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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of suppliers' lists

Note by the Secretariat

Addendum

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[*Chapters I and II are published in document A/CN.9/WG.I/WP.45*]

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III. Possible revisions to the Model Law and the Guide to Enactment as regards the use of suppliers' lists: reform options

A. Position under the Model Law with respect to suppliers' lists

1. Drafting history

1. The Model Law contains nothing explicit on the use of suppliers' lists. When it was drafted, the then Working Group agreed that eligibility requirements that excluded certain types of enterprises from participating in tender proceedings should be kept to a minimum and that a procuring entity should be able to apply only those requirements that were specifically set forth in the model procurement law. The then Working Group also agreed to keep to a minimum the procedures and formalities by which a procuring entity would establish the eligibility of suppliers or contractors to participate in procurement proceedings.¹

2. The Secretariat's first draft included a provision on the use of suppliers' lists (article 13).² The draft article read as follows:

“Article 13 *Lists of approved contractors and suppliers*

The procuring entity may use a list of approved contractors and suppliers as its source for the selection of contractors and suppliers from which to solicit tenders pursuant to article 12 (2) only if:

(a) requests to be entered on the list are receivable at any time from any interested contractor or supplier and are acted upon within a reasonable period of time;

(b) entry on the list is subject to no eligibility criterion more stringent than those set forth in article 8 (1)(a) and is subject to no qualification criterion more stringent than those established pursuant to article 15;

(c) the existence of the list, the conditions to be satisfied by contractors and suppliers in order to be entered on the list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and for renewal of the entry have been generally publicized in a manner designed to bring them to the attention of contractors and suppliers;

(d) the conditions, methods, procedures and other matters referred to in subparagraph (c) do not discriminate against foreign contractors and suppliers with respect to entry on a list used for the solicitation of tenders in international tendering proceedings or with respect to their opportunity to participate in such proceedings; and

(e) the selection by the procuring entity from the list allows all contractors or suppliers on the list equitable opportunities to be selected.”³

3. As was explained in the commentary to that article: (i) the article concerned the use of lists as the source for the selection of contractors and suppliers to participate in restricted tendering proceedings; (ii) a number of conditions were imposed with the aim to ensure that the procuring entity has a sufficiently broad

field from which to make its selection in order to improve its chances of finding the most suitable contractor or supplier for the procurement and to ensure that the use of the list does not inhibit effective competition or unfairly exclude contractors and suppliers; and (iii) the article was not made applicable in respect of open tendering proceedings where lists could be used as only one of additional means to widespread publication of procurement opportunities and therefore they did not present the same risks as did the use of lists in restricted tendering proceedings.⁴

4. At the then Working Group's eleventh session (New York, 5-16 February 1990), the only time when the draft article was considered, the necessity and usefulness of draft article 13 was questioned if the list did not have to be used, or if tenders could be solicited from contractors and suppliers that were not on the list, the points left open under the draft article. At that session, views were expressed that the use of lists of contractors and suppliers for the solicitation of tenders was diminishing and, in any event, should not be encouraged because the lists could be used in a manner that would unfairly discriminate against particular contractors and suppliers. In favour of retaining the article, it was argued that the article could serve to eliminate uncertainty as to whether or not a procuring entity could employ such lists, and could contribute to fairness and transparency in connection with the use of the lists.⁵

5. The draft article was deleted in the preparation of the second draft of the Model Law. The decision by the Working Group not to provide for the suppliers' lists in the Model Law was subsequently questioned by some States and procurement specialists, which expressed concern about the lack of provisions regarding suppliers' lists in the Model Law.⁶

2. Situation under the Model Law

6. The criteria, requirements and procedures for the ascertainment by the procuring entity of the qualifications that suppliers or contractors must meet in order to participate in procurement proceedings are set in article 6 of the Model Law.⁷ Article 6 (3) prohibits procuring entities from imposing any "criterion, requirement or procedure" for participation in procurement other than those in article 6.

7. Since article 6 does not refer to registration on a list as a requirement that suppliers or contractors must meet in order to participate in procurement proceedings, mandatory suppliers' lists are prohibited under the Model Law. In contrast, nothing prevents procuring entities from using optional lists. Their establishment and operation are implied in procurement proceedings with direct solicitation.

8. Direct solicitation is possible under the Model Law, apart from competitive negotiation (article 49), request for quotations (article 50) and single-source procurement (article 51), in requests for proposals, including for services (under articles 37 (3) and 48 (2)), where the requirement for public advertisement can be dispensed with in the interests of economy and efficiency. The use of lists, both mandatory and optional, for the selection of suppliers or contractors in these procurement methods in practice is common and in some cases may indeed be useful and necessary to ensure transparency and fairness in the selection of suppliers for a particular procurement. When no public advertisement of procurement is

required and no controls are imposed on the operation of lists, using lists to identify suppliers for these procedures in practice may result in the de facto exclusion of non-registered suppliers even if registration cannot be a formal condition of participation under article 6. Thus, although formally optional, lists have an effect of mandatory lists, as potential suppliers or contractors would have to be on the list to be considered for procurements for which lists are used.

9. As regards advertising invitations to apply for inclusion on the list as an alternative to advertising specific procurements (see A/CN.9/WG.I/WP.45, para. 49), such a mechanism under the Model Law would not be allowed where advertising of each procurement is required, which is the case in open and two-stage tendering (under article 24 and article 46 (1) by reference to article 24, entities are required to publish invitations to tender or invitations to prequalify for each procurement) and in restricted tendering (under article 47 (2), procuring entities are required to publish a notice of each restricted tendering proceeding). In other procurement methods, where direct solicitation is possible, procuring entities are free to advertise the existence of the lists in lieu of advertisement of separate procurement contracts covered by the list as in those cases no publicity requirement to advertise a separate procurement contract applies.

B. Consideration of the subject at the Working Group's sixth session (Vienna, 30 August-3 September 2004)

10. The subject of suppliers' lists was before the Working Group at its sixth session (Vienna, 30 August-3 September 2004). At that session, the Working Group recognized that, whether or not they were viewed as consistent with the aims and objectives of the Model Law, suppliers' lists were in use in various States. The Working Group agreed that it would be appropriate to acknowledge their existence and use, and to subject their operation to minimum standards of transparency. The aims would be to put in place regulation that would ensure fairer and more transparent access of suppliers to the lists and to achieve some degree of harmonization in the regulation of the lists with other regional and international procurement regimes that address the subject. As a separate consideration, it was agreed that regulating suppliers' lists could provide a transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there was no control over the selection of suppliers in the Model Law (A/CN.9/568, para. 61).

11. The Working Group did not reach agreement on reform options including the extent to which the provisions on the subject should be included in the Model Law itself, or in the Guide to Enactment (or in some cases left to implementing regulations in individual States), and deferred the consideration of the matter to a future session. Nevertheless, there was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists and the Working Group agreed that all suppliers should be given an opportunity to (i) become aware of the lists, (ii) apply for qualification at any time, (iii) be included on the list within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and (iv) be notified of any decisions to terminate a list or remove them from it. It was agreed that the requirement for the publication of the existence of lists would add a significant element of control over the use of lists

and therefore the existence of lists should be advertised with reasonable frequency or on an ongoing basis. Additionally, the Working Group agreed that the further consideration of the subject would cover all manners of registration that operated de facto as a suppliers' list (including registrations with third parties) (A/CN.9/568, paras. 62-67).

C. Reform options

1. General considerations

(a) Mandatory or optional lists or both

12. Noting that any specific reference to suppliers' lists in the Model Law may indicate endorsement of their use beyond that which the Working Group would wish to express, the Working Group may decide to leave the use of suppliers' lists under the Model Law, as a general rule, optional, while not excluding the mandatory recourse to them under certain circumstances. For example, the balance of costs and benefits may favour the use of mandatory lists in the procurement methods with direct solicitation. Requiring a procuring entity to use lists in those procurement methods, subject to adequate controls and a possibility for new suppliers to join the list at any time, may add transparency to the selection of suppliers or contractors in these procurement methods, which under the current provisions of the Model Law is left to the discretion of procuring entities. If the recourse to lists remains optional, the discretion of procuring entities in choosing methods to select suppliers or contractors in those procurement methods will remain unlimited. A mandatory recourse to lists may also be justified and even necessary in other cases, for example, in electronic bidding.

13. As a separate consideration, some States may use mandatory lists regardless of recognition in the Model Law, and it may thus be useful to provide at least guidance on operating them in the Guide to Enactment.

(b) Advertisement of lists in lieu of advertisement of specific contracts

14. Related to the issue of mandatory lists is the issue of whether advertising the existence of a list rather than specific procurements covered by the list should be permitted in a revised Model Law and whether in such case, access to procurements must be restricted to registered suppliers only, or open to all. At its sixth session, the Working Group agreed to revisit that issue at a later date (A/CN.9/568, para. 65). In considering the subject further, the Working Group may wish to note a substantive degree of overlap between the operation of suppliers' lists advertised in lieu of advertisement of specific contracts covered by the list and framework agreements (for discussion of the latter, see A/CN.9/WG.I/WP.44 and Add.1).

15. For some procurement methods for which advertisement of each procurement contract is important, the method of advertising a list instead of separate contracts is not suitable and should not be allowed. In other cases, for instance, with respect to requests for proposals, requiring advertising through a list would make it more difficult to dispense with an advertisement requirement altogether, which, for example, is currently possible under article 48 (2) of the Model Law for reasons of efficiency and economy. Where no requirement on advertisement of a separate

contract exists, such method may strengthen the system by ensuring more transparency and competition in procurement processes, at the same time saving time and costs and preserving flexibility necessary in those procurement methods.

(c) Controls over the use of lists

16. Regardless of the options pursued by the Working Group (mandatory or optional lists or both), provisions containing at least minimum controls on the use of suppliers' lists may be warranted in any case, either in the Model Law or the Guide to Enactment, to secure competition and transparency in the operation of the lists in those procurement proceedings where the use of suppliers' lists is implied and in fact may be necessary and useful (see para. 8 above). The GPA rules could be used as a model and could be transposed to the Model Law or the Guide, as applicable, for such purpose and to harmonize the two instruments, taking into account any proposed revisions to GPA on the subject. The substantially same controls should be imposed on the use of any suppliers' lists since the differences in practice between various types of lists are often blurred (see paras. 13 and 16 of A/CN.9/WG.I/WP.45).

17. The Working Group may decide that a general control to the effect that procuring entities may not use lists in violation of the objectives of the Model Law would be sufficient, leaving details to the Guide and implementing regulations of an enacting State. Alternatively, more detailed controls may be incorporated in the Model Law. To avoid inclusion of a separate article on suppliers' lists and repetitions of the same controls in all articles where the use of suppliers' lists is implied, the relevant provisions may be consolidated, consistently with the approach in bilateral and multilateral free trade agreements (see paras. 41, 42 and 44 of A/CN.9/WG.I/WP.45), in the Model Law's articles dealing with qualification and prequalification.

2. Drafting suggestions

(a) Model Law

18. If the use of mandatory lists is made mandatory in certain cases, the Working Group may decide to amend article 6 of the Model Law by adding the requirement of "registrations on the list of approved suppliers" to the criteria, requirement or procedure that suppliers or contractors must meet to be deemed qualified to participate in procurement proceedings. The phrase "as may be prescribed in procurement regulations" may be added to make it clear that such mandatory registration may be prescribed only in cases stipulated in procurement regulations. Thus, the phrase reading "registrations on the list of approved suppliers as may be prescribed in procurement regulations" may be added in the list contained in article 6 (b) (i). This would satisfy the provision of article 6 (3) that "a procuring entity shall impose no criterion, requirement or procedure with respect to the qualification of suppliers or contractors other than those provided for in this article." Controls on the use of lists may be included in a separate provision.

19. Alternatively, the Working Group may decide to deal with the suppliers' lists in article 7 (Prequalification proceedings), which currently allows a procuring entity to hold prequalification on a case-by-case basis to identify qualified suppliers or contractors under any procurement methods envisaged under the Model Law. With

some amendments, article 7 may be expanded to deal with standing prequalification and the use of suppliers' lists by procuring entities. Such approach may be justified to avoid repetitions in drafting since criteria, requirement and procedures contained in article 7 and by cross-reference in article 6 of the Model Law would apply to a large degree to the operation of suppliers' lists.

20. Pending the decisions of the Working Group on a number of issues related to the treatment of suppliers' lists and the related issue of advertisement of lists in lieu of advertisement of specific contracts in the revised Model Law or the Guide to Enactment, the following drafting suggestions focus mostly on the controls over the use of suppliers' lists. They were prepared as amendments to article 7 in the light of the considerations listed in the preceding paragraph (the text of article 7 is restated below in normal font while changes are underlined):

“Article 7. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) The following information:

(i) Instructions for preparing and submitting prequalification applications;

(ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, unless prequalification is for the sole purpose of compiling or maintaining a standing list of prequalified suppliers or contractors for future procurements;

(iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed 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;

(v) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations

relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(b) (i) In proceedings under chapter III, the information required to be specified in the invitation to tender by article 25 (1) (a) to (e), (h) and, if already known, (j);

(ii) In proceedings under chapter IV, the information referred to in article 38 (a), (c), if already known, (g), (p) and (s); and

(c) If prequalification is intended for a standing list of prequalified suppliers or contractors for future procurements, in addition to what is in subparagraph (a) above, as applicable, a statement to that effect, the purpose of the list, types of procurement covered by the list, the conditions to be satisfied by suppliers or contractors in order to be entered on the list, the methods according to which satisfaction of each of these conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and renewal of the entry.

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and, without prejudice to paragraph 9 of this article, shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Without prejudice to paragraph 9 of this article, only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its

qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

(9) Lists of prequalified suppliers or contractors compiled in accordance with this article [may] [shall] [may and in the cases specified in the procurement regulations promulgated pursuant to article 4 of this Law shall] be used by a procuring entity for the selection of suppliers or contractors in future procurement proceedings [conducted pursuant to articles 47 and 49 to 51, in direct solicitation proceedings pursuant to articles 37 (3) and 48 (2), and in other cases as may be prescribed by procurement regulations], provided that such use shall be in compliance with the objectives of the Model Law, and:

(a) The list and an invitation to prequalify for inclusion on the list, containing at a minimum information in paragraph 3 (c) above, shall be publicized [at least [annually]] [at regular intervals] [on an ongoing basis];

(b) Inclusion on the list shall be open to any interested supplier or contractor at any time and shall be carried out within a reasonably short period of time;

(c) All suppliers or contractors included in the list shall be notified of the termination of the list or of their removal from it, and upon request of a supplier or contractor concerned of the ground for the removal;

(d) Suppliers or contractors requesting to participate in particular procurement proceedings shall be permitted to participate and be considered. [When the registration on the list is required for participation in procurement, non-listed suppliers or contractors shall be allowed to participate in procurement, provided there is sufficient time to complete the qualification procedure or a possibility to postpone it at a later stage of the procurement proceedings]. The number of additional suppliers or contractors permitted to participate shall be limited only by the efficient operation of the procurement system;

(e) [When an invitation to prequalify for inclusion on the list constitutes an invitation to participate in procurement proceedings covered by a list, suppliers or contractors shall be selected from among those on the list. The invitation for inclusion on the list shall contain the statement to that effect as well as that it constitutes an invitation to participate in all procurement proceedings covered by the list. The operation of the list in such cases shall not exceed [one] year].”

21. Proposed changes in paragraphs preceding new paragraph 9 are made to explicitly address in article 7 prequalification proceedings in the context of suppliers' lists. Prequalification proceedings in this context may be initiated for the purposes solely related to suppliers' lists (establishment of lists and updating them, including addition of new suppliers), or for the purpose of prequalifying for a specific procurement with simultaneous establishment or update of suppliers' lists. Proposed amendments to paragraph 3 (a) (ii) reflect that the level of detail in prequalification documents under those two scenario would be different.

22. The first proposed amendment to paragraph 6 is made in the light of the different publicity requirements applicable to suppliers' lists, as contained in proposed new paragraph 9. The second amendment is made to exclude the

application to suppliers' lists of that part of the paragraph under which only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings making prequalification mandatory. The Working Group's decision is pending on whether the use of standing suppliers' lists should remain optional or be made mandatory under some conditions, such as those that justify the recourse to non-competitive procurement methods (see, for example, articles 19 (2), 20 and 22 of the Model Law) or as may be prescribed in procurement regulations (to cover in addition the cases of the use of mandatory lists of approved suppliers in electronic bidding). As currently drafted in proposed subparagraphs 9 (d) and (e), in the context of suppliers' lists, the eligibility of suppliers or contractors to participate in future procurements is regulated differently than in current paragraph 6 of article 7 of the Model Law.

23. Suggested paragraph 9 provides controls on the operation of lists, such as the requirement of their publicity and accessibility by all interested suppliers or contractors at any time. The wording in the square brackets in the chapeau of suggested paragraph 9 will depend on the Working Group's decision on whether a procuring entity shall be authorized to use lists or may also be required to do so in some cases.

24. The wording in proposed subparagraphs (a) to (e) draw from the applicable provisions of GPA and regional and bilateral free trade instruments. Proposed subparagraph (d) provides an important safeguard against favouritism, exclusivity and discrimination in the operation of the lists. The text in the square brackets of that subparagraph intends to cover the operation of mandatory lists. It provides safeguards for those not on the lists, in particular non-domestic suppliers, who are interested in participating in the procurement proceedings for which the registration on the list is required.

25. The Working Group may also wish to consider whether subparagraph (d) should in addition provide for equitable opportunity to all suppliers on the list to be selected for participation in a particular procurement, akin to the provisions contained in subparagraph (e) of the old draft article dealing with suppliers' lists proposed in 1989 (see para. 2 above). Alternatively, the Working Group may decide that this control is already sufficiently reflected by reference to the Model Law's objectives in the chapeau of the proposed draft article 9.

26. Proposed subparagraph (e) covers situations when a notice of the list serves as a notice of all separate procurements covered by the list. It is linked to the text in square brackets in proposed subparagraph (d) as such a mechanism would be possible only with mandatory lists. The procurement methods to be affected by proposed changes are primarily those in which no advertisement of separate procurements is required. It is up to procuring entities to advertise them separately or by way of advertising lists. Proposed subparagraph (e) does not change anything in this respect except, as an alternative to not advertising anything at all, it requires advertising lists and therefore adds more transparency in the process. It provides some important safeguards specific to such a mechanism. The first safeguard relates to the content of the notice of the list which in addition to all other information required to be included in such a notice pursuant to proposed subparagraph (a) has also specifically stated that (i) the notice constitutes an invitation to participate in all procurement proceedings covered by the list and (ii) the selection of suppliers or contractors for a specific procurement covered by the list will be made exclusively

from among those on the list. The second safeguard relates to the duration of the list. Due to its exclusive nature, imposing a time limit in the operation of this type of list is more important than of the lists covered by proposed subparagraph (d) as access to future procurements under the latter by non-listed suppliers or contractors is not or less restricted. The duration of the lists should be considered in conjunction with the publicity requirements in subparagraph (a).

27. Proposed paragraph 9 intends also to cover the use by a procuring entity of suppliers' lists compiled and maintained by third parties, such as by another procuring entity or a designated authority in a centralized system. The use of these lists would be authorized under the proposed paragraph if their establishment and maintenance complies with the controls imposed by proposed paragraph 9. The Working Group may wish to consider whether additional controls should be imposed in such cases, for example, a procuring entity may be required to disclose the fact that other agencies will use the list and the names of these agencies (see A/CN.9/WG.I/WP.45, para. 20).

28. If provisions on suppliers' lists appear in article 7, as suggested, amendments will be required to be made in article 6 of the Model Law that according to article 7 (1) applies to prequalification proceedings. Such amendments, in particular in paragraphs 1 (a), 1 (b) (chapeau provisions) and 2 of article 6, would aim to expand the application of article 6 from qualification and prequalification on a procurement-by-procurement basis to a standing prequalification. That could be achieved by inserting, where appropriate, the references to a standing list of prequalified suppliers or contractors.

(b) Guide to Enactment

29. The text of the Guide may read as follows:

“1. Various types of lists containing information on suppliers or contractors for the use in more than one procurement (often referred to as “lists of ‘qualified’ or ‘approved’ suppliers”, “rosters or registers of suppliers”) are used in a variety of jurisdictions for a variety of purposes. Most commonly, they are used to prequalify suppliers or contractors for participation in procurements covered by the list. Electronic means of communication and electronic procurement have increased and diversified their use and value.

2. The operation of suppliers' lists, while bringing some benefits, such as reducing costs and time for qualification of suppliers in a specific procurement, and being to some degree indispensable in some procurement techniques, can be deeply anticompetitive, and should be carefully structured and monitored, in particular to be subject to controls to secure competition and transparency. Enacting States should be aware that lists are often a target of appeals as rules applicable to the operation of the list are found to be either highly restrictive (and therefore limit access, competition and transparency) or difficult to implement and maintain. A commonly encountered problem with maintaining lists is obsolescence of information on the list that does not necessarily always reflect changes in capacity achieved by potential suppliers and in other data on which registration on the list had relied. As a result, contracts could be awarded to suppliers or contractors without adequate qualifications or qualified suppliers or contractors could be excluded. Such a

risk is mitigated by an ongoing status review of suppliers on the list. However, for a long list of suppliers when only a few will be qualified for a specific procurement, such a review could be expensive for both suppliers and procuring entities. Enacting States should also be aware of possible market segmentation effect of suppliers' lists, such as contracts of a given value may always be awarded to bidders with a corresponding classification level on the list, elevated by various State social-economic and related policies (e.g., set aside programmes) applicable to the operation of the list.

3. The balance of costs and benefits in the use of lists is affected by many different factors, such as the nature of markets, purchases involved, the training and skills of procurement personnel and the degree of transparency in public administration in any given jurisdiction in general. It will vary for different enacting States, and also for different procuring entities and types of procurement. Costs of lists generally outweigh the benefits when lists have the effect of excluding suppliers or contractors from contracts that are subject to competitive tendering following an advertisement. The objectives underlying the introduction of a suppliers' lists may also be more efficiently and economically achieved by other means, for example, by prequalification on a contract-by-contract basis for large or complex contracts, by post-qualification of a winning supplier in other cases or by framework arrangements. On the other hand, for small value procurement, having an efficient and transparent system of suppliers' lists may be beneficial as it avoids the need to qualify the suppliers for every small purchase. In some cases, suppliers' lists may be indispensable, for example, for the operation, safety and security of electronic procurement or when they serve as a platform for such electronic purchasing techniques as electronic catalogues or dynamic purchasing systems.

4. Providing effective and wide dissemination of information about the existence and functioning of suppliers' lists is essential to ensure that they do not impact negatively on the level of competition and are operated in a transparent and non-discriminatory manner. Keeping lists open for access by new suppliers and ensuring that the new applications are processed promptly avoids exclusivity in the operation of lists. In the specific context of suppliers' lists, registration on which is mandatory for suppliers to participate in procurement, it is important that non-registered suppliers be considered if there is sufficient time to complete the registration process or postpone registration to the pre-award stage. Such safeguards are especially important in the context of cross-border procurements. Regular updates of lists, by ascertaining in particular that information remains up to date and that registrants that are no longer qualified are deleted, ensures effectiveness in the operation of lists.

5. Consequently, a number of regional and international instruments impose controls on the operation of lists. They include the requirements that all suppliers should be given an opportunity to: (i) become aware of the lists and the criteria, rules and procedures applicable to them, (ii) apply for registration at any time, (iii) be registered within a reasonably short period, (iv) be notified of any decisions about their listing, to terminate a list or remove them from it, and (v) be selected for participation in procurements covered by the list on an equitable basis. In addition, they require that the requirements for listing

should be objective, non-discriminatory, transparent and proportionate and be assessed in an objective manner, and there should be a mechanism in place for review and formal challenge of applicable requirements and procedures.

6. The controls contained in those instruments should be seen as the minimum required to be incorporated by an enacting State in its procurement regulations. They should apply to all types of lists (optional or mandatory, maintained formally or informally) since in practice the difference between various types of lists is often blurred: what is supposed to be optional could easily become a compulsory register, what is supposed to serve for information purposes or as a mailing list could be used for prequalification of suppliers. The most danger exists in the use of informal lists operating in a disguised manner for prequalification or pre-selection of potential suppliers or contractors.

7. With electronic procurement, ensuring that suppliers' lists operate according to the internationally acceptable standards is becoming easier. More information is made available to the public in general contributing to transparency in the operation of the lists. The lists are made more accessible by suppliers, including across the borders, reducing anti-competition risks and exclusionary practices. Fast and easy updating information on the list, including by self-registration, -classification, or -certification by suppliers themselves and through links to other registries (allowing to check compliance with fiscal, licensing and other obligations), ensures ongoing less costly review and accuracy of existing entries on the list and addition of new suppliers. Nevertheless, adequate controls as described above are also required for the suppliers' lists operating in the electronic domain. Furthermore, if overloaded with requirements, the electronic lists as well could become deterrent for participation and would thereby limit competition.

8. In open tendering proceedings, only optional lists could be used as an additional means for solicitation of tenders or as a source of information about suppliers in a qualification stage. [Additional remarks and the level of detail would depend on the Working Group's decision on the treatment of suppliers' lists in the Model Law and the related issue of advertising a notice of the list as an invitation to participate in procurement proceedings covered by the list.]”

Notes

¹ See A/CN.9/315, paras. 36-37, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.

² The text was included in the first draft following the controversial consideration of the subject at the tenth session of the then Working Group (Vienna, 17-25 October 1988). At that session, on the one hand, it was stated that the model procurement law should not deal with lists of approved contractors and suppliers, as such lists were used in practice only in connection with domestic procurement and were sometimes used abusively to exclude certain contractors or suppliers or those from certain countries. On the other hand, the prevailing view was that the lists were used in the international procurement and that they should be dealt with in the model procurement law. It was noted that the lists could be beneficial to procuring entities by enabling them to identify reputable and competitor contractors and suppliers. In response to that point, it was observed that there existed other, less potentially abusive, means by which a procuring

entity could identify such contractors or suppliers. See A/CN.9/315, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.

- ³ See A/CN.9/WG.V/WP.24, article 13, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, B.
- ⁴ See A/CN.9/WG.V/WP.25, para. 1 of the commentary to article 13, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.
- ⁵ See A/CN.9/331, para. 62, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.
- ⁶ See A/CN.9/WP.376, comments by Australia. Reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, D. Also, Arrowsmith S., "Harmonization of Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard", *International and Comparative Law Quarterly*, 2004, vol. 53, No. 1, pp. 17-46.
- ⁷ The article was originally two articles, articles 8 and 9, dealing with pure eligibility of suppliers (basic legal requirements) and qualification for a particular procurement. It was decided to merge the two as both dealt with essentially the same matter: the assessment by the procuring entity of suitability of contractors to perform the contract. For the drafting history of article 6, see A/CN.9/315, paras. 35-41, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A; A/CN.9/331, paras. 45-54 and 66-71, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 93-110, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; A/CN.9/359, paras. 55-63, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C; A/CN.9/371, paras. 54-62, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, A; A/CN.9/389, paras. 28-29 and 84-89, reproduced in the *UNCITRAL Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part two, I, A; and A/CN.9/392, paras. 32-37, reproduced *ibid.*, C.