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Current activities of international organizations in the area of public procurement: possible future work

Note by the Secretariat**

Addendum

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III. Issues related to the practical application of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services¹ reflects the different legal traditions of the broad membership of the United Nations Commission on International Trade Law (UNCITRAL), including States from all regions and of all levels of economic development, and is as a result acceptable to many and varied jurisdictions. As a “framework law”, the UNCITRAL Model Procurement Law sets out the essential minimum content of an effective procurement system, but does not set forth all rules and regulations that may be necessary to implement procurement procedures, as it is envisioned that enacting States will issue procurement regulations that may take into account specific and possibly changing national circumstances. Also, the inclusion of options in the UNCITRAL Model Procurement Law ensures flexibility in the implementation of issues that are in practice treated differently from State to State.

2. In the light of experience in the application of the UNCITRAL Model Procurement Law and comments summarized below, some points relating to a possible review of the UNCITRAL Model Procurement Law may be worth consideration by the Commission. It has been suggested that review of the UNCITRAL Model Procurement Law in the light of those developments may assist the harmonization of national procurement rules and increase its appeal as a template for domestic procurement reforms, while effectively promoting the objectives of transparency, fairness and efficiency.

3. Several issues and problems identified in current procurement practice are briefly discussed in order to facilitate discussion in the Commission as to whether it would be desirable to consider a review of the UNCITRAL Model Procurement Law. Issues considered in the present note include aspects relating to the scope of the UNCITRAL Model Procurement Law; general provisions; procurement methods; alternative methods of procurement under the UNCITRAL Model Procurement Law; electronic procurement; evaluation and comparison of tenders; and remedies and enforcement.

A. Procurement methods

4. It is generally acknowledged that procedures in the UNCITRAL Model Procurement Law relating to open tendering, restricted tendering and requests for price quotations reflect best practices found in domestic public procurement regulations. However, comments have been made on several more specific issues discussed below.

1. Supplier lists

5. It has been pointed out that the UNCITRAL Model Procurement Law does not address the subject of supplier lists (also known as qualification lists). Such lists identify selected suppliers and can be either mandatory or optional. Mandatory lists require registration of the supplier on the list as a condition of participation in the

procurement, whereas, in the case of optional lists, a supplier may choose to register without prejudice to eligibility. Though lists vary in scope, registering a supplier on a list will typically involve an initial assessment of some qualifications, with others being assessed when a supplier is considered for specific contracts.

6. Observers have noted that the UNCITRAL Model Procurement Law allows procuring entities to use optional lists to choose firms to participate in some procurement methods that do not require advertising, such as restricted tendering, competitive negotiations, requests for proposals and single-source procurement. This may in practice result in the exclusion of non-registered suppliers. It has been noted that the UNCITRAL Model Procurement Law does not contain any controls over the use of such optional lists to ensure transparency and competition. Controls could for example consist of an obligation to publicize the existence of any list.

7. It has also been noted that although the UNCITRAL Model Procurement Law does not allow procuring entities to restrict access to procurement to suppliers registered on lists (i.e. mandatory lists), that practice, while not suitable for open tendering, may be efficient in relation to other procurement methods. Also, the relevance of supplier lists to electronic procurement techniques has been noted.

2. Procurement of services

8. It has been suggested that, though flexible, the current “principal method for procurement of services” under chapter IV is not sufficiently differentiated to address different types of service. It has also been suggested that the procurement of services measurable on the basis of physical outputs could employ rigorous and objective selection methods instead of employing qualitative and negotiated methods. In that case, chapter IV of the UNCITRAL Model Procurement Law could then be limited to the selection of intellectual services that did not lead to measurable physical outputs, such as consulting and other professional services, the specificity of which could also be recognized in article 2 (“Definitions”) of the UNCITRAL Model Procurement Law.

9. Observers have suggested that article 42 of the UNCITRAL Model Procurement Law could form the basis for a quality-based method of selection. It has also been noted that the exclusion of simultaneous and consecutive negotiations in the selection of proposals (arts. 43 and 44) would be beneficial to transparency. Further, it has been suggested that a budget-based selection method for well defined services lending themselves to lump-sum contracts could be added to the methods provided in article 42. It has been observed that since it may not be cost-effective for consultants to be invited to submit proposals by open invitation, consideration could be given to providing for open solicitation of expressions of interest followed by short-listing as opposed to pre-qualification as envisaged in article 7, paragraph 1.

3. Alternative methods of procurement

10. Suggestions have been made by at least one multilateral lending institution that it might be useful to review the need and conditions of use of some of the “alternative methods of procurement” set out in chapter V of the UNCITRAL Model Procurement Law.

11. The following suggestions have been made with respect to specific methods:

(a) “*Two-stage tendering*” (art. 46), instead of being categorized as an “alternative method”, could be treated as a form of open tendering, aimed at refining specifications throughout the first stage of the process in order to achieve a transparent selection in the second stage;

(b) The grounds for “*restricted tendering*” (arts. 47 and 20) could be narrowed from “disproportionate cost of other procedures” and “limited number of suppliers” to the former only;

(c) “*Requests for proposals*” and “*competitive negotiation*” (arts. 48 and 49) are in practice often intended to compensate for inadequacies in the preparation of specifications (and other descriptions of goods, construction or services) and evaluation criteria and more care in the preparation of the solicitation of tenders could facilitate achieving a similar end;

(d) The justifications for using “*single-source procurement*” could be narrowed in scope so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or countertrade, as is currently the case under article 22, paragraph 2, of the UNCITRAL Model Procurement Law.

12. The Commission may wish to note, however, that the extensive consideration already given to these issues during the preparation of the UNCITRAL Model Procurement Law should be taken into account in any decision to re-open the debate.

4. Community participation in procurement

13. It has been brought to the Secretariat’s attention that a number of modern procurement systems provide for a selection method that draws on the participation of users. The method is used for the purpose of achieving social goals and a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education.

14. In practice there are variations in the way community participation in procurement takes place. For example, utilization of local know-how and materials may be increased, labour-intensive technologies employed and other forms of participation of the community in the procurement may be called for. Where efficient, procurement procedures and specifications could be adapted to reflect these practices.

5. Framework agreements

15. Observers have also noted that many national laws on procurement contain provisions on “framework agreements”, used when procuring entities require particular products or services over a period of time but do not know the exact quantities. Accordingly, it has been suggested that the UNCITRAL Model Procurement Law could usefully deal with situations such as these.

6. Electronic procurement

16. It has been brought to the attention of the Secretariat that procurement conducted through electronic means is rapidly increasing in popularity and is being considered under domestic laws and by the World Trade Organization (WTO) and

the European Community. It has also been pointed out that recent documents issued by multilateral development banks on standards for assessing national procurement systems encourage the use of electronic means but do not provide guiding principles for regulation. In that light, specific comments and suggestions were made on ways of adapting the UNCITRAL Model Procurement Law to electronic procurement. The point was also made that in addition to dealing with a number of basic issues of electronic procurement, some guidance could usefully be provided on methods of electronic procurement.

(a) *Electronic communications*

17. It has been pointed out that the possibility of electronic tendering is not excluded under the UNCITRAL Model Procurement Law, in the sense that article 30, paragraph 5 (b), specifically provides that “a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality”. Nevertheless, it has been suggested that it would be useful, perhaps even necessary, that a provision such as article 30 be accompanied by some detailed provisions dealing with authenticity, security and confidentiality.

18. It has also been commented that, in view of the spread of electronic tendering and its advantages, consideration could be given to including a provision permitting procuring entities to require electronic communications, including electronic tendering. Currently the UNCITRAL Model Procurement Law does not permit procuring entities to require use of electronic means by suppliers (arts. 9 and 30).

(b) *Electronic catalogues*

19. Comments have been made relating to the versatility and flexibility of electronic catalogues. Electronic catalogues can be electronic versions of traditional hard-copy catalogues or may incorporate electronic ordering facilities. Electronic catalogues are often operated through supplier lists (see above, paras. 5-7) or through framework arrangements (para. 15), which may be an additional reason for addressing supplier lists and framework agreements in the UNCITRAL Model Procurement Law.

(c) *Electronic auction*

20. With regard to electronic tendering techniques, comments have focused on an increasingly popular tendering process known as “reverse electronic auction”. Although suppliers participating in the auction do not know the identity of other suppliers, they have on-screen information on ranking or amount required to beat other suppliers’ offers.

21. While during the auction only prices can be compared, non-price criteria such as quality can be rated separately prior to the auction and then combined, using specialized auction software, with the information submitted in the auction so as to give each supplier’s overall standing.

22. It has also been noted that transparency would be increased if both information on other tenders and the outcome of the procedure were available to participants.

23. Some comments have been made on provisions that currently do not take into account the possibility of an electronic auction. For example, it has been noted that the UNCITRAL Model Procurement Law's general tendering procedure, "open tendering", assumes a single tendering stage. This is incompatible with "two-stage" electronic auctions in which the first stage is the rating by the purchaser of the relevant non-price aspects and the second stage is the auction phase, in which the price and non-price aspects are combined to give overall ranking. It has also been noted that the practice of submitting tenders in writing in a sealed envelope is not compatible with an auction process. With regard to evaluation and comparison of tenders, it was pointed out that article 34, paragraph 1 (a), of the UNCITRAL Model Procurement Law prohibits changes to the price of tenders after submission and that, under article 34, paragraph 8, information on tenders must not be disclosed, both of which constitute an obstacle to using electronic auctions.

24. Comments were also made on whether it would be best to regulate electronic auctions as a version of traditional procurement methods or as a distinct method. It has been pointed out that treating such auctions as a version of traditional tendering would require the introduction of additional rules to address auctions' special features relating to tender confidentiality and two-phase evaluation, but that this could be more simple than treating electronic auctions as a separate tendering method requiring novel and specific provisions.

B. Evaluation and comparison of tenders

25. It has been pointed out that, in order to make the outcome of the evaluation of tenders predictable from the perspective of the tenderer, it would be optimal to express tender evaluation criteria (art. 34, para. 4 (b)) in monetary terms or in the form of pass/fail requirements, that is, requirements set out by the procuring entity that the supplier must meet in order for its proposal to be considered acceptable for evaluation purposes.

26. Also, so as to increase the transparency of the selection process and exclude extrinsic considerations in the determination of the best value for money, the use of evaluation criteria such as shadow-pricing of foreign exchange and countertrade considerations should be limited. Article 34, paragraph 4 (c)(iii), of the UNCITRAL Model Procurement Law currently allows the taking into account of these considerations.

27. It has also been suggested that, in the case of open and restrictive tendering, as well as solicitation of price quotations, it would be appropriate to base the award on the determination of the lowest evaluated bid that is also substantially responsive to the bidding documents instead of on the lowest bid price (art. 34, para. 4 (b)(i)) or lowest evaluated tender (art. 34, para. 4 (b)(ii)).

28. Regarding the acceptance of the tender and entry into force of the contract, suggestions were made that consideration could be given to whether article 36 could address the cancellation of the process for failure of the contract to become effective.

29. Regarding preferences, it was brought to the attention of the Secretariat that, while article 34, paragraph 4 (d), states that a procuring entity can grant a margin of preference for the benefit of domestic industries, it does not require that domestic

regulations specify the maximum preference that can be granted. It has been noted that a provision to that effect would benefit transparency. The point has also been made that, given that paragraphs 4 (c)(iii) and 4 (d) of article 34 both appear to relate to preferences for domestic content, these could usefully be integrated.

30. The related point was made that granting domestic industry a margin of preference is preferable to the practice of excluding foreign bidders and that the latter option should only be resorted to when there are valid reasons for not granting a margin of preference. Also, transparency would benefit from a requirement to set out the conditions under which foreign bidders can be excluded.

31. The general comment was made that policies such as those outlined above relating to the use of procurement to promote industrial, social or environmental objectives should be acknowledged in the UNCITRAL Model Procurement Law so as to increase transparency and better control their operation.

C. Remedies and enforcement

32. General comments have been made that stronger endorsement of the importance of independent review and more detailed guidance thereon could be given in the UNCITRAL Model Procurement Law or the accompanying Guide to Enactment. Other, more specific, comments have been on the scope of bid protest review, applicable standards and whether review should be carried out by an administrative or judicial body.

1. Scope of review

33. Regarding review standards under the UNCITRAL Model Procurement Law, it has been suggested that the scope of provisions relating to exceptions to review (art. 52, para. 2) could be narrowed so as to permit review of decisions on the selection of procurement methods and rejection of all tenders. It was noted also that the “review by procuring entity” provided under article 53 could operate as an obstacle to rapid review. Also, it has been suggested that a minimum set of standard remedies could be included, possibly as an optional provision.

34. Further, concerning the scope of damages that can be awarded, it has been suggested that compensatory damages (art. 54, para. 3 (f)) should be limited to the cost of bid preparation and submission, because a broader definition might result in funding loss of future profit out of scarce government resources.

2. Review

35. Concerning the institutional status of the domestic review body, comments have been made that adequate and independent administrative review, without going as far as judicial review, is sufficient. In that connection it has been pointed out that article XX, paragraph 6, of the WTO Agreement on Government Procurement, which sets out procedural requirements in relation to an independent administrative body, could be a useful model.

36. It has been suggested that, in order to assure the business community that a review will yield independent results, administrative review could be supplemented by judicial review, except in countries in which courts routinely review the validity

of procurement decisions. In that connection it was noted that the courts of some States in Latin America can issue interim decisions suspending the award process. Comments were made that, in any case, the time frame of the review should be such that the reversal of an incorrect procurement decision would be feasible.

37. Another suggestion has been that the award of small contracts the selection and execution of which is conducted in close proximity to the procurement's intended users could be subject to reviews by users' associations at both the bidding stage and the contract acceptance stage.

D. Other points for consideration

38. In relation to qualification of suppliers, it has been pointed out that, although article 6, paragraph 1 (b)(i), of the UNCITRAL Model Procurement Law refers to "reputation" as a qualification criterion, reputation may not be an objective and transparent qualification criterion.

39. With regard to rules concerning documentary evidence provided by suppliers, it has been suggested that the scope of article 10 of the UNCITRAL Model Procurement Law could be limited to the documentation submitted by the winning bidder.

40. Concerning inducements from suppliers or contractors, it has been suggested that article 15 of the UNCITRAL Model Procurement Law might benefit from an expansion in scope so as to deal with the suspension of collusive bidders, bidders misrepresenting their qualifications or contractors in continuous breach of fundamental contract obligations.

41. With regard to the contents of solicitation documents, suggestions have been received that there may be scope for additional clarification in article 27 of the UNCITRAL Model Procurement Law; in particular, a "lot and package" approach (the practice of dividing the whole procurement into lots or portions that would constitute the minimum acceptable scope of a tender) could be referred to with more clarity in subparagraph (h) and subparagraph (i) could be modified so as to separate into different requirements the inclusion of taxes in the bid price and the inclusion of specific services.

42. Finally, it has been noted that providing guidance on the extent to which the UNCITRAL Model Procurement Law satisfied the requirements of the WTO Government Procurement Agreement could play a role in facilitating and promoting accessions to that Agreement.

IV. Conclusions and recommendations

43. In the light of the above, the Commission may wish to consider whether it would be desirable to study the possibility of a review of the Guide to Enactment of the UNCITRAL Model Procurement Law or of the Model Procurement Law itself so as to increase its appeal as a template for domestic procurement reforms. The possibility of undertaking such a review should not be understood as a suggestion to re-open issues that have already been fully dealt with in the discussions leading to the adoption of the Model Procurement Law. Rather the intention would be to assess

the opportunity of adjusting the Model Law in the light of new developments and practices (notably electronic procurement) or to deal with issues that were not discussed at that time.

44. If the Commission decides that such work in the area of procurement is desirable and feasible, it may wish to request the Secretariat to engage in such consultations so as to prepare a document identifying the open issues, possibly with tentative indications of solutions. Thereafter, an intergovernmental working group might be entrusted with the review of the various issues mentioned in the present note and any other issues that were raised during the consultations. On that basis, the Commission would be able to take a decision on whether further work was warranted and if so what its scope should be.

45. As to the resources needed for any such work, the Commission may wish to take into account that Working Group I, which has completed its work in the area of privately financed infrastructure projects, could be convened to consider these issues.² The Commission may also wish to determine that Working Group I should cooperate closely with Working Group IV (Electronic Commerce) as regards the electronic commerce aspects of procurement legislation.

Notes

¹ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), annex I.*

² As regards the resources of the secretariat of the Commission, it is hoped that the secretariat will be strengthened as from January 2004 so as to allow it to absorb the increased workload resulting from the expansion from three to six UNCITRAL working groups and from projects outside the working groups. In its resolution 57/19 of 19 November 2002, entitled "Enhancing coordination in the area of international trade law and strengthening the secretariat of the United Nations Commission on International Trade Law", the General Assembly requested the Secretary-General to consider measures to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization, if possible during the current biennium and, in any case, during the biennium 2004-2005. In light of that resolution, the proposed programme budget for the biennium 2004-2005 (A/58/6 (Sect. 8)), includes a proposal for three new Professional and one administrative post in the secretariat of the Commission.