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Recent developments in the area of public procurement— issues arising from the increased use of electronic communications in public procurement

Note by the Secretariat

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I. Introduction

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Procurement Law or the Model Law), and its accompanying Guide to Enactment, are intended to serve as a model for States for procurement legislation and to promote procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process. Legislation based on or largely inspired by the UNCITRAL Model Procurement Law has been adopted or the Model Law has influenced legislation in a large number of jurisdictions, and the use of that law has resulted in widespread harmonization of procurement rules and procedures.
2. 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 Procurement Law to be considered (*Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/58/17)*, para. 229). The Commission further indicated that the work of the Working Group should focus on two main areas in respect of which the Model Law may benefit from some revision: first, issues arising from procurement conducted through electronic means, and, secondly, issues that have arisen during the application of the Model Law itself.
3. This note is the first of two papers prepared by the Secretariat in anticipation of future work by the Commission on the question of public procurement, and considers the issues that have arisen from the increasing use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet. The second of the two papers, entitled “Recent developments in the area of public procurement—issues arising from recent activities and experience of international organizations and lending institutions in the application of the UNCITRAL Model Law on Procurement of Goods, Construction and Services” (document A/CN.9/WG.I/WP.32). For the ease of the reader, this note uses the term “electronic procurement” to refer to the use of electronic communications and technologies in public procurement.
4. This note also considers various policy options that the Working Group may wish to consider so as to address the issues raised by the use of electronic procurement within the UNCITRAL Model Procurement Law. The Working Group may consider that some of these issues can be accommodated within its existing provisions (or through the interpretation of existing laws and rules, including as set out in the Guide to Enactment). However, further provision in the Model Law may be required in some cases. The Secretariat has focused on policy issues rather than on how relevant provisions may be drafted at this stage and, accordingly, this note does not seek to provide drafting suggestions.
5. The Secretariat’s work 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.

II. Recent developments in public procurement—procurement application of electronic communications and technologies

6. Two main technological developments in the last ten years 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, submission of tenders for contracts, or other means of awarding contracts, is conducted online, commonly using the Internet). Such use is rapidly increasing and is being considered under a variety of domestic laws and by such international bodies and agreements as the Asia-Pacific Economic Cooperation (APEC), the European Union (EU), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization's (WTO) Agreement on Government Procurement (GPA).

Potential benefits and possible difficulties of the use of electronic procurement

7. The use of electronic procurement offers many potential benefits, including improved value for money from more rigorous competition in a broader supplier market, better information for suppliers and more competitive techniques, savings of time and costs, improved administration of contracts awarded, and, through the possibility of better monitoring and less direct contact between suppliers and procuring entities, improved compliance with rules and policies and less corruption and abuse. Further, electronic procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process.

8. It is also clear that electronic procurement can operate throughout the procurement cycle, and its potential benefits may extend beyond the procurement arena alone, in that it may yield valuable synergies with other domestic policies. For example, electronic procurement can stimulate a more competitive local supply base by speeding up private sector adoption of modern public procurement practices and promoting standardization. For further general discussion on this topic, see International Trade Centre, Public Procurement Training System, Module 5, E-procurement, at paragraph 3.2, Talero, Electronic Government Procurement: Concepts and Country Experiences, World Bank Discussion Paper (Sept. 2001), section B, and the United Kingdom Office of Government Commerce, A Guide to Procurement for the Public Sector (available at www.ogc.gov.uk), chapter 2.

9. On the other hand, the potential benefits set out above may come into conflict with other socio-economic aims in enacting States, for example, in that improving efficiency through the use of larger contracts and framework agreements may tend to favour large, rather than small and medium-sized enterprises, the promotion of which as an engine of economic growth forms part of many domestic policies.

10. Further, the relative novelty of electronic communications and fears over confidentiality and authenticity may deter suppliers from participating in procurements for which electronic communications are mandatory.

Possible objectives of the Model Law on Procurement of Goods, Construction and Services as regards electronic procurement

11. The potential benefits of electronic procurement summarized above are consistent with the main aims and objectives of the UNCITRAL Model Procurement Law as set out in its preamble, but it has been suggested that the Law may need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States.

12. The extent to which individual States can benefit from electronic procurement will depend on the availability of appropriate infrastructure and other resources, the adequacy of the applicable law on electronic commerce, and the extent of standardization within the State concerned. The general legal environment in a State (as opposed to measures specific to government procurement) may or may not provide adequate support for electronic procurement. For example, laws regulating the use of written communications, electronic signatures, what is to be considered an original document and the admissibility of evidence in court may be an obstacle to the use of e-procurement. These issues are addressed through the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001). The Working Group may therefore consider that such issues should be addressed by measures other than procurement laws in enacting States. For example, the Model Laws referred to above provide for the principle of functional equivalence of electronic and paper-based messages. However, the Working Group may wish to consider whether the Guide to Enactment should recommend that appropriate laws to address such issues should be promulgated in enacting States.

13. A related point is that, as a consequence of rapid technological advance and of the divergent level of technical sophistication in Member States, the Working Group may consider that any additional provisions to the UNCITRAL Model Procurement Law should be technologically neutral. That is, any provisions governing the use of electronic procurement should address the principles and not the mechanics of the relevant communications and technologies. Accordingly, this note does not consider the technologies involved beyond insofar as they affect policy considerations.

14. The main policy issues identified to date concerning the use of electronic procurement arise in the following two areas:

(a) Advertisement of procurement-related information, including the publication of the laws and regulations governing procurement contracts, of solicitation documents and related information and of contract awards; and

(b) The use of electronic communications in the procurement process, including the use of electronic (reverse) auctions.

15. Each of these issues will be addressed by summarizing relevant potential benefits and difficulties, summarizing the extent of current use, briefly considering relevant provisions in other international regimes (where they exist) and in some domestic systems, referring to relevant provisions in the UNCITRAL Model Procurement Law as it currently stands and, finally, setting out some policy options that the Working Group may wish to consider. The provisions considered are those of APEC and WTO, the main trade agreements considered are those of the EU, the draft FTAA, GPA and NAFTA, and the main domestic provisions considered are

those of Brazil, France, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America and, to a more limited extent, Canada and Hong Kong. The latter were selected so as to be representative of different regulatory traditions and also because they have significant experience with electronic procurement practice or regulation.

1. Electronic publication of procurement-related information

A. Background

16. Article 5 of the UNCITRAL Model Procurement Law provides for a general principle of accessible publication for the law itself as well as “procurement regulations and directives of general application in connection with procurement covered by this Law ...”, and continues that such information “shall promptly be made accessible to the public and systematically maintained”. In considering issues of publication of procurement-related information as a whole, the Working Group may consider that it would be appropriate to expand this principle to all procurement-related information in all media.

Potential benefits and possible difficulties

17. Electronic publication of procurement-related information may provide wider dissemination of such information than would be achieved through traditional paper means, by making it more accessible to more suppliers. Procuring entities may make more, and better-quality, information available electronically using the Internet than would be the case using paper media (as to do so may be seen reaching a greater number of suppliers). However, such potential benefits assume efficient Internet search facilities and/or adequate notification when new information is added. Notification itself would in turn require that suppliers be registered in some form. (The interrelated issues of supplier registration and lists, and electronic catalogues, are addressed in document A/CN.9/WP.32, section II.A, entitled “The use of suppliers’ lists”.)

18. Electronic publication and advertising are frequently less expensive than traditional hard copy forms, but the costs of being required to advertise in paper media as well as optionally by electronic means may operate as a disincentive to the use of electronic publication. This disincentive may arise because the benefits of electronic publication may be outweighed by increased costs, especially in the early stages of implementing electronic systems, and if information not previously stored electronically has to be made available in electronic format.

19. A common view is 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 benefits even when electronic means are optional, and mandatory electronic publication may not be suitable in all cases.

20. For example, the use of mandatory electronic publication may limit access to contract information if infrastructure is inadequate, access technically difficult, electronic advertisement displaces more accessible paper means, and if charges are made for access. Although these issues may be regarded as a temporary and

geographically limited phenomenon, the Working Group may consider that they are of significant current concern. A related point arises in that ensuring the equivalence of electronically available information and available paper media becomes more difficult if the former can be updated more or less instantaneously, but the latter requires documents to be sent out to suppliers (which may also be expensive and time-consuming).

B. Contract opportunities

Extent of current use and relevant provisions in international and domestic regimes

21. States that use electronic publication frequently issue advance information about forthcoming projects or general information about contract opportunities with particular entities.

22. Relevant information may appear on both procurement entities' individual web sites, or in centralized electronic systems covering many entities. In those States in which such procurement procedures are regulated, procuring entities are normally required to use a centralized electronic system for publishing information that must be published under the applicable law (such as invitations to participate). However, the Secretariat has not found that requirements to publish contract opportunities as a normal feature of domestic systems.

23. Electronic publication of forthcoming contracts, however, was found in nearly all the domestic systems considered. Procurement regimes have differing methods of publication: 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.

24. The EU regime operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Communities, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard copy form and/or in additional electronic media). The EU regime requires entities to publish general notices of opportunities when their purchases in certain product or service areas exceed a specified amount, plus advance notice of major works projects, although under its new directives this publication is to be made optional. (Entities that publish such information can shorten the time limits for certain tendering procedures. Under the new EU directives, entities will need to publish these advance notices only if they wish to take advantage of such of shorter time limits, and also will be able to publish them on their own web pages rather than through the Official Journal.) Another international instrument, the GPA, contains no obligation to provide further information, either in electronic form or otherwise (although many GPA parties do so in practice).

Position under the UNCITRAL Model Procurement Law

25. Article 24 of the UNCITRAL Model Procurement Law has two limbs, addressing the publication of invitations to participate in a forthcoming

procurement. The first limb requires such invitations to be advertised. The Model Law does not itself specify where such publication is to be effected, but it suggests in parentheses that it should be in an official publication specified by the enacting State when implementing the Model Law (such as an official gazette).

26. The second limb addresses international procurements, and may be viewed as supplementary to the first. It requires an invitation to participate to be advertised in a “newspaper” or “relevant trade publication or technical or professional journal” of wide international circulation.

27. These provisions imply a paper means of publication in either case.

28. On the other hand, article 27 of the UNCITRAL Model Procurement Law considers the information to be included in solicitation documents. Although there is no specific reference to information on use of electronic means, article 27 (z) enables the procuring entity to include requirements that it has established relating to the procurement proceedings, a provision that may be interpreted as providing for the inclusion of information on the use of electronic means of communication and tendering. The Guide to Enactment suggests that States may wish to make further regulations on such matters.

Policy options

29. The Working Group may consider that a specific provision in the UNCITRAL Model Procurement Law addressing the issue of mandatory or optional use of electronic publication as regards contract opportunities may be appropriate, with the aim of providing for wider publication at limited cost.

30. The Working Group may, however, consider that requiring electronic publication may compromise the general principle of accessibility so long as adequate infrastructure remains unavailable in some States. If so, a provision could address publication in terms of accessibility alone, without specifying the technical means to be used, as is the case in the example described above, and appropriate guidance may be provided in regulations and the Guide to Enactment. One advantage of such an approach is that it is technologically neutral, and so future developments in technology would not require further revision to the provisions, and the principle of flexibility in publication medium is preserved. However, a disadvantage is perceptible, in that enforcement of the accessibility requirement may be difficult in many systems, and transparency and public confidence may be correspondingly jeopardized. That disadvantage could be mitigated to some extent by the provision of advice and clarifications in the Guide to Enactment.

31. Nonetheless, as the current text of the Model Law implies paper advertising alone, it is suggested that statements in the Guide to Enactment setting out the benefits, desirability and possible methods of electronic publication alone, rather than further provision in the UNCITRAL Model Procurement Law itself would not be sufficient to promote the use of electronic procurement. If in agreement with that suggestion, the Working Group may wish to consider whether to include an appropriate provision in the text of the Model Law.

32. If the Working Group considers that such a specific provision is warranted:

(a) As regards the first limb, it may choose to redefine “publication” in the first limb to include (optional) or to be effected by (mandatory) electronic publication in accessible electronic media. Alternatively, a parenthetical reference in the text indicating that enacting States should where possible insert a reference to a (specified) electronic medium may be considered;

(b) If the principle of optional electronic publication is preferred, but it is desired to promote mandatory electronic publication in time, electronic publication could be required if it is or becomes possible in the State concerned, or if a threshold of use of electronic communications has been reached. Such a threshold may be set out in regulations (easier to alter in times of change than primary legislation), or discussed in the Guide to Enactment. Alternatively, if the Working Group considers that a consensus on a threshold could be achieved, and so as to preserve transparency, the Working Group may wish to set it out in the UNCITRAL Model Procurement Law itself;

(c) As regards the second limb, it may choose similarly to redefine the terms “newspaper” or “relevant trade publication or technical or professional journal” to be or to include electronic publications, or to take an equivalent to alternative set out in the preceding subparagraph. It should be noted that the use of the Internet for international electronic publication implies near-universal accessibility of the information concerned, but (as noted in para. 17 above), entities and in particular overseas entities may not know where to find it without efficient search engines, nor be aware of changing information.

33. As to the extent of information to be provided, a greater amount of information may be required in cases of electronic publication. However, the Working Group may consider that the requirement to publish substantial information on forthcoming opportunities beyond the announcement of a future contract would be too onerous if such information has historically been maintained only in paper form. Accordingly, and given that the appropriate further information to be published would vary from case to case and State to State, the Working Group may consider that such guidance should be provided in the Guide to Enactment and through recommendations for enacting States’ own regulations rather than in the UNCITRAL Model Procurement Law itself.

34. Additionally, the Working Group may wish to address whether the provision of detailed guidance would be required, either in the UNCITRAL Model Procurement Law or the Guide to Enactment, to cover, inter alia, such issues as flexibility as to the use of a publication medium, who should decide on a publication medium, whether the use of electronic publication only or the non-use of electronic means should be justified, upon what grounds such decisions may be taken, whether such a decision is to be open to review (see, further, section II.E of document A/CN.9/WG.I/WP.32) and who should bear the responsibility of an omission. Finally, the issue of ensuring equivalence between electronic and paper-based publication should be considered.

35. The Working Group may also wish to consider whether the provisions of article 27 (z) are sufficiently broad in their current scope or whether the Model Law should be revised to make specific reference to the use of electronic communications in such circumstances.

C. Publication of the laws and regulations governing procurement contracts

Extent of current use and provisions in other international regimes

36. Many States provide extensive information in electronic form on the legal rules governing procurement, rulings interpreting those rules, and on the procurement policies and procedures of particular procuring entities—in some cases on centralized web sites, in others on those entities' own web sites.

37. Under the GPA Article XIX, certain measures relating to procurement must be published, though no medium is specified. (In the WTO, government procurement is largely excluded from the key non-discrimination obligations of the multilateral agreements, but it is not excluded from transparency obligations of the General Agreement on Tariffs and Trade (GATT) Article X.1 and the General Agreement on Trade in Services (GATS) Article III.1.) Nonetheless, the WTO Secretariat has sought to make available some of the key information on national systems through its own home pages. The draft FTAAA requires in article 10 that such information to be published in print or electronic media that are “widely disseminated and readily accessible to the public as identified in Annex XX” of the draft FTAAA. In addition, it provides that States should “endeavour to develop an electronic information system” that can provide access to such information. The APEC non-binding principles on government procurement (APEC Government Procurement Experts Group, Non-binding Principles on Government Procurement, paragraph 5, available at http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement) suggest that the above information should be available in an accessible medium, and APEC seeks to promote easy access to such information electronically via its own web site.

Position under the UNCITRAL Model Procurement Law

38. Article 5 of the Model Law requires regulations, administrative rulings and directives of general application to government procurement to be “promptly made accessible to the public and systematically maintained”.

Policy options

39. Article 5 appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means, and addresses the issue from the standpoint of accessibility.

40. However, the Working Group may wish to include more detailed provisions on this topic, such as an express provision permitting or requiring electronic publication of all information that the UNCITRAL Model Procurement Law currently requires States to publish. The same policy considerations as set out in paragraphs 29 to 31 above would apply on the questions of optional or mandatory electronic publication, accessibility and thresholds.

41. It may also be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication, and to stress the relative ease of maintenance and updating of information using electronic means.

42. Further, relevant information relevant to potential suppliers (such as internal policies or guidance) that the UNCITRAL Model Procurement Law does not currently require to be published may be brought within the scope of any new provision or guidance given.

D. Publication of contract awards

Extent of current use and provisions in other international regimes

43. Many States are making use of electronic media for publishing extensive information about award procedures that are being conducted or have taken place. For example, Singapore provides information on all bids submitted after bid-opening (available at <http://www.gebiz.gov.sg> under Business Opportunity-> More opportunities -> Tender Schedules) and in Brazil a current draft bill would require entities to publish on the Internet information on both ongoing procurements and awarded contracts, including successful suppliers and their ultimate controlling entities. (Substitute by the Senate to Draft Bill No. 75, from the Lower House, of 2000.)

44. Most international regimes require procuring entities to publish contract award notices giving certain basic information about contract awards, subject to confidentiality provisions. GPA Article XVIII, NAFTA Article 1015.7 and the draft FTAAA Chapter XVIII draft Article 24.3 require entities to publish contract award notices, without reference to specific media (though the latter implies that electronic publication alone may be acceptable). The EU directives require procuring entities to publish contract award notices in electronic form only.

Position under the UNCITRAL Model Procurement Law

45. 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 appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise.

Policy options

46. Similar issues arise as in the question of the publication of the laws and regulations governing procurement contracts.

47. The Working Group may therefore wish to consider whether there should be some provision in the UNCITRAL Model Procurement Law for publishing in electronic form information that the Model Law currently requires States to publish, and does not require States to publish, or refer to the value of such publication in the Guide to Enactment. (As noted above, States are not required to publish entities' internal policies or guidance, which do not constitute "directives" in the sense of the Model Law.)

2. Use of electronic communications in the procurement process

Background

48. In addition to the legal issues set out in paragraph 12 above, enacting States may be interested in ensuring that procurement contracts concluded electronically within their domestic systems are fully enforceable, and to protect the corresponding interests of their suppliers. To the extent that they are suitable for regulation, these latter questions may fall to be dealt with by specific provisions in government procurement law rather than in other legislation in those systems.

49. From this perspective four main regulatory issues arise:

(a) Whether legal rules on government procurement should permit or require procuring entities to use electronic communications by consent with suppliers;

(b) Whether those rules should permit or require procuring entities to require suppliers to use electronic communications;

(c) Whether those rules should provide that suppliers may require procuring entities to use electronic communications; and

(d) Whether those rules should attach conditions to the use of electronic means to safeguard the objectives of the procurement law, so as to prevent the electronic means chosen from operating as a barrier to access, to secure confidentiality, to ensure authenticity and security of transactions, and the integrity of data.

50. Each of these issues will be considered in the sections that follow.

51. A further issue is how a requirement for tenders to be in “writing” should be addressed. It is noted that measures to define “writing” or “written” communications as including electronic means have appeared (sometimes along the lines of the Model Law on Electronic Commerce) in general or government procurement law. The Working Group may wish to recommend, for example in the Guide to Enactment, that enacting States address such matters in their domestic systems.

Extent of current use and provisions in other international regimes

52. Many international regimes include or propose provisions recognizing the reality of the use of electronic communications in procurement, including mandatory electronic communications.

53. There are proposals for amending the EU and GPA regimes that currently have limited provisions concerning the use of electronic communications, if at all, so as to allow the use of electronic communication by consent, to allow procuring entities to insist on them, and to introduce controls, such that electronic means used are accessible, and to ensure authenticity, confidentiality and integrity.

54. Under NAFTA, article 1015 (1) provides that tenders by any electronic means are permitted, but it is silent on mandatory electronic communications. The draft FTAAA assumes that procuring entities may use electronic means and also seems to envisage that they may require suppliers to deal electronically. The

APEC non-binding principles on government procurement do not deal explicitly with electronic communications in the procurement process, except to mention the value of the Internet as a transparent and non-discriminatory means for providing information and publicizing procurement rules. However, promotion of e-procurement systems among members has been one of APEC's main recent objectives.

55. In France, procuring entities may use electronic means for sending various documents, without the agreement of suppliers, but the converse will not be true until January 2005. Controls address the certainty of the date of receipt, authenticity and confidentiality. In Hong Kong, electronic tendering is also now used, but suppliers are allowed the option of submitting a hard copy. In Singapore, electronic communication is used extensively and is sometimes mandatory, including for the submission of tenders. In Brazil, too, procuring entities in practice require suppliers to use electronic means to communicate. In the United Kingdom, mandatory use of electronic communications (at the discretion of the procuring entities themselves) is common. Controls cover standards for authentication and confidentiality, in government activity generally. Similarly, in the United States, at the federal level the means of communicating with suppliers is at the discretion of procuring entities, some of which have required tenderers to deal electronically.

Position under the UNCITRAL Model Procurement Law

(a) Use of electronic procurement by consent

56. Article 9 (1) of the Law addresses the form of communications to be used in the procurement process. It provides that communications are to be in a form that provides a record (or, as an alternative for most communications, otherwise to be confirmed in a form that provides a record under article 9 (2)), a provision that could include electronic means of communications. The use of electronic means of communications by consent is therefore permitted.

(b) Mandatory use of electronic communications

57. Article 9 (1) states that the general rule on form of communications is "subject to ... any requirement of form specified by the procuring entity" when first soliciting participation. Although this article might be interpreted as authorizing mandatory electronic communications, background papers from the sessions of Working Groups at which the (then) draft UNCITRAL Model Procurement Law was considered indicate the intention at the time was to permit the use of electronic communications by consent only. See, for example, the views of the Australian and Canadian delegations on article 9 of the draft Model Law, found in UNCITRAL's 1993 Yearbook, Vol. XXIV (available at www.uncitral.org, under Yearbook Volume XXIV, Item I, document D, "Model Law on Procurement: compilation of comments by Governments" (documents A/CN.9/376 and Add.1 and 2)), and paragraphs 82-90 of the "Report of the Working Group on the New International Economic Order on the work of its fifteenth session (New York, 22 June-2 July 1992)" (document A/CN.9/371), available under same reference.

58. Article 9 (3) states that the procuring entity shall not discriminate against or among suppliers on the basis of the form in which they transmit or receive

communications, and it is clear that mandatory electronic communications could be seen as infringing this article. For example, even if time limits for submitting requests to pre-qualify or for submitting tenders are the same for all suppliers, it is *prima facie* discriminatory under article 9 (3) if these time limits are set with regard to the sufficiency of time for those communicating by electronic means only. On the other hand, formally different treatment may in fact ensure equality of treatment in practice.

59. In addition to questions relating to the fair and non-discriminatory treatment of suppliers, the mandatory use of electronic communications needs to be considered from the point of view of the formal requirements in the UNCITRAL Model Procurement Law. A written requirement for communications is imposed only in the case of tenders which, under article 30 (5)(a), are to be submitted “in writing, signed and in a sealed envelope”, or “in any other form specified in the solicitation documents”, subject to certain conditions. Thus electronic submission of tenders is permitted when both parties accept it, but whether the “other form” in article 30 (5)(a) may include mandatory electronic submission is not expressly stated. Article 30 (5)(b) specifically provides for the right of a supplier to submit a tender by the “usual” method set out in article 30 (5)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment, this is an “important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as [Electronic Data Interchange (EDI)]”. Consequently, it appears that suppliers cannot be required to submit a tender electronically under the Law as currently drafted.

(c) Controls over the use of electronic means

60. Apart from the rules on the requirement for a record in article 9 (1), and general transparency provisions, the UNCITRAL Model Procurement Law does not provide any explicit controls over use of electronic means, other than the case of electronic submission of tenders.

Policy options

61. The Working Group may find it desirable to apply the same standards and principles in electronic as in paper-based procedures—for example, to ensure tenders remain confidential during the tendering procedure—and also take steps to ensure that suppliers and the public have the same degree of confidence in electronic procedures as in paper-based procedures. The specific provisions that will be included in a State’s procurement law on these matters will depend to an extent on the relevant background law, such as the treatment of and legal framework for electronic signatures in a particular country.

62. Specific areas that the Working Group may wish to address include:

(a) Possibility for the procuring entity to require suppliers to use electronic communications

63. There are two aspects to this issue: first, whether procuring entities should be able to require the use of electronic communications in general and, secondly, to require the electronic submission of tenders. Recalling that market conditions have

changed since the prohibition on mandatory electronic tendering was adopted, and that proprietary EDI systems have been replaced by the Internet, it could be argued that for some States, in some circumstances, a requirement for electronic tendering and other electronic communications, is a reasonable commercial requirement that also promotes the objectives of the UNCITRAL Model Procurement Law. The Working Group may also consider that it is important the Model Law should not operate or be seen as a barrier to the most efficient use of electronic communications, nor should it lag behind practical developments in its approach to the use of mandatory electronic communications.

64. However, the Working Group may also wish to recognize that the current circumstances in some States are such that requiring the use of electronic communications would not be desirable.

65. The Working Group may therefore wish to acknowledge the fact that different approaches are suitable in different countries and circumstances, that circumstances may continue to change, and to consider allowing for appropriate options regarding the mandatory use of electronic communications in the UNCITRAL Model Procurement Law.

66. One possible option might be to provide that the use of electronic communications may not be imposed as a general requirement except to the extent authorized in procurement regulations. The Guide to Enactment could then address issues to be considered in the drafting of relevant regulations, such as the issue of timing (that is, when or under what circumstances the prohibition should be lifted, though it may be appropriate to encourage the use of electronic communications in the interim by providing that electronic communications are permitted and that they may be required in certain (specified) circumstances). This approach would also have the advantage that the regulations could be adapted to address the issues in the way most suitable for each State, bearing in mind the matters set out in the preceding paragraphs. For example, the regulations may provide which procuring entities could make use of mandatory electronic tenders, and in what circumstances and under what conditions, possibly subject to a justification and/or approval requirement.

67. Alternative options may be to allow mandatory electronic communications in the UNCITRAL Model Procurement Law itself, subject to appropriate conditions (such as a justification requirement), to allow mandatory electronic communications at the discretion of procuring entities (with or without a justification requirement), or only in defined and limited cases—for example, for particular types or methods of procurement.

68. The Working Group may consider that setting any definitions and limits to the use of mandatory electronic communications, particularly in the UNCITRAL Model Procurement Law itself, may be viewed as rigid and difficult to adapt to changing market conditions. The Working Group may therefore adopt the position that the Model Law should continue to enable those States that wish always to give suppliers the right to communicate in non-electronic form to do so, but to allow a change in that stance to be effected by regulation. Additionally, the Working Group may wish to allow States to require suppliers to use electronic communications in formal tendering, perhaps with the decision on whether to do so to be addressed in regulations, or to be left for each procurement resting with the procuring entity.

69. In all cases, the Guide to Enactment may usefully provide detailed guidance on the matter.

(b) Possibility for suppliers to require the procuring entity to use electronic means

70. The Working Group may consider that to allow suppliers to require the use of electronic means has the potential benefits of efficiency but also the possible difficulties noted in paragraph 20 above.

71. The Working Group may also wish to consider to provide that allowing suppliers to require the use of electronic communications does not affect the right of procuring entities to insist on the use of particular means of communication. The aim of such a provision would be to preserve the primacy of the procuring entity's position. It may also wish to address in the Guide to Enactment the issue that States are likely to wish to give suppliers the right to use electronic communications in certain cases, perhaps to be set out in regulations on this subject.

72. Further, the Working Group may consider that the differences in use of electronic communications in different States indicate that any such right would have to be limited to cases in which the procuring entity has reasonable access to the electronic means chosen. As with the case of procuring entities, options in the UNCITRAL Model Procurement Law may be an appropriate course.

73. The Working Group may alternatively consider whether to include a general provision that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement, and to set out more detailed rules on what kind of means can be used and the controls that must exist in the Guide to Enactment.

(c) Discrimination

74. The Working Group may also wish to clarify the provisions of article 9 (3), for the reasons set out in paragraph 58 above.

(d) Controls over the use of electronic means

75. The Working Group may wish to consider the desirability of establishing controls as regards security, confidentiality and authenticity of submissions, and integrity of data. The Guide in its commentary on article 30 suggests that where the possibility for using electronic tendering exists, additional "rules and techniques" may be needed for some of these matters, and also to deal with other issues such as the form the tender security will take.

76. However, the Working Group may wish to consider whether the general principles applicable to all means of communication should be set out in the UNCITRAL Model Procurement Law.

77. The Working Group may wish to consider whether the following would constitute appropriate guiding principles:

(a) That the means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle

that would allow a requirement for either paper-based or electronic communications in appropriate circumstances);

(b) That it should be possible to establish the origin of communications (authenticity);

(c) That the means and mechanisms used should be such as to ensure that the integrity of data is preserved;

(d) That the means used should enable the time of receipt of documents to be established, when the time of receipt is significant in applying the rules of the procurement process (i.e. for submission of requests to participate and tenders/proposals);

(e) That the means and mechanisms used ensure that tenders and other significant documents are not accessed by the procuring entity or other persons prior to any deadline, so as to prevent procuring entities' passing information on other tenders to favoured suppliers, and to prevent competitors from gaining access to that information themselves (security);

(f) That the confidentiality of information submitted by or relating to other suppliers is maintained.

78. The Working Group may wish to adopt a formulation that covers all means of communication, perhaps using the concept of functional equivalence for electronic communications (so as to address, for example, the requirement that paper tenders must be signed and sealed), and to consider the issues of storage and handling of electronic data. Such a formulation could be found in the UNCITRAL Model Procurement Law, or as guidance as to appropriate regulations to be issued pursuant to the Model Law in the Guide to Enactment.

3. Electronic (reverse) auctions

Background

79. An electronic reverse auction, of which there are several variants, is an increasingly popular tendering process. A reverse auction is a tendering procedure in which suppliers are provided with information on the other tenders, and can amend their own tenders on an ongoing basis in competition with those 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.

80. 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 built in to the auction phase, or evaluated in a separate phase in the overall procedure.

Potential benefits and possible difficulties

81. Electronic auctions pressurize suppliers to offer their best possible price, and provide an incentive to the procuring entity to specify non-price award criteria precisely. They operate in a transparent manner (in that information on other tenders is available and the outcome of the procedure visible to participants, matters that also disfavour abuse and corruption), can also speed up the tendering process and reduce transaction costs. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs.

82. However, there are also possible difficulties, of which the most often cited are encouraging an excessive focus on price. Moreover, the speed of the electronic auction is such that there may be an issue of “auction fever”: that is, the suppliers may be induced to offer a price that is not realistic. This issue can lead to significant problems during the administration phase if the contract is awarded to such a supplier. A possible solution to this issue would be to select with care the types of contracts for which this procurement method is suitable.

Extent of current use and provisions in other international regimes

83. Some States and international bodies have begun to regulate or provide guidance on the use of electronic reverse auctions. Such guidance addresses both the mechanics of holding an electronic auction and legal issues such as the ability to make substantial changes to tenders—including to the price—after submission.

84. At the international level, there is nothing at present in the GPA, EU directives or NAFTA on electronic reverse auctions, nor is this method mentioned in the draft FTAA or APEC (perhaps unsurprising, since the latter regime describes general principles rather than detailed rules). However, an explicit provision on electronic reverse auctions is included in the current draft revisions of the GPA (Article XI.3 bis of the draft text as at 4 November 2003) stating that this procurement method may be used and regulating its operation. The new EU procurement directives also include a specific provision for electronic auctions, to remove prior legal uncertainty and to apply relevant controls. (See, in particular, new public sector directive Article 54; new Utilities Directive Article 56.)

85. At the national level, for example, Brazil and France have enacted legally binding provisions. (In Brazil: Federal Law No. 10.520/2002 of 17 July 2002, Article 2 (1), authorizing electronic auctions to be carried out in accordance with rules to be specified, and Decree No. 3697, of 21 December 2000, laying down precise rules for conducting electronic auctions; and in France, Public Procurement Code Article 56 (3) and Decree No. 2001-846 of 18 September 2001.) In the United States, on the other hand, regulators have not adopted specific legal rules or formal guidance to address them. In the United Kingdom, rules on public procurement are mainly limited to those of EU law, which does not at present regulate electronic reverse auctions. However, the British Government considers that EU law allows scope for such auctions, has endorsed their use and has issued guidance (“eAuctions” at <http://www.ogc.gov.uk/index.asp?docid=1001034>). Anecdotal

evidence suggests that the lack of regulation in the United Kingdom and the United States deters some procuring entities from using such auctions.

Position under the UNCITRAL Model Procurement Law

86. The UNCITRAL Model Procurement Law does not address auctions. The tendering method used for goods and works procurement assumes a single-tendering stage, and prohibits substantial changes to tenders—including to the price—after submission (article 34 (1)(a)). It also prohibits procuring entities from disclosing tender information (article 34 (8)), thus preventing auctions by agreement between the entity and suppliers. The provision conferring a right to tender in writing in a sealed envelope also precludes an auction in the absence of consent by the suppliers (articles 30 (5)(a) and (b)). The same rules apply to restricted tendering (article 47 (3)).

87. The grounds for using non-tender procedures for procuring goods and works will only rarely apply to procurements for which an auction is suitable, even if it is technically possible to accommodate an auction phase within the legal parameters of some of those procedures. The same observations can be made of the UNCITRAL Model Procurement Law's procedures for procuring those services that cannot be viewed essentially as a commodity, sometimes known as intellectual services, whose non-price criteria are proportionately significant and commonly viewed as difficult to quantify.

Policy options

88. As noted in paragraph 82 above, electronic reverse auctions are not universally considered as a suitable procurement tool for all types of procurement. Nevertheless, and given their increasing use, the Working Group may wish to consider the desirability of making provision for them in the UNCITRAL Model Procurement Law. Furthermore, the Working Group may also wish to consider how far other types of auctions, not currently regulated under the Model Law, should also be subject to its provisions.

89. The Working Group may therefore first wish to address the types of procurement that may be and may not be suitable for an electronic reverse auction procedure. For example, the Working Group may wish to recognize that the potential benefits of auctions will accrue only to the extent that an initial common specification against which tenders are submitted can be drafted, and for procurements for which non-price criteria can be effectively quantified. The Working Group may therefore wish to consider whether to provide guidance as to the types of services that would be suitable for auction procedures in the Guide to Enactment, perhaps in conjunction with optional provisions in the UNCITRAL Model Procurement Law itself.

90. If the Working Group considers that provision should be made for electronic reverse auctions in the UNCITRAL Model Procurement Law itself, the issue arises as to whether those provisions should be presented as a version of traditional procurement methods or as a distinct method. It has been suggested that treating such auctions as a version of traditional tendering would require the introduction of additional rules to address auctions' special features. Those features include the

publication of prices during the tender process (otherwise prohibited) and a two-phase evaluation of tenders. However, to do so may be viewed as more appropriate than treating electronic auctions as a separate tendering method requiring new and specific provisions.

91. If so, the Working Group may wish to ensure procedural and substantive consistency between the auction procedures and those applied by the UNCITRAL Model Procurement Law to non-auction procurements, such as tendering—the general procurement method for goods and construction. If so, the Working Group may wish to provide, for example, an auction procedure should follow the pattern of the “tendering” or “restricted tendering” methods of procurement, adapted to include an auction phase (in relevant cases, it may also be modelled on the pattern of a two-stage tendering procedure).

92. Separately, the Working Group may then wish to include provisions regarding the conduct of the auction phase either in the UNCITRAL Model Procurement Law or to provide guidance in the Guide to Enactment as to the content of regulations to be issued pursuant to the Model Law. The Working Group may also wish to consider the issue in the context of whether the Law is to remain “technologically neutral”, as is explained in the discussion on electronic publication in paragraph 13 above.

III. Recommendations

93. In this first note for the sixth session of the Working Group, considering issues arising from electronic procurement, the Working Group is presented with a description of the main such issues identified to date. It is recommended that the Working Group identify those issues that it wishes to address in this regard, and provide guidance as to the policy objectives that should be reflected in draft provisions that the Working Group might wish to request the Secretariat to prepare for future consideration by the Working Group.
