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PROCUREMENT

Draft Guide to Enactment

of

UNCITRAL Model Law on Procurement

Note by the Secretariat

1. In preparing the draft UNCITRAL Model Law on Procurement, the Working Group on the New International Economic Order noted that it would be useful to provide in a commentary additional information concerning the Model Law. At the fourteenth and fifteenth sessions, the Working Group identified three possible functions of a commentary, namely, giving guidance to legislatures considering enactment of the Model Law, to procuring entities applying the Model Law, and to courts interpreting the Model Law. It was noted that the content of a commentary would differ depending upon its predominant function. It was agreed that, at least at the initial stage, priority should be given to the function of giving guidance to legislatures (see A/CN.9/359, para. 249, and A/CN.9/371, para. 254) and that a small and informal ad hoc working party of the Working Group would be convened prior to the twenty-sixth session to review a draft of the guide that the Secretariat would prepare. The meeting of the ad hoc working party took place in Vienna from 30 November to 4 December 1992. The annex to the present note contains the draft Guide, as revised after the meeting of the ad hoc working party.

2. It may be noted that the draft Guide is geared to the text of the draft Model Law as established by the Working Group upon the conclusion of its fifteenth session and set forth in the annex of the report of that session (A/CN.9/371). Once the Commission has completed its review and adoption of the Model Law, it is the intention of the Secretariat to finalize the Guide to take account of the deliberations and decisions in the Commission. For the convenience of the reader, it may be preferable to publish the text of the Model Law together with the Guide. This has not been done in the present document due to its length and the availability to the Commission of the text of the draft Model Law in the annex to document A/CN.9/371.

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Annex

Draft Guide to Enactment

of

UNCITRAL Model Law on Procurement

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INTRODUCTION

History and purpose of UNCITRAL Model Law on Procurement

1. The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement (hereinafter referred to as the "Model Law") at its twenty-sixth session, held in Vienna in 1993. The Model Law is intended to serve as a model to countries for the evaluation and modernization of their procurement laws and practices and for the establishment of procurement legislation where none presently exists. The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

2. Sound laws and practices for public sector procurement are necessary in all countries. This need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible.

3. The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the public purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell to the Government are confident of obtaining fair treatment. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy. Furthermore, inadequate procurement legislation at the national level also creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement hamper the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate state of national procurement legislation in many countries.

4. UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to the international flow of goods caused by divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on Carriage of Goods by Sea ("Hamburg Rules"), on Liability of Terminal Operators in International Trade, and on International Bills of Exchange and International Promissory Notes), model laws (Model Law in International Commercial Arbitration and Model Law on International Credit Transfers), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts and countertrade transactions).

Purpose of this Guide

5. Inherent in the decision of UNCITRAL to formulate its work in the form of a model law is a recognition that there are some aspects of procurement that may have to be handled differently from State to State and that enacting States will have to evaluate the Model Law taking into account their circumstances. Accordingly the Commission decided that it would be helpful to present background information for States using the Model Law to measure the adequacy of existing procurement law or to prepare new legislation.

6. In the first place the Guide explains to the reader the options expressly provided to enacting States in the Model Law with respect to issues that were expected in particular to be treated differently from State to State. Options have been included on issues such as the definition of the term "procuring entity", which involves the scope of application of the Model Law; imposition of the requirement of a higher approval for certain key decisions and actions in the procurement proceedings; methods of procurement other than tendering for exceptional cases; and the form of and remedies available under review procedures.

7. Secondly, taking into account that the Model Law is a "framework" providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.

8. Thirdly, the Guide presents basic information about the procedures set forth in the Model Law and why the drafters considered them to be essential elements of a modern procurement law. This background information is presented in view of the likelihood that the Model law will be used in a number of States with limited familiarity with the type of procurement procedures in the Model Law.

A "framework" law to be supplemented by procurement regulations

9. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement the procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of "procurement regulations" to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State -- without compromising the objectives of the Model Law. The Guide is also intended to assist the enacting State in identifying areas in which the Model Law may be supplemented by procurement regulations.

10. It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial procedure law.

Procurement methods in the Model Law

11. The Model Law presents several procurement methods so as to enable the procuring entity to deal with the varying circumstances likely to be encountered by procuring entities. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and objectivity in procurement. For the exceptional circumstances in which tendering is not appropriate or feasible, the Model Law offers methods other than tendering. For cases in which the procuring entity is unable to formulate specifications to the degree of precision or finality required for tendering proceedings, as well as for a number of other special circumstances, the Model Law offers three options for incorporation into national law. These include two-stage tendering, request for proposals, and

competitive negotiation; those methods provide the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms. For cases of low-value procurement of standardized goods, the Model Law offers the request-for-quotations method, which involves a simplified, accelerated procedure commensurate to the relatively low value involved. Lastly, for exceptional circumstances such as urgency and the availability of goods from only one supplier, the Model Law offers single-source procurement.

Administration of procurement

12. The Model Law sets forth only the procedures to be followed in selecting suppliers and contractors with whom to contract. The Model Law assumes that an enacting State has or will establish the proper institutional and bureaucratic structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law.

13. The administrative system needed to implement procurement procedures is illustrated by the requirement in the Model Law that certain important actions and decisions by the procuring entity (e.g., use of a procurement method other than tendering) should be subject to prior approval by a higher authority. The advantage of a prior-approval system is that it is designed to detect errors and problems before certain actions and final decisions are taken. In addition, it may provide an added measure of uniformity in a national procurement system, particularly when the enacting State has an otherwise decentralized procurement system in which a variety of entities conduct procurement proceedings. However, the approval requirement in the Model Law is an option. This is because an approval requirement is not traditionally applied in all countries, in particular where control over the conduct of procuring entities is exercised primarily through audit.

14. The references in the Model Law to approval requirements leave it up to the enacting State to designate the organ or organs responsible for issuing the various approvals. The authority exercised as well as the organ exercising the approval function may differ. An approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g. a ministry of finance or of commerce, or a central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, countries may find it preferable for the approval function to be exercised by an organ or authority that is part of the governmental or administrative apparatus in order to ensure that the public policies that are sought to be advanced by the Model Law are given due effect. In any case, it is important that the organ or authority be sufficiently independent of the persons or department involved in the procurement proceedings, to be able to exercise its functions impartially and effectively. It may be preferable for the approval function to be exercised by a committee of persons, rather than by one single person.

15. In addition to designating the organ or authority to perform the approval function referred to in the preceding paragraph, an enacting State may find it desirable to provide for functions directed to the overall supervision of and control over procurement to which the Model Law applies. An enacting State may vest all of those functions in a single organ or authority (e.g., a ministry of finance or of commerce, or a central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned here:

(a) Supervising overall implementation of procurement law and regulations. This may include, for example, issuance of procurement regulations, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws. In some cases, e.g., in the case of high-value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the contract can enter into existence.

(b) Rationalization and standardization of procurement and procurement practices. This may include, for example, co-ordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader Government policies. This may include, for example, examining the impact of procurement on the national economy, rendering advice on the effect of particular procurement on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government. The organ or authority may be charged with issuance of approvals for particular procurement prior to the commencement of the procurement proceedings.

(d) Training of procurement officers. The organ or authority could also be responsible for training the procurement officers and other civil servants involved in operating the procurement system.

It may be noted that a State enacting the Model Law does not thereby commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased Government expenditures.

16. The organ or authority to exercise administrative and oversight functions in a particular enacting State, and the precise functions that the organ or authority is to exercise, will depend, for example, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of economy and efficiency in mind, since systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively.

Procurement of services

17. The Model Law as adopted by UNCITRAL at its twenty-sixth session is designed to be applicable to the procurement of goods and construction, with only services covered that are incidental to the procurement contract. Having completed the elaboration of model legislation for the procurement of goods and construction, UNCITRAL has turned its attention to the formulation of model legislative provisions for the procurement of services. The procurement of services is an area in which methods of procurement have traditionally been used that are often less competitive with respect to price than methods used for the procurement of goods and construction. This is because emphasis has usually been placed on quality and technical factors rather than on price in awarding contracts for procurement of services. For example, it has often been the practice to select the service provider that receives the highest qualification evaluation from among those bidding on a contract and then to negotiate the price with that one service provider. As a result of such practices, the public purchaser may in many cases place itself at risk of paying more than is necessary to obtain quality services.

18. It may be expected that the provisions on the procurement of services to be formulated by UNCITRAL, which may take the form of additions and adjustments to the present Model Law designed to expand the scope to cover services, would be designed to foster the objectives of good procurement set forth in the preamble to the Model Law. One approach might be to provide for a price competition among service providers that meet a high qualification threshold for a given project.

Assistance from UNCITRAL Secretariat

19. In line with its training and assistance activities relating to international trade law conventions and model laws, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation

based on the UNCITRAL Model Law on Procurement, as it would for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

20. Further information concerning the Model Law on Procurement, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

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PREAMBLE

The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for contractors or suppliers. In States in which it is not the practice to include preambles, it is recommended that the statement of objectives be incorporated in the body of the provisions of the Law.

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CHAPTER I. GENERAL PROVISIONS

Article 1

Scope of application

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The 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. The provision limits exclusions of the Model Law to cases provided for either by the Law itself or by regulation. This is done so that exclusions would not be made in a secretive or informal manner. In order to expand as far as possible the application of the Model Law, article 1(2) provides for complete or partial application of the Model Law even to excluded sectors.

2. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of the procurement regulations, since such exclusions of the Model Law by means of administrative rather than legislative action may be seen as negatively affecting the objectives of the Model Law. Furthermore, the broad variety of procedures available under the Model Law to deal with the different types of situations that may arise may make it less necessary to consider non-application of the procedures provided in the Model Law.

* * *

Article 2

Definitions

1. The Model Law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State due to differences in the allocation of legislative competence among different levels of Government. Accordingly, subparagraph (b)(i), defining the term "procuring entity", presents options as to the levels of Government to be covered in the enacting State. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central Government as well as to provincial, local or other governmental subdivisions of the enacting State. This Option would be adopted by non-federal States, and by federal States, that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national Government.

2. In subparagraph (b)(ii) the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government of the enacting State if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to

cover, the enacting State may consider factors such as the following:

(a) whether the Government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) whether the Government grants to the entity an exclusive license, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(e) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose and whether the type of public law applicable typically to Government contracts applies to procurement contracts entered into by the entity;

(g) whether the entity is integrated within a centralized economic plan.

* * *

Article 3

International obligations of (this State) relating to procurement [and intergovernmental agreements within (this State)]

1. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the GATT Agreement on Government Procurement, and members of the European Communities (EC) are bound by directives on procurement adopted by the Council of the EEC. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by the regional grouping. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to the guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law.

2. Optional subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more of subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in an enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

* * *

Article 4

Procurement regulations

1. As noted in paragraph 7 of the Introduction, the Model Law is a "framework law", setting forth basic legal rules governing procurement that are intended to be supplemented by detailed regulations promulgated by the appropriate organ or authority of the enacting State. The "framework law" technique enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly provide for supplementation by procurement regulations. Furthermore, the enacting State may wish to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the regulations should be consistent with the Model Law.

2. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: application of the Model Law to excluded sectors (article 1(2)); the prequalification proceedings (article 7(3)(e)); limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to what is required to deal with the urgent circumstances), details concerning the procedures for soliciting tenders or applications to prequalify (article 18); and requirements relating to the preparation and submission of tenders (article 21(y)). In some cases failure to issue procurement regulations when the regulations are referred to in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: the limitation of participation in procurement proceedings on the ground of nationality (article 8(1)); use of the request-for-quotations method of procurement, since that method may be used only below threshold levels set in the procurement regulations (article 15); and authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 29(4)(d)).

* * *

Article 5

Public accessibility of legal texts

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be considered important not only in States in which such a requirement would not already be found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.

2. In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign contractors and suppliers, in another appropriate manner.

* * *

Article 6

Qualifications of suppliers and contractors

1. The purpose of article 6 is to create a procedural climate conducive to participation by qualified suppliers and contractors in procurement proceedings. It does so by strictly specifying the criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors. The aim of the procedures in article 6 is to help ensure that all suppliers and contractors are treated on the same basis and to avoid arbitrariness in the evaluation of qualifications.

2. Paragraph (2)(e) refers to disqualification of suppliers and contractors pursuant to administrative suspension or disbarment proceedings. Such administrative proceedings -- in which alleged wrongdoers should be given some procedural rights such as an opportunity to disprove the charges -- are commonly used to suspend or disbar suppliers and contractors found guilty of wrongdoing such as faulty accounting, default in contractual performance, or fraud.

* * *

Article 7

Prequalification proceedings

1. Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers and contractors that are not suitably qualified to perform the contract and thus to narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. Such a procedure may be particularly useful for the purchase of complex or high-value goods or construction, and may even be advisable for purchases that are of a relatively low value but involve very specialized goods or construction. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time-consuming. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable suppliers and contractors.

2. The prequalification procedures set forth in article 7 are made subject to a number of important safeguards. These safeguards include the subjugation of prequalification procedures to the limitations contained in article 6, in particular as to assessment of qualifications, and the procedures found in paragraphs (2) through (7) of article 7. This set of procedural safeguards is included to ensure that prequalification procedures are conducted only on non-discriminatory terms and conditions that are fully disclosed to participating suppliers and contractors, and that otherwise ensure a minimum level of transparency and facilitate the exercise by a supplier or contractor that has not been prequalified of its right to review.

3. The purpose of article 7(8) is to provide for reconfirmation, at a later stage of the procurement proceedings of the qualifications, of suppliers and contractors that had been prequalified. Such "post-qualification proceedings" are intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification remains valid and accurate. The procedural requirements for post-qualification are designed to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors.

* * *

Article 8

Participation by suppliers and contractors

1. Making provision for international procurement proceedings has important advantages. The greater the extent to which foreign suppliers and contractors are free to participate, the greater will be the competition in procurement proceedings and the better the price and quality available to the public purchaser. Furthermore, exposing local suppliers and contractors to international competition may also benefit the long-term development of national industrial capacity, both for supplying national needs and the export market. Accordingly, article 8 provides that suppliers and contractors should, subject to limited exceptions, be permitted to participate in procurement proceedings without regard to nationality. Such exceptions are not to be taken informally or secretly. Rather, they must be based on either provisions in other bodies of law (e.g., economic embargo imposed by the United Nations Security Council; international obligations of the enacting State, such as regional economic groupings that grant procurement preferences to members of the grouping) or on provisions in the procurement regulations.

2. In the "margin of preference" in favour of local suppliers and contractors provided for in article 29(4)(d), the Model Law provides the enacting State with a mechanism for balancing the objectives of internationality in procurement and fostering national industrial capacity. The margin of preference permits the procuring entity to select the lowest-priced tender of a local supplier or contractor when the difference in price between that tender and the overall lowest price tender falls within the range of the margin of preference. The margin of preference provides an incentive to local suppliers and contractors to achieve price competitiveness nearly at the level of foreign competition. It favours national industry without totally insulating it from foreign competition. The total exclusion of foreign competition for certain sectors of local industry that are not internationally competitive will, by continually isolating them from international competition, tend to perpetuate the lack of economy, efficiency and competitiveness of those sectors of local industry. In addition it would tend to drive up the cost of procurement for the public purchaser and may actually inhibit the long term development and international competitiveness of local industry.

3. It may be noted that article 17(b) of the Model Law has been included to deal with situations in which it is unlikely that foreign suppliers and contractors would have an interest in participating because of the low value or amount of the goods or construction in question. This provision permits the procuring entity to forego in such cases the procedures designed to solicit international participation, while at the same time not excluding foreign participation that might arise. A blanket exclusion of foreign participation in low-value contracts might needlessly deprive the procuring entity of the best value for its expenditure.

* * *

Article 9

Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement as to the form of such communications, subject to other provisions of the Model Law, is that they must be in a form that provides a record of the contents of the communication. This approach is designed not to tie communication to the use of paper. This takes account of the fact that communications are increasingly carried out through means such as electronic data interchange ("EDI").

2. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through

means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the communication.

* * *

Article 10

Rules concerning documentary evidence provided by suppliers and contractors

In order to facilitate participation by foreign suppliers and contractors, article 10 bars the imposition of any requirements as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article is not intended to require that all documents provided by contractors and suppliers are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

* * *

Article 11

Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds.

2. A question in enacting record requirements is to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of procuring entities, of broad disclosure; the need to provide suppliers and contractors with information necessary to permit them to assess their performance in the proceedings and to determine whether there are grounds for seeking review; and the need to protect the confidential trade information of suppliers and contractors. In view of these considerations, article 11 provides two levels of disclosure. It mandates disclosure to any member of the general public of the information referred to in article 11(a), (b) and (i) -- 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 for suppliers and contractors, 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.

3. As alluded to above, among the necessary objectives of disclosure provisions is to avoid disclosure confidential trade information of suppliers and contractors. That is true in particular with respect to what is disclosed concerning the evaluation and comparison of tenders, proposals, offers and quotations, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of suppliers and contractors. Accordingly, the information referred to in paragraph (1)(e) involves only a summary of the evaluation and comparison of tenders, proposals, offers or quotations, while paragraph (3)(b) limits the disclosure of detailed information beyond the level of that summary.

4. The purpose of requiring disclosure to suppliers and contractors at the time when the decision is made to

accept a particular tender, proposal or offer is to give efficacy to the right to review under article 38. Delaying disclosure until entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy since, in many countries, the procurement proceedings would be deemed concluded upon the entry into force of the procurement contract.

5. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to Government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the enacting State.

* * *

Article 12

Inducements from suppliers and contractors

1. Article 12 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to completely eradicate such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place an effective system of sanctions against corruption by Government officials and suppliers and contractors in the procurement process.

2. To guard against abusive application of article 12, rejection is made subject to approval, a record requirement and a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

* * *

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 13

Methods of procurement

1. Article 13 establishes the use of tendering proceedings as the method of procurement to be used normally. This is because tendering proceedings generally maximize economy and efficiency in procurement. However, the Model Law also provides a number of other methods of procurement for exceptional circumstances in which tendering proceedings would not be feasible or, even if feasible, would not be the procurement method most likely to provide the best value.

2. Article 13(2) sets forth the requirement that a decision to use a method of procurement other than tendering should be supported in the record by a statement of the grounds and circumstances underlying the decision. This requirement is included because the decision to use a method of procurement potentially less competitive than tendering should not be made secretly or informally.

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Article 14

Conditions for use of two-stage tendering, request for proposals or competitive negotiation

1. For the circumstances specified in article 14(1), the Model Law provides the enacting State with a choice among three different methods of procurement other than tendering -- two-stage tendering, request for proposals, and competitive negotiation. Notable among these circumstances is the case in which the procuring entity is unable to formulate specifications for the goods or construction to be procured to the level of finality required for tendering proceedings, in which all participating suppliers and contractors compete on the basis of a final set of specifications. Such a situation may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g., it has not decided upon the material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In such limited cases, because of the technical sophistication and complexity of the goods, it may be considered undesirable, from the standpoint of obtaining the best value, for the procuring entity to procure the goods or construction on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered.

2. The three methods of procurement referred to in article 14 have been included because of variations in practice as to the method used in circumstances of the type in question. No hierarchy has been assigned to the three methods, which are presented as options. They employ different procedures for selecting a supplier or contractor. In the first stage of a two-stage tendering proceeding, the procuring entity solicits proposals from suppliers and contractors as to various possible ways of solving the procurement need and consults with the suppliers and contractors concerning the details and possible modifications of those proposals. Upon the completion of that first-stage process, the procuring entity decides what exactly it wants to procure and formulates a set of final specifications that form the basis, in the second stage, of an ordinary tendering proceeding. By contrast, at no stage of the second type of method referred to in article 14, request-for-proposals, does a procuring entity conduct a tendering proceeding. Rather, in request-for-proposals proceedings the selection of a winning proposal from among proposals offering varied solutions is based on the application of weighted criteria that assess the effectiveness of proposals in meeting the needs of the procuring entity and their cost. The third method, competitive negotiation, is much more flexible and less structured than the other two, since the procuring entity is essentially permitted to conduct negotiations as it sees fit, with very little in the way of procedural requirements beyond the "best and final offer" procedure mandated in article 35.

3. An enacting State need not necessarily incorporate each of the three methods for the common circumstance referred to in article 14 or even incorporate more than one of them. It may indeed be undesirable to do so in view of the uncertainty likely to be encountered by procuring entities in trying to discern the most appropriate method from among two or three similar methods. In deciding which of the three methods to incorporate, a decisive criterion for the enacting State may be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be incorporated, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.

4. Subparagraphs (b) and (c) of article 16 (single-source procurement), referring, respectively, to cases of non-catastrophic and catastrophic urgency, are identical to subparagraphs (a) and (b) of article 14 (2), which permit the use of competitive negotiation in such cases of urgency. The purpose of this overlap is to permit the procuring entity to decide which of the two methods best suits the circumstances at hand. For both procurement methods, the urgency cases contemplated are intended to be truly exceptional, and not merely

cases of convenience. In the application of the Model Law to procurement involving national defence or national security and in cases of research contracts for the procurement of a prototype, the procuring entity is, for similar reasons, given a choice between the methods of procurement provided for in article 14 and single-source procurement. Thus, an enacting State may, even if it does not incorporate competitive negotiation for the circumstances referred to in paragraph (1), incorporate competitive negotiation for the circumstances referred to in paragraph (2).

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Article 15

Conditions for use of request for quotations

Inclusion of request for quotations is intended to provide a method of procurement appropriate for low-value purchases of standardized goods. In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 15(2), however, strictly limits the use of this method to procurement of a value below the threshold set in the procurement regulations. It also forbids division of a procurement in order to circumvent the threshold. In incorporating article 15, it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. It may indeed be advisable in certain cases that fall below the threshold to use tendering or one of the other methods of procurement. This may be the case, for example, when an initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system.

* * *

Article 16

Conditions for use of single-source procurement

1. In view of the non-competitive character of single-source procurement, article 16 strictly limits its use to the exceptional circumstances set forth in article 16.

2. Article 16(g) has been included in order to permit the use of single-source procurement in cases of serious economic emergency in which such procurement would avert serious harm to the economy of the State or of a particular region. A case of this type may be, for example, where a particular enterprise employing most of the labor force in a particular region is threatened with closure unless it obtains a procurement contract. Article 16(g) contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement.

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CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 17

Domestic tendering

As pointed out in paragraphs 5 and 6 of the comments to article 8, article 17 has been included in order to specify the exceptional cases in which measures designed to solicit foreign participation in the tendering proceedings do not have to be employed.

* * *

Article 18

Procedures for soliciting tenders or applications to prequalify

1. In order to promote transparency and competition, article 18 sets forth the publicity procedures to be followed for soliciting tenders and applications to prequalify from an audience wide enough to provide an adequate level of competition. Including these procedures in the procurement law enables interested suppliers and contractors to determine, simply by reading the procurement law, which publications they need to follow in order to stay abreast of procurement opportunities in the enacting State. In view of the objective of the Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 18(2) requires publication of the invitations also in a publication of international circulation. One possible medium of such publication is the business edition of Development Business, published by the United Nations Department of Public Information and the United Nations University.

2. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender or the invitation to prequalify by additional means that would promote widespread awareness by suppliers and contractors of the procurement proceedings. These might include, for example, posting the invitation on official notice boards, and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity.

3. Article 18(3) has been included in order to enable the procuring entity in exceptional cases, for reasons of economy and efficiency, to solicit participation only from a limited number of suppliers or contractors (referred to hereinafter as "restricted tendering"). In some cases, restricted tendering can be a more efficient means of procurement than open tendering proceedings while still providing competition. Such cases may include: where the time and cost of the examination and evaluation a large number of tenders would be disproportional to the value of the goods or construction to be procured; where the goods or construction are available only from a few contractors or suppliers; and in the case of high-value goods or construction, for which the cost of preparing tenders is high and the statistical chance of being the successful tenderer would be low due to the potentially large number of tenderers, thus possibly deterring competent suppliers and contractors from participating.

4. In order to curb abusive resort to restricted tendering, article 18(3) contains safeguards. These include the requirement that resort to restricted tendering be subject to prior approval, that the number of suppliers or contractors invited be sufficient to ensure effective competition, and that the grounds and circumstances for resorting to restrictive tendering be stated in the record.

* * *

Article 19

Contents of invitation to tender and invitation to prequalify

In order to promote efficiency and transparency, article 19 requires that invitations to tender as well as invitations to prequalify contain the information required for suppliers and contractors to be able to ascertain whether the goods or construction being procured are of a type that they can provide and, if so, how they can participate in the tendering proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

* * *

Article 20

Provision of solicitation documents

Solicitation documents are intended to provide suppliers and contractors with the information they need to prepare their tenders and to inform suppliers and contractors of the rules and procedures according to which the tendering proceedings will be conducted. Article 20 has been included in order to ensure that all suppliers and contractors that have expressed an interest in participating in the procurement proceedings and that comply with the procedures set forth by the procuring entity are provided with solicitation documents. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers and contractors from participating in the tendering proceedings.

* * *

Article 21

Contents of solicitation documents

1. Article 21 contains a listing of the information required to be included in the solicitation documents. An indication in the procurement law of those requirements is useful to ensure that the solicitation documents include the information necessary to provide a basis for enabling suppliers and contractors to submit tenders that meet the needs of the procuring entity and that the procuring entity can compare in an objective and fair manner. Many of the items listed in article 21 are regulated or dealt with in other provisions of the Model Law. The enumeration in this article of all items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a "check-list" in preparing the solicitation documents.

2. One category of items listed in article 21 concerns instructions for preparing and submitting tenders (subparagraphs (a), (i) through (p), and (s); issues such as the form, and manner of signature, of tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers and contractors would be placed at a disadvantage or even rejected due to lack of clarity as to how the tenders should be prepared.

3. The Model Law recognizes that for the procurement of goods or construction that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers and contractors to submit tenders either for the entirety of the goods or construction or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by smaller suppliers and contractors, that may have the capacity to submit tenders only for certain portions. Article 18(h) is included to make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the goods or construction to be procured into separate contracts merely as it sees fit after tenders are submitted.

* * *

Article 22

Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

1. The purpose of including article 22 is to make it clear that the prequalification and solicitation documents should be formulated in a clear, complete and objective manner, particularly with respect to the description of the goods or construction to be procured. Solicitation documents with those characteristics enable suppliers and contractors to formulate tenders that meet the needs of the procuring entity, to forecast the risks and costs of their participation in the tendering proceedings and of the performance of the contract to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Properly prepared solicitation documents enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. Furthermore, application of the rule that specifications should be written so as not to favour particular contractors or suppliers will help to limit use of methods of procurement less competitive than tendering.

2. Paragraph (4) is intended to help make the solicitation documents understandable to foreign suppliers and contractors. The reference to a language customarily used in international trade need not be adopted by an enacting State whose official language is one customarily used in international trade.

3. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule against issuing "bilingual" solicitation documents, i.e., solicitation documents in which both languages together form a single publication. The different language versions should rather be independent of each other. This would enable suppliers and contractors to submit tenders on the basis of the information in one language version of the solicitation documents. If the two language versions form part of a single document, suppliers and contractors would be placed in the position of having to ascertain that the two language versions were in substance identical prior to subscribing to them. The provision is an important safeguard in view of the probability that the solicitation documents may contain information or documents that would somehow be incorporated in the future procurement contract.

* * *

Article 23

Clarifications and modifications of solicitation documents

1. The purpose of article 23 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster efficient, fair and successful conduct of tendering proceedings. The right of the procuring entity to modify the solicitation documents is fundamental and necessary in order to enable the procuring entity to obtain goods or construction that meet its needs. Article 23 provides that clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated by the procuring entity to all suppliers and contractors to whom the procuring entity provided solicitation documents. It would not be sufficient to simply permit suppliers and contractors to have access to clarifications upon request since they would have no independent way of finding out that a clarification had been made.

2. The rule governing clarifications is meant to ensure that the procuring entity responds to a timely request for clarification in time for the clarification to be taken into account in the preparation and submission of tenders. Prompt communication of clarifications and modifications also enables suppliers and contractors to exercise their right under article 26(3) to modify or withdraw their tenders prior to the deadline for submission

of tenders. Similarly, minutes of meetings of suppliers and contractors convened by the procuring entity must be communicated to suppliers and contractors promptly so that those minutes too may be taken into account in the preparation of tenders.

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SECTION II. SUBMISSION OF TENDERS

Article 24

Language of tenders

Article 24 provides that tenders may be formulated in any language in which the solicitation documents have been formulated or in any other language specified in the solicitation documents. This rule has been included in order to facilitate participation by foreign suppliers and contractors.

* * *

Article 25

Submission of tenders

1. An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders. Article 25 recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the goods or construction to be procured, the extent of subcontracting anticipated, and the time needed for transmitting tenders. Thus, it is up to the procuring entity to fix the deadline by which tenders must be submitted. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders.

2. In order to promote competition and fairness, paragraph (2) requires the procuring entity to extend the deadline in the exceptional case of late issuance of clarifications or modifications of the solicitation documents, or of minutes of a meeting of suppliers and contractors. Paragraph (3) permits, but does not compel, the procuring entity to extend the deadline for submission of tenders in other cases, i.e., when one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be blocked from participation.

3. The requirement in paragraph (5) that tenders are to be submitted in writing represents an exception to the general rule set forth in article 9(1) that communications between the procuring entity and suppliers and contractors may be in any form that provides a record of the content of the communication. The rationale behind retaining the writing requirement is to limit the possibility that suppliers and contractors without adequate EDI capability would be discriminated against. Another reason is the perception that EDI techniques are not capable of providing the level of security achieved by the traditional requirement that tenders be in writing and in sealed envelopes.

4. The restriction in article 25(5) notwithstanding, as the application of EDI techniques continues to develop and to gain acceptance, enacting States may wish to consider including a formulation in paragraph (5) that would permit the use of EDI for the submission of tenders. Such an approach would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent "opening" of the tenders prior to the deadline for submission of tenders, and to deal with other issues such as the form that the tender security would take in the context of a paperless submission. In such an event, it would also be recommended to provide for the submission and evaluation in a given tendering proceeding of a mix of written and electronic tenders.

5. The rule in paragraph (6) prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable tenderers to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other tenderers. In addition, it could interfere with the orderly and efficient process of opening tenders.

* * *

Article 26

Period of effectiveness of tenders; modification and withdrawal of tenders

1. Article 26 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders should remain in effect.

2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable long period of effectiveness hoping to cover the needs of most if not all tendering proceedings. This would be inefficient since for many cases the period would be longer than necessary. Excessively long periods of effectiveness may result in higher tender prices since suppliers and contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., the risks of higher manufacturing or construction costs).

3. Paragraph (2)(b) has been included to enable the procuring entity to deal with delays in the tendering proceedings by requesting extensions of the tender validity period. The procedure is not compulsory, so as to protect suppliers and contractors from being bound to their tenders for unexpectedly long durations -- a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order to prolong also the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender.

4. Paragraph (3) is an essential companion of the provisions in article 23 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders.

* * *

Article 27

Tender securities

1. The procuring entity may suffer losses if suppliers or contractors withdraw tenders or if a procurement contract with the supplier or contractor whose tender had been accepted is not concluded due to the fault of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 27 authorizes the procuring entity to require suppliers and contractors participating in the tendering proceedings to post a tender security so as to cover at least a portion of such losses and to discourage the supplier or contractor from defaulting. Procuring entities are not required to impose tender

security requirements in all tendering proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, though it may be of importance to require a tender security in some cases, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security -- which will normally be reflected in the contract price -- will be less justified.

2. Safeguards have been included to ensure that a tender security requirement is only imposed fairly and for the intended purpose. That purpose is to secure the obligation of suppliers and contractors to enter into a procurement contract on the basis of the tenders they have submitted and to post a security for performance of the procurement contract, if required to do so.

3. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, there is optional language at the end of paragraph (1)(c) providing flexibility on this point for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law.

4. The reference to confirmation of the tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The inclusion of the reference in the Model Law, however, is not intended to encourage such a practice in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tendering proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for submission of tenders and added costs for foreign suppliers and contractors).

6. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or other transferable medium of value. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely, even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry.

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SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 28

Opening of tenders

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of the assurance of the opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.

2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers and contractors that have submitted tenders or their representatives to be present at the opening of tenders. Permitting suppliers and contractors or their representatives to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of

suppliers and contractors that have submitted tenders, as well as the prices of their tenders, are announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers and contractors that were not present or represented at the opening of tenders.

* * *

Article 29

Examination, evaluation and comparison of tenders

1. The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers and contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Incorporation of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.

2. Paragraph (2) sets forth the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.

3. Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and automaticity, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the "lowest evaluated tender", i.e, one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria as envisaged in the Model Law. 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. 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. Requiring that the criteria be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine those quantifications with the tender price. The tender resulting in the lowest evaluated price is regarded as the successful tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the solicitation documents. The tender with the most favourable aggregate weighting is the lowest evaluated tender.

5. Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See

paragraph 4 of the comments to article 8 concerning the advantages of using a margin of preference as a technique for achieving national economic objectives while still preserving competition.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the EC may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority.

6. The Model Law envisages that the procurement regulations will set forth rules concerning the calculation and application of a margin of preference. Such rules could also establish criteria for qualifying as a "domestic" contractor or supplier and for qualifying as "domestically produced" goods (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for goods and for construction. As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.

7. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity (see article 21(r)).

8. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may therefore wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender upon failure of the supplier or contractor to reconfirm and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case.

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Article 30

Rejection of all tenders

1. The purpose of article 30 is to enable the procuring entity to reject all tenders. Inclusion of this provision is important because a procuring entity may need to do so for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the tendering proceedings, where the procuring entity's need for the goods or construction ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting action constituting an abuse of right or a violation of fundamental principles of justice.

2. The requirement in paragraph (3) that notice of the rejection of all tenders be given to suppliers and contractors that submitted tenders, together with the requirement in paragraph (1) that the grounds for the rejection be communicated upon request to those suppliers and contractors, is designed to foster transparency and accountability. Paragraph (1) does not require the procuring entity to justify the grounds that it cites for rejection of all tenders. This approach is based on the premise that the procuring entity should be free to abandon the procurement proceeding on economic, social or political grounds which it need not justify. The protection of this power is further buttressed by the fact that the decision of the procuring entity to reject all tenders is not subject, in accordance with article 38(2)(d), to the right to review provided by the Model Law; it

is also supported by paragraph (2), which provides that the procuring entity is to incur no liability towards contractors and suppliers, such as compensation for their costs of preparing and submitting tenders, solely by virtue of its invoking paragraph (1). The potentially harsh effects of article 30 are mitigated by permitting the procuring entity to reject all tenders only if the right to do so has been reserved in the solicitation documents.

* * *

Article 31

Negotiations with suppliers and contractors

Article 31 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by the supplier or contractor. This rule has been included because such negotiations might result in an "auction", in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used.

* * *

Article 32

Acceptance of tender and entry into force of procurement contract

1. The purpose of paragraph (1) is to state clearly the rule that the tender ascertained to be the successful tender pursuant to article 29(4)(b) is to be accepted and that notice of the acceptance is to be given promptly to the supplier or contractor that submitted the tender. Absent a provision on entry into force of the procurement contract, the entry into force of the procurement contract would be governed by general legal rules, which in many cases have evolved to deal with the formation of simple contractual relationships and which may not clearly indicate the relevant time in relation to the formation of a contract as a result of tendering proceedings.

2. The Model Law provides for different methods of entry into force of the procurement contract, in recognition 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. Depending upon its preferences and traditions, an enacting State may wish to incorporate one or more of these methods.

3. Under one method (set forth in paragraph (4)), absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender. This approach may be satisfactory when the contract as described in the solicitation documents covers all relevant terms. The second method (set forth in paragraph (2)), ties the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. This approach may be desirable where there exist minor outstanding contractual terms to be settled by the parties, although the major contract terms are to have been already settled in the solicitation documents. Paragraph (2) contains an optional reference to "the requesting ministry" as a signatory to the procurement contract in order to take into account that in some States the procurement contract is signed on behalf of the Government by the ministry for whose use the goods or construction were destined, but which did not itself conduct the procurement proceedings nor act as the procuring entity within the meaning of the Model Law. In States with such a procurement practice, procurement proceedings may be conducted by a central entity such as a central procurement or tendering board.

4. A third method of entry into force (set forth in paragraph (3)), provides for entry into force upon approval of the procurement contract by a higher 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). 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 tender or of any tender security are designed to establish a balance between the rights and obligations of suppliers and contractors. They are designed in particular to exclude the possibility 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.

5. 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 former approach is more appropriate to the particular circumstances of tendering proceedings. In order to bind the supplier or contractor to a procurement contract or to obligate it to sign a written procurement contract, the procuring entity has to give notice of acceptance while the tender is in force. Under the "receipt" approach, if the notice was properly transmitted, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received before the expiry of the period of effectiveness of its tender, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, that right of the procuring entity is preserved. 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 its tender that the tender 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.

6. In order to promote the objectives of good procurement, paragraph (5) makes it clear that, in the event that the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract in accordance with paragraph (2), the selection of another tender from among the remaining tenders should be in accordance with the provisions normally applicable to the selection of tenders, subject to the right of the procuring entity to reject all tenders.

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CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Articles 33 to 37 present procedures to be used for the methods of procurement other than tendering. As indicated in the comments to article 14, there is an overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation. The decision as to which of those methods to incorporate will determine which of articles 33 (procedures for two-stage tendering), 34 (procedures for request for proposals) and 35 (procedures for competitive negotiation) will be incorporated. With respect to request for proposals, competitive negotiation, request for quotations and single-source procurement, chapter IV does not provide as full a procedural framework as chapter III does with respect to tendering proceedings. This is mainly because those methods of procurement involve more flexibility than does tendering. Some of the questions that for tendering are answered in the Model Law (e.g., entry into force of the procurement contract) may be answered for those other methods of procurement in other bodies of its applicable law. An enacting State may consider it useful to incorporate into the procurement law some of those solutions from other bodies of applicable law, as well as to supplement chapter IV with rules in the procurement regulations. It should also be noted that chapters I and V would also be generally applicable to the methods of procurement other than tendering.

* * *

Article 33

Two-stage tendering

The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: the flexibility afforded to the procuring entity in the first stage by the ability to negotiate with suppliers and contractors in order to arrive at a final set of specifications for the goods or construction to be procured, and, in the second stage, the high degree of objectivity and competition characteristic of tendering proceedings. The procedures used in two-stage tendering are distinct from those used in request for proposals. In the latter method of procurement, the procuring entity sets forth in the request for proposals the broad parameters of its procurement needs and the criteria according to which the suitability of proposals will be assessed, requests proposals from suppliers or contractors, and negotiates with those submitting proposals in order to arrive at the most suitable proposal. The two methods also differ in that in two-stage tendering, since it is subject to article 18, solicitation of participation would generally be on a broad basis.

* * *

Article 34

Request for proposals

1. While request for proposals is a method in which the procuring entity typically solicits proposals from a select, relatively small group of suppliers or contractors, article 34 contains provisions designed to ensure that a sufficient number of suppliers or contractors have an opportunity to express their interest in participating in the proceedings and that a sufficient number of suppliers or contractors actually do participate so as to foster adequate competition. In that regard, paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, but from a minimum of three if possible. The companion provision in paragraph (2) is designed to potentially widen participation by requiring the procuring entity, unless this is not desirable on the grounds of economy and efficiency, to publish in a publication of international circulation a notice seeking expressions of interest in participating in the request-for-proposals proceedings. In order to protect the procurement proceedings from the delays that might result if the procuring entity were obligated to admit all suppliers or contractors that responded to such a notice, publication of the notice does not confer any rights on suppliers or contractors.

2. The procurement regulations may set forth further rules for the procuring entity in this type of a notice procedure. For example, the practice in some countries is that a request for proposals is sent as a general rule to all suppliers and contractors that respond to the notice, unless the procuring entity decides that it wishes to send the request for proposals only to a limited number of suppliers and contractors. The rationale behind such an approach is that those suppliers and contractors that expressed an interest should be given an opportunity to submit proposals. A countervailing consideration is that such a procedure might create an extra burden for the procuring entity at a time when it is already busy.

3. The remainder of article 34 sets forth the essential elements of request-for-proposals proceedings related to the evaluation and comparison of proposals and the selection of the winning proposal. They are designed to maximize transparency and fairness in competition, and objectivity in the comparison and evaluation of proposals.

4. The relative managerial and technical competence of the supplier or contractor is included as a possible evaluation factor since the procuring entity might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal. This provision should be distinguished from the authority granted to the procuring entity in paragraph (9)(d) not to pursue the proposals of suppliers or contractors deemed unreliable or incompetent. The latter provision permits the procuring entity to avoid evaluating proposals submitted by suppliers or contractors considered unreliable or incompetent.

5. The "best and final offer" procedure required by paragraph (8) is intended to maximize competition and transparency by providing for a culminating date by which suppliers or contractors are to make their best and final offers. This procedure puts an end to the negotiations and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict the undesirable situation in which the procuring entity uses the price offer made by one supplier or contractor to pressure another supplier or contractor to lower its price.

* * *

Article 35

Competitive negotiation

1. Article 35 is a skeleton provision. Subject to the rules set forth in the Model Law and in the procurement regulations, and subject to any rules of other bodies of applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. Those rules that are set forth in the present article are intended to allow that freedom to the procuring entity while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process.

2. The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: that it establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; that it prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, and the desired contractual terms and conditions; and that it require the suppliers and contractors with whom it negotiates to itemize their prices so as to enable the procuring entity to compare what is being offered by one contractor or supplier during the negotiations with what is being offered by the others.

3. The procurement regulations may indicate that, particularly in the case of complex goods or construction, the procuring entity and each supplier and contractor with which it negotiates should stipulate, where permitted by the applicable law, that no contractual obligations exist between the parties regarding the procurement until such time as a written contract has been entered into between them. Such a stipulation may be useful in particular in legal systems where there is a possibility of "pre-contract" liability, i.e., that a "pre-contract" document embodying all the essential terms of a future contract may be regarded as an enforceable contract. The means and time at which a contract enters into existence will be governed by the applicable law, which procuring entities will generally want to be the law of the State of the procuring entity. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as the formation of contract will be subject to the internationally uniform rules contained in the Convention.

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Article 36

Request for quotations

It is important to include in a procurement law minimum procedural requirements for request for quotations of the type set forth in the Model Law. They are designed to foster an adequate level and quality of competition.

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Article 37

Single-source procurement

The Model Law does not contain procedures to be followed specifically in single-source procurement. This is because single-source procurement is subject to very exceptional conditions of use and involves a sole supplier or contractor.

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CHAPTER V. REVIEW

1. An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system. This chapter sets forth provisions establishing a right to review and setting forth provisions governing its exercise.

2. It is recognized that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

3. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

4. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

5. In view of the above, and in order to avoid impinging upon fundamental conceptual and structural aspects of legal systems and systems of State administration, the provisions in chapter V are of a more skeletal nature than other sections of the Model Law. As indicated in the asterisk footnote at the head of chapter V, some States may wish to incorporate the articles on review without change or with only minimal changes, while other States might not see fit, to one degree or another, to incorporate those articles. In the latter cases, the articles on review may be used to measure the adequacy of existing review procedures.

6. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an enacting State might include more detailed rules concerning matters that are not dealt with by the Model Law on Procurement or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been presented.

7. Chapter V does not deal with the possibility of dispute resolution through arbitration, in particular since the types of situations contemplated are not situations that may typically lend themselves to arbitration and since the capacity of procuring entities to submit to arbitration would be determined by the applicable law.

* * *

Article 38

Right to review

1. The purpose of article 38 is to establish the basic right to obtain review. Under paragraph (1), the right to review appertains only to suppliers and contractors, and not to members of the general public as such. However, it would not necessarily exclude suppliers and contractors that have not participated, in particular suppliers and contractors who claim have been unlawfully precluded from participating in procurement proceedings. Subcontractors have been intentionally omitted from the ambit of the right to review provided for in the Model Law. This limitation is designed to avoid an excessive degree of disruption that might impact negatively on the economy and efficiency of public purchasing. The article does not deal with the nature or degree of interest or detriment that is required to be claimed for a supplier or contractor to be able to seek review, or with other issues relating to the capacity of the supplier or contractor to seek review. Such issues are left to be resolved in accordance with the relevant legal rules in the enacting State.

2. The reference in paragraph (1) to article 43 has been placed within square brackets because the article number will depend on whether or not the enacting State provides for hierarchical administrative review (see paragraph 1 of the comments to article 40).

3. Not all of the provisions of the Model Law impose obligations which, if unfulfilled by the procuring entity, give rise under the Model Law to a right to review. Paragraph (2) provides that certain types of actions and decisions by the procuring entity which involve an exercise of discretion are not subject to the right of review provided for in paragraph (1). The exemption of certain acts and decisions is based on a distinction between, on the one hand, requirements and duties imposed on the procuring entity that are directed to its relationship with suppliers and contractors and that are intended to constitute legal obligations towards suppliers and contractors, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, that are aimed at the general public interest, or that for other reasons are not intended to constitute legal obligations of the procuring entity towards suppliers and contractors. The right to review is generally restricted to cases where the first type of requirement is violated by the procuring entity.

* * *

Article 39

Review by procuring entity (or by approving authority)

1. The purpose of providing for first-instance review by the head of the procuring entity or of the approving authority is essentially to enable that officer to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive stage. References to the approving authority in paragraph (1), as well as elsewhere in article 39 and the other articles on review have been placed in parentheses since they may not be relevant to all enacting States (see paragraphs 13 to 16 of the introduction).

2. The policy rationale behind requiring initiation of review before the procuring entity or the approving authority only if the procurement contract has not yet entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the head of the procuring entity or of the approving authority could usefully require. Hierarchical administrative review or judicial review would be available for complaints arising after the entry into force of the procurement contract.

3. The purpose of the time limit in paragraph (2) is to ensure that grievances are filed and resolved so as to avoid unnecessary delays and disruption in the procurement proceedings at a later stage. Paragraph (2) does not define the notion of "days" (i.e., whether calendar or working days) since most States have enacted interpretation acts that would provide a definition.

4. Paragraph (3) is a companion provision to paragraph (1), providing that, for the reasons referred to in paragraph 2 of the comments to the present article, the head of the procuring entity or of the approving authority need not entertain a complaint, or continue to entertain a complaint, once the procurement contract has entered into force.

5. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see also paragraph 7 of the comments to the present article). Possible corrective measures might include the following: requiring the procuring entity to revise the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity not to issue the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

6. An enacting State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "40 or 43". If the enacting State provides judicial review but not hierarchical administrative review (see paragraph 1 of the comments to article 40), the reference should be only to the article appearing in this Model Law as article 43. If the enacting State provides both forms of review but requires the supplier or contractor submitting the complaint to exhaust the right to hierarchical administrative review before seeking judicial review, the reference should be only to article 40. If the enacting State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 40 or 43."

7. Certain additional rules applicable to review proceedings under this article are set forth in article 41. Additionally, the enacting State may include in the procurement regulations detailed rules concerning the procedural requirements to be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient. Furthermore, the procurement regulations may include detailed rules concerning the conduct of review proceedings under this article (e.g., concerning the right of suppliers and contractors participating in the procurement proceedings, other than the one submitting the

complaint, to participate in the review proceedings (see article 41); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take).

8. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. Paragraphs (4) and (5) have been included to that end.

* * *

Article 40

Administrative review

1. States where hierarchical administrative review against administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 43).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an enacting State that provides both means of review does not have such rules, the State may wish to establish them by law or by regulation.

3. An enacting State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central procurement board), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board". It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

4. While paragraph (1)(a) establishes time limits for the commencement of administrative review actions with reference to the point of time when the complainant became aware of the circumstances in question, the Model Law leaves to the applicable law the question of any absolute limitation period for the commencement of review.

5. The suppliers and contractors entitled to institute proceedings under paragraph (1)(d) are not restricted to suppliers or contractors who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 40 (2)), but include any other suppliers or contractors claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

6. The requirement in paragraph (2) is included so as to enable the procuring entity or the approving authority to carry out its obligation under article 41 (1) to notify all suppliers and contractors of the filing of a petition for review.

7. With respect to paragraph (3), the means by which the supplier or contractor submitting the complaint establishes its entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

8. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In enacting the Model Law, a State may include all of the remedies listed in paragraph (3), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (3), those remedies may be added to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. The approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 39(4)(b)). The policy underlying the approach in article 39(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 40 (3) seeks to avoid impinging on those rules.

9. Optional language is included in the chapeau of paragraph (3) in order to accommodate those States where review bodies do not have the power to grant the remedies listed in paragraph (3) but can make recommendations.

10. With respect to the types of losses in respect of which compensation may be required, paragraph (3)(f) sets forth two alternatives for the consideration of the enacting State. Under Option I, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit from the procurement contract that was lost because of non-acceptance of a tender or offer of the supplier or contractor submitting the complaint. The types of losses that are compensable under the second possibility are broader than those under the first possibility, and might include lost profit in appropriate cases.

11. If the procurement proceedings are terminated pursuant to paragraph (2)(g), the procuring entity may institute new procurement proceedings.

12. There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a large contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts is particularly disruptive of the procurement process and generally not in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law.

13. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations. Rules may be provided, for example, concerning: the time limit for instituting the hierarchical administrative review proceedings; the right of suppliers and contractors, other than the one instituting the review proceedings, to participate in the review proceedings (see article 40(2)); the burden of proof; the submission of evidence; and

the conduct of the review proceedings.

14. The overall period of 30 days imposed by paragraph (4) may have to be adjusted in countries in which administrative proceedings take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. In such countries the difficulties raised by the limitation can be treated in the light of the optional character of article 40.

* * *

Article 41

Certain rules applicable to review proceedings under article 39 [and article 40]

1. This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article.

2. References within square brackets in the heading and text of this article to article 40 and to the administrative body should be omitted by an enacting State that does not provide for hierarchical administrative review.

3. The purpose of paragraphs (1) and (2) of this article is to make suppliers and contractors aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. The possibility of broader participation in the review proceedings is provided since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

4. While paragraph (2) establishes a fairly broad right of suppliers and contractors to participate in review proceedings that they have not themselves generated, the Model Law does not provide detailed guidance as to the extent of the participation to be allowed to such third-parties (e.g., whether the participation of such third parties would be at a full level, including the right to submit statements). Enacting States may have to ascertain whether there is a need in their jurisdictions for establishing rules to govern such issues.

5. In paragraph (3), the words "any other supplier or contractor or governmental authority that has participated in the review proceedings" refer to suppliers and contractors participating pursuant to paragraph (2) and to governmental authorities such as approving authorities.

* * *

Article 42

Suspension of procurement proceedings

1. An automatic suspension approach (i.e., suspension of the procurement proceedings triggered by the mere filing of a complaint) is followed in the procurement laws of some countries as an exception to a general rule in judicial or administrative proceedings that the burden is on the party seeking relief. The purpose of suspension is to enable the rights of the supplier or contractor instituting review proceedings to be preserved pending the disposition of those proceedings. Without a suspension, a supplier or contractor submitting a complaint may not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the supplier or contractor to avoid the entry into force of the procurement contract pending

disposition of the review proceedings and, if an entitlement to interim relief would have to be established, there might not be sufficient time to do so and still avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages). With a suspension approach, it will be more likely to result in the settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement.

2. In order to limit the unnecessary triggering of a suspension, the suspension in article 41 is not, strictly speaking, automatic, but is subject to the fulfilment of the fairly simple conditions set forth in paragraph (1). The requirements set forth in paragraph (1) as to the declaration to be made by a supplier or contractor in applying for a suspension are not intended to involve an adversarial or evidentiary process as this would run counter to the objective of a swift triggering of a suspension upon timely filing of a complaint. Rather, what is involved is an ex parte process based on the affirmation by the complainant of the existence of certain circumstances, circumstances of the type that must be alleged in many legal systems in order to obtain preliminary relief. The requirement that the complaint not be frivolous is included since, even in the context of ex parte proceedings, the reviewing body should be enabled to look on the face of the complaint to reject frivolous complaints.

3. In order to mitigate the potentially disruptive effect of a suspension, only a short initial suspension of seven days may be triggered through the fairly simple procedure envisaged in article 42. This short initial suspension is intended to permit the procuring entity or other reviewing body to assess the merits of the complaint and to determine whether a prolongation of the initial suspension under paragraph (3) would be warranted. The potential for disruption is further limited by the overall thirty-day cap provided for in paragraph (3). Furthermore, paragraph (4) provides for the waiver of the suspension in exceptional circumstances when the procuring entity certifies that urgent public interest considerations require the procurement to proceed without delay, for example when the procurement involves goods needed urgently at the site of a natural disaster.

4. Paragraph (2) provides for the suspension for a period of seven days of a procurement contract that has already entered into force in the event that a complaint is submitted in accordance with article 40 and meets the requirements of paragraph (1). This suspension also is subject to waiver under paragraph (4) and to extension up to a thirty-day total period under paragraph (3).

5. Since, beyond what is contained in article 43, the Model Law does not deal with judicial review, article 42 does not purport to address the question of court-ordered suspension, which may be available under the applicable law.

* * *

Article 43

Judicial review

The purpose of this article is not to limit or to displace the right to judicial review that might be available under other applicable law. Rather, it is merely to establish that right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 38. This includes appeals against decisions of review bodies pursuant to articles 39 and 40, as well as against failures by those review bodies to act. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. The law applicable to the judicial proceedings will govern the question of whether, in the case of an appeal of a review decision made pursuant to article 39 or 40, the court is to examine de novo the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding. Such an approach has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.

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