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Evaluation and comparison of tenders and the use of procurement to promote industrial, social and environmental policies

I. Introduction

1. One of the topics that the Working Group is mandated to consider is “the use of procurement to promote industrial, social and environmental policies”, which the Working Group at its sixth session considered in the context of the evaluation and comparison of tenders (the term “tenders” is used as a shorthand one, to refer to all submissions). This note does not address the scope of the Model Law per se, even where that scope might be determined with reference to other economic policies. Articles 1 and 8 of the 1994 text seek to ensure that the Model Law is widely applied and is based on the principle of international participation (in addition to full and open competition unless exceptions are justified). As the Guide to Enactment explains, “[t]he approach used in the Model Law is to provide in principle for the coverage of all types of procurement, but at the same time to recognize that an enacting State may wish to exempt certain types of procurement from coverage”, and “[i]t is recommended that application of the Model Law be made as wide as possible” (commentary to article 1, paras. 1 and 2). Thus this note addresses exemptions to the main principle of full and international competition based on social and economic objectives not related to the procurement itself.¹ Under the Model Law, such exemptions are not general exemptions granted in the law or procurement regulations (by comparison with the position of defence procurement under article 1 of the 1994 text),² but exemptions permissible for a

¹ See also the commentary in the Guide to Enactment entitled “F. Provisions on international participation in procurement proceedings”, paras. 24-27.

² Or additional types of procurement to be excluded in the procurement regulations under article 1 (2) (b).



particular procurement, by virtue of articles 27 (e), 34 (4), 38 (m) and 39 of the 1994 text.³

2. The Model Law addresses such exemptions as part of the evaluation and comparison of submissions. It sets out the evaluation criteria that can be used to identify the lowest price tender, lowest evaluated tender, or the proposal best meeting the needs of the procuring entity. These criteria when applied to determine the lowest evaluated tender, or the proposal best meeting the needs of the procuring entity, “may allow for the use of procurement to promote industrial, social or environmental objectives. Such objectives may include the promotion of national industrial development (through the exclusion of foreign suppliers, the granting of preferences and the use of single source procurement in limited circumstances). The award criteria may also allow for foreign exchange impacts to be taken into account. There are express control mechanisms to ensure that the award criteria remain objective, quantifiable, and disclosed in advance to suppliers.”⁴

3. As the Guide to Enactment, when discussing article 34 (4) (c)(iii), notes: “The criteria in paragraph (4) (c)(iii) related to economic-development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4) (c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4) (c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.”

4. As then noted in A/CN.9/WG.I/WP.32, paragraph 53, “the view has been expressed by some observers that such policies may affect negatively both efficiency and economy in procurement, but that they play a significant part in enacting States’ domestic policies. Further, it has been noted that the notion of regional as well as national objectives is being considered. Accordingly, suggestions have been made that the Model Law should be refined in order to maintain or achieve a better balance between the aims of maximizing economy and efficiency in procurement, and other policy goals.”

II. Consideration by the Working Group at its sixth session and proposals for consideration at its fifteenth session

5. At its sixth session, when addressing the possible review of the role of social and economic objectives in public procurement, the Working Group noted that,

³ However, as regards the use of margins of preference, article 34 (4) (d) of the Model Law permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation being set out in the procurement regulations.

⁴ A/CN.9/WG.I/WP.32, para. 52.

“despite possible objections, as a matter of principle, to the use of public procurement to promote other policy goals, rather than only obtaining ‘value for money’, it was acknowledged that in practice States often used public procurement to achieve those other goals. Moreover, the view was expressed that in certain instances, it was appropriate and important to use procurement as a tool to achieve those goals provided that such use did not undermine the main objectives of the procurement process, such as economy, efficiency, transparency, competition and equitable treatment of all suppliers and contractors. However, it was generally felt that the focus of the Model Law should remain that of procurement rather than the promotion of other policy goals.”⁵ The Working Group also considered “whether it would be appropriate, in the interest of enhanced transparency, to introduce limitations on the use of evaluation criteria such as shadow-pricing of foreign exchange and counter trade considerations (both permitted under article 34 (4) (d) of the Model Law).”⁶

6. At that session, the Working Group’s preliminary conclusions were:

(a) That the “existing provisions of the Model Law provide[...] sufficient balance between the need for the economy and efficiency and possibility for an enacting State to address other policy goals through procurement”, but that “some of those other policy goals listed in the Model Law seemed to be outdated”;⁷

(b) To consider further whether to retain “shadow pricing of foreign exchange and counter-trade arrangements as factors to be taken into account” in the evaluation of submissions;⁸ and

(c) That the Guide to Enactment should be updated, and should provide more detailed guidance on additional criteria regarding preferences for which enacting States may wish to provide, and on when procurement could be used to promote other policy goals and how to ensure that such uses were transparent.⁹

7. Despite extensive discussions at its sixth session, the Working Group did not come to a final conclusion on the following issues:

(a) Whether to require by law that the specifications include, where applicable, the promotion of such other policy goals that the Working Group may wish to provide for in the revised Model Law;¹⁰

(b) Whether to retain the requirement of article 34 (4) (b)(ii) of the 1994 Model Law that any such goals must be quantifiable evaluation criteria and disclosed at the solicitation stage;¹¹

(c) Whether additional control measures on the use of other policy goals should be provided for in the revised Model Law (for example, the requirements that the goals must relate to the object of the procurement; that their evaluation should not be left entirely to the discretion of the procuring entity; that their use as

⁵ A/CN.9/568, para. 96.

⁶ A/CN.9/WG.I/WP.32, para. 54.

⁷ A/CN.9/568, para. 101.

⁸ A/CN.9/568, para. 99.

⁹ A/CN.9/568, paras. 98 and 101.

¹⁰ A/CN.9/568, para. 97.

¹¹ Ibid.

evaluation criteria must preserve essential principles of good procurement practice, such as equal treatment of suppliers and the need to promote competition; and that their misuse might be challenged through the bid protest mechanisms);¹²

(d) Whether “a maximum preference should be included in the Model Law (expressed in monetary terms, pass or fail requirements or otherwise), or relevant guidance given in the Guide to Enactment”;¹³

(e) Whether the provisions of article 34 of the Model Law permitting the use of preferences in favour of local (domestic) suppliers should be extended to regional suppliers;¹⁴

(f) How to address, if at all, the overlap between the provisions of two subparagraphs of article 34 (4) of the 1994 Model Law (arising because both aim at promoting the domestic economy): subparagraph (c)(iii), dealing with non-objective factors permitted to be taken into account in determining the lowest evaluated tender; and subparagraph (d), dealing with granting a margin of preference for domestic needs.¹⁵

8. In addition, at its sixth session, the Working Group considered whether the Model Law should make provision to allow for community participation in procurement, which certain observers had noted could confer benefits in procurement, such as in the implementation of procurement contracts.¹⁶ Noting those benefits, and also that “it has been observed that allowing for community participation involves an unacceptable degree of subjectivity, which can be abused”,¹⁷ the Working Group considered whether “the involvement of the local community might be one of the criteria for the selection of the method of procurement or for the award of the contract. Alternatively, tenderers might offer their best solutions, including community participation if they so choose, and those solutions might then be compared, or the conditions of implementation might be set to include the employment of local labour or materials, or part of the budget for the project might be set aside for community participation”.¹⁸ It concluded that “most issues raised by community participation related primarily to the planning and implementation phases of a project, more than to the procurement process. As such, community participation was not a matter that could be easily addressed in the Model Law. Being aware, however, of the growing importance of community participation and the possible need for enabling legislation in many jurisdictions, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement.”¹⁹

9. Proposals for revision of the Model Law as regards the selection of the procurement method are set out in paragraphs 65-70 of a note by the Secretariat (A/CN.9/WG.I/WP.66). Those proposals do not currently envisage the selection of

¹² Ibid.

¹³ A/CN.9/WG.I/WP.32, para. 54.

¹⁴ Ibid.

¹⁵ A/CN.9/568, para. 95.

¹⁶ A/CN.9/WG.I/WP.32, paras. 62-64.

¹⁷ A/CN.9/WG.I/WP.32, para. 64.

¹⁸ A/CN.9/568, para. 121.

¹⁹ A/CN.9/568, para. 122.

the procurement method for socio-economic reasons. This position is reflected in the 1994 text of the Model Law other than as regards (a) single-source procurement (in article 22 (2) of the 1994 text), as further discussed in paragraphs 45-48 of the same note by the Secretariat, and (b) defence procurement, or procurement involving national security considerations, in which the procuring entity may decide not to rely on the general exemption conferred by article 1 (2) of the Model Law, and select a procurement method (including single-source procurement) for the procurement concerned.

10. Also in paragraph 26 of the same note by the Secretariat, it is suggested that, as regards the evaluation and comparison of tenders, the Working Group may wish to consider formulating a single set of requirements as regards evaluation criteria building on the provisions of articles 27 (e), 34 (4), 38 (m) and 39 of the 1994 text of the Model Law. A draft provision to such effect is presented to the Working Group for its consideration as draft article 12 in document A/CN.9/WG.I/WP.66/Add.1. One feature of this provision is that the evaluation criteria must relate to the subject matter of the procurement, and the Working Group may wish to consider whether this limitation might prevent the use of social and economic objectives in the evaluation of submissions under the Model Law, including that it might operate to pose an obstacle to the use of community participation in procurement.

III. Provisions addressing social and economic objectives in other international procurement texts

11. Given that the Model Law is expressly subject to international obligations of the enacting State, and also with a broader view to harmonizing procurement regulation, the Working Group may wish to bear in mind provisions addressing social and economic objectives in other international procurement texts. For example, in the World Trade Organization (WTO's) Agreement on Government Procurement (GPA) and its 2006 draft revision (2006 GPA), provide regimes for special and differential treatment directed specifically at developing countries. They are subject to annual review (GPA) or are "transitional measures" in accordance with a schedule (the 2006 GPA). The measures themselves under the GPA focus primarily on coverage. Under the GPA, States may exclude certain procuring entities from "coverage", but the text in general seeks to ensure that the coverage lists of both developing and developed countries are as favourable as possible to the financial, trade and development interests of the developing countries. It also includes in its Article V a series of measures under the framework of "Special and Differential Treatment for Developing Countries", including coverage, agreed exclusions, special treatment for least-developed countries, and offsets. Under the 2006 GPA, special consideration is given to the development, financial, and trade needs and circumstances of developing countries and least-developed countries when negotiating accession to the GPA, and these countries are given a greater range of options including using transitional measures (such as a price preference programme) and the possibility of delaying the application of a specific obligation in the Agreement while the developing country implements that obligation. Thus, under the GPA and the 2006 GPA, the exemptions are granted on a general basis,

which is intended to be temporary, rather than on a procurement-by-procurement basis.²⁰

12. In the European Union,²¹ the Directives give Member States the *opportunity* to use procurement policy to meet wider socio-economic goals. The relevant provisions are found in the recitals.

13. For example, recital 29 of Directive 2004/18/EC provides (in part):

“... Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services ...” (the equivalent provision is found in recital 42 of Directive 2004/17/EC).

14. Recital 33 of Directive 2004/18/EC provides:

“Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements – applicable during performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation” (the equivalent provision is found in recital 44 of Directive 2004/17/EC).

15. Both Directives also make more general reference in their first recital to “the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles [mentioned in recital 2].” However, the Directives do not provide further detail on the implementation of these principles in the procurement itself.

²⁰ In addition, Article XXIII (2) of the GPA and Article III (2) (a)-(d) of the 2006 GPA provide (in essence) that Parties may create exceptions to the Agreements on the basis of (inter alia) the protection of public morals, order, or safety, or the need to protect human, animal or plant life or health provided that they do not do so in an arbitrary or unjustifiably discriminatory way or as a means to create a disguised restriction on international trade. These provisions are essentially repeated in the North American Free Trade Agreement (NAFTA).

²¹ See Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, available at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

IV. Conclusions

16. In the light of the above, the Working Group may wish to consider the following questions:

(a) Whether to continue to allow for the use of social and economic objectives in procurement under the Model Law, and, if so, both whether to retain some or all of the current objectives permitted, and whether any further objectives should be allowed (such as expressly allowing for obligations relating to labour law or environmental considerations);

(b) If such objectives are to be provided for in the Model Law, whether they can be used to justify the selection of a particular procurement method, whether they should operate as evaluation criteria or, alternatively, as qualification criteria where appropriate; and

(c) The contents of the commentary on the issue to be included in the Guide to Enactment.
