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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany articles 16 to 22 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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Part II. Article-by-article commentary

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Article 16. Tender securities[1]

1. The purpose of the article is to set out requirements as regards tender securities as defined in article 2 (t), in particular as to their acceptability by the procuring entity, the conditions that must be present for the procuring entity to be able to claim the amount of the tender security, and the conditions under which the procuring entity must return or procure the return of the security document. As stated in the commentary to the definition of "tender security" in article 2, the Model Law refers to "tender security" as the commonly-used term in the relevant context, without implying that this type of security may be requested only in tendering proceedings. The definition also excludes from the scope of the term any security that the procuring entity may require for performance of the procurement contract (under article 38 (k) for example). The latter may be required to be provided by the supplier or contractor that enters into the procurement contract while the requirement to provide a tender security, when it is imposed by the procuring entity, applies to all suppliers or contractors presenting submissions (see paragraph (1) of the article).

2. The procuring entity may suffer losses if suppliers or contractors withdraw their submissions or if a procurement contract with the supplier or contractor whose submission had been accepted is not concluded due to fault on the part of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 16 authorizes the procuring entity to require suppliers or contractors participating in the procurement proceedings to post a tender security so as to cover such potential losses and to discourage them from defaulting.

3. Procuring entities are not required to impose tender security requirements in all procurement proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, though it may be of importance to require a tender security in some cases, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security — which will normally be reflected in the contract price — will be less justified. Requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.[2] Although practices might continue to

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[1] The provision of guidance to the Secretariat is requested on whether practice in some jurisdictions as regards the use of securities issued in electronic form will affect the content of the commentary to this article as set out below.

[2] The provision of guidance to the Secretariat is requested on whether it would be at all

evolve, at the time of preparing this Guide, little experience on the use of tender securities in electronic reverse auctions has been accumulated and existing practices were highly diverse. It might be problematic to obtain one in the context of electronic reverse auctions, as banks generally require a fixed price for the security documents. There also may be situations not justifying demanding tender securities, for example in request for proposals with dialogue proceedings since tender securities would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue phase (unlike BAFOs). (See the relevant discussion in the commentary to the relevant provisions of article 48.) Even if in both cases referred to above (electronic reverse auctions and request for proposals with dialogue proceedings), tender securities are requested, as the commentary to the definition of "tender security" in article 2 states, multiple tender securities cannot be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.[3]

4. Safeguards have been included to ensure that a tender-security requirement is only imposed fairly and for the intended purpose. That purpose is to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the submissions they have presented and to post a security for performance of the procurement contract, if required to do so.

5. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, the language in subparagraphs (i) and (ii) provides flexibility on this point: first, for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law; and secondly, in domestic procurement where the procuring entity stipulated in the solicitation documents in accordance with paragraph (1)(b) that a tender security must be issued by an issuer in the enacting State.

6. The reference to confirmation of the tender security in paragraph (1)(d) is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The reference, however, is not intended to encourage such a practice, in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in procurement proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for presenting submissions and added costs for foreign suppliers and contractors).

7. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of

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practically possible to obtain tender security unless the potential obligation to compete under the framework agreement is defined. The similar considerations arise in the context of ERAs and pre-BAFO stages of the request for proposals with dialogue proceedings.

[3] As noted in the commentary to the relevant provisions of article 2, article 16 does not include such prohibition.

particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry. As article 40 (3), paragraph (2)(d), reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for presenting submissions is not subject to forfeiture of the tender security.[4]

8. In the light of the cost of providing a tender security, which will normally be reflected in the contract price, the use of alternatives to a tender security should be considered and encouraged where appropriate. In some jurisdictions, a bid securing declaration is used in lieu of tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for contingencies that normally are secured by a tender security. (Sanctions do not include debarment since the latter should not be concerned with commercial failures (see the relevant commentary to article 9 in … above).) These alternatives aim at promoting more competition in procurement, by increasing participation in particular of SMEs that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.[5]

Article 17. Pre-qualification proceedings

1. The purpose of the article is to set out procedures for pre-qualification proceedings. Pre-qualification proceedings are intended to identify, at an early stage, those suppliers or contractors that are suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but of a highly specialized nature. The reason in each case is that the evaluation of submissions in those cases is much more complicated, costly and time-consuming than for other procurement. Competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the submission may be high, if the competitive field is too large and where they run the risk of having to compete with submissions presented by unqualified suppliers or contractors. The use of pre-qualification proceedings may narrow down the number of submissions that the procuring entity will evaluate to those from qualified suppliers or contractors. It is thus a tool to facilitate the effective procurement of relatively complex subject matter.

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[4] The provision of guidance to the Secretariat is requested on whether there is a need of adding discussion on issues of extension of the period of effectiveness of tender securities in the commentary to this article in addition to the commentary to article 40.

[5] The need for further discussion on the potentially onerous nature of securities is to be considered. If so, the provision of the guidance to the Secretariat is requested in particular as regards the following issues suggested in the Working Group: the further negative effects of requiring suppliers or contractors to present tender securities, the issues of mutual recognition and the right of the procuring entity to reject securities in certain cases.

2. Pre-qualification under paragraph (1) of the article is optional and may be used regardless of the method of procurement used. Because of an additional step and delays in the procurement caused by pre-qualification and because some suppliers or contractors may be reluctant to participate in procurement involving pre-qualification, given the expense of so doing, pre-qualification should be used only when strictly necessary, in situations described in the immediately preceding paragraph.

3. The pre-qualification procedures set out in article 17 are made subject to a number of important safeguards. These safeguards include the limitations in article 9 (in particular on the assessment of qualifications, applicable equally to pre-qualification procedures) and the procedures found in paragraphs (2) to (10) inclusive of article 17. This set of procedural safeguards is included to ensure that pre-qualification procedures are conducted using objective terms and conditions that are fully disclosed to participating suppliers or contractors; they are also designed to ensure a minimum level of transparency and to facilitate the exercise by a supplier or contractor that has not been pre-qualified of its right to challenge its disqualification.

4. The reference to the official gazette in paragraph (2) is to be interpreted according to the principle of functional equivalence between paper- and non-paper means and media of information; and thus includes any official gazette used in an enacting State or group of States, such as the electronic Official Journal of the European Union. Issues raised in the commentary to article 5 on publication of legal texts and to article 32 (4) are relevant in the context of paragraph (2) as well.

5. The term "address" found in paragraph (3)(a) is intended to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address, etc. as appropriate). This term should be interpreted so consistently throughout the Model Law notwithstanding whether reference is to the address of the procuring entity or the address of a supplier or contractor.

6. As in similar provisions found elsewhere in the Model Law, references to the currency of payment and languages appearing in paragraph (3) may be omitted in the invitation to pre-qualification and in the pre-qualification documents issued by the procuring entity in domestic procurement, if it would be unnecessary in the circumstances. An indication of the language or languages may still be important in some multilingual countries.

7. While the provisions of the article allow for charges for the pre-qualification documents, development costs (including consultancy fees and advertising costs) are not to be recovered through those provisions. It is understood, as stated in paragraph (4) of the article, that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate). In addition, enacting States should note that best practice is not to charge for the provision of such documents.[6]

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[6] The last sentence reflects the view of some commentators, as a statement of principle, but others consider that this is not a practical proposition. The provision of guidance to the Secretariat is requested as regards guidance to be provided on charging for the provision of this type of documents (and also on filing fees).

8. The reference to the "place" found in paragraph (5)(d) includes not the physical location but rather an official publication, portal, etc. where authoritative and up-to-date texts of laws and regulations of the enacting State are made available to the public. The issues raised in the commentary to article 5 on ensuring appropriate access to up-to-date legal texts are therefore also relevant in the context of paragraph (5)(d) of article 17.

9. The references to "promptly" in paragraphs (9) and (10) should be interpreted to mean that the notification required must be given to suppliers and contractors prior to solicitation. This is an essential safeguard to ensure that there can be an effective review of decisions made by the procuring entity in the pre-qualification proceedings. For the same reason, article 10 requires the procuring entity to notify each supplier or contractor that has not been pre-qualified of the reasons therefor.

10. The provisions of the article on disclosure of information to suppliers or contractors or the public are subject to article 23 on confidentiality (which contains limited exceptions to public disclosure).

11. Pre-qualification should be differentiated from preselection, envisaged under the Model Law only in the context of request for proposals with dialogue proceedings under article 48. In pre-qualification, all pre-qualified suppliers or contractors may end up presenting submissions. In the case of preselection, the number of pre-qualified suppliers or contractors that will be permitted to present submissions is expressly limited at the outset of the procurement proceedings, and the maximum number of participants is made known in the invitation to preselection. The identification of qualified suppliers or contractors in the pre-qualification proceedings is on the basis of whether applicants pass or fail pre-established qualification criteria while preselection involves additional, most likely competitive, selection procedures when the established maximum of pre-qualified suppliers or contractors permitted to present submissions has been exceeded (e.g. the preselection may involve, after the pass/fail examination, ranking against the qualification criteria and selecting the best few according to the established maximum). This measure is taken even though the drafting of stringent pre-qualification requirements might in fact limit the numbers of pre-qualified suppliers or contractors.

Article 18. Cancellation of the procurement

1. The purpose of article 18 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so prior to the acceptance of the successful submission. After that point, it can do so only if the supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security (see paragraph (1) of article 18 and article 21 (8)). [Reasons for this difference are to be articulated.]

2. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding or because all the

submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that the public interest may be best served by allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed.

3. In the light of the unconditional right given to the procuring entity to cancel the procurement up to acceptance of the successful submission, the article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision. [An example illustrating differences between reasons and justifications is to be added.] The procuring entity need not but is not prevented from providing justifications when it decides that it would be appropriate to do so (for instance, when it wishes to demonstrate that the decision was neither irresponsible nor as a result of dilatory conduct). It may also decide to engage in debriefing (see paragraphs … above).

4. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring entities' practices in the enacting State.

5. Some provisions in paragraphs (1) and (2) of the article are designed for treating submissions presented but not yet opened by the procuring entity (for example, when the decision on cancellation is made before the deadline for presenting tenders). After the decision on cancellation is taken, any unopened submission must remain unopened and returned to suppliers or contractors presenting them. This requirement avoids the risk that information supplied by suppliers or contractors in their submissions will be used improperly, for example by revealing it to competitors. This provision is also aimed at preventing abuse of discretion to cancel the procurements for improper or illegal reasons, such as after the desired information about market conditions was obtained or after the procuring entity learned that a favoured supplier or contractor will not win.

6. In many jurisdictions, decisions to cancel the procurement would not normally be amenable to review, in particular by administrative bodies, unless abusive practices were involved. The Model Law however does not exempt any decision or action taken by the procuring entity in the procurement proceedings from challenge or appeal proceedings under chapter VIII (although some cautious language is included in article 66 to reflect that in some jurisdictions the administrative body would not have jurisdiction over this type of claims). What the Model Law purports to do in paragraph (3) of article 18 is to limit liability of the procuring entity for its decision to cancel the procurement to exceptional circumstances. Under

paragraph (3), the liability is limited towards suppliers or contractors having presented submissions when cancellation was a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

7. Under the Model Law, the right to challenge the decision of the procuring entity to cancel the procurement proceedings would therefore exist and could be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case. Paragraph (3) is considered important in this respect because it provides protection to the procuring entity from unjustifiable protests and, at the same time, safeguards against an unjustifiable cancellation of the procurement proceedings by the procuring entity. It is however recognized that, despite the limitations of liability under paragraph (3), the procuring entity may face liability for cancelling the procurement under other branches of law. In particular, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened even in circumstances not covered by paragraph (3).

8. Administrative law in some countries may restrict the exercise of the right to cancel the procurement, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice. Administrative law in some other countries may, on the contrary, provide for an unconditional right to cancel the procurement at any stage of the procurement proceedings, even when the successful submission was accepted, regardless of the provisions of the Model Law. Law may also provide for other remedies against abusive administrative decisions taken by public officials. The enacting State may need therefore to align the provisions of the article with the relevant provisions of its other applicable law.

9. The cancellation of the procurement by the procuring entity under article 18 should be differentiated from termination of the procurement proceedings under article 66 (9)(f) of the Model Law. The consequences of both are the same — no further actions and decisions are taken by the procuring entity in the context of the cancelled or terminated procurement after the decision on cancellation is taken by the procuring entity or the termination of the procurement proceedings is ordered by the administrative body. The termination of the procurement proceedings however is ordered by the administrative body as a remedy as a result of the challenge or appeal proceedings.

Article 19. Rejection of abnormally low submissions

1. The purpose of the article is to enable the procuring entity to reject a submission whose abnormally low price gives rise to concerns as to the ability of the supplier or contractor presenting such submission to perform the procurement contract. The article does not oblige the procuring entity to reject an abnormally low submission.[7] The article applies to any procurement proceedings under the Model Law, including one involving an electronic reverse auction, where risks of

[7] The provision of guidance to the Secretariat is requested on reasons for the absence of the obligation in the Model Law to reject an abnormally low submission, for inclusion in the commentary.

abnormally low bids may be considered higher than in other procurement, particularly where the technique is new to the system concerned.[8]

2. The article provides safeguards that aim to protect the legitimate interests of both parties (procuring entities, and suppliers and contractors). On the one hand, it enables the procuring entity to address possible abnormally low submissions before a procurement contract has been concluded. From the perspective of the procuring entity, an abnormally low submission involves a risk that the contract cannot be performed, or performed at the price submitted, and additional costs and delays to the project may ensue leading to higher prices and disruption to the procurement concerned. The procuring entity should therefore take steps to avoid running such a performance risk.

3. On the other hand, the procuring entity cannot automatically reject a submission simply on the basis that the submission price appears to be abnormally low. Conferring such a right on a procuring entity would introduce the possibility of abuse, as submissions could be rejected for being abnormally low without justification, or on the basis of a purely subjective criterion. Such a risk would be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.[9]

4. For these reasons, the article protects suppliers and contractors against the possibility of arbitrary decisions and abusive practices by procuring entities by allowing the rejection of an abnormally low submission only when the procuring entity has taken steps to substantiate its concerns as to the ability of the supplier or contractor to perform the procurement contract. This, however, is without prejudice to any other applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations) are involved.

5. Accordingly, subparagraphs 1 (a) to (c) of the article specify the steps that the procuring entity has to take before the abnormally low submission may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

6. First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submission presented that the procuring entity considers relevant to justify the price submitted. Those details may include: information, samples, etc. proving the quality of the offered subject matter of the procurement; the methods and economics of the manufacturing process for the goods, of the construction or of the provision of the services concerned; the technical solutions chosen and/or any exceptionally

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[8] The provision of guidance to the Secretariat is requested on desirability of retaining this statement in the commentary to this article as opposed to chapter VI.

[9] The provision of guidance to the Secretariat is requested on appropriateness of the examples given in this paragraph in the light of the objectives of the Model Law, in particular to promote competition.

favourable conditions available to the supplier or contractor for the execution of the construction or for the supply of the goods or services; or the originality of the construction, supplies or services proposed by the supplier or contractor. The submitted price is therefore always analysed in the context of other constituent elements of the submission concerned.[10]

7. The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the submission, such as those discussed in the preceding paragraph), and using such factors as pre-procurement estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

8. Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier or contractor refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low submission; it is one element to take into consideration when considering whether a submission is abnormally low.

9. Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the procurement contract, it must record those concerns and its reasons for holding them in the record of procurement proceedings pursuant to subparagraph (1)(c) of the article. This provision is included to ensure that any decision to reject the abnormally low submission is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

10. Only after the steps outlined in subparagraphs 1 (a) to (c) have been fulfilled may the procuring entity reject the abnormally low submission. The decision on the rejection of the abnormally low submission must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. The decision may be challenged in accordance with chapter VIII of the Model Law.

11. Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low submissions. Thoroughly assessing suppliers or contractors' qualifications and examining and evaluating their submissions can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of the description of the subject matter of the procurement. Procuring entities should be appropriately

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[10] The provision of guidance to the Secretariat is requested on consistency between this and the immediately following paragraph as regards cost assessment.

instructed to that end, and should be aware of the needs to compile accurate and comprehensive information about the qualifications of suppliers or contractors, including information about their past performance, and to pay due attention in evaluation to all aspects of presented submissions, not only to price (such as to maintenance and replacement costs where appropriate). These steps can effectively identify performance risks.

12. Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low submissions; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low submissions and promote responsible behaviour on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents or other equivalent documents that submissions may be rejected if they are abnormally low and raise concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract.

Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

1. The purpose of the article is to provide an exhaustive list of grounds for the exclusion of a supplier or contractor from the procurement proceedings for the reasons not linked to the content of a submission presented or the qualifications of the supplier or contractor. Those reasons are inducements from the supplier or contractor, an unfair competitive advantage and conflicts of interest. The provisions of the article do not use the term "corruption" (which is not a term that has an accepted international definition) and refer to situations (inducement, unfair competitive advantage and conflicts of interest) requiring the exclusion of the relevant supplier or contractor from the procurement proceedings. These situations are commonly cited examples of corrupt behaviour, and the article is therefore an important anti-corruption measure in public procurement.

2. The article is intended to be consistent with international standards against corrupt practices and to outlaw any corrupt practices regardless of their form and how they were defined. Such standards may be found in international instruments, such as the United Nations Convention against Corruption, or documents issued by international organizations, such as the Organization on Economic Cooperation and Development (OECD) and multilateral development banks. They may evolve over time. In the light of article 3 of the Model Law that gives prominence to international commitments of enacting States, enacting States are encouraged to consider international standards against corrupt practices applicable at the time of the enactment of the Model Law. Some of them may be binding on the enacting State if it is the party to the relevant international instrument.

3. Nevertheless, the article, as the entire Model Law, should not be regarded as providing exhaustive measures to combat corruption in public procurement. Although the procedures and safeguards in the Model Law are designed to promote

transparency and objectivity in the procurement proceedings and thereby to reduce corruption, a procurement law alone cannot be expected to eradicate completely corrupt practices in public procurement in an enacting State. Procuring entities are not equipped and should not be expected to deal with all issues of corruption in public procurement. The enacting State should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.[11]

4. The term "inducement" is spelled out in paragraph (1)(a) of the article and can be generally described as any attempt by suppliers or contractors improperly to influence the procuring entity. What would constitute an unfair competitive advantage or a conflict of interest for the purpose of applying paragraph (1)(b) is left to determination by the enacting State. The provisions intend to address conflicts of interest only on the side of the supplier or contractor. Conflicts of interest on the side of the procuring entity are subject to separate regulation, such as under article 25 on the code of conduct of procuring officials. To avoid an unfair competitive advantage and conflicts of interests, the applicable standards of the enacting State should, for example, prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. It is expected however that some aspects related to these concepts may be regulated in other breaches of law of the enacting State, such as anti-monopoly legislation.

5. Although the concepts of "an unfair competitive advantage" and a "conflict of interest" appear in the same subparagraph, those two concepts could arise independently of each other. An unfair competitive advantage might be expected to arise from a conflict of interest (for example, where the same lawyer represented both sides in the case). However, this would not necessarily always be the case and an unfair competitive advantage might be gained under unrelated circumstances.[12]

6. The provisions of the article are without prejudice to any other sanctions, such as debarment (see paragraphs … above), that may be applied to the supplier or contractor. However, application of sanctions under other applicable branches of law, such as for example a criminal conviction, is not a pre-requisite for exclusion of the supplier or contractor under this article. To guard against abusive application of article 20, the decision on exclusion and reasons therefor are to be reflected in the record of procurement proceedings and to be promptly communicated to the alleged wrongdoer to enable where necessary the effective challenge.[13]

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[11] In the Working Group, a suggestion was made that the Guide should reflect that, in the context of public procurement, it may be impossible to establish the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action. The provision of guidance to the Secretariat is requested on desirability of including this or other statements in the Guide in attempt to describe relevant examples.

[12] The provision of guidance to the Secretariat is requested on examples of what will constitute an unfair competitive advantage, for inclusion in the Guide. The suggestion in the Working Group was to refer in this context to consolidation of business or a prior business relationship, which might be excessively broad.

[13] The suggestion was made in the Working Group that the Guide should explain that risks of unjustified rejection might be mitigated by encouraging a dialogue between the procuring entity

7. As noted above, the implementation of the article is subject to other branches of law of an enacting State where anti-corruption policies of the State are spelled out. The alignment is necessary in order to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of the enacting State.

(For further discussion of the relevant issues, see the commentary to article 25 on codes of conduct.)

Article 21. Acceptance of the successful submission and entry into force of the procurement contract

1. The purpose of article 21 is to set out detailed rules applicable to: (i) the acceptance of the successful submission; (ii) the safeguard in the form of a standstill period to enable suppliers or contractors to challenge the decision of the procuring entity to award the procurement contract or framework agreement before the contract or framework agreement enters into force; and (iii) the entry into force of the procurement contract. The article is supplemented by requirements in the Model Law that information on these matters be provided to suppliers and contractors at the outset of the procurement proceedings. For example, from the standpoint of transparency, it is important for suppliers and contractors to know in advance the manner of entry into force of the procurement contract. Article 38 therefore requires (in subparagraph (v)) the solicitation documents to provide information about the duration of the standstill period and if none will apply, a statement to that effect and reasons therefor. Article 38 in addition requires (in subparagraph (w)) specifying in the solicitation documents any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force. Such formalities, in accordance with article 21, may include the execution of a written procurement contract and approval by another authority.

2. Paragraph (1) provides that the successful submission, as a general rule, is to be accepted by the procuring entity, meaning that the procurement contract or framework agreement must be awarded to the supplier or contractor presenting that successful submission, reflecting the terms and conditions of the submission. (There is no single definition of the successful submission. Articles regulating procedures of various procurement methods define the term in the context of each procurement method.) The exceptions to the general rule set out in paragraph (1) are listed in subparagraphs (a) to (d) (disqualification of the supplier or contractor presenting the successful submission, cancellation of the procurement, rejection of the successful submission on the ground that it is abnormally low in accordance with article 19, or exclusion of the supplier or contractor presenting the successful submission on the grounds of inducement from its side, unfair competitive advantage or conflict of interest in accordance with article 20).

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and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 19 regulating procedures for investigating abnormally low submissions. The provision of relevant guidance to the Secretariat is requested in the light of possible abusive practices and results that such dialogue may facilitate to avoid the application of this article.

3. The ground for not accepting the successful submission set out in subparagraph (a) (disqualification) should be understood in the light of the provisions in article 9 (1) that allow the qualifications of suppliers or contractors to be assessed at any stage of the procurement proceedings, article 9 (8)(d) allowing the procuring entity to require any pre-qualified supplier or contractor to demonstrate its qualifications again, and article 42 (6) and (7) and 56 (2) that specifically regulate the assessment of the qualifications of the supplier or contractor presenting the successful tender or bid.

4. It is understood that the list of exceptions in paragraph (1)(a) to (d) is not exhaustive: it refers only to the grounds that may be invoked by the procuring entity. Additional grounds may appear as a result of challenge and appeal proceedings, for example when the administrative body, under article 66, orders the termination of the procurement proceedings or requires the procuring entity to reconsider its decision or prohibits the procuring entity from deciding unlawfully. These grounds should also not be confused with the grounds that justify the award of the procurement contract to the next successful submission under article 21 (8): the latter grounds would appear after the successful submission was accepted, and not at the stage when the procuring entity decides whether the successful submission should be accepted.

5. Paragraph (2) regulates the application of the standstill period, defined in article (2)(q) as "the period starting from the dispatch of a notice as required by article 21 (2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified". The primary purpose of the standstill period is therefore to provide an opportunity to rectify any improprieties discovered prior to the entry into force of the procurement contract or the conclusion of the framework agreement, and thus to avoid the need for an annulment of a contract or framework agreement that has entered into force.

6. The notification of the standstill period is served to all suppliers or contractors that presented submissions, including the one(s) to which the procurement contract or framework agreement is intended to be awarded. This notification should not be confused with the notice of acceptance of the successful submission that is served only to the supplier or contractor that presented that submission under paragraph (4) of the article. The information notified under paragraph (2) includes that listed in its subparagraphs (a) to (c). The provisions of article 23 on confidentiality will indicate if any information about the successful submission under subparagraph (b) should be withheld for confidentiality reasons. Although the need to preserve confidentiality of commercially sensitive information may arise in setting out the characteristics and relative advantages of the successful submission, it is essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make meaningful use of the standstill period.

7. Because the standstill period starts running from the time of dispatch of the notification, to ensure transparency, integrity, and the fair and equitable treatment of all suppliers and contractors in procurement proceedings, the provisions require simultaneous dispatch of the notification to each supplier or contractor concerned (this obligation is conveyed in the requirement "promptly [to] notify each supplier or contractor"). The provisions require sending notification individually to each

supplier or contractor concerned. Putting, for example, a notice on the website would be insufficient.

8. The provisions do not include any requirement for the procuring entity to notify unsuccessful suppliers or contractors of the grounds why they were not successful. Providing a full statement of the grounds to each supplier or contractor might be burdensome. Nor do they provide for mandatory debriefing since debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement and provisions on debriefing are not easily enforceable. Nevertheless, debriefing upon request of the supplier or contractor concerned, represents best practice and should be encouraged by the enacting State. (On debriefing generally, see paragraphs … of Part I of the Guide.)

9. The provisions of paragraph (2) also require the procuring entity specifying in the notification the duration of the standstill period. The duration will be the same as that specified in the solicitation documents at the outset of the procurement proceedings. Providing this information at the outset of the procurement is important given its potential impact on the decision by suppliers or contractors to participate in the procurement proceedings. Providing this information in the notification under paragraph (2) is important not only as a reminder but also for precision — since the standstill period runs from the notice of the dispatch, the notification will specify the starting and ending dates of the standstill period reflecting the entire duration of the standstill period indicated in the solicitation documents.

10. Certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period is critical for ensuring both that the suppliers and contractors can take such action as is warranted and that the procuring entity can award the contract without risking an upset. The date of dispatch creates the highest level of certainty and is specified in the Model Law as the starting point for the standstill period. The same approach is taken as regards other types of notifications served under this article (see paragraphs … below). Paragraph (9) of the article explains the meaning of the "dispatch."

11. The Model Law leaves it to the procuring entity to determine the exact duration of the standstill period on a procurement-by-procurement basis, depending on the circumstances of the given procurement, in particular the means of communication used and whether procurement is domestic or international. To ensure equality of treatment, the additional time may need to be allowed for example for a notification sent by traditional mail to reach overseas suppliers or contractors.

12. The discretion of the procuring entity to fix the duration of the standstill period is not unlimited. It is subject to the minimum to be established by the enacting State [in the law] [as may be further modified by the procurement regulations] [or the procurement regulations].[14] A number of considerations should be taken into account in establishing the minimum duration of the standstill period, including the impact that the duration of the standstill period would have on overall objectives of the Model Law as regards transparency, accountability, efficiency and

[14] The wording depends on the final wording of paragraph (2)(c) of the Model Law.

equitable treatment of suppliers or contractors. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. The enacting States should however note that excessively long periods of time may be inappropriate in the context of some procurement methods and procedures, such as electronic reverse auctions and open framework agreements, that pre-suppose speedy awards and in which the number and complexity of issues that can be challenged are limited.[15] It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to protest the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, supposed to be relatively short. Once the challenge has been submitted, the provisions on challenge and appeal proceedings of chapter VIII of the Model Law would address a suspension of the procurement procedure and other appropriate remedies.

13. Paragraph (3) sets out exemptions from the application of the standstill period. The first exemption refers to contracts awarded under framework agreements without second-stage competition.[16] It should be emphasized that the exemption is not applicable to the conclusion of a framework agreement itself: regardless of the type of the framework agreement awarded, the standstill period will apply. Neither will an exemption apply to contracts awarded under framework agreements involving second-stage competition, including under open framework agreements.

14. The second exemption applies to low-value procurement. [The enacting State should consider aligning the threshold in paragraph (3)(b) with the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying an exemption from the requirement of public notice of the procurement contract award (article 22 (2) of the current draft) and recourse to request for quotations proceedings (article 28 (2)).][17]

15. The third exemption is justified on the ground of urgent public interest considerations. It should be noted that urgent public interest considerations may also be invoked by the procuring entity under article 64 (3) of the Model Law as a justification to appropriate authorities to lift a prohibition against entering into the procurement contract or framework agreement while the challenge or appeal is pending.[18]

16. The purpose of paragraph (4) is to specify when the notice of acceptance of the successful submission is to be sent to the supplier or contractor presenting that submission. There may be various scenarios, as reflected in the paragraph. First, a

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[15] The general point is to be reflected in the appropriate place in the Guide that enacting States in establishing periods of time of a short duration should indicate them in working days; in other cases, it may indicate them in calendar days.

[16] The provision of guidance to the Secretariat is requested as regards reasons for this exemption. The records of the Working Group's deliberations (see A/CN.9/687, para. 96) are not conclusive on this point.

[17] The text in square brackets may need to be reconsidered if the decision is made that all the threshold amounts will be set out in the procurement regulations rather than in the Model Law itself.

[18] The provision of guidance to the Secretariat is requested as regards the appropriate considerations, which may differ, to justify an exemption under this provision and under article 64 (3).

standstill period was applied and no challenge or appeal is outstanding upon expiry of the standstill period. In such a case, the notice is dispatched by the procuring entity promptly upon the expiry of the standstill period. Second, the standstill period was applied and a challenge or appeal is still outstanding upon the expiry of the standstill period. In such a case, the procuring entity (under article 64 of the Model Law) is prohibited from dispatching the notice of acceptance until it receives notification from appropriate authorities ordering or authorizing it to do so. Third, when no standstill period was applied, the procuring entity must dispatch the notice of acceptance promptly after it ascertained the successful submission, unless it receives an order not to do so from a court or another authority designated by the enacting State in the Law.

17. The Model Law provides for different methods of entry into force of the procurement contract, recognizing that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances.

18. Under one method (set out in paragraph (5)), absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that presented the successful submission. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the former approach is more appropriate to the particular circumstances of procurement proceedings. In order to bind the supplier or contractor to a procurement contract, including obligating it to sign any written procurement contract, the procuring entity has to give notice of acceptance while the submission is in force. Under the "receipt" approach, if the notice was properly transmitted, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received before the expiry of the period of effectiveness of the submission, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, that right of the procuring entity is preserved. In the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its submission that the submission had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

19. The second method of entry into force of the procurement contract (set out in paragraph (6)) ties the entry into force of the procurement contract to the signature by the supplier or contractor presenting the successful submission of a written procurement contract conforming to the submission. This is possible only if the solicitation documents included such a requirement. Requiring a written contract should not be considered the norm in all procurement proceedings. Enacting States are encouraged to indicate in the procurement regulations the type of circumstances in which a written procurement contract may be required, taking into account that the requirement for execution of a written contract may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authority for the relevant signature.

20. The third method of entry into force (set out in paragraph (7)) provides for entry into force upon approval of the procurement contract by another authority. In States in which this provision is enacted, further details may be provided in the

procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). Paragraph (7) reiterates the role of the solicitation documents in giving notice to suppliers or contractors of formalities required for entry into force of the procurement contract at the outset of the procurement proceedings. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful submission or of any tender security are designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed in particular to exclude the possibility that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

21. In order to promote the objectives of good procurement practice, paragraph (8) makes it clear that, in the event that the supplier or contractor whose submission was accepted fails to sign a procurement contract in accordance with paragraph (6), the procuring entity may choose to cancel the procurement or to award the contract or framework agreement to the next successful submission. That submission will be identified in accordance with the provisions normally applicable to the selection of the successful submission in the context of a particular procurement method or technique. The discretion given to the procuring entity to cancel the procurement in such cases is intended to mitigate the risk of collusion among suppliers or contractors. [More guidance on the utility of this provision in the Model Law is to be added.]

Article 22. Public notice of awards of procurement contract and framework agreement

1. In order to promote transparency in the procurement process, and the accountability of the procuring entity to the public at large for its use of public funds, article 22 requires prompt publication of a notice of award of the procurement contract and framework agreement. This obligation is separate from the notice of the procurement contract (or framework agreement as applicable) required to be given pursuant to article 21 (10) to suppliers and contractors that presented submissions in the given procurement proceedings, and independent from the requirement that information of that nature in the record should be made available to the general public under article 24 (2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which paragraph (3) suggests may be dealt with in the procurement regulations. For the minimum standards for publication of this type of information, see the guidance to article 5 (see paragraphs … above), which is relevant in this context.

2. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts no matter how low their value, [the enacting State is given the option in paragraph (2) of setting a monetary value threshold below which the publication requirement would not apply. However, since the monetary value threshold might be subject to periodic changes, for example, due to inflation, it might be preferable to set out the threshold in the procurement regulations, the

amendment of which would presumably be less complicated than an amendment of the statute.][19] Paragraph (2) requires periodic publication of cumulative notices of such awards, which must take place at least once a year.

3. While the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would most probably exceed the low-value threshold.

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[19] The text in square brackets may need to be redrafted depending on the decision of the Commission as regards the place where thresholds should be specified.