



[GW Law Faculty Publications & Other Works](#)

[Faculty Scholarship](#)

2005

UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts

Christopher R. Yukins

George Washington University Law School, cyukins@law.gwu.edu

Don Wallace Jr.

Jason P. Matechak

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Government Contracts Commons](#)

Recommended Citation

Christopher R. Yukins et. al., UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts, 40 *The Procurement Lawyer* (2005).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts

BY DON WALLACE, JR., CHRISTOPHER R. YUKINS, AND JASON P. MATECHAK



Don Wallace



Christopher R. Yukins



Jason P. Matechak

A working group of the United Nations Commission on International Trade Law (UNCITRAL) recently met in Vienna, Austria, for a week of debate on potential reforms to UNCITRAL's Model Law on Procurement of Goods, Construction and Services and its Guide to Enactment. The working group reached initial consensus on a number of difficult procurement issues, including electronic commerce, reverse auctions, and "framework" contracts, and significant progress was made in a number of other areas including the procurement of services, the strengthening of procurement remedies (known in the United States as "bid protests"), and the utilization of socioeconomic policy tools. Early in 2005, the group will reconvene to move further toward a reformed Model Law that can be used as a benchmark for sound procurement practices around the world.

The UNCITRAL Model Law¹ was originally adopted by the UNCITRAL member states in 1994; it followed on an earlier model, which did not cover procurement of services. The Model Law is designed to assist nations in reforming and modernizing their laws on procurement procedures; it is built on ensuring competition, transparency, fairness and objectivity in procurement so that nations will be able to buy goods and services more cheaply and efficiently.

In the summer of 2003, the UNCITRAL member states met in New York and endorsed an initiative to reform the

Model Law, in part to allow the Model Law to accommodate new types of electronic procurement.² Per that direction, in early 2004 a group of experts met in Vienna to discuss potential reforms to the Model Law.³ In a meeting in New York in July 2004, UNCITRAL's member states approved further reform efforts by a working group from the member states, and so from

August 30 through September 3, 2004,⁴ the UNCITRAL working group met in Vienna.

Several of the issues before the working group have, in recent years, forced deeply divisive debates among the procurement communities in the United States, Europe, and countries with developing and transitional economies. From electronic procurement, to reverse auctions, to "framework" contracts, to socioeconomic programs, the issues addressed in Vienna were, in fact, issues that have drawn keen debate in the United States and the European Union.⁵ Although the Model Law is not binding on any country, including the United States, it offers a useful backdrop to procurement reform in countries around the world. The UNCITRAL working group was able to find middle ground on at least some of the divisive issues in procurement policy, and so the working group's progress—and the overall reform of the Model Law—offer hopeful signs for procurement reform worldwide.

In tackling each of these issues, the UNCITRAL working group built on the basic principles that underlie the Model Law: competition, transparency, efficiency, nondiscrimination (equal treatment of bidders), and integrity. Consistent with those central principles and mindful of developments from around the world, the working group's goal is to make it easier for other nations—especially developing and transition-economy nations—to adopt the Model Law as the foundation of a properly functioning procurement system. With these principles in mind, the working group came to a general consensus in the areas of electronic procurement, electronic reverse auctions, and suppliers lists, and made significant progress in the areas of the procurement of services, the strengthening of procurement remedies, and the utilization of socioeconomic policy tools. Each of these areas will be discussed in turn.

Don Wallace, Jr., professor of law at Georgetown University Law Center (wallace@ili.org), and Christopher Yukins, associate professor of government contract law at The George Washington University Law School (cyukins@law.gwu.edu), served as advisers to the U.S. delegation at the recent UNCITRAL meeting. Jason Matechak, an attorney at Reed Smith LLP (jmatechak@reedsmith.com), was an observer at the UNCITRAL working group meeting; he attended on behalf of the International Development Law Organization (IDLO). Views expressed here are the authors' own.

Electronic Procurement

When UNCITRAL launched this reform effort, the commission's chief goal was to bring the Model Law into the world of electronic commerce.⁶ The UNCITRAL member states hope that the Model Law and its Guide to Enactment, like the Federal Acquisition Regulation (FAR) in the United States and the European procurement directives,⁷ will eventually reflect at least some of the enormous changes that electronic communications have brought to procurement.

Based to some extent on the experiences of more developed nations, including the United States and Canada, the working group emphasized that any effort in the area of electronic procurement must be "technology-neutral." That is, to accommodate rapidly changing technologies, procurement systems must not tie themselves to any specific technology or solution.⁸

Beyond technology-neutrality, the working group came to an easy consensus that the electronic publication of procurement information including laws, regulations, procurement opportunities, and contract awards should be promoted but not mandated.

Likewise, the working group members generally urged that the Model Law allow procurement systems to adopt electronic means gradually and incrementally. While the U.S. experience over the last decade showed that electronic means could bring huge savings in procurement, the General Accounting Office (now the Government Accountability Office) held early on that U.S. contractors could reasonably be required to use computers to access opportunities,⁹ and the U.S. central site for listing business opportunities has been a great success,¹⁰ in general U.S. procurement officials have been reluctant to force electronic solutions onto the procurement system. Consistent with that experience, the working group was somewhat more cautious about the use of electronic communications. Taking into consideration the notion of technological neutrality discussed above, as well as the divergent infrastructural realities in UNCITRAL member countries, the working group promoted the concept that electronic communications could be promoted through revisions to the Model Law and to the Guide to Enactment, but should not be strictly required.

Electronic Reverse Auctions¹¹

There was, however, less consensus among the UNCITRAL working group members on the use of electronic reverse auctions, which continue to be a point of debate. In a reverse auction, prospective sellers "bid" against one another to offer the buyer (in this case, a government) the lowest price. In electronic form, this ancient model is brought into the 21st century: prospective contractors typically bid against one another in an electronic forum, generally anonymously and rapidly against a fixed deadline.

The working group began with the premise that the Model Law is currently silent on the issue of reverse auctions and that the use of electronic reverse auctions is still a newer and relatively untested concept in procurement regimes in all of the UNCITRAL member states represented. For example, in the United States, while electronic reverse auctions have been utilized, the regulatory structure surrounding reverse auctions remains largely unfinished.¹²

As the UNCITRAL secretariat noted, other countries, such as France and Brazil, have used electronic reverse auctions with some success, the United Kingdom has endorsed the use of reverse auctions, and draft proposed revisions to the World Trade Organization's Government Procurement Agreement (GPA) contemplate the use of reverse auctions.¹³ Probably the most important international endorsement of reverse auctions in procurement, however, has come from the European Union (EU), which in March 2004 issued directives¹⁴ specifically allowing—indeed requiring—member states to permit reverse auctions in public procurement.¹⁵ While the prefatory¹⁶ and substantive¹⁷ terms of the EU directives do provide a good deal of guidance on when reverse auctions are appropriate, they leave unanswered many serious questions as to when reverse auctions could, in fact, be inappropriate or dangerous.

Although the working group did discuss options when reverse auctions work best, such as in the procurement of commodities or standardized items, where competitions turn on price, not necessarily quality, the working group was notably concerned that electronic reverse auctions could be subject to overuse, misuse, and abuse. The working group was particularly concerned with the problem of below-cost pricing.

In light of the still-evolving discussion on electronic reverse auctions, the working group participants left open how, ultimately, the UNCITRAL Model Law and/or its Guide to Enactment should deal with this issue. The UNCITRAL's secretariat (its professional staff) was asked to prepare several studies on the implementation of reverse auctions around the world.

Suppliers' Lists and Framework Agreements

Major points of discussion in the working group included how to address supplier lists—a list of preapproved suppliers—and "framework agreements," which the European Union's recent directives specifically endorsed. Framework agreements are master agreements, typically awarded to several contractors simultaneously. After the initial master agreements are in place, the awardees then compete against one another for task or delivery orders (or contracts), which are competed among the master contract holders only. In the United States, these are colloquially referred to as "task- and delivery-order" contracts, or as "indefinite delivery/indefinite quantity" (IDIQ) contracts. In the United States, their use has exploded since they were first recognized in the 1990s' wave of regulatory reform.

As the Model Law does not directly address the topic of suppliers' lists, many members of the working group approached this issue with caution, due to the risk that government buyers and contractors could use the supplier lists to discriminate against potential new entrants to the market in contravention to the Model Law's mandate for competition. Traditional international experience with supplier lists has been less than favorable, especially where those lists were mandatory, and were highly discriminatory against market entrants. However, as discussed below, the efficiency and transparency brought to procurement by technological tools drew the working group to reconsider the utilization of suppliers' lists. Nonetheless, the working group consensus was that further consideration of procedural protections will need to be undertaken prior to the working group's formulation of specific provisions on suppliers' lists.

Building out of the discussion of suppliers' lists, the working group addressed as a parallel issue how to deal with framework agreements, which are becoming increasingly popular in both the U.S. and the European public procurement markets. The problems with framework agreements are in some ways similar to those with supplier lists. Indeed, the most popular framework agreements in the U.S. market—the schedule contracts let by the General Services Administration (GSA)—can in many ways be compared to optional supplier lists, for now thousands of contractors have been qualified under these non-mandatory contract vehicles. The working group noted the differences between the U.S. and European approaches to framework contracts, including the way in which they deal with requirements that are let *after* the initial framework agreements. In the U.S. system, once the framework contracts are in place, subsequent requirements are competed as *orders* under the existing contracts—the subsequent competitions are not for “contracts,” and so the normal transparency and competition requirements do not apply.¹⁸

Under the European directives, in contrast, after framework agreements are in place, subsequent requirements are competed and awarded as *contracts*, and so may trigger (at least some of) the normal transparency and competition requirements.¹⁹ While the U.S. approach may move in this direction over time, at this point the U.S. framework contracts are, ultimately, far less competitive and transparent than those contemplated by the European directives. The open question for the UNCITRAL working group, therefore, will be whether the Model Law and the Guide to Enactment will allow framework contracts in developing nations, and other nations undertaking procurement reform initiatives, to follow a more open, competitive process, or will framework arrangements be allowed to evolve into islands of dramatically lower competition and transparency. The working group has also left open the question of whether the Model Law or the Guide to Enactment should

be modified at all in this regard; alternatively, the issue of framework contracts could be left to local regulation.

Other Areas of Progress: Socioeconomic Programs, Services, and Remedies

The UNCITRAL working group is also addressing how the Model Law might handle socioeconomic initiatives that are intertwined with procurement systems.²⁰ While many procurement systems around the world include socioeconomic requirements, traditionally the European Union has approached socioeconomic requirements cautiously because such requirements can have a profoundly discriminatory impact on procurement from other nations. Since nondiscrimination and the opening of the European market are core goals for the European Union, socioeconomic requirements are only cautiously allowed. In the United States, in contrast, Congress has overlaid the procurement system with a wide variety of socioeconomic requirements, ranging from race-based preferences to stringent goals for procurements let to service-disabled veterans. In the United States, policy makers generally have *not* seen public procurement as part of a broader free market, and so have made few efforts to dismantle the socioeconomic programs that, though discriminatory, answer the demands made by a wide variety of interest groups.


The UNCITRAL working group recognized that socioeconomic programs would affect the economy and efficiency of an overall procurement system. However, the working group also recognized that the power of public spending is an important social policy tool. A number of working group members commented on the positive contributions of socioeconomic programs in a wide array of geographic, political, and cultural scenarios. With these considerations in mind, the working group will continue to evaluate the effectiveness of such programs and whether additional procedural protections will need to be introduced into the Model Law and Guide to Enactment when socioeconomic programs are utilized in procurement. Thus, the UNCITRAL working group will have to weigh the very different role that socioeconomic preferences—say, for a particularly disadvantaged group—may play in smaller, emerging economies.

In the area of services, the working group began with the recognition that the Model Law methodology for procuring services differs from that used for the procurement of goods and public works. The working group also recognized that the 1993 version of the Model Law (upon which the current Model Law was built) covered only goods and construction, and that a more intensive consideration of service procurement is possibly required. The working group sought to draw upon the experiences of the member states in the use of procurement methodologies that considered non-price factors and allowed for discussions, clarifications, and negotiations in the procurement of services. The working group also considered how these various national expe-

riences could be distilled to provide a single approach in the Model Law and Guide to Enactment.

The final area of progress in the working group involved remedies and enforcement of procurement laws and regulations. The working group recognized many national remedies regimes such as those of the United States, the United Kingdom, and France, with their respective specialization, generalization and administrative approaches to procurement dispute resolution. The working group also noted that it would look to the Government Procurement Agreement (GPA), the European Union (EU), and the North American Free Trade Agreement (NAFTA), and other supranational regimes, for possible solutions for rectifying supplier complaints. Recognizing the inhering differences in each of these regimes, the working group is considering more forcefully setting forth recommendations and conclusions as to remedies in the Model Law and Guide to Enactment.

Conclusion

As the UNCITRAL reform process unfolds over the coming months and years, procurement practitioners around the world would be well served to monitor the emerging international consensus on a model procurement law. Although the Model Law is not, strictly speaking, applicable to the procurement regime of any particular country, changes to the Model Law will help to highlight possible areas for reform in national procurement systems and allow for greater participation in the procurement systems of other countries. 

Endnotes

1. The full title of the Model Law is the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Model Law is accompanied by the Guide to Enactment, which serves as a roadmap through the Model Law. The English-language version of the UNCITRAL Model Law with its Guide to Enactment is available at <http://www.uncitral.org/english/texts/procurem/procurementindex.htm>.

2. *Report of the United Nations Commission on International Trade Law on Its Thirty-Sixth Session*, ¶¶ 225-230A/58/17 (June 30–July 11, 2004).

3. See Don Wallace, Jr. & Christopher Yukins, *UNCITRAL's Model Procurement Law: Changes on the Horizon*, Fed. Cont. Rep. (BNA) Vol. 81, No. 11 (Mar. 23, 2004).

4. See UNCITRAL Secretariat, *Provisional Agenda [for Working Group Meeting]* (U.N. Doc. A/CN.9/WG.I/WP30) (May 17, 2004), available at http://www.uncitral.org/english/workinggroups/wg_1/wg1-procurement-index-e.htm.

5. Some of these issues have also arisen under the Government Procurement Agreement (GPA), which is a plurilateral agreement entered into by a number of member states under the World Trade Organization (WTO). See generally Gerard De Graff & Matthew King, *Symposium: Uruguay Round—GATT/WTO: Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT'L LAW. 435 (1995).

6. See United Nations Commission on International Trade Law, Working Group I (Procurement), Sixth Session, Vienna (August 30 to September 3, 2004), *Recent Developments in the Area of Public Procurement—Issues Arising from the Increased Use of Electronic Communications in Public Procurement: Note by the Secretariat* ¶ 85 U.N. Doc.

A/CN.9/WG.I/WP.31 (June 7, 2004) [hereinafter UNCITRAL Secretariat's Note on Electronic Communications]; United Nations Commission on International Trade Law, Working Group I (Procurement), Sixth Session, Vienna (August 30 to September 3, 2004), *Recent Developments in the Area of Public Procurement—Issues Arising from Recent Experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services* U.N. Doc.

A/CN.9/WG.I/WP.32 (June 25, 2004), both available at http://www.uncitral.org/english/workinggroups/wg_1/wg1-procurement-index-e.htm.

7. Member states in the European Union must comply with those directives within two years of issuance, by bringing the member states' laws—here, for our purposes, the laws governing procurement—into line with the terms of the directives. See generally Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: A Comparative Study*, 32 PUB. CONT. L.J. 713, 721-22 (2003). Most recently, after extensive internal debate and compromise, see, e.g., European Council—Parliament Reconciliation Committee, Ref. PRES/03/353 (Feb. 12, 2003), the European Union published two revamped directives on public procurement, discussed in further detail below, and available at http://europa.eu.int/eur-lex/en/archive/2004/l_13420040430en.html.

8. The United States's difficult experience with Electronic Data Interchange (EDI) technology through the Federal Acquisition Computer Network (FACNET) in the 1990s, for example, showed that technology-specific solutions are, in the long run, often simply too risky. See, e.g., Christopher R. Yukins, *FACNET: Has Congress Struck a Mortal Blow?*, WASH. TECHNOLOGY (Jan. 12, 1998).

9. *Arcy Manufacturing Company*, Comp. Gen. No. B-261538, 1995 WL 479664 (Aug. 14, 1995) (small businesses unsuccessfully challenged the requirement of the Defense Department requirement that firms respond to certain requests for quotations by electronic transmission).

10. See www.fedbizopps.gov.

11. This section on reverse electronic auctions is adapted from a paper presented by Professor Yukins at the International Public Procurement Policy Conference, Fort Lauderdale, Florida, on October 21, 2004.

12. See generally 65 FED. REG. 65,232 (Oct. 31, 2000) (request for comments on reverse auctions); U.S. Army Materiel Command, *Reverse Auction Contracting Technique*, at 2, available at http://www.amc.army.mil/amc/command_counsel/resources/documents/newsletter02-4/encl06.pdf (discussing stalled regulatory effort); Major Susan L. Turley, *Wielding the Virtual Gavel—DOD Moves Forward with Reverse Auctions*, 173 MIL. L. REV. 1, 25-31 (Sept. 2002) (discussing sources of industry opposition to reverse auctions).

13. See UNCITRAL Secretariat's Note on Electronic Communications, *supra* note 6, available at http://www.uncitral.org/english/workinggroups/wg_1/wg1-procurement-index-e.htm.

14. Directive 2004/17/EC of the European Parliament and of the Council of March 31, 2004, coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors, 2004 O.J. (L 134) 1 (Apr. 30, 2004); Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, 2004 O.J. (L 134) 114 (Apr. 30, 2004) [hereinafter EC Public Works Procurement Directive], both available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm.

15. As in the U.S. system, doubts in the European Union regarding the legality of reverse auctions had apparently slowed their implementation. See Sue Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules: Current Possibilities and Future Prospects*, 2003 PUB. PROC. L. REV. 299 (arguing that electronic reverse auctions were allowable under prior European directives, and reviewing early history of reform eventually manifested in the 2004

directives).

16. The prefatory materials to the 2004 procurement directive for public works, for example, stress that “those aspects of the tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions.” EC Public Works Procurement Directive, *supra* note 14, para. (14).

17. Article 54 of the EC Public Works Procurement Directive, *supra* note 14, discusses electronic auctions.

18. See generally Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, STAN. L. & POL. REV. (forthcoming, Volume 16:2, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=605367.

19. EC Public Works Procurement Directive, *supra* note 14, art. 32. See generally Rhodri Williams, *The New Procurement Directives of the European Union*, 2004 PUB. PROC. L. REV. 153, 157-58.

20. For a slightly dated survey of price preferences afforded domestic goods and services under socioeconomic initiatives in national and regional procurement systems, see Paul Carrier, *Domestic Price Preferences in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement*, 10 N.Y. INT'L L. REV. 59 (1997).