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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

Addendum

This note sets out a proposal for chapter VIII (Review) of the revised Model Law, comprising articles 61 to 66.

The Secretariat's comments are set out in the accompanying footnotes.

* This document was submitted less than ten weeks before the opening of the session because of the Commission's request for inter-session informal consultations on the entire text (A/64/17, para. 281).

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CHAPTER VIII. REVIEW

Article 61. Right to review¹

Any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to non-compliance with the provisions of this Law² may seek review in accordance with articles 62 to 66 and challenge in appropriate bodies in accordance with applicable law any decisions taken as a result of such a review.

Article 62. Review by the procuring entity or the approving authority³

(1) Without prejudice to the right of suppliers or contractors to seek directly review before an independent administrative body in accordance with article 63 of this Law, a supplier or contractor entitled under article 61 to seek review may submit a complaint to the procuring entity or where applicable to the approving authority.⁴ The complaints shall be submitted in writing provided that:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted before the entry into force of the procurement contract within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(2) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within [...] days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

¹ The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 257). An informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to this article should amplify that article 17 of the Model Law would explicitly exempt a procuring entity from monetary liability for cancelling a procurement. The Working Group may wish to consider this recommendation in the light of the wording of article 17 that will be eventually agreed upon.

² The Working Group may wish to consider the suggestion of experts during consultations with the Secretariat that the scope of this provision is too limited, and should be expanded to include the denial of a fair opportunity to compete.

³ The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, paras. 259-260). In particular, it was agreed that the provisions should not fix any deadlines in terms of a specific number of days but leave this information in square brackets to be filled in by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO Agreement on Government Procurement.

⁴ The paragraph was redrafted further to the suggestion at the Working Group's fifteenth session to make the provisions of the proposed article less ambiguous as regards the optional nature of the review under article 62 (A/CN.9/668, para. 259).

(b) If the complaint is upheld in whole or in part, state the corrective measures that shall be undertaken.

(3) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (2) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article 63 or 66. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.

Article 63. Review before an independent administrative body*.⁵

(1) A supplier or contractor entitled under article 61 to seek review may submit a complaint to [insert name of administrative body].⁶

(2) The complaints shall be submitted in writing within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting submissions.

(3) The [timely] submission of a complaint under article 62 shall suspend the time period for submission of a complaint under this article for the whole duration of the actual proceedings under article 62 up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article 62 (2) and communicate such decision to the supplier or contractor in accordance with article 65 (3).⁷

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 66), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

⁵ The Working Group, at its fifteenth session, approved the draft article as revised at that session subject to further consideration of an outstanding issue (see the footnote immediately below) (A/CN.9/668, para. 265). It was agreed to clarify in the Guide in the context of this article the meaning of the term “independent administrative body,” in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions would be subject to appeal and would cause further delays (A/CN.9/668, para. 262 (g)).

⁶ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will draw a clear distinction between this review procedure and a debriefing procedure.

⁷ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this suspension of time limits is not the suspension of the procurement procedure referred to in article 65.

(5) The [insert name of administrative body] may grant one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject matter of the complaint;⁸

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;⁹

(f) [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity, and for any loss or damages suffered, which [may] [shall] be limited to [either] costs for the preparation of the submission or [protest] [the costs relating to the challenge, or both];]¹⁰ [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result

⁸ At the Working Group's fifteenth session, in response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264). The results of the requested research were set out in a note by the Secretariat A/CN.9/WG.I/WP.68, under section D.

⁹ The Working Group may wish to revise the wording of this subparagraph to include a reference to corrective action, which is the term used in both the WTO Agreement on Government Procurement (1994) (the GPA) and the provisionally agreed text of the revised WTO Agreement on Government Procurement (the draft revised GPA).

¹⁰ The Working Group, at its fifteenth session, agreed to retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA. The Working Group further agreed to move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO instruments. For the reasons set out in a note by the Secretariat A/CN.9/WG.I/WP.68, section C, the Secretariat faced difficulties with the implementation of the Working Group's instructions. The Working Group may wish to consider the wording proposed in this pair of square brackets together with the considerations raised in the referred note by the Secretariat. The words put in this pair of square brackets also reflect the different wording in article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA.

of any unlawful act or decision of, or procedure followed by, the procuring entity;]¹¹

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within [...] days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(7) The decision shall be final unless an action is commenced under article 66.

Article 64. Certain rules applicable to review proceedings under articles 62 and 63¹²

(1) Promptly after the submission of a complaint under article 62 or article 63, the review body shall notify all suppliers or contractors participating in the procurement proceedings¹³ to which the complaint relates as well as any governmental authority whose interests are or could be affected of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, [and the right to request that the proceedings take place in public]¹⁴ and that witnesses be

¹¹ The proposed wording of the informal drafting party, July 2009, based on option I from the 1994 Model Law. The suggested wording was accompanied by an explanatory note stating that, per the decision of the Working Group at its February 2009 session, option II from the 1994 Model Law is to be moved “from paragraph 5 (f) to the Guide to Enactment with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints.” (A/CN.9/668, paragraph 262 (f)). Moving option II to the Guide would leave it to the enacting State to allow for broader damages, if the enacting State so decided.

¹² The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 267-268).

¹³ At the Working Group’s fifteenth session, it was agreed to clarify in the Guide that the term “participating in the procurement proceedings” could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint, and further to specify that those whose submissions were rejected might not have the right to participate in the review proceedings if the latter concerns the stages in the procurement proceedings subsequent and not related to the rejection (A/CN.9/668, para. 267 (c)).

¹⁴ The informal drafting party, July 2009, proposed putting these words in square brackets for further consideration, in particular in order to accommodate concerns regarding national defence and security and other grounds justifying exemptions of information from public disclosure.

presented. No information shall be disclosed if its disclosure would be contrary to law, or would impede law enforcement, or would not be in the public interest, or would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition.¹⁵

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide timely to the review body all the documents pertinent to the complaint, including the record of the procurement proceedings, provided, however, there should be appropriate protections in place to ensure that no information will be disclosed to those outside the review process, if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence.¹⁶

(5) A copy of the decision of the review body shall be furnished within [...] days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence.¹⁷

(6) Any decision by the review body and the reasons and circumstances therefore shall be made part of the record of the procurement proceedings.

Article 65. Suspension of procurement proceedings¹⁸

(1) The [timely] submission of a complaint suspends the procurement proceedings for a period to be determined by the review body.¹⁹

¹⁵ The Working Group, at its fifteenth session, agreed to consider including in paragraphs (3) and (4) exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (b)). The paragraph was redrafted accordingly by the addition of the second sentence. The provisions added should be considered together with similar provisions in other articles of the proposed revised Model Law, such as draft article 20 (2) (b). At its fifteenth session, the Working Group deferred the consideration of the possible exceptions to the disclosure (A/CN.9/668, para. 131).

¹⁶ This paragraph has been revised pursuant to the agreement at the Working Group's fifteenth session to remove the ambiguity in reference to "relevant documents" and to include in the paragraph exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (a) and (b)). See the immediately preceding footnote for the issues related to the confidentiality provisions.

¹⁷ *Ibid.*, as regards confidentiality provisions.

¹⁸ The Working Group, at its fifteenth session, approved the draft article, which is based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

¹⁹ As suggested by experts during consultations with the Secretariat, the Working Group may wish to address what happens at the end of the period determined for the suspension of the

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed, and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the reasons for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.²⁰

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article 63 or 64 as applicable.

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension. Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the reasons therefor. Any decision under this article and the reasons and circumstances therefor shall also be made part of the record of the procurement proceedings.

Article 66. Judicial review²¹

The [insert name of court or courts] has jurisdiction over actions pursuant to article 61 and 65²² and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article 62 or 63.

procurement; and who determines, and on what basis, whether the complaint fulfils the requirements of subparagraph (1) (a).

²⁰ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this provision is included because the review body's determination of public interest considerations cannot bind a Court or other Tribunal.

²¹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

²² This additional cross-reference was suggested by experts during consultations with the Secretariat, in order to allow for a further suspension of the procurement at the expiry of the suspension granted by the review body under article 65.