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

Note by the Secretariat

1. At its nineteenth session (Vienna, 1-5 November 2010), having completed its work on the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”),¹ the Working Group reached the understanding that, at its twentieth session, it would focus on proposals for a revised Guide to Enactment. It was understood that the Commission would adopt the Model Law on Public Procurement (the revised Model Law) at its forty-third session, in 2011. The Working Group noted its intention of submitting a working draft of the revised Guide emanating from the work of its twentieth session to the Commission, so as to assist the latter with its consideration of the draft revised Model Law at that session (A/CN.9/713, para. 138). It was not expected that the Commission would adopt the revised Guide at that session.

2. At its nineteenth session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission (A/CN.9/713, para. 139). The Working Group requested the Secretariat to prepare proposals for the revised Guide in accordance with the following guidelines: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV: 1994) (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website: www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.



legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency should be ensured. It was agreed that the relative emphasis of the general part and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

3. This note is submitted pursuant to this request of the Working Group. Addenda 1 to 3 to the present note set out proposals for some sections of Part I (General remarks) of a draft revised Guide to Enactment to the revised Model Law. The purpose of the general part of the Guide to Enactment is to explain the main policy considerations arising when enacting national legislation on public procurement, and the recommendations made by the Working Group, so as to put the article-by-article remarks that will follow the general part of the Guide into context. It is intended that this structure of the Guide will assist legislators in enacting the provisions of the revised Model Law into their national legislation.

4. The Working Group is invited to consider whether any additional sections/sub-sections or topics should be added in Part I. They may include, for example: use of procurement methods, tools and techniques available under the Model Law; methods of solicitation; qualification of suppliers and contractors; the use and importance of the documentary record; debriefing; institutional issues (including considerations of centralized and decentralized procurement systems); sustainable procurement; and assistance from the UNCITRAL secretariat.

5. Addenda 4 to 9 to this note set out proposals for Part II (Article-by-article commentary) of the Guide, which purpose is to guide not only legislators in enacting the provisions of the revised Model Law into national legislation but also regulators and procuring entities in implementing the provisions of the revised Model Law. It is expected that this Part of the Guide will also be supported by practical materials, such as a glossary of terms used in the Model Law (equating them to alternatives in current use where appropriate), timetables and flow-charts, to assist practitioners. Each of these addenda contain: a summary of the purpose of the provisions under discussion; where relevant, any drafting issues that may assist legislative drafters; and guidance on the provisions themselves.

6. Addendum 4 to this note sets out a proposal for the Guide text to accompany chapter VIII (Challenges and appeals) of the revised Model Law. Addenda 5 to 9 set out proposals for guidance to the use of each procurement method referred to in chapters IV and V of the revised Model Law. Although the provisions regulating methods of procurement are found in several places of the Model Law, the relevant guidance is presented per procurement method, consolidating the guidance on related provisions of chapters II, IV and V. The manner of presenting guidance followed in the current draft of addenda 5 to 9 is thus different from the presentation of article-by-article commentary that was a feature of the 1994 text, and is also

found in addendum 4 to this note. This deviation is for ease of reference in the Working Group and the Commission. That manner of presenting guidance per procurement method, if retained in the final revised Guide, may allow legislators and other policy-makers to consider how to enact the provisions to suit local circumstances in the light of both the conditions for use and procedures for each method. The Working Group is invited to consider the manner of presenting the guidance on the use of procurement methods in the final revised Guide.

7. The draft revised Guide to Enactment contained in the addenda to this note addresses the revised Model Law. A separate section of the Guide may be added that will discuss the revisions made to the 1994 text (including a correlation table).
