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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 articles 20 to 26 of chapter I (General provisions) 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-session informal consultations on the relevant provisions of the draft revised Guide to Enactment.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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Part II. Article-by-article commentary

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Article 20. Rejection of abnormally low submissions

1. The purpose of the article is to enable the procuring entity to reject a submission whose price is abnormally low and gives rise to concerns as to the ability of the supplier or contractor concerned to perform the procurement contract. The article applies to any procurement proceedings under the Model Law.

2. The article provides safeguards to protect the interests of both parties. On the one hand, it enables the procuring entity to address possible abnormally low submissions before a procurement contract has been concluded, avoiding the risk that the contract cannot be performed, or performed at the price submitted, and additional costs, delays and disruption to the project.

3. On the other hand, the procuring entity cannot automatically reject a submission simply on the basis that the submission price appears to be abnormally low: such a right would introduce the possibility of abuse, as submissions could be rejected without justification, or on the basis of a purely subjective assessment. Such a risk could be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.[1]

4. For these reasons, the article allows the rejection of an abnormally low submission only when the procuring entity has taken steps to substantiate its performance concerns. This ability, however, is without prejudice to any other applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations or collusion) are involved.

5. Accordingly, paragraph 1 of the article specifies the steps that the procuring entity has to take before an abnormally low submission may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

6. First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submission that the procuring entity considers may justify the price submitted. Those details may

[1] The Working Group may wish to consider deleting the final sentence, in order not to compromise international competition.

include: information, samples, etc. proving the quality of the subject-matter offered; the methods and economics of any relevant manufacturing process; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution contract. The submitted price is therefore always analysed in the context of other constituent elements of the submission concerned.[2]

7. The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the submission, such as those discussed in the preceding paragraph), and using such factors as pre-procurement estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

8. Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier or contractor refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low submission; it is one element to take into consideration when considering whether a submission is abnormally low.

9. Only after the steps outlined in paragraph 1 have been fulfilled may the procuring entity reject the abnormally low submission.[3] The article does not oblige the procuring entity to reject an abnormally low submission. The regulations or guidance from the public procurement agency or similar body should, however, circumscribe the discretion to accept or reject such submissions both in order to ensure consistency and good practice, and in order to avoid abuse.

10. Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the contract, it must record those concerns and its reasons for holding them in the record of the procurement (see paragraph 2). This provision is included to ensure that any decision to reject the abnormally low submission is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

11. The decision on the rejection of the abnormally low submission must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. This

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[2] The provision of guidance to the Secretariat is requested on consistency between this and the immediately following paragraph as regards cost assessment.

[3] The Working Group is requested to provide guidance on why this is not an obligation but an option: is it a measure intended to frustrate collusion, as per the discretion to cancel the procurement or accept the second-best submission under article 22.

decision may be challenged in accordance with chapter VIII of the Model Law [**hyperlink**].

12. Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low submissions. Thoroughly assessing suppliers or contractors' qualifications and examining and evaluating their submissions can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of the description of the subject-matter of the procurement. Procuring entities should be aware of the need to compile accurate and comprehensive information about suppliers or contractors' qualifications, including information about their past performance, and to pay due attention in evaluation to all aspects of submissions, not only to price (such as to maintenance and replacement costs). These steps can effectively identify performance risks.

13. Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low submissions; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low submissions and promote responsible behaviour on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents that submissions may be rejected if they are abnormally low and raise performance concerns.

Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

14. The purpose of the article is to provide an exhaustive list of grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings for reasons not linked to qualification or to the content of a submission . The article does not use the term "corruption" itself but refers to examples of corrupt behaviour (inducement, unfair competitive advantage and conflicts of interest). These examples are commonly cited examples of corrupt behaviour, and the article is therefore an important anti-corruption measure.

15. The article is intended to be consistent with international standards and to outlaw any corrupt practices regardless of their form and how they were defined. Such standards may be found in international instruments, such as the United Nations Convention against Corruption, or documents issued by international organizations, such as the Organization on Economic Cooperation and Development (OECD) and multilateral development banks [**hyperlinks**]. They may evolve over time. In the light of article 3 of the Model Law [**hyperlink**] that gives prominence to international commitments of enacting States, enacting States are encouraged to consider international standards against corrupt practices applicable at the time of the enactment of the Model Law. Some of them may be binding on the enacting State if it is a party to the international instruments concerned.[4]

[4] The Commission requested that the Guide discuss why there was no de minimums threshold, with reference to national provisions and practices, and should indicate that even small items

16. Although the procedures and safeguards in the Model Law are designed to promote transparency and objectivity and thereby to reduce corruption, a procurement law alone cannot be expected to eradicate corrupt practices in public procurement in the enacting State. Procuring entities should also not be expected to deal with all issues of such corruption. The enacting State should therefore have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process, aimed at enhancing governance throughout the system.[5]

17. The term "inducement" in the title of the article can be generally described as any attempt by suppliers or contractors improperly to influence the procuring entity. What would constitute an unfair competitive advantage or a conflict of interest for the purpose of applying paragraph (1)(b) is left to determination by the enacting State. The provisions address conflicts of interest only on the side of the supplier or contractor; those on the side of the procuring entity are subject to separate regulation, such as under article 26 on the code of conduct for procuring officials [**hyperlink**]. To avoid an unfair competitive advantage and conflicts of interests, the applicable standards of the enacting State should, for example, prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. Some aspects of these concepts may be regulated in other branches of law of the enacting State, such as anti-monopoly legislation.

18. "An unfair competitive advantage" could arise from a conflict of interest (for example, where the same lawyer represented both sides in the case). However, this would not necessarily always be the case and an unfair competitive advantage might arise under unrelated circumstances.[6]

19. The provisions of the article are without prejudice to any other sanctions that may be applied to the supplier or contractor, such as exclusion or debarment (as to which, see the commentary in Section ** of the general commentary [**hyperlinks**]). However, sanctions — including criminal convictions — are not prerequisites for the exclusion of the supplier or contractor under this article.

20. To guard against any abusive application of article 21 [**hyperlink**], the decision on exclusion and reasons are to be reflected in the record of procurement proceedings and to be promptly communicated to the alleged wrongdoer to enable a challenge.[7] The procurement regulations or rules or guidance should assist in

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could constitute inducements in some circumstances. The guidance of the Working Group is sought to fulfil the Commission's request.

[5] In the Working Group, a suggestion was made that the Guide should reflect that, in the context of public procurement, it may be impossible to establish the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action. The provision of guidance to the Secretariat is requested on desirability of including this or other statements in the Guide in an attempt to describe relevant examples.

[6] The Commission suggested the use of examples to explain an unfair competitive advantage: the Working Group is requested to provide such examples.

[7] The suggestion was made in the Working Group that the Guide should explain that risks of unjustified rejection might be mitigated by encouraging a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the

assessing whether or not a factual basis for exclusion has arisen. For further discussion of these issues, see also the commentary to article 26 on codes of conduct [**hyperlink**].

21. The implementation of the article is also subject to other anti-corruption law in an enacting State, to avoid unnecessary confusion, inconsistencies and incorrect perceptions about its anti-corruption policies. Here, information-sharing and coordination between government agencies should be encouraged and facilitated, as discussed in the commentary in the introduction to Chapter I [**hyperlink**].

Article 22. Acceptance of the successful submission and entry into force of the procurement contract [hyperlink**]**

22. The purpose of article 22 is to set out detailed rules for: (i) the acceptance of the successful submission; (ii) a safeguard in the form of a standstill period to enable suppliers or contractors to file a challenge before the contract or framework agreement enters into force; and (iii) the entry into force of the procurement contract. The article is supplemented by transparency requirements in the Model Law regarding information to be provided to suppliers and contractors at the outset of the procurement proceedings, such as the manner of entry into force of the procurement contract (see, for example, article 39(v) [**hyperlink**], which requires the solicitation documents to provide information about the application and duration of the standstill period). Article 39(w) also requires [**hyperlink**] the solicitation documents to specify any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force which, in accordance with this article, may include the execution of a written procurement contract and approval by another authority.

23. Paragraph (1) provides that the successful submission, as a general rule, is to be accepted by the procuring entity, meaning that the procurement contract or framework agreement must be awarded to the supplier or contractor presenting that successful submission (referred to as the winning supplier), reflecting the terms and conditions of the submission. (There is no single definition of the successful submission. The articles regulating the procedures for each procurement method define the term in the context of each procurement method [**hyperlinks**].) The exceptions to the general rule set out in paragraph (1) are listed in subparagraphs (a) to (d) (disqualification of the winning supplier, cancellation of the procurement, rejection of the successful submission on the ground that it is abnormally low in accordance with article 20 [**hyperlink**], or exclusion of the winning supplier on the grounds of inducement from its side, unfair competitive advantage or conflict of interest in accordance with article 21 [**hyperlink**]).

24. The ground for not accepting the successful submission set out in subparagraph (a) (disqualification) should be understood in the light of the provisions in article 9 (1) [**hyperlink**] that allow the qualifications of suppliers or contractors to be assessed at any stage of the procurement proceedings, article 9(8)(d) allowing the procuring entity to require any pre-qualified supplier or contractor to demonstrate its qualifications again [**hyperlink**], and articles 43(6) and (7)

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provisions of article 19 regulating procedures for investigating abnormally low submissions. The provision of relevant guidance to the Secretariat is requested in the light of possible abusive practices and results that such dialogue may facilitate to avoid the application of this article.

and 57(2) that specifically regulate the assessment of the qualifications of the winning supplier [**hyperlinks**].

25. It is understood that the list of exceptions in paragraph (1)(a) to (d) is not exhaustive: it refers only to the grounds that may be invoked by the procuring entity. Additional grounds may appear as a result of challenge and appeal proceedings, for example when the independent body, under article 67 [**hyperlink**], orders the termination of the procurement proceedings, requires the procuring entity to reconsider its decision, or otherwise requires further steps. These grounds should also not be confused with the grounds that justify the award of the procurement contract to the next successful submission under article 22(8) [**hyperlink**]: the latter grounds would appear after the successful submission was accepted, and not at the stage when the procuring entity decides whether the successful submission should be accepted.

26. Paragraph (2) regulates the application of the standstill period, defined in article (2)(r) as "the period starting from the dispatch of a notice as required by article 22(2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law [**hyperlink**], the decision so notified". The primary purpose of the standstill period is therefore to avoid the need for an annulment of a contract or framework agreement that has entered into force.

27. The notification of the standstill period is served on all suppliers or contractors that presented submissions, including the winning supplier. (This notification should not be confused with the notice of acceptance of the successful submission addressed only to the winning supplier under paragraph (4) of the article.) The information notified under paragraph (2) includes that listed in its subparagraphs (a) to (c). The provisions of article 24 on confidentiality [**hyperlink**] will indicate if any information about the successful submission under subparagraph (b) should be withheld for confidentiality reasons. Although the need to preserve confidentiality of commercially sensitive information may arise in setting out the characteristics and relative advantages of the successful submission, it is essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make meaningful use of the standstill period.

28. Because the standstill period starts running from the time of dispatch of the notification, to ensure transparency, integrity, and the fair and equitable treatment of all suppliers and contractors in procurement proceedings, the provisions require prompt and simultaneous dispatch of an individual notification to each supplier or contractor concerned. Putting a notice on a website, for example, would be insufficient.

29. The provisions do not include any requirement for the procuring entity to notify (or debrief) unsuccessful suppliers or contractors about the grounds upon which they were unsuccessful. However, debriefing upon the request of a supplier or contractor represents best practice and should be encouraged by the enacting State. (On debriefing, see the discussion at the end of the commentary to this article.)

30. The provisions of paragraph (2) also require the procuring entity to specify the duration of the standstill period in the notification, which will have been set out in

the solicitation documents. Providing this information in the notification under paragraph (2) is important not only as a reminder but also for precision — since the standstill period runs from the notice of the dispatch, the notification will specify the starting and ending dates of the standstill period reflecting the entire duration of the standstill period indicated in the solicitation documents.

31. Certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period is critical for ensuring both that the suppliers and contractors can take such action as is warranted and that the procuring entity can award the contract without risking an upset. The date of dispatch creates the highest level of certainty and is specified in the Model Law as the starting point for the standstill period. The same approach is taken as regards other types of notifications served under this article (see paragraphs … below). Paragraph (9) of the article explains the meaning of the "dispatch."

32. The Model Law leaves it to the procuring entity to determine the exact duration of the standstill period on a procurement-by-procurement basis, depending on the circumstances of the given procurement, in particular the means of communication used and whether procurement is domestic or international. To ensure equality of treatment, the additional time may need to be allowed for example for a notification sent by traditional mail to reach overseas suppliers or contractors.

33. The discretion of the procuring entity to fix the duration of the standstill period is not unlimited. It is subject to the minimum to be established by the enacting State in the procurement regulations. A number of general considerations should be taken into account in establishing this minimum duration, including the impact that the duration of the standstill period would have on the overall objectives of the Model Law. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. Enacting States may wish to set more than one standstill period for different types of procurement, reflecting the complexity of assessing whether or not the applicable rules and procedures have been followed, but should note that excessively long periods of time may be inappropriate in the context of electronic reverse auctions and open framework agreements, which presuppose speedy awards and in which the number and complexity of issues that can be challenged are limited. On the other hand, the situation in an infrastructure procurement may require a longer period of consideration.

34. The length of the standstill period may appropriately be reflected in working or calendar days, depending on the length and likely intervention of non-working days. It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to challenge the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, expected to be as short as the circumstances allow, so as not to interfere unduly with the procurement itself. If a challenge is submitted, the provisions in chapter VIII of the Model Law [**hyperlink**] would address any suspension of the procurement procedure and other appropriate remedies.

35. Paragraph (3) sets out exemptions from the application of the standstill period. The first refers to contracts awarded under framework agreements without second-stage competition.[8] (In the conclusion of a framework agreement itself, and in all contracts awarded under any framework agreement involving second-stage competition the standstill period will apply.)

36. The second exemption applies to low-value procurement. As discussed in the commentary in the Introduction to Chapter I [**hyperlink**], the enacting State should consider aligning the low-value threshold in the procurement regulations under paragraph (3)(b) with other thresholds, such as those justifying an exemption from public notices (under article 23(2)) and the use of request-for-quotations proceedings (under article 29(2) [**hyperlinks**]).

37. The third exemption is urgent public interest considerations, the nature of which are discussed in the commentary to article 65(3) on justifications for lifting the prohibition against bringing the procurement contract into force [**hyperlink**].

38. The purpose of paragraph (4) is to specify when the notice of acceptance of the successful submission is to be sent to the winning supplier or contractor. There may be various scenarios. First, where a standstill period was applied and no challenge or appeal is outstanding, the notice is dispatched by the procuring entity promptly upon the expiry of the standstill period. Secondly, where a standstill period was applied and a challenge or appeal is outstanding, the procuring entity is prohibited from dispatching the notice of acceptance (under article 65 of the Model Law [**hyperlink**]) until it receives notification from appropriate authorities ordering or authorizing it to do so. Thirdly, if no standstill period was applied, the procuring entity must dispatch the notice of acceptance promptly after it has identified the successful submission, unless it receives an order not to do so from a court or another authorized authority.

39. The Model Law provides for different methods of entry into force of the procurement contract, recognizing that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances.

40. Under one method (set out in paragraph (5)), and absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the winning supplier. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the procuring entity has to give notice of acceptance while the submission is in force so as to bind the supplier or contractor to perform the contract. Under the "receipt" approach, if the notice were properly transmitted, but the transmission was delayed, lost or misdirected through no fault of the procuring entity, and the period of effectiveness of the submission expires, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, in the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of

[8] The provision of guidance to the Secretariat is requested as regards reasons for this exemption. The records of the Working Group's deliberations (see A/CN.9/687, para. 96) are not conclusive on this point. To be considered also in the context of the guidance to Chapter VII.

its submission that the submission had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

41. A second method (set out in paragraph (6)) ties the entry into force of the procurement contract to the signature by the winning supplier of a written procurement contract conforming to the submission. This is possible only if the solicitation documents included such a requirement, and should not be considered the norm in all procurement proceedings. Enacting States are encouraged to indicate in the procurement regulations the type of circumstances in which a written procurement contract may be required, taking into account that such a requirement may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authenticity of the signature.

42. A third method (in paragraph (7)) provides the prior approval of the procurement contract by another authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). Paragraph (7) reiterates the role of the solicitation documents in giving notice to suppliers or contractors of the formalities required for entry into force of the procurement contract. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful submission or of any tender security is designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed to avoid that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

43. As a matter of best practice, paragraph (8) makes it clear that, if the winning supplier or contractor fails to sign a procurement when required, the procuring entity may choose to cancel the procurement or to award the contract to the next successful submission. That submission will be identified in accordance with the provisions applicable to the selection of the successful submission in procurement concerned. The flexibility given to the procuring entity to cancel the procurement in such cases is intended, among other things, to allow the consequences of collusion among suppliers or contractors to be mitigated. The procurement regulations or rules or guidance from the public procurement agency or similar body should guide the decision on the appropriate course of action, and discuss avoiding abuse of the discretion conferred.

Debriefing

44. 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 or, less commonly, to successful suppliers. The overall aims are to reduce the potential for challenges, to hold the procurement officials accountable for their decisions, and to enhance the effectiveness of the procurement process and the quality of future submissions.

45. Debriefings can be provided, on request or offered routinely, to suppliers or contractors excluded through pre-qualification, or after award, but should be provided as soon as practically possible. Debriefings may be done orally (such as at meetings), in writing, or by any other method acceptable to the procuring entity. Although oral debriefings may be appropriate or necessary, the recording of the information provided is important for good governance purposes, and may be provided to the supplier or contractor that is given the debriefing (the "requesting supplier").

46. At a minimum, the debriefing information should include:

(a) The procuring entity's evaluation of the significant weaknesses or deficiencies in the requesting supplier's qualifications, tender or other submission, as applicable;

(b) A comparison of the information in subparagraph (a) and the procuring entity's evaluation of the characteristics, price and other quality elements, and relative advantages, of the successful submission;

(c) The qualifications, overall evaluated price and technical rating, if applicable, of any successful supplier or contractor and the requesting supplier, and qualification information regarding the requesting supplier;

(d) The overall ranking of all suppliers or contractors, when any ranking was developed by the agency during the procurement process;

(e) A summary of the rationale for any qualification decision or award; and

(f) Reasonable responses to relevant questions about whether the procurement procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.

47. A key issue is that the debriefing must not reveal any commercially sensitive information — whether prohibited by the procurement law or not, and from whatever source — from disclosure. The procuring entity will therefore need to find the appropriate balance between providing helpful information to the requesting supplier and protecting confidential information.

48. A summary of the debriefing should be included in the record of the procurement. This is not only part of good governance and administrative practice, but can also help mitigate the risk of disclosure of confidential information, which in extreme cases might lead to legal action. The issues of due process arising in debriefings are not dissimilar to those arising in some challenge proceedings, notably a request for reconsideration made to the procuring entity. A discussion of those issues is found, therefore, in the introduction to Chapter VIII [**hyperlink and check that the point is properly covered**]. [**hyperlink** to World Bank debarment system as additional example **]

Article 23. Public notice of awards of procurement contract and framework agreement [**hyperlink**]

49. In order to promote transparency in the procurement process, and the accountability of the procuring entity, article 23 requires prompt publication of a notice of award of a procurement contract and a framework agreement. This obligation is separate from the notice of the procurement contract (or framework

agreement as applicable) required to be given under article 22(10) [**hyperlink**] to suppliers and contractors that presented submissions, and from the requirement that the information in the record that should be made available to the general public under article 25(2) [**hyperlink**]. The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which, paragraph (3) suggests, may be dealt with in the procurement regulations. For the minimum standards for publication of this type of information, see the guidance to article 5 (see paragraphs … above [**hyperlink**]), which is relevant in this context.

50. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts irrespective of their value, the procurement regulations will set out a monetary value threshold below which the publication requirement would not apply. Paragraph (2) requires periodic publication of cumulative notices of such awards, which must take place at least once a year.

51. While the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would probably exceed any low-value threshold.

Article 24. Confidentiality

52. The purpose of article 24 is to protect the confidential information of all parties to procurement. The article imposes different types of confidentiality requirements on different groups of persons, depending on which type of information is in question. It is supplemented by article 69 [**hyperlink**], which addresses the protection of confidential information in challenge and appeal proceedings.

53. Paragraph (1) refers to information that the procuring entity is prohibited from disclosing to suppliers or contractors and to the public comprising, first, information that may not be disclosed to protect the essential security interests of the enacting State, which may be legally identified as classified information. This could relate to procurement for national security or for national defence, and procurement of arms, ammunition, or war materials, involving medical research or procurement of vaccines during pandemics.[9] See, further, the commentary to the definition in article 2 of "procurement involving classified information" [**hyperlink**].

54. Paragraph (1) also addresses other information whose disclosure may "impede fair competition". The phrase should be interpreted broadly, referring not only to current but also to subsequent procurement. Because of the broad scope of the provision and possibility of abuse, it is essential for the enacting State to set out in the procurement regulations, if not an exhaustive list of such information, at least its legal sources. Paragraph (1) also provides that such information may be disclosed only by order of the court or authority (for example, the independent body referred to in article 66 [**hyperlink**]). The identity of any organ with such power is to be

[9] Some experts question the appropriateness of reference to "procurement of vaccines during pandemics" in this context. The provision of the guidance to the Secretariat is requested.

specified in the law; the order issued by the court or other designated organ will regulate the extent of disclosure and relevant procedures.

55. Paragraph (2) deals with information submitted by suppliers or contractors. By their nature, such documents contain commercially sensitive information; their disclosure to competing suppliers or contractors or to an unauthorized person could impede fair competition and would prejudice legitimate commercial interests. Such disclosure is therefore generally prohibited. The term "unauthorized person" in this context refers to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized in the enacting State to have access to the information in question. The Model Law, however, recognizes that disclosure of some information submitted — whether to competing suppliers or contractors or to the public in general — is important to ensure transparency and integrity in the procurement proceedings, meaningful challenge by suppliers or contractors and proper public oversight. Accordingly, paragraph (2) of the article sets out exceptions to the general prohibition. It cross-refers to the requirements under article 22(2) and (10) [**hyperlink**] to notify the intended award to suppliers or contractors that presented submissions; under article 23 [**hyperlink**], to identify the winning supplier and the winning price in the public notice of contract award; under article 25 [**hyperlink**], to disclose information through permitting access to certain parts of the documentary record; and, under article 42(3) [**hyperlink**], to announce certain information in tenders during their public opening.

56. Whereas paragraphs (1) and (2) have general application, paragraph (3) is restricted to procurement proceedings under articles 48(3) and 49 to 51 [**hyperlinks**]. These proceedings envisage interaction between the procuring entity and suppliers or contractors. Paragraph (3) broadens the obligation from the procuring entity to any party and to all information arising in the interaction in these proceedings. Disclosure of any such information is permissible only with the consent of the other party, or when required by law or ordered by the court or other authority. The procuring entity may seek a blanket consent to disclosure of all information submitted by suppliers or contractors, such as by providing in the solicitation documents that participation in the procurement requires such consent, but this approach is at risk of abuse and requires additional authority. This approach emphasizes that any consent given should be construed narrowly, as a broader interpretation may violate paragraphs (1) or (2) of the article. The reference to orders by the court or other relevant organ designated by the enacting State is identical to the one found in paragraph (1) of the article. The enacting State in designating the relevant organ should ensure consistency between paragraphs (1) and (3) of the article.

57. Paragraph (4) is also of restricted application, applying only to procurement involving classified information (for the definition of "procurement involving classified information", see article 2(l) and the relevant commentary in Section ** of the general commentary [**hyperlinks**]). It envisages that the procuring entity, may take measures to protect classified information in the context of a specific procurement additional to the general legal protection under paragraph (1). Such additional measures may concern only suppliers or contractors or may be extended through them to their sub-contractors. They might be justified by the sensitive nature of the subject-matter of the procurement or by the existence of classified

information even if the subject-matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

Article 25. Documentary record of procurement proceedings [hyperlink**]**

58. The purpose of the article is to promote transparency and accountability by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing appropriate access to it. This record summarizes key information concerning the procurement proceedings; ensuring timely access where such is authorized is essential for any challenge by suppliers and contractors to be meaningful and effective. This in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities.

59. The article does not prescribe the form and means in which the record must be maintained. These issues are subject to article 7 on communications in procurement [**hyperlink**], in particular the standards set out in paragraphs (1) and (4) of that article (see, further, the commentary thereto [**hyperlink**]).

60. The list of information to be included in the record under paragraph (1) is not intended to be exhaustive as the chapeau provisions (through the word "includes") and paragraph (1)(w) indicate. The latter is intended to be a "catch-all" provision, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor are recorded. Some decisions, although not listed in paragraph (1) of the article, are to be included in the record under other provisions of the Model Law. For example, article 35(3) [**hyperlink**] requires the decision and reasons for using direct solicitation in request-for-proposals proceedings to be recorded. Articles 53(2) and 59(7) [**hyperlinks**] require the decision and reasons for limiting participation in auctions and open framework agreements on the ground of technological constraints to be recorded. Paragraph (1)(w) refers also to information that the procurement regulations may require to be recorded.

61. The reference in the chapeau of paragraph (1) to maintaining the record also require it to be updated. Information is therefore included to the extent it is known to the procuring entity. For example, in procurement proceedings in which not all proposals were finalized by the proponents, or where the latter left the proceedings without submitting a BAFO, the procuring entity under paragraph (1)(s) should include a summary of each submission at the relevant time in the procurement proceedings. The reference to the price should be interpreted to allow for the possibility that in some instances, particularly in procurement of services, the submissions would contain a formula by which the price could be determined rather than an actual price quotation.

62. Record requirements should specify the extent, and the recipients, of the disclosure, requiring factors to be balanced. They include such as full disclosure as a general rule to promote accountability; the need to provide suppliers and contractors with information necessary to permit them to assess their performance and consider a challenge where appropriate; and the need to protect suppliers' and

contractors' confidential information. In view of these considerations, article 24 provides two levels of disclosure. It mandates in paragraph (2) disclosure to any member of the general public of the information referred to in paragraph (1)(a) to (k) of the article — basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated under paragraph (3) of the article for the benefit of suppliers and contractors that presented submissions, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the Model Law. The procuring entity may not decline to disclose such information even if it considers that the disclosure would impede fair competition (for example by facilitating collusion in subsequent procurements, or driving suppliers out of business). However, it is recommended that the regulations or guidance issued by the public procurement agency or similar body should require the procuring entity to notify suppliers or contractors of its intention to disclose portions of the record relevant to them: those suppliers or contractors may wish to challenge the decision to do so, on the basis of a breach of confidentiality as required by article 24 [**hyperlink**], under the provisions of Chapter VIII [**hyperlink**].

63. The pool of suppliers or contractors under paragraph (3) is limited to those that presented submissions: other suppliers or contractors, including those disqualified, should not have access to information on the examination and evaluation of submissions. The reasons for their disqualification will have been communicated to them under the requirements of articles 18(10) and 49(3)(e) [**hyperlinks**], and should give them sufficient information to consider whether to challenge their exclusion.

64. The purpose of the provision in paragraph (3) allowing disclosure to the suppliers or contractors of the relevant parts of the record at the time when the decision to accept a particular submission (or a decision to cancel the procurement proceedings) has become known to them is to give efficacy to the right to challenge under article 64 [**hyperlink**]. In order to make this provision effective, article 69 [**hyperlink**] permits access by the suppliers or contractors concerned to the relevant parts of the record. Delaying disclosure until, for example, the entry into force of the procurement contract might deprive suppliers and contractors of a meaningful remedy and, consequently, the procurement regulations should require the procuring entity to grant prompt access to those records. The provisions are also intended to capture two situations when the decision to accept a particular submission becomes known to the relevant suppliers or contractors: one is when it becomes known through a standstill period notification under article 22(2), and the second when it may become known despite no such notification having been served, through the publication of a contract notice as required by article 23 [**hyperlink**], or through disclosure by civil society, or media or monitoring reports, etc.

65. The disclosure of information either to the public or to relevant suppliers or contractors is without prejudice to paragraph (4)(a) of this article, which sets out grounds that would allow the procuring entity to exempt information from disclosure, and to paragraph (4)(b) listing information that cannot be disclosed. (See the commentary to article 23 above [**hyperlink**] on the first ground.) As regards

paragraph (4)(b), and as mentioned in the commentary to article 23 [**hyperlink**] and above, among the objectives of these provisions the avoidance of disclosure of confidential commercial information to suppliers and contractors; the need is particularly acute with respect to what is disclosed concerning the evaluation of submissions, as the information may naturally involve commercially sensitive information, which suppliers and contractors have a legitimate interest in protecting. Accordingly, the information referred to in paragraph (1)(t) involves only a summary of the evaluation of submissions, while paragraph (4)(b) restricts the disclosure of more detailed information that exceeds what can be disclosed in this summary.

66. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the application of other statutes in the enacting State, conferring on the public at large a general right to obtain access to Government records, to certain parts of the record. For example, the disclosure of the information in the record to oversight bodies may be mandated as a matter of law in the enacting State.

67. Paragraph (5) of the article reflects a requirement in the United Nations Convention against Corruption that States parties must "take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents" (article 9(3) of the Convention [**hyperlink**]). The requirement to preserve documents related to the procurement proceedings and applicable rules on documentary records and archiving, including the period of time during which the record and all the relevant documents pertaining to a particular procurement should be retained, should be stipulated in other provisions of law of the enacting State. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations or guidance from the public procurement agency or similar body may so require.

Article 26. Code of conduct [hyperlink**]**

68. The purpose of article 26 is to emphasize the need for States to enact a code of conduct for officers and employees of procuring entities, which should address actual and perceived conflicts of interest, increased risks of impropriety on the part of officers and employees of the procuring entities in such situations, and measures to mitigate such risks, including through filing declarations of interest. Enacting such a code should be considered as a measure to implement certain requirements of the United Nations Convention against Corruption [**hyperlink**], articles 8 and 9 [**hyperlinks**] of which have direct relevance to public procurement, and to measures to regulate matters regarding personnel responsible for procurement (the "procurement personnel"). Enacting States should ensure that gaps in regulation and in enacting measures for the effective implementation of the relevant provisions of the Convention are eliminated though such codes of conduct.

69. Depending on the legal traditions of enacting States, codes of conduct may be enacted as part of the administrative law framework of the State, either at the level of statutory law or regulations, such as the procurement regulations. They may be of general application to all public officials regardless of the sector of economy or may be enacted specifically for the procurement personnel, and some may be part of the

procurement laws and regulations. When a general code of conduct for public officials is enacted, it is expected that some provisions will nevertheless contain provisions addressing specifically the conduct of the procurement personnel. The enacting State, in considering enacting or modernizing a code of conduct for its public officials or specifically for the procurement personnel, may wish to consult the relevant documents of international organizations, such as the Organization on Economic Cooperation and Development [**hyperlinks**].

70. The provisions of article 2 focus on the conflicts of interest situations in procurement, in the light of particularly negative effects of conflicts of interest on transparency, objectivity and accountability in public procurement. Without intending to be exhaustive, the provisions list only some measures to regulate the conduct of the procurement personnel in conflicts of interest situations, such as requiring them to file declarations of interest, undertake screening procedures and be involved in training. This is in line with article 8(5) of the Convention [**hyperlink**], referring to: "measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result". The Model Law provides only general principles, recognizing that setting out in the Model Law exhaustive provisions on conflict of interest situations, including measures to mitigate the risks of impropriety in such situations, would be impossible in the light of varying ways of addressing conflicts of interest in different jurisdictions.

71. In addition to conflicts of interest situations and measures explicitly identified in the article to mitigate risks of impropriety in such situations, a code of conduct should address other matters, such as the concerns raised by the concept of the "revolving door" (i.e. that public officials seek or are offered employment in the private sector by entities or individuals that are potential participants in procurement proceedings). Although the provisions do not purport to mandate the enacting State to enact a code of conduct for suppliers or contractors in their relations with the procuring entity, some provisions of the code of conduct, such as those related to the concept of the "revolving door", should indirectly establish boundaries for the behaviour of private sector entities or individuals with public officials.

72. The provisions of the article requiring the code of conduct to be promptly made accessible to the public and systematically maintained are to be read together with article 5(1) of the Model Law [**hyperlink**], in which a similar requirement applies to legal texts of general application. The commentary to article 5(1) is therefore relevant in the context of the relevant provisions of article 26 [**hyperlink**].