United Nations A/CN.9/WG.I/WP.79/Add.1

General Assembly

Distr.: Limited
16 February 2012

Original: English

United Nations Commission on International Trade Law
Working Group I (Procurement)
Twenty-first session
New York, 16-20 April 2012

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

Note by the Secretariat

Addendum

This addendum sets out a proposal for General remarks comprising issues of implementation and use for a draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

* This document was submitted less than ten weeks before the opening of the session because of the need to complete inter-sessions informal consultations on the relevant provisions of the draft revised Guide to Enactment.

V.12-50930 (E)

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part I. General remarks

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E. Implementation and use of the Model Law

Elements of a procurement system

1. The Model Law as a "framework" law

1. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In this regard, the Model Law is a "framework" law that does not itself set out all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, legislation based on the Model Law should form part of a coherent and cohesive procurement system that includes regulations, other supporting legal infrastructure, and guidance and other capacity-building tools.

2. Regulations and other laws required to support the Model Law

2. As a first step, the Model Law envisages that enacting States will issue procurement regulations to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State (such as the real value of thresholds for request for quotations, for example, and accommodating technical developments). Article 4 of the Model Law requires and that the entity responsible for issuing procurement regulations be identified in the text of the law itself (as further explained in the commentary to that article [**hyperlink**]).

3. As regards other legal infrastructure, not only will procurement procedures under the Model Law raise matters of procedure that will be addressed in the procurement regulations, but answers to other legal questions arising will probably be found in other bodies of law (such as administrative, contract, criminal and judicial-procedure law). Procuring entities may need to take account of and apply employment and equality legislation, environmental requirements, and perhaps other requirements. The approach to regulating procurement should also be consistent with the enacting State's legal and administrative tradition, so that the procurement system operates under a cohesive body of law. Enacting States will enhance their procurement efficacy to the extent that the various legal and implementation issues are clearly disseminated and they and their interaction with procurement law understood.

4. Specific considerations relating to the implementation of electronic procurement are discussed in section ** below [**hyperlink**].

3. Additional guidance to support the legal framework

5. Not all issues that will arise in the procurement process are capable of legal resolution such as through regulation: effective implementation and the operational efficacy of the Model Law will be enhanced by the issue of internal rules, guidance notes and manuals. These documents may operate to standardize procedures, to harmonize specifications and conditions of contract and to build capacity.

6. Rules and guidance notes on all aspects of procurement will themselves be further strengthened and supported by standard forms and sample documents. A combination of these measures has proved an effective tool in practice. Manuals and standard documents are used by international and regional organizations and other bodies are active in procurement reform, both in the systems they recommend and in their own internal systems. Resources discussing best practice, samples of standard documents and other guidance can be found at [**references, hyperlinks**].

7. Addressing the procurement system in such a holistic manner will assist in developing the capacity to operate it, an important issue as the Model Law envisages that procurement officials will exercise limited discretion throughout the procurement process, such as in designing qualification, responsiveness and evaluation criteria and in selecting the procurement method (and manner of solicitation in some cases).

8. In addition to the matters that the Model Law requires to be set out in regulations (as discussed in the commentary to article 4, [**hyperlink**]), enacting States are encouraged to support the Model Law with regulations of sufficient scope, and with other supporting rules and/or guidance notes, so as to ensure the effective implementation of the Model Law. Documents discussing the recommended content of such supporting documents are available on the UNCITRAL website.

9. One procedure that is not expressly mentioned in the Model Law, but is an important way of supporting the implementation of its objectives, is the issue of debriefing, as discussed in the commentary to article 22 [**hyperlink**]. Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful.

4. Institutional and administrative support for the Model Law

10. The Model Law is also based on an assumption that the enacting State has in place, or will put into place, the proper institutional and administrative structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law. However, it should be noted that by enacting the Model Law, a State does not commit itself to any particular administrative structure. The following discussion summarizes the types of support envisaged to support the Model Law.

1. Administrative support

11. At the administrative level, appropriate interaction between good management of public finances and procurement is a feature of good governance, and is also necessary to ensure compliance with the Convention Against Corruption (and in

particular, its article 9 [**hyperlink**]). Budgeting requirements or procedures may be found in a variety of sources, and enacting States will wish to ensure that procuring entities are aware of all relevant obligations, such as whether budgetary appropriation is required before a procurement procedure may commence, and whether or not those obligations are part of the procurement system per se.

12. At the macro-economic level, the practical effect of the actions of the government as a buyer can be to consolidate the market and reduce the number of participating suppliers, particularly where the government purchases constitute a significant percentage of the market by volume or value. At the extreme, oligopolies or monopolies could be created or maintained. Procuring entities, taking decisions at the micro-economic level, will generally not be in a position to consider the longer-term macro-economic impact. For this reason, ensuring reporting and cooperation between agencies responsible for monitoring the public procurement function (such as a public procurement agency as discussed in the following section [**hyperlink**]) and that responsible for competition policy should be ensured. The competition agency may monitor collusion and bid-rigging, and concentration in public procurement and other markets.

13. As discussed in the commentary to article 21 [**hyperlink**], the Model Law provides that seeking to give inducements, or having a conflict of interest or unfair competitive advantage leads to the exclusion of the supplier or contractor concerned from the procurement proceedings at issue. Enacting States, as the commentary also notes, may wish to introduce a system of sanctions, which may involve temporary or permanent exclusion from future procurements (and which may be called an administrative debarment or suspension process in some systems). Coordination of the procedures, including due process safeguards and transparency mechanisms, should be ensured among bodies that can invoke a suspension or debarment, and information on any suppliers or contractors that have been suspended or debarred should be available to all such bodies.

14. Enacting States may also wish to consider whether enforcement authority in competition-related and procurement-related matters is more effectively provided at a centralized rather than a decentralized level.

2. Institutional support

15. At the institutional level, an enacting State may also find it desirable to set up a public procurement agency or other authority or body to assist in the implementation of rules, policies and practices for procurement to which the Model Law applies. The functions of such a body (or bodies) might include, for example:

(a) *Ensuring effective implementation of procurement law and regulations*. This may include the issue of the procurement regulations required by article 4 of the Model Law [**hyperlink**], the code of conduct required under article 26 [**hyperlink**], monitoring implementation of the procurement law and regulations, making recommendations for their improvement, issuing interpretations of those laws, and addressing conflicts of interest and other issues that may give rise to sanctions or enforcement action.

(b) *Rationalization and standardization of procurement and of procurement practices*. This may include coordinating procurement by procuring entities, and

preparing standard documents as noted above. This function may be particularly productive where the enacting State seeks to enhance the participation of SMEs in the procurement process.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include examining the impact of procurement on the national economy (such as monitoring concentration in particular markets and potential risks to competition, in conjunction with competition bodies as noted above [**hyperlink**]), analysing the costs and benefits of pursuing socio-economic goals through procurement, rendering advice on the effect of particular procurement on prices and other economic factors[, and verifying that a particular procurement falls within the programmes and policies of the Government].

(d) *Capacity-building*. The body could also be made responsible for training the procurement officers and other civil servants involved in operating the procurement system. A key feature of an effective procurement system based on the Model Law is the establishment of a cadre of procurement officials with a high degree of professionalism, especially at upper levels within procuring entities, where critical decisions are taken. The advantages of considering procurement as a professional, rather than an administrative function, with its officials being on a par with other professionals in the civil service (engineers, lawyers, etc. and the members of tender committees) are well-documented at the regional and international level, both in terms of avoidance of corruption and in achieving economy or value for money [**hyperlinks **].[1] There are various bodies at the international level that specialize in certification and training of procurement officers, information regarding which is available at [**hyperlinks**]. Capacity-building programmes should be tailored to specific needs — to reflect existing levels of capacity, development needs, and the acquisition of more in-depth skills over time. Capacity-building is also needed in the private sector, to ensure that suppliers and contractors are familiar with and can participate in the procurement system, and may be particularly important where the enacting State seeks to enhance the participation of new entrants in the procurement market, including on the part of SMEs and historically disadvantaged groups.

(e) *Assisting and advising procuring entities and procurement officers*. Procurement officers may seek guidance on drafting internal documents for use within a procuring entity, and interpretations of specific aspects of law and regulations, or whether there is expertise elsewhere in the enacting State in the procurement of highly-specialised or complex items or services. Technical or legal advice may already have been provided by the advisers to the Government, or within a particular procuring entity, but procurement officials may seek guidance from the body as to whether their intended actions (for example using an alternative procurement method or recourse to direct solicitation) are in compliance with the legislative framework. As noted below [**hyperlink**], advisers will not be effective as such if they also have an enforcement role.

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[1] Note to the Working Group: references will be made to appropriate documents from international organizations including the multilateral development banks, and to regional organizations including the OECD, and others as appropriate.

(f) *Certification*. In some cases, such as high value or complex procurement contracts, the agency might alternatively be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the award is made or the contract enters into force.

16. As regards capacity-building, the use of a prior-approval system in which certain important actions and decisions of procurement officials are subject to ex ante approval mechanisms, which operate to require approval from outside the procuring entity, was a feature of many procurement systems in the past. The advantage of such a prior-approval system is to foster the detection of errors and problems before certain actions and final decisions are taken. In addition, it can provide an added measure of uniformity in a national procurement system and operate as part capacity-building through the justification and consideration of the decisions or actions concerned. However, its use is decreasing. It is no longer encouraged by many donor agencies engaged in procurement reform and capacity-building. The main reason is that its use appears to prevent the longer-term acquisition of decision-making capacity, and can dilute accountability.

17. Accordingly, a requirement for external approval is not envisaged in most circumstances envisaged in the Model Law, particularly given that there are precise conditions for use of its procurement methods. In two-stage tendering and some instances of single-source procurement (for urgent situations) for example, external approval may be particularly inappropriate for this reason (see commentary to those procurement methods [**hyperlink**]. The Model Law does provide an option to include an external approval mechanism in articles 23 and 30, as further explained in the commentaries to those articles [**hyperlink**]. One alternative to an external approval mechanism is to exercise oversight over procurement practices only through ex post facto monitoring, including audit and evaluation, an approach that can allow procurement officials to develop decision-making skills, and reporting mechanisms can allow the decisions to be assessed at a macro as well as a micro level.

18. The references in the Model Law to external approval as an option are in the use of request-for-proposals with dialogue and single-source procurement to promote socio-economic policies under article 30 [**hyperlink**], as explained in the commentary to these procurement methods [**hyperlinks**]. In addition, the entry into force of the procurement contract can also be made subject to prior approval under article 23 [**hyperlink**, as explained in the commentary to that article [**hyperlink**]).

19. Where it decides to enact an approval requirement, the enacting State will need to ensure that the requirement for ex ante approval is set out in the procurement law. It should also designate the agency or other body or bodies responsible for issuing the various approvals, and to delineate the extent of authority conferred in this regard. An approval function may be vested in an agency or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or public procurement authority) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself, as further discussed in section ** below on institutional structure ([**hyperlink**]). An approval decision is subject to challenge under Chapter VIII of the Model Law as any other decision in the procurement process.

20. Where procuring entities are independent of the governmental or administrative structure of the State, such as some State owned commercial enterprises, States may find it preferable for any approval, certification or guidance function to be exercised by a body that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect. Most importantly, where approval functions are concerned, the body must be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for these functions to be exercised by a committee of persons, rather than by one single person, to avoid the risk of abuse of the power conferred.

21. The procedures for any approval requirement should be clear and transparent, so as to avoid the use of the requirement to hold up the procurement process. In this regard, and in deciding on the level of external approval, if any, the enacting State will wish to take account of such matters as whether there is a large public sector with complex functions, and in a federal state or one in which access to centralized authorities may be difficult, the potential delays of external approval may be significant.

22. Thresholds or guidance for types of procurement in which external approval may be sought can assist in allowing the use of a prior-approval mechanism without jeopardizing capacity acquisition over the longer-term, though mixed systems can lead to diluted accountability if decision-making responsibilities are divided or not clear. Any decision to disallow the use of a particular procurement method, or to reject the award of a contract, should be justified and included in the record of the procurement proceeding concerned as well as in the records of the approving body.

23. A related issue is the question of oversight and enforcement of individual procurement decisions. An oversight function will be effective only to the extent that it is exercised by an entity that is independent of the decision-taker — that is, of the procuring entity or any approving body. An alternative structure for those systems in which the public procurement authority or other body exercises decision-making powers may be for oversight to be undertaken by a national audit body. Similarly, and as regards the enforcement of compliance with the provisions of legislation based on the Model Law, enacting chapter VIII of the Model Law requires an independent review function (administrative or judicial). as noted above [**hyperlink**], an advisory function will be compromised if procurement officers are reluctant to use it for fear of subsequent enforcement action on the basis of information they provide when seeking advice.

24. The structure of the bodies that exercise administrative, review, oversight and enforcement functions in a particular enacting State, and the precise functions that they will exercise, will depend, among other things, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of effectiveness, economy and efficiency in mind, and with controls to ensure the independence of members of the body or bodies from decision-makers in the Government and in procuring entities.. Systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials

who carry out the procurement proceedings could in some cases stifle their ability to act effectively. Enacting States may consider that investment in systems to ensure that procuring entities have sufficient capacity, and that they and procurement officers are adequately trained and resourced, will assist in the effective functioning of the system and in keeping the costs of administrative control proportionate.

5. Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management

25. The Model Law includes the essential procedures for the selection of suppliers and contractors for a given procurement contract, consistent with the objectives described in section ** above [**hyperlink**], and provides for an effective challenge mechanism if the rules or procedures are broken or not respected. The Model Law does not purport to address the procurement planning, or contract performance or implementation phase. Accordingly, issues such as budgeting, needs assessment, market research and consultations, contract administration, resolution of performance disputes or contract termination are not addressed in its provisions. 1. Nonetheless, the Commission recognizes the importance of these phases of the procurement process for the overall effective functioning of the procurement system. The enacting State will need to ensure that adequate laws and structures are available to deal with these phases of the procurement process: if they are not in place, the aims and objectives of the Model Law may be frustrated.

26. As regards procurement planning, international and regional procurement regimes have moved towards encouraging the publication of information on forthcoming procurement opportunities, and some enacting States may require the publication of such information as part of their administrative law. Some other systems reduce time limits for procurement advertisements and notices where there has been such advance publication. The benefits of this practice accrue generally through improved procurement management, governance and transparency. Specifically, it encourages procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements. The Model Law encourages, but does not require, the publication of information on forthcoming procurement opportunities, as explained in the commentary to article 6 [**hyperlink**].

27. The contract management stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) [**hyperlink**]: many of the points made in that instrument apply equally to the management of all procurement contracts, particularly where the contract relates to a complex project.

6. Specific issues arising in the implementation and use of e-procurement

28. As noted in Section ** [**hyperlink**] above, many of the benefits arising through e-procurement are derived from enhanced transparency. As advertising on Internet portals of procurement opportunities and the publication of procurement rules and procedures allows more relevant information to be made available at an acceptable cost than was the case in the paper-based world (for further detail, see the commentary on articles 5 and 6 below [**hyperlinks**]. E-advertising also enables suppliers to apply to participate in the procedure, and then to give and receive information, and submit tenders and other offers online, yielding better market access as the market is opened up to entrants located far away and that might not otherwise participate, and consequently better participation and competition.

29. ICT tools can enhance administrative efficiency in terms of both time and costs (the use of e-communications allowing paper-related administrative costs and the time needed to send information in paper form to be reduced). E-communications during the procurement process encompasses the submission of tenders and other offers online. Other e-procurement tools include e-reverse auctions, e-catalogues and e-framework agreements (as discussed in the commentary in the introduction to Chapters VI and VII [**hyperlinks **]). These tools and techniques can allow the procedures for purchases to be completed in hours or days rather than weeks or months.

30. Automated processes can also provide additional measures to support integrity, by reducing human interaction in the procurement cycle and the personal contacts between procurement officials and suppliers that can give rise to bribery opportunities. Repeated purchases can be conducted using standard procedures and documents available to all system users through ICT, enhancing uniformity (generating efficiencies and further supporting performance evaluation, particularly where procurement systems are integrated with planning, budgetary and contract administration and payment systems – which themselves may include electronic invoicing and payment).

31. In the light of the above considerations, the general approach to the implementation and use of e-procurement in the Model Law is based on three key considerations. First, given the potential benefits of e-procurement, and subject to appropriate safeguards, the Model Law facilitates and, where appropriate and to the extent possible, encourages its introduction and use. Secondly, as a consequence of rapid technological advance and of the divergent level of technical sophistication in States, the text is technologically neutral (i.e. it is not based on any particular technology). Thirdly, detailed guidance is needed to support enacting States in introducing and operating an e-procurement system effectively.

32. As regards the facilitation and encouragement of e-procurement, the Model Law provides for the publication of procurement-related information on the Internet, the use of ICT for the communication and exchange of information throughout the procurement process, for the presentation of submissions electronically and for the use of procurement methods facilitated by ICT and the Internet (in particular, electronic reverse auctions, and electronic framework agreements, including electronic catalogues). The detailed considerations arising from specific aspects of e-procurement are discussed in the article-by-article remarks; in articles 5 and 6 on e-publication [**hyperlink**], in article 40 on electronic submissions in

[**hyperlink **], in Chapter VI on electronic reverse auctions in [**hyperlink **] and in Chapter VII on electronic framework agreements, including e-catalogues [**hyperlink **].

33. As regards technological neutrality, the Model Law does not recommend any particular technology, but describes the functions of available technologies (see section ** below [**hyperlink**]. It has been drafted to present no obstacle to the use of any particular technology. Terms such as "documents", "written communication" and "documentary evidence" are becoming more commonly used to refer to all information and documents (whether electronic or paper-based) in those countries in which e-government and e-commerce are widespread, but, in others, the assumption may be of a paper-based environment. The Model Law is drafted so that all means of communication, transmission of information and recording of information can be used in procurement procedures carried out under legislation based on the Model Law, and so these terms in the text should not be interpreted to imply a paper-based environment. In addition, the Model Law does not include any references or form requirements that pre-suppose a paper-based environment (see, further, the commentary to article 7 on communications in procurement and article 40 on the presentation of tenders [**hyperlinks**]).

34. As regards guidance to introduce and operate an e-procurement system effectively, it will be clear from the foregoing that the reforms concerned involve far more than simply digitizing existing practices: if paper communications are simply replaced with e-mails and Internet-based communications, and advertising procurement opportunities on a website, many of the above benefits will not materialize. Further, weaknesses in a traditional procurement system will be transported to its new, digital equivalent. An overhaul of an entire procurement system to introduce e-procurement involves a significant investment, but it should be considered as an opportunity to reform the entire procurement process, to enhance governance standards, and to harness the facilities of ICT for the purpose.

35. As regards the introduction of an e-procurement system, the extent to which individual States can effectively implement and use e-procurement depends on the availability of necessary e-commerce infrastructure and other resources, including measures regarding electronic security, and the adequacy of the applicable law permitting and regulating e-commerce. The general legal environment in a State (rather than its procurement legislation) may or may not provide adequate support for e-procurement. For example, laws regulating the use of written communications, signatures, what is to be considered an original document and the admissibility of evidence in court might be inadequate to allow e-procurement with sufficient certainty. While these issues may not diminish the desire to use e-procurement, the outcome may be unpredictable and commercial results will not be optimized.

36. An initial consideration in addressing this issue is whether the general regulation of, or permission to use, e-procurement is to be addressed in procurement law or in the general administrative law of an enacting State. As noted in Section ** above [**hyperlink**], the Model Law is not a complete protocol for procurement: procurement planning, contact administration and the general supporting infrastructure for procurement are addressed elsewhere. Even if the Model Law were to provide for a general recognition of electronic documents and communications, it would not cover all documents, information exchange and communications in the procurement cycle, and there may be conflicts with other

legal texts on electronic commerce. The solution adopted in the Model Law therefore, is to rely on laws of the enacting States, including general electronic commerce legislation to enable e-procurement, adapting them as necessary for procurement-specific needs. Enacting States will therefore first need to assess whether their general electronic commerce legislation enables e-procurement in their jurisdictions.

37. For this purpose, enacting States may wish to adapt the series of electronic commerce texts that UNCITRAL has issued: the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) [**hyperlinks/add publication details for paper version**].[2] These texts provide a general recognition of electronic commerce and electronic signatures, and which, if enacted in a State, provide the general legal requirements for the use of e-procurement. They rely on what has been called a "functional equivalent approach" to electronic commerce, which analyses the functions and purposes of traditional requirements for paper-based documents and procedures, and fulfils those requirements using information technologies. This approach has also been followed for procurement-specific applications of e-commerce in the Model Law.

38. Because the approach is functional, it encompasses the notion of technological neutrality (as described above) and avoids the imposition of more stringent standards on e-procurement than have traditionally applied to paper-based procurement. It is important to note that more stringent standards will operate as a disincentive to the use of e-procurement, and/or may elevate the costs of its use, and its potential benefits may be lost or diluted accordingly. Further, there will be risks of paralysis of a system should any technology that it mandates become temporarily unavailable. An additional reason for applying technological neutrality is to avoid the consequences of a natural tendency to over-regulate new techniques or tools in procurement or to follow a prescriptive approach, reflecting a lack of experience and confidence in the use of new technologies, which would also make their adoption more difficult than it needs to be.

39. Another implication of this approach is that no definitions of the terms "electronic", "signature", "writing", "means of communication" and "electronic data messages" are included in the Model Law. Definitions of the main terms needed for effective electronic commerce transactions do appear in the UNCITRAL electronic commerce texts described above. For example, article 2 of the UNCITRAL Model Law on Electronic Commerce describes "data message" as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. [**hyperlink**]" The Model Law itself addresses issues specific to procurement that are not addressed in general e-commerce legislation, such as the need for precise times of receipt for e-tenders, and the importance of preventing access to their contents until the scheduled opening time [** cross reference and hyperlinks to article-by-article remarks**].

40. A second aspect of introducing e-procurement is to remove obstacles to the use of e-procurement. These obstacles may be logistical and/or technological. Although

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[2] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html

many Governments have moved to conducting at least some of their business online, reliable access to the Internet cannot always be assumed: there may be infrastructure deficiencies, and the relevant technologies may not be universally available, particularly if it involves or uses new technologies and their supporting infrastructures that are not yet used sufficiently widely, or that is beyond the reach of SMEs.

41. Indeed, the use of ICT can impede market access in some circumstances, posing a constraint on full implementation of e-procurement. The problem may be temporary, and can arise directly and generally (for example where the electricity supply or broadband access is unreliable, or where electronic documents have doubtful legal validity), or can be an indirect consequence of e-procurement and limited to certain suppliers, such as SMEs and small suppliers that might not have the resources to purchase suitably fast Internet access or to participate in larger contracts that e-procurement can encourage. The Model Law contains safeguards to address the risks and constraints, which are discussed in paragraphs [**] of the commentary to article 7 [**hyperlink**].

42. As regards the setting-up of procurement systems, a first issue is the structure and financing of the system. Some systems are set up to be self-financing through outsourcing to a third-party agency, which levies charges on suppliers that use them, an approach that has been on the rise as e-procurement systems have been implemented. Outsourcing may be administratively efficient, and particularly so where specialist ICT systems need to be designed, run and administered, but can involve risks. Commentators have observed both decreasing participation and competition where charges are levied, and the potential for institutional conflicts of interest (that is, the agency or body running the system seeks to increase its revenues by encouraging procuring entities to overuse the system [**hyperlinks**]). These risks may be enhanced if designing a system is outsourced, with the main aim of introducing it swiftly and relatively cheaply, to those that will run it. Enacting States will therefore wish to consider the costs and benefits of self-financing systems and outsourcing parts of the procurement system as part of designing a reform programme that includes e-procurement.

43. A related issue is the use by procuring entities of proprietary information technology systems and specialist software for e-procurement. Market access is enhanced if procuring entities allow all potential suppliers to participate without charge. But procuring entities may be under significant pressure to recoup the costs of their e-procurement systems (including the costs of managing them) and the only way they can do so is by charging participants a fee for such use.

44. Consequently, the Model Law does not require procuring entities to allow all potential suppliers to participate in e-procurement opportunities at no charge, but it is strongly recommended that they do so. Enacting States may wish to consider using off-the-shelf or open-source software or other non-proprietary information technology in their e-procurement systems, as long as such systems do not impose unnecessary restrictions or otherwise impede market access. If they are not already required to do so, enacting States may wish to comply with the interoperability requirements of the WTO GPA [**hyperlink**], or of regional trade agreements, many of which have interoperability requirements similar to those of the WTO GPA.

45. As regards the operation of e-procurement systems, public confidence in the security of the information system is necessary if suppliers and contractors are willing to use it. Such public confidence itself requires adequate authentication of suppliers, sufficiently reliable technology, systems that do not compromise tenders or other offers, and adequate security to ensure that confidential information from suppliers remains confidential, is not accessible to competitors and is not used in any inappropriate manner. That these attributes are visible is particularly important where third parties operate the system concerned. At a minimum, the system must verify what information has been transmitted or made available, by whom, to whom, and when (including the duration of the communication), and must be able to reconstitute the sequence of events. It should provide adequate protection against unauthorized actions aimed at disrupting the normal operation of the public procurement process. Transparency to support confidence-building will be enhanced where any protective measures that might affect the rights and obligations of procuring entities and potential suppliers are made generally known to public or at least set out in the solicitation documents.

46. Applying the principles of functional equivalence and technological neutrality discussed above to safeguards is also necessary to manage the requirements for e-procurement. For example, specific safeguards for e-communications or confidentiality in tenders or other offers would inevitably set higher standards of security and for preserving integrity of data than those applicable to paper-based communications (because there are very few, if any, such standards set in the paper-based world), and they may fail to allow for the risks that paper-based communications have always involved.

47. The first safeguard is to ensure the authentication of communications, i.e. ensuring that they are traceable to the supplier or contractor submitting them, which is commonly effected by electronic signature technology and systems that address responsibilities and liabilities in matters of authentication. Relevant rules may either be specific to a procurement system or may be found in the State’s general law on electronic systems. The concept of technological neutrality means in practice that procurement systems should not be automatically restricted to any one authentication technology. Some such systems are based on a local certification requirement. Accordingly, and in order to avoid the use of e procurement systems as instruments to restrict access to the procurement, the system should ensure the recognition of foreign certificates and associated authentication and security requirements, by disregarding the place of origin (as recommended in the UNCITRAL e-commerce texts). In this regard, enacting States will need to consider which communications, such as tenders or other offers, require full authentication, and that other mechanisms for establishing trust between the procuring entity and suppliers may be sufficient for other communications. This approach is not novel: the 1994 Model Law applied different requirements to lesser and more important communications in the procurement process, and the Model Law has preserved this distinction (see article 7 [**hyperlink**],).

48. Another requirement is for integrity, so as to protect the information from alteration, addition or manipulation or, at least, that any alteration, addition or manipulation that takes place can be identified and traced. A related issue is “security”, meaning that time-sensitive documents, such as tenders, cannot be accessed until the scheduled opening time. These issues are discussed in more detail

in the guidance on the electronic submission of tenders under article 40 [**hyperlink**], in which they assume the greatest importance. Enacting States may also wish to consider the functional and technical requirements for e-tendering systems by reference to the standards set by a Working Group from the multilateral development banks, which can be found on the Working Group's website [**hyperlink**].

49. A longer-term, but equally important potential benefit, is that the use of ICT allows a more strategic approach to procurement, harnessing the data that ICT can generate to allow the pursuit of goals and performance to be guided by information and analyses rather than by procedures alone. Benefits through internal transparency, integrity support and efficiency savings can be achieved. Internal transparency and traceability – meaning better records of each procurement process – gives the ability to monitor, evaluate and improve not only individual procurement procedures but overall system performance and trends.

50. UNCITRAL recognizes that a fully-integrated e-procurement system encompassing budgeting and planning, the selection or award process, contract management and payment systems, and linking it with other public financial management systems, will involve a lengthy reform programme, involving different considerations for each stage of the procurement process and for integration with other parts of the overall system. In practice, many e-procurement systems that are introduced have taken years to provide the full benefits envisaged, and the most effective implementation has been often undertaken in a staged manner, which can also assist in amortizing the investment costs. However, significant benefits in terms of enhancing transparency and competition can be obtained in the early stages of the introduction of e-procurement, which generally focus on making more and better information available on the Internet.

F. Structure of the Model Law

51. The Model Law comprises eight Chapters.

52. Chapters I and II contain provisions of general application, and so delineate the main principles and procedures under which the system envisaged by the Model Law is intended to operate. In Chapter I, they identify how the objectives set out in the Preamble are implemented, by regulating such matters as ensuring that all terms and conditions of any procurement procedure (notably, the rules under which it will operate, what is to be procured, who can participate and how responsive submissions and the winning supplier will be determined) are determined and publicised in advance. They also include institutional and administrative requirements – such as the issue of regulations and the maintenance of documentary records, which are necessary to allow the procurement system overall to function as intended. The commentary in the introduction to Chapter I and that on individual articles provide further detail of the general principles and their implementation [**hyperlink**].

53. The provisions governing a major decision in preparing for the selection/award phase of the procurement cycle — the choice of procurement method — are found in Chapter II, part I. The Model Law contains a variety of procurement methods, reflecting developments in the field and evolving government procurement practice

in recent years. The number of procurement methods provided reflects the view of the Commission that the objectives of the Model Law are best served by providing States with a varied menu of options from which to choose in order to address different procurement situations, provided that the conditions for use of the particular method are met. The availability of multiple procurement methods allows States to tailor the procurement procedures according to the subject matter of the procurement and the needs of the procuring entity, and so permits the procuring entity to maximize economy and efficiency in the procurement while promoting competition, as further discussed in the commentary to Chapter II, part I and the procurement methods themselves [**hyperlinks**].

54. Chapter II part II contains provisions regulating the manner of solicitation for each procurement method, designed to ensure that the Model Law's key principle of transparency is followed, as further elaborated in the commentary to that part of the Chapter [**hyperlink**].

55. Chapters III-VII contain the procedures for the procurement methods and techniques under the Model Law. As noted in section ** above [**hyperlink to discussion of Model Law as a framework law**], these provisions are not intended to provide an exhaustive set of procedures for each method or technique, but to set out the framework for it, and the critical steps in the process. They are therefore intended to be supplemented by more detailed regulations and guidance, set out in the commentary to each Chapter and (as regards regulations and guidance more generally, in section ** below and in the commentary to article 4 [**hyperlinks**]).

56. Chapter VIII sets out a series of procedures that enable procurement decisions in the procurement process to be challenged by potential suppliers and contractors. As the guidance to that Chapter explains [**cross-reference and hyperlink**], there are wide variations among enacting States' administrative and legal traditions so far as appeals against administrative decisions taken by or on behalf of a government are concerned, and flexibility and guidance is provided to allow those traditions to be reflected without compromising the essential principle that an effective forum is given allowing all decisions in the procurement process, including choice of procurement method, to be challenged and, if necessary, appealed.