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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement

Note by the Secretariat

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 89 of document A/CN.9/WG.I/WP.67, which is before the Working Group at its sixteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.

2. At its fifteenth session, the Working Group completed the first reading of the proposed revised Model Law contained in a note by the Secretariat (A/CN.9/WG.I/WP.66/Add.1-4). It noted that, although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments. The Working Group requested the Secretariat to revise the drafting materials contained in document A/CN.9/WG.I/WP.66/Add.1-4, reflecting its deliberations at the fifteenth session, for further consideration (A/CN.9/668, paras. 11 and 12).

3. The present note is submitted pursuant to the Working Group's request at its fifteenth session to the Secretariat to research the drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in the relevant international instruments. Those provisions have been incorporated in the draft revised Model Law that was before the Working Group at its fifteenth session but raised questions and proposals for revision from the delegates and observers. The Working Group deferred the consideration of those proposals until after it had considered the Secretariat's findings. This note sets out the results of the Secretariat's research. (The draft revised Model Law that reflects the deliberations at the Working Group's fifteenth session (the "proposed revised Model Law") is set out in a separate note (A/CN.9/WG.I/WP.69 and addenda)).

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

II. The Secretariat's findings as regards the drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement

A. Provisions on responsiveness of tenders (article 34 (2) (a) of the 1994 Model Law and draft article 32 (2) (a) of the proposed revised Model Law)

5. At its fifteenth session, the Working Group heard the suggestion that the broad reference to "all requirements set forth in the solicitation documents" in the context of ascertaining responsive tenders should be narrowed by referring only to the

"relevant requirements". The Working Group agreed to defer the consideration of this suggestion to a later stage. The Secretariat was requested: to present the suggestion in square brackets; to research the drafting history of the provisions, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181).

6. The Secretariat researched the drafting history of these provisions and also examined the relevant provisions of the applicable international instruments. The findings are set out below.

Drafting history of the provisions

7. In its first draft of the Model Law, the Secretariat proposed to define a responsive tender as the tender conforming "to the required characteristics of the goods or construction to be procured, contractual terms and conditions and other requirements set forth in the procurement documents" (A/CN.9/WG.V/WP.24, draft article 28 (4) (a)). In the second draft of the Secretariat, the reference was made to the conformity of the tender to "the requirements set forth in the solicitation documents, including requirements concerning the characteristics of the goods, construction [or services] to be procured and the terms and conditions of the procurement contract." In both drafts, the provisions also referred to permissible minor deviations from the requirements set forth in the solicitation documents.

8. At its eleventh and twelfth sessions, in 1990 and 1991, the Working Group on the New International Economic Order, which considered the drafts, agreed with the general principle that the tender must be rejected if it did not conform in all respects to the requirements set forth in the procurement documents, except where deviations from those requirements were minor (A/CN.9/331, para. 156, and A/CN.9/343, para. 49). The Working Group agreed on "a general rule to the effect that a procuring entity might regard a tender as responsive if the tender contained only minor deviations from the requirements set forth in the procurement documents, and that 'responsive tender' be defined in the article containing definitions ([then] article 2). Under that approach, the procuring entity would have the flexibility to determine whether or not a deviation was minor in the context of the particular procurement proceedings." (A/CN.9/331, para. 156).

9. Further to the agreement reached at the twelfth session (A/CN.9/343, paras. 49-52), the provisions were reformulated: the reference was made to "all" requirements set forth in the tender solicitation documents and the words at the end of the provisions (reproduced in paragraph 7 above) beginning with the word "including" were deleted as being superfluous. At that session, the Working Group did not accept the proposal that the provisions should refer to "mandatory" requirements, in order to distinguish specifications or stipulations in the solicitation documents to which tenders must conform from those to which tenders need not to conform (for example, if tenders could be enhanced). It was agreed that the word "requirements" itself implied that conformity was mandatory" (A/CN.9/343, para. 50).

10. The notion that, in order to be considered responsive, a tender had to conform to all of the requirements set forth in the solicitation documents, was reiterated at the Working Group's fourteenth session (A/CN.9/359, para. 155).

11. At subsequent sessions, the Working Group had before it further revised wording of the relevant provisions. They in particular reflected the Working Group's decision not to include a definition "responsive tender" in article 2 of the Model Law, but to include its substance within the article addressing evaluation and comparison of tenders (A/CN.9/WG.V/WP.36, draft article 28 (1 bis) (a)). The revised provisions read in essence as article 34 (2) (a) of the 1994 Model Law, which are procedural in nature since they indicate which tenders can be regarded as responsive, rather than defining responsiveness itself. Suggestions to replace in those provisions the word "may" with "shall" and to delete the word "only" did not gain support (A/CN.9/371, paras. 145 and 252, and annex, article 29 (2) (a)).

12. Upon circulation of the draft Model Law for comments and adoption of the text of the Model Law by the Working Group and the Commission, in 1994, no pertinent changes were proposed to these provisions (A/CN.9/392, para. 106, and A/49/17, para. 44).

13. The drafting history does not indicate that the drafters considered the provisions of article 34 (2) (a) in conjunction with article 34 (3). Article 34 (3) lists grounds for rejection of tenders, setting, among others, the absence of qualifications of suppliers or contractors and non-responsiveness of tenders as separate grounds. While both – the requirements applicable to qualifications of suppliers or contractors and requirements as regards responsiveness of tenders – would be set forth in the solicitation documents, from the drafting it is not clear whether the drafters intended that both or only the latter (i.e., excluding the requirements applicable to qualifications of suppliers) would be taken into account in determining the responsiveness of tenders. The drafters of the 1994 text were not persuaded of the merits of specifying which requirements are taken into account in ascertainment of the responsiveness of tenders, preferring to keep the general reference in the Model Law to all requirements in the solicitation documents (see paragraphs 7-9 above).

Relevant provisions of applicable international instruments

14. The WTO Agreement on Government Procurement, which entered into force in 1994 (the WTO GPA), requires in this context that for a tender to be considered for award it must, at the time of opening, comply with "the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation" (article XIII (4) (a)). The respective provisions in the provisionally agreed text of the revised WTO Agreement on Government Procurement (the revised WTO GPA)[1] are essentially the same: "to be considered for award, a tender must be in writing and must, at the time of opening, comply with the essential requirements of the notices **and** tender documentation and be from a supplier that satisfies the conditions for participation" (emphasis added) (article XV (4)). (The WTO GPA and the revised WTO GPA are hereafter referred to collectively as the "WTO instruments".)

15. The equivalent provisions of the EU procurement directive 2004/18/EC of 31 March 2004 (the EU directive) appear to be located in article 41 (2), second indent, and refer to reasons to be given to any unsuccessful tenderer for the rejection

[1] Document GPA/W/297, December 2006, available as of the date of this report at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

of its tender. The provisions refer in this context to technical specifications, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.

Options for the Working Group to consider

16. The Working Group may wish to clarify either in the Model Law or in the Guide that the reference to "all requirements set forth in the solicitation documents" in the context of ascertaining responsive tenders should be read as a reference to the requirements relevant to that ascertainment and not as a reference to all requirements set out in the solicitation documents. For example, the solicitation documents may include requirements applicable to the qualifications of suppliers or contractors, or requirements about modalities and the deadline for submission of tenders. The consequences of non-compliance with these latter requirements are addressed in other articles of the Model Law, for example, article 30 (6) of the 1994 Model Law, which addresses late submissions.

B. Provisions on the successful tender (article 34 (4) (b) and 42 (2) (b) of the 1994 Model Law and draft articles 32 (4) (b), 35 (8) (b) and 47 (1) of the proposed revised Model Law)

17. The Working Group, at its fifteenth session, heard suggestions that the use of the term "lowest evaluated tender" in the revised Model Law should be reconsidered. In particular, the use of the term "the best evaluated submission" was suggested. It was explained that in practice it was the highest or the best, not the lowest, evaluated submission that was accepted. The provisions, it was pointed out, as drafted at present, might cause unnecessary confusion. The Working Group noted that the term "lowest evaluated tender" was used in the 1994 text (A/CN.9/668, paras. 180 (c) and 220). The Working Group also noted in this context that the 1994 Model Law in the context of article 42, Selection procedure without negotiation (in the proposed revised Model Law is presented as draft article 35 entitled "Two-envelope tendering"), did not use the term "lowest evaluated tender" but referred to the successful proposal as the proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (1) of that article and the price (A/CN.9/668, para. 200).

18. A separate suggestion linked to these provisions was that the revised Model Law in the relevant parts should make it clear that where the price was the only award criterion, the contract was to be awarded to the lowest priced submission, and where there were price and other award criteria, the contract was to be awarded to the lowest/best evaluated submission (A/CN.9/668, para. 180 (d)).

19. The Working Group agreed to defer the consideration of all these suggestions to a later stage. The Secretariat was requested: to present the suggestion in square brackets; to research the drafting history of the provisions, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered (A/CN.9/668, paras. 180-181).

20. The Secretariat researched the drafting history of these provisions and also examined the relevant provisions of the WTO instruments and the EU directive. The findings are set out below.

1. The use of terminology

Drafting history of the provisions

21. In its first draft of the Model Law, the Secretariat used the term "the most advantageous tender" and defined it as the tender with the lowest price or the most economically advantageous tender (A/CN.9/WG.V/WP.24, draft article 28 (7) (c)).

22. When that first draft was considered at the eleventh session of the Working Group on the New International Economic Order, the concern was expressed about the use of the term "most advantageous tender". Notwithstanding of the provided definition of the term, it was considered that the danger was high that the term could be misinterpreted in such a way as to imply that the procuring entity had considerably more discretion in evaluating tenders than was intended. It was therefore agreed that the term be replaced with another term that was less susceptible to misinterpretation (A/CN.9/331, para. 166).

23. In its second draft, the Secretariat used the term "the most economic tender" and defined it as the tender with the lowest tender price or the lowest evaluated tender (A/CN.9/WG.V/WP.28, draft article 28 (7) (c)). When that draft was considered by the Working Group, concerns were expressed as regards both of the newly suggested terms – "the most economic tender" and "the lowest evaluated tender". The terms did not appear to the drafters as taking sufficient account of the use by the procuring entity of criteria other than price to select the successful tender. Similar misgivings were expressed again also with respect to the terms used in the first draft (see paragraph 21 above).

24. As regards the term "the most economic tender", it was widely felt that a more neutral term, such as "successful tender," should be used (A/CN.9/356, para. 22). This term was agreed to be used provisionally pending the determination of a more suitable expression (A/CN.9/356, para. 27). However, the records did not indicate that any discussion of an alternative term took place, or any concern about the use of the term "successful tender" were expressed, at the subsequent sessions of the Working Group and upon adoption of the 1994 text in the Commission. The term "successful tender" is used throughout the 1994 Model Law in the relevant context.

25. As regards the term "the lowest evaluated tender", although some misgivings were initially expressed about this term when it was first before the Working Group at its thirteenth session (see paragraph 23 above), the term was nevertheless continued being used in the formulations considered by the Working Group at that session (A/CN.9/356, paras. 26 and 31).

26. In its third draft, the Secretariat suggested for consideration by the Working Group the term "most favourable tender" in place of the term "lowest evaluated tender" (A/CN.9/WG.V/WP.33, draft article 28 (7) (c) (ii) and (d), footnote 13)). Support was expressed in the Working Group for the use of that alternative term on the grounds that the term "lowest evaluated tender" might suggest that price was dispositive factor and that the term appeared to be opaque and contradictory. The prevailing view however was that the term "most favourable tender" connoted an

undesirable degree of subjectivity, while the term "lowest evaluated tender", despite its drawbacks, was preferable because it suggested a greater degree of objectivity (A/CN.9/359, para. 156).

27. No concerns were expressed about the use of the term "the lowest evaluated tender" at subsequent sessions of the Working Group and upon adoption of the 1994 text in the Commission. It is used in the 1994 Model Law (article 34 (4) (b) (ii) and (c)).

Relevant provisions of applicable international instruments

28. The WTO instruments in the respective context state that the contract is to be awarded to the supplier:

(a) Whose tender is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documents is determined to be the most advantageous (article XIII (4) (b) of the WTO GPA);

(b) That submitted the most advantageous tender, or where the price is the sole criterion, the lowest price (article XV (5) (a) of the revised WTO GPA).

29. The EU directive in this context uses the term the most economically advantageous tender (articles 53-54) (although in some instances the term "the best tender" is also used (articles 32 (4) (d) and 33 (6)).

Options for the Working Group to consider

30. In considering the use of the term the "lowest evaluated tender", and other alternatives such as "the best evaluated tender/submission" in its place, as was proposed at the Working Group's fifteenth session (see paragraph 17 above), the Working Group may wish to consider the extensive consideration of the various terms to be used in the relevant context at the time when the 1994 text was drafted and the advantages and concerns expressed about the use of such terms. The Working Group may also wish to consider the effect of the change on the States who enacted the 1994 Model Law with the terminology used therein.

31. As was acknowledged by the drafters, the term "lowest evaluated tender" has its drawbacks and may be confusing in practice, especially in the context of the new provisions on electronic reverse auctions (in which the highest score wins the contract where non-price factors are involved). The Working Group may also wish to take into account concerns that the drafters expressed about an undesirable degree of subjectivity that alternative terms may introduce in the process of identifying the successful tender

32. The term "the best evaluated tender/submission" was not considered by the drafters at the time the 1994 text was prepared, but the concerns about subjectivity may also apply to this term, especially in the light of its closeness to the term "the best and final offer" commonly used in procurement methods involving negotiations.

33. The Working Group may wish to consider that departures from the use of the term appropriate for tendering may be justifiable in other provisions of the Model Law, in the light of the specifics of the procurement method concerned. For example, in the provisions on two-envelope tendering (see paragraph 17 above), the

use of the term "lowest evaluated tender" would be misleading since it presupposes that price and non-price criteria are assessed simultaneously. Thus it may be justifiable to refer in these latter provisions to the best[2] combined evaluation in terms of the criteria other than price and the price, which more accurately reflects the evaluation process in that procurement method. The same is true with respect to the use of the term the "best and final offer" in procurement methods involving negotiations.

2. Specification of the award criterion/criteria in the definition of the successful tender

Drafting history of the provisions

34. In the accompanying commentary to the first draft of the Model Law, it was explained that "the most advantageous tender" would be the tender with the lowest price when it was ascertained on the basis of the tender price alone. Where "the most advantageous tender" would be the most economically advantageous tender, the criteria in addition to the tender price would be considered (A/CN.9/WG.V/WP.25, paras. 16-17 of the commentary to draft article 28). These ideas have subsequently been reflected in the accompanying Guide commentary to the 1994 Model Law.

35. When the draft Model Law approved by the Working Group on the New International Economic Order was considered in the Commission in 1993, a suggestion was made to amend the provisions on the successful tender based on the lowest priced tender as follows: "The successful tender shall be (i) the tender from the tenderer which has been determined to be fully capable of undertaking the contract and whose tender bears the lowest tender price." It was explained that the purpose of the amendment was to allow the procuring entity to take into account, in addition to the price, also the capability of the tenderers to perform the contract. The proposed modification did not attract much support. It was agreed that, once a supplier or contractor was found to be qualified and its tender accepted, slight differences among the suppliers or contractors as to their capability to perform the contract should not be used as a factor in evaluating the tenders. Otherwise, an undesirable degree of subjectivity would be injected into the evaluation of tenders that would open the door to improper practices. To guard against this risk in tendering proceedings, the qualification decision should be simply an "in or out" decision, and not a criterion for comparing tenders (A/48/17, para. 172).

Relevant provisions of applicable international instruments

36. The WTO GPA is silent in this respect. The relevant provisions of the revised WTO GPA state that the contract is to be awarded to the supplier that submitted the

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[2] It should be noted that the original draft referred to the "highest combined evaluation". It was subsequently agreed to replace it with the "best combined evaluation", in view of the confusion that might be caused if it were juxtaposed with the notion of the lowest price. The Working Group also took into account that technical factors would not necessarily be expressed or quantified in monetary terms, the system using "merit" points might be used in rating proposals rather than adjusting the price to reflect the relative technical merit of a proposal (A/CN.9/389, para. 73).

most advantageous tender, or where the price is the sole criterion, the lowest price (article XV (5) (a) of the revised WTO GPA).

37. The relevant provisions of the EU directive state that the criteria on which the contracting authorities shall base the award of public contracts shall be either: (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or (b) the lowest price only (article 53 (1)).

Option for the Working Group to consider

38. The additions proposed to be made to the text at the Working Group's fifteenth session (see paragraph 18 above) appear not to contradict the intention of the drafters and may align the revised Model Law with the applicable international instruments in the relevant part. It should be noted that the proposed revisions are also in line with the drafting approach taken in the provisions on electronic reverse auctions (draft article 41 (2) of the proposed revised Model Law). The Working Group may wish therefore consider incorporating the proposed changes in the revised Model Law, and may wish to include references to these terms in draft article 12 of the proposed revised Model Law. The Working Group may also wish to clarify the matter further in the accompanying Guide.

C. Provisions on compensation for losses (article 54 (3) (f) of the 1994 Model Law and draft article 58 (5) (f) of the proposed revised Model Law)

39. The Working Group, at its fifteenth session, considered provisions on compensation for costs or losses in the 1994 Model Law. The Working Group agreed:

(a) To retain in paragraph (5) (f) of the relevant draft article (draft article 58 of the proposed revised Model Law) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the WTO GPA and article XVIII (7) (b) of the revised WTO GPA;

(b) To move option II from paragraph (5) (f) to the Guide with an explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses had proved to be highly disruptive for procurement proceedings, in that it provided additional incentives for complaints. It was also suggested that the Guide should explain the evolution in regulations on this matter and highlight the relevant provisions of the WTO GPA and the revised WTO GPA.

40. The Secretariat researched the drafting history of the relevant provisions and the relevant provisions of the WTO instruments. The findings are set out below.

Drafting history of the provisions

41. The question as to the types of losses that should be compensable was addressed at the tenth session of the Working Group on the New International Economic Order. A view was expressed at that session that compensation should be limited to the costs of the tenderer in preparing and submitting its tender; the tenderer should not be entitled to compensation for its lost profits since that would expose the procuring entity to complaints for potentially large sums. The Working Group did not take any decision on that issue at that session (A/CN.9/315, para. 120).

42. In its first draft of provisions on administrative review, the Secretariat's relevant wording on compensation read as follows: "The [insert name of administrative body] may grant one or more of the following remedies: … (g) require the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act of decision of, or procedure followed by, the procuring entity (A/CN.9/WG.V/WP.27, draft article 38 (2) (g)). In the accompanying commentary, it was noted that, in the absence of the decision by the Working Group on the matter, two alternative possibilities were set forth within square brackets: under the first possibility, the costs envisaged would not include profit from the procurement contract that was lost because of non-acceptance of the tender or offer of the complainant; the second possibility might include lost profit in appropriate cases (paragraph 7 of the commentary on draft article 38, and paragraph 3 of the commentary on draft article 37, in A/CN.9/WG.V/WP.27).

43. At the Working Group's thirteenth session, no decision was reached regarding the types of losses to be compensated. On a related issue, the Working Group agreed that the notion of interest or injury that the person would be required to have in order to be entitled to seek review should be linked to actual or potential loss or damage suffered when the procuring entity violated duties established in the provisions of the Model Law (A/CN.9/356, para. 156).

44. In the absence of the relevant decision at the Working Group's thirteenth session, the same wording was presented for the Working Group's consideration at its next session. At the fourteenth session, differing views were expressed as to the two alternative possibilities. The relevant extracts from the report of that session (A/CN.9/359) are reproduced below:

> "230. …One view was that limiting recovery merely to tender or proposal preparation costs would result in insufficient compensation. At the same time, it was acknowledged that exposing the procuring entity also to liability for other losses suffered, in particular lost profit, was excessive given the fact that compensation would come from the public purse. It was therefore suggested that compensation should be set somewhere between the mere costs associated with participating in the procurement proceedings and lost profit. The prevailing view, however, was that the Model Law should not recommend as necessary the adoption of a standard of compensation beyond costs associated with the procurement proceedings. In particular, the concern was voiced that the Model Law should not add to the burdens borne by procuring entities in the developing world. At the same time, it was agreed that the

Model Law should exclude the possibility of compensation of costs beyond those associated with the procurement proceedings.

"231. Several suggestions were considered for leaving open the possibility of compensation beyond the costs associated with the procurement proceedings. One suggestion was to indicate that the administrative body may require the compensation of "at least" for costs associated with the procurement proceedings. Another suggestion was that the possibility of additional compensation would remain open without the addition of any such language because a complainant might obtain further compensation from a court. The Working Group finally decided that it would be best to present both approaches to compensation currently embodied in subparagraph (g) as options for the enacting State and to discuss in the commentary the choice to be made in this regard by legislatures."

45. The decision taken at that session was not reopened at the Working Group's subsequent sessions and was not questioned upon adoption of the text of the Model Law in the Commission. Two options for the provisions on compensation were included in the 1994 text, and they were accompanied by the exiting commentary in the Guide (see paragraph 10 of the Guide commentary to article 54).

Relevant provisions of applicable international instruments

46. The relevant extracts from the WTO instruments read as follows:

"7. Challenge procedures shall provide for: … (c) … corrective action or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest." (Article XX of the WTO GPA)

"7. Each Party shall adopt or maintain procedures that provide for: … (b) … corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both." (Article XVIII of the revised WTO GPA)

47. Commentators, when addressing the meaning of these extracts, have observed that they can be interpreted as limiting pecuniary relief to costs for tender preparation or costs of challenge, and alternatively as giving an option to States to provide for damages in addition to such costs. The Working Group may note that the use of the facilitative word "may" as regards limiting pecuniary compensation, rather than a more prescriptive word (such as "shall", or "should"), is the basis of some of these interpretations (notwithstanding the addition of the words "or both" at the end of article XVIII of the revised WTO GPA). Commentators have also observed that the provisions are designed to enable States to enact them in accordance with the traditions and practices in their own legal systems.

48. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (the "Remedies Directive") requires member States to provide for interim measures, for setting aside decisions taken unlawfully and for awarding damages to persons harmed by such decisions (article 2 (1)). It does not set the legal

grounds for award of damages nor a basis for calculating the amount of damages to be awarded. The issue of the award of damages is left to national jurisdictions.

49. As the Remedies Directive has not yet been implemented in all European Union member States, the Working Group may wish to consider the relief available in current national systems within the European Union. The issue of awarding damages in most systems is approached from the broader perspective of putting in place an effective remedies system.[3] Some commentators, for example, have observed that providing in legal texts for remedies that are not practically available (such as by making awards of damages contingent on the complainant proving conclusively that it would have won the procurement contract concerned) might render the system ineffective.

50. In accordance with the results of studies of review and remedies systems of the European Union member States by the Support for Improvement in Governance and Management Programme (SIGMA), launched by the Public Governance Committee of the Organization for Economic Cooperation and Development (OECD): "there is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies. However, the practice varies significantly across countries."[4]

51. According to a joint survey of the OECD and the European Union,[5] the relief in the European Union member States focuses on corrective action (sometimes known as interim relief) and pecuniary compensation, including the costs of tender preparation, of the challenge procedure, and other damages. In some systems, the SIGMA Paper No. 30 "Public Procurement Review Procedures," available at http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN006807.pdf.possibility of award for damages is viewed as an integral part of an effective recourse system, and in most systems, the primary remedy is corrective action. Damages may be available where corrective action is not possible or practicable, or more generally (and they may include not only lost profits, but also loss of a chance to win the contract concerned, and (less commonly) loss of reputation). Practices differ as regards review bodies that may award compensation of damages.

52. More specifically, when the legal grounds for claiming compensation of damages exist, tender costs are awarded in all member States while lost profits in some European Union member States, such as Denmark, Finland, Germany, Hungary, Latvia, Lithuania, the Netherlands, Portugal and the United Kingdom. In France, lost profits are awarded if the claimant had a serious chance of winning the contract. In most cases, courts, ordinary or administrative, have power to award compensation of damages; in Denmark, however, a specialized public procurement review body also has such power. According to commentators on the European

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[3] A requirement that remedies systems be effective also underpins the provisions in the WTO instruments (article XX.2 of the WTO GPA and article XVIII of the revised WTO GPA), the United Nations Convention Against Corruption (article 9 (1) (d)), and the APEC Non-Binding Principles on Government Procurement (Annex 3, at 4.1). These texts also suggest that the systems should be non-discriminatory, transparent, timely and effective.

[4] E. Beth, "Integrity in Public Procurement: Good Practice from A to Z", OECD, 2007. Available at SSRN: http://ssrn.com/abstract=987026 and through the OECD website.

[5] SIGMA Paper No. 30 "Public Procurement Review Procedures", available at http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN006807.pdf.

Union procurement regulations, there are increasing examples of successful actions in some European Union member States for damages in the field of the enforcement of public procurement rules, including actions for loss of profit.[6]

53. The provisions in the systems surveyed by the OECD are in broad terms consistent with the overall emphasis on the primacy of corrective action in the WTO instruments, though they appear to be more facilitative of damages as relief than the provisions in the WTO instruments. The development of case law in national systems and in the European Court of Justice,[7] and the fact that the Remedies Directive is not yet broadly implemented, indicate that this is a developing area of law.[8]

Option for the Working Group to consider

54. In the light of the drafting history of the provisions, the wording of the applicable international instruments and their less than uniform interpretation, the Working Group may wish to consider how best to implement its decisions set out in paragraph 39 above. One option would be to use a prescriptive term to prevent the award of damages such as for lost profits in the text of the Model Law, and another would be to retain the arguably more flexible approach of the WTO instruments. It may wish to provide additional guidance as it deems appropriate on the subject in the revised Guide, addressing such matters as ensuring an effective system of remedies, the balance between various types of relief, the particular issues arising with setting aside concluded contracts, and the different considerations that might apply to administrative rather than judicial remedies (including the potential risk of abuse if administrative systems concentrate decision-making power, particularly the power to award damages, in a small entity or the hands of a few individuals).

D. Provisions on some other remedies (article 54 (3) (a) of the 1994 Model Law and draft article 58 (5) (a) of the proposed revised Model Law)

55. The Working Group, at its fifteenth session heard the suggestion that paragraph (5) (a) of draft article 60 (draft article 58 of the proposed revised Model Law) should be included in the chapeau of the paragraph. The relevant paragraph lists the declaration by an independent administrative body of the legal rules or

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[6] See, e.g., a series of articles on the subject in Public Procurement Law Review, 2006, vol. 15, pp. 159-240; also S. Treumer "Damages for Breach of the EC Public Procurement Rules from a Danish Perspective", European Business Organization Law Review, 2004, and H. Leffler, "Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions", *Public Procurement Law Review*, 2003, vol. 4, p. 151 at p. 161.

[7] For a summary of some European cases prior to the Remedies Directive, see http://www.sigmaweb.org/dataoecd/44/45/40443900.ppt, and for information about infringement of European Union law, see http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm.

[8] For a summary of federal review in the United States (which is conducted by the United States Government Accountability Office (GAO), in which "anticipatory damages" (broadly speaking, lost profits) are not awarded, see "Bid Protests at GAO: a Descriptive Guide", 8th ed., 2006 (GAO-06-797SP), available at http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf , and for the published case reports, see resources at http://www.gao.gov/legal/bidprotest.html.

principles that govern the subject-matter of the complaint as one of the remedies that the independent administrative body may grant. It was explained that the listed measure could not be regarded as a remedy but should rather be regarded as a natural step in the review process. The Working Group requested the Secretariat to research the drafting history of the provisions and decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264).

56. The wording in question and its location in paragraph was included in the Secretariat's first draft of provisions on administrative review and remained as such throughout the negotiation of the 1994 text. No concerns were raised about its content or location. The general comment was made at the tenth session of the Working Group on the New International Economic Order that the remedies listed in the relevant paragraph would be available to a tenderer depending on the nature of its claim (A/CN.9/315, para. 121).

57. Thus it may be that the aggrieved supplier or contractor is submitting a claim to an independent administrative body in which it complains about the application by the procuring entity of incorrect legal rules or principles to the subject-matter of its complaint (for example if it appeals to the administrative body the decision taken by the procuring entity under article 53 of the 1994 Model Law). In such a case, the administrative body would grant the remedy listed in article 54 (3) (a) of the 1994 text.

58. In the light of this explanation, the Working Group may wish to consider whether there may be a benefit in retaining the wording and its location as it appears in the 1994 text.

E. Exceptions to disclosure (articles 11 (3) (a) and 55 (3) of the 1994 Model Law and draft articles 19 (2) (b), 22 (4) (a), and 59 (3)-(5) of the proposed revised Model Law)

59. The Working Group, at its fifteenth session, heard the suggestion that the exceptions to disclosure in paragraph (2) (b) of draft article 19 were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. The Working Group agreed to consider whether to revise the wording at a future session (A/CN.9/668, para. 131).

60. As was pointed out at that session, the exceptions to disclosure in paragraph (2) (b) of draft article 19 were linked to draft article 22 (4) (a) of the proposed revised Model Law (the article on the record of procurement proceedings; article 11 (3) (a) of the 1994 Model Law), from which the relevant wording was taken (A/CN.9/668, para. 130). It should also be noted that exceptions to disclosure are also found in article 34 (8) of the 1994 Model Law (draft article 31 (8) of the proposed revised Model Law) that reads:

> "(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11."

61. The Secretariat researched the drafting history of articles 11 (3) (a) and 34 (8) of the 1994 Model Law and examined the relevant provisions from the applicable international instruments. The findings are set out below.

Drafting history of the provisions

62. The Secretariat's first draft of provisions on the record of procurement proceedings stated that "no information shall be disclosed contrary to any law of [this State] relating to confidentiality" (A/CN.9/WG.V/WP.24, draft article 33 (2)). When this draft was before the Working Group on the New International Economic Order, it was agreed that the scope of confidentiality should be expanded by providing that "information should not be disclosed if disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition." Some opposition was expressed with this wording on the ground that the scope of disclosure could severely be restricted by enacting States that would adopt laws making various aspects of procurement proceedings confidential (A/CN.9/331, para. 210). At subsequent sessions, it was agreed however to retain all these restrictions to disclosure but add in the Model Law that disclosure may be made in these cases by the order of a competent court and subject to the conditions of such an order (A/CN.9/356, para. 80).

63. The Secretariat's first draft of what became article 34 (8) of the 1994 Model Law was in essence the same as the current text (A/CN.9/WG.V/WP.24, draft article 28 (9)). When the draft was considered by the Working Group on the New International Economic Order, it was generally agreed that information relating to the examination, clarification, evaluation and comparison of tenders should not be disclosed except as provided in the article on the record of procurement proceedings. The explicit reference in this context was made to possibility of obtaining an order of a competent court on disclosure of the information concerned (A/CN.9/331, para. 211, and A/CN.9/356, para. 80). Thus the Working Group ultimately adopted the original wording proposed in the Secretariat's first draft, with some drafting modifications. No concerns about the wording were raised during the adoption of the text of the Model Law in the Commission.

Relevant provisions of applicable international instruments

64. As was noted at the Working Group's fifteenth session (A/CN.9/668, para. 131), the wording in question used in the 1994 Model Law and repeated in the proposed revised Model Law is similar to the wording on the same subject found in the WTO instruments and the EU directive. The table below sets out the relevant provisions from these instruments for ease of reference:

WTO GPA (1994)	Revised WTO GPA (2006)	EU directive
Article XVIII **Information and Review as Regards Obligations of Entities** … 4. However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2 (c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers. **Article XIX** **Information and Review as Regards Obligations of Parties** ... 2. The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.	**Article XVII** **Disclosure of Information** ... *Non-Disclosure of Information* 2. Notwithstanding any other provision of this Agreement, a Party, including its procuring entities, may not provide information to a particular supplier that might prejudice fair competition between suppliers. 3. Nothing in this Agreement shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to release confidential information under this Agreement where release: (a) would impede law enforcement; (b) might prejudice fair competition between suppliers; (c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or (d) would otherwise be contrary to the public interest.	**Article 35** **Notices** **…** 4. … Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where release of such information would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them. **Article 41** **Informing candidates and tenderers** 1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities. … 1. However, contracting authorities may decide to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether

WTO GPA (1994)	Revised WTO GPA (2006)	EU directive
		public or private, or might prejudice fair competition between them. **Article 69** **Notices** 2. … Where the release of information on the outcome of the contest would impede law enforcement, be contrary to the public interest, prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or might prejudice fair competition between service providers, such information need not be published.

Options for the Working Group to consider

65. The Working Group may consider that the concerns raised regarding the provisions were fully considered by the drafters of the 1994 Model Law, that nevertheless they preferred to use the current wording, and that the current wording is aligned with the relevant provisions of the applicable international instruments.

66. In addition, the Working Group may wish to consider that, whatever wording is adopted as regards restrictions to disclosure, the provisions of the revised Model Law where such restrictions are set out should all be aligned. Apart from the provisions on the record of procurement proceedings, examination, evaluation and comparison of tenders, and acceptance of the successful tender (standstill provisions), other provisions of the proposed revised Model Law follow the wording of article 11 (3) (a) of the 1994 Model Law in setting out exceptions to disclosure (for example, draft article 59, which is based on article 55 of the 1994 Model Law and which was further revised pursuant to the deliberations at the Working Group's fifteenth session (in particular, the agreement to add the provisions on exceptions to disclosure; see A/CN.9/668, para 267)).

67. In addition, the Working Group may wish to ensure internal consistency among all relevant provisions, such as those on restrictions on disclosure of information relating to the examination, clarification, evaluation and comparison of tenders in article 34 (8) of the 1994 Model Law (draft article 31 (8) of the proposed revised Model Law).