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Recent developments in the area of public procurement—issues arising from recent experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services

Note by the Secretariat

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I. Introduction

1. This note is the second of two notes prepared by the Secretariat in anticipation of future work by the Commission on the question of public procurement. The notes address issues as regards the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Procurement Law or the Model Law), and this note considers recent activities and experience of international organizations and lending institutions, some of which are currently in the process of reviewing their rules and regulations in the field of public procurement. The first of the two papers is entitled "Recent developments in the area of public procurement—issues arising from the increased use of electronic commerce for public procurement" (A/CN.9/WG.I/WP.31), and sets out the background to the proposed inclusion of procurement law in the work programme of the Commission. 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.

2. The above-mentioned institutions' activities and experience in the application of the UNCITRAL Model Procurement Law highlight the need for coordination of efforts by international bodies active in the field of procurement. In this regard, the Commission has indicated that the Model Law may benefit from some revision (A/58/17, para. 229). Consistency with other international and regional public procurement regimes in use should, while respecting the basic policies and principles underlying the Model Law, tend to increase the use of the Model Law, and thereby further the aim of harmonization.

3. 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. The Secretariat has considered the experience of and relating to 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's) Agreement on Government Procurement (GPA). The main domestic provisions that have been 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, selected so as to be representative of different regulatory traditions and also because they have significant experience with electronic procurement practice and regulation.

II. Possible areas for review in the UNCITRAL Model Procurement Law

4. The Working Group is referred to the Secretariat's note A/CN.9/553 and also to two notes to the thirty-sixth session of the Commission, documents A/CN.9/539, and A/CN.9/539/Add.1, which set out further background information regarding the possible areas for review. This note will consider the following issues, foreshadowed in the earlier notes:

(a) The use of suppliers' lists;

(b) Framework agreements;

(c) Procurement of services;

(d) Evaluation and comparison of tenders;

(e) Remedies and enforcement; and

(f) Other matters (legalization of documents, alternative methods of procurement, community participation in procurement, and the simplification and standardization of the Model Law).

A. The use of suppliers' lists

Background

5. 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. A supplier may choose to register on an optional list but not doing so does not prejudice eligibility for a particular contract. Admission of a supplier to a list may involve a full assessment of the supplier's suitability for certain contracts, some assessment or no assessment at all. However, there will normally be an initial assessment of some qualifications, leaving others to be assessed when the supplier is considered for specific contracts.

Position under the UNCITRAL Model Procurement Law

6. The UNCITRAL Model Procurement 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. Article 6(3) of the Model Law 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. However, the use of optional lists may in practice result in the exclusion of non-registered suppliers, for example in the use of the relatively informal request for quotations procedure, and operate effectively as a mandatory list.

7. The Model Law does not allow advertisement of a list to serve as a substitute for advertising a specific contract. As regards (open) tendering and two-stage tendering, for example, article 24 requires entities to advertise to "solicit tenders" or "applications to pre-qualify", indicating that an advertisement is necessary for each procurement (although it could be divided into lots).

8. At the time of the adoption of the Model Law, the use of suppliers' lists was considered to be both undesirable and diminishing in frequency. 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 – that is, product catalogues with single or multiple suppliers,

which are compiled following a traditional tender. Under the tender, the suppliers are selected to provide an electronic catalogue from which the procuring entity can choose and order goods and services, and this procedure may also lead to more procurement being conducted in a way that involves de facto reliance on suppliers' lists.

Potential benefits and possible difficulties

9. In those countries that use suppliers' lists, it has been found that the lists assist in streamlining the procurement process, leading to cost savings, wider competition, and more efficient information management, which benefit both purchasers (as regards administration of earlier contracts, for example) and suppliers. There may also be advantages arising from consistency in policies regarding the qualification of suppliers. However, the costs of registration on the lists must be taken into account (including the costs of assessment of qualifications, some of which may be unnecessary if suppliers that will not qualify seek to register). The cost-benefit analysis is likely to vary from enacting State to State.

10. 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, often carried out in an ad hoc way that favours suppliers known to the procuring entity. The particular 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.

11. Mandatory lists can increase the above advantages. For example, more time may be saved with mandatory lists, as an entity can avoid considering any new suppliers within the time scales of a specific procurement. Mandatory lists can also facilitate close relationships – for example, providing a means for working with the few best suppliers to improve quality – and can allow entities to assess qualifications more fully than is possible within the time frame of a specific procurement. However, they also pose significant risks in potentially restricting competition by excluding suppliers from forthcoming contracts. New suppliers or foreign suppliers who do not frequently sell to that particular government, for example, may not be registered. Mandatory lists may compromise confidence in public procurement, as they may reduce transparency and the close relationships between suppliers and procuring entities may be negatively perceived. Their operation may also involve significant administrative costs.

12. Advertising a list rather than specific contract opportunities can also be one way of giving publicity to an entity's requirements so that suppliers can respond, reducing advertising costs and time scales. However, dispensation from normal advertising requirements for each future procurement would normally be required.

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

13. Suppliers' lists are used in many States and in international procurement regimes, and in the cases of larger contracts are sometimes mandatory. 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. Examples include the GPA, which allows the use of mandatory and optional lists (with controls governing such use other than in the case of small, limited tendering or non-competitive urgent procurement). NAFTA allows for the use of lists, including mandatory lists, under rules and controls very similar to those of the GPA. (See, in particular, NAFTA Article 1011(2) allowing use of lists to select suppliers in restricted procedures, and Article 1009(2) containing controls). The EU procurement directives normally prohibit mandatory lists for competitive procurements (other than in the utility sectors, which (including publicly-owned procuring entities) may use mandatory lists with controls similar to those of the GPA). There are no controls over the use of optional lists in the directives. (For a detailed analysis, see "Framework Purchasing and Qualification Lists under the European Procurement Directives" (1999) 8 Public Procurement Law Review 115-146 and 168-186.)

14. The controls in these regimes generally include the following points: that registration should be permanently open, that the time taken to register suppliers should be reasonable, and that registration through mail and (where feasible) the Internet should be permitted.

15. The World Bank and other multilateral lending institutions do not allow the use of mandatory lists in international competitive bidding procedures, but the possibility of mandatory lists for national suppliers in some cases may be accepted (with controls similar to those of the GPA). The APEC non-binding principles on government procurement assume that APEC members may maintain such lists subject to the application of APEC's general principles of effective competition. (See, further, APEC Government Procurement Experts Group Non-binding Principles on Government Procurement, available at http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement.)

16. The EU, GPA and NAFTA rules all permit advertisement of lists as a substitute for advertising specific contracts to some extent, but the development banks do not.

Policy options

17. The fact that the Model Law does not specifically address suppliers' lists indicates that, at the time the Model Law was drafted, the Commission was not in favour of promoting the wide use of suppliers' lists, noting that they may operate in practice as mandatory lists even where they are stated to be optional. This approach was in line with the policy of many international lending institutions, which do not regard the use of mandatory lists as good practice so far as open tender procedures are concerned. At the same time, however, the Commission did not wish to go as far as to express a recommendation against their use. Experience has shown, however, that many States continue to use mandatory lists for various reasons. The Working Group may therefore wish to consider whether it would be desirable to formulate specific provisions on them in the UNCITRAL Model Law or guidance

on their operation in the Guide to Enactment that accompanies it, with a view to contributing to enhanced transparency in the use of suppliers' lists.

18. Furthermore, the Working Group may wish to consider whether 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 Procurement Law. The aim 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.

19. The Working Group may also wish to recognize that informal records of potentially suitable suppliers may be maintained by procuring entities. If the definition of a list is not sufficiently broadly defined, then entities may escape the controls by keeping an informal list, and the controls may not therefore be of universal application, a matter that may affect public confidence in the procurement process.

20. If the Working Group were to consider that the use of mandatory lists should also be permitted (with the aim of improving efficiency), it may decide that new articles should include controls to secure competition and transparency. For example, the Working Group may wish to provide for the use of mandatory lists for procurements not subject to tendering procedures, to provide that suppliers not yet registered must be considered if there is sufficient time to complete the registration process and to provide that the existence of the lists must be advertised with reasonable frequency in the place in which a county's procurement contracts are normally advertised. Further, it may consider that an explicit provision to the effect that all suppliers are given an opportunity to become aware of the lists and so to register, to apply for qualification at any time, to be included within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and to be notified of any decisions to terminate a list or remove them from it should be included. Finally, the Working Group may consider it desirable to provide that registration must not be used with the intention of keeping suppliers of third parties off a suppliers' list.

21. Noting the divergent level of use of suppliers' lists, the Working Group may wish to address the extent to which the provisions should be included in the Model Law itself, or (perhaps with appropriate model provisions accompanied by comments in the Guide to Enactment) they should be left to implementing regulations in individual States. Further, the Working Group may wish to consider whether and, if so, in what circumstances, advertising the existence of a list, rather than future contracts, should be permitted under the Model Law.

22. The Working Group may also wish to provide guidance in the Guide to Enactment as to the policy considerations affecting and practical operation of the use of all types of lists, so as to stress the need to ensure that their operation is not used as a barrier to full and open competition as the norm in procurement.

B. Framework agreements

Background

23. Framework agreements (also known as supply arrangements and indefinite-delivery/indefinite-quantity contracts) can be defined as agreements for securing the repeat supply of a product or service over a period of time, and which involve a call for initial tenders against set terms and conditions, the 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, nature or timing of their requirements.

24. Framework agreements are widely used and in some cases are regulated by national law. They are also regulated by some regional bodies or international lending institutions.

25. Framework agreements may be concluded with a single supplier or multiple suppliers. Single-supplier agreements may bind the procuring entity to purchase, may 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. A non-binding arrangement is common if arrangements are made for the benefit of several procuring entities—for example, by a central purchasing agency—such that the procuring entities can reserve the right to make their own arrangements.

26. Multi-supplier arrangements involve an initial process to select several potential suppliers that can supply the products or services on the terms and conditions of the procuring entity (the first stage). 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 stage). The methods used for the selection of the supplier(s) in the second award phase vary widely among the entities that use them, notably in that the degree of further competition varies significantly. So, for example, the second phase may involve a further round of tenders, or the selection of the supplier whose initial tender offers the best value for the particular requirement, or the rotation of suppliers. A second round of tenders may be restricted to the submission of a price against pre-existing specifications, and the qualifications of the suppliers will have been assessed in advance, and so may be referred to as a "mini-tender". Alternatively, suppliers may be permitted to revise their prices at any time, and the procuring entity may then select the supplier that offers the best value at the time of each requirement, a process often described as "ongoing alteration of tenders". These variations reflect the aim of achieving a balance between the aims of competition (so as to promote value for money), openness and transparency in the approaches chosen as against the reduction in procedural costs of the methods themselves is reflected in these variations.

Position under the UNCITRAL Model Procurement Law

27. The UNCITRAL Model Law contains no specific provisions on framework agreements. Nevertheless, single-supplier and some multi-supplier agreements (that is, those by which suppliers that offer the best value for each requirement are

selected at the second stage) could arguably be operated under existing procedures, for instance, if they were treated as tendered procurements divided into lots. However, under the Model Law the tender solicitation documents are required to state the quantity of goods required though accompanying regulations may permit an estimate alone, and under a framework the quantity is normally unknown.

28. The Model Law's tendering procedure also does not contemplate arrangements that involve entering into a binding contract only when orders are placed. In particular, article 36 (4) provides that a contract arises when a tender is accepted, and does not provide for contracts that will arise only when the procuring entity later decides to make specific purchases.

29. It would also appear that the requirement for publishing a public notice of a "contract award" under article 14, which applies to all procedures, is not suited for providing publicity for frameworks. There is, on the other hand, no requirement to publish the results of a competition to choose framework suppliers (as it does not involve a contract award), nor, arguably, to publish details of contracts awarded to the various suppliers. Indeed, many orders may escape publicity altogether because they would fall below relevant thresholds.

Potential benefits and possible difficulties

30. The potential benefits of using frameworks, rather than commencing a new procurement procedure for every requirement, include the saving of procedural costs and time in procurement. In particular, the arrangements avoid the need to advertise individual contracts and to assess suppliers' qualifications for every order placed, as this phase of the process is carried out once only at the conclusion of the framework agreement.

31. The potential 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 new procedure for each requirement, 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 the 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).

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

32. One of the main concerns as regards the regulation of framework agreements is to limit the duration of such agreements, so that the price obtained remains current and competitive.

33. The methods of procurement available for operating framework agreements may depend on the general rules on financial thresholds (that is, thresholds below which procedures other than tendering, such as the informal request for quotations, 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 (for example, procuring entities

may be required to aggregate their purchases over a given period of time, whether they are made under one framework agreement or not).

34. The EU, GPA and NAFTA current rules do not make express provision for frameworks, but it is considered possible to fit most types of framework arrangements within the rules, other than, for example, those that involve alteration of tender prices after the first stage or simple rotation of suppliers. The recently adopted EU directives address frameworks specifically and apply controls, notably limiting them to four years' duration, apart from exceptional and duly justified cases. The EU also has strict rules requiring the aggregation of similar purchases made over a period of time, such that many purchases of standardized items are subject to the directives' formal tendering procedures, and it is not possible to make repeat purchases under informal request for quotation-type procedures.

35. The non-binding form of single-supplier framework is also often used in practice in many domestic systems to ensure that the procuring entity can change suppliers if the market price changes. For example, in Canada, Hong Kong, Singapore and the United Kingdom, the use of frameworks is not specifically regulated, and it is common to select only a limited number of suppliers at the first stage, based on the initial tenders. There are several types of frameworks in use in the United States, whose notable features include the fact that negotiations can form part of a mini-tender exercise in the second phase, that the ordering process is largely immune from bid protest review, and awards need not be published. In France, frameworks are regulated expressly: in essence, frameworks are permitted when the timetable or scope of work cannot be fully regulated in the contract. In Brazil, there is a strong preference for single supplier arrangements, the use of multi-suppliers arrangements is limited and frameworks are limited to one year for goods and one year, but with a possible extension of up to one further year, for services.

36. In various systems there are also provisions regulating the point at which the number of suppliers may be limited if there is to be a mini-tender at the second stage (ranging from unlimited number of suppliers at both stages, limiting the number admitted to the framework but then including all at the second stage, admitting many to the framework but including only some at the second stage, and limiting numbers at both stages).

Policy options

37. Given the increasing use of frameworks, and noting that other international bodies do or are to deal with them expressly, the Working Group may wish to consider whether it would be desirable to make specific provision for them in the Model Law.

38. Matters that the Working Group may wish to consider in this context include whether it is desirable to address the issues of when a binding contract may come into force in a framework arrangement, thresholds and aggregation of purchases (noting that thresholds under the Model Law are currently left to the implementing regulations in the individual enacting States), the duration of frameworks, estimating and exceeding estimated quantities, and changes of price. The issue of advertising either or both stages of a framework may also be a matter to be addressed in article 14 of the Model Law. Further, the Working Group may wish to

include model provisions and guidance in the Guide to Enactment, such as model implementing provisions addressing some or all of these matters.

39. As regards multi-supplier frameworks in particular, further provision would be required if the Working Group were to wish to provide for the second stage of the procurement to involve mini-tenders, the ongoing alteration of tenders or proposals, or the award of contracts other than on a competitive basis at the second stage (such as a rotation basis, which may be appropriate if the security of supply is a major constraint). Addressing how to limit the number of suppliers at either stage, if at all, may also be an issue that the Working Group may wish to consider.

40. The Working Group may also wish to consider whether any of such matters would be more appropriately addressed in enacting States' regulations, for which guidance could be provided as models provisions in the Guide to Enactment. For example, the Guide could provide a brief outline of the circumstances in which multi-supplier frameworks are useful, including in the context of centralized purchasing, the key issues that a procuring entity (which may be acting as a central purchasing agency for government departments or on its own behalf) needs to consider for both single and multi-supplier arrangements, and may wish to include in its regulations (such as the relationship between a centralized procurement agency and user entities, the procedure for placing orders, the steps needed for a procurement contract to become binding, and the points at which decisions as to the procurement should be publicized).

C. Procurement of services

Background—the provisions in the UNCITRAL Model Procurement Law governing the "principal method for procurement of services"

41. The premise of the UNCITRAL Model Procurement Law for the procurement of services is that the procurement will be undertaken using different methods from the procurement of goods and construction. The main features of the principal method for procurement of services provide for tendering when it is feasible to formulate detailed specifications and tendering is considered "appropriate", and for other methods used in procuring goods and construction if to do so would be more appropriate, and if conditions for their use are satisfied (article 18 (3) of the Model Law).

42. The selection procedure if tendering is used may involve subjecting all tenders that receive a technical rating above a set quality or non-price threshold to a straightforward price competition (article 42), may involve the procuring entity's negotiating with suppliers, after which suppliers submit their best and final offers (article 43), or may involve the procuring entity's holding negotiations solely on price with the supplier that obtained the highest technical rating (article 44). Under this latter procedure, the procuring entity may negotiate thereafter with the other suppliers in sequential fashion on the basis of their rating, but only after terminating negotiations with the previous, higher-ranked supplier.

43. This approach may have been influenced by the fact that a Model Law on Procurement of Goods and Construction was adopted in 1993, which covered only goods and construction. The Model Law on Procurement of Goods, Construction

and Services, which was adopted a year later in 1994, includes additional provisions on procurement of services other than construction, which were then formulated as a separate procurement method.

44. Article 42 of the UNCITRAL Model Procurement Law provides for the selection of suppliers for the provision of services based on a threshold for quality and other non-price criteria, and thus forms the basis for a quality-based method of selection, useful in the provision of intellectual services. It has been noted that this approach to evaluation, which has the advantage of flexibility and employs qualitative and negotiated methods, has in practice worked satisfactorily for certain types of procurement, notably intellectual services (that is, services that do not lead to measurable physical outputs, such as consulting and other professional services). However, questions have been raised about the appropriateness of this method for services where quality and quantity specifications may be provided by the procuring entity in advance of the procurement concerned. It has been argued that considering services separately led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.

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

45. The EU directives provide for more flexible procedures for the procurement of services than for goods and construction, in that they allow the use of a flexible form of competitive procedures (referred to as the "negotiated procedure") in exceptional cases, and the exceptions arise more frequently for services than for goods and construction—for example, when it is not possible to draw up specifications with precision. This situation applies in particular to intellectual services and financial services, but its use is not limited to those cases. The GPA and NAFTA provisions give entities a free choice of the forms of competitive procedure available, without regard to the nature of the procurement.

46. National regimes take widely divergent approaches to this issue. For the purposes of considering the Model Law, one of the most notable features is that even the most flexible systems do not allow for free use of all the evaluation methods provided for in the Model Law's principal method for the procurement of all types of services. Rather, entities are required to use the ordinary methods for procurement of goods when purchasing services, unless specific exceptions apply.

Policy options

47. The risks to transparency and of potential abuse arising from flexibility of the principal method for the procurement of services have led to suggestions that the use of the method should be restricted. The Working Group may therefore wish to consider whether the procurement of services that are measurable on the basis of physical outputs (that is, services other than intellectual services) should be conducted using tendering as the normal procurement method. The other goods and construction methods would also be available when the grounds for using them are established. One possible consequence of such an approach may be that the principal method for the procurement of services would need to be renamed to reflect its use within the context of the UNCITRAL Model Procurement Law, and that a definition of intellectual services may then be required in the Model Law or in the Guide to Enactment.

48. The Working Group may also wish to consider whether the Model Law itself additionally could specify when the principal method should be available, either by reference to general circumstances (as is done for the other procurement methods) or by reference to particular types of services (such as intellectual services). Alternatively, the Model Law may require enacting States to specify the services or circumstances for which this procedure should be available, either in the relevant law or in regulations. The Working Group may consider that the former approach may be preferable in that there can be significant scope for abuse in leaving the choice of procurement method essentially unregulated.

49. As to the method for the provision of intellectual services, the Working Group may consider that the flexibility afforded by the possibility of simultaneous and consecutive negotiations in the selection of proposals should be retained. That flexibility is conferred by articles 43 and 44 of the Model Law, and address in the case of services in cases in which procurement needs are not well defined or in which the quality and technical expertise are paramount. Although some observers have commented that the restriction of the provisions would be beneficial to transparency, the Working Group may consider the flexibility afforded by those provisions is consistent with the Model Law's aims of economy and efficiency, and that transparency may be improved by the publication and dissemination of relevant information during the negotiations concerned, matters which may be addressed either in the Model Law itself or the Guide to Enactment, in the form of guidance or model provisions.

50. The Working Group may also wish to consider whether a budget-based selection method for well-defined services lending themselves to lump-sum contracts could be added to the methods provided in article 42, the aim of which is to provide limited flexibility in non-complex services provision (that is, for the procurement of services for which quality and technical expertise are relevant, but are not paramount).

51. The Working Group may wish to note, however, the extensive consideration given to these issues during the preparation of the UNCITRAL Model Procurement Law, and to take that consideration into account in making any decision to reopen the debate.

D. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies

52. Evaluation criteria as regards tenders are set out in article 34, paragraph 4, of the UNCITRAL Model Procurement 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 foreign suppliers, 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.

53. The view has been expressed by some observers that such policies may affect negatively both efficiency and economy in procurement, but that they play a significant part in enacting States' domestic policies. Further, it has been noted that the notion of regional as well as national objectives is being considered. Accordingly, suggestions have been made that the Model Law should be refined in order to maintain or achieve a better balance between the aims of maximizing economy and efficiency in procurement, and other policy goals.

54. In view of the fact that the efficiency of preferences and their impact on transparency have been questioned, the Working Group may wish to consider whether there would be reasons that may justify addressing the issue of preferences in general, and in particular whether a maximum preference should be included in the Model Law (expressed in monetary terms, pass or fail requirements or otherwise), or relevant guidance given in the Guide to Enactment. If the Working Group decides to undertake such a review of the role of social and economic objectives in public procurement, it may wish to consider whether it would be appropriate, in the interest of enhanced transparency, to introduce limitations on the use of evaluation criteria such as shadow-pricing of foreign exchange and counter trade considerations (both permitted under article 34 (4) (d) of the Model Law). The Working Group may further wish to consider whether the provisions of article 34 of the Model Law permitting the use of preferences in favour of local (domestic) suppliers should be extended to regional suppliers. Additionally, the Working Group may wish to consider in this context whether the Guide to Enactment, which discusses criteria that permit the evaluation and comparison of tenders in the light of other policy objectives, and notes that enacting States may also be restricted in their ability to accord preferential treatment by their membership of international or regional organizations, should be updated, and should provide more detailed guidance on additional criteria regarding preferences for which enacting States may wish to provide.

E. Remedies and enforcement

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

55. An effective system for monitoring and enforcing procurement rules is considered to be an important element of a transparent procurement system, to which review triggered by a supplier can contribute. Provisions are found in the EU regime, GPA, NAFTA and in the draft FTAAA proposals, which all have a common feature requiring an independent review. APEC's non-binding principles on government procurement also include provision for a supplier complaints mechanism, although it is flexible as well as non-binding. Common guidelines agreed by the multilateral development banks for assessing the adequacy of borrowers' procurement systems also contemplate a review system before an independent entity, and the World Bank has recommended this system to those using the UNCITRAL Model Law.

56. However, States differ significantly in their approach to enforcement and, in particular, in the extent to which they offer review at the instance of the supplier. For example, the United States has a long established system of review before specialist authorities and courts. However, in the United Kingdom and in countries

that follow the British model, there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In France, there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal. In other civil law countries, such as Brazil, there is a combination of administrative review, including possible suspension of procurement proceedings, and judicial review of procurement decisions through the ordinary courts and special criminal proceedings for violations of procurement laws by procuring entities.

Position under the UNCITRAL Model Procurement Law and possible scope of review

57. The current review provisions are found in articles 52-57 of the Model Law. They are limited, and a note to the text suggests that enacting States might not incorporate all or some of the articles. These solutions in the Model Law are limited to general guidance and leave considerable scope to the enacting State in implementing the Model Law. For example, the Model Law does not address the question of the independence of the administrative review body, does not address the form of the relief to be given (which may include orders or recommendations), and there are no provisions for a judicial or quasi-judicial proceeding. There is no provision creating a right to judicial review, though article 57 allows enacting States that operate judicial review to include procurement review within the relevant courts' jurisdiction.

Policy options

58. Suggestions have been made regarding the expansion of the review provisions, for example, as follows:

(a) Should there be a more articulate recommendation as to the inclusion and operation of review provisions in the national law and further guidance, including draft model provisions, in the Guide to Enactment?

(b) Should the administrative review provisions be strengthened, for example, by making provision for an independent review process? and

(c) Should there be more detailed advice and guidance as to the judicial review process, including as to the powers of the courts and time frame for the review, the possible reversal of incorrect procurement decisions and remedies that are available?

59. Further to these questions, the Working Group may wish to consider whether the scope of provisions relating to exceptions to review (article 52 (2)) should be revisited.

F. Other matters

Alternative methods of procurement

60. Suggestions have been made that it may be useful to review the need and conditions of use of some "[a]lternative methods of procurement" set out in

Chapter V of the UNCITRAL Model Procurement Law, so as to address concerns expressed by certain multilateral lending institutions and other bodies that the number of such alternative methods is excessive. Although it is noted in the Model Law that an enacting State need not and perhaps should not enact all such methods, the Working Group may wish to consider whether the provisions relating to certain of the alternative methods should be reviewed.

61. The following suggestions have been made in respect of specific methods: "two-stage tendering" (article 46) instead of being categorized as an "alternative method" could be treated as a form of open tendering, aimed at refining specifications throughout the first stage of the tendering process in order to achieve a transparent selection in the second stage. Secondly, it has been observed that methods other than open tendering procedures may have been used in practice more widely than had been anticipated, and accordingly that the grounds for using those methods could be restricted, or justifications for their use could be required or narrowed in scope. So, for example, the grounds for "restricted tendering" (articles 20 and 47) could be narrowed from "disproportionate cost of other procedures" and "limited number of suppliers" to the former only, and the justifications for using "single-source procurement" could be restricted so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or counter trade (as is currently the case under article 22 (2) of the UNCITRAL Model Procurement Law). Further, the Model Law could include a requirement that the use of the "requests for proposals" and "competitive negotiations" procedures (articles 48 and 49) be justified.

Community participation in procurement

Background—community participation and the provisions of the UNCITRAL Model Procurement Law

62. The UNCITRAL Model Procurement Law does not address the contract implementation phase of a procurement project. It has been suggested that the most efficient way to implement a project may sometimes be through the participation of users (known as community participation). Those users have an incentive to ensure good quality in the performance of work affecting them directly. So, for example, community participation may lead to a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education. It may offer benefits including the improvement of the quality of the end product, as local people have a motivation to see that adequate standards are achieved and that work is completed on time, the potential for on-site disputes can be reduced, and bureaucracy may also be reduced through the use of less formal procedures. There are also other potential benefits, including the provision of local employment using labour-intensive technologies, the utilization of local know-how and materials, the encouragement of local businesses and the improvement of municipal accountability, which may form part of enacting States' social goals.

63. Community participation has been observed to work successfully in local small-scale construction projects (such as the installation of septic tanks in rural communities), in the distribution of basic foodstuffs, and the provision of health services (e.g. to mothers and infants).

64. However, there are also potential difficulties in the use of community participation (and it has been observed that allowing for community participation involves an unacceptable degree of subjectivity, which can be abused). First, community participation may be most effective if projects are handled by entities that may not have contracting capacities in the State concerned. Secondly, there are risks that the scale of the projects may exceed the capacity of the community concerned, research is required to ensure that methods and materials are appropriate for local use, cash-flow issues may arise, and record-keeping and ensuring accountability and avoiding abuse may be problematic. It may therefore be appropriate to provide technical assistance, and to use a project manager to address such risks, but the costs of doing so can be significant.

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

65. It has been observed that there are variations in the way community participation in procurement takes place in procurement systems.

66. Requiring community participation, such as by the involvement of the local community, may be one of the criteria for the selection of the method of procurement, or for the award of the contract. Alternatively, tenderers may offer their best solutions including community participation if they so choose, and those solutions may then be compared, or the conditions of implementation may be set to include the employment of local labour or materials, or part of the budget for the project may be set aside for community participation. Finally, grants may be made available to communities, for example, to assist them in seeking procurement contracts. However, it has also been observed that the communities that enacting States may most desire to benefit from such projects may be unable (legally or financially) or unwilling to undertake contracts or to submit bids.

67. As the use of community participation may involve additional cost, it has also been observed that single-source procurement may be the only way to achieve the goals sought.

Policy options

68. The UNCITRAL Model Procurement Law does not specifically address the issue of community participation, but its provisions are sufficiently flexible to allow some of the arrangements described above to be put in place. However, the Working Group may wish to consider whether the Model Law, and its accompanying Guide to Enactment should address the issues set out above directly. The Working Group may wish to consider whether model provisions or regulations, rather than the text of the law itself, should address such matters as the proportion of funds that may be set aside, margins of preference, the extent to which the use of local, unemployed or minority group labour may be required, and legislation that may be necessary so as to allow unincorporated associations or groups to contract.

Simplification and standardization of the UNCITRAL Model Procurement Law

69. It has been noted that some enacting States have chosen not to enact some of the more detailed parts of the Model Law, finding that they have not proved necessary for legislation in the States concerned. It has also been suggested that

some restructuring of the presentation of the Model Law may also prove useful, as a tool to assist enacting States in formulating domestic legislation.

70. The Working Group may wish to consider, therefore, and in the light of the amendments to the issues identified earlier in this note and in document A/CN.9/WG.1/WP.31, whether there is some room for improving the Model Law's structure and for simplifying its contents, for example, by some reordering or by eliminating unnecessarily detailed provisions. It has been suggested, for example, that certain provisions currently found in the text of the Model Law may be removed to an annex to the Model Law, or to model provisions that the Guide to Enactment could provide. Examples include article 7 (3), listing the contents of pre-qualification documents, article 25, listing the contents of invitations to tender and pre-qualify in tendering procedures, article 27, listing the contents of the solicitation documents, article 38, concerning the contents of a request for proposals for services under the principal method for the procurement of services, and article 48 (4), concerning the content of a request for proposals under the Request for Proposals procedure.

Legalization of documents

Background

71. Procuring entities sometimes require the legalization of documents by all those who need to demonstrate their qualifications to participate in a procurement procedure (for example, when pre-qualification is used in tendering), which can be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers may be passed on to procuring entities.

Position under the UNCITRAL Model Procurement Law

72. Article 10 of the Model Law provides that if the procuring entity requires the legalization of documents, it shall not impose any requirements other than those provided by the general law for the type of documents in question. However, it imposes no restrictions on the power of procuring entities to call for legalization of documents.

Policy options

73. The Working Group may wish to consider whether article 10 of the Model Law should be amended to limit the power of procuring entities to require legalization of documentation from the successful supplier alone. If so, the Working Group may wish to consider consequential changes such as to the rules on entry into force of the contract, to accommodate the possibility that a contract may not enter into force because the supplier fails to comply with the requirement.