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

Note by the Secretariat*

This Note introduces a proposal for a chapter in a draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement that would explain changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services, covering the preamble and provisions of chapters I and II of the 1994 Model Law.

* This document was submitted less than ten weeks before the opening of the session due to the need to finalize consultations.

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Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Part III. Changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services

I. Executive Summary

1. This part of the Guide provides a commentary on the revisions made to the 1994 Model Law when compiling the 2011 Model Law. The aim is to enable users of the 1994 text to assess their domestic laws to see how best to update them, where it is not intended to implement the 2011 Model Law in its entirety. Accordingly, editorial changes (stylistic, consequential, structural and other minor changes not affecting the substance of the provisions) are not addressed; nor, therefore, are all provisions of either Model Law discussed in this part.

2. With the same aim in mind, this part of the Guide links the 1994 and 2011 provisions to the extent possible. A table of concordance between the 2011 Model Law and the 1994 Model Law and a table of concordance between the 1994 Model Law and the 2011 Model Law (excluding new provisions) are reproduced in annexes to this part of the Guide. References to the paragraphs and articles in this part of the Guide are to the articles of the 1994 Model Law, or where they have not been changed, to both texts, unless otherwise noted.

3. The commentary in this part of the Guide is intended to supplement, and not replace, the commentary in Parts I (General remarks) and II (Article-by-article commentary). The policy issues set out in those earlier parts of the Guide are therefore not repeated here; cross-references are, however, included where the policy discussion further explains the revisions concerned.

II. Commentary on the changes made

Preamble

4. Deletion throughout the Model Law, including in the preamble (see chapeau and paragraph (c)), of references to "goods, construction and services", reflects the approach taken in the 2011 Model Law as regards the basis for the selection of procurement methods — the level of complexity of the subject matter of the procurement, as opposed to whether it is goods, construction or services that are to be procured (further explained in paragraph 57 below [**hyperlink**]).

5. Paragraph (b) has been amended to indicate that the Model Law promotes the objectives of fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality as a general rule. The relevant qualifier in the 1994 text ("especially where appropriate") has therefore been deleted.

6. Finally, paragraph (d) has been amended to refer to the "equal", in addition to the "fair and equitable", treatment of suppliers and contractors, which harmonizes the Model Law in this respect with other international and regional instruments

regulating public procurement, where all these three concepts in different combinations may be found.

CHAPTER I. GENERAL PROVISIONS

A. Summary of changes made in this chapter

7. Chapter I sets out the principles that govern all procurement under the Model Law, and is considerably expanded as compared with its 1994 counterpart (the 1994 chapter I contains 17 articles, the 2011 chapter I contains 26 articles). Many of the principles that were previously found in the 1994 text either in the rules on tendering or elsewhere in procedural articles have been collated in the expanded 2011 chapter I. Examples include clarifications and modifications of solicitation documents, language of tenders, tender securities and acceptance of the successful submission and entry into force of the procurement contract. The 2011 articles are not so much new as made broader and of general application.

8. The consolidation of some provisions found in various articles of the 1994 Model Law resulted in the addition of the following new articles: article 11 (Rules concerning evaluation criteria and procedures), article 14 (Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions), article 16 (Clarification of qualification information and of submissions) and article 24 (Confidentiality). Some provisions are completely new, not found in the 1994 text: article 6 (Information on possible forthcoming procurement), article 12 (Rules concerning estimation of the value of procurement), article 20 (Rejection of abnormally low submissions) and article 26 (Code of conduct).

9. The chapter has been reordered to present, so far as possible, the provisions in chronological order of steps usually taken in most procurement proceedings.

B. Article-by-article commentary

Scope of application (article 1)

10. Paragraphs (2) and (3) have been deleted, with consequential changes in paragraph (1), to reflect that the Model Law applies to all public procurement, including in the defence and national security sectors. In 1994, defence procurement was excluded (though article 1 of that text allowed the procuring entity to choose to apply the Model Law to a given procurement). UNCITRAL considered that the broad variety of procedures available under the 2011 Model Law made it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the 2011 Model Law contain provisions that are intended to accommodate procurement involving essential national security or defence issues (termed in this Guide “security-related procurement” for ease of reference), such as provisions applicable to the procurement involving classified information in which transparency mechanisms may need to be relaxed, and provisions regulating certain “alternative” procurement methods. Any decision not to apply the full ambit of the 2011 Model Law to any

procurement has to be justified in the record of the procurement under article 25: there is no blanket exemption from the 2011 Model Law's procedures. On this point, see further paragraphs … of the Guide [**hyperlink**].

Definitions (article 2)

11. This article has been substantially redrafted. A number of new definitions have been added and some definitions found in the 1994 text have been deleted or amended, as a consequence of the introduction of new procurement techniques, concepts and other changes throughout the Model Law. The definitions now also appear in alphabetical order.

12. New definitions are: "direct solicitation", "domestic procurement", "electronic reverse auction", "framework agreement procedure", "pre-qualification", "pre-qualification documents", "pre-selection", "pre-selection documents", "procurement involving classified information", "procurement regulations", "socioeconomic policies", "solicitation", "solicitation document", "standstill period" and "a submission (or submissions)".

13. Amended definitions are: "procurement", "procurement contract", "procuring entity", "supplier or contractor" and "tender security":

(a) In the definition of "procurement" (or "public procurement"), the words "by a procuring entity" have been added in the end, to highlight that the Model Law does not deal with procurement by parties not covered by the definition of the "procuring entity";

(b) In the definition of "procurement contract" changes have been made to reflect in particular the introduction of framework agreement procedures and to encompass procurement contracts concluded under such procedures. As a result, references to "supplier or contractor" have been put in the plural and the words "resulting from procurement proceedings" have been replaced with "at the end of the procurement proceedings";

(c) In the definition of "procuring entity", changes have been made to reflect the fact that procurement may be conducted by multiplicity of public entities, not only by a single public entity, and that such public entities may be from different States (i.e. joint purchases by public entities of two or more countries);

(d) In the definition of "supplier or contractor", changes have been made, as in the definition of "procurement contract", to reflect primarily the introduction in the 2011 Model Law of framework agreement procedures. The reference to "the party to a procurement contract with the procuring entity" has therefore been replaced with a reference to "any party to the procurement proceedings with the procuring entity";

(e) The definition of "tender security" now reflects the fact that a tender security is provided to the procuring entity upon the requirement of the procuring entity. The definition therefore opens with the statement "a security required from suppliers or contractors by the procuring entity". At the end of the definition, a sentence has been added to make it clear that the definition does not refer to a security guaranteeing contract performance.

14. For the reasons set out in paragraph 4 above, the definitions of "goods", "construction" and "services" have been deleted. These terms have been substituted in the 2011 Model Law by the term "subject matter of the procurement", a self-explanatory concept.

International obligations of this State relating to procurement [and intergovernmental agreements within (this State)] (article 3)

15. The article remains substantively unchanged, except for inclusion of additional pairs of square brackets in the title and in the text of the article and an accompanying footnote that explains that the text in brackets is relevant to, and intended for consideration by, federal States.

Procurement regulations (article 4) remains substantively unchanged.

Public accessibility of legal texts (1994 article 5) (Publication of legal texts (2011 article 5))

16. The title of the article has been broadened to reflect the substantive changes made in the article, which is now split into two paragraphs: the first dealing with legal texts of general application that must be promptly made accessible to the public and systematically maintained, and the second dealing with judicial decisions and administrative rulings with precedent value that must be made available to the public.

Qualifications of suppliers and contractors (1994 article 6; 2011 article 9)

17. The phrase "in order to participate in procurement proceedings" in paragraph (1)(b) has been deleted, since it could have been understood to require pre-qualification proceedings in all cases. Since the general rule is that qualifications of suppliers or contractors may be ascertained by the procuring entity at any stage of the procurement proceedings, article 9(1) the 2011 Model Law avoids linking ascertainment of qualifications to any particular stage of the proceedings.

18. The list of criteria in paragraph (1)(b) has also been expanded to refer to environmental qualifications and requirement that suppliers and contractors meet ethical and other standards applicable in the State. The 1994 reference to "reputation", on the other hand, has been deleted to eliminate subjectivity in the process of ascertainment by the procuring entity of the qualifications of suppliers or contractors.

19. Paragraph 2 of the 2011 Model Law refers not only to "appropriate" qualification criteria, as the 1994 provisions did, but also to qualification criteria "relevant" in the circumstances of the particular procurement, to restrict the discretion of the procuring entity in the selection of qualification criteria.

20. New provisions have been included in the article as paragraph (7) of the 2011 text: they reflect in substance the provisions of 1994 article 10, which has been deleted, with one substantive modification. The modification restricts any requirement for legalization of documentary evidence to the supplier or contractor presenting the successful submission (the 1994 text allowed the procuring entity to require the legalization of documentary evidence from any supplier or contractor).

21. 1994 paragraph (6)(a) (which has become 2011 paragraph 8(a)) has been amended, and now requires the procuring entity to disqualify a supplier for "misrepresentation" as well as for submitting false information (for a discussion of "misrepresentation", see the commentary to 2011 article 8 [**hyperlink**]). A new subparagraph 8(d) has been added in the 2011 text, reproducing the provisions of article 7(8) of the 1994 Model Law that permit a further ascertainment of qualifications in the procurement proceedings that involved pre-qualification.

Pre-qualification proceedings (1994 article 7; 2011 article 18)

22. In paragraph (1), the phrase "prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V" has been replaced with the phrase "prior to solicitation". The 2011 provisions better reflect the point at which the qualifications of suppliers and contractors are ascertained, and qualified suppliers and contractors are identified, in pre-qualification proceedings.

23. The reference to "printing" in paragraph (2) has been deleted, to reflect the technology-neutral nature of the 2011 Model Law. On that point, see paragraphs … of Part I (General remarks) [**hyperlink**]. The substantive provision found in 1994 paragraph (3)(a)(iv) (requiring the procuring entity to express the deadline for submission of applications to pre-qualify "as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity") has become the basis for drafting equivalent requirements in a new article in chapter I of the 2011 Model Law on rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions (article 14). As a result, these requirements have become applicable under the 2011 text not only to the deadlines for submitting applications to pre-qualify but also to those for presenting applications for pre-selection and for presenting submissions.

24. Two new paragraphs have been introduced in the article, as paragraphs (3) and (4) of 2011 article 18, addressing the publication and content of the invitation to pre-qualify. In the 1994 Model Law, these provisions appeared in chapter III on open tendering (articles 24 and 25). The goal of the amendments is to make the article self-contained and applicable to all procurement methods, and thus the article consolidates all provisions on pre-qualification. The lists of information to be included in the invitation to pre-qualify and in the pre-qualification documents have been amended: everything that would be of immediate interest and relevance to potential suppliers or contractors in order to decide whether to participate in the procurement proceedings is to be disclosed at the outset of the procurement proceedings (i.e. in the invitation to pre-qualify) while details of the pre-qualification proceedings are to be included in the pre-qualification documents.

25. Paragraph (5) (which has become 2011 paragraph (7)) has been amended to make it clear that the procuring entity, in reaching a decision with respect to the qualifications of each supplier or contractor, can apply only those criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents. A new paragraph (8) has been included in the 2011 provisions reproducing the last sentence of 1994 paragraph (6) (the rule that only pre-qualified

suppliers or contractors may participate in further stages of the procurement proceedings has therefore been made more visible).

26. Paragraph (7) (which has become 2011 paragraph (10)) has been considerably strengthened: the phrase "upon request" and the last part of the paragraph has been deleted with the result that the procuring entity is obliged under the 2011 Model Law, without any qualifier, to promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

27. As noted in paragraph 21 above, 1994 paragraph (8) has been relocated to the article on qualifications.

Participation by suppliers or contractors (article 8)

28. The article has been significantly amended. Two new paragraphs have been introduced, as paragraphs (2) and (5) of the 2011 article. First, 2011 paragraph (2) prohibits the procuring entity from establishing any requirement aimed at limiting the participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof, except when the procuring entity is authorized or required to do so by the procurement regulations or other provisions of law of the enacting State. This provision should be understood in conjunction with paragraph (1) of the article, which refers to a possible limitation of participation on the basis of nationality: the newly-introduced paragraph refers to possible limitation on other grounds permitted by law, to comply for example with sanctions imposed by the United Nations Security Council. The second new paragraph, 2011 paragraph (5), requires the procuring entity to make available to any person, upon request, its reasons for limiting the participation of suppliers or contractors in the procurement proceedings. This provision is in line with one of the general goals that guided UNCITRAL in amending the 1994 Model Law — to strengthen its transparency provisions to allow, inter alia, public oversight of the decisions of the procuring entity where and as appropriate.

29. The other substantive change in this article relates to provisions of paragraph (3). The 2011 text has eliminated the requirement for a specific declaration by the procuring entity, required in the 1994 text, that suppliers and contractors may participate in the procurement proceedings regardless of nationality. The 1994 text left unregulated the consequences of the failure by the procuring entity to make such declaration, and article 52(2) explicitly excluded any decision on limitation of participation from review. The default rule in the 2011 Model Law as reflected in the amendments made in the Preamble (see paragraph 5 above) is that all suppliers or contractors are permitted to participate in any procurement proceedings regardless of nationality or other criteria. No specific declaration by the procuring entity of unlimited participation is therefore needed. The 2011 article makes it clear, as explained in the preceding paragraph, that reasons for exclusion must exist in the procurement regulations or other provisions of law of the enacting State, and are not a matter of discretion by the procuring entity. When such reasons exist, 2011 provisions require the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, to declare that participation is limited and provide a statement of the reasons and circumstances on which it relied to reach the decision to limit the participation (see 2011 paragraphs (3) and (4)). To ensure fair, equal and

equitable treatment of suppliers and contractors, 2011 paragraph (3) continues that any such declaration may not later be altered.

Form of communications (1994 article 9) (Communications in procurement (2011 article 7))

30. The change in the title of the article reflects its expanded scope: it deals now not only with the form but also with means of communication.

31. The substance of provisions of paragraphs (1) and (2), which in essence provide for functional equivalence between paper- and non-paper form and means of communication, is retained in the 2011 text with a few exceptions. First of all, the principle of functional equivalence is now unconditional (i.e. the caveats introducing 1994 paragraph (1) have been deleted). Second, 2011 paragraph (1) includes an additional requirement as regards the form of communication, not found in the 1994 text: it must be accessible so as to be usable for subsequent reference. This additional requirement aligns the provisions with the corresponding provisions of the UNCITRAL instruments on e-commerce. Lastly, the flexibility envisaged in paragraph (2) as regards the form and means of communication is no longer applicable to (a) notices of cancellation of the procurement (in the 1994 text, these were notices of the rejection of all tenders, proposals, offers or quotations (see article 12(3)) and (b) the notices of acceptance of the successful submission (in the 1994 text, this was a notice of the acceptance of the successful tender (see article 36(1)). This is because under the 2011 Model Law completely new regimes have been established with respect to these types of notices: a requirement for publication of a notice of cancellation has been introduced (see article 19(2) of the 2011 Model Law) and a robust procedure for acceptance of the successful submission, including notice of a standstill period as a general rule, must be followed (see 2011 article 22). On these issues, see further paragraphs 38-42 and … below.

32. Paragraph (3) of the 1994 text, which provides for non-discrimination against or among suppliers or contractors on the basis of the form in which they transmit or receive information, has been replaced with provisions that reflect the new approach to the selection of form and means of communication under the 2011 Model Law. Unlike the 1994 text that provides for the unconditional right of a supplier or contractor to submit a tender in a particular form and by particular means (see article 30(5) of the 1994 text), the 2011 Model Law gives the right to the procuring entity to select the form and means of communication without the need to justify that choice, subject to some safeguards. On this subject, see further paragraphs … of this Guide [**hyperlink**].

Rules concerning documentary evidence provided by suppliers or contractors (article 10)

33. The article has been deleted and its provisions, including one substantive modification, have been incorporated in the article on qualifications of suppliers or contractors (see paragraph 20 above).

Record of procurement proceedings (1994 article 11) (Documentary record of procurement proceedings (2011 article 25))

34. The article has been substantially revised; the change to the title has been made to emphasize that all steps in the procurement proceedings must be documented. The list of information to be included in the record of procurement proceedings has been expanded and made illustrative, rather than exhaustive. Some additional information has been included in the list as a result of introduction of new procurement techniques and regulatory regimes (e.g. electronic reverse auctions, framework agreements, selection of means of communication, standstill period, classified information, socioeconomic policies, and abnormally low submissions). Other additional information has been listed to strengthen transparency and to allow for effective oversight, be it by the public, or interested suppliers or contractors or competent authorities.

35. 2011 paragraph (2) expands the scope of information to be made available for inspection by the public. 2011 paragraph (3) does the same with respect to suppliers or contractors that presented submissions. Unlike the 1994 Model Law, the 2011 text limits the group of suppliers or contractors who may have access to information listed in paragraph (3) to those that presented submissions and excludes those that applied for pre-qualification (since the information in question is of no relevance to them). Those suppliers or contractors that presented submissions may request access to the procurement records at any time after the decision of acceptance of the successful submission has become known to them. The 2011 text, unlike its 1994 counterpart, does not cover situations when the procurement is cancelled. This is on the understanding that in such cases, access to the records may be restricted for public interest and interested suppliers or contractors would need to obtain the order of competent authorities to get access to them.

36. The exceptions to disclosure found in paragraph (3) of the 1994 text has been made of general application, i.e. without reference to any particular portion of the record or to any particular group of interested persons seeking access to the record. The 1994 public interest exception has been replaced with an exception to protect the essential security interests of the State. The latter was considered to be more precise and more likely to be regulated by law. The 1994 exception referring to legitimate commercial interests of the parties has been replaced with a reference to legitimate commercial interests of the suppliers or contractors.

37. 1994 paragraph (4), which excluded any liability of the procuring entity for damages to suppliers or contractors owing solely to a failure to maintain a record of the procurement proceedings, has been deleted. The 2011 text now includes an obligation of the procuring entity to record, file and preserve all documents relating to the procurement proceedings in accordance with applicable law (see 2011 article 25(5) [**hyperlink**]).

Rejection of all tenders, proposals, offers or quotations (1994 article 12) (Cancellation of the procurement (2011 article 19))

38. This article has been substantially revised. The change in title (reflected throughout the 2011 Model Law) refers to the cancellation of the procurement rather than to the rejection of all tenders, proposals, offers or quotations, to accurately

reflect that cancellation of the procurement can take place at any time, not only after all submissions have been received.

39. Paragraph (1) of the 2011 text confers an unconditional right on the procuring entity to cancel the procurement at any time prior to the acceptance of the successful submission. It is more flexible than the 1994 equivalent provision, which allowed for the prior approval of such a decision by a designated authority of the State. The removal of this condition was part of the wholesale removal of ex ante control mechanisms throughout the 2011 Model Law (with two exceptions, which are addressed in paragraph 59 below; for general guidance on the approach to control mechanisms, see paragraphs … of Part I (General remarks) of this Guide above [**hyperlink**]). A second condition in the 1994 text, requiring the possibility of rejection of all submissions to be reserved in the solicitation documents, has been removed, reflecting that this requirement had proved of little practical benefit.

40. Paragraph (1) of the 2011 text also envisages the possibility of cancelling the procurement after the successful submission is accepted, but where the successful supplier fails to sign a written procurement contract or provide a mandatory contract performance guarantee (see 2011 article 22(8) [**hyperlink**]). It also imposes an explicit requirement on the procuring entity not to open any tenders or proposals after taking a decision to cancel the procurement and to return them unopened to the suppliers or contractors that presented them.

41. The notification requirements in case of cancellation of the procurement have been considerably strengthened. The procuring entity is required under 2011 paragraph (2) not only promptly to notify of the cancellation suppliers or contractors that presented submissions but also to communicate to them the reasons for the decision to do so. There is also now an explicit requirement to include the decision and reasons for it in the record of the procurement proceedings and to publish a notice of cancellation in the same manner and place where the original notice of the procurement was published.

42. Finally, 2011 paragraph (3) restricts the no-liability clause in paragraph (2) of the 1994 Model Law to situations other than arising as a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

Entry into force of the procurement contract (article 13)

43. The article has been deleted. The dual regime for entry into force of the procurement contract under the 1994 Model Law — the one applicable to tendering proceedings and the other applicable to all other proceedings — has been replaced with a single regime, set out in 2011 article 22. On this subject, see the further discussion of changes made to article 36 of the 1994 Model Law in paragraphs … below and the commentary to article 22 of the 2011 Model Law above [**hyperlink**].

Public notice of procurement contract awards (1994 article 14) (Public notice of the award of the procurement contract or framework agreement (2011 article 23))

44. The article has been revised by the addition of requirements that aim at enhancing transparency. 2011 paragraph (1) now provides for the minimum content of the notice to be published: the name of the supplier (or suppliers) or contractor

(or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price. It also makes it clear that the provisions apply to publication of notices upon the entry into force of the procurement contract or conclusion of a framework agreement. Such clarification was necessary to avoid possible confusion with other types of notices, such as the standstill notice under 2011 article 22(2) [**hyperlink**].

45. 1994 paragraph (2) has been strengthened and becomes paragraph (3) of the 2011 text; it requires the procurement regulations to prescribe the manner of publication of all contract award notices under the article, so that there will be no uncertainty on this matter. Paragraph (2) of the 2011 text exempts low-value contract awards from the publication requirement contained in paragraph (1) of the article. However, it requires the procuring entity to publish a cumulative notice of such low-value awards from time to time but at least once a year; in this regard it retains the exemption in paragraph (3) of the 1994 text, but with an added transparency safeguard.

46. Under the 1994 provisions, the low-value threshold amount for the purpose of invoking an exemption from the publication requirement contained in paragraph (1) is to be specified in the law. In the 2011 text, this amount is to be specified in the procurement regulations, to provide greater flexibility, as further explained in the commentary to article 23 of the 2011 Model Law above [**hyperlink**].

Inducements from suppliers or contractors (1994 article 15) (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 (2011 article 21))

47. The scope of the article has been expanded, as reflected in the 2011 title, in order to implement the requirements of the United Nations Convention against Corruption.[1] 2011 paragraph (1) now also states expressly that exclusion may result where a gratuity, an offer of employment or any other thing of service or value is offered, given or agreed to be given so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

48. The title of the article and the provisions have also been amended to convey more clearly the possibility of such exclusion, which may occur at any time in the procurement proceedings. The 1994 wording (with its references to rejection of a tender, proposal, offer or quotation) implied that this may happen only after a tender, proposal, offer or quotation was submitted.

49. Finally, the requirement of approval by a designated organ of the enacting State of the decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings, found in parenthesis in the 1994 text, has been deleted.

[1] United Nations, *Treaty Series*, vol. 2349, p. 41.

Rules concerning description of goods, construction or services (1994 article 16) (Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement (2011 article 10))

50. The change to the title of the article has been made to convey clearly the scope of the article, which addresses both descriptions and terms and conditions of the procurement.

51. The article has also been substantially revised. 2011 paragraph (1) is a new provision, and requires a description of the subject matter of the procurement in the solicitation and, where and as applicable, pre-qualification or pre-selection documents. An important safeguard against abuse in the assessment of responsiveness of submissions is the requirement in 2011 paragraph (1)(b), not found in the 1994 text, to set out clearly in the solicitation documents the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.

52. Paragraph (1) of the 1994 text, which prohibited obstacles to participation and which has become paragraph (2) of the 2011 text, has been considerably strengthened. The 2011 text prohibits any description of the subject matter of the procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality. The provisions now also cross-refer to article 8 of the 2011 Model Law, which sets out a general rule for unrestricted participation of suppliers or contractors in the procurement proceedings (with limited exceptions as described in that article [**hyperlink**]).

53. Paragraph (2) of the 1994 text, which has become paragraph (3) of the 2011 text, has also been strengthened. The first sentence of paragraph (2) of the 1994 text has been streamlined in the 2011 Model Law. The relevant provisions in the 2011 text set out two separate rules: first, that, to the extent practicable, the description of the subject matter of the procurement must be objective, functional and generic; and second that it must set out the relevant technical, quality and performance characteristics of that subject matter. Unlike its 1994 counterpart, the 2011 text encourages functional specifications.

54. The provisions of 1994 paragraph (3)(b) have been expanded in paragraph 5(b) of the 2011 text, with references to “standardized trade conditions” and “the terms and conditions of the procurement”. The 1994 corresponding provisions referred in this context only to “standardized trade terms” and “the terms and conditions of the procurement contract”.

Language (1994 article 17) (Rules concerning the language of documents (2011 article 13))

55. The title of the 2011 article reflects its expanded scope: it has been consolidated with the provisions of 1994 article 29 that set out rules for the language of tenders. The resulting consolidated article of the 2011 Model Law does not limit its application to tenders but covers all submissions as well as applications to pre-qualify and for pre-selection.

1994 CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE (2011 Chapter II. Methods of procurement and their conditions for use; solicitation and notices of the procurement)

A. Summary of changes made in this chapter

56. The title of the chapter has been changed to reflect the introduction of a new section on solicitation and notices of the procurement. The 2011 title of the chapter is: "Methods of procurement and their conditions for use; solicitation and notices of the procurement". The chapter in the 2011 Model Law thus contains two sections: the first with provisions on methods of procurement and their conditions for use and the second with provisions on solicitation and notices of the procurement.

1. Methods of procurement and their conditions for use

57. The provisions on methods of procurement and their conditions for use have been substantially revised as a result of introduction of new procurement methods and techniques and reflecting a new approach to drafting the revised Model Law as explained in paragraph 4 above: the selection of procurement methods is on the basis of complexity of the subject matter of the procurement rather than whether it is goods, construction or services that are procured. This decision was based on several grounds. First, services and other procurement methods are procedurally similar, if not identical: the main difference is the extent to which the skills and experience of individuals providing the subject matter of the procurement can be taken into account. UNCITRAL considered that these issues are important not just in services procurement, but also in mixed contracts and goods and construction (accordingly, under article 11 of the 2011 Model Law, they can be included in the evaluation criteria in any procurement). Secondly, many traditional goods contracts now take the form of services — such as IT contracts in which the hardware is leased, rather than purchased, and it would make little sense to allow procurement decisions to be potentially distorted by considerations of which method might offer the most flexibility. In addition, UNCITRAL expressly stated that the Model Law should reflect the fact that policies and practices evolve over time, and has therefore crafted its provisions in a flexible manner, balancing the needs of borrowers, ongoing developments in procurement methods and capacity development. As a result, subject to their conditions for use, all procurement methods are available for all procurement.

58. The section on methods of procurement and their conditions for use is opened by a new article 27 that lists all procurement methods and techniques available under the 2011 Model Law. Some listed procurement methods have names identical to their 1994 counterparts (restricted tendering, request for quotations, two-stage tendering, competitive negotiations and single-source procurement). Some listed procurement methods have names not found in the 1994 Model Law although they drew their features from the procurement methods or selection procedures of the 1994 Model Law: open tendering is equivalent to tendering proceedings in chapter III of the 1994 Model Law; request for proposals without negotiation draws its features on the selection procedure described in article 42 of the 1994 text;

request for proposals with dialogue combines the features of articles 43 (selection procedures with simultaneous negotiations for procurement of services) and 48 (request for proposals) of the 1994 Model Law;[2] and request for proposals with consecutive negotiations draws its features from the selection procedure described in article 44 of the 1994 Model Law. The article refers to newly introduced procurement techniques — electronic reverse auctions and framework agreements — and the chapter includes conditions for use of these techniques (articles 31 and 32 of the 2011 text):

(a) Electronic reverse auctions have been increasing in use since the adoption by UNCITRAL of the 1994 Model Law. The 1994 text did not provide for traditional in-person auctions, in large part because of observed collusion. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the 2011 Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentially and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in electronic reverse auctions, especially when they are used as a phase in other procurement methods or preceded by offline examination or evaluation of initial bids (for the relevant discussion, see the commentary to the articles of chapter VI of the 2011 Model Law [**hyperlink**]);

(b) The 1994 Model Law did not make provision for the use of framework agreements. Their use has increased significantly since the date of the adoption of the 1994 Model Law, and in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement can arguably be operated without specific provision in the Model Law. UNCITRAL considers that the use of framework agreements could enhance efficiency in procurement and in addition enhance transparency and competition in procurements of subject matters of small value that in many jurisdictions fall outside many of the controls of a procurement system. Indeed, the grouping of a series of smaller procurements can facilitate oversight. UNCITRAL therefore has made specific provision for them, to ensure their appropriate use and to ensure that the particular issues that framework agreements raise are adequately addressed (for the relevant discussion, see the commentary to the articles of chapter VII of the 2011 Model Law [**hyperlink**]).

59. 2011 article 27 is accompanied by a footnote, the first part of which repeats a footnote to article 18 of the 1994 Model Law. The footnote has been expanded by the requirement to provide in the national enactment of the Model Law for an appropriate range of options, including open tendering. In addition, it now states that “States may consider whether, for certain methods of procurement, to include a

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[2] These two procurement methods in the 1994 text have many similarities and can be used for procurement of services. Request for proposals with dialogue retains the main feature of those 1994 procurement methods — the use of interaction with suppliers or contractors, which is held concurrently with a group of suppliers or contractors (as opposed to consecutive negotiations, which is a distinct feature of another request for proposals type of proceedings). In order to avoid confusion over terminology and the choice of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the revised Model Law uses a distinct term to identify this new procurement method.

requirement for external approval by a designated organ." This addition replaces the ex ante approval mechanisms, which are presented as options in the context of the selection of an alternative procurement method in the 1994 Model Law. Ex ante approval mechanisms for the use of alternative procurement methods have been removed from the Model Law with two exceptions: an approval mechanism is envisaged as an option for the use of request for proposals with dialogue (a footnote to article 30(2) suggests that States may wish to consider a measure of ex ante control for the use of request for proposals with dialogue [**hyperlink**]) and for single-source procurement to promote socioeconomic policies under article 30 of the 2011 text [**hyperlink**].

2. Provisions on solicitation and notices of the procurement

60. The newly-introduced section of this chapter consolidates the provisions on solicitation and notices of procurement for various procurement methods found throughout the 1994 Model Law, such as articles 24, 37, 47(1) and (2), 48(1) and (2), 49(1), 50(1) and 51. The changes made to those articles of the 1994 Model Law are analysed below in the context of each specific article.

61. New provisions have been introduced in the section, in particular including a requirement on the procuring entity to publish an ex ante notice of the procurement in case of direct solicitation, other than in request for quotations and where direct solicitation is used in cases of urgent procurement. The Law now also specifies the minimum information to be included in such ex ante notices of the procurement.

B. Article-by-article commentary

Methods of procurement (1994 article 18) (General rules applicable to the selection of a procurement method (2011 article 28))

62. The rules applicable to the selection of procurement methods contained in the 1994 text have been substantially revised. The default procurement method remains open tendering (the change in terminology from tendering to open tendering has been made to harmonize the Model Law with other international instruments regulating public procurement). The use of any other procurement method still requires justification through a consideration of whether the conditions for use under articles 29 to 31 of the 2011 text are satisfied; a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other method is still to be included in the record of the procurement proceedings. The optional language for an ex ante approval mechanism has been removed.

63. The rules on methods of procurement available for procurement of services contained in paragraph (3) of the 1994 text have been removed. This change reflects the new approach to drafting the 2011 Model Law as explained in paragraphs 4 and 57 above.

64. A significant change from the 1994 Model Law is an approach to the selection of a method from among the alternative procurement methods. As the 1994 Guide acknowledges, there was an overlap in the 1994 Model Law in the conditions for use of two-stage tendering, request for proposals and competitive negotiations and

no rules that would establish a hierarchy among them. The 1994 Guide invited enacting States to consider the desirability of including all these three methods in their procurement laws. The 2011 Model Law takes a different approach: in addition to setting out the largely distinct conditions for use of each procurement method, it introduces two requirements that are supposed to guide the procuring entity in determining the most appropriate method among those available in some situations. Those requirements are "to accommodate the circumstances of the procurement concerned" and to "seek to maximize competition to the extent practicable". (For explanation of these requirements, see paragraphs … of the commentary to articles 27 and 28 of the 2011 Model Law [*hyperlinks**]).

65. These requirements are particularly useful where conditions for use of some procurement methods may overlap, for example request for proposals with dialogue and competitive negotiations are both considered appropriate for protection of essential security interests of the State. The requirements "to accommodate the circumstances of the procurement concerned" and to "seek to maximize competition to the extent practicable" will determine the procuring entity's choice between these two procurement methods.

Conditions for use of two-stage tendering, request for proposals or competitive negotiation (1994 article 19) (conditions for the use of two-stage tendering, request for proposals with dialogue and competitive negotiations are found in 2011 article 30, paragraphs (1), (2) and (4))

66. The provisions of 1994 article 19 have become the basis for formulating the conditions for use of three procurement methods in the 2011 Model Law: two-stage tendering, request for proposals with dialogue and competitive negotiations. Two-stage tendering and competitive negotiations draw their main features from the methods of the same names in the 1994 Model Law. Request for proposals with dialogue is in many respects a new procurement method, and is one of the three requests-for-proposals types of proceedings of the 2011 Model Law.

67. As noted in paragraph 64 above, the 2011 text largely eliminated the overlap in the 1994 conditions for use of two-stage tendering, request for proposals and competitive negotiations. In the 2011 Model Law, there are only two conditions for the use of two-stage tendering (they drew on 1994 paragraph (1)(a) and (d)), there are only three conditions for the use of competitive negotiations (they drew on 1994 paragraph (1)(c) and paragraph (2)) and each request-for-proposals type of proceedings can be used under a distinct set of conditions, as explained further below. The optional language for an ex ante approval mechanism has been removed.

68. 1994 article 19(1)(a) has been amended in 2011 article 30(1)(a) to make the primary condition for use of two-stage tendering more specific and distinct from the conditions for use of other procurement methods. For example, the 1994 reference to "negotiations" has been replaced with a reference to "discussions" with suppliers or contractors, to convey more accurately the notion that no bargaining type of negotiations is held in this procurement method; rather, discussions are solely for the purpose of refining some aspects of the description of the subject matter of the procurement to formulate them with the necessary level of detail (see paragraphs ** and ** of the introductory commentary to chapter V procurement methods and article 30(1) above [**hyperlinks**]).

69. The second condition for use of two-stage tendering, where previous open tendering failed (1994 article 19(1)(d)), has been amended in 2011 article 30(1)(b) by including an additional requirement on the procuring entity to consider that not only new open tendering proceedings but also any procurement method under chapter IV of the 2011 text (i.e. restricted tendering, request for quotations and request for proposals without negotiation) would be unlikely to result in a procurement contract. This requirement has been added to reflect one of the general premises on which revisions to the 1994 text have been made — to limit unnecessary human interaction of the procuring entity with suppliers or contractors as much as possible, which is considered to be an important anti-corruption measure.

70. The conditions for use of request for proposals in 1994 article 19(1) apply largely unchanged as the conditions for use of request for proposals with dialogue under article 30(2) of the 2011 text, except that subparagraph (c) now refers to the protection of "essential security interests of the State" (this change has been made to ensure consistency in this respect with other international instruments), and subparagraph (d) includes the additional requirements described in the preceding paragraph.

71. The 2011 Model Law has also introduced conditions for use of two other request-for-proposals types of proceedings (not found in the 1994 Model Law): request for proposals without negotiation, and request for proposals with consecutive negotiations (see articles 29(3) and 30(3) of the 2011 text). Both are available under the 1994 Model Law in the context of procurement of services only. Under the 2011 Model Law, they are not treated as a procurement method appropriate only for procurement of services, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured (see paragraph 57 above). (For a discussion of the conditions for use of these methods, see the commentary to articles 29(3) and 30(3) above [**hyperlinks**].)

72. The conditions for use of competitive negotiations under the 2011 Model Law have been made limited to the situations set out in 1994 articles 19 (1)(c) (which has also been reworded to refer to the protection of essential security interests of the enacting State, see paragraph 70 above) and 19 (2) (urgency and catastrophic events). The latter has been amended. 1994 article 19 (2)(b) required the procuring entity, in the context of urgency owing to a catastrophic event, to establish before the use of competitive negotiations that it would be impractical to use any other procurement method. In the case of simple urgency it had to establish before the use of competitive negotiations that it would be impractical to use tendering proceedings (1994 article 19(2)(a)). The 2011 Model Law applies the same requirement to both cases — simple urgency and urgency owing to a catastrophic event: in both cases the procuring entity must establish before the use of competitive negotiations that it would be impractical to use any other competitive procurement method. The provisions by referring to "competitive methods of procurement" make it clear that they do not intend to encompass single-source procurement (the 1994 reference to "other methods of procurement" was ambiguous in this respect).

Conditions for use of restricted tendering (1994 article 20; 2011 article 29(1))

73. The 1994 reference to "reasons of economy and efficiency" has been deleted from the revised text. This deletion reflects the UNCITRAL decision not to refer to any objective of the Model Law listed in its Preamble in the articles of the text itself. The procuring entity should, in any event, consider the objective of "maximizing economy and efficiency in procurement" and all other objectives of the Model Law when selecting any procurement method — a consideration that should also be applied at all other stages of the procurement proceedings, as appropriate. In addition, it was also considered that the reference to "economy and efficiency" was relevant in the context of the second condition for use of this procurement method (to avoid disproportionate costs and time), not to its use where there was a limited supply base. The optional language for an ex ante approval mechanism has been removed.

Conditions for use of request for quotations (1994 article 21; 2011 article 29(2))

74. The wording of the article has been amended so as to allow the use of request for quotations for all types of standardized or common procurement that is not tailored by means of specifications or technical requirements. Paragraph (2) of the 1994 text has been deleted from 2011 article 29(2) in the light of 2011 article 12 setting rules concerning estimation of the value of procurement applicable to all procurement methods, not only request for quotations. The optional language for an ex ante approval mechanism has been removed.

Conditions for use of single-source procurement (1994 article 22; 2011 article 30(5))

75. The condition for use in 1994 article 22(c) has been restricted in the 2011 text to cases of extreme urgency; the justification for the use of single-source procurement found in 1994 article 22(e) has been eliminated, and the condition for use in 1994 article 22(f) has been rephrased, for reasons explained in paragraph 70 above, to refer to the protection of essential security interests of the State.

76. The optional language for an ex ante approval mechanism has been removed, except where the use of single-source procurement is for the promotion of socioeconomic policies under article 30 of the 2011 text (in the 1994 Model Law, an ex ante approval mechanism in such circumstances is not presented as an option but rather as a default statement).