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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law

Note by the Secretariat

I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 90 of document A/CN.9/WG.I/WP.70, which is before the Working Group at its seventeenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.

2. At its sixteenth session, the Working Group considered proposals for a new procurement method, proposed to be called "Request for proposals with competitive dialogue". The Working Group agreed on the principles on which the provisions should be based and on much of the text, and requested the Secretariat to review the provisions in order to align the text with the rest of the Model Law. The Working Group also requested the Secretariat to make amendments throughout the draft revised Model Law, in particular to provisions in chapter I addressing the record of procurement proceedings, confidentiality, evaluation criteria, public notice of procurement contract awards, clarifications and modifications of solicitation documents, on requests for expression of interest and cancellation of the procurement, for consideration at a later stage (A/CN.9/672, para. 13).

3. At its forty-second session, the Commission considered the draft revised Model Law prepared after the Working Group's sixteenth session, and noted that the revised Model Law was not yet ready for adoption at that session. As regards

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chapter I of the revised Model Law, it noted that most issues had been agreed, though others remained outstanding. The Commission did not have sufficient time to consider the other chapters of the draft revised Model Law. It requested the Secretariat to prepare drafting suggestions to address outstanding issues for consideration by the Working Group. The Commission also supported intersessional informal consultations, which it urged to be inclusive and with as wide a geographical representation of participants as possible, to assist in the preparation of those materials (A/64/17, paras. 281 and 283).

4. To this end, the Secretariat invited views in writing as widely as possible, and held a series of meetings with experts in various regions.

5. The present note is submitted pursuant to the Commission's and the Working Group's requests at their recent sessions. It summarizes the results of the intersessional informal consultations, and presents the draft revised Model Law to reflect the Commission's and Working Group's deliberations, and, where consensus among those consulted was achieved, the results of the consultations for consideration by the Working Group.

6. In accordance with the agreement reached at the Working Group's fifteenth session (A/CN.9/668, para. 280), the documents for the sixteenth session of the Working Group are posted on the UNCITRAL website upon their availability in various language versions.

II. The results of intersessional consultations

7. The intersessional consultations focussed on the following issues or sections of the draft revised Model Law: chapter I (addressing general principles) of the text before the Commission at its forty-second session (the July 2009 draft); the use of procurement methods other than tendering, including the proposal for a new procurement method using negotiations or dialogue (see paragraph 2 above); the use of socio-economic factors as evaluation or qualification criteria and restriction to domestic suppliers for reasons of public policy; and chapters V-VII of the July 2009 draft (addressing electronic reverse auctions, framework agreements, and review and remedies, respectively). The consultations also briefly considered questions arising from the decision in principle to include defence procurement within the scope of the revised Model Law. The results of those consultations are presented to the Working Group for its consideration.

A. Chapter I

8. As regards chapter I, the consultations considered the Commission's mandate to simplify and standardize the Model Law where possible, which might have a significant impact on those States that had enacted legislation based on the 1994 text. It was generally agreed that restructuring aimed at enhancing user-friendliness and promoting best practice would be of great assistance to users of the text, but that such restructuring should not go beyond what was necessary. For example, chapter I should address those principles that were in reality of a general nature but principles that apply to one method only would normally be best located in the provisions addressing that method. In addition, it was noted that

settling terminology issues would be important to ensure that the revised text was understood and could be implemented and used as intended, and that a table or similar presentation of the changes to the 1994 text would be a vital support for those implementing its revised version.

9. In this regard, it was agreed by all those consulted that the provisions of article 7 in the July 2009 draft (governing the choice of procurement method) were insufficiently prominent in the text and the 1994 organization of the text, in which chapter II was entirely devoted to this topic, might be more easily understood. This suggestion has been followed in the revised text presented to the Working Group at this session (draft chapter II, set out in A/CN.9/WG.I/WP.71/Add.2).

10. Other suggestions that reflected the consensus view of those consulted have been made in articles 2, 6, 8, 10-12, 16, 17, and 20-23 (the main changes are highlighted in the accompanying footnotes).

B. Chapter II

11. As regards the use of procurement methods other than tendering, the consensus view was that the drafting should be crafted to support the toolbox approach agreed by the Working Group, i.e. by continuing the 1994 approach of requiring justification for the use of methods other than tendering in the proposed chapter II. Caution was urged against making advice and procedures overly prescriptive, so that procuring entities could exercise appropriate discretion in the choice of procurement methods. It was also agreed that the choice should be linked to achieving the objectives of the procurement system, as set out in the preamble to the Model Law. These suggestions have been reflected in the proposed chapter II, set out in A/CN.9/WG.I/WP.71/Add.2. The importance of ensuring adequate capacity for the use of various procurement methods was stressed (a matter for discussion in the Guide).

12. It was also suggested that, while the Model Law provisions would be presented on the basis of individual procurement methods, the Guide to Enactment (whose commentary would be vital to support the toolbox approach) could discuss the choice on the basis of common situations (normal, complex, simple and low-value procurement and normal, urgent or emergency situations).

13. **Transparency in the decision-making process was underscored and it was consequently suggested that the decision on the procurement method to be used could be recorded in the notice of any procurement. This formulation would also assist in ensuring that any challenge to the decision concerned could be made early in the procedure when its disruptive effect would be minimized. This suggestion was made towards the end of the consultation process and so was not considered by a majority of those consulted. It is therefore not reflected in the draft text before the Working Group, but is presented to the Working Group for its consideration.**

14. The number of procurement methods in the Model Law was discussed, and it was suggested that there would be some overlap among the available methods, and some methods might be considered optional. Consequently, the Guide should assist enacting States when drafting domestic legislation regarding the policy

considerations applying to the choice of procurement methods, by reference to the conditions for use of the various methods. The Guide could also assist enacting States in drafting internal guidance for the use of the methods. On the other hand, superfluous methods should be eliminated.

C. Chapter IV

15. The consultations also revealed many views on the use of restricted tendering (three options for which were before the Working Group at its sixteenth session and before the Commission at its forty-second session (see article 34, in A/CN.9/WG.I/WP.69/Add.3, which contained two variants of restricted tendering and tendering with pre-selection)). Aside from the view that pre-selection should not be a mandatory step in any procurement method, the view of those consulted was that a pre-selection process in open tendering would not be consistent with the open nature of this procedure envisaged in the Model Law. Accordingly, the method should be crafted as an alternative to open tendering, i.e. restricted tendering. This approach has been followed in draft chapter IV of the revised text (set out in A/CN.9/WG.I/WP.71/Add.4).

16. The question of a notice before engaging in restricted tendering was discussed at length, by reference to the 1994 conditions for use, and to the usefulness of the notices themselves.[1] It was agreed that the consequences of the notice needed to be clear. Where the notice had no clear legal consequence, for example because the decision at issue could effectively not be challenged, it might also have little value. Some considered that notices without legal consequences would be onerous for procuring entities that were not conducting electronic procurement; but others considered that their retention would allow scrutiny of the procurement, would permit effective challenge to the use of restricted tendering on the second ground, might enable poor practices within a procuring entity to be reviewed as part of a political challenge before a contract was awarded, and would enable the creation of a paper trail for audit purposes.

17. Yet others considered that the issue was not in reality one of notices but that the second ground for using restricted tendering should be removed from the text.

18. The draft revised Model Law before the Working Group therefore follows the 1994 formulation, requiring a notice before the commencement of the restricted tendering procedure, pending any further decision of the Working Group.

19. It was also observed that the value of notices had been similarly queried in the second competitive stage of framework agreements and in some other procurement methods. Some of those consulted considered that oversight might be adequately served by contract award notices where notices at the beginning of a procedure might be without real legal consequence, but others considered that post-award notices were too late. It was agreed among those consulted that a consistent approach would be appropriate, so that the draft revised text provides for notices

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[1] Those conditions are: either that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

before all procurement, other than where special considerations such as the protection of classified information or emergency procurement dictate otherwise, and this position has been reflected in the draft revised text, other than as regards the request for quotations procedure. As regards the latter, there was no consensus on a notice provision in this method.

20. It was agreed by all those consulted that the proposal in the July 2009 draft for a method called "Two envelope tendering" as set out in article 35 of A/CN.9/WG.I/WP.69/Add.3 should be deleted. Although it was noted that the method was based on article 42 of the 1994 Model Law (and that the substance of that article had been retained), it was considered the provisions of other procurement methods (such as request for proposals) would accommodate the separate assessment of technical and financial assessment that the method envisaged. This suggestion has been reflected in the draft revised text.

D. Chapter V

21. As regards procurement using negotiations or dialogue, the consultations led to many drafting suggestions, which are reflected in chapter V of the draft revised text, set out in A/CN.9/WG.I/WP.71/Add.5. The Working Group's attention is drawn, in particular, to the introductory comments to that chapter, which highlight outstanding issues and the question of consistency in regulating: (i) some procedural aspects in all request for proposals proceedings (request for proposals with dialogue, with consecutive negotiations, and without negotiations); (ii) the extent to which evaluation criteria and descriptions (including specifications) could be modified in two-stage tendering, and request for proposals with and without dialogue and negotiations; and (iii) pre-selection procedures in request for proposals proceedings and restricted tendering. **The extent to which evaluation criteria and descriptions (including specifications) could be modified in various procurement methods was one area where the consultations yielded significant differences of opinion.**

22. Another issue upon which there were differences of opinion was the interaction between the dialogue-based methods and procurement planning. Some considered that these methods should not be used as an alternative to effective planning, including conducting market research and feasibility studies; others considered that interaction with the market might be part of an "advisory multi-step process", the reason for which was to encourage suppliers to participate in giving information that would facilitate the drafting of an outline description of the intended procurement. It was suggested that these views reflected a difference in the way that practitioners might use the method, and the advantages and concerns should be discussed in the accompanying Guide to Enactment.

23. In addition, the consultations concluded that the Guide should stress that sufficient capacity to operate these methods would be critical for their successful use; that the interaction with conflicts of interest provisions should be addressed; that enacting States should consider carefully which methods within chapters IV and V of the draft revised text should be enacted by reference to local circumstances, particularly given the overlapping conditions for use of those methods; and that the implications of a pre-selection procedure, which might have the effect of excluding innovative but small suppliers, should be set out.

E. Socio-economic policy goals

24. As regards the interaction of socio-economic policy goals and procurement, the sensitivity of the topic was recognized, and the conclusions of the Commission on the matter recalled (A/64/17, paras. 45, 48, 106-166 and 267(b)). It was suggested that enacting States should be accorded the flexibility in the 1994 text to apply socio-economic factors (subject to regional and international constraints on such use), and that individual goals could arise as reasons to limit the procurement to domestic suppliers, as qualification criteria, as elements of responsiveness or as evaluation criteria. It was agreed that the approach of the Model Law should be to require transparency, while according this flexibility, so that potential participants in the process would understand how the socio-economic factors would be applied: this was not a novel suggestion, but the simple application of the general objectives of the Model Law (and would also be required by the United Nations Convention Against Corruption — the Working Group having agreed that the Model Law should be consistent with the obligations of this Convention). These suggestions, which were agreed by all those consulted, have been applied in articles 8-11 and 16 of the revised text (set out in A/CN.9/WG.I/WP.71/Add.1 and Add.2).

25. It was also agreed that accompanying Guide to Enactment text should stress the effects of the use of these factors on achieving value for money in procurement, and the requirement to address the factors in detail in regulations or other bodies of law. The background to the use of the factors such as the desire to avoid proliferation of monopoly-based industrial development and the fact that large-scale procurement in developing countries tends to favour overseas suppliers from developed countries should also be discussed, together with the use of such factors and the achievement of a socio-economic goal such as development or capacity-building. Further guidance on the application of these factors should be given, including the consequences of categorizing an evaluation criterion as a socio-economic criterion, the use of set-asides, local experts and joint-venture partners, the splitting of contracts, sub-contractual requirements and so forth.

F. Chapter VIII

26. As regards the proposed revisions to the remedies system, several suggestions were made for the text, which have been reflected in the revised draft (chapter VIII, set out in A/CN.9/WG.I/WP.71/Add.8). It was queried whether the scope of the remedies, limited to non-compliance with the provisions of the Model Law, was sufficient, and that failure to afford a fair opportunity to compete should give justification for a complaint. The difference between the request to a procuring entity to review a decision should be separated from a debriefing procedure; and the difference between an initial 7 day suspension period (while a complaint would be assessed to see whether it should go ahead or was frivolous) and the time needed to hear the complaint needs to be made clearer. The provisions should set out who should determine whether a complaint is frivolous, and a cross-reference to article 65 in draft article 66 should be made, so as to ensure that any declaration from procuring entity/administrative review body that urgent public considerations mean procurement should go ahead will not bind a court. **These comments were not**

considered by a majority of those consulted, because of time constraints, and so only the final comment has been reflected in the draft text before the Working Group. The remainder is presented to the Working Group for its consideration as notes to the draft provisions.

27. The Guide should explain that the provisions of article 65 address suspensions and not the standstill period, and should be supported by a requirement that the procuring entity must provide prompt response to requests for information during standstill period. The Guide should also discuss the advantages and concerns of administrative review and judicial review systems, particularly given the urgency of requests for review in the procurement context, and the importance of specialized personnel with appropriate experience.

G. Debriefing

28. Enabling debriefing was considered to be part of an effective remedies system, and it was suggested that the Working Group consider whether to include provisions on debriefing in the Model Law. It was recalled that the Working Group discussed the importance of facilitating effective debriefing (in the context of prequalification, see para. 107 of A/CN.9/668) but has not formulated its position on the question generally.

H. Electronic reverse auctions and framework agreements

29. Some of the consultations considered the draft provisions on electronic reverse auctions and framework agreements. Enabling legislation and supporting guidance was requested to be made available as soon as possible, particularly for the benefit of developing countries, but it was also commented that the draft provisions are lengthy and complex. Suggestions included that some should be redrafted as regulations, with a greater emphasis on principle in the text, and that the complexity should be removed with more discussion in the Guide.

I. Defence procurement

30. As regards defence procurement, there was insufficient time to address the issue in detail. It was noted that the draft revised text would implement the instructions of the Commission (to bring defence procurement within the scope of the revised model law, noting that recourse to direct solicitation and procurement methods alternative to tendering should be allowed, special measures for protecting classified information should be drafted and reflected in the contents of the mandatory record of procurement proceedings and access to the record, and repetitions should be avoided in the draft wherever possible (A/64/17, para. 265)). A further suggestion was made that the Guide could state that the Model Law intends to cover defence procurement in its entirety, and could acknowledge that the procurement in this sector often involves classified information, that the Model Law therefore envisages exceptions to public disclosure requirements in procurement involving classified information, which often but not exclusively takes place in the defence sector procurement. It was also suggested that these exceptions would be

addressed in more detail in the procurement regulations to be enacted in accordance with article 4 of the Model Law, though some experts considered that exceptions should always receive parliamentary scrutiny and should not be permitted through regulation.

31. Another suggestion was that, as future work, a separate chapter for defence procurement could be crafted, taking account of other issues raised by the topic, such as security of supply, the maintenance of defence industry and capacity in enacting States and other issues that would be identified through consultation with experts in defence procurement. The alternative suggestion considered, which had been put before the Commission, was to include non-sensitive defence procurement within the Model Law's normal provisions, but to exclude sensitive defence procurement entirely or within its own chapter. No conclusions were reached in the consultation time available before the production of this note. It was agreed, however, that care was needed to prevent the abuse or misuse of any special provisions relating to defence procurement through the classification of normal procurement as defence procurement so as to take advantage of the special provisions.

J. Other issues

32. Other issues that were raised during the consultations were:

(a) **To include in the preamble a new objective that would refer to "the promotion of sustainable development"**, perhaps in conjunction with provisions on "sustainable procurement" in the text of the Model Law. Views were divided on this question, notably as regards whether these goals were appropriate for a procurement system;

(b) **To include provisions on procurement planning, contents of codes of conduct and professionalism in procurement in the Model Law text.** These matters were discussed in the Guide accompanying the 1994 text. The Working Group has provided in article 4(2) of the revised draft text that the procurement regulations must include a code of conduct.[2] Some considered that lack of provision in the text would hamper effective procurement; others that a procurement law was not the right place for these issues to be addressed.[3] A further suggestion was that UNCITRAL could consider these matters as possible future work in procurement;

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[2] The code of conduct would be subject to mandatory publication in accordance with article 5 (1). See, further, the discussions on the topic following the Working Group's deliberations on conflicts of interest, notably in A/CN.9/664, paras. 17 and 116, and A/CN.9/668, para. 22.

[3] The Working Group has not considered professionalism in procurement as a specific topic, though it has noted that the Guide addresses training of procurement personnel and related matters (see Guide to Enactment, *Proper administrative structure for implementation of the Model Law*, paragraph 37). As regards procurement planning, the Working Group considered the issue by reference to the extent to which future procurement should be subject to publication requirements under article 5 of the draft revised text (at its seventh, eighth, ninth, tenth, twelfth and fifteenth sessions), and summarized its position as follows: "Specifically in the context of procurement planning, it was pointed out that the Working Group had already touched upon one of the issues related to the procurement planning stage, the publication of information on forthcoming procurement opportunities. Support was expressed that the Guide should encourage

(c) **To consider whether the selection procedures in the UNCITRAL PFIPS instruments UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects[4] should be conformed with those under the Model Law**, though again it was suggested that UNCITRAL could consider these matters as possible future work in procurement;

(d) **To include definitions of corruption (fraudulent, corruptive, collusive and coercive practices, drawing on multilateral development bank definitions)**.[5] Some considered that these would be helpful in addressing the situations in which submissions should be rejected, but others considered that as there was no universally agreed definition of corruption and its various forms, reflected in the lack of definitions of corruption in the United Nations Convention Against Corruption, the Model Law should not introduce such definitions;

(e) To reconsider the description of the successful submission, being the lowest price tender, the lowest evaluated tender, the proposal with the lowest price, the proposal with the best combined evaluation in terms of the criteria other than price and the price, the lowest-priced quotation meeting the needs of the procuring entity, the proposal best meeting the needs of the procuring entity, and the best and final offer. Following deliberations at the forty-second session of the Commission, the issue remained outstanding. A related question is the definition of the successful submission in article 2, or, as alternatively proposed, of the "most advantageous tender or other successful submission".[6]

(f) **To include a further procurement method, or further procurement methods, exclusively for the procurement of advisory services**, or to restrict one or more of the proposed procurement methods to the procurement of such services.

It was said that the need for a specialised procurement method arose from the fact that the procurement of advisory services did not lead to a measurable physical output and that a very broad discretion on the part of the procuring entity was both desirable and inevitable when identifying the winner. Thus the qualitative evaluation criteria would be more important than price (indeed, price need not be a determining

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the publication of this information in enacting States as conducive to proper procurement management, good governance and transparency. Caution was expressed as regards the inclusion in the Model Law of anything beyond general principles that should govern procurement planning since otherwise the flexibility necessary in that stage would be eliminated. Suggestion was made that the Guide or other tools that could be developed to assist States with enacting and implementing the Model Law was an appropriate place to discuss details about procurement planning and some good practices to be encouraged." (A/CN.9/595, para. 83).

[4] The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003).

[5] See, for example, commentary on harmonized definitions from the Asian Development Bank, available at http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf.

[6] This issue has been the subject of deliberation at the Working Group's sessions: see A/CN.9/668, paras. 180 (c), 181 and 220, and the discussion of the drafting history of the 1994 provisions in A/CN.9/WG.I/WP.68, section II. B (paras. 17-38). For a summary of the Commission's deliberations on the issue, see A/64/17, paras. 169-173. Views were divided on whether to retain the term "lowest evaluated tender" in the revised Model Law, some supporting its retention, others expressing concern that the term implied that the supplier with the lowest rating at the end of the evaluation process would be the winner. Alternative terms such as "most advantageous tender", used in the WTO Agreement on Government Procurement (GPA), "most economical tender", or "best evaluated tender" were also suggested.

factor) and would reflect the procuring entity's assessment of how its needs could be best served, and would reflect such matters as experience in the type of advice at issue, quality of methodology proposed, qualifications of staff for the assignment and transfer of knowledge.

It was agreed among those consulted that the procedural requirements for a specialised procurement method would follow those set out in request for proposals with dialogue and consecutive negotiations, articles 43 and 44 of chapter V (set out in A/CN.9/WG.I/WP.71/Add.5), or in article 41 of chapter IV (set out in A/CN.9/WG.I/WP.71/Add.4). Alternatively, a request for proposals procedure with simultaneous negotiations (based on either article 43 or article 48 of the 1994 Model Law) could be provided for, to give greater flexibility in the negotiations themselves.

Some considered that the flexibility required for procurement of this type of advisory services was provided for in the chapter IV and V methods noted above, notably in article 43 of the draft revised text, which was intended by its proponents to replace article 48 of the 1994 Model Law. It was noted that this method was not reserved for any particular category of procurement, and that the particular features of procurement of this type of advisory services could be handled through regulations (addressing quality-based and cost-based selection, and the question of operating within budgeted amounts, where appropriate). Others considered that many States that had enacted legislation based on the 1994 text had included a special procurement method (drawn from the Guidelines: Selection and Employment of Consultants by World Bank Borrowers), and harmonization would be served by following this approach in the Model Law.

33. The Working Group may wish to recall the comments made in the forty-second Commission session when deciding which of the experts' suggestions to include in the draft revised Model Law. In the Commission "the importance of completing the revised model law as soon as reasonably possible was highlighted. It was emphasized that the revised model law would have considerable impact on ongoing procurement law reforms at the local and regional levels. Guidance from UNCITRAL in the procurement field was in particular sought on such issues as electronic reverse auctions, framework agreements, e-procurement in general, competitive dialogue and procurement in the defence sector," (A/64/17, para. 285).