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## **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) auctions in public procurement**

Note by the Secretariat

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## **I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter “the UNCITRAL Model Procurement Law” or “the Model Law”)<sup>1</sup> is set out in paragraphs 1 to 5 of document A/CN.9/WG.I/WP.34, submitted to the Working Group for its consideration at its seventh session.

2. At its sixth session, the Working Group considered inter alia the use of electronic reverse auctions in public procurement. It recognized the reality of electronic reverse auctions and confirmed its willingness to consider the appropriateness of enabling provisions for the optional use of electronic reverse auctions in the Model Law. However, before making a final decision on the matter, the Working Group agreed that it would be useful to have more information on the practical use of electronic reverse auctions in the countries that had introduced them. The Secretariat was requested to provide that information in the form of a comparative study of practical experience (A/CN.9/568, para. 54).

3. The present note has been prepared pursuant to that request. It compares existing regulations of electronic reverse auctions in the surveyed countries from various regions of the world. The present note deals only with public procurement legislation that specifically addresses electronic reverse auctions. It does not cover other areas of law relevant to electronic reverse auctions, such as competition law or rules on electronic commerce. For the analysis of electronic commerce aspects of public procurement, see notes by the Secretariat (A/CN.9/WG.I/WP.34 and Add.1 and 2).

## **II. General Remarks**

### **A. Definition of an “electronic reverse auction”**

4. An electronic reverse auction (ERA) can be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who compete against each other to win the contract by submitting successively lower priced bids during a scheduled time period.<sup>2</sup> ERAs are used in both the private and public sectors. The way government does its procurement affects the format of electronic auctions in public procurement.

5. Unlike a traditional selling auction which involves a single seller and many buyers, the latter bidding for the right to purchase and the former using market forces to drive buyers to raise the price of purchase, in a reverse auction, there is a single buyer and many suppliers: the buyer indicates its requirement, and suppliers progressively bid downwards to win the right to supply. In this instance, the buyer uses market forces to drive suppliers to lower prices. According to economic analysis, there is no difference in results between traditional and reverse auction formats.<sup>3</sup> Both have been used for government purposes, for instance, auctions in the traditional format are utilized in Colombia for the sale of government assets<sup>4</sup> and in the reverse format in Argentina,<sup>5</sup> Brazil<sup>6</sup> and Costa Rica<sup>7</sup> for the purchase of products for government needs. In the latter case, public procurement proper, it is

only a reverse auction format that can be used as several suppliers or contractors compete among themselves for the public contract award.

## **B. The extent of use of ERAs**

6. The extent of the use is determined to a large degree by the extent of e-business activity in the overall economy. In countries where e-commerce has become a norm, the trend towards the use of ERAs in public procurement is strong. Countries in which application of ERAs to public procurement has been pioneered include in particular Australia,<sup>8</sup> Brazil,<sup>9</sup> Canada, France, Singapore, Thailand, the United Kingdom<sup>10</sup> and the United States.<sup>11</sup> A strong trend towards introducing ERAs in public procurement exists in a number of countries, including various countries in Asia, Central and Eastern Europe and some countries in Latin America.<sup>12</sup> This trend is reinforced by initiatives at international and regional levels, in particular by the multilateral development banks (MDBs)<sup>13</sup> and WTO.<sup>14</sup> However, most countries have not yet introduced ERAs in their public procurement for various reasons.

## **C. Benefits and concerns**

7. In the view of some analysts, if used properly, ERAs have the potential to improve value for money,<sup>15</sup> efficient allocation of resources,<sup>16</sup> and transparency in the process of awarding contracts.<sup>17</sup> It has also been observed that they can make governmental systems more accessible and user-friendly, allow governments to keep up with changes in technology, business practices and prices found in the private sector, gain better knowledge of the market and open government bidding markets to suppliers who had not enjoyed access to them previously.<sup>18</sup> The potential of ERAs to exert a positive effect on competition, in particular by dismantling the preferential purchasing patterns in some States members of the European Union (EU), has been recognized in the recently-enacted EU directives in the field of public procurement.<sup>19</sup> It has also been noted that the use of ERAs reduced the number of contracts awarded through non-competitive methods.<sup>20</sup>

8. Most analysts agree that ERAs are successful for goods and services that can clearly be specified, whose non-price criteria can be quantified, for which switching costs (e.g. replacement of suppliers) are acceptable, and for which a competitive market exists. In contrast, it is generally considered that for one-off products where quality is more important than price, and for strategic items, for which alliance level supplier relationships are critical, they are not suitable.<sup>21</sup>

9. For ERAs to function properly, complex technology, operating capabilities, legal and regulatory infrastructure, and systems that allow the submission and opening of bids electronically, and that ensure security, reliability, and accessibility of the process, should be in place. Implementation costs, in particular in connection with designing appropriate software or adapting generic software to local conditions, may be significant and of concern, especially if the costs are not commensurate with the value of procurement or the use of ERAs is not so extensive to ensure that the system will pay for itself in the long term. Another concern expressed is that, in the countries where the Internet penetration is low and unevenly

shared among the different income levels, ERAs may have a potentially discriminatory effect on suppliers depending on the latter's access to new technology and on quality of the connection.

10. In some countries where ERAs have been introduced, concerns have been expressed that, at least for some types of procurement, ERAs seldom provide benefits comparable to currently-recognized selection procedures. For instance, it has been suggested that they: (a) do not guarantee the lowest responsible and responsive price<sup>22</sup> and continued savings in subsequent ERAs;<sup>23</sup> (b) have hidden costs that may negate any savings realized from the auction process itself;<sup>24</sup> (c) may encourage imprudent bidding and thus create a higher risk of abnormally low bids;<sup>25</sup> (d) do not adequately handle non-price factors, such as quality of performance and buyer-supplier relationships;<sup>26</sup> (e) create conflict of interests in market players, such as software firms<sup>27</sup> and "market makers" or "e-market operators";<sup>28</sup> (f) are more vulnerable than traditional bidding processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate;<sup>29</sup> and (g) have negative effects on the market, including an anti-competitive impact<sup>30</sup> and a negative impact on technical innovations and innovative practices.<sup>31</sup> In addition, some analysts question the legality of such a technique in light of the conflict of its inherent features with traditional procurement principles and practices, such as rules forbidding the disclosure of information on other bids,<sup>32</sup> pre-closing negotiations or bid-shopping.<sup>33</sup>

11. It has been recognized that most of the problems stemming from the use of ERAs in public procurement, including a potential danger of overuse, could be mitigated if adequate regulations were in place. The regulatory process, however, even in the countries where ERAs have been used in public procurement for some time already, has been slow.<sup>34</sup> Apart from public procurement, ERAs raise competition and governance issues, which require treatment under relevant branches of law.

### **III. The regulatory framework and practice with respect to the use of ERAs in public procurement: comparative study**

#### **A. The extent of regulation**

12. At the international level, there is no specific regulation of ERAs. At present, the most universal procurement specific international instrument, the World Trade Organization (WTO) Agreement on Government Procurement (GPA), does not address ERAs.<sup>35</sup>

13. Except for the new EU directives, dated 31 March 2004,<sup>36</sup> no regional instruments regulate the use of ERAs. EU current directives in the field of public procurement<sup>37</sup> were not written with ERA procurement technique in mind. The new EU procurement directives, which EU member States have to implement by 31 January 2006,<sup>38</sup> include a specific provision for ERAs.<sup>39</sup>

14. At the national level, only a few countries, including Austria,<sup>40</sup> Brazil,<sup>41</sup> France<sup>42</sup> and some Eastern European countries,<sup>43</sup> regulate the use of ERAs in public

procurement. In most cases, enabling provisions are found in statutes, while detailed aspects, such as the mechanics of holding an ERA, are addressed in implementing regulations. Although linked to electronic commerce, no specific provisions on ERAs have been found in the legal acts regulating e-commerce. Rather, the subject is regulated by general public procurement law and regulations or, in some instances, by ERA-specific legislation.<sup>44</sup>

15. In some Asian countries that regulate ERAs, the regulation is found mainly at the level of local governments or ministries. In China, regulations on online public procurement bidding have been adopted by a number of local governments<sup>45</sup> while in Singapore, the subject is regulated by internal documents of procuring agencies.<sup>46</sup>

16. In some countries, like Australia, the United Kingdom and the United States, ERAs are used in the absence of binding regulations. Centralized regulatory guidelines exist in Australia<sup>47</sup> and the United Kingdom<sup>48</sup> while in the United States,<sup>49</sup> the procedures are largely determined on an agency-by-agency basis, and sometimes on a procurement-by-procurement basis.<sup>50</sup> Some other States work with experimental laws in order to allow pilot projects to carry out real-life ERAs.<sup>51</sup>

## **B. Conditions for use**

### **1. General conditions**

17. The recourse to ERAs is normally subject to general principles of government procurement. Provisions of international agreements, including regional and bilateral agreements, promulgating the principle of freedom of movement of goods and services, are also applicable.<sup>52</sup>

18. Other general conditions imposed, for instance by the new EU directives, are that contracting authorities may not have improper recourse to ERAs or use ERAs in such a way as to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.<sup>53</sup> In some other regulations, ERAs are to be used only when it makes “good business sense” to do so.<sup>54</sup>

19. Although security, safety and integrity of data are usually addressed in the broader context of using electronic means of communication in the procurement process (see A/CN.9/WG.I/WP.34 and Add.1), some existing regulations reaffirm those principles in the context of ERAs and impose specific responsibilities in this regard on ERA service providers<sup>55</sup> and bidders.<sup>56</sup>

### **2. Limitations of objects of ERAs**

20. Although a monetary cap for the use of ERAs could be found in some legislation,<sup>57</sup> generally the ERA is allowed to be used irrespective of the value of the procurement.<sup>58</sup> It is more common to restrict the use of ERAs to certain types of purchases. There has been a general tendency in international practice to confine the use of this procurement technique to standardized goods and some simple types of services. Commodities, such as fuel, standard information technology equipment, office supplies and primary building products, are seen as examples of items

appropriately procured by ERAs.<sup>59</sup> The position of the MDBs has also been that ERAs should be used for commodities only.

21. In Australia, for example, the use of ERAs is restricted to products or commodities with no or little value-added or service component and appropriate products have the following characteristics: very strict and unambiguous specifications that ensure homogeneity, a competitive market, with price as a primary selection criterion, no or limited impact from whole-of-life costs or consideration and no services or added benefits specified in the requirement.<sup>60</sup> In France, ERAs are authorized for the purchase of standard supplies.<sup>61</sup> An implementing regulation further specifies that standard supplies are those with no individual specifications.<sup>62</sup> In Poland, the use of ERAs is restricted to procurement where the object of the contract includes generally available supplies of fixed quality standards.<sup>63</sup>

22. In some countries, for example in Brazil,<sup>64</sup> the use of ERAs is also allowed for the procurement of simple services.

23. Illustrative lists of goods and services that could be procured using ERAs exist in some jurisdictions, such as Brazil<sup>65</sup> and Romania.<sup>66</sup> The Federal Government in Brazil, however, is considering substituting the positive list by a definition of eligibility, thus eliminating the need for periodically updating the list with the appearance of new commodities.<sup>67</sup>

24. Works are usually excluded from ERAs.<sup>68</sup> In some countries, such as Canada and the United States, grave concerns are expressed particularly over the use of ERAs for the procurement of construction.<sup>69</sup> In some states of the United States, such as Pennsylvania and Kansas, state procurement regulation explicitly prohibits procurement of construction contracts through ERAs.<sup>70</sup> It has been observed, however, that some construction works and services (e.g., road maintenance) may be appropriately procured through ERAs. In Austria, for instance, ERAs can be used for procurement of standard works.<sup>71</sup> Under the new EU directives, any purchases can be procured through ERAs if certain conditions are met. The directives omit the qualifier “standard”, predominantly used in other regulations, in describing purchases eligible for the procurement through ERAs.<sup>72</sup> Instead, they specify that ERAs can be used for any purchases (works, supplies or services) provided that “specifications can be established with precision,” such as recurring supplies. “Intellectual” works or services, such as the design of works, are explicitly excluded.<sup>73</sup>

25. In the United States, restrictions as to the size and type of the procurement that can be subject to ERA are set on an ad hoc basis. At least one vendor of ERA services has suggested that ERAs are appropriate across a broad spectrum of procurements<sup>74</sup> and a U.S. Army procuring entity has similarly urged that ERAs are appropriate for a very wide variety of procurements.<sup>75</sup> A U.S. Navy entity that sponsors ERAs has taken a different approach, suggesting that ERAs are appropriate under the following more limited circumstances: (a) for “high-dollar”, large quantity, clearly-defined purchases; (b) items to be acquired must be fully and accurately specified; (c) it is expected that two or more suppliers will agree to participate in the event; however, an item for which there are only two approved sources of supply may not be a good candidate because the anonymity factor may not be present during the ERAs; and (d) sufficient time is available to conduct the

acquisition using the ERA (in particular for the training of suppliers and the configuration of the dynamic pricing event).<sup>76</sup>

### **3. Ways of using ERAs in procurement proceedings**

26. Regulations provide for two ways of using ERAs, either as a stand-alone method of procurement or as an optional phase in other methods of procurement.<sup>77</sup> The latter approach is taken by the new EU directives<sup>78</sup> and in Australia,<sup>79</sup> some Eastern European countries,<sup>80</sup> France,<sup>81</sup> Singapore<sup>82</sup> and the United States.<sup>83</sup> In most of those cases, an ERA is a final stage preceding the award of a public contract.<sup>84</sup> It is not necessarily the case in the United States, where a typical ERA results in bidders being ranked by price only, and the successful bid is selected after the ERA phase, when the results of the auction are evaluated with non-price criteria.

27. In some jurisdictions, like in Austria, Brazil, China and Poland, ERA is a distinct award procedure.<sup>85</sup> In those cases, ERAs can be conducted in an open market to all suppliers, as in Brazil, or to a limited number of pre-selected or pre-qualified suppliers, as in Austria (see A/CN.9/WG.I/WP.35/Add.1, paras. 13-14).

### **4. Evaluation and award criteria**

28. Depending on the permitted criteria for the award of a contract procured through ERAs, two systems are found: those based on the lowest price alone and those that permit additional criteria.

29. In the systems where the price is the only permitted criterion for the award, as in Brazil, China and Poland,<sup>86</sup> quality requirements are limited and factored in the bidding documents as minimum qualification requirements, which, if met, put suppliers in an equal footing. In addition, in Brazil, quality requirements of the goods being procured are established when cataloguing the goods and services in the Materials and Services Catalogues (CATMET and CATSERVE).<sup>87</sup> In China, some quality requirements, such as ability to provide quality after-sale service and complete technical maintenance, are evaluated upon the application for the membership in the online public procurement bidding system, without which no participation in ERAs is possible.<sup>88</sup> Quality aspects are also taken into account in the event of a price tie, when a supplier with a higher credibility is selected.<sup>89</sup>

30. By contrast, the Austrian law permits other award criteria in addition to price. It differentiates two types of auctions: simple ERAs, in which the price is the only award criterion; and other types of ERAs where the technically and financially “most advantageous” offer is given the award on the basis of evaluation of all award criteria fixed in the tender documents.<sup>90</sup> In the latter case, the procuring entity defines such parts of the tender to be covered by the ERA, to be only those parts for which any variation can be represented by figures or quantity parameters. Provisions of the law imply that all criteria not subject to the ERA are to be evaluated prior to the auction.<sup>91</sup> In the tender documents, the procuring entity states all award criteria intended to be used within the framework of a mathematical formula and in the order of importance attributed to them. In the course of the ERA, the respective ranking of the participants is fixed in accordance with the new bids calculated using the formula.

31. Provisions to the same effect are found in the new EU directives. ERAs may be based solely on prices when the contract is awarded to the lowest price; or on



prices and/or on the new values of the features of the tender indicated in the specification, if the contract is to be awarded to the most economically advantageous tender.<sup>92</sup> As in Austria, the values of only those features that are quantifiable and can be expressed in figures or percentages can be the subject of ERAs.<sup>93</sup> However, by contrast with the Austrian system, in the EU system, all features of the tender, auctionable and non-auctionable, are to be evaluated prior to the auction in accordance with their relative weightings.<sup>94</sup> The outcome of the full evaluation of each tenderer is made known before the ERA in the invitation to the auction. The invitation also states the mathematical formula<sup>95</sup> to be used in ERA to determine automatic reranking on the basis of the new prices and/or new values submitted (see A/CN.9/WG.I/WP.35/Add.1, para.17).

32. In the United States, award criteria are determined on an ad hoc basis. Typically, ERAs are limited to price only (see above, para. 26).

## 5. Models of ERAs

33. Depending on which evaluation criteria are assessed and when, three models for conducting ERAs are used in practice by procuring entities:

- Model 1, in which all aspects of tenders that are to be compared in selecting the winning supplier are submitted through the ERA itself. Often lowest price is 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 in a mathematical formula, which 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 of 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.

## 6. Conclusion

34. It is generally recognized that not all types of procurement are appropriate for ERAs. The primary factor to consider in deciding whether a certain type of procurement is appropriate for ERA is the level of product/service complexity for the procurement and with what level of accuracy the procurement can be specified, i.e., whether suppliers can easily understand the requirement or the requirement can only be defined superficially and needs early supplier intervention. Other factors considered are: (a) predicted value of procurement to determine whether procurement would be attractive to suppliers; (b) market competition (whether it is high enough to ensure the participation of sufficient number of suppliers in the ERA);<sup>96</sup> and (c) award procedure (to what extent the procurement award criteria are

quantifiable). Those considerations would determine the procurement and auction strategy.

#### Notes

- <sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).
- <sup>2</sup> See the Focus Study of the Center for Advanced Purchasing Studies (CAPS Research), “Role of reverse auctions in strategic sourcing”, 2003, available at <http://www.capsresearch.org/publications/pdfs-public/beall2003es.pdf>.
- <sup>3</sup> See Soudry O., “Promoting economy: electronic reverse auctions under the EC directives on public procurement”, 2004, *Journal of Public Procurement*, vol. 4, No. 3, p. 345.
- <sup>4</sup> Law 80 of 1993 (available at [http://www.secretariasenado.gov.co/leyes/L0080\\_93.HTM](http://www.secretariasenado.gov.co/leyes/L0080_93.HTM)), article 24, subsection 3. Colombia also has the system of dynamic conformation of offers which resembles auction mechanism. It was established under article 5 of Presidential Decree 2170 of 30 September 2002 (executive guidelines for Law 80, available at the documents section of <http://www.contratos.gov.co>).
- <sup>5</sup> *Decreto delegado* 1023/2001 of 13 August 2001 (available at <http://infoleg.mecon.gov.ar/txtnorma/68396.htm>), article 25, Selection Procedures, paragraph b) provides for the use of public auctions for the procurement of goods.
- <sup>6</sup> Federal Law No. 8.666 of 21 June 1993 as amended (the full text in Portuguese is available at <https://www.planalto.gov.br/> and <http://www.COMPRASNET.gov.br/legislacao/leis/lei8666.pdf>) added “procurement auction” (*pregao*) to other methods of procurement. Decrees 3.555 and 3.693 of 8 August and 20 December 2000, respectively, established the list of goods and services eligible for procurement through reverse auctions limiting them to “commodity items”, i.e. off-the-shelf products, with quality standards established by the market, and in which price is the only differential.
- <sup>7</sup> *Decreto* No. 25038-H, *Reglamento General de Contratación Administrativa*, of 6 March 1996 (available at <http://www1.hacienda.go.cr/proveeduria-financiera/reg%20gral%20de%20contratacion%20adva.html>), article 64.1, under which auctions can be used for the purchase of generic products, defined in article 64.2 as those produced subject to general manufacturing patterns and that are distributed by at least four vendors, with the satisfaction of requirements being indifferent as to contractual mechanisms, make or supplier. Under article 64.6, quotations are formulated verbally in person in front of all other accredited bidders.
- <sup>8</sup> Australia has had an integrated national electronic procurement framework since May 1999 (see the “Framework for national cooperation on electronic commerce in government procurement”, available at <http://www.apcc.gov.au/docs/NationalECFramework.pdf>). This framework consists of Commonwealth initiatives developed to promote electronic procurement. State governments have also established business centres to encourage acceptance of online procurement and have developed their own online portals for e-procurement, including New South Wales (<http://www.cpsc.nsw.gov.au/e-procurement/links.htm>), Victoria ([http://www.ec4p.dtf.vic.gov.au/domino/web\\_notes/ec4p/ec4p.nsf/frameset/EC4P?OpenDocument](http://www.ec4p.dtf.vic.gov.au/domino/web_notes/ec4p/ec4p.nsf/frameset/EC4P?OpenDocument)) and Queensland ([http://www.qgm.qld.gov.au/prc/English/prc\\_intro.htm](http://www.qgm.qld.gov.au/prc/English/prc_intro.htm)).

- <sup>9</sup> In Brazil, ERAs were introduced to public procurement by Decree 3.697 of 21 December 2000. In 2001, 3.2 per cent of the total volume of goods and services procured by the Federal Government were procured through ERAs, growing to 12 per cent, in 2003, and to approximately 20 per cent, in 2004. COMPRASNET ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)) is the web platform for e-Government Procurement of the Federal Government in Brazil. It is supplemented by OBRASNET (<http://www.obrasnet.gov.br/>) that includes a database of costs, progress reports of works, photography, and material regarding civil works implemented by the Federal Government, based on information available from the National Court of Accounts (TCU) and the Government Housing Development Bank (CEF).
- <sup>10</sup> See the website of the Office of Government Commerce in the United Kingdom (OGC) (<http://www.ogc.gov.uk>).
- <sup>11</sup> For news on experience in the United States and elsewhere in governments' use of ERAs, see <http://www.egov.vic.gov.au/Research/OnlineAuctions/auctions.htm>. For a discussion group on successes and failures in the use of ERAs in U.S. procurement, see <http://www.wifcon.com/arc/forum62.htm>.
- <sup>12</sup> With respect to Latin America, although the results of the survey demonstrate that, with the exception of Brazil, none of the countries surveyed and apparently no other country in the region is currently using ERAs as a means of procuring goods and/or services for the public sector, some countries, such as Chile, Costa Rica and Mexico, are looking into such a possibility. The pace of introduction of ERAs in public procurement is connected to the pace of e-government initiatives and particularly e-procurement which is advancing rapidly in those countries. Current legislation generally permits—and in some countries even mandates—the use of electronic means in procurement. Nevertheless, the enactment of legislation specifically permitting and regulating the use of ERAs is required. Constraints found are of a technical, financial and political nature.
- <sup>13</sup> See, in particular, the Electronic Government Procurement Portal launched by the Asian Development Bank, the Inter-American Development Bank and the World Bank in November 2004 (available at <http://www.mdb-egp.org/data/default.asp>). It contains a number of documents prepared by the MDBs and used by many countries in designing their e-government procurement portals. One of the sections of the portal provides a snapshot on the usage and readiness for e-government procurement of various countries as well on system functions and characteristics and also enables to make comparisons between countries.
- <sup>14</sup> The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA) (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf)) which will include an explicit provision on ERAs (Article XI.3 bis of the draft text as at 4 November 2003. Official version is not published).
- <sup>15</sup> In that better value for money can be achieved through a competitive market price, and substantial cost savings through dynamic and real-time trading as a result of increased competition among tenderers and direct link between buyers and sellers without any middleman, effectively putting power to set prices in the hands of the buyer and transforming pricing from static to dynamic. In a number of ERAs held by public entities, tangible cost savings directly attributable to the use of the on-line auction have been reported. See Stein A. and Hawking P. "Reverse auction e-procurement: a suppliers viewpoint," available at <http://ausweb.scu.edu.au/aw02/papers/refereed/stein/paper.html>. See also Wyld D. C. "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>; and Curran E., Bernert A., Wiegand A. "Electronic procurement in the public sector: factsheet on latest developments in e-procurement in the EU and its Member States," August 2004, available at [http://www.eic.ie/downloads/e\\_procurement.pdf](http://www.eic.ie/downloads/e_procurement.pdf). Also OGC's "E-procurement: cutting through the hype", at <http://www.ogc.gov.uk>.

- <sup>16</sup> The time required to conduct an acquisition using the on-line auction technique is said to be significantly reduced compared to the traditional paper proposal process. They can also reduce many administrative difficulties and costs associated with the traditional open procedure, such as costs of handling and evaluating bids, costs of communication, and even costs that potential bidders spend on industrial and business espionage before submitting bids. See CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2). Shortened time frames for actions in the context of ERAs have already been reflected in some legislative texts. On the other hand, it is observed that such a pattern may impact other methods of procurement where, however, reduction of time frames for certain acts may not be justifiable.
- <sup>17</sup> Some analysts noted clear advantages of auctions with respect to transparency of the contract award process over the traditional tendering procedure. This stems from the fact that under the ERA procedure, the danger of having the procuring entity favoring a particular firm by providing it information on other tenders is limited: information on other bids is available to all tenderers in an open and equal manner; and all bidders are allowed to amend their tender at any time within the limits of the time period. Thus, the ERA can increase transparency in two levels: (1) information available on other tenders; and (2) the availability of the procedure phases and its outcome to all interested tenderers. See Soudry O. "Promoting economy: electronic reverse auctions under the EC directives on public procurement", 2004. *Journal of Public Procurement*, vol. 4, No. 3, p. 354. See also Wyld D. C., "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>.
- <sup>18</sup> See CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2). See also Wyld D. C., "Auction model: how the public sector can leverage the power of e-commerce through dynamic pricing", 2000, available at <http://www.businessofgovernment.org/pdfs/WyldReport.pdf>.
- <sup>19</sup> See Soudry O. "Promoting economy: electronic reverse auctions under the EC directives on public procurement", *Journal of Public Procurement*, vol. 4, No. 3, pp. 340-342. (In the recent study of the European Commission, it was indicated that direct cross-border procurement in Europe accounts for only 3 per cent of the total number of bids submitted by the sample firms, and no more than 30 per cent of indirect cross-border penetration (i.e., foreign firms using local subsidiaries)).
- <sup>20</sup> As the secretariat was advised during consultations with experts.
- <sup>21</sup> See, e.g., the OGC guidance, available at <http://www.ogc.gov.uk/index.asp?docid=1001034>. Also, CAPS Research Focus Study, "Role of reverse auctions in strategic sourcing", 2003 (see above, footnote 2).
- <sup>22</sup> It is suggested that unlike in traditional sealed biddings where competitors have only one opportunity to bid, in ERAs, each bidder recognizes that it will have the option to provide successive bids and therefore has a little incentive to offer its best price and subsequently may never offer its best price. Consequently, the winning bid may be simply an established increment below the second lowest bid rather than the lowest responsible and responsive bid. See the white paper of the Associated General Contractors of America (AGC), "Reverse auctions over the Internet: efficiency—at what cost?", 2003, available at [http://www.agchouston.org/content/public/pdf/cornerstone/Winter2003\\_Reverse\\_Auctions.pdf](http://www.agchouston.org/content/public/pdf/cornerstone/Winter2003_Reverse_Auctions.pdf).
- <sup>23</sup> Ibid.
- <sup>24</sup> See Emiliani M. L. and Stec D. J., "Aerospace parts suppliers' reaction to online reverse auctions". *Supply Chain Management: An International Journal*, 2004. For instance, there is a tendency not to involve suppliers during the design stage when significant saving and quality improvements could be made for the production stage. Although the concern was expressed in the context of B2B transactions, it may also be relevant in B2G environment. For the summary and key points of the article as well as other articles by the same authors on ERAs, see <http://www.theclbm.com/research.html>.

- <sup>25</sup> For the analysis of existing approaches for handling the risk of abnormally low prices, including in ERAs, see a note by the Secretariat (A/CN.9/WG.I/WP.36).
- <sup>26</sup> There seems to be a consensus that ERAs, with their anonymous and extreme pressure to force down prices, are not always optimal tools for agencies seeking to forge lasting supply-chain relationships built on quality, much as the industrial *keiretsu* of Japan would shun ERAs in their carefully built supply chains. See Liker J. K. and Choi T. Y., "Building deep supplier relationships," HARVARD BUSINESS REVIEW, December 2004, pp. 104, 106 (also available at <http://www.nbbc.org/builddeep.pdf>). See also Emiliani M. L. and Stec D. J. at <http://www.theclbm.com/research.html>.
- <sup>27</sup> In the United States, for example, it was noted that the launch of ERAs was accompanied by a stampede of interest from software developers that sell ERA solutions. See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat. See also Nash R. C. and Cibinic J., "Reverse auctions: more thoughts," NASH & CIBINIC REPORT (West Group, December 2000), vol. 14, No. 12, p. 67 ("It seems that the computer software marketing people are launching a full-force attack on Government procurement offices pushing the 'reverse auction' online bidding software programs that they developed for use in the commercial world.")
- <sup>28</sup> Those are agencies that provide a buyer the services of an auction manager to set up and administer the auction, and advice on purchasing method to utilize. They may be in an especially delicate situation, representing and having access to both suppliers and buyers in the market place. The European experience has borne out the serious threat these potential organizational conflicts may pose. See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat; and Kennedy-Loest C. and Kelly R., "EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 PUBLIC PROCUREMENT LAW REVIEW, No.1, pp. 27-33. In the United States, the move to ERAs has been driven, at least in part, by "entrepreneurial" federal agencies that offer other agencies reverse-auction services on a fee-for-service basis ([www.buyers.gov](http://www.buyers.gov)). See Yukins C. R., "Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system," October 2004, available with the Secretariat.
- <sup>29</sup> Collusion can be defined as an arrangement among a group of bidders, either explicit or implicit, that is designed to restrict competition (Porter & Zona, 1993). Collusion can occur in the ERA when two or more bidders work in tandem to manipulate the price of an auction, or, alternatively, when a seller uses shells to enter fake bids and drive up the asking price. As a result, contracting authorities might face higher prices and the members of the cartel will enjoy profits above the competitive prices. See Soudry O., "Promoting economy: electronic reverse auctions under the EC directives on public procurement", 2004, Journal of Public Procurement, vol. 4, No. 3, pp. 360-363 and 366.
- <sup>30</sup> See, generally, Trepte P., "Electronic procurement marketplaces: the competition law implications," 2001, 10 PUBLIC PROCUREMENT LAW REVIEW, pp. 260-280 (discussing anti-competitive concerns in the context of an electronic government procurement market). Also Kennedy-Loest C. and Kelly R., "The EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 PUBLIC PROCUREMENT LAW REVIEW, No.1, pp. 27-33 (talks about three main areas of concerns identified by the European Commission in relation to the compatibility of electronic marketplaces (and, by analogy, ERAs) with the EU competition rules: information exchange, in particular because the auction marketplace provides a forum for competitors to exchange commercially sensitive information; access and foreclosure issues (has a marketplace or auction been set up to exclude certain competitors or to require them to participate on an exclusive basis?); and the aggregation of purchasing power (does the auction or marketplace facilitate joint purchasing or joint selling by participants in an auction?).

- <sup>31</sup> In particular, due to the level of detail usually required in the specifications of the objects of ERAs.
- <sup>32</sup> In the United States, the debate over ERAs has centered, in important part, on the disclosure of competitive information as the ERA proceeds. The Procurement Integrity Act provides that procurement officials, as defined in the Act, “shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before award of a contract to which the information relates.” 41 U.S.C. § 423(a)(1) - (2) (2000). See also Federal Acquisition Regulation (FAR) 3.104-4(a). Disclosure is permitted in certain cases, such as with the offeror’s permission (i.e., where the disclosure is voluntary). 41 U.S.C. § 423(h)(1) - (2) (2000) and FAR 15.306(e)(3). According to the American Bar Association, Public Contract Law Section, “Comments on reverse auction notice”, 5 January 2001, available at [http://www.abanet.org/contract/federal/regscomm/ecommm\\_003.html](http://www.abanet.org/contract/federal/regscomm/ecommm_003.html), in ERAs conducted to date, potential offerors have expressly agreed to disclosure of their pricing in order to participate in the procurement. It appears, however, that they would have been precluded from participating if they had refused, so that the effectiveness and “voluntariness” of their consent may be open to question. See Yukins C. R., “Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system,” October 2004, available with the Secretariat.
- <sup>33</sup> The extension of bid closing times and the ability to resubmit prices as allowed by ERAs can be interpreted as a form of pre-closing negotiation or bid-shopping which may compromise a fair and open competitive process. See Boucher P., “Technology versus industry practices”, February 2003, available at [http://www.findarticles.com/p/articles/mi\\_qa4088/is\\_200302/ai\\_n9176581](http://www.findarticles.com/p/articles/mi_qa4088/is_200302/ai_n9176581).
- <sup>34</sup> See Yukins C. R., “Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system,” October 2004, available with the Secretariat (stating that no standard legal response to the issues arising from the use of ERAs appears yet to have been developed beyond broad “enabling provisions,” and further that it is too often overlooked in the literature when the use of ERAs is inappropriate or, more specifically, when procurement officials should curb what may well be an overuse of ERAs).
- <sup>35</sup> See footnote 14.
- <sup>36</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)).
- <sup>37</sup> Directive 92/50/EEC of 18 June 1992 (Services Directive), *Official Journal of the European Communities*, No. L 209, 24 July 1992, p. 1, as amended by Directive 97/52/EC of 13 October 1997, *Official Journal of the European Communities*, No. L 328, 28 November 1997, p.1; Directive 93/36/EEC of 14 June 1993 (Supply Directive), *Official Journal of the European Communities*, No. L 199, 9 August 1993, p. 1, as amended by Directive 97/52/EC above; Directive 93/37/EEC of 14 June 1993 (Works Directive), *Official Journal of the European Communities*, No. L 199, 9 August 1993, p.54, as amended by Directive 97/52/EC above. These are often referred to as the “classic sector directives”. Directive 89/665/EEC of 21 December 1989, *Official Journal of the European Communities*, No. L 395, 30 December 1989, p. 33, as amended by Directive 92/50 above, deals with enforcement in these sectors.
- <sup>38</sup> See article 80(1) of Directive 2004/18/EC and article 71(1) of Directive 2004/17/EC.
- <sup>39</sup> See article 54 of Directive 2004/18/EC and article 56 of Directive 2004/17/EC.
- <sup>40</sup> See the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>.

- <sup>41</sup> Federal Law No. 10.520/2002 of 17 July 2002 (available at [https://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](https://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)), complemented by Law 8.666 to the extent it does not conflict; Decrees 1.094/94, 3.555/00, 3.693/00, 3.697/01 and 3.784/01; and Internal Instructions (Portarias) SAF/PR 2.050 and MARE 5.
- <sup>42</sup> See the Public Procurement Code, article 56 (3), and Decree No. 2001-846 of 18 September 2001.
- <sup>43</sup> See, e.g., article 25(1)(a) of Government Decree 167/2004 (V.25) of Hungary that envisages the practice of ERAs; articles 74 to 81 of the Public Procurement Law of Poland of 29 January 2004 that expressly authorizes and regulates the use of ERAs; article 36 of Government Ordinance No. 20 of 24 January 2002 of Romania dealing with an open bid procedure (further information on the ERA procedure is provided on the website [www.e-licitatie.ro](http://www.e-licitatie.ro)); and the Rules on the content, conditions and restraints for rendering electronic auction in contract award procedures of Slovenia, published in the Official Gazette of the Republic of Slovenia No. 130/2004, 3 December 2004 (the “Slovenian Rules”).
- <sup>44</sup> See, e.g., Decree No. 3.697 of 21 December 2000, of Brazil, that created “electronic procurement auction”.
- <sup>45</sup> See the Nanning City Interim Measures for the Management of Online Public Procurement Bidding of 18 June 1999; the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding of 1 September 2000; the Hefei City Interim Measures for the Management of Online Public Procurement Bidding of 13 March 2001; the Wuxi City Interim Measures for the Management of Online Public Procurement Bidding of 1 April 2001; the Zhuhai City Interim Measures for the Management of Online Public Procurement Bidding of 27 June 2002; the Shenzhen City Interim Measures for the Management of Online Public Procurement Bidding of 15 October 2003; and the Shanghai Interim Measures for the Management of Online Public Procurement Bidding of December 2004. The text of the latter in Chinese and its unofficial translation in English are available with the Secretariat.
- <sup>46</sup> See, e.g., the Administrative guidelines for assisted reverse auction event of the Ministry of Defense (the “Singapore guidelines”).
- <sup>47</sup> In Australia, regulation is currently limited to policy documents, non-statutory procurement guidelines and broad statutory provisions about electronic procurement. New South Wales remains the only State to provide any specific guidance on topic. See the NSW Government Procurement Guidelines on Reverse Auctions of March 2001 (available at <http://www.dpws.nsw.gov.au/NR/rdonlyres/ezac4yppqkqqzaj5qdjgerv3aj62n4ishpa3xhofh4fdl3cquit4m7l4ibv3a2w67sslw5zuhmjpois43joel4ees4xe/Reverse+Auctions.pdf>) (the “Australian Guidelines”).
- <sup>48</sup> In the United Kingdom, rules on public procurement are mainly limited to those of the EU law. The British Government has considered that the EU current directives allow scope for ERAs in public procurement and has endorsed their use. OGC, in promoting the use of ERAs in government procurement, has issued the on-line guidance (available at <http://www.ogc.gov.uk/index.asp?docid=1001034>).
- <sup>49</sup> Attempts to formulate centralized binding rules have not yet been successful, reportedly because of industry opposition and because there is no consensus on when reverse auctions should be used. See, e.g., Turley S. L., “Wielding the virtual gavel—DOD moves forward with reverse auctions,” 173 MILITARY LAW REVIEW, September 2002, pp. 1, 25-31 (discussing sources of industry opposition to ERAs); and Yukins C. R., “Conduct of electronic reverse auctions: a comparative report on experience in the U.S. procurement system,” October 2004, available with the Secretariat. In the opinion of many commentators in the United States, ERAs are permitted under FAR 15.306(e)(3) construed against the back-drop of FAR 1.102(d), which permits any procurement practice consistent with sound business judgment, provided that the practice is consistent with law, regulation, and case law, and is not addressed in the FAR. See, e.g., Feldman S. W., “Government contract awards: negotiation and sealed bidding” § 16:18.10,

“Revealing prices without permission”, March 2004 (available on Westlaw); Whiteford, “Agencies celebrated the auction prohibition’s demise, as demonstrated by their use of the reverse online auction technique”; and a special notice of the administrative councils that publish the Federal Acquisition Regulation, 2000. However, concerns on the legality of such a technique under US law also exist. See, e.g., American Bar Association, Public Contract Law Section, “Comments on reverse auction notice”, 5 January 2001, available at [http://www.abanet.org/contract/federal/regscmm/ecommm\\_003.html](http://www.abanet.org/contract/federal/regscmm/ecommm_003.html); also Antonio R., “Do reverse auctions violate FAR 15.307 (b)?”, 24 July 2000, available at <http://www.wifcon.com/anallegal.htm>.

- <sup>50</sup> For a buying agency which has endorsed the use of ERAs but has not provided detail guidance on when ERAs may be appropriate (or inappropriate), see the June 2003 letter from the U.S. Department of Veterans Affairs to its contracting offices, available at <http://www1.va.gov/oamm/info/il03-11.pdf>.
- <sup>51</sup> See Curran E., Bernert A. and Wiegand A., “Electronic procurement in the public sector: factsheet on latest developments in e-procurement in the EU and its Member States”, August 2004, available at [http://www.eic.ie/downloads/e\\_procurement.pdf](http://www.eic.ie/downloads/e_procurement.pdf).
- <sup>52</sup> See, e.g., articles 28 and 49 of the Treaty establishing the European Community (available at <http://europa.eu.int/abc/obj/treaties/en/entoc05.htm>); as well as general principles relevant to public procurement in Australia New Zealand Government Procurement Agreement (ANZGPA) (available at [http://www.dfat.gov.au/geo/new\\_zealand/anz\\_cer/anzcerta\\_1997revised\\_npa.pdf](http://www.dfat.gov.au/geo/new_zealand/anz_cer/anzcerta_1997revised_npa.pdf)).
- <sup>53</sup> See, e.g., article 54(8) of Directive 2004/18/EC.
- <sup>54</sup> See, e.g., the Australian Guidelines (see above, footnote 47).
- <sup>55</sup> Requirements found are: (a) separation of records of different databases; (b) the development and operation of the system by agencies that are not end users of the system, work in a separate environment and do not access the operational environment of the system’s end users (in Brazil); (c) generation of detailed records of ERA; and (d) authentication of messages, including bids, by means of electronic signature and encryption (see article 78 of the Public Procurement Law of Poland) or, more commonly, through the assignment of an identification key and password to access the electronic system (e.g., in Brazil and the United States).
- <sup>56</sup> Decree No. 2001-846 of France, articles 4 and 7. Some ERA systems include standard warning for bidders that they may not artificially manipulate the price of a transaction by any means or place bad faith offers, use decoys in the process or to collude with the intent or effect of hampering the competitive process. See, e.g., solicitations at [www.FedBid.com](http://www.FedBid.com).
- <sup>57</sup> See, e.g., para. 28 of the Purchase Contract Awards Act 2002 of Austria that restricts the application of ERAs to purchases valued (excluding VAT) less than 40,000 Euro; and article 74(2) of the Public Procurement Law of Poland, which refers to an 60,000 Euro cap. However, one of the rationales for confining the use of ERAs to lower value procurement in those cases was to keep those transactions below the thresholds for application of the EU current directives, which do not deal with ERAs, a consideration which is no longer relevant as the new EU directives endorse the ERA procedure.
- <sup>58</sup> As the secretariat was advised during consultations with experts, establishing maximum or minimum monetary caps may be counter-productive. For instance, the imposition of the cap in Poland is said to have contributed to the low rate of usage of ERAs in that country, since small value ERAs do not allow the costs of conducting the auction (including the fees and costs of the service provider) to be recouped. Apart from cost-recovery factor, the urgency of which may diminish with the development of appropriate technology, software and widespread practice, the value of a procurement through ERAs must be substantial enough to attract meaningful competition and at the same time should not be so high as to hinder participation of potential bidders. Establishing a monetary cap that would take into account those considerations for all types of procurement may not be possible.



- <sup>59</sup> See, e.g., the Australian Guidelines (see above, footnote 47); and article 4 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding (see above, footnote 45).
- <sup>60</sup> The Australian Guidelines (see above, footnote 47).
- <sup>61</sup> Public Procurement Code, article 56(3). Refers to “fournitures courantes”.
- <sup>62</sup> Decree No. 2001-846 of 18 September 2001, article 1.
- <sup>63</sup> Public Procurement Law of Poland of 29 January 2004, article 74(2).
- <sup>64</sup> Under article 1 of Law No. 10.520 of 17 July 2002, auctions can be used only for “common” goods and services, defined as those for which quality and performance standards can be objectively and precisely defined according to standard specifications used in the market.
- <sup>65</sup> For the full list, see the annex of Decree 3.784, dated April 6, 2001, that amended lists contained in Decrees 3.555 and 3.693. The list is limited to the procurement conducted by federal entities. States and municipalities may promulgate their own regulations on the subject.
- <sup>66</sup> See [www.e-market.e-licitatie.ro](http://www.e-market.e-licitatie.ro).
- <sup>67</sup> As the secretariat was advised by experts.
- <sup>68</sup> Brazilian regulations do not mention works in the list of eligible items for ERAs. Under the Australian Guidelines (see above, footnote 47) as well, the use of ERAs is to be restricted to the procurement of products or commodities only.
- <sup>69</sup> Special Bulletin of the Canadian Construction Association, December 2001, available at <http://www.cca-acc.com/news/committee/rag/rag-owner.pdf>.
- <sup>70</sup> See AGC’s white paper, “Reverse auctions over the Internet: efficiency—at what cost?”, 2003 (see above, footnote 22).
- <sup>71</sup> Purchase Contract Awards Act 2002, para. 28.
- <sup>72</sup> The same is true in the Slovenian rules. See articles 2 and 4 of the Slovenian Rules (see above, footnote 43).
- <sup>73</sup> See article 1(7) of EU Directive 2004/18/EC that defines “reverse auction”. It explicitly provides that certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions. Recital paragraph 14 explains this restriction as follows: “In order to guarantee compliance with the principles of transparency, only elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tender which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain work contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works should not be the object of electronic auctions.”
- <sup>74</sup> <http://www.fedbid.com/faq.jsp>.
- <sup>75</sup> See Power Point presentation, dated 14 June 2001, of DASA(P), Headquarters, Department of the Army, “Reverse auctions,” at slide 8, available at <http://www.hq.usace.army.mil/cepr/RoundTable/ReverseAuctionBrief.ppt>.
- <sup>76</sup> U.S. Navy Supply Systems Command, Navy Auction Site, “Getting started,” available at <http://www.auctions.navy.mil/about/gettingstarted.html>.

- <sup>77</sup> Although this means that ERAs can be used in open tendering proceedings, it has been observed that, in practice, the restricted procedure will normally be used when an ERA is involved. ERAs are likely to be used only rarely in negotiated procedures since many of the grounds permitting recourse to such procedures are concerned with situations in which specifications and other conditions cannot be easily set in advance, something which is generally essential for an auction. See Arrowsmith S., "Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects," 11 Public Procurement Law Review, No. 6, 2002, pp. 299-330 (originally prepared for Achilles Information Ltd.).
- <sup>78</sup> Article 54 (2) of EU Directive 2004/18/EC states that: "In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision." It may also be held on the reopening of competition among the parties to a framework agreement and on the opening for competition of contracts to be awarded under the dynamic purchasing system.
- <sup>79</sup> Under the Australian Guidelines (see above, footnote 47), ERAs could be used as part of the tender process, as a means of obtaining quotes from suppliers, and as the second stage of a two-stage tender process where price is the remaining selection criteria.
- <sup>80</sup> See, e.g., article 2 of the Slovenian Rules (see above, footnote 43).
- <sup>81</sup> See Decree No. 2001-846.
- <sup>82</sup> Section 1.1 of the Singapore Guidelines (see above, footnote 46).
- <sup>83</sup> In the United States, in the absence of explicit prohibition, ERAs could be used in combination with any available procurement methods and is also used in the context of frameworks and dynamic purchasing systems. However, according to US Navy activity, normal solicitation procedures applicable for a competitive negotiation should be used (FAR Part 15) and the reverse auction technique is not suited for Sealed Bidding, and simplified acquisition procedures (FAR Part 13), in the latter case unless projected savings will be substantial enough to offset the cost of conducting the procurement using FAR Part 15 procedures. See U.S. Navy Supply Systems Command, Navy Auction Site, "Getting started," available at <http://www.auctions.navy.mil/about/gettingstarted.html>.
- <sup>84</sup> This approach is said to be taken in the revised GPA as well (see above, footnote 14).
- <sup>85</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para.23.8 and 9.
- <sup>86</sup> Article 78(2) of the Public Procurement Law of Poland. This approach has also been preferred by the MDBs.
- <sup>87</sup> For more details see Internal Instructions (Portaria) 2.050, dated 18 May 1992, on the COMPRASNET website ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)).
- <sup>88</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding", article 6, and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding", article 8.
- <sup>89</sup> See the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 19; and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22. Factors considered to assess suppliers' credibility are inter alia a good record of legal compliance, past performance, business integrity, strong credit standing, considerable capital strength and sound financial status.
- <sup>90</sup> See, e.g., Purchase Contract Awards Act 2002, paras. 28, 117 and 118.
- <sup>91</sup> Ibid, para. 118.
- <sup>92</sup> Article 54 (2) of EU Directive 2004/18/EC.
- <sup>93</sup> Ibid., article 54(3).

<sup>94</sup> Ibid., article 54(4).

<sup>95</sup> Ibid., article 54 (5). That formula incorporates the weightings of all criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges shall be reduced beforehand to a specified value. Where variants are authorized, a separate formula is provided for each variant.

<sup>96</sup> Some systems specifically address a minimum number of participants in the ERA while in other systems general provisions of procurement law apply. The requirement of at least three participants in an ERA is commonly found in the regulations. See, e.g., article 22 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding. It has been observed that a higher number of participants effectively prevents the risk of collusion. In Austria, participation in ERA of minimum ten participants is required (see Purchase Contract Awards Act 2002, para. 116.7).

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