



General Assembly

Distr.: General
22 December 2010

Original: English

**United Nations Commission on
International Trade Law**
Forty-fourth session
Vienna, 27 June-15 July 2011

Draft revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out a proposal for chapter VIII (Challenges and appeals) of the revised Model Law, comprising articles 63 to 69.



CHAPTER VIII. CHALLENGES AND APPEALS

Article 63. Right to challenge and appeal

(1) A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned by way of an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [name of independent body] under article 66 of this Law, or an application to the [name of court or courts].

(2) A supplier or contractor may appeal any decision taken in challenge proceedings under article 65 or 66 of this Law.

Article 64. Effect of an application for reconsideration or review or an appeal

(1) The procuring entity shall not enter into a procurement contract or framework agreement in the procurement proceedings concerned:

(a) Where it receives an application for reconsideration within the time-limits specified in article 65 (2); or

(b) Where it receives notice of an application for review or of an appeal from the [name of independent body] or from the [name of court or courts].

(2) The prohibition referred to in paragraph (1) shall lapse ... working days (the enacting State specifies the period) after the decision of the procuring entity, [name of independent body] or the [name of court or courts] on the challenge or appeal concerned has been communicated to the applicant or appellant, as the case may be, to the procuring entity where applicable, and to all other participants in the challenge or appeal proceedings.

(3) (a) The procuring entity may at any time request the [name of independent body] or the [name of court or courts] to authorize it to enter into the procurement contract or framework agreement on the ground that urgent public interest considerations so justify.

(b) The [name of independent body], upon consideration of such a request (or of its own motion)⁶ may authorize the procuring entity to enter into the procurement contract or framework agreement where it is satisfied that urgent public interest considerations so justify. The decision of the [name of independent body] and reasons therefor shall be made part of the record of the procurement proceedings, and shall promptly be communicated to the procuring entity, to the applicant or appellant, as the case may be, to all other participants in the challenge or appeal proceedings and to all other participants in the procurement proceedings.

⁶ The enacting State may consider not enacting the provisions within parenthesis where the independent body's taking action of its own motion would be inconsistent with the enacting State's legal tradition.

Article 65. Application for reconsideration before the procuring entity

(1) A supplier or contractor may apply to the procuring entity for a reconsideration of a decision or an action taken by the procuring entity in the procurement proceedings.

(2) Applications for reconsideration shall be submitted to the procuring entity in writing within the following time periods:

(a) Applications for reconsideration of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for reconsideration of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted within the standstill period applied pursuant to article 21 (2) of this Law, or, where none has been applied, prior to the entry into force of the procurement contract or the framework agreement.

(3) Promptly after receipt of the application, the procuring entity shall publish a notice of the application, and shall, not later than three (3) working days after receipt of the application:

(a) Decide whether the application shall be entertained or dismissed and, if it is to be entertained, whether the procurement proceedings shall be suspended. The procuring entity may dismiss the application if it decides that the application is manifestly without merit, was not submitted within the deadlines set out in paragraph (2) of this article, or if the applicant is without standing. Such a dismissal constitutes a decision on the application;

(b) Notify all participants in the procurement proceedings to which the application relates about the submission of the application and its substance;

(c) Notify the applicant and all other participants in the procurement proceedings of its decision on whether the application is to be entertained or is dismissed:

(i) If the application is entertained, the procuring entity shall in addition advise whether the procurement proceedings are suspended and, if so, the duration of the suspension;

(ii) If the application is dismissed or the procurement proceedings are not suspended, the procuring entity shall in addition advise the applicant of the reasons for its decision.

(4) If the procuring entity does not give notice to the applicant as required in paragraphs (3) (c) and (8) of this article within the time-limit specified in paragraph (3) of this article, or if the applicant is dissatisfied with the decision so notified, the applicant may immediately thereafter commence proceedings in the [name of independent body] under article 66 of this Law or in the [name of court or courts]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

(5) In taking its decision on an application that it has entertained, the procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the application relates.

(6) The decision of the procuring entity under paragraph (5) of this article shall be issued within ... working days (the enacting State specifies the period) after receipt of the application. The procuring entity shall immediately thereafter communicate the decision to the applicant, to all other participants in the challenge proceedings and to all other participants in the procurement proceedings.

(7) If the procuring entity does not communicate its decision to the applicant in accordance with the requirements of paragraphs (6) and (8) of this article, the applicant is entitled immediately thereafter to commence proceedings in the [name of independent body] under article 66 of this Law or in the [name of court or courts]. Where such proceedings are commenced, the competence of the procuring entity to entertain the application ceases.

(8) All decisions of the procuring entity under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application received by the procuring entity under this article.

Article 66. Application for review or an appeal before an independent body⁷

(1) A supplier or contractor may apply to the [name of independent body] for review of a decision or action taken by the procuring entity in the procurement proceedings, or the failure of the procuring entity to take a decision under article 65 of this Law within the time-limits prescribed in that article, and may also file an appeal to that body against a decision of the procuring entity taken under article 65 of this Law.

(2) Applications for review and appeals shall be submitted to the [name of independent body] in writing within the following time periods:

(a) Applications for review of the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

(b) Applications for review of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted:

(i) Within the standstill period applied pursuant to article 21 (2) of this Law;
or

⁷ States where review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 69). The enacting State should provide for an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

(ii) Where no standstill period has been applied, within ... working days (the enacting State specifies the period) after the time when the applicant became aware of the circumstances giving rise to the application or when the applicant should have become aware of those circumstances, whichever is earlier, but not later than ... working days (the enacting State specifies the period) after the entry into force of the procurement contract or the framework agreement (or a decision to cancel the procurement)⁸;

(c) Notwithstanding subparagraph (b) (i) of this paragraph, a supplier or contractor may request the [name of independent body] to entertain an application for review filed after the expiry of the standstill period, but not later than ... working days (the enacting State specifies the period) after the entry into force of the procurement contract or the framework agreement (or a decision to cancel the procurement),⁸ on the ground that the application raises significant public interest considerations. The [name of independent body] may entertain the application where it is satisfied that significant public interest considerations so justify. The decision of the [name of independent body] and reasons therefor shall promptly be communicated to the supplier or contractor concerned;

(d) Appeals against decisions of the procuring entity taken under article 65 of this Law, or applications for review of a failure of the procuring entity to issue a decision under article 65 of this Law within the time-limits prescribed in that article shall be submitted within ... working days (the enacting State specifies the period) after the decision of the procuring entity was communicated or should have been communicated to the appellant in accordance with the requirements of article 65 (3), (6) and (8) of this Law, as appropriate.

(3) Following receipt of an application for review or an appeal, the [name of the independent body] may, subject to the requirements of paragraph (4) of this article:

(a) Order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract; and

(b) Order the suspension of the performance of a procurement contract or operation of a framework agreement that has entered into force);⁹

if and for as long as it finds a suspension necessary to protect the interests of the applicant or appellant, as the case may be, unless the [name of the independent body] decides that urgent public interest considerations require the procurement proceedings(, the procurement contract or the framework agreement, as applicable),⁹ to proceed. The [name of the independent body] may also order that any suspension applied be extended or lifted, taking into account the aforementioned considerations.

(4) (a) The [name of the independent body] shall order the suspension of the procurement proceedings for a period of ten (10) working days where an application or an appeal is received prior to the deadline for presenting submissions; and

⁸ The enacting State may consider not enacting the provisions within parenthesis where it decides that applications for review in the case of cancellation of the procurement should be reviewed only by the courts.

⁹ The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) does not have the power to suspend performance of the procurement contract or to suspend operation of the framework agreement.

(b) The [name of the independent body] shall order the suspension of the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be)⁹ where an application or an appeal is received after the deadline for presenting submissions and where no standstill period has been applied;

unless the [name of the independent body] decides that urgent public interest considerations require the procurement proceedings(, the procurement contract or the framework agreement, as applicable,)⁹ to proceed.

(5) Promptly upon receipt of the application or appeal, the [name of independent body] shall:

(a) Suspend or decide not to suspend the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be)⁹;

(b) Notify the procuring entity and all identified participants in the procurement proceedings to which the application or appeal relates of the application or the appeal and its substance;

(c) Notify all identified participants in the procurement proceedings to which the application or appeal relates of its decision on suspension. Where the [insert name of the independent body] decides to suspend the procurement proceedings (or the performance of a procurement contract or the operation of a framework agreement, as the case may be),⁹ it shall in addition specify the period of the suspension. Where it decides not to suspend them, it shall provide the reasons for its decision to the applicant or appellant, as the case may be, and to the procuring entity; and

(d) Publish a notice of the application or appeal.

(6) The [name of independent body] may dismiss the application or appeal, and shall lift any suspension applied, where it decides that:

(a) The application or appeal is manifestly without merit or was not presented in compliance with the deadlines set out in paragraph (2) of this article; or

(b) The applicant or appellant, as the case may be, is without standing.

The [name of independent body] shall promptly notify the applicant or appellant, as the case may be, the procuring entity and all other participants in the procurement proceedings of the dismissal and reasons therefor and that any suspension in force is lifted. Such a dismissal constitutes a decision on the application.

(7) The notices to the applicant or appellant, as the case may be, the procuring entity and other participants in the procurement proceedings under paragraphs (5) and (6) of this article shall be given no later than three (3) working days after receipt of the application or appeal.

(8) Promptly upon receipt of notice of an application for review or of an appeal from the [name of independent body], the procuring entity shall provide the [name of the independent body] with all documents relating to the procurement proceedings in its possession.

(9) In taking its decision on an application or an appeal that it has entertained, the [name of independent body] may declare the legal rules or principles that govern the subject matter of the application or an appeal, shall address any suspension in force, and shall take one or more of the following actions, as appropriate:

(a) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(b) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

((c) Overturn in whole or in part an unlawful act or decision of the procuring entity (other than any act or decision bringing the procurement contract or the framework agreement into force)¹⁰;

(d) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, (other than any act or decision bringing the procurement contract or the framework agreement into force)¹¹ or confirm a lawful decision by the procuring entity;

(e) Overturn the award of a procurement contract or the framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;)¹²

(f) Order that the procurement proceedings be terminated;

(g) Dismiss the application or appeal;

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application or an appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, and for any loss or damages suffered(, which shall be limited to costs for the preparation of the submission, or the costs relating to the application and the appeal where applicable, or both)¹³; or

(i) Take such alternative action as is appropriate in the circumstances.

(10) The decision of the [name of the independent body] under paragraph (9) of this article shall be issued within ... working days (the enacting State specifies the period) after receipt of the application or the appeal. The [name of the independent

¹⁰ The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to overturn any act or decision of the procuring entity bringing the procurement contract or the framework agreement into force.

¹¹ The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to revise or substitute any act or decision of the procuring entity bringing the procurement contract or the framework agreement into force.

¹² The enacting State may consider not enacting the provisions in subparagraphs (c) to (e) when the independent body in its jurisdiction(s) has no powers referred to in those subparagraphs. It may replace these subparagraphs with subparagraph (c) reading "Quash an unlawful decision or confirm a lawful decision taken by the procuring entity."

¹³ The enacting State may consider not enacting the provisions within parenthesis when the independent body in its jurisdiction(s) has the power to award in addition compensation for lost profits.

body] shall immediately thereafter communicate the decision to the procuring entity, to the applicant or appellant, as the case may be, to all other participants in the challenge or appeal proceedings and to all other participants in the procurement proceedings.

(11) All decisions of the [name of the independent body] under this article shall be in writing, shall state the action taken and the reasons therefor, and shall promptly be made part of the record of the procurement proceedings, together with the application or appeal received by the [name of the independent body] under this article.

Article 67. Rights of participants in challenge or appeal proceedings

(1) Any supplier or contractor participating in the procurement proceedings to which the application or the appeal relates, as well as any governmental authority, whose interests are or could be affected by the application or the appeal, shall have the right to participate in the challenge or appeal proceedings under articles 65 and 66 of this Law. A supplier or contractor that fails to participate in such proceedings is barred from subsequently challenging under articles 65 and 66 of this Law the decisions or actions that are the subject matter of the application or appeal.

(2) The procuring entity shall have the right to participate in challenge or appeal proceedings under article 66 of this Law.

(3) The participants in challenge or appeal proceedings under articles 65 and 66 of this Law shall have the right to be present, represented and accompanied at all hearings during the relevant challenge or appeal proceedings, the right to be heard, the right to present evidence, including witnesses, the right to request that any hearing should take place in public, and the right to seek access to the record of the challenge or appeal proceedings subject to the provisions of article 68 of this Law.

Article 68. Confidentiality in challenge and appeal proceedings

No information shall be disclosed in challenge or appeal proceedings and no public hearing under articles 65 and 66 of this Law shall take place if so doing would impair the protection of essential security interests of the State, would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

Article 69. Judicial review¹⁴

The [name of court or courts] has jurisdiction pursuant to article 63.

¹⁴ States may provide for the system of appeal judicially, or administratively, or both, to reflect the legal system in the jurisdiction concerned. States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. Such an effective system of judicial review shall in particular ensure: (i) that deadlines for submission of applications for judicial review or appeal of decisions of the procuring entity or the independent body, as the case may be, shall be appropriate in the procurement context, in particular the provisions of this Law on the standstill period shall be taken into account; (ii) that the court or courts with jurisdiction pursuant to article 63 may take any or any combination of the actions contemplated in article 66 (9) of this Law and to grant interim measures that it considers necessary to ensure effective review, including suspension of the procurement proceedings or performance of the procurement contract or the operation of the framework agreement, as applicable; and (iii) that minimum safeguards as regards the participation in the challenge or appeal proceedings, submission of evidence and protection of confidential information in the procurement context, contemplated in articles 67 and 68 of this Law, are in place.