ARE IDIQS INEFFICIENT? SHARING LESSONS WITH EUROPEAN FRAMEWORK CONTRACTING

By Christopher R. Yukins

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Christopher R. Yukins (cyukins@law.gwu.edu) is Associate Professor of Government Contracts Law and Co-Director of the Government Procurement Law Program at The George Washington University Law School. He serves as faculty advisor to the Public Contract Law Journal.

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ABSTRACT

In a remarkable historical parallel, the United States and the member nations of the European Union have, over the last decade, embraced framework agreements (generally called "indefinite-delivery/indefinite-quantity" or "IDIQ" contracts in the U.S. system). Agencies put these master agreements in place with vendors and then order from these agreements (or allow other agencies to order from them) as requirements arise. These arrangements offer a terrifically easy means of procurement, without much of the cumbersome transparency and competition (and accountability) that normally dog government procurement. Experience in the European and U.S. systems suggests, however, that procurement officials may be *overusing* these agreements and abandoning traditional means of procurement that are, in the end, more efficient means of gaining best value. This article discusses the problems that have emerged with these agreements and, drawing on experience from both sides of the Atlantic, suggests possible means of reform, to restore a more efficient balance to the highly advanced procurement systems in the United States and Europe.

I. INTRODUCTION

Just over a decade ago, the European Commission launched enforcement proceedings against the United Kingdom, proceedings that stemmed from the Commission's concern that the "framework" agreements used by the United Kingdom (indefinite-delivery/indefinite-quantity (IDIQ) contracts as they are known in the United States) were inherently anticompetitive. Although those proceedings were ultimately resolved, the Commission's core concern—that IDIQ contracts may well be inefficient—raises important questions for procurement policy, both here in the United States and abroad.

Framework agreements in Europe, and IDIQ contracts in the United States, have risen in a remarkable sort of historical parallel.[1] In both markets, these special contracts gained popularity rapidly over the last decade, in part because procurement officials on both sides of the Atlantic were able to use these contracts to evade tightening requirements for competition, transparency, and accountability in public contracting. This contracting method, which is arguably the historical successor to supplier lists, makes it quite easy to avoid competition and transparency: although master framework agreements (and IDIQ contracts) are generally awarded with full and open competition to one or more vendors, the *orders* (sometimes called contracts) under those standing agreements are typically *not* subject to normal competition or transparency requirements. As a result, once those standing framework agreements (IDIQ contracts) are in place, procurement officials and vendors

1. *See*, for example, Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?* 35 Pub. Cont. L. J. 337, 348 (2006), noting parallels between framework agreements and U.S. task- and delivery-order (IDIQ) contracts.

using these vehicles pass into a much darker, uncompetitive world, where normal public procurement principles often do not apply.

This article draws on the European and U.S. experiences to assess a troubling aspect of IDIQ (and framework) contracting: whether these contracts are being overused, as procurement officials are drawn towards a procurement method that is inherently inefficient compared to other, more traditional contracting methods. While IDIQ contracts and framework agreements obviously bear fewer administrative costs than traditional contracting methods—once a master agreement is in place, an order for goods or services can be issued against that agreement with far less notice and process, often with little risk of accountability[2]—that gain in *administrative* efficiency may come at the cost of a deep loss in procurement value.

The analysis here assumes that, in choosing a procurement method, a procuring official must weigh a large number of costs and benefits, including, *inter alia*, the administrative costs of conducting the procurement, any legal constraints on the official's choice of method, the likely participants in and outcome of the competition, and the potential delay should the procurement be challenged by a disappointed offeror. In an efficient system, the procuring official will weigh and balance all of these factors (and more) in order to select a procurement strategy to achieve best value, at lowest cost, for the customer agency.[3] The question, then, is whether that efficient choice of procurement method has been distorted, as procurement officials on both sides of the Atlantic have flocked to framework agreements and IDIQ contracts.

Experience over the past decade in Europe and the United States suggests that the *overall* efficiency of procurement systems on both sides of the Atlantic

2. *See*, *e.g.*, John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 Pub. Cont. L.J. 395, 405 (1998).

3. Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services erects a "roundhouse"—a conceptual turntable across which the procurement planning process passes, to be redirected to an optimal competitive method. United Nations Comm'n on Int'l Trade Law [UNCITRAL], *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*, U.N. Doc. A/49/17 & Corr. 1, art. 18 (June 15, 1994) [hereinafter UNCITRAL Model Procurement Law], *available at* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf. Chapter V of the European public works directive attempts to do the same thing, for it maps out alternative procurement methods that member states may use. 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, Chap. V, 2004 O.J. (L 134) 114, 134 (EC) (the "classic" directive), *available at* http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm. There is no similar guidance (no similar "roundhouse") in the United States' Federal Acquisition Regulation (FAR) for how contracting officials should balance these many factors in choosing a procurement method. *Cf.*, *e.g.*, FAR 14.103-1 (presumption in favor of sealed bidding); FAR 15.101 (considerations in choosing a strategy for a negotiated contract). The choice is further complicated in the U.S. system because the contracting official also must consider the *contract type* that will be used (fixed-price versus cost-reimbursement, for example), *see* FAR 16.1, Selecting Contract Type, and some methods of competition are incompatible with certain types of contracts; it would be difficult, for example, to use a reverse auction to award a complex cost-reimbursement contract.

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has been impaired because contracting officials, encouraged by vendors and enticed by administrative efficiencies, may *overuse* framework agreements and IDIQ contracts. Lured by fleeting administrative savings and a holiday from accountability, too often contracting officials choose IDIQ/framework contracting over other methods even when those more traditional contracting methods would provide a better outcome. Thus, IDIQ contracts and framework agreements distort the procurement market in an inefficient way, by drawing purchases that should, in a properly functioning procurement market, be made by other means.

This article reviews this market distortion in four steps. In Part II, the article reviews the European Commission's proceedings against framework agreements, proceedings that, though ultimately mooted by a new procurement directive, raised red flags about the inherent inefficiencies of framework contracting. Part III reviews subsequent developments in Europe, including studies within the European Commission that suggested that framework contracting may be a less-than-optimal solution. Part IV draws on the parallel experience in the United States, where IDIQ contracting, like framework contracting, blossomed in response to an increasingly stringent regime of procurement rules. Part V argues that because framework agreements and IDIQ contracts may be *overused* for simple administrative expedience, policymakers may wish to consider whether some of those expedients (exempting IDIQ orders from protest review, for example) are creating inefficient distortions in the procurement market.

II. THE EUROPEAN COMMISSION PROCEEDINGS REGARDING FRAMEWORK AGREEMENTS

The initiative from Brussels in the mid-1990s, to check the growth of framework contracting in the European Union, was instructive on several levels. The initiative grew from a recognition that because procurement is part of a broader economy—there, the European common market—it is as important in procurement as elsewhere to scour away inefficiencies. That insight has never truly pierced the U.S. procurement policy community, which tends to view federal procurement as an island, insulated from workaday American concerns with economic efficiency.

A. *Procurement in Europe's Single Market*

When he announced that the United Kingdom's use of framework agreements (with a number of other procurement matters) were to be referred for review by the European Court of Justice, Mario Monti, then the European Commission's leading competition official, made it clear that the Commission viewed public procurement as a critical part of the European economy:

> "The application of public procurement legislation still leaves a great deal to be desired, as was highlighted in the recent business survey we published to accompany

the Single Market Scoreboard," commented Single Market Commissioner Mario Monti. "This is why proposals to improve the opening up of public procurement markets, worth 11.5% of GDP in the EU, will be featured in a Communication early in 1998 . . . In the meantime, I will continue to pursue infringement proceedings against any Member State which fails to apply the public procurement Directives correctly."[4]

The European Commission's announcement noted that the United Kingdom matter stemmed from the use of framework agreements by the Department of Environment, in Northern Ireland (United Kingdom), for the procurement of architectural, engineering, and other construction-related services.[5] Under this procedure, the Commission explained:

> [A] tender notice is published in the EC Official Journal indicating a general category of services to be provided rather than giving details of a specific contract. Once a list of approved suppliers has been established by this procedure, entities may choose suppliers from the list without going through a new competitive procedure for each individual contract.

The procedures used for the European framework agreements thus paralleled, of course, the IDIQ contracts that were just coming into common usage in the United States.[6]

The European Commission's announcement argued that the UK case raised "an important question of principle, namely the use by contracting entities of such framework contract arrangements for the procurement of services, supplies, and works." The Commission noted that, while the then-current European directive on procurement in the utilities sectors explicitly provided for the use of such framework contracts,[7] the use of framework contracts was not authorized by the rest of the directives governing public procurement in

4. Press Release, European Comm'n, Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal, IP/97/1178 (Dec. 19, 1997) [hereinafter IP/97/1178], *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/97/1178&format=HTML&aged=1&language=EN&guiLanguage=en.

5. *Id.*

6. Sections 1004 and 1054 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, authorized the use of multiple award task and delivery order contracts—framework agreements, as the European directives term them. *See generally* Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 Pub. Cont. L.J. 383, 387–96 (2002) (history leading up to 1994 legislation); Howell, *supra* note 2, at 399–401 (legislative foundations). This statutory authority was largely implemented in FAR 16.5. As the administrative notice that implemented the new laws pointed out, though, *see* Federal Acquisition Regulation; Task and Delivery Order Contracts, 60 Fed. Reg. 49,723, 49,724 (Sept. 26, 1995), the U.S. General Services Administration had separate (and longstanding) authority to run its own, similar contracts, the GSA Multiple Award Schedules (MAS) contracts, per FAR subpart 8.4 and related rules. *See, e.g.*, Michael J. Lohnes, Note, *Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 Pub. Cont. L.J. 599, 604–05 (2004).

7. Council Directive 93/38/EEC of 14 June 1993 on Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1993 O.J. (L 199) 84 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0038:EN:HTML. For a discussion of framework agreements under the

the European Union.[8] Although the European Commission had raised the issue with authorities in the United Kingdom, said the Commission, the "UK authorities' reply . . . to the reasoned opinion sent by the Commission . . . was unsatisfactory, in the Commission's view."[9]

The European Commission had long seen public procurement as one piece of a much broader initiative to liberalize trade across the European Union's internal market.[10] An important 1985 white paper from the Commission, *Completing the Internal Market*,[11] cited improvements in public procurement rules as just one part of a broader campaign to integrate the internal market. "While the elimination of physical barriers provides benefits for traders," the white paper noted, "it is through the elimination of technical barriers that the Community will give the large market its economic and industrial dimension by enabling industries to make economies of scale and therefore to

directives prior to the 2004 reforms, *see* Sue Arrowsmith, *Framework Purchasing and Qualification Lists Under the European Procurement Directives: Part II*, 8 Pub. Procurement L. Rev. 161 (1999).

8. *See* Council Directive 92/50/EEC of 18 June 1992 Relating to the Coordination of Procedures for the Award of Public Service Contracts, 1992 O.J. (L 209) 1 (EEC); Council Directive 93/36/EEC of 14 June 1993 Coordinating Procedures for the Award of Public Supply Contracts, 1993 O.J. (L 199) 1 (EEC); Council Directive 93/37/EEC of 14 June 1993 Concerning the Coordination of Procedures for the Award of Public Works Contracts, 1993 O.J. (L 199) 54 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0037:EN:HTML (respectively, rules applicable in all other sectors to public service, supplies, and works contracts).

9. IP/97/1178, *supra* note 4.

10. *See* European Comm'n, The Internal Market: Ten Years Without Frontiers 24 (2003), *available at* http://ec.europa.eu/internal_market/10years/workingdoc_en.htm.

11. Comm'n of the European Cmtys., COM(85) 310 final, Completing the Internal Market (1985), *available at* http://ec.europa.eu/comm/off/pdf/1985_0310_f_en.pdf. The European Commission described the 1984 white paper as follows, in a recent retrospective:

> For centuries, Europe was the scene of frequent and bloody wars. France and Germany fought each other three times in the period 1870 to 1945, with terrible loss of life. That is why, in 1951, they and four other European countries (Belgium, Italy, Luxembourg and the Netherlands) signed a treaty to tie their coal and steel industries so closely together that they could never again go to war against each other.
>
> Within a few years, these same six countries decided to widen the scope of this "economic integration" between them, as a further guarantee of future peace and prosperity. So in 1957 they signed the Treaty of Rome, creating the European Economic Community (later the European Union) with its "common market". By July 1968 they had eliminated all quotas and "tariffs"—duties on imported goods—from trade in goods between them. But that was the easy bit.
>
> . . .
>
> It proved much more difficult to remove the so-called "non-tariff barriers"—things like differences between the Member States' safety or packaging requirements or between national administrative procedures. These differences in practice prevented manufacturers from marketing the same goods all over Europe . . .
>
> . . .
>
> [B]y the early 1980s, progress had been virtually halted. The main reason was simply that Europe's increasingly uncompetitive national economies were too rigid and fragmented, and the European countries could not reach the unanimous agreements necessary to change the

become more competitive."[12] The white paper specifically cited public procurement as a key target for these rationalizing efforts to establish a common market. "Public procurement covers a sizeable part of GDP" across Europe, the Commission wrote, "and is still marked by the tendency of the authorities concerned to keep their purchases and contracts within their own country." These national preferences, the Commission argued, with their "continued partitioning of individual national markets" was "one of the most evident barriers to the achievement of a real internal market."[13]

By 1997, when the Commission launched its enforcement action against the United Kingdom's framework contracting, substantial progress had been made. The European procurement directives, which had first been issued in the early 1970s, had evolved to cover a broad spectrum of European procurements.[14] The directives were not (and are not) specific codes for public procurement; instead, the directives facilitate harmonization (and reduce barriers) by setting a common minimum "floor" for procurement rules in each of the member states.

> situation. An impasse had been reached, these were the years of so-called "eurosclerosis" when Europe's economies and technological capacities appeared in serious danger of falling irrevocably behind the United States and Japan.
>
> …
>
> The European Commission, under its new president Jacques Delors, seized the initiative in 1985: it published [*Completing the Internal Market*,] a comprehensive blueprint… for welding together the fragmented national markets to create a genuinely frontierfree single market by the end of 1992. All the Member States agreed on this goal and the EU—which by now included Denmark, Greece, Ireland and the United Kingdom—suddenly acquired a galvanizing purpose.

European Comm'n, Looking Back (2006), http://ec.europa.eu/internal_market/10years/history_en.htm.

12. Completing the Internal Market, *supra* note 11, at ¶ 13.

13. *Id.* at ¶ 81.

14. S*ee*, *e.g.*, Council Directive 71/304/EEC of 26 July 1971 Concerning the Abolition of Restrictions on Freedom to Provide Services in Respect of Public Works Contracts and on the Award of Public Works Contracts to Contractors Acting Through Agencies or Branches, 1971 O.J. (L 185) 1 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31971L0304:EN:HTML; Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council Repealing Council Directive 71/304/EEC of 26 July 1971 Concerning the Abolition of Restrictions on Freedom to Provide Services in Respect of Public Works Contracts and on the Award of Public Works contracts to Contractors Acting Through Agencies or Branches, 2007 O.J. (C 161) 40 (noting that Directive 71/304/EEC "sought to combat direct or indirect discrimination against non-national service providers in the awarding of public contracts by the Member States"); Council Directive 71/305/EEC of 26 July 1971 Concerning the Co-ordination of Procedures for the Award of Public Works Contracts, 1971 O.J. Spec. Ed. (L 185) 5 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31971L0305:EN:HTML; Council Directive 72/277/EEC of 26 July 1972 Concerning the Details of Publication of Notices of Public Works Contracts and Concessions in the Official Journal of the European Communities, 1972 O.J. Spec. Ed. (L 176) 12 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31972L0277:EN:HTML; Council Directive 89/440/EEC of 18 July 1989 Amending Directive 71/305/EEC Concerning Coordination of Procedures for the Award of Public Works Contracts, 1989 O.J. (L 210) 1 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0440:EN:HTML; Council

The directive that governed procurement by public utilities had, by 1997, already been drafted to accommodate framework contracting.[15] Article 5 of the "utilities" directive stated:

> **Article 5**
>
> 1. Contracting entities may regard a framework agreement as a contract…
>
> 2. Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 20(2)(i) when awarding contracts based on that agreement…
>
> 4. Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.

Under article 20(2)(i) of the 1993 utilities directive, utilities could enter into contracts under standing framework agreements *without* issuing a call for competition.[16] Much like the IDIQ contracts that were being institutionalized through legislation in the United States at roughly the same time, European framework agreements, at least for utilities, could unfold into subsidiary contracts that required no publication or special competition.

B. *The Challenged Framework Agreements*

There were, however, still gaps in the regulatory structure, one of which the United Kingdom's initiative had stepped through. Although, as noted, the 1993 European "utilities" directive already contemplated framework agreements for procurement by public utilities, the directive that addressed public procurement in other sectors (the "classic" directive) did not explicitly address framework agreements.[17] As noted, the European Commission therefore challenged the United Kingdom's use of frameworks under the classic directive. Ultimately, however, the European Commission's enforcement action against the United Kingdom did not proceed,[18] and the issue was made moot when the 2004 version of the European classic directive, driven in part by the controversy before the European Commission, explicitly endorsed the use of framework agreements.[19]

Directive 93/38/EEC, *supra* note 7; Council Directive 93/37/EEC, *supra* note 8. For a comprehensive review of nineteen member states' progress in implementing the 2004 directives, *see* Martin Trybus & Teresa Medina, *Unfinished Business: The State of Implementation of the New EC Public Procurement Directives in the Member States on February 1, 2007*, 16 Pub. Procurement L. Rev. NA89 (2007).

15. *See* Council Directive 93/38/EEC, *supra* note 7, defining a framework agreement as "an agreement between one of the contracting entities defined in Article 2 and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period."

16. *Id.* ("Contracting entities may use a procedure without prior call for competition…for contracts to be awarded on the basis of a framework agreement…").

17. *See* Sue Arrowsmith, The Law of Public and Utilities Procurement 669–70 (2d ed. 2005).

18. *See id.* at 669–70 & n.4.

19. *Id.* at 670.

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III. SUBSEQUENT DEVELOPMENTS REGARDING EUROPEAN FRAMEWORKS CONTRACTING

A. *European Directives—2004*

The controversy in the European Commission surrounding framework contracting thus was stilled by the 2004 European procurement directives, which finally specifically endorsed framework contracts across the board.[20] In implementing those new directives, the European Commission noted, however, continuing concerns that the duration and scope of framework agreements should be carefully circumscribed to limit any anticompetitive effect.[21]

The 2004 directive governing procurement in public works—the "classic" directive—described two models of framework agreements.[22] The first, sometimes termed "Model 1," calls for a framework agreement in which all the essential terms and conditions of award are fixed. Under this model, contracts

20. 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, Art 14, 2004 O.J. (L 134) 1 (EC) (the "utilities" directive), *available at* http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm; Directive 2004/18/EC, *supra* note 3.

21. European Comm'n, Directorate Gen. Internal Market and Services, Explanatory Note—Framework Agreements—Classic Directive 6 (2005) [hereinafter Internal Market and Services], *available at* http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf ("The limitation of the duration of framework agreements and the competition provisions may help avoid or limit the problems associated with the presence of dominant suppliers.").

22. Directive 2004/18/EC, *supra* note 3, tit. II, art. 32, ¶ 4, described the two types of framework agreements:

> 4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.
>
> Contracts based on framework agreements concluded with several economic operators may be awarded either:
>
> —by application of the terms laid down in the framework agreement without reopening competition ["Model 1"], or
>
> —where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure ["Model 2"]:
>
> (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
>
> (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
>
> (c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;
>
> (d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

are awarded under the master framework agreement without any further competition. "Model 2" framework agreements under the classic directive, in contrast, contemplate a second round of competition before award of a contract under the master agreement.[23]

B. *European Study of Procurement Practices—2006*

Probably the most striking finding about the recent use of framework contracting in the European Union, however, is that purchasers have relied increasingly on framework agreements (and the centralized purchasing agencies that sponsor those agreements) *not* because framework agreements (or centralized purchasing agencies) are more efficient, but rather because they provide a ready means of avoiding the burdens and inefficiencies *of the procurement directives themselves.*[24] Because the European procurement directives (like the U.S. rules) generally impose transparency and competition requirements only at the first stage of contracting, when the master agreements are put in place, European purchasing agencies may enter into contracts under those master agreements with relatively few transaction costs, and with lower risk of protest. Purchasing through framework agreements has grown, in other words, at least partly due to purchasers' strategic response to *regulatory* pressures and opportunities, not necessarily economic forces.[25]

IV. LESSONS FOR (AND FROM) U.S. PROCUREMENT

As the discussion above reflects, framework agreements and IDIQ contracts have followed extraordinarily parallel paths of growth in Europe and the United States. Because of the similarities between framework agreements and IDIQ contracting, and because of the many political, economic, and social parallels on the two sides of the Atlantic, U.S. and European procurement policymakers have important comparative lessons to share.

A. *Public Procurement Is an Important Part of an Efficient Economy*

At the most fundamental level, the European experience reminds us in the United States of something we too often forget: procurement is a significant part of the economy, and it is vitally important to ensure that it is conducted efficiently. In Europe, public procurement represents approximately

23. *See, e.g.*, UNCITRAL, *Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—Drafting Materials for the Use of Framework Agreements and Dynamic Purchasing Systems in Public Procurement*, ¶ 6, U.N. Doc. A/CN.9/WG.I/WP.52 (Mar. 13, 2007), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

24. Europe Econ., Markt/2004/10/D, Evaluation of Public Procurement Directives §§ 5.7–5.28 (2006), *available at* http://ec.europa.eu/internal_market/publicprocurement/studies_en.htm.

25. *Id.* § 5.7 ("The use of both central purchasing and framework contracts has been developed in order to reduce compliance costs and to reduce the risks of legal challenge from accidental breaches of the Directives.").

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16 percent of the European Union's gross domestic product,[26] and, as a result, policymakers are careful to ensure that any broader efforts at making the European internal market more efficient also reach the public procurement market. That concern extended to framework agreements as well, and the European Commission (as the discussion above reflected) has been careful to ensure that framework agreements do not undermine integration of the European market.

In the United States, where federal procurement accounts for approximately 3 percent of the gross domestic product,[27] there is in contrast too little recognition in policy circles that inefficiencies in federal procurement may well slow the economy as a whole. No one would seriously argue that Michigan, which as a state has a gross annual domestic product smaller than the sum of annual federal procurement spending, could or should be walled off from the highly efficient national economy; conversely, however, few policymakers seem equally concerned when the federal procurement market, which is *larger* than the economy of Michigan, becomes mired in inefficiency. The problem in the United States is purely one of political perspective, and the European perspective—which views procurement as an integral part of the broader economy—is an important lesson for the United States.

B. *IDIQ (Framework) Contracts Inevitably Undermine Competition*

The second round of lessons from the European experience is, of course, that IDIQ contracts—their framework agreements—carry risks to competition and efficiency. At their worst, IDIQ contracts establish false, if temporary, oligopolies, sheltering just a few select suppliers from ongoing competition. That need not be the case, of course, and the European experience suggests ways to mitigate that risk. At the same time, the U.S. experience with IDIQ contracts, which reflects hundreds of billions of dollars over a decade of contracts, suggests stresses and problems that the European member nations may encounter, as the Europeans' own experience with frameworks unfolds.

26. European Comm'n, EU Policy on Public Procurement, http://europa.eu/publicprocurement/print_index_en.htm.(last visited Feb. 25, 2008) ("Public procurement, [at] 16.3% of the Community GDP, is an important sector of the European economy.").

27. The figures are approximate. The gross domestic product (GDP) for the United States in calendar year 2006 was roughly $13,195 billion. U.S. Dep't of Commerce, Bureau of Econ. Analysis, Gross Domestic Product, http://www.bea.gov/national/index.htm#gdp (last visited Feb. 25, 2008). In fiscal year 2006 (October 2005–September 2006), the Federal Government spent roughly $415 billion on procurement. Fed. Procurement Data Sys., Trending Analysis Report Since Fiscal Year 2000, http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls (last visited Feb. 25, 2008). Unlike the European figures, this total excludes spending by other levels of government, such as state and local governments. Thus, U.S. federal procurement represented just over 3 percent of the U.S. gross domestic product. For perspective, this means that Federal Government spending in 2006 exceeded the GDP of the state of Michigan and was slightly less than the GDP of Ohio or New Jersey. News Release, U.S. Dep't of Commerce, Bureau of Econ. Analysis, Gross Domestic Product (GDP) by State in 2006 (June 7, 2007), *available at* http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm.

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1. Tracing Old Risks to Supplier Lists

The European experience offers an important clue to IDIQ contracts' anticompetitive potential: their provenance. The literature that surrounds European framework agreements notes that framework agreements are arguably simply modern versions of supplier lists.[28] As Professor Sue Arrowsmith explained:

> [T]he basic advantages of [supplier] lists of this type are similar to the advantages of framework transactions: they save transaction costs for both purchasers and suppliers by allowing part of the award process for a number of contracts—in this case, the process of ascertaining some or all of the suppliers' qualifications—to be completed in a single stage.[29]

In the United States, however, there has been far less recognition that IDIQ contracting is, in fact, simply the historical successor to qualified supplier lists.[30] While qualified supplier lists have long been a part of U.S. and foreign procurement,[31] U.S. law now *disfavors* qualified supplier lists, on the understanding that supplier lists raise clumsy—and unnecessary—barriers to competition from other vendors.[32]

Recognizing, as the European literature has, that framework agreements (and IDIQ contracts) are simply an advanced form of supplier lists provides important insights into what IDIQ contracts offer agencies. As Professor Arrowsmith suggested, an agency with an IDIQ contract in place, much like one with a preestablished supplier list, can move quickly to purchase from preapproved suppliers, without incurring search and evaluation costs, or negotiating costs and delays. An IDIQ contract (or a framework agreement) offers an additional element of protection: the agency not only has approved *suppliers* (as a traditional supplier list would), but also has prenegotiated the available goods and services, and prices, with those vendors—an advantage that traditional supplier lists lacked. IDIQ contracts and framework agreements thus mark an evolutionary step beyond supplier lists—an improvement on supplier lists, if you will—that helps explain why supplier lists have faded away in developed nations, such as the United States, where IDIQ contracts and framework agreements have flourished.

28. *See*, *e.g.*, Arrowsmith, *supra* note 7, at 171–72; Marques Ontiveros Peterson, The Indefinite Delivery Indefinite Quantity Contract: Its Natural Outgrowth from Supplier List Contracts and the Continuing Need for the Single Award IDIQ (Dec. 2007) (unpublished manuscript on file with author).

29. *See* Arrowsmith, *supra* note 7, at 172.

30. *Cf.* Don Wallace Jr., Christopher R. Yukins & Jason P. Matechak, *UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts*, PROCUREMENT LAW., Winter 2005, at 12, 13–14 (discussing links between supplier lists and framework agreements in UNCITRAL model law revision process); Don Wallace Jr., *UNCITRAL: Reform of the Model Procurement Law*, 35 PUB. CONT. L.J. 485, 492–93 (2006) (noting concern about anticompetitive misuse of supplier lists).

31. *See*, *e.g.*, Michael T. Janik, *A U.S. Perspective on the GATT Agreement on Government Procurement*, 20 GEO. WASH. J. INT'L L. & ECON. 491, 500 (1987).

32. *See* 10 U.S.C. § 2319 (2000) (strict procedural prerequisites before prequalification requirements may be imposed).

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At the same time, however, tracing IDIQ (and framework) contracts' roots to supplier lists also highlights new dangers to competition. Supplier lists have traditionally been disfavored because they smack too much of cronyism: it is too easy for a self-serving procurement official, during a quiet time well before the glare of any competition, to register a list of corruptly favored suppliers.[33] The experience of the United States has confirmed that danger: a number of studies have shown that large IDIQ contracts can, in effect, serve much like supplier lists, as a protective shield around the awardees, to exclude potential new competition.[34]

2. Limited Number of Awardees: Breaking a Natural Oligopoly

The recognition that framework agreements and IDIQ contracts may simply be modern supplier lists translates, in turn, into possible solutions for the future. As noted, like supplier lists, framework agreements and IDIQ contracts can become natural oligopolies, erecting a protective ring around those few vendors that hold standing agreements with the Government. The European directives have been slow to break this natural monopoly; the U.S. experience suggests, however, a ready means of breaking these natural oligopolies, taken from traditional strategies for supplier lists.

The European Commission has addressed this problem in the European procurement directives relatively cautiously, largely by carefully limiting the term of framework agreements: unlike IDIQ contracts in the United States, which have relatively loose maximum terms,[35] framework agreements in the European Union are presumptively limited to four years, and then must be reopened to new competition.[36] The Europeans also attempt to ensure competitive access by structuring framework agreements, if possible, so as not to impair small- or medium-sized businesses, and by seeking to ensure adequate competition among framework agreement holders.[37]

33. *Cf.* Int'l Bank for Reconstruction and Dev./World Bank, Guidelines Procurement Under IBRD Loans and IDA Credits §§ 2.9–2.10 (May 2004, rev. Oct. 2006) (discussing limitations on prequalification of bidders); World Bank, Country Procurement Assessment Report, Annex A http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/ontentMDK:20105545~menuPK:84285~pagePK:84269~piPK:60001558~theSitePK:84266,00.html (last visited Feb. 25, 2008) ("Are bidders required to register with a local or federal authority as a prior condition for bidding? Should be discouraged. Acceptable only if registration criteria, process and cost reasonable/efficient and qualified foreign firms are not precluded from competing.").

34. *See*, *e.g.*, Christopher R. Yukins, *Feature Comment: The Gathering Winds of Reform—Congress Mandates Sweeping Transparency for Federal Grants and Contracts*, 48 Gov't Contractor ¶ 318 (2006).

35. *See*, *e.g.*, 10 U.S.C. § 2304a(f) (Supp. V 2005) ("Contract period—The head of an agency entering into a task or delivery order contract under this section may provide for the contract to cover any period up to five years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless such head of an agency determines in writing that exceptional circumstances necessitate a longer contract period.").

36. Directive 2004/18/EC, *supra* note 3, at tit. II, art. 32, ¶ 2 ("The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.").

37. Internal Market and Services, *supra* note 21, at 6.

The United States has addressed this issue of oligopoly more practically than theoretically. The solution reflects practical experience with supplier lists: much as supplier lists should remain open, to the extent possible, to new entrants,[38] so too IDIQ contracts and framework agreements should remain open, to the extent reasonably possible, to new vendors, to ensure that the IDIQ contracts and framework agreements do not form natural oligopolies.

In the United States, for certain IDIQ contracts this has been done by requiring that these contracts be kept open, much as supplier lists have been kept open,[39] to new entrants at any time. This goes beyond a simple presumption that there be multiple awardees, which is a standard part of U.S. law regarding IDIQ contracting.[40] This approach instead contemplates a potentially *infinite* number of awardees,[41] to include much of a marketplace of vendors.

Over several decades, the U.S. General Services Administration (GSA) has developed its Multiple Award Schedule (MAS) contracts, which are in essence IDIQ contracts that can be joined at *any time* by new contractors—these contracts are, in other words, "always open."[42] Thousands of vendors have joined these MAS contracts over the years, in various categories of goods and services,[43] and any federal agency may order from these contracts.[44] Because there are no defined rounds of competition to join these contracts, GSA keeps price pressure on its vendors by demanding that MAS vendors keep their MAS prices at or below the vendors' commercial prices. In essence, the vendors' own prices to their own commercial customers (all or a subset of commercial customers) serve as a benchmark for the government prices, and GSA seeks to preserve best value by forcing participating vendors to treat their MAS customers as their "most favored customers."[45]

38. *See*, *e.g.*, FAR 9.202(c) (new entrants to compete for procurement under qualified list).

39. *E.g.*, REFA Int'l, Inc., Comp. Gen. B-274849, B-275140, Jan. 7, 1997, 97-1 CPD ¶ 13 ("[W]here an agency restricts contract award to only approved sources and imposes qualification requirements, unapproved sources must be given a reasonable opportunity to qualify."); Saturn Indus., Comp. Gen. B-261954, B-261954.3, Jan. 5, 1996, 96-1 CPD ¶ 9.

40. *See*, *e.g.*, FAR 16.500 ("This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference for making multiple awards of indefinite-quantity contracts.").

41. As a practical matter, unproductive vendors in the GSA MAS system referenced here—those that do not sell the requisite dollar value of goods or services every year—may be swept out of their contracts by cancellation.

42. *See* U.S. Gen. Servs. Admin., GSA Schedules, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW (last visited Feb. 24, 2008) (discussing process for entering into a Multiple Award Schedule contract with GSA).

43. The U.S. General Services Administration sponsors an online database, *Schedules Sales Query*, that allows users (including members of the public) to prepare detailed reports on sales under the Multiple Award Schedules program. Using this database, users can, for example, generate reports detailing sales data for a specific contractor, for a specific federal fiscal year quarter. *See* U.S. Gen. Servs. Admin., Schedules Sales Query, http://ssq.gsa.gov/(last visited Feb. 24, 2008).

44. *See*, *e.g.*, Ralph C. Nash & John Cibinic, *Dateline November 2006*, 20 Nash & Cibinic Rep. ¶ 55, Nov. 2006, at 173–75.

45. *See* U.S. Gen. Servs. Admin., Getting on Schedule, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8202&contentType=GSA_OVERVIEW (last visited Feb. 24, 2008),

The European directives have taken a half step towards a framework agreement that is "always open" but have not fully embraced the solution. The European procurement directives[46] permit a hybrid contracting strategy called a "dynamic purchasing system,"[47] which vendors may join at any time.[48] Professor Arrowsmith described those dynamic purchasing systems as follows:

> This system authorizes entities to establish, using electronic means, a list of suppliers interested in supplying certain standard supplies or services. To register, suppliers must submit a compliant (responsive) tender for the product or service in question; and all qualified (responsible) firms who submit such a tender must be admitted to the system. However, when the procuring entity wishes to place an order under the system, it cannot simply select a tender from the system, but must place a new simplified notice of the dynamic purchasing system in the *Official Journal*, allow new suppliers to register, and then seek tenders for the particular order from all the registered suppliers—a cumbersome procedure.[49]

As several commentators have noted, European procurement officials are unlikely to use dynamic purchasing systems extensively because of the cumbersome second-stage notice required by the directives.[50] That said, dynamic purchasing systems are arguably an important first step towards "always open" framework agreements in Europe, which can help dissolve the natural oligopolies created by frameworks by opening the door to future competitors. If the European Commission is to follow this path towards "always open" framework agreements, it will be necessary to modify these new "always open" framework agreements with protective devices—such as the "most favored customer" protection used by the MAS contracts in the United States—to bring constant competitive pressure to bear so as to ensure best value.

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for the statement that GSA's negotiation objective in forming MAS contracts "is commonly known as 'most favored customer' pricing."

46. Directive 2004/17/EC, *supra* note 20, at art. 15; Directive 2004/18/EC, *supra* note 3, at art. 33.

47. For background on use of dynamic purchasing systems, *see* Comm'n of the European Cmtys., *Requirements for Conducting Public Procurement Using Electronic Means Under the New Public Procurement Directives 2004/18/EC and 2004/17/EC*, at 21–23, SEC(2005) 959 (2005), *available at* http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf; Roger Bickerstaff, *Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means*, 15 Pub. Procurement L. Rev. NA17, NA22 (2006).

48. *See UK Releases Response to Consultation on New Regulations*, 3 Int'l Gov't Contractor ¶ 3, at 7 (2006) (UK officials "emphasized that a key difference between this procedure [dynamic purchasing system] and a framework agreement is the bidders' right to join the DPS at any time").

49. Arrowsmith, *supra* note 1, at 347–48; *see* Sue Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives—A Not So Dynamic Concept?* 15 Pub. Procurement L. Rev. 16 (2006). For nonbinding guidance on implementing a dynamic purchasing system, published by the European Commission to help implement the 2004 directives, *see* European Comm'n, Functional Requirements for Conducting Electronic Public Procurement Under the EU Framework § 2.2.1.2 (Jan. 2005), *available at* http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/functional-reguirements-vol1_en.pdf.

50. Arrowsmith, *supra* note 1, at 347–48; Arrowsmith, *supra* note 49, at 29; Katharina Summann, *Winds of Change: European Influences on German Procurement Law*, 35 Pub. Cont. L.J. 563, 573–74 (2006).

3. Using a Second Stage of Competition: European Models

Even if European policymakers can solve the natural oligopoly created by a limited number of framework awards, European policymakers (and their U.S. counterparts) will have to resolve how to ensure competition and transparency *among* the contract holders. Besides offering insights into where IDIQ contracts came from, the European directives—and their unique, bifurcated approach to framework agreements—also help us understand where IDIQ contracts are likely to go in the United States, as the U.S. system shakes clear of the regulatory torpor described above. By adopting a European perspective and dividing IDIQ contracts into two classes, those that have no second stage of competition (Model 1) versus those that do (Model 2), we can trace a probable trajectory for future U.S. reform.

As noted, the European "classic" directive describes two "models" for framework agreements: "Model 1," under which the terms are fixed at the time of award of the master agreement, and "Model 2," which allows for further competition among the holders of the master agreements. The U.S. experience has reflected a gradual transition from the European "Model 1" to "Model 2" agreements, even though U.S. regulations do not distinguish between the two types of IDIQ contracts.

Shortly after IDIQ contracts were first statutorily authorized in the mid-1990s, Steve Kelman, then the head of the Office of Federal Procurement Policy, actually encouraged purchasing agencies *not* to conduct competitions among contractors that held master agreements when ordering commercial off-the-shelf (COTS) items. He wrote:

> It has been brought to my attention that agencies may be creating unnecessary burden when awarding delivery orders under multiple award IDIQ contracts for COTS products, especially information technology products. We understand that some agencies are interpreting the "fair opportunity to be considered" language in FAR 16.505(b) as requiring them to compete each order even though they already may have information available to determine which awardee offers the best value and price for the government.
>
> Under multiple award IDIQ contracts for COTS products, prices are typically set forth in price sheets and are often available electronically . . . for customers to select the products that best satisfy their needs. As long as the contracting officer or customer can easily compare the various prices and products being offered under these contracts, awardees will have been given a fair opportunity to be considered . . . Negotiations with each awardee prior to awarding a delivery order should not be necessary, unless the contracting officer believes that the information provided on the price sheets is insufficient to make an award in the best interest of the government.[51]

After a decade—and many IDIQ-related contracting scandals[52]—the presumption in U.S. federal procurement has swung to the opposite pole, in favor

51. Memorandum from Steven Kelman, Adm'r, Office of Fed. Procurement Policy, to Agency Senior Procurement Executives and Deputy Under Sec'y of Def. (July 15, 1996), *available at* acquisition.navy.mil/content/download/719/3043/file/kelman.pdf.

52. *See, e.g.*, U.S. Gen. Servs. Admin., Office of Inspector Gen., Rep. No. A020144/T/5/Z04002, Audit of Federal Technology Service's Client Support Centers (2004), *available at*

of a second round of competition ("Model 2" under the European directives) before any awards are made under standing agreements. Over much of the last decade, a series of reports and inquiries has criticized "no-bid contracts," including IDIQ contracts.[53] Attacks on contracting without full competition, including IDIQ contracting—attacks that were propelled in part by concerns regarding congressional earmarks and contracting scandals in Iraq—gained momentum, and ultimately became an important theme in the 2008 political campaign.[54] As criticisms of IDIQ contracting mounted, it became acutely obvious that federal procurement policy should *favor* a second stage of competition in IDIQ contracts.[55] In other words, a presumption in favor of continuing competition in IDIQ contracting (the European "Model 2") has prevailed, over the long term, in the U.S. federal procurement system.

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http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/A020144_R2QA4-j_0Z5RDZ-i34K-pR.pdf; John G. Stafford Jr. & Pang Khou Yang, *The Federal Supply Schedules Program*, Briefing Papers, Sept. 2004, at 15; *Developments in Brief: Senator Grassley Wants FTS "Housecleaning" After GSA IG Audit*, 46 Gov't Contractor ¶ 32 (2004); *Better Oversight and Stronger Internal Controls Needed at GSA's FTS Offices*, 46 Gov't Contractor ¶ 176 (2004); U.S. Gen. Servs. Admin., Federal Technology Service, National Capital Region Acquisition Assessment: "Adding Value to the Client" (2004) (prepared by Acquisition Solutions, Inc., Oakton, VA, Mar.); Karen Robb & David Phinney, *Contracting Shortcuts, Violations Rampant at GSA*, Fed. Times, Apr. 26, 2004; Major Gen. George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 47–52, 116–17 (2005); Memorandum from Earl Devaney, Inspector Gen., U.S. Dep't of the Interior, to Assistant Sec'y for Policy, Mgmt. and Budget, (July 16, 2004), *available at* http://www.oig.doi.gov/upload/CACI%20LETTER3.pdf; James J. McCullough & Courtney J. Edmonds, *Contractors on the Battlefield Revisited: The War in Iraq and Its Aftermath*, Briefing Papers, May 2004, at 11–12; Ralph C. Nash & John Cibinic, *Acquisition Planning: Competition for Task Orders: The Exception or the Rule?* 18 Nash & Cibinic Rep. ¶ 42, Oct. 2004, at 130 ("[T]here are requirements for competition in issuing such task orders and there are numerous indications that [COs] are diligent in finding ways to avoid such competition. In the traditional tug-of-war between 'customer satisfaction' (honoring the desire of program and technical personnel to obtain services from knowledgeable and high performance incumbents) and obtaining competition, customer satisfaction appears to be winning by a large margin.") (italics omitted).

53. *See*, *e.g.*, Gail Russell Chaddock, *Targeting No-Bid Deals: Critics Are Taking a Hard Look at Several Rich US Contracts to Rebuild War-Damaged Iraq*, Christian Sci. Monitor, Oct. 10, 2003, at 2, *available at* http://www.csmonitor.com/2003/1010/p02s01-usfp.html ("'We're overrelying on large umbrella contracts…Halliburton has a monopoly on the work in oil, and Bechtel has a monopoly on the reconstruction work,' says Rep. Henry Waxman (D) of California, the ranking Democrat on the House Government Reform Committee. 'There is no incentive to lower costs.'").

54. *See*, *e.g.*, *Fox News*, *Hillary Clinton's Remarks to the New Hampshire Democratic Party*, Jan. 4, 2008, http://www.myfoxdc.com/myfox/pages/News/Politics/Detail;jsessionid=243F2FDB4DF5A6EF0C630133CC3133C7?contentId=5398993&version=1&locale=EN-US&layoutCode=TSTY&pageId=3.14.1&sflg=1 (last visited Feb. 27, 2008) ("We need to reform our government. It is time that we ended the cronyism and the no-bid contracts…"); *Thinktank Says Congress Needs to Clean Up Procurement Process Mess; Industry Group Responds*, 49 Gov't Contractor ¶ 212 (2007).

55. *See*, *e.g.*, Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the U.S. Congress 67–72 (2007), *available at* http://www.acquisition.gov/comp/aap/24102_GSA.pdf (citing reports and legislation mandating stronger competition among holders of standing IDIQ contracts); U.S. Gov't Accountability Office, GAO-08-160, Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations (2007), *available at* http://www.gao.gov/new.items/d08160.pdf (supporting panel recommendations).

As the costs and complications of second-stage competitions continue to decline, U.S. policymakers are almost certain to press for ever more competition in IDIQ contracting. For their part, European policymakers, anticipating the same strains in framework agreements (and perhaps the same political criticisms), may wish to shift the European directives' presumption towards Model 2—towards a more aggressive second stage of competition in framework procurement.

4. Improving Transparency, Competition, and Accountability in Second-Stage Competitions: Drawing on the U.S. Experience

Should procurement systems on both sides of the Atlantic shift, presumptively, to using second-stage "Model 2" competitions among standing contract holders—to using "mini-competitions" as they are known in the United Kingdom[56]—reform will likely focus on improving transparency, competition, and accountability in those second-stage competitions. The U.S. reform efforts in these quarters, while far from complete, may help shed light on future potential reforms in the European Union.

a. Reform Is Likely to Be Incremental

Although critics have long complained of the lack of transparency and competition for task orders in the U.S. system, reform has been slow and fragmented. What has emerged is an enormously complicated system, with grossly uneven transparency and uncertain competition. Task orders for services worth over $100,000 for the Department of Defense (but not civilian agencies), for example, must be competed among *all* eligible vendors under a multiple-award IDIQ contract,[57] but only if a standard IDIQ contract is used; if a GSA MAS contract is used, the notice may, in principle, be limited to three vendors, so long as they are reasonably likely to respond.[58] Agencies need not publicize future task-order opportunities through the central website for federal procurement, *FedBizOpps.gov*,[59] and the Federal Government can only estimate the total number of dollars awarded in orders under interagency IDIQ contracts.[60] No publication of awarded orders is required for standard IDIQ contracts,[61] while there is limited publication of information

56. United Kingdom Office of Gov't Commerce, Framework Agreements: OGC Guidance on Framework Agreements in the New Procurement Regulations 6 (2006), *available at* http://www.ogc.gov.uk/documents/guide_framework_agreements.pdf.

57. DFARS 216.505-70(c)(1) (an order "exceeding $100,000 is placed on a competitive basis only if the contracting officer . . . [p]rovides a fair notice of the intent to make the purchase . . . to all contractors offering the required supplies or services under the multiple award contract").

58. DFARS 208.405-70(c)(1) (an order under the GSA MAS program "exceeding $100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase . . . to . . . [a]s many schedule contractors as practicable . . . to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements").

59. *See* FAR 5.202 for a list of exceptions to the publication requirement for proposed contract actions.

60. *See*, *e.g.*, Acquisition Advisory Panel, *supra* note 55, at 245–46.

61. FAR 5.301(b)(4).

on *cumulative* awards to GSA schedule contract vendors.[62] Nor is there a published list of all governmentwide IDIQ contracts, although one is required by law.[63] The legal regime is a motley disaster, by any reasonable measure, a twisted set of compromises that likely reflect, in part, the procurement community's quiet resistance to bringing more competition, and more transparency, to IDIQ contracting.

The first lesson from the U.S. experience, therefore, is that reform in this area is almost inevitably incremental, especially in mature democracies where stakeholders will have a voice in reform. As problems emerge in framework contracting in the European member states, political pressure for reform will almost certainly surge, as it has in the United States. In answering that pressure, European policymakers may want to learn from similar U.S. initiatives. The lesson from the U.S. experience is reflected in the tortuous, incremental reforms: these deeply compromised efforts reflect the fact that, while there is substantial public support for reform, both agencies *and* vendors are invested in IDIQ contracting and will therefore resist reforms to make IDIQ contracting more transparent (by adding notice requirements) or more formally competitive. User agencies have made it clear that they favor the administrative ease of IDIQ contracting,[64] centralized purchasing agencies welcome the fees that come from centralized IDIQ contracting,[65] and the vendor community, having invested heavily in a marketplace marked by little competition or transparency, has little incentive to press to make IDIQ contracting more open and competitive.

b. Bringing Transparency to Second-Stage Competitions

The next lesson from the U.S. experience is that it *is* possible to bring transparency to second-stage competitions, although U.S. policymakers are still debating how much transparency to afford. As noted, in the U.S. federal system there is little or no prior public notice of second-stage competitions: there has been no broad effort to publish forthcoming "mini-competitions" to the world. Instead, U.S. policymakers have strengthened requirements for publishing notice of upcoming "mini-competitions" to standing contract holders, and Congress has specifically required that task orders, once awarded, be published to the public.[66]

62. *See supra* note 43 for a discussion of the GSA Schedule Sales Query system.

63. FAR 5.601 calls for a "Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies . . . via the Internet." That directory, which is to appear at http://www.contractdirectory.gov/, has been suspended. *Id.*

64. *e.g.*, U.S. Fed. Emergency Mgmt. Agency, How to Market to FEMA, http://www.fema.gov/business/market.shtm (last visited Feb. 24, 2008) (advice from FEMA to vendors: "Go after GSA Schedule and Indefinite Delivery Indefinite Quantity (IDIQ) contracts. These are popular contracting vehicles with government buyers because of little or no paperwork and fast delivery. If a product or service is available through one of these vehicles—especially information technology—the agency will go this route instead of issuing an RFP," a formal, publicized request for proposals, which normally launches a negotiated procurement).

65. *See*, *e.g.*, Acquisition Advisory Panel, *supra* note 55, at 242.

66. *See* Federal Funding Accountability and Transparency Act of 2006 (FFATA), Pub. L.

c. Enhancing Competition in Second-Stage "Mini-Competitions"

Reform in the U.S. federal system has also improved competition during second-stage "mini-competitions." As noted, once standing IDIQ agreements are in place, an agency competing a requirement often will launch a "mini-competition" between the standing contractors. Because of abiding concern that there is not enough competition in that second stage,[67] Congress has in recent years made two major amendments to the law, to intensify competition in this second stage.[68]

The first statutory change came in section 803 of the National Defense Authorization Act for Fiscal Year 2002.[69] Section 803 required that the U.S. Department of Defense ensure minimum levels of competition in ordering services under IDIQ contracts if the task orders at issue exceeded $100,000.[70] Because of continuing concern that agencies across the Government were not ensuring adequate competition,[71] Congress mandated further competition in section 843 of the defense authorization act for fiscal year 2008. Section 843 requires that all agencies (1) award no task orders in excess of $100 million on a sole-source basis and (2) when orders are to exceed $5 million, afford all standing contract holders (a) notice of the pending mini-competition, (b) a reasonable period to provide a proposal, (c) a statement of the significant evaluation factors for award, (d) a statement of the basis of award, and (e) an opportunity for a post-award debriefing.[72]

No. 109-282, 120 Stat. 1186 (2006). FFATA defines a "federal award" to include task- and delivery-order awards, *id.* § 2(a)(2)(A), and requires that all "federal awards" be published in an Internet-based database, *id.* § 2(b). The website launched in accordance with FFATA, http://www.fedspending.gov, does provide information on awarded orders, but it is not clear that the database includes information on *all* task and delivery orders under standing IDIQ contracts.

67. Lohnes, *supra* note 6, at 605–06 (citing authorities).

68. *Cf.* DaPonte Thornton, *supra* note 6, at 418–19 (discussing limited regulatory changes during period leading up to legislation).

69. Pub. L. No. 107-107, § 803, 115 Stat. 1012, 1178–80 (2001); *see* Lohnes, *supra* note 6, at 609.

70. *See*, *e.g.*, Ralph C. Nash & John Cibinic, *Competition: Reaching a Happy Median*, 19 Nash & Cibinic Rep. ¶ 55, Dec. 2005, at 177–78.

71. *See*, for example, Acquisition Advisory Panel, *supra* note 55, at 32, for the recommendation that section 803 requirements be applied governmentwide.

72. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3. This defense authorization legislation, originally passed as H.R. 1585 in December 2007, was rejected by President George W. Bush, on unrelated grounds. The legislation, with minor amendments to address the White House's objections, was passed by both houses as H.R. 4986 in January 2008, and signed by the president. *See*, *e.g.*, *Authorization Bill Signed, After Month of Wrangling*, CongressDaily, Jan. 29, 2008, *available at* http://www.govexec.com/dailyfed/0108/012908cdam1.htm. The conference report relating to the original bill, H.R. 1585, therefore offers important insight into Congress's intent in passing the final legislation. The conference report, H.R. Rep. No. 110-477, at 956 (2007) (Conf. Rep.), describes the intent behind section 843 as follows:

> *Enhanced competition requirements for task and delivery order contracts (sec. 843)*
>
> The House bill contained a provision (sec. 821) that would address the issue of competition in contracting on a government-wide basis.

The trajectory of U.S. reform seems clear: step by step, Congress is adding procedural constraints that make IDIQ second-stage competitions more like traditional contracting methods. Ultimately, therefore, the arc of reform may trace a circle, should IDIQ orders in the U.S. federal system—especially large orders—be made subject to *all* of the traditional requirements of competition and transparency.

d. Improving Accountability for IDIQ Contracting

The last sphere of U.S. reform involves remedies, or "protests" as they are known in the United States. The 1994 legislation that formally launched IDIQ contracting[73] generally exempted orders under a master IDIQ agreement from protest.[74] That exemption from protest raised concerns in many quarters, and so the Acquisition Advisory Panel, a distinguished reform commission, recommended that protests be allowed for orders over $5 million.[75] The panel's recommendation was carried into the Senate version of the defense authorization bill for fiscal year 2008, and ultimately Congress passed compromise legislation that will allow protests for orders over $10 million.[76] Notably, this new liberality in IDIQ protests in the United States coincided

> The Senate amendment contained a provision (sec. 821) that would encourage the use of multiple-award task and delivery order contracts in lieu of single-award contracts, enhance requirements for the competition of task orders and delivery orders under multiple-award contracts, and authorize bid protests for task or delivery orders in excess of $5.0 million under such contracts.
>
> The House bill contained no similar provision.
>
> The House recedes with an amendment that would address the competition issues in the Senate provision on a government-wide basis. The provision would raise the threshold for bid protests to $10.0 million and sunset the authorization for bid protests after 3 years. The conferees expect that the sunset date will provide Congress with an opportunity to review the implementation of the provision and make any necessary adjustments.

Id. at 956.

73. Federal Acquisition Streamlining Act, Pub. L. No. 103-355, §§ 1004, 1054, 108 Stat. 3243, 3249–50, 3261–62 (1994); *see* Global Computer Enters., Inc., Comp. Gen. B-310823, B-310823.2, B-310823.4, 2008 WL 314520, at *5 (Jan. 31, 2008), *available at* www.gao.gov/decisions/bidpro/310823.pdf. The Government Accountability Office, however, generally continued to exercise jurisdiction over protests arising from the General Services Administration's Multiple Award Schedule (MAS) contracts; the GAO took the position that the statutory ban on protests applied only to IDIQs authorized under Federal Acquisition Regulation (FAR) part 16, and not to the MAS contracts (though they are very similarly structured) authorized by FAR part 8. *See*, *e.g.*, Labat-Anderson, Inc., Comp. Gen. B-287081, B-287081.2, B-287081.3, Apr. 16, 2001, 2001 CPD ¶ 79, at 5 n.1.

74. 10 U.S.C. § 2304c(d) (2000) ("A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." (Defense Department)); 41 U.S.C. § 253j(d) (2000) (same, for civilian agencies); *see*, *e.g.*, *Task Order Protest Barred by Statute and by Protester's Lack of Standing for Failure to Submit Bid Bond, COFC Rules*, 48 Gov't Contractor ¶ 309 (2006).

75. *See*, *e.g.*, Acquisition Advisory Panel, *supra* note 55, at 36.

76. *See* H.R. Rep. No. 110-477, at 956 (legislative history).

almost exactly with approval of the new European directive on remedies, which similarly broadened protest rights under framework agreements.[77]

V. IDIQ CONTRACTS, FRAMEWORK AGREEMENTS, AND THE SUBOPTIMAL CHOICE

The problems in framework and IDIQ contracting discussed above, many of them quite predictable, have emerged over the last decade on both sides of the Atlantic. The problems stem, in important part, from the very structure of these contracts: in order to reduce transaction costs and speed procurement, purchasing agencies must sacrifice competition and transparency for expedience. The purchasing agency may pay more,[78] and the procurement process may be less transparent, but the agency will save time and money in the contracting process. The working assumption underlying framework and IDIQ contracting was that agencies would balance those saved transaction costs against the losses to best value—that agencies would, in other words, make an efficient decision to use framework agreements (and IDIQ contracts) when the costs saved would outweigh the losses in value and price. More recent studies suggest, however, that government officials on both sides of the Atlantic may be *overusing* framework agreements, for at least two reasons.

First, many framework agreements in Europe (and IDIQ contracts in the United States) are sponsored by centralized purchasing agencies, which typically receive fees for each purchase under the centralized contracts,[79] and therefore have an incentive to encourage their use. The central purchasing

77. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, 2007 O.J. (L 355) 31(EC),*availableat*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT; *see Commission Welcomes New Directive on Improving Rejected Bidders' Rights*, 11 Int'l Gov't Contractor ¶ 85 (2007); *see also* U.K. Office of Gov't Commerce, Action Note 05/06, European Commission Proposal to Amend the Remedies Directives (Aug. 7, 2006), *available at* http://www.ogc.gov.uk/documents/ProcurementPolicyRemediesDirectives.pdf (UK position opposing expansion of remedies for framework agreements).

78. *See* U.K. Nat'l Audit Office, Assessing the Value for Money of OGCbuying.Solutions, 2006-07, H.C. 103, at 13, *available at* http://www.nao.org.uk/publications/nao_reports/06-07/0607103.pdf ("the majority of prices paid by [the UK Office of Government Commerce] OGCbuying.solutions' [agency] customers were cheaper than the equivalent public sector market average price . . . but, we examined three large professional services framework agreements and found the prices paid by OGCbuying.solutions' customers are underperforming against the lowest 25 per cent of public sector market prices . . ."); *id.* at 14 (chart reflecting price ranges against benchmark prices).

79. The Office of Government Commerce (OGC) in the United Kingdom receives, on average, slightly less than 1 percent of sales in fees from vendors that participate in its framework agreements. *See id.* at 4. The U.S. General Services Administration directs its vendors to add a fee of 0.75 percent (the "Industrial Funding Fee") to prices charged on the GSA Multiple Award Schedules contracts. *See* U.S. Gen. Servs. Admin., 72A Quarterly Reporting System, Frequently Asked Questions, https://72a.gsa.gov/ifffaq.cfm#01 (last visited Feb. 28, 2008); U.S. Gen. Servs. Admin., 72A Quarterly Reporting System, GSA Schedules Industrial Funding Fee Rates, https://72a.gsa.gov.iffrates.cfm (last visited Feb. 28, 2008).

agencies are not, of course, homogeneous. A 2006 European study reported that centralized purchasing agencies were viewed as "less transparent, less fair, and more bureaucratic than other public procurement bodies."[80] In the U.S. federal system, in contrast, centralized purchasing agencies have been criticized for being entrepreneurial to a fault because centralized purchasing agencies often establish centralized IDIQ contracts, at least in part, to win the fees that other agencies pay to use the centralized contracts.[81] That said, on both sides of the Atlantic it is clear that centralized purchasing agencies, driven by self-interest, have encouraged the growth of IDIQ contracting and framework agreements—arguably beyond an efficient level.

Second, some purchasing officials have turned to framework agreements and IDIQ contracts simply to avoid procurement's normal procedural requirements—to avoid the need to publish opportunities or awards, for example, or to avoid bid protests.[82] Framework agreements and IDIQ contracts are being used, in other words, not to make procurement more efficient, but rather to bypass the procedural steps required by law. Because those procedural steps should, in principle, reflect policymakers' considered judgments as to an optimal balance of process and efficiency, a shortcut around those steps—a legal loophole, in other words—logically suggests a suboptimal choice.

Taken together, these factors—centralized agencies' self-interested incentives to expand IDIQ contracts and purchasing agencies' skewed incentives to overuse these vehicles to avoid competition, transparency, and accountability—do help to explain the explosive growth in IDIQ contracting. The most popular IDIQ contracts in the U.S. federal system, for example, the GSA MAS contracts, grew from $4 billion in sales in fiscal year 1995 to over $35 billion in fiscal year 2006.[83] In the United Kingdom, framework contracting by the Office of Government Commerce (one of the leading centralized agencies) rose from approximately £800 million in 2001–2002 to over £2 billion in 2005–2006.[84] At the same time, however, these distorting factors suggest that frameworks (and IDIQ contracting) will continue to grow far out of any efficient proportion, to meet centralized purchasing agencies' hunger for growth and to accommodate customer agencies' search for a legal safe harbor from normal procurement requirements.

How, then, should policymakers restore equilibrium, to keep the use of framework agreements at an optimal level? The recent reforms in the U.S. federal system and in the European Union's directives suggest a way forward.

First, policymakers should try to maximize competition in the award of standing master agreements, perhaps by strictly limiting contract duration

80. Europe Econ., *supra* note 24, at v–vi (the full report is available through http://ec.europa.eu/internal_market/publicprocurement/studies_en.htm).
81. Acquisition Advisory Panel, *supra* note 55, at 242–43.
82. *Id.* at 242; *see supra* notes 24–25 and accompanying text.
83. Acquisition Advisory Panel, *supra* note 55, at 233.
84. *See* U.K. Nat'l Audit Office, *supra* note 78, at 23.

(as in the European Union) or by leaving those master agreements "always open" to new competitors (as is the case with the U.S. GSA MAS contracts).

Once master agreements are in place, policymakers should favor maximum competition among those holding the master agreements. The United States, which appears to be leading reform in this regard, now requires that larger orders (over $5 million) be competed for in a very traditional manner: those holding master contracts must receive notice of a pending competition for an order, a clear statement of the criteria for award, a reasonable opportunity to compete, a publication of award, and an opportunity for a debriefing. Furthermore, once orders are awarded, they must be published much like any other contract. Although the U.S. reform effort has been stunted and mottled by political compromise, the path towards greater competition and transparency seems clear—for policymakers on both sides of the Atlantic.

Finally, both U.S. law and the European directives have opened the door to protests (remedies) of IDIQ and framework contracting. These reforms will remove a false incentive for using IDIQ and framework contracting: agencies' selfish hope to dodge review. By opening the door to review, and thus helping to level the choice between traditional contracting methods and IDIQ and framework contracts, policymakers will help ensure that agencies choose framework agreements and IDIQ contracts not because they afford a sly shelter from transparency, accountability, or competition, but rather because, on balance, they truly provide the best value in procurement.

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