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Possible future work in the area of public procurement (Provisional agenda item (9))

Note by the Secretariat

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I. Introduction

1. In 1981, the United Nations Commission on International Trade Law (UNCITRAL), at its fourteenth session, decided that further to strengthen the coordinating role of the Commission, the Secretariat should select, at appropriate intervals, a particular area for consideration and should submit a report focusing, inter alia, on the work already undertaken in that area, indicating topics suitable for legal unification and modernization.¹
2. The Secretariat selected the law of procurement of goods, construction and services for such a discussion by the Commission. Accordingly, the Secretariat presented two notes on the question of public procurement to the Commission at its thirty-sixth session, held in Vienna from 30 June-11 July 2003 (A/CN.9/539 and A/CN.9/539/Add.1). Those notes set out current activities of other organizations in the area of public procurement and presented information on practical experience in the implementation. The notes were conceived as a starting point in the formulation of proposals as to how to address the issues raised, with a view to their consideration by a working group that may be convened in the third quarter of 2004, subject to confirmation by the Commission at its thirty-seventh session.
3. In its report on the thirty-sixth session, the Commission expressed strong support for the inclusion of procurement law in the work programme of the Commission, inter alia, so as to allow novel issues and practices that have arisen since the adoption in 1994 of the UNCITRAL Model Law to be considered.²
4. In this regard, the Commission requested the Secretariat to prepare detailed studies on issues regarding public procurement as identified in the notes presented to it.³
5. The Commission also noted that its work might also extend to the formulation of best practices, model contractual clauses and other forms of practical advice, in addition or as an alternative to legislative guidance. It was further noted that the Secretariat's studies and proposals should take into account the fact that, in some countries, public procurement was not a matter for legislation, but for internal directives of ministries and government agencies.⁴
6. The Secretariat's work undertaken thereafter has been carried out in close cooperation with organizations having experience and expertise in the area, such as the World Bank, and has received the benefit of consultations with experts in the field. The Secretariat's studies on issues regarding public procurement, as requested by the Commission, have also taken into account negotiations held under the auspices of the World Trade Organization and other international and regional organizations.
7. This note by the Secretariat sets out a summary of those studies undertaken, and is presented as a follow-up to notes A/CN.9/539 and A/CN.9/539/Add.1, and in order to assist the Commission in considering how to address the issues raised in this field.

II. History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services

8. As set out in the Secretariat's note A/CN.9/539, paragraph 2 "[t]he UNCITRAL Model Law, and an accompanying Guide to Enactment,⁵ is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none previously existed. Further, the UNCITRAL Model Law contains procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and has proved to be an important international benchmark in procurement law reform. Legislation based on or largely inspired by the UNCITRAL Model Law has been adopted in more than 30 jurisdictions in different parts of the world and the use of that law has resulted in widespread harmonization of procurement rules and procedures."

9. However, as previously reported to the Commission, experience of law reform based on the UNCITRAL Model Law, together with new issues and practices that have arisen in its practical application, may justify an effort to review certain of the issues addressed in its text. Specifically, the increased use of electronic commerce for public procurement, including methods based on the Internet, are capable of further promoting the objectives of procurement legislation. Further, the activities of selected international and regional organizations in the area of government procurement reflect the growing importance of procurement regimes for the development of national economies and for regional and interregional integration. They also highlight the need for harmonized and modern models and for coordination of efforts by international bodies active in the field of procurement.

III. Procurement applications of electronic communications and technologies

10. There are two main technological developments in the last ten years that have changed the manner in which procurement has been undertaken: first, the use of electronic means of communication has become widespread and, secondly, certain States now operate some parts of their procurement electronically (that is, tenders or other means of awarding contracts are conducted online, using a proprietary system or over the Internet). Procurement conducted through electronic means is rapidly increasing in popularity and is being considered both under domestic laws and by the World Trade Organization (WTO) and the European Union.

11. However, although recent documents of international lending institutions addressing standards for assessing national procurement systems encourage the use of electronic means, they do not provide principles that would guide its regulation. Specific comments and suggestions have been brought to the attention of the Secretariat that address ways of adapting the UNCITRAL Model Law to electronic procurement. Accordingly, the Commission may consider that, in addition to dealing with a number of basic issues of electronic procurement, guidance could usefully be provided on methods of electronic procurement.

12. The Secretariat considers the issues raised from the perspective of how they may be addressed in the UNCITRAL Model Law within its existing provisions or, if

further provision may be necessary, from the perspective of its aims and existing provisions. Many electronic procurement practices can be accommodated through the interpretation of existing laws and rules, but some undesirable obstacles to the use of electronic commerce in procurement may still remain.⁶

13. Electronic means of communication are used by procuring entities for communicating with suppliers, and with the public and other public bodies, and in a government's internal administrative processes. They can be employed at all stages of the procurement cycle: that is, in planning, in the procurement process itself through advertising and the transmission of documents and information—such as specifications and invitations to tender, and in tendering itself. They are also used in administering the ultimate contract, from the placement of orders, through invoicing to payment.

14. The potential advantages of the use of electronic commerce include improved value for money arising from downwards pressure on prices, as a greater number of potential suppliers can be reached, and in some cases through the promotion of standardization. They also include improved efficiency of operation, from savings on transaction costs (such as the costs of paper processing), savings from speedier communications and easier access to supplier and contract information, and improved compliance with rules and policies, including the ability to improve monitoring.

15. The extent to which individual States can benefit from electronic procurement will depend on various factors, including access to and use of reliable and affordable electricity, telecommunications, and adequate hardware and software, the adequacy of the general law on electronic commerce, the extent of standardization, and available human resources. Recalling that public procurement is not always a matter for legislation, but for internal directives of ministries and government agencies, the Commission may wish to consider whether there is a need for more detailed provisions in enacting States' own national legislation so as to offer the appropriate level of regulation, and whether relevant principles should be explained in the Guide to Enactment that accompanies the UNCITRAL Model Law.

16. The secretariat addresses certain of the issues raised by the increasing use of electronic communications in the procurement process in the following sections of this note.

A. Publication of contract opportunities

17. The aims of the UNCITRAL Model Law will best be achieved if opportunities are publicized as widely as possible at reasonable cost, and therefore the issue arises as to whether those aims would be furthered by requiring electronic publication of opportunities in addition to, or as an alternative to, more traditional means.

18. It has been suggested to the Secretariat that electronic publications are at their most effective when they are mandatory (that is, when paper publications are not permitted in addition). However, there may be significant advantages even when electronic means are optional. Further, any enhanced benefits from mandatory electronic means could be outweighed by increased costs, especially in the early stages of implementing electronic systems. The Commission may therefore wish to

consider whether (given the current circumstances in various States) legislative rules addressing the issue of mandatory or optional use of electronic publication may be needed (and the related question of whether provision of such rules is appropriate, if they might restrict the accessibility of the information concerned).

19. Article 24 of the UNCITRAL Model Law requires that participation in a procurement must be advertised by publication in a place specified by the enacting State when implementing the UNCITRAL Model Law and (for international procurements) a “newspaper” or “relevant trade publication or technical or professional journal” of wide international circulation. This provision implies a paper means of publication. Other procurement regimes have differing publication requirements: one regional body, for example, issues information regarding opportunities in electronic form only, but other bodies allow for any medium that satisfies requirements as to accessibility.

20. Electronic publication might alternatively be required where it is possible in the State concerned, even if as a supplement to paper means, if it is viewed as providing wider publication at limited cost. Similarly, a greater amount of information could be provided electronically, as the costs of so doing are expected to be lower than by the use of traditional paper means. The Commission may wish to address whether the provision of legislative guidance would be required, either in the UNCITRAL Model Law or its accompanying Guide to Enactment, covering, *inter alia*, such issues as flexibility, who should decide on a publication medium, whether the use of electronic means only should be justified, upon what grounds such decisions may be taken, and who should bear the responsibility of an omission.

B. Publication of the laws and regulations governing procurement contracts

21. Article 5 of the UNCITRAL Model Law requires regulations, administrative rulings and directives of general application to be “promptly made accessible to the public and systematically maintained”. This article is sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise, but an express provision permitting or requiring electronic publication may be viewed as desirable. Further, the Commission may wish to address whether there is a need for a legislative rule in this area, considering the limited cost of electronic publication of information, and whether information relevant to potential suppliers (such as internal policies or guidance) that is not currently required to be published should be published by electronic or any available means. The issues set out in the previous paragraph will also apply to the question of publication of relevant laws and regulations.

C. Publication of solicitation documents and related information

22. Article 27 of the UNCITRAL Model Law addresses the information to be included in solicitation documents. There is no specific reference to information on use of electronic means, but article 27 (z) enables the procuring entity to include any other requirements that it has established relating to the procurement proceedings and such information on the use of electronic means of communication

and tendering could be included. The Guide to Enactment suggests that States may wish to make further regulations on such matters.

D. Publication of contract awards

23. Article 14 of the Model Law requires procuring entities to publish notices of contract awards above a threshold specified by the enacting State, and that regulations may provide for the manner of publication. Again, this article is sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise, but an express provision permitting or requiring electronic publication may be viewed as desirable, taking into account the issues raised in paragraph 20 above.

E. Use of electronic communications in the procurement process

24. Electronic communications can be used throughout the procurement procedure, for the distribution of tender documents and invitations to participate, the submission of pre-qualification information, tenders and proposals, among others. The advantages include reduced processing costs, speedier communications, a potential for reduced corruption and abuse (as a result of less direct contact between officials and suppliers, and greater anonymity of tenders) and more reliable communication for non-local suppliers, in States in which postal delivery is unreliable. These advantages can result in increased competition, such as if they lead to wider participation by non-local firms.

25. Article 9 (1) of the UNCITRAL Model Law requires communications to be in a form that provides a record (or, as an alternative for most communications, to be confirmed in a form that provides a record), and so does not exclude electronic means of communication.

26. The possibility of the submission of electronic tenders is also not excluded under the UNCITRAL Model Law, in the sense that article 30, paragraph 5 (b), specifically provides that “a tender may [...] be submitted in any [...] form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality”. Apart from the rules on the requirement for a record in article 9 (1) as set out above, the UNCITRAL Model Law does not provide any explicit controls over use of electronic means, except when such means are used for submitting tenders in formal tendering. For example, there is no requirement to ensure that confidentiality of information in documents submitted by suppliers can be maintained at an equivalent level to that possible for paper documents. Accordingly, it may be useful, and perhaps necessary, that a provision such as article 30 be accompanied by some detailed provisions dealing with authenticity, security and confidentiality, such that suppliers and the public have the same degree of confidence in electronic procedures as in paper-based procedure and so as to ensure, for example, that tenders remain confidential during the tendering procedure.

27. Other related issues for consideration include the communications means and mechanisms used that would ensure that the integrity of data is preserved, will enable entities to establish the time of receipt of documents, when the time of

receipt is significant in applying the rules of the procurement process, and will ensure that tenders and other significant documents are not accessed by the procuring entity or other persons prior to relevant deadlines.

28. The UNCITRAL Model Law does not currently permit procuring entities to require use of electronic means by suppliers (articles 9 and 30). One of the main issues that falls to be considered is whether the use of electronic communications should be mandatory or optional: that is, whether the procuring entity and/or the suppliers or potential suppliers may insist on electronic or, indeed, paper means of communication. The Commission will wish to follow the principle that the means of communication imposed should not present an unreasonable barrier to access in considering this issue.

29. Other issues raised in paragraph 18 above concerning the advantages and disadvantages of a mandatory electronic regime may fall to be considered in this regard. It is noteworthy that the provisions dealing with authenticity, security and confidentiality (for example, if digital signatures are required) may involve significant costs to the parties. Further, whether the general legal environment in a State provides adequate support for using electronic means will be an important consideration. For example, laws on admissibility of evidence or formalities (such as signatures) for certain types of contract may refer only to non-electronic documents, or the law on issues such as the time and location of offer and acceptance in contract through electronic means may be unclear. The UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures address certain of these issues.

F. Electronic (reverse) auctions

30. The “reverse electronic auction” is an increasingly popular tendering process. A reverse auction is a tendering procedure for the procurement of products, works or services in which suppliers are provided with information on the other tenders, and can amend their own tenders on an ongoing basis in competition with the other tenders, normally without knowing the identity of other suppliers. In an electronic reverse auction suppliers then post tenders electronically through an electronic auction site, normally via the Internet (the use of which has largely superseded proprietary systems), using information on ranking or amount required to beat other suppliers’ offers. Suppliers can view in electronic form the progress of the tenders as the auction proceeds and amend their own tenders accordingly. The auction may take place over a set time period, or may operate until a specified period has elapsed without a new tender.

31. Reverse auctions are most commonly used for standardized products and services for which price is the only, or at least a key, award criterion, since it is generally price alone that features in the “auction” process. However, other criteria can be used and can be built in to the auction phase, or evaluated in a separate phase in the overall procedure.

32. Recognition of the use and potential use of auctions and their positive effect on competition has led some States and international organizations to regulate or provide guidance on the method (that is, they address the technique explicitly). However, there are no equivalent provisions in many other States.

33. It has been noted that transparency would be increased if both information on other tenders and the outcome of the procedure were available to participants (see, further, the section entitled “Publication of contract awards”, at para. 23 above).

34. The UNCITRAL Model Law does not make express provision for the use of an electronic reverse auction. While some aspects of the process may be encompassed by existing provisions, others may not. Accordingly, in cases in which non-price criteria such as quality are rated separately prior to the auction, price and non-price criteria are then combined, using specialized auction software, with the information submitted in the auction so as to give each supplier’s overall standing at any time. Thus the overall procedure is a “two-stage” one, in which the first stage is the rating by the purchaser of the relevant non-price aspects and the second stage is the auction phase, in which the price and non-price aspects are combined to give an overall ranking.

35. It has been noted that the UNCITRAL Model Law’s general tendering procedure, “open tendering”, assumes a single tendering stage, and would not permit the process outlined above. Further, the practice of submitting tenders in writing in a sealed envelope is not compatible with an auction process. With regard to evaluation and comparison of tenders, article 34, paragraph 1 (a) of the UNCITRAL Model Law prohibits changes to the price of tenders after submission and that, under article 34, paragraph 8, information on tenders must not be disclosed, both of which constitute an obstacle to using electronic reverse auctions.

36. The Commission may therefore wish to consider whether there is a need to regulate electronic auctions, either as a version of traditional procurement methods or as a distinct method. It has been pointed out that treating such auctions as a version of traditional tendering would require the introduction of additional rules to address auctions’ special features relating to tender confidentiality and two-phase evaluation, but to do so may be more desirable than treating electronic auctions as a separate tendering method requiring novel and specific provisions.

37. The Commission may also wish to consider whether there is a need to address the above issues in the UNCITRAL Model Law and elsewhere. For example, and since an electronic auction might not be suitable for all States for technical or other reasons (as is also the case with certain other provisions, including the different evaluation methods for the procurement of services), consideration might be given to presenting it as an optional procedure.

38. The UNCITRAL Model Law is based on a general acknowledgement that the use of open tenders, restricted tenders and requests for quotations reflects best practice in domestic public procurement regulations. The Commission may wish to consider whether there is a need to provide guidance in the UNCITRAL Model Law for an auction procedure that follows the pattern of these methods, adapted to include an auction phase, but nonetheless consistent with the principles and objectives of the UNCITRAL Model Law.

G. Electronic catalogues

39. Electronic catalogues can be electronic versions of traditional hard-copy catalogues or may incorporate electronic ordering facilities, and are in increasing

use. In practice, a procuring entity may use an electronic catalogue arrangement as a means of identifying suppliers to receive quotations (or standing offers) and, de facto, have a similar effect to the operation of a mandatory qualification list or a multi-supplier framework agreement. Further comment on the question of electronic catalogues will therefore be made in the sections addressing those issues (see, further, paras. 48-56 and 73-75 below).

H. Conclusions and recommendations as regards the use of electronic communications in procurement

40. The Commission will have noted that there are two main threads of the use of electronic communications in the field of procurement: communication by electronic means, and the use of the Internet for conducting a procurement process itself. The Commission may wish to consider whether, in view of the fact that the technology involved is developing rapidly, there is a need to provide legislative rules on the principles that govern methods of electronic procurement and communication in the UNCITRAL Model Law, rather than addressing the technology itself in that document. Further, the Commission may wish to review whether further guidance on the adoption and use of such methods in the law or elsewhere that may assist States with less sophisticated technologies or that do not (yet) have the required levels of access to the technology required could be provided.

IV. Possible additional points for review in the UNCITRAL Model Law

41. The activities and experience of the international organizations and lending institutions in the area of government procurement are described in the Secretariat's notes A/CN.9/539 and A/CN.9/539/Add.1, and those notes observe that some institutions are currently in the process of reviewing their rules and regulations in the field of public procurement.

42. These activities and reviews reflect the growing importance of procurement regimes as a vehicle for national economic development and for regional and interregional cooperation and integration. Issues that will fall to be considered include the varying stages of economic and technological development of the economies concerned, and how to address the aims of efficiency, effectiveness and transparency.

43. The Commission's aim of harmonization appears to confirm the desirability of ensuring that, to the extent possible and respecting its principles, the UNCITRAL Model Law is consistent with other international and regional public procurement regimes in use, and such harmonization should increase its use.

44. The secretariat addresses possible additional points for review arising from such matters in the following sections of this note.

A. The use of suppliers' lists

45. Suppliers' lists (also known as qualification lists, qualification systems or approved lists) identify selected suppliers for future procurements and can operate as either mandatory or optional lists. Mandatory lists require registration of the supplier on the list as a condition of participation in the procurement, whereas, in the case of optional lists, a supplier may choose to register without prejudice to eligibility. Admission of a supplier on a list may involve a full assessment of the supplier's suitability for certain contracts, some assessment or no assessment at all, but normally will involve an initial assessment of some qualifications, leaving others to be assessed when the supplier is considered for specific contracts.

46. The main purpose of suppliers' lists is to streamline the procurement process, leading to cost savings, wider competition, and more efficient information management, benefiting both purchasers and suppliers.

47. The advantages of optional lists include cost reductions from eliminating the need to provide and evaluate separate qualification information for each contract, access to information if emergency procurements are required, reduced costs for suppliers in finding contract information (which can be given automatically to registered suppliers), and potentially wider competition if lower supplier costs lead to increased numbers of interested suppliers. Lists can also save time by eliminating or reducing the period for advertising, awaiting expressions of interest, and assessing qualifications (of particular importance in the case of procurement that is not subject to advertisement and competition, such as urgent procurement, which is often carried out in an ad hoc way that favours suppliers known to the procuring entity).

48. In the practice of some countries, lists have been found to promote consistency and efficiency in procurement policy by encouraging standard questionnaires and qualification policies. The advantages are magnified when several purchasers use a common list, and common lists also enable entities to pool supplier information—for example, on unethical behaviour or reliability.

49. Mandatory suppliers' lists can increase the above advantages (that are largely those to the benefit of procuring entities), but also pose significant risks in potentially restricting competition by excluding suppliers from contracts (including those that would otherwise be subject to competitive tendering following an advertisement), if they compromise public confidence in public procurement by reducing transparency and promoting close relationships between suppliers and procuring entities. Their operation may also involve significant administrative costs.

50. Accordingly, the disadvantages of mandatory lists may outweigh the benefits. Nonetheless, they are used in many States and in international procurement regimes covering larger contracts. However, under these regimes their use is regulated: first, by limiting in some cases the entities that may use them and, secondly, by controlling their use to ensure they operate in a reasonable and transparent way.

51. It has been noted that the UNCITRAL Model Law does not address the subject of suppliers' lists, though it does not prevent procuring entities from using optional lists to choose suppliers in procurement that does not require advertising, such as restricted tendering, competitive negotiations, requests for proposals or quotations and single-source procurement. This use may in practice result in the exclusion of

non-registered suppliers, such as by the use of the relatively informal request for quotations procedure, and operate effectively as a mandatory list.

52. At the time of the adoption of the UNCITRAL Model Law, the use of suppliers' lists was considered to be both undesirable and diminishing. However, with the spread of electronic communications, the use (and value) of lists has increased and their costs diminished. Further, it has been commented that increasing use of electronic catalogues may also lead to more procurement being conducted in a way that involves de facto reliance on suppliers' lists.

53. The use of suppliers' lists could provide a more transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there is no control over the selection of suppliers in the UNCITRAL Model Law. The aim of such controls would be to ensure that fairer and more transparent access to the lists for suppliers is put into place and could, for example, consist of an obligation to publicize the existence of any list in accordance with any publication requirements governing future opportunities.

54. It has also been noted that the UNCITRAL Model Law does not allow procuring entities to restrict access to procurement to suppliers registered on lists (i.e. to operate mandatory lists), in that article 6 (3) prohibits entities from imposing any "criterion, requirement or procedure" other than those in article 6, and article 6 does not refer to registration on a list.

55. Many international lending institutions do not regard the use of mandatory lists as good practice so far as open tender procedures are concerned. However, some States continue to use mandatory lists, and the Commission may therefore wish to consider whether legislative guidance on operating them in the UNCITRAL Model Law or the Guide to Enactment may be needed.

56. It is also arguable that an advertised and regulated mandatory list can provide for fairer and more transparent access for suppliers in certain types of procurement, as is noted with regard to optional lists above. To allow States a regulated mandatory list option could improve competition and transparency in those circumstances.

B. Procurement of services

57. The current "principal method for procurement of services" under chapter IV of the UNCITRAL Model Law is flexible, in that it incorporates flexible procurement methods, which can involve negotiation, for selecting the winner after submission of suppliers' proposals.

58. The UNCITRAL Model Law also provides that tendering should be used for the procurement of services when it is feasible to formulate detailed specifications and tendering is considered "appropriate". Otherwise, other methods for procuring goods and construction may be used if to do so would be more appropriate, and if conditions for their use are satisfied (article 18 (3)).

59. The premise of the UNCITRAL Model Law is that procurement of services will be undertaken using different methods from the procurement of goods and construction. It has been noted, however, that the flexible approach to evaluation

(employing qualitative and negotiated methods) is, in practice, used only for certain types of services procurement. A notable example is the selection of intellectual services (that is, services that do not lead to measurable physical outputs, such as consulting and other professional services). It has also been suggested that the procurement of services measurable on the basis of physical outputs could employ the rigorous and objective selection methods applied to the procurement of goods and construction. Paragraph 9 of the Secretariat's note A/CN.9/539/Add.1 provides more detail as to the suggestions made in this regard.

60. The Commission may wish to consider, therefore, whether amendment to certain provisions of the UNCITRAL Model Law may be required, so as to provide for a more rigorous regime for the procurement of many services, and to give greater flexibility to the procurement of intellectual services.

C. Alternative methods of procurement

61. Suggestions have been made by at least one multilateral lending institution that it might be useful to review the need and conditions of use of some of the "alternative methods of procurement" set out in chapter V of the UNCITRAL Model Procurement Law. Details as to suggestions made to the Secretariat in this regard are found in paragraph 11 of the Secretariat's note A/CN.9/539/Add.1.

62. The Commission may wish to note, however, that extensive consideration was given to these issues during the preparation of the UNCITRAL Model Law. It may wish to consider therefore whether such issues should be further addressed.

D. Community participation in procurement

63. The UNCITRAL Model Law does not address the contract implementation phase of a procurement project. One aspect of such implementation that has been brought to the attention of the Secretariat is the notion of community participation (that is, the end-users are involved in the implementation of a project). Community participation has been noted by one international lending institution to be the most efficient way to implement a project, because the users have an incentive to ensure good quality in the performance of work affecting them directly.

64. Community participation is provided for in a number of modern procurement systems in which the selection method is used for the purpose of achieving social goals and a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education.

65. Provision is sometimes made for such participation in national procurement rules, in that the selection of the method of procurement or award criteria may allow community participation to be considered, or alternatively as a condition of the contract or contracts ultimately awarded. The Secretariat understands that there are variations in the way community participation in procurement takes place, allowing for the utilization of local know-how and materials, and the employment of labour-intensive technologies, among others.

66. The UNCITRAL Model Law does not specifically address the issue of community participation, but its provisions are sufficiently flexible to allow most of

the arrangements set out in the preceding paragraphs be put in place. However, the Commission may wish to consider whether express provision for community participation to be included in the selection of a procurement method or award criteria may be needed.

67. The Secretariat also understands that certain methods of allowing for community participation in procurement contracts involve the subdivision of contracts or the award of small contracts often using single-source procurement. These methods would not be permissible under the UNCITRAL Model Law as it currently stands, and the Commission may wish to consider whether provision in the UNCITRAL Model Law is necessary for such procedures to be adopted, whether it may be necessary to comment on their adoption in the Guide to Enactment and whether giving enacting States a possibility to make appropriate exceptional provisions in their domestic legislation may be needed.

E. Framework agreements

68. “Framework agreements” can be defined as agreements for securing the repeat supply of a product or service over a period of time, which involve a call for initial tenders against set terms and conditions, and selection of one or more suppliers on the basis of the tenders, and the subsequent placing of periodic orders with the supplier(s) chosen as particular requirements arise. Their main use therefore arises in circumstances in which procuring entities require particular products or services over a period of time but do not know the exact quantities that they will need.

69. Observers have noted that many national laws on procurement contain provisions on framework agreements, or equivalent procedures that operate under alternative nomenclature. The main reason for using this type of arrangement, rather than commencing a new award procedure for every requirement, is to save on the procedural costs of procurement. In particular, such an arrangement avoids the need to advertise and the assessment of suppliers’ qualifications for every order placed, as this phase of the process is done once only at the initial stage described above.

70. The UNCITRAL Model Law contains no specific provisions on framework agreements.

71. Framework agreements are widely used in many States and in some cases are regulated by national law (as well as being in some cases subject to the rules of regional bodies or international lending institutions). The methods of procurement available for operating framework agreements often depend on the general rules on financial thresholds (that is, thresholds below which non-open tendering procedures may be used) and on how, if at all, the rules on thresholds are adapted for framework agreements. Those thresholds may depend simply on the value of each contract or may involve some degree of aggregation.

72. Framework agreements may be concluded with a single supplier or multiple suppliers. Single-supplier agreements may bind the procuring entity to purchase, bind the supplier to supply, or both, or may bind neither party but set the terms for contracts to be awarded in the future, with a legal commitment arising only when an order is agreed.

73. Multi-supplier arrangements involve an initial competition to select several potential suppliers that can supply the products or services on terms and conditions set out by the procuring entity (the first award phase). When a requirement subsequently arises for the product or service, the procuring entity then chooses from these suppliers a supplier for that particular order (the second award phase).⁷ The methods used for the selection of the supplier(s) in the second award phase vary widely among the States that use them, notably in that the degree of further competition varies significantly. The balance of the aims of use of competition (so as to promote value for money), openness and transparency in the approaches chosen as against the procedural costs of the methods themselves is reflected in these variations.

74. The main benefits of using multi-supplier rather than single supplier agreements include flexibility in the selection of a supplier for a specific order, avoiding the costs of a whole new procedure, the security of supply, the advantages of centralized purchasing, and enhanced access to government work for smaller suppliers. They can also enhance value for money and other procurement objectives by providing a more transparent procedure than would otherwise exist for small purchases. In particular, aggregation of contract amounts under a framework agreement may justify costs of advertising, and framework suppliers have an interest in monitoring the operation of purchases under the arrangement (by contrast with a supplier under a single-supplier framework).

75. Although the UNCITRAL Model Law does not address framework agreements expressly, some single-supplier and perhaps some multi-supplier agreements could be operated under existing procedures. Given their increasing use, and noting that other regional bodies (including the European Union) do address them, the Commission may wish to review whether provision for them in its Model Law is necessary.

F. Evaluation and comparison of tenders

76. Evaluation criteria as regards tenders are set out in article 34, paragraph 4, of the UNCITRAL Model Law, and it is provided that the criteria for determining the lowest evaluated tender may allow for the use of procurement to promote industrial, social or environmental objectives. Such objectives may include the promotion of national industrial development (through the exclusion of a supplier, the granting of preferences and the use of single source procurement in limited circumstances). The award criteria may also allow for foreign exchange impacts to be taken into account. There are express control mechanisms to ensure that the award criteria remain objective, quantifiable, and disclosed in advance to suppliers.

77. A common comment made to the Secretariat is that the use of procurement to promote industrial, social or environmental objectives should be acknowledged in the UNCITRAL Model Procurement Law, so as to increase transparency and allow for greater control of their operation. Furthermore, the notion of regional as well as national objectives of that sort may also be considered.

78. In summary, it has been suggested to the Secretariat that certain provisions in article 34, paragraph 4, may be revised with such aims in mind, and that transparency would also be enhanced if express tender evaluation criteria were set

out in its subparagraph (b), in monetary terms or in the form of requirements that the supplier must meet in order for its proposal to be considered acceptable for evaluation purposes. Further details of the suggestions made are found in paragraphs 25-30 of the Secretariat's note A/CN.9/539/Add.1.

79. The Commission may wish to consider whether revisions of these provisions may be appropriate, perhaps in the UNCITRAL Model Law itself, or whether appropriate guidance may be provided elsewhere, such as in the Guide to Enactment.

G. Remedies and enforcement

80. It is generally accepted that an effective system for monitoring and enforcing substantive rules is an important element of a transparent procurement system. However, there is less consensus on the scope of protests and remedies available to a tenderer, applicable standards and whether review should be carried out by an administrative or judicial body.

81. The UNCITRAL Model Law's provisions are found in articles 52-57, but it is noted that in the Guide enacting States might not incorporate all or some of the articles. Further, relatively limited standards are provided for administrative review, even when no judicial review exists. These notes underline the particular sensitivity of the provisions at the time of the adoption of the provisions. However, it has been brought to the Secretariat's attention that the use of protests and remedies in procurement has become more acceptable and widespread as a result, *inter alia*, of the impact of international trade regimes (which now impose review obligations on many more countries than previously) and the policies of the various international lending institutions.

82. The Commission may wish to consider, therefore, whether there is a need for the UNCITRAL Model Law to provide both a clear endorsement of the desirability of and also more detailed guidance on how to achieve an adequate review system. Further detail of certain suggestions with regard to provisions that may be considered appropriate are set out in paragraphs 33-37 of the Secretariat's note A/CN.9/539/Add.1.

V. Other points for consideration

83. Further detail of certain suggestions with regard to provisions that the Commission may consider to be appropriate for further review are set out in paragraphs 38-42 of the Secretariat's note A/CN.9/539/Add.1. They include the qualification of suppliers, rules regarding documentary evidence provided by suppliers, inducements from suppliers and contractors, contents of solicitation documents and guidance as regards the extent to which the UNCITRAL Model Procurement Law satisfies the requirements of the WTO Government Procurement Agreement, which could play a role in facilitating and promoting accessions to that Agreement.

84. In considering the issues set out in this note, the Commission may consider that some consequential revisions of the text of the UNCITRAL Model Law may be

desirable. Given the differing stages of development of the States that will use the Model Law, and the possible inclusion of alternative or optional provisions, some simplification of certain provisions may also be helpful.

VI. Conclusions and recommendations

85. The body of this note sets out aspects of the area of public procurement that may, in the Commission's opinion, merit consideration at this juncture, some of which might involve the formulation of best practices, model contractual clauses and other forms of practical advice, in addition or as an alternative to legislative guidance. Such consideration would not be intended to re-open issues that were fully dealt with in the discussions leading to the adoption of the UNCITRAL Model Law, but to assess the opportunity of adjusting the UNCITRAL Model Law in the light of new developments and practices (notably electronic procurement) or to deal with issues that were not discussed at that time.

86. As to the resources needed for any further work that the Commission may find appropriate, the Commission may recall that Working Group I has completed its work in the area of privately financed infrastructure projects, and could be convened in the third quarter of 2004, if the Commission were to so decide at its thirty-seventh session. Possible dates for the next meeting of the Working Group appear in section 17 of the provisional agenda (A/CN.9/541). The Commission may also wish to determine that Working Group I should cooperate closely with Working Group IV (Electronic Commerce) as regards the electronic commerce aspects of procurement legislation.

Notes

¹ *Official Records of the General Assembly, Fourteenth Session, Supplement No. 17 (A/36/17)*, para. 100.

² *Ibid.*, *Thirty-sixth session, Supplement No. 17 (A/58/17)*, para. 229.

³ *Ibid.*, para. 230.

⁴ *Ibid.*

⁵ The Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

⁶ Some such obstacles relate to electronic procurement procedures and might not be fully addressed by uniform legislation, in particular the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001) (A/56/17 and Corr.3, annex II; see also General Assembly resolution 56/80, annex), which are based on the principle of functional equivalence of electronic and paper-based messages.

⁷ The distinction between a multi-supplier framework and a supplier list or electronic catalogue is that with a framework more of the process is completed in the first phase. At this time most or all of the terms are generally agreed, there is a full assessment of suppliers' qualifications, and there is some initial selection between interested suppliers based on sample tenders.