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

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany chapter VIII (Challenges proceedings) of the UNCITRAL Model Law on Public Procurement.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

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CHAPTER VIII. CHALLENGE PROCEEDINGS [**hyperlink**]

A. Introduction

Executive Summary

1. A key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation, audits and investigations, and prosecutions for criminal offences. Challenge procedures are provided for in Chapter VIII of the Model Law; the other mechanisms involve broader questions of oversight of administrative decision-making than arise in the procurement context alone, and consequently are not provided for in the Model Law.

2. An effective challenge mechanism helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for suppliers and contractors that have a natural interest in monitoring procuring entities' compliance with the provisions of the Model Law in each procurement procedure. It also helps foster public confidence in the procurement system as a whole. An additional function of a challenge mechanism is to act as a deterrent: its existence is designed to discourage actions or decisions knowingly in breach of the law. For these reasons, a challenge mechanism is an essential element of ensuring the proper functioning of the procurement system and can promote confidence in that system.

3. Furthermore, article 9(1)(d) of the UN Convention against Corruption [**hyperlink/reference**] requires procurement systems to include an effective challenge mechanism, termed a system of domestic review and including a system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures required by article 9(1) of the Convention are not followed. UNCITRAL, in seeking to ensure that the Model Law addresses the Convention's requirements, requires in the Model Law that enacting States provide all rights and procedures necessary (both at first instance and in appeals) for such an effective challenge mechanism. Similarly, and applying its general approach to the

international context of the Model Law, the Model Law has been designed to be consistent, so far as practicable, with the approach to challenge procedures under the WTO GPA [**hyperlink/reference**].

4. Chapter VIII of the Model Law contains the provisions aimed at ensuring an effective challenge mechanism, and enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits. They comprise a general right to challenge (and to appeal a decision in a challenge proceeding), an optional request to the procuring entity to reconsider a decision taken in the procurement process; a review by an independent body; and/or an application to the Court. However, the Model Law does not impose a specific structure on the system, as further explained in ** below [**hyperlink**]. In addition, there are various mechanisms to ensure the efficacy of the procedure. The Model Law seeks to decrease the need for challenges through its procedures for each procurement process. For example, Article 15 [**hyperlink**] provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents; the clarification mechanism in article 16 is designed to reduce the likelihood of challenges to decisions on qualifications, responsiveness and on the evaluation of submissions.

5. Other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under chapter VIII, if, for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, appropriate guidance should be provided to procuring entities and to suppliers, including requiring that this information is publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

2. Enactment: Policy considerations

6. The requirements of the Convention against Corruption and the Model Law are founded on the recognition that legislation for challenge procedures needs to be drafted in a manner consistent with the legal tradition in the enacting State concerned. It is recognized that there exist in most States mechanisms and procedures for the challenge of acts of administrative organs and other public entities (often called a review function). In some States, such mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. States do, however, differ significantly in their approach to enforcement: in some countries, there is a long-standing system of review before specialist authorities and courts; in others there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some systems there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal, while in others there is a combination of administrative review, or independent review, and/or judicial review of procurement decisions through the ordinary courts (accompanied by special criminal proceedings for violations of procurement laws by procuring entities).

7. In view of the above, and in order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world, the provisions in chapter VIII set out the principles and main procedures to be followed in order to constitute an effective challenge mechanism. Continuing the general approach of the Model Law as a framework text, they are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner.

8. In general terms, an effective mechanism involves the possibility of intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible (e.g. after the contract is awarded); and the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course. The mechanism, in order to be effective, must include, at least, one body to hear a challenge as a first step and a further body to hear an appeal as a second step.

9. The Model Law's provisions require enacting States to provide for all the above elements of an effective mechanism, in a manner consistent with their legal tradition. They establish in the first place that suppliers and contractors have a right to challenge an act or decision of a procuring entity: there are no acts or decisions in a procurement procedure that are exempt from the mechanism. As to the body to hear the challenge (i.e. the first step), the Model Law provides for three alternatives.

10. As a first alternative, a challenge may be presented to the procuring entity itself under article 66 [**hyperlink**], provided that the procurement contract is yet to be awarded. The purpose of providing for this procedure is to allow the procuring entity to correct defective acts, decisions or procedures.

11. Significantly, this system is an option for suppliers or contractors, and not a mandatory first step in the challenge process. The system has been included so as to facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs. Speedy remedies that can be granted without significant time and cost are features that are highly desirable in a procurement challenge mechanism, and the fact that the procuring entity will be in possession of the facts relating to and in control of the procurement proceedings concerned, and may be willing and able to correct procedural errors of which it may perhaps not have been aware, contribute to achieving them. These features are important not only to the challenging supplier, but also in order to minimize disruption to the procurement process as a whole. Such a voluntary system may also lessen the perceived risk of jeopardizing future business through a legal procedure, which has been observed to operate as a disincentive to challenges. On the other hand, it is sometimes observed that procuring entities simply ignore the request, and submitting one operates in practice merely to delay a formal application in another forum. Enacting States are encouraged therefore to include the system, given its potential benefits, but to take

steps to ensure that it functions in practice (matters of such implementation and use are considered in the following section).

12. The second alternative is for an independent, third-party review of the decision or action of the procuring entity that the supplier alleges is not in compliance with the law. This independent review may operate as an administrative procedure. It is broader in scope than the peer system outlined above, because challenges can be submitted after the entry into force of the procurement contract (or framework agreement). The independent body receiving the challenge may grant a wide range of remedies, and the commentary to the provisions concerned highlights those remedies that may not traditionally be available in certain legal systems. Those remedies are considered important features of the system envisaged under the Model Law, so enacting States are encouraged to enact them, subject to ensuring consistency between the independent review system and equivalent mechanisms before their courts. The length of time for disputes to be resolved in traditional court proceedings, and the potential benefits that can accrue with the acquisition of specialist expertise within the independent bodies, are also grounds for providing for the independent review system.

13. The third alternative an application before a competent court. The Model Law does not provide procedures for such proceedings, which will be governed by applicable national law. Enacting States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system for first instance applications and appeals, to ensure adequate legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in order to be compliant with the requirements of the Convention against Corruption [** hyperlink**].

14. As to the body to hear the appeal, enacting States may limit such applications to the court, or may provide that they can be submitted to the independent body, or both, to reflect the legal system in the jurisdiction concerned. Where the State wishes to provide for appeal before the independent review body under article 67 [**hyperlink**], that article will need to be adapted to confer an appellate jurisdiction: in the form it is provided in the Model Law, article 67 confers a first-instance competence only.

15. Enacting States may also wish to use the provisions of the Model Law to assess the effectiveness of challenge mechanisms already in operation in their country. Where a system of effective and efficient court review is already present, there may be little benefit in introducing a new independent body, and, on the other hand, there may be equally little benefit in promoting procurement specialization in the courts if there is a well-functioning alternative forum. The importance of individuals with specialist expertise within any forum that will hear challenges should be emphasized, given the demanding decisions required and extensive procedures under the Model Law.

16. In this regard, enacting States are encouraged to review the scope of all forums available, to ensure that the system put in place indeed confers effective legal recourse and remedies (including appeals) as required by the Convention against Corruption [**hyperlink**] and as is acknowledged to constitute best practice.

17. Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative forums, since the use of arbitration in the context of

procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which generally involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting, a dispute relating to the procedures in the Model Law to arbitration, in appropriate circumstances, and notably as regards disputes during the contract management phase of the procurement cycle.

3. Issues of implementation and use

18. A key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the interests of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process (particularly in the light of the general prohibition in article 65 [**hyperlink**] that prohibits the entry into force of the procurement contract or framework agreement while a challenge remains unresolved (with limited exceptions)). The provisions limit the right to challenge to suppliers and contractors (including potential suppliers and contractors that have, for example, been disqualified); provide time limits for filing of applications and appeals, and for disposition of cases; and provide discretion in deciding in some circumstances whether a suspension of the procurement proceedings may apply. Regulations and rules or other guidance should elaborate on these aspects of the provisions and achieving the appropriate balance between the interests of suppliers and the needs of the procuring entity. The discretion conferred regarding suspension of the procurement procedure (which is additional to the prohibition under article 65 referred to above) is critical in this regard; considerations relating to when suspension may or may not be appropriate are considered in paragraphs ** below.

19. A second factor contributing to the efficient resolution of disputes and limiting the disruption of the procurement process is encouraging early and timely resolution of issues and disputes, and enabling challenges to be addressed before stages of the procurement proceedings would need to be undone, of which the most significant is the entry into force of the procurement contract (or, where applicable, the conclusion of a framework agreement). There are several provisions in the Model Law to this end, first, the procedures for an application for reconsideration before the procuring entity; secondly, the imposition of time limits for filing and, thirdly, the imposition of time limits for the issue of the decision.

20. A supporting element is the use of a standstill period (provided for in article 22(2) [**hyperlink**]). The aim of imposing a standstill period is to require a short delay between the identification of the successful submission and the award of the procurement contract (or framework agreement), so that any challenges to the proposed award can be dealt with before the additional complications and costs of addressing an executed contract arise, as further explained in the commentary to that article, above [**hyperlink**].

21. The rules and procedures set out in chapter VIII are also intended to be sufficiently flexible that they can be adapted to any legal and administrative system, without compromising the substance of the challenge mechanism itself or its efficacy. For example, certain important aspects of challenge proceedings, such as

the forum where an application or appeal is to be filed and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of state administration in every country; the enacting State will need to adapt the provisions of Chapter VIII in this regard.

22. Where States enact the optional system of requests for reconsideration to the procuring entity, they are encouraged to take steps to ensure that the benefits of this mechanism and its manner of operation (which includes formal procedures as the commentary to article 66 [**hyperlink**] explains) are widely disseminated and understood, so that effective use can be made of it. In this regard, there is often confusion between a request for reconsideration and a debriefing. The objective of debriefing is to explain a procuring entity's decision to the supplier or contractor affected, so that its rationale is clear, with the hope that its compliance with the provisions of the law becomes clear, or that a mistake can be corrected. It is thus an informal mechanism to support procurement procedures and, while encouraged by UNCITRAL in appropriate circumstances, is not expressly provided for in the Model Law. (For a further discussion of debriefing, see Section ** of the general commentary above [**hyperlink**]). In order to avoid such confusion, the key differences, in terms of the objectives, procedures and possible outcomes of both procedures should be highlighted. In addition, enacting States should monitor and oversee the response to requests submitted, so as to ensure that they are treated seriously and the potential benefits obtained.

23. A further issue to be highlighted in the guidance to users is to emphasize that the request for reconsideration is not available where the procurement contract has entered into force. The reason for this restriction is that, thereafter, there are limited corrective measures that the procuring entity could usefully require: its powers cease when the contract comes into force. The restriction of the procuring entity’s competence to pre-contract disputes is also intended to avoid granting excessive powers to the procuring entity, and is also consistent with the exclusion from the Model Law of the contract management stage. Thereafter, the challenge will fall instead within the purview of independent or judicial review bodies – that is, the independent body or the court. Ensuring that the notice and standstill provisions under article 22 [**hyperlink**] are respected should also help limit the potential for post-contract disputes.

24. As regards the system of review before an independent body under article 69 [**hyperlink**], the structure will need to reflect the legal tradition in the enacting State. Some legal systems provide for challenge or review of acts of administrative organs and other public entities before an administrative body, which exercises hierarchical authority or control over the organ or entity. In legal systems that provide for this type of review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the state administration. This type of body would not be independent in the sense required by the Model Law. The notion of “independence” in the context of Chapter VIII means independence from the procuring entity rather than independence from the Government as a whole and protected from political pressure. For the same reasons as apply to hierarchical administrative review in the previous paragraph, an administrative body that, under the Model Law as enacted in the State, has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on

procedures, will not fulfil the requirement for independence. In addition, States will wish to consider in particular whether the body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

25. Enacting States are therefore encouraged, within the scope of their national systems, to provide the independent body with as much autonomy and independence of action from the executive and legislative branches as possible, in order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and effective.

26. An enacting State that wishes to set up a mechanism for independent review will need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

27. Guidance will also be required on the operating procedures of the independent body, as further discussed in the commentary to article 67 [**hyperlink**]. Particular importance should be given to the question of evidence, confidentiality and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard, to ensure that there is consistency in all proceedings, and to allow an effective and efficient appeal from a decision of an independent body. Finally, it may be desired to allow civil society representatives or others to observe challenge proceedings, and, if so and unless other laws already so permit, the regulations or rules and guidance will need to provide for the required facility, in accordance with the legal tradition in the enacting State concerned. These questions fall outside the scope of the Model Law and Guide, along with other issues discussed in this introduction to Chapter VIII of the Model Law As there is therefore a risk of fragmented information, the role of the public procurement agency or similar body discussed in Section ** of the general commentary in ensuring that the guidance directs the reader to all appropriate locations will be vital. [**hyperlink**]

28. A substantive issue that arises in challenge proceedings generally is the question of whether the procurement proceedings should be suspended when a challenge application is filed. Although article 65 [**hyperlink**] prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary where without a suspension, a supplier or contractor submitting a complaint may not have sufficient time to seek and obtain interim relief. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings. The availability of suspension also enhances the

possibility of settlement of applications at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. Both the procuring entity when considering an application for reconsideration of its own decision or action and the independent body when considering an application for review are therefore required to decide whether or not to suspend the procurement proceedings.

29. As regards the decision by a procuring entity in applications for a reconsideration, UNCITRAL, was mindful that an automatic suspension would involve a cumbersome and rigid approach, and might allow suppliers to submit vexatious requests that would needlessly delay the procurement proceedings, and might cause serious damage to the procurement proceedings. This possibility would allow suppliers to pressure the procuring entity to take action that might, albeit unwittingly, inappropriately favour the supplier concerned. Another possible disadvantage of an automatic suspension approach might be an increase in challenge mechanisms generally, resulting in disruption and delay in the procurement process.

30. Under article 66 [**hyperlink**], the procuring entity is therefore given discretion to decide on whether or not to suspend the procurement proceedings. That decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. For example, a challenge to certain terms of the solicitation made early in the proceedings may not have the type of impact that requires suspension even if some minor corrective action is ultimately required; a challenge to some other terms might warrant a suspension, where there is a possibility that corrective action might mean undoing steps taken and wasting costs; at the other extreme, a challenge to such terms a few days before the submission deadline would require quite different action and a suspension would be likely to be appropriate. The supplier concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved.

31. This approach confers significant discretion on a procuring entity whose decision is being challenged. Enacting States may be concerned to minimize the risks of abuse of that discretion. An alternative approach, particularly where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance, would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. If such an approach is desired, more prescriptive regulation may be considered.

32. The suspension provisions in applications for review before an independent body are more directed in that there are two situations in which the procurement proceedings must be suspended (unless the independent body decides that urgent public interest considerations require the procurement contract or framework agreement to proceed, as the guidance to article 67 [**hyperlink**] explains). The two situations concerned are considered to represent particularly serious risks to the integrity of the procurement process, and are first, where the application is received prior to the deadline for presenting submissions (in which case it is likely to refer to

the terms of the procurement, or to the exclusion of a supplier in pre-qualification proceedings). The second is where no standstill was applied and a challenge is received after the submission deadline (where a suspension may allow a potentially abusive award to be prevented). The reason for requiring the suspension reflects the need to prevent other suppliers or contractors, or the procuring entity, from continuing down a non-compliant path, risking wasting time and probably costs.[1] In other circumstances, the suspension is discretionary as in the case of applications for reconsiderations above.

33. Whatever solution is adopted, regulations, rules and guidance explaining the policy considerations will be key to ensuring good decision-taking in the question of suspensions.

34. As regards a system of applications to the court, many national legal systems provide for a judicial review of acts of administrative organs and public entities, either in addition to the independent body outlined above, or instead of its function. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted; in other systems the two means of challenge or review are available as options. Some States concerned may already provide rules that will guide those involved in challenge procedures on these matters. If not, the State may wish to establish them and to provide for the desired approach through law or regulations, as supported by other rules and guidance. The Model Law, which does not regulate court procedures, does not address this issue of sequencing. In addition, commencing parallel proceedings is not encouraged.

35. The Model Law does not address such issues in proceedings before a court as powers to award compensation for anticipatory losses (such as lost profits) or to grant interim measures, including under a contract that has been executed and where performance has commenced. Nonetheless, UNCITRAL encourages all remedies available in proceedings before the independent body to be available before the court.

36. Challenges can address breaches of rules and procedures only at the instigation of suppliers, and so the other oversight mechanisms outlined in the Executive Summary above should be in place to deal with (a) non-compliance where a supplier chooses not to take action and (b) systemic issues. Suppliers may not wish to take action for many reasons: where the contract is of low value, larger suppliers may consider that losses may not justify the costs concerned; smaller suppliers may consider that the time and costs of any challenge are unaffordable; and all suppliers may be unwilling to challenge discretionary decisions because of the higher risk of failure, and may be concerned that a challenge will risk future relationships with the procuring entity.

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[1] The Working Group is requested to advise how to explain why the considerations in the procuring entity's case do not apply here