International Procurement

CHRISTOPHER YUKINS, DON WALLACE, JR, JASON MATECHAK, AND JEFFREY MARBURG-GOODMAN*

I. Introduction

The International Procurement Committee has prepared this update on a number of key international procurement issues including: the proceedings at the United Nations Commission on International Trade Law, recent developments involving the Trade Agreements Act in U.S. domestic procurement, and the Organization for Economic Cooperation and Development's (OECD) work on untying foreign assistance.

II. UNCITRAL Working Group on Public Procurement

In 2004, the United Nations Commission on International Trade Law (UNCITRAL) voted to update the UNCITRAL Model Law on Procurement of Goods, Construction and Services (Model Procurement Law).[1] The Commission entrusted the reform effort to UN-

*The comments below are the authors' own and do not represent the positions of any organization to which the authors may have an affiliation. Section II was prepared by Christopher Yukins and Don Wallace, Jr. Chris Yukins is an associate professor of government contracts law at The George Washington University Law School, and Don Wallace is a professor of law at Georgetown University Law Center and chairman of the International Law Institute. Both have served as members of the UNCITRAL expert advisory groups, and as advisers to the U.S. delegation to the UNCITRAL working group. Professor Yukins serves as liaison to the ABA Section of Public Contract Law Section on the current UNCITRAL reform effort. A different version of this paper, co-authored by Chris Yukins and Professor Laurence Folliot-Lalliot of the University of Paris and drawing on France's comparative experience, was published in the French language journal *Contrats Publics-Actualité de la Commande Publique (CP-ACP)*, published by Groupe du Moniteur in January 2006.

Section III was prepared by Jason Matechak, Partner, Reed Smith LLP, Delegate to the UNCITRAL Working Group on Public Procurement, and Chair of the ABA SIL International Procurement Committee.

Section IV was prepared by Jeffrey Marburg-Goodman, Assistant General Counsel of the U.S. Agency for International Development, U.S. Delegate to the Procurement Joint Venture of the OECD Development Assistance Committee, and Vice-Chair of the ABA SIL International Procurement Committee.

1. UNCITRAL Model Law on Procurement of Goods, Construction and Services, U.N. GAOR, 49th Sess., Supp. No. 17, Annex 1, U.N. Doc. A/49/17 (1994), revised by U.N. Doc. A/49/17/Corr.1 (1994) [hereinafter Model Law]; *see* United Nations Commission on International Trade Law, Current Activities of International Organizations in the Area of Public Procurement: Possible Future Work, U.N. Doc A/CN.9/539 (Apr. 30, 2003); *see* United Nations Commission on International Trade Law, Possible Future Work in the Area of Public

CITRAL Working Group I (Procurement). Working Group I began its work in Vienna in August-September 2004,[2] and continued in New York in April 2005,[3] and in Vienna in November 2005.[4] Pursuant to the UNCITRAL Secretariat's proposed agenda,[5] at the Vienna session in November 2005, the Working Group addressed the following topics in public procurement: electronic communications, electronic reverse auctions (ERAs), and abnormally low (or unrealistically low) bidding. The last day of the Working Group was reserved for discussion of potential additional topics for consideration, including framework agreements (known popularly as indefinite-delivery/indefinite-quantity or task-order contracts in the United States) and supplier lists.[6] This part reviews the items before the Working Group, and notes policy concerns regarding each of those points.[7] This article will not address the Secretariat's proposal[8] to broaden the Model Procurement Law's *Guide to Enactment*, perhaps to include model implementing regulations for the Model Procurement Law. That initiative, which would likely enhance harmonization in contract formation and administration, will have to be addressed in more detail in the future.

Procurement, U.N. Doc A/CN.9/553 (Mar. 24, 2004). References to the United Nations documents throughout this article (the A/-series documents) are to the working papers and reports of Working Group I, and are *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

2. *See* United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Aug. 30-Sept. 3, 2004, Report of Working Group I (Procurement) on the work of its sixth session, U.N. Doc A/CN.9/568 (Sept. 17, 2004).

3. *See* United Nations Commission on International Trade Law, Working Group I (Procurement), New York, Apr. 4-8, 2004, Report of Working Group I (Procurement) on the work of its seventh session, U.N. Doc A/CN.9/575 (Apr. 12, 2005) [hereinafter Seventh Session].

4. The last meeting of November 2005 was officially the Working Group's eighth session. (The Working Group existed before the current round of reform). The official report of November 2005 meeting is to be published as United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Nov. 7-11, 2005, Report of Working Group I (Procurement) on the work of its eighth session, U.N. Doc A/CN.9/590 (Nov. 18, 2005) [hereinafter Eighth Session]. As of this writing, the report remained in draft form; citations herein are to that draft report.

5. United Nations Commission on International Trade Law, Working Group I (Procurment), Vienna, Nov. 7-11, 2005, Annotated provisional agenda for the eighth session of Working Group I (Procurement), U.N. Doc A/CN.9/WG.I/WP.37 (June 24, 2005).

6. *Id.* ¶ 35-36; Eighth Session, *supra* note 4, ¶ 10.

7. The authors have previously published papers on the UNCITRAL procurement effort. *See* Christopher R. Yukins & Don Wallace Jr., *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the United State* (The George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 144) (forthcoming in 4 PUB. PROCUREMENT L. REV. 2005); *see* Don Wallace Jr. et al., *UNCITRAL Model Procurement Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Agreements*, 40 PROC. LAW. 12 (2005); *see* UNCITRAL's Model Procurement Law: Changes on the Horizon, 81 FEDERAL CONTRACTS REPORT No. 11 (2004), *available at* www.ssrn.com. This article will not review framework agreements, which are to be addressed in a future session of the Working Group and which are to be addressed in two further working papers from the UNCITRAL Secretariat. The papers will be denoted by the following U.N. document numbers, A/CN/9/WG.I/WP.41 and A/CN.9/WG.1/WP.42. *See* United Nations Commission on International Trade Law, Working Group I, (Procurement), Vienna, Nov. 7-11, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—Drafting Materials Addressing the Use of Electronic Communication in Public Procurement, U.N. Doc. A/CN/9/WG.I/WP.38, ¶ 3 (July 19, 2005) [hereinafter Possible Revisions].

8. *See* Possible Revisions, *supra* note 7, ¶¶ 9-11.

A. Electronic Communications: Functional Equivalence and Accessibility

The first topic taken up by the Working Group was electronic communications in public procurement. This is not a controversial issue, as many procurement processes, especially in the industrialized world, have shifted to electronic media, most often the Internet. In undertaking this initiative, the Working Group has deferred to the work being done under the UNCITRAL Model Law on Electronic Commerce.[9] In keeping with the Model Law on Electronic Commerce, the proposed changes to the Model Procurement Law are to reflect the principles of functional equivalence between electronic communications and traditional paper-based transactions, and technological neutrality between different types of technology solutions.[10]

B. Records of Electronic Procurement Processes

The November 2005 meeting also addressed how procuring agencies might maintain records of electronic procurements. The Secretariat's proposed additional language for article 11 of the Model Procurement Law, to regulate procedures for maintaining electronic records,[11] engendered little debate. More controversial, however, was proposed language for the Model Procurement Law's *Guide to Enactment*, which would have been far more prescriptive regarding electronic procurement records.[12] The Secretariat's proposed guidance regarding accessibility standards, when applied to procurement records, would have required that a means of storage be selected "that will enable the information concerned to remain accessible even as technologies advance, and to be non-discriminatory."[13] That was probably too ambitious a standard. The U.S. experience suggests that when confronted with an inflexible requirement to make procurement records permanently accessible, agencies may simply revert to paper. The Working Group concluded that a better approach, therefore, would be to require that records at least be available during the time that a bid protest (challenge) might be brought, but that imposing a requirement that electronic records be permanently accessible might be too onerous.[14]

C. Electronic Tenders

To enable electronic procurement functions, the Working Group considered proposed new language for article 30 of the Model Procurement Law.[15] The Secretariat also suggested

9. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997).

10. *See* Possible Revisions, *supra* note 7, ¶¶ 14-17; *see* Eighth Session, *supra* note 4, ¶ 19 (citing Seventh Session, *supra* note 3, ¶ 12).

11. United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Nov. 7-11, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—Drafting Materials Addressing the Use of Electronic Communication in Public Procurement, U.N. Doc. A/CN.9/WG.I/WP.38, Add.1, ¶¶ 16-18 (July 19, 2005) [hereinafter Possible Revisions Addendum].

12. *Id.* ¶ 18.

13. *Id.*

14. *See* Eighth Session, *supra* note 4, ¶ 45.

15. Article 30. Submission of tenders

(5) (a) A tender shall be submitted in writing, signed and in a sealed envelope or in any form specified

language for the *Guide to Enactment* to ensure that electronic tenders are kept confidential until opening, much as traditional paper tenders are kept in sealed envelopes until opening; some of the proposed language was based upon the 2004 European Procurement Directive.[16]

D. Electronic Publication of Procurement Texts

The Working Group also addressed issues raised by electronic publication of procurement-related texts—laws, regulations, and administrative guidance. Article 5 to the Model Procurement Law currently provides as follows regarding publication: "[t]he text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained."[17] It should be noted that in the U.S. procurement system almost all these categories of documents are published on the Internet, or, in some isolated cases, are at least available through a Freedom of Information Act request.[18] The Secretariat's working paper concluded with a recommendation that the Model Procurement Law should follow the World Trade Organization's Government Procurement Agreement and press for broader publication of procurement-related materials, such as judicial decisions regarding procurement.

E. Publication of Procurement Plans

A separate issue arises from the publication of future procurement plans. The Secretariat's working papers included a study of procurement practices worldwide with regard to publication of future procurement plans.[19] Publishing procurement plans is not the same as publishing a particular procurement opportunity. The Secretariat's study—and the Working Group's discussion—focused on whether the Model Procurement Law should be amended to encourage (or mandate) publication of general future procurement plans by procuring agencies.

F. Electronic Reverse Auctions

Probably the most controversial issue taken up at the UNCITRAL Working Group meeting of November 2005 was ERAs—online auctions through which vendors compete to provide lower prices to buyers.[20] This issue, which has been pending before UNCITRAL

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in the solicitation documents, provided that the means of submission chosen by the procuring entity shall comply with the accessibility standards contained in [article 4 bis or 5 bis];

(b) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

Possible Revisions Addendum, *supra* note 11, ¶ 24.

16. Council Directive 2004/17/EC, 2004 O.J. (L 134/1) (EC).

17. Model Law, *supra* note 1.

18. The unpublished exceptions tend to be standing embarrassments to the agencies involved.

19. United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Nov. 7-11, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in Public Procurement, U.N. Doc A/CN.9/WG.I/WP.39/Add.1 (Aug. 15, 2005).

20. *See, e.g.*, Sue Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules: Current Possibilities and Future Prospects*, 11 Pub. Procurement L. Rev. 299 (2002).

for some time,[21] raises serious issues related to competition, transparency, and the collateral impacts of reverse auctions. The European Union has promulgated directives governing ERAs;[22] the United States, however, remains in a regulatory limbo, having failed to issue final regulations regarding reverse auctions.[23]

At the outset of the November 2005 meeting, the UNCITRAL Secretariat proposed new texts to govern the use of ERAs under the Model Procurement Law, built on the Working Group's prior deliberations. The central proposed text would have established certain conditions including standardized product or services with price as the determining criterion and market of at least a certain number of expected qualified suppliers.[24]

In order to bring reverse auctions into the Model Procurement Law, the Secretariat introduced proposed new text for the Model Procurement Law, regarding conduct in the pre-auction period. The first issue raised by the proposed language went to prequalification. Under the Secretariat's proposed language, procuring entities would be left the option of not reviewing prospective tenderers in prequalification procedures, per the Brazilian model, which may defer a review of supplier qualifications until after a reverse auction.[25] In the Brazilian system, however, reverse auctions generally are used only for certain categories

21. *See, e.g.*, 4 PUB. PROCUREMENT L. REV. 183 (2005); United Nations Commission on International Trade Law, Working Group I (Procurement), New York, Apr. 4-8, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in Public Procurement: Comparative Study of Practical Experience with the Use of Electronic (reverse) Actions in Public Procurement, U.N. Doc A/CN.9/WG.I/WP.35 (Feb. 16, 2005) [hereinafter Reverse Auctions]; United Nations Commission on International Trade Law, Working Group I (Procurement), New York, Apr. 4-8, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in Public Procurement: Comparative Study of Practical Experience with the Use of Electronic (reverse) Actions in Public Procurement, U.N. Doc A/CN.9/WG.I/WP.35/Add.1 (Feb. 17, 2005) [hereinafter Reverse Auctions Addendum].

22. Press Release, EUROPA, Public Procurement: Commission Promotes Online Advertising of Public Contracts EU-wide (Oct. 11, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1248&format=HTML&aged=0&language=EN&guiLanguage=en.

23. *See* Federal Acquisition Regulation; Reverse Auctioning, 65 Fed. Reg. 65,232 (Oct. 31, 2000) (request for comments on whether regulation of electronic reverse auctions is necessary or appropriate).

24. United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Nov. 7-11, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, U.N. Doc A/CN.9/WG.I/WP.40, ¶ 10 (Aug. 5, 2005).

> Article 19 bis. Conditions for use of electronic reverse auctions
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> (1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article 47 bis and ter,* in the following circumstances:
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> a. Where it is feasible for the procuring entity to formulate detailed [, and] precise [and accurate] specifications for the goods [construction or services] such that homogeneity in the procurement can be achieved [;
>
> b. Where there is a competitive market of at least [ten] suppliers or contractors [that are anticipated to be qualified to participate in the electronic reverse auction]; and]
>
> c. The goods [, construction or services] to be procured are [standardized] [standard products] [commodities], [[such that] [and] the price [and other quantifiable criteria expressed in figures or percentages] thereof [is] [are] the only [criterion] [criteria] to be used in determining the successful bid] [[such that] [and] all criteria that are to be submitted and evaluated in the auction can be evaluated automatically].

25. *Id.* ¶ 22.

of commodities that are preselected carefully. In less carefully controlled environments, procuring entities may wish to screen prospective vendors through prequalification proceedings.

Much more controversial, however, were the different models of ERAs that the Secretariat's working paper put forward. Those models, drawn from international practice, had been outlined in an earlier working paper:

- Model 1, in which all aspects of tenders that are to be compared in selecting the winning supplier are submitted through the ERA itself. Lowest price is often the sole award criterion in competitions conducted entirely through an ERA. Tenderers know their position both during the ERA phase and its close;
- Model 2, with prior assessment of all tender aspects or only those not subject to the ERA phase. Before the ERA phase, suppliers are provided with information on their ranking based on the outcome of an evaluation of the relevant tenderer prior to the ERA. All evaluation criteria are factored into a mathematical formula that re-ranks the tenderers on the submission of each bid. Thus, during the ERA phase and at its close, suppliers know their overall standing;
- Model 3, in which there is no prior assessment of any aspects of the tender. During the ERA phase, suppliers have information only on how they compare with their competitors in respect to those criteria that are subject to the ERA phase (usually, but not always, just the price). Thus, in contrast with models 1 and 2, when the ERA phase closes, the suppliers do not know whose tender is the best; this is established once the non-auction aspects of the tender have been factored in.[26]

Discussion at the Working Group reflected a consensus that Model 3—in which, for example, bidders will compete on price in a reverse auction but award will be made based upon criteria applied after the reverse auction—is sharply disfavored, for bidders are bidding blind in the initial auction, without knowing what criteria will ultimately be applied for the award. Model 3 was therefore not under serious consideration by the Working Group. Model 1 (all criteria for award included in auction) and Model 2 (pre-ranking reflected in handicapped bidding) thus were the only models under consideration.[27]

Several members of the Working Group argued that it is not clear that Model 2 (ranking and handicapping bidders) is a sound approach. Opponents of Model 2 noted that it is an approach typically favored by strong proponents of reverse auctions, who would like to argue that all criteria for award can ultimately be factored into a reverse auction. Model 2 raises transparency and competition concerns, however, for it is not clear whether vendors will fully understand how the pre-auction ranking will impact their bids in the reverse auction (i.e., how their bids will be handicapped). Model 2 also raises logical concerns: for example, an attribute that leads to a high ranking before the bidding begins (e.g., a particularly robust transmission in an automobile) should, in theory, hurt the bidder as prices descend in the reverse auction, for that robust attribute increases performance risk (raises the risk of default) as the reverse auction ratchets down the prices offered. Thus, Model 1 might be the safer course since a pre-bid ranking seems to offer a good deal of opportunity for missteps.[28]

26. *See* Reverse Auctions Addendum, *supra* note 21, ¶ 33.
27. *See* Eight Session, *supra* note 4, ¶¶ 84-85.
28. *See id.* ¶ 85.

Several members of the Working Group—including, especially, those from Member States of the European Union—argued in favor of including Model 2 in the UNCITRAL Model Procurement Law. The European Union's procurement directives allow for electronic reverse auctions using Model 2,[29] and proponents of Model 2 argued that it affords procuring agencies an opportunity to weigh non-price factors in an initial review, before the electronic reverse auction begins.

G. Abnormally Low Tenders

The final substantive issue taken up by the November 2005 Working Group meeting was the lingering issue of below-cost (abnormally low) bidding.[30] In the U.S. procurement system, low-ball pricing is generally referred to as pricing that is too low to be realistic. In the wake of bidding, but before award, the contracting officer may determine whether the price offered is indeed realistic.[31] In principle, low-ball (or below-cost) pricing could occur for a number of reasons, including (1) predatory pricing to drive out competitors; (2) at-loss pricing to maintain market share; (3) indifference to cost constraints because of (e.g., imminent bankruptcy); and (4) mistakes as to true internal costs of production.[32]

As the U.S. Government Accountability Office (GAO) noted in *Star Mountain, Inc.*,[33]

> [t]he Federal Acquisition Regulation (FAR) provides a number of price analysis techniques that may be used [by agencies] to determine whether prices are reasonable [not too high] and realistic [not too low], including comparison of the prices received with each other; comparison of previously proposed prices for the same or similar items; comparison with independent government estimates; and analysis of pricing information provided by the offeror.[34]

Because federal agencies in the United States are often barred from demanding cost information from vendors, agencies typically cannot assess price realism by asking whether the vendor's pricing is below cost, which is not transparent to the agency. In the U.S. system, therefore, agencies typically will assess price realism by asking whether "the proposed cost or price provides an adequate reflection of [the contractor's] understanding of the requirements of the solicitation."[35] As the GAO explained in *J.A. Farrington Janitorial Services*,[36] this question of price realism in the United States thus generally becomes part of the purchasing agency's broader assessment of the offeror's responsibility or ability to perform.

29. *See, e.g.*, Council Directive 2004/18/EC, art. 54, 2004 O.J. (L 134/114) (EC).

30. These issues were addressed in United Nations Commission on International Trade Law, Working Group I (Procurement), Vienna, Nov. 7-11, 2005, Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, U.N. Doc A/CN.9/WG.I/WP.40/Add.1 (Aug. 5, 2005).

31. *See* Ralph C. Nash & John Cibinic, *Postscript II: Price Realism Analysis*, 19 No. 7 Nash & Cibinic Rep. ¶ 37 (July 2005).

32. For an excellent theoretical assessment of auction theory in the context of reverse auctions in public procurement, *see* Ohad Soudry, *Promoting Economy: Electronic Reverse Auctions Under the EC Directives on Public Procurement*, 4 J. Pub. Procurement 340 (2004).

33. Star Mountain Inc., Comptroller Gen. No. B-285883, Oct. 25, 2000, 2000 CPD ¶ 189, *available at* http://archive.gao.gov/legald426p9/164256.pdf.

34. *Id.* (citing 48 C.F.R. § 15.404-1(b)(2), FAR 15.404-1(b)(2)).

35. Acquisition Regulation; Source Selection Process, 61 Fed. Reg. 25,440, 25,443 (May 21, 1996) (to be codified at 48 C.F.R. pts. 1515, 1552).

36. J.A. Farrington Janitorial Services, Comptroller Gen. No. B-296875, Oct. 18, 2005, *available at* http://www.gao.gov/decisions/bidpro/296875.htm.

III. Trade Agreements Act Developments and Enforcement

A. Trade Agreements Act Overview

The Trade Agreements Act (TAA)[37] is a U.S. federal law that addresses national procurement requirements and commitments made by the United States as part of the General Agreement on Tariffs and Trade/World Trade Organization Government Procurement Agreement (GPA). In accordance with the GPA, through the TAA, the United States has agreed to open its procurement markets to those countries that reciprocate. Specifically, the TAA allows the President to waive those portions of U.S. law, most notably the Buy American Act (BAA),[38] that discriminate against purchases of foreign goods by certain enumerated federal-government agencies in the case of certain countries.[39] In waiving the BAA (and its manufactured in the United States with greater than 50% U.S. components requirement), the TAA applies generally to those supply procurements in excess of the micropurchase threshold.[40] In order to qualify for the TAA preference, a product to be procured must be wholly from the designated country or substantially transformed in a designated country.[41] Designated countries include GPA signatory, least developed, Caribbean Basin, and U.S. Free Trade Agreement signatory countries.[42] The TAA applies to U.S. procurements in general, but is prevalent in the context of certain commercial procurements made under the U.S. General Services Administration's (GSA) Federal Supply Schedule (FSS) framework contracting system.

B. U.S. Customs Guidance on TAA Cases

In addition to its general country of origin marking competence,[43] the Department of Homeland Security's U.S. Customs and Border Protection provides specialized advisory rulings on government procurement cases where the TAA applies.[44] Under these procedures, Customs applies the substantial transformation test to determine whether a particular item is eligible for preferential treatment under the TAA from a country of origin perspective.[45] A ruling from Customs can be an important factor in determining whether a product may rightfully be sold to the U.S. government in procurements when the TAA applies.

During 2005, Customs issued a number of decisions on what constitutes substantial transformation sufficient to make a product eligible for government purchase where the TAA waives the applicability of the BAA. In each of these cases, Customs reaffirmed the standard substantial transformation test as requiring individual components of an end product to have undergone a change in their name, character, or use. But these recent cases also shed

37. 19 U.S.C. § 2503(c)(1)-(2) (1999).

38. 41 U.S.C. § 10 (2004).

39. 19 U.S.C. § 2511(a)-(b); Government Procurement Agreement Annex I, WT/Let/482/Rev.1 (Oct. 1, 2004) (listing enumerated U.S. Departments and Agencies).

40. 48 C.F.R. § 25.400 (2006) (listing thresholds for FTA, GPA, Least Developed, and Caribbean Basin countries).

41. *Id.* at § 25.001(c) (defining designated country products by employing the substantial transformation test); 19 U.S.C. § 2518(4)(b).

42. *See* 19 U.S.C. § 2511; *see* 48 C.F.R. §§ 25.003, 25.400.

43. *See* 19 C.F.R. pts. 102 (NAFTA marking) & 134 (Non-NAFTA marking).

44. *Id.* § 177.21.

45. *Id.* § 177.22.

important light on how foreign manufacturing and foreign manufactured components can affect the TAA eligibility of a particular product that a company may wish to sell to the U.S. government.

In *Final Determination of Optical Spectroscopy Instrument Systems*,[46] Customs determined that the combination in the United States of an imported Australian shell housing with numerous other components (furnace, light bulbs, mirrors/optics, printed wiring board) gave the optics module the ability to function, and therefore represented a substantial transformation. Customs found that the installation of the software (i.e., the product brains) allowed the end products to function as required and noted that their assembly required considerable labor and sophisticated operations. Thus, the products at issue were TAA eligible.

In *Final Determination Concerning Multi-Line Telephone Sets*,[47] Customs found that the assembly of 250 components and assemblies from countries including non-TAA eligible countries, such as China and Malaysia, in Mexico was sufficient to constitute a substantial transformation such that the end products were products of Mexico and therefore eligible under the TAA for sales to the U.S. government. Applying the standard substantial transformation test, Customs found that that the components of a telephone set, which had no function alone, lost their separate identities and were substantially transformed when assembled to form completed telephone sets. In making this determination, Customs evaluated the level of skill and amount of time required for the complex and meaningful assembly operations.

In *Final Determination Concerning Desktop Scanners*,[48] Customs reviewed the manufacture of the Kodak i600 scanner and found the scanner to be TAA eligible. Of interest in this case was the fact that most of the scanner's six hundred parts were manufactured in China—a non-eligible country under the TAA. Further, the facts showed that three of the thirteen subassemblies were assembled in China. Despite these facts, Customs ruled that complex and meaningful assembly operations in the United States substantially transformed the various components and subassemblies into the final scanner such that the scanner's country of origin was the United States. Customs found that each of the individual components and subassemblies performed a specific function that, collectively, constituted a finished product system capable of electronically scanning a variety papers images. Customs relied on the fact that the complex assembly process in the United States required the installation and programming of the firmware software, as well as calibration and testing in making its substantial transformation determination. As such, the scanners were of U.S. origin and therefore eligible under the TAA despite the significant amount of Chinese content.

Each of these cases suggests that more and more companies are seeking to meet U.S. government procurement requirements by sourcing component products from outside the United States and in some cases non-TAA eligible countries. Further, these cases give good guidance on what level of manufacturing is necessary to meet country of origin requirements for production in both the United States and TAA-eligible countries. Finally, the number of these cases suggests that companies are becoming more cautious when it comes to TAA compliance under U.S. government contracts.

46. Customs Ruling HQ 735315 (Apr. 10, 1995).
47. Customs Ruling HQ 563236 (July 6, 2005).
48. Customs Ruling HQ 563294 (Sept. 9, 2005).

C. TAA Enforcement Actions

Recent TAA enforcement actions suggest that this level of caution is warranted as in the past few months the U.S. government has obtained significant settlements from government contractors for violations of the TAA. By way of background, the primary sanction for violations of the TAA is civil and criminal liability under the False Claims Act (FCA).[49] In general, liability under the civil side of the FCA can arise when a false or fraudulent claim for payment to the U.S. government is made—such as when a contractor makes a claim for payment on a product that is not from a TAA designated country. In order to demonstrate a FCA violation the following must occur: (1) a contractor must have presented a claim for payment to the United States; (2) the claim must have been false or fraudulent; and (3) the contractor must have acted with the requisite knowledge.[50] False claims can result in civil penalties between $5500-$11,000 per incident, plus potentially three times the amount of damages that the U.S. government incurs.[51] With thousands of internet-based GSA FSS sales per day, a federal government contractor can run up significant TAA liability for seemingly simple violations.

During 2005, the U.S. Government imposed a series of dramatic fines for TAA violations. On May 19, 2005, the U.S. Department of Justice reportedly entered into a $9.8 million settlement with OfficeMax, involving false claims submitted by OfficeMax for office supply products that had been manufactured in non-TAA designated countries, most notably China.[52] This action was initiated by a private party, Safina Office Products, who had previously paid a fine for TAA violations, via the FCA's *qui tam* provisions.[53] Under the *qui tam* provisions of the FCA, a private party, known as a relator, is permitted to file suit on behalf of the U.S. government and is entitled to share in the recovery obtained by the U.S. government, if any. In a related case, also brought by Safina Office Products, the U.S. Department of Justice on September 19, 2005, reportedly entered into a $4.75 million settlement with Office Depot involving false claims submitted by Office Depot for office supply products that had been manufactured in non-TAA designated countries, including China, Taiwan, and Thailand.[54] In addition, on October 18, 2005, the Department of Justice announced that Staples had agreed to pay $7.4 million in order to settle TAA violations for sales of products from China and Taiwan. Unsealed court records indicate that there are six other office products suppliers who are under investigation for TAA violations. More settlements are expected.

The significant fines levied against these companies suggests that TAA enforcement, especially under GSA FSS framework style contracts for commercial products will increasingly be an area of U.S. government oversight and government contractor compliance efforts.

49. 31 U.S.C. § 3729 (1996).

50. *Id.*

51. *Id.*; Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099 (Aug. 30, 1999).

52. Press Release, U.S. Dep't of Justice, Officemax to Pay United States $9.8 Million to Resolve False Claims Act Allegations, Department of Justice (May 19, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/May/05_civ_278.htm.

53. Press Release, U.S. Dep't of Justice, Office Depot Pays United States $4.75 Million to Resolve False Claims Act Allegations, Department of Justice (Sept. 19, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/September/05_civ_483.htm.

54. *Id.*

IV. OECD Developments and Foreign aid Untying

A. Background on Foreign Aid Untying

While the TAA generally requires the U.S. government to open its procurement markets as described above, contracts entered into for purposes of the U.S. foreign assistance program are exempted from its requirements. This carve out is written into the GPA and each of the Free Trade Agreements entered into by the United States,[55] and is codified in the Acquisition Regulation of the U.S. Agency for International Development (USAID).[56] This carve out reflects the historical congressional prerogative of tying U.S. foreign aid supply and service contracting to U.S. source, origin, and nationality whenever possible and is articulated in the Foreign Assistance Act of 1961.[57]

While the U.S. foreign aid program has thus long embraced a procurement regime of so-called "tied aid," the foreign aid community (including the United States, other industrialized nations possessing their own foreign assistance programs, the multilateral development banks, and certain international organizations, such as the OECD) has been attempting for several decades to bring about the general "untying" of foreign aid.[58] Such

55. For example, in the GPA list of U.S. Central Government Entities which Procure in Accordance With the Provisions of this Agreement, USAID is listed alongside the caveat, "not including procurement for the direct purpose of providing foreign assistance." Government Procurement Agreement Annex I, *supra* note 39.

56. FAR § 25.4 establishes procedures for purchases under the TAA of 1979 (including the GPA and FTAs). Under such agreements, USAID's contracts for the purpose of providing foreign assistance are not subject to the procedures set forth in FAR § 25.4. In contrast, USAID's operating expense-type administrative purchases (i.e., purchases for the direct benefit and use of USAID) are subject to the procedures in FAR § 25.4, unless otherwise exempted by one of the exemptions specified in FAR § 25.4. 48 C.F.R. § 725.403.

57. Act for International Development of 1961, as amended, Pub. L. 87-195 (FAA). *See also* 22 U.S.C. 2354 (2005).

> (a) Limitations on Procurement Outside the United States.
> (1) Funds made available under this Act may be used by the President for procurement—
> (A) only in the United States, the recipient country, or developing countries; or
> (B) in any other country but only if—
> (i) the provision of such assistance requires commodities or services of a type that are not produced in and available for purchase in any country specified in subparagraph (A); or
> (ii) the President determines, on a case-by-case basis, that procurement in such other country is necessary-
> (I) to meet unforeseen circumstances, such as emergency situations, where it is important to permit procurement in a country not specified in subparagraph (A); or
> (II) to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.
> (2) For purposes of this subsection, the term "developing countries" shall not include advanced developing countries.

Id. Additionally, foreign aid contracting is tied to U.S. sourcing by numerous statutory and rule restrictions on procurement of specific commodities and eligible commodity suppliers, (e.g., restrictions on the procurement of pharmaceuticals (FAA § 606) and vehicles (FAA § 636)).

58. Largely confined to usage in international trade and development circles, the term "tied aid" signifies foreign assistance contracts and other delivery mechanisms that are reserved exclusively for bidding by, or are otherwise available only to, sources and entities of the donor country. In the United States, this translates to Buy America or Buy America-type requirements. By contrast, "untied aid" refers to donor country funding which is "freely and fully available to finance procurement from substantially all aid recipient countries and from [the industrialized] countries." Organization for Economic Cooperation and Development, Development Assistance Counsel, Recommendation On Untying Official Development Assistance to the Least Developed Countries, DCD/DAC(2001)12/REV1 (2001) [hereinafter DAC Recommendation], *available at* http://www.usaid.gov/policy/ads/200/221.pdf.

untying can be beneficial in a number of ways, both from procurement and development perspectives, and is increasingly viewed as the preferred method of conducting foreign aid contracting.

It would be useful to list some of the strong benefits of foreign aid untying at the outset: first, and perhaps foremost, untying promotes aid effectiveness (i.e., the efficiency and reach of aid financing). For example, by opening up bidding for U.S. foreign aid procurements to worldwide sources, rather than exclusively to national ones, best-value contracting is enhanced, with poor countries benefiting from a wider selection of suppliers for their development needs. The donor country benefits, as well—when the U.S. government unties its foreign aid procurements, its citizens see their tax dollars being used more efficiently, by purchasing supplies or services that are of the highest quality and lowest cost, on a worldwide basis. And when foreign aid untying is carried out on a reciprocal basis, the classic benefits of free trade are realized: even as American entities lose some business when U.S. foreign aid procurements are opened up to worldwide bidding, American entities will gain business from their eligibility to compete for the foreign aid procurements of the other industrialized nations.

Also worthy of at least passing reference are the developmental benefits of untying, especially when untying enhances the ability of developing country entities to compete for our foreign aid dollars. By allowing local and regional businesses to participate in foreign aid delivery through the procurement process, untying is said to strengthen the responsibility and ownership of the participating countries in their own development. Ultimately, such untying promotes greater integration of developing countries into the global economy, with clear downstream gains for overall global trade, as well as better local preparedness for natural and man-made disasters to come. On another level, to the extent that untying results in the actual growth of local and regional businesses, both employment and capacity-building gains will certainly be realized.[59]

B. The OECD Untying Agreement of 2001 and 2005 Report

After intense negotiations and prolonged discussions lasting several decades, the twenty-one Member States of the OECD's Development Assistance Committee (DAC) entered into a landmark Agreement (a "Recommendation" in OECD parlance) in May 2001 to untie Official Development Assistance benefiting the world's forty-eight poorest countries (the Least Developed Countries or LDCs). While this first multilateral agreement to reciprocally untie foreign aid procurements from donor sourcing is limited in scope and was slow to be implemented, it is currently being seriously followed by DAC Members and, indeed, efforts are underway to expand its coverage.[60]

At less than ten pages, the DAC Recommendation to untie foreign aid is a relatively short document, yet its coverage and implementation provisions are quite convoluted, and

59. These benefits of untied aid are enhanced by another initiative taking place at the OECD and with which the author is associated: procurement capacity-building efforts undertaken in partnership with developing country government ministries, a broad and ongoing governance activity. *See, e.g.*, Organization for Economic Cooperation and Development, Harmonizing Donor Practices for Effective Aid Delivery: Strengthening Procurement Capacities In Developing Countries, (Preliminary Edition, 2005), *available at* http://www.oecd.org/dac/harmonisingpractices.

60. The Recommendation was adopted by every full Member nation of the OECD/DAC and therefore includes every industrialized country with a significant bilateral foreign aid program.

are drafted using verbiage peculiar to the OECD. Still, it can be fairly summarized as opening up Member Nation foreign aid procurements, whether financed by grants or by loans to worldwide sources, when such procurements: (1) are for the building of infrastructure or capital projects, as well as large commodity buys; (2) individually exceed an OECD currency valuation that is today equivalent to approximately one million dollars; and (3) benefit the world's very poorest countries.[61]

The hallmark of the Recommendation is a transparency provision that requires *ex ante* announcement of upcoming untied procurement opportunities and *ex post* reporting of awards made. In order to facilitate transparency worldwide, an Untied Aid Bulletin Board[62] has been established on the OECD website, where Member Nations post their foreign aid bidding opportunities.[63] Review of that website shows that at least every few days an untied aid availability is announced by DAC Member Nations. In November 2005, the United States posted what is probably the largest untied contracting opportunity in USAID history: a $1.4 billion infrastructure contract for Afghanistan that was open for bidding at the time this article was authored.[64]

Adherence to the Recommendation, which took effect in 2002, was at first inconsistent. Over the years participation by Member nations has clearly become more robust. A recent review showed that in 2004, more than two billion dollars of non-U.S. untied foreign aid opportunities (*ex ante* reporting) had been posted to the DAC Bulletin Board.[65] Meanwhile, Members' reporting of contract awards remains uneven. The OECD reported that 107 untied aid contracts, amounting to $675 million, were awarded in 2003, with twenty-nine of those contracts going to donor sources, thirty-seven going to sources in other industrialized and advanced developing countries, and forty-one going to sources located in developing countries, including thirty in LDCs.[66]

In 2005, the United States provided its first report to the OECD of untied aid awards, with sixteen untied aid contract awards, amounting to $107.3 million, being distributed in 2004 amongst ten U.S. sources, three other industrialized and advanced developing country sources, and three developing country sources, including two LDC awards. But overall reporting for 2004 fell off from 2003, as notably Japan, Italy, Denmark, and Norway failed altogether to make their reports. Nevertheless, 133 untied contract awards were reported for 2004, with forty-eight going to donor sources, twenty-seven to industrialized and advanced developing country sources, and fifty-eight to developing country sources, including thirty-six in LDCs.[67] Clearly, even by these incomplete metrics, the Recommendation is beginning to further the goal of ensuring the maximum possible foreign aid untying.

61. These countries include Haiti in the Western Hemisphere, most sub-Saharan African countries, and a relative handful of Asian countries, including Afghanistan, Bangladesh, Cambodia and Nepal. The Recommendation was targeted to the LDCs "because of their relative dependence on aid and their relatively greater need for accelerated progress towards the International Development Goals . . . This initiative aims to capture, for these countries, the benefits of open procurement markets." DAC Recommendation, *supra* note 58, at 2.

62. The Untied Aid Bulletin Board is a tool similar in presentation and goals to www.fedbizopps.gov.

63. The Untied Aid Bulletin Board, http://webdomino1.oecd.org/comnet/dcd/untiedpubliccws.nsf.

64. FBO Daily, Afghanistan Infrastructure and Rehabilitation Program, USAID RFP 306-06-001 APSO (Jan. 26, 2006), http://www.fbodaily.com/archive/2005/11-November/19-Nov-2005/FBO-00933394.htm.

65. This review of ex ante postings to the DAC's Untied Aid Bulletin Board was undertaken by the author's office in May-June 2005.

66. Organization for Economic Cooperation and Development, *2001 DAC Recommendation on Untying ODA to the LDCs*, DCD/DAC/EFF(2004)12.

C. Current Trends: OECD and USAID Untying Plans

In 2005, the DAC began serious efforts to expand the coverage of the Untying Recommendation. Although the Recommendation encourages Member Nations to untie foreign aid beyond its coverage—and many countries, including the United States, have done so—there is no obligation to do so. The Recommendation does not require: (1) untying beyond infrastructure projects and large commodity purchases, so as to include, technical assistance contracts, for example; (2) untying below the one million dollar threshold for pre-announcing and award reporting of untied contracts; or (3) untying for countries other than those procurements benefiting the LDCs so as to include other lower income countries or wealthier developing countries. All these areas for expansion of the Recommendation were on the table as the OECD/DAC set its 2006 Agenda at its Senior Level Meeting in December 2005.

One other area for expansion of the Recommendation, and for untying efforts generally, emerged prominently in 2005: the idea of shifting foreign aid procurements to local and regional sources, whenever possible. While the Recommendation signaled the importance of "promoting local and regional procurement in partner countries,"[68] it set no requirements as to localized sourcing. Indeed, sourcing that is opened up to developing countries alone does not meet the technical definition of untied aid. Meanwhile, USAID has recognized the overarching importance, for both development and best-value procurement considerations, of encouraging developing country entities to compete for, and win, foreign aid contracts that will result in their own betterment. To this end, in late 2005, the Agency formally decided to implement regulation and policy changes that will increase the amount of foreign aid contracts that go to indigenous country sources.[69] While some hurdles remain in completing this policy shift, it is one that should be seriously considered, and adopted by the DAC, as well.

67. Organization for Economic Cooperation and Development, Development Assistance Counsel, Implementing the 2001 DAC Recommendation on Untying ODA to the Least Developed Countries: 2005 Progress Report, DCD/DAC 44 (2005).

68. DAC Recommendation, *supra* note 58, at I ¶ 4.

69. This shift from currently restrictive regulations aligns the Agency with the FAA language that allows for procurement sourcing, from "the United States, the recipient country, or developing countries." 22 U.S.C. § 2354(a).