integration of existing electronic registries maintained by procuring entities with the electronic registry set up to support the Government Electronic Procurement System. In the Republic of Korea, multiple registration requirements have been consolidated by "single-window" registration by way of registration through the Government Electronic Procurement System (GePS) "to ensure efficiency and transparency in the public procurement sector by utilising the Government Electronic

Procurement System (GePS)” (information submitted by the Republic of Korea to the APEC Government Procurement Experts Group, Phuket, Thailand, 15-16 August 2003, APEC document 2003/SOM111/GPEG/009, agenda item 7a).

- ²⁵ This is especially true in decentralized systems but also the case in centralized systems, since consistency must be ensured and duplication avoided between the suppliers’ lists and various professional and licensing registries.
- ²⁶ See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Chile, August 2004, in particular paras. 23, 37, 75 and 76 (available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/11/19/000012009_20041119095309/Rendered/INDEX/289140CL.txt).
- ²⁷ See, e.g., in Australia, Financial Management Guidance No. 13, p. 58. This is listed as an option if a procuring entity wants to benefit from both the competitive advantages of an open process and take advantage of assessment work already undertaken during the prequalification for inclusion on the list.
- ²⁸ In a limited market or in case of emergency, for example, suppliers’ lists may be the only or the quick source from which to choose parties to bid or negotiate contracts without public advertisement. In some jurisdictions, they are also used as the source for the selection of suppliers for small value purchases to save costs that are involved in more formal tendering proceedings. E.g., in Singapore, under Contracts and Purchasing Procedures, paragraph 120, the Government Electronic Business (GeBIZ) is used to identify and solicit quotations for contracts below \$50,000 (for which formal open or selective tendering is not required) without posting the quotation openly on the GeBIZ website.
- ²⁹ See, e.g., in Australia, Financial Management Guidance No. 13, section 5-3, p. 24, and p.27 “An Example of a Multi-Use List: Endorsed Supplier Agreement”.
- ³⁰ For the relevant discussion, see the European Court of Justice, joined cases 27-29/86 (“CEI” and “Bellini”), 9 July 1987, [1987] ECR 3347; [1989] 2 CMLR 224. See, also e.g., § 36 (2) of the Public Procurement Act of Estonia and article 91 of the Public Procurement Act of the Slovak Republic, providing the presumption of qualification of a supplier for a particular procurement contract established by registration on the list.
- ³¹ For example, the World Bank’s country procurement surveys of some countries indicates that prequalification, although prescribed in the regulations, rarely employed in practice, as the lists of registered suppliers, although not regulated, effectively perform such a function. See, e.g., the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. II, Main Findings and Recommendations, June 2004, paras. 129 and 139 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617)
- ³² See, e.g., in Argentina, Ministerial resolution No. 5 of 30 January 2004, available at http://www.onc.mecon.gov.ar/paginas/inicio/downloads/Resolucion_5_2004.doc.
- ³³ See, e.g., § 36 (1) of the Public Procurement Act of Estonia. Certificates could be generated automatically by electronic system, or granted by registration authorities. The validity of certificates may vary from several days (usually if automatically generated) to months and years. A certificate may be required to be renewed every time the registration is updated. See, e.g., in Brazil, article 36.1 of Law No. 8.666.
- ³⁴ E.g., in Malaysia, where possible sanctions include warnings, suspension of registration with the Construction Industry Development Board (CIDB) for up to five years, and blacklisting (see Terms of Registration, available at <http://www.cidb.gov.my/main.php?cid=166>).
- ³⁵ See, e.g., the World Bank Country Assessment Procurement Reports (CPAR) of some jurisdictions (such as Uganda, Malawi, Tanzania) at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617.
- ³⁶ See, e.g., in Brazil, under article 36 of Law No. 8.666, registered suppliers shall be ranked in various categories having regard to their specialization, each category being subdivided in groups according to the technical and economic qualification of the

suppliers; in Colombia, under article 79 of *Ley 80 de 1993* and Decree 856 of 1994, chambers of commerce must keep records, classified according to specialization, groups or types of goods or services offered, of contracts awarded and sums allocated; in Costa Rica, under article 2 of *Decretos n° 25113-h “Reglamento para la Utilización del Registro de Proveedores”* (<http://www1.hacienda.go.cr/proveeduria-financiera/reg%20registro%20proveedores.html>), the registry includes detailed information on the goods and services each supplier has to offer, minimum thresholds of interest of suppliers and form of payment, among others; and in Malaysia there are seven grades for each of three registration categories (civil engineering construction, building construction and mechanical and electrical) in the registry maintained by the Construction Industry Development Board (CIDB) (<http://www.cidb.gov.my/content.php?cid=166&11=0>).

- ³⁷ E.g., in Chile, under article 85 of Law 19.886, each supplier is registered under a specific category or area, and the evaluation process depends on the specific category or area requested. Under article 88 of the same Law, renewal of registration is held in accordance with the requirements for each particular category or area.
- ³⁸ See, e.g., article 8.5.1 of the Government Procurement Reform Act of the Philippines, stating that a supplier duly registered with the Government Electronic Procurement System may participate in a procurement undertaken by any procuring entity provided that the said supplier's registration is proper and relevant to the particular type of procurement.
- ³⁹ See, e.g., small business set-aside programmes in the United States: procurement falling within one or more monetary-value categories is designated for award only to firms classified at designated size levels. Set-aside approach may involve the designation of specific types of product for purchase exclusively from groups targeted for assistance. For example, in India, there are provisions for procurement of various items only from the Khadi and Village Industries Commission, which acts as a selling agent on behalf of producers from those communities. Similar programmes are found in South Africa and Indonesia (with respect to registered cooperatives). Information provided to the Secretariat by consultants.
- ⁴⁰ Dissatisfaction with the reliability and relevance of qualification emanating from a registration system in Indonesia has led to removal in the new procurement rules (*Keppres 80/2003*) of references to, and reliance on, registration and certification formalities that were prominent in the preceding instrument (*Keppres 18/2000*). Information provided to the Secretariat by a consultant. See also, e.g., the World Bank Country Assessment Procurement Report (CPAR): Paraguay, January 2003, para. 22 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617)
- ⁴¹ See “Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems,” OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, p. 3.
- ⁴² See, e.g., in China, an advancement of RMB ¥ 10,000 (around 1,239 USD at the conversion rate on 13 January 2006) is required as goodwill security by suppliers wishing to be included in the suppliers' database. Information provided to the Secretariat by a consultant. See, also, the World Bank Country Assessment Procurement Report (CPAR): Uganda, vol. I, Executive Summary, June 2004, para. 17.
- ⁴³ See “Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems,” OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, p. 3. See also, e.g., the World Bank Country Assessment Procurement Report (CPAR), India, December 2003, para. 5.9, and Indonesia, March 2001 (available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?type=advSrch&psz=20&pcont=results&dt=540617). Among problems noted in this context by the World Bank are over-reliance on submitted documents without proper verification, lack of sanctions in cases of misrepresentation of facts, and registration under several names and different size firms to enhance the chances to be selected.
- ⁴⁴ In the domestic regulations reviewed, a number of requirements have been found amounting to

non-tariff barriers to international trade, such as requirements of domestic tax clearances, domestic bank guarantees, local legal personality or local physical presence, reciprocal arrangements or language barriers. The Secretariat was informed by consultants that, for example, in Brazil it would not be possible for foreign companies to register on the suppliers' list without a local address and legal presence. The maintenance of the registry only in the Portuguese language also hinders access to the registration system. In the United States, foreign vendors have complained informally that some of the required data for the CCR (the Dun & Bradstreet identifying number, or the CAGE code assigned defence suppliers) can, in practice, be difficult for foreign firms to gather. The requirements of local legal personality and of physical presence are found in China (the Rules of Beijing Municipality Regarding Minimum Standards for Qualified Suppliers in Public Procurement, for example, provide that suppliers who fail to appear at the Public Procurement Centre of Beijing for the annual review of their listing are deemed to be automatically disqualified for participation in the public procurement activities in Beijing). The requirement of reciprocal treatment is found, for example, in China, article 7 of Interim Measures of Guangxi Zhuang Autonomous Region for Suppliers' Access into the Realm of Public Procurement, and in article 92 (1) of the Public Procurement Act of Slovenia.

- ⁴⁵ 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. The references to the lists are found in articles VIII-XI.
- ⁴⁶ It is suggested that procuring entities may use mandatory or optional lists for these award procedures without any controls. For a detailed analysis see Arrowsmith S., "Government Procurement in the WTO," 2002, pp.237-241.
- ⁴⁷ See, in particular, article 1011 (2) of NAFTA allowing the use of lists to select suppliers in restricted procedures and article 1009 (2) (containing controls).
- ⁴⁸ See, in particular, para. 27 of the Non-binding Principles, available at http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement.html.
- ⁴⁹ See article 53 of directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 1, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).
- ⁵⁰ See article 52 of directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114, also available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).
- ⁵¹ See, e.g., chapter 15, article 15.7 (4 and 5), of the Free Trade Agreement between Australia and USA; chapter 9, article 9.8 (3) of the Dominican Republic-Central America-United States Free Trade Agreement; article 57 of the Free Trade Agreement between the EFTA (European Free Trade Association) States and Chile; articles 144-147 of the Association Agreement Between the European Union and Chile; and article 15.7 of the Free Trade Agreement between the Republic of Korea and Chile. All available at <http://www.sice.oas.org/Trade>.
- ⁵² See, e.g., part three, chapter six, article 6.1, of the Free Trade Agreement between Canada and Israel; article 13.3 of the Free Trade Agreement between the United States and Singapore; and article 61 and annex XVIII of the Free Trade Agreement between EFTA States and Mexico. All available at <http://www.sice.oas.org/Trade>.
- ⁵³ For OECD's activities in the public procurement sector, see "Public Governance and Management" section of their website http://www.oecd.org/topic/0,2686,en_2649_37405_1_1_1_1_37405_00.html.
- ⁵⁴ See "Strengthening Procurement Capacities in Developing Countries. International Benchmarks and Standards for Public Procurement Systems. Requirements for Local Procurement in Borrowing Countries" p. 3, OECD/DAC—World Bank Roundtable, Paris, 22-23 January 2003, available at <http://www.oecd.org>.

- ⁵⁵ For example, under GPA, the use of the lists by central government agencies listed in Appendix I, annex 1 is subject to more stringent controls than the use of the same by sub-central government entities listed in annex 2.
- ⁵⁶ In some jurisdictions, the recourse to qualified suppliers' lists is allowed only in exceptional cases, and must be justified and approved. E.g., in the United States, under FAR 9.202, if the qualification lists are used, the contracting activity must have a written justification by the head of the contracting activity. In Hong Kong as well, approval for establishment of lists, of qualification criteria applicable to the lists and revisions thereof are issued by various central agencies, such as by the Permanent Secretary for the Environment, Transport and Works (Works). Entities applying for such approval must provide justifications and information on the source of prospective applicants, qualification criteria and assessment panel and method of assessment. Regulations often limit the entities that might use the mandatory lists. See, e.g., GPA and the EU procurement directives. In some jurisdictions, the use of lists is restricted to certain sectors, types or methods of procurement.
- ⁵⁷ Some or all of these requirements are provided for in, e.g., articles VIII to X of GPA; in Australia, Financial Management Guidance No. 13, pp. 56-57; in Austria, § 129 (8) of the Purchase Contracts Award Act 2002; in Brazil, article 34 § 1 of Law No. 8.666; in Chile, article 97 of the Executive Guidelines to Law 19.886 (http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html); in China, article 12 of the Interim Measures of the Public Procurement Centre for Central Government Authorities Regarding Registration of Suppliers' Qualifications; in Colombia, under Law 598; in Costa Rica, article 59, section 3, of *Decretos N° 25038-H, Reglamento General de Contratación Administrativa*; in the Czech Republic, articles 76 (2) and 77 of the Public Procurement Law; in Hong Kong, Tender Procedures for Government Procurement (Chapter III of the Stores and Procurement Regulations, section 320 (c)); EU directive 2004/17/EC, articles 41 (3), 49 (5) and 53 and annex XIV, and EU directive 2004/18/EC, article 52 (6); in Latvia, article 7 (5) 1 of the Public Procurement Law; in Mongolia, article 37 of the Public Procurement Law; in Serbia, article 53 of the Public Procurement Law; in the Slovak Republic, article 28 of the Public Procurement Act; and in the United States, FAR 9.202 (a)(2), 9.204 (a), (c) and (d), and 205.
- ⁵⁸ See, e.g., article IX (9 (e)) of GPA, and annex XIV, para. 6, of EU directive 2004/17/EC.
- ⁵⁹ See, e.g., article 53 (9) of EU directive 2004/17/EC.
- ⁶⁰ See, e.g., article 53 (9) of EU directive 2004/17/EC.
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