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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the following sections and sub-sections of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: I. Introduction ("History and purpose of the UNCITRAL Model Law on Public Procurement" and "Purpose of the Guide") and II. Main features of the Model Law ("Objectives", "Scope" and "General approach").

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part I. General remarks

I. INTRODUCTION

A. History and purpose of the UNCITRAL Model Law on Public Procurement

1. History

1. At its twenty-seventh session (New York, 31 May-17 June 1994), the United Nations Commission on International Trade Law (UNCITRAL or the Commission) adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law),[1] and an accompanying Guide to Enactment.[2] The 1994 Model Law proved to be widely-used and successful. It formed the basis of procurement law in more than thirty countries across the world, and its general principles have been reflected to a greater or lesser degree in many more.

2. At its thirty-seventh session, in 2004, the Commission decided that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic public procurement, and the experience gained in the use of the 1994 Model Law as a basis for law reform, without departing from its basic principles.

3. The UNCITRAL Model Law on Public Procurement, adopted by the Commission at its forty-fourth session (Vienna, 27 June-… July 2011) (the revised Model Law)[3] is the result of the work of UNCITRAL to reform the 1994 Model Law. This Guide accompanies the revised Model Law. References to the "Model Law" in this Guide, save where otherwise noted, are to the revised Model Law.

2. Purpose

4. The decision by UNCITRAL to formulate model legislation on procurement was promoted by a wish to address inadequate or outdated legislation that had been observed in many countries, resulting in inefficiency and ineffectiveness in the

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[1] The text of that Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17)), and is also available at www.uncitral.org.

[2] The first UNCITRAL text on public procurement was the UNCITRAL Model Law on Procurement of Goods and Construction, adopted in 1993 at the twenty-sixth session of the Commission (annex I to the report of UNCITRAL on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17)). This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.

[3] The text of the revised Model Law is found in annex I to the report of UNCITRAL on the work of its forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17)), and is also available at www.uncitral.org.

procurement process, abuse, and the consequent failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

5. Inadequate procurement legislation at the national level creates obstacles to international trade (the promotion of which is a major aspect of the mandate of UNCITRAL), a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may be a partial limitation on the extent to which Governments can access the competitive price and quality benefits available through international procurement. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

6. The purpose of the Model Law is therefore three-fold: first, to serve as a model for States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The third purpose is to allow users of the 1994 Model Law to amend their national legislation to reflect modern procurement practices.

3. Universal application of the Model Law

7. In accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law. This approach also serves to ensure that the text reflects best practice, and its provisions are universally applicable.

8. In the period following the issue of the 1994 Model Law, the text was used most frequently as a basis for introducing procurement legislation in countries whose economies were in transition and in developing countries. In countries at those levels of development, a substantial portion of all procurement is engaged in by the public sector, and a substantial proportion of gross domestic product is represented by public procurement. A significant part of total procurement may arise in connection with projects that are part of the essential process of economic and social development, and procurement may be targeted at enhancing such development and capacity-building. In economies in transition, the introduction of procurement legislation is also part of a process of increasing the market orientation of the economy and a tool to regulate the relationship between its public and private sectors.

9. For developed countries, many of which enacted procurement legislation before the Model Law was issued, the Model Law's flexible and non-prescriptive provisions can be utilized as a tool for evaluation and modernization of existing systems and earlier legislation, so as to improve the outcomes in public procurement.

10. The potential of the Model Law as an instrument to harmonize international trade will be fully realized to the extent that it is used by all types of States. The text has therefore not been designed with any particular groups of countries or particular state of development in mind, and does not promote the experience in and approach of any one region. Sound laws and practices for public sector procurement are

necessary in all countries: resources are scarce in all regions, even if relative scarcity varies, and so the Model Law is designed to facilitate the objective of ensuring that procurement is carried out in the most advantageous way possible.

4. Interaction with other international texts addressing public procurement

11. Since the issue of the 1994 Model Law, other international texts and agreements addressing public procurement have been promulgated, and they confer obligations that affect national procurement legislation in States that are parties to the texts concerned. The Model Law is expressly subject to any international agreements entered into by the enacting State (pursuant to article [3]), and UNCITRAL has sought to ensure, to the extent possible, consistency with these international texts and with common provisions in regional texts, so that it can be used by parties to them without major amendment.

12. The United Nations Convention against Corruption (New York, 31 October 2003)[4] (the Convention against Corruption) addresses the prevention of corruption by setting mandatory minimum standards for procurement in its article 9, which requires each State party to take the "necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption". Although the Model Law is not an anti-corruption instrument per se, its procedures are aimed, among other things, at the avoidance of abuse, so allowing the many enacting States that will be subject to the Convention against Corruption to comply with its obligations.

13. The Agreement on Government Procurement of the World Trade Organization (the WTO) contained in the Final Act of the 1986 —1994 Uruguay Round of trade negotiations (the 1994 GPA)[5] is a plurilateral agreement between [28] members, whose purpose is described by the WTO as to open up as much of public procurement as possible to international competition, through making laws, regulations, procedures and practices regarding government procurement more transparent and ensuring that Governments do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. [A new Agreement on Government Procurement is expected to be formally issued in 2011[6] [to be updated and a generic reference to both versions of the GPA (the "GPA") is to be included].] There are also regional trade agreements and procurement directives applicable in other economic or political groupings of States. The Model Law is designed with sufficient flexibility to allow enacting States to adapt it to meet their international trade obligations as regards procurement without compromising the efficacy of the text itself.

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[4] United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

[5] Available at www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (accessed January 2011).

[6] The provisionally agreed revised GPA text (of 11 December 2006) is available at www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm (accessed January 2011) [to be updated].

14. In developing countries and countries whose economies are in transition, many procurement projects may be funded by multilateral donors or by foreign direct investment and, indeed, donors may finance procurement reform. The Model Law includes provisions that are suitable for all types of procurement, including large-scale and complex projects, and so can be used for the procurement aspects of privately or donor-funded projects. The multilateral development banks have agreed to harmonize their regimes as regards donor-financed procurement. The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action[7] provide, inter alia, for partner country ownership and the use of country systems for aid delivery (in circumstances in which the procurement system in the country concerned is assessed to be of the requisite standard). As the Model Law is drafted to reflect best practice in procurement, enacting States can be assured that it provides a sound basis for an approach based on the use of a country's procurement system.

B. Purpose of the Guide

15. In preparing and adopting the Model Law, UNCITRAL is mindful that the Model Law will be a more effective tool for States modernizing their procurement legislation if background and explanatory information is provided to policymakers and legislators to assist them in using the Model Law, particularly if there is limited familiarity with the type of procurement procedures it contains. This Guide also addresses the expanded scope of the revised Model Law as compared with its 1994 counterpart, and also explains, as necessary, the main recent developments in procurement that underlie the revisions made to the 1994 Model Law.

16. The information presented in this Guide is intended to explain both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The information in this Guide may also assist States in exercising the options provided for in the Model Law and in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular local circumstances. For example, options have been included on issues that are expected in particular to be treated differently from State to State, such as the definition of the term "procuring entity", which involves the scope of application of the Model Law, and issues related to challenge and appeals procedures.

17. Taking into account that the Model Law is a "framework" law and provides only essential principles and procedures (see further section [II.D] below), this Guide discusses the need for regulations to support legislation based on the Model Law, identifies the main issues that should be addressed in them, and discusses legal and other infrastructure that will be needed to support the effective implementation of the text.

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[7] Available at www.oecd.org/dataoecd/30/63/43911948.pdf (accessed January 2011).

II. MAIN FEATURES OF THE MODEL LAW[8]

A. Objectives

18. The Model Law has six main objectives, set out in its Preamble, which can be summarized as follows:

(a) Achieving economy and efficiency (value for money);

(b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;

(c) Maximising competition;

(d) Ensuring fair and equitable treatment;

(e) Assuring integrity, fairness and public confidence; and

(f) Promoting transparency.

19. The above objectives are mutually supporting and reinforcing. The procedures and safeguards in the Model Law are designed to promote objectivity in the procurement proceedings which, in turn, facilitate participation, competition, fair treatment and transparency. These notions are the key principles that facilitate achieving the overarching aims of the Model Law: value for money and avoidance of abuse. Both the Convention against Corruption and the GPA are also based on statements of highly similar principles: expressed in the Convention as transparency, competition and objectivity in decision-making, and in the GPA as non-discrimination and transparency.

20. The statement of objectives may not confer substantive rights on any participants or potential participants in the procurement process. The effective implementation of the objectives can only take effect through cohesive and coherent procedures based on these underlying principles, and where compliance with them is evaluated and, where necessary, enforced. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State will therefore create an environment in which the public is assured that the government purchaser will spend public funds with responsibility and accountability, and thus will obtain value for money. This will also be the environment in which parties offering to sell to the Government are confident of receiving fair treatment and that abuse is absent.

1. Value for money

21. Value for money in procurement includes both economy (meaning that the transaction costs or administrative costs of procurement and procurement systems are reasonable) and efficiency (meaning an optimal relationship between cost and other factors, which include the quality of the subject matter of the procurement). Price may be the sole or main determinant of the winning offer, or quality or other considerations may prevail, depending on the nature of the procurement concerned. When assessing what will represent value for money in a particular procurement, the procuring entity may wish to include a broad range of elements, such as

[8] Some provisions in this section may need to be amended after the article-by-article commentary has been completed, to avoid unnecessary repetitions.

life-cycle costs (which may themselves include disposal (sale or decommissioning) costs), and the impact of variations agreed during the administration of a procurement contract. The notion of sustainability — the costs and benefits to society as a whole rather than to the procuring entity alone, and which themselves may include the social and environmental impact of the procurement — may also be considered relevant. [Add a cross-reference to discussion in the Guide on sustainable procurement.]

22. The Model Law allows flexibility in designing the minimum standards that tenders or other offers must meet in order to be considered responsive (article [10]), and in the design of evaluation criteria (article [11]), so that procuring entities can determine the most advantageous tender in accordance with local practices regarding the components of value for money. (See, further, paragraphs 33-35 below regarding the transparency measures designed, inter alia, to facilitate the accountability of procurement officials for the decisions they take.)

2. Participation and competition

23. The Model Law mandates as the main procurement method open tendering — widely recognized as the most effective in promoting the objectives of the Model Law. A main reason is that the procurement is "open" to all potential suppliers, and its terms are pre-determined and pre-publicised, so that suppliers are encouraged to participate and to compete to sell to the Government.

24. Participation on both a domestic and international level is a pre-requisite for competition, and accordingly, such international participation is the default rule for procurement under the Model Law. The limited circumstances in which international participation can be limited (directly or indirectly) are set out in articles [8]-[11] of the Model Law, as further explained in section [II.F] below. Enacting States will need to take into account any relevant international trade obligations regarding international participation in their procurement, when implementing these provisions into their domestic legislation.

25. The commentary to chapter II, section II, of the Model Law explains the default rule of open solicitation for procurement methods, other than those that necessarily involve or permit the use of direct solicitation (procurement that is not "open" in the sense set out above).

26. Finally, there are rules that require a minimum number of participants in procurement in which there might otherwise be too few participants to compete, to ensure, among other considerations, that competition remains a relevant consideration regardless of whether or not the procurement is "open" (see, for example, the provisions on Request for proposals with dialogue, article [48]).

27. Enacting States may wish to take steps to increase the participation of small, medium and micro enterprises (SMMEs) in their domestic procurement. [To be completed when the article-by-article remarks sections have been drafted — to avoid repetition.]

28. Although some procurement markets will comprise many potential suppliers, procurement of larger and more complex items and services will normally take place in a more concentrated market. Enacting States may wish to monitor the extent of real competition in public procurement and take steps to avoid collusion

and/or the creation of oligopolies where there are repeated procurements or long-term procurements in markets without many potential suppliers. The risks involved may increase where the effect of the Government's purchases may be to consolidate still further the market.

3. Fair and equitable treatment

29. The concept of fair and equitable treatment of suppliers under the Model Law involves non-discrimination and objectivity in taking procurement decisions that affect suppliers. The Model Law includes several provisions implementing these principles. First, except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity may not establish any "requirement limiting participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof" (article [8 (2)]). Secondly, subject to provisions of article [8], the procuring entity may not establish any criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable (article [9 (6)]). Thirdly, article [10 (2)] as regards descriptions of the procurement provides that the procuring entity, again subject to provisions of article [8], may not establish any description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality. A further aspect of fair and equitable treatment is reflected in the requirement of article [10] that descriptions of what is to be procured must be objective, clear and complete. Along with the safeguards contained in article [11] on the evaluation criteria, this requirement of article [10] is aimed at ensuring that suppliers compete on an equal footing. (See, further, the commentary to article [7] on the rules of communication, designed not to exclude suppliers in a discriminatory fashion; article [9] setting rules on qualifications and providing in particular that suppliers can be disqualified only on the basis of pre-determined grounds; articles [10 and 11] regulating examination and evaluation criteria and providing in particular that submissions have to be examined and evaluated against pre-publicised criteria; and article [39] as regards presentation of tenders, in particular that late tenders cannot be accepted.)

30. The principle of equal treatment underlying free trade agreements normally implies that suppliers in all participating States are treated equally; the Model Law's principle of fair and equitable treatment is a more nuanced one, which recognizes that strictly equal treatment can lead to a discriminatory outcome (such as if the same time limits are applied to suppliers communicating in paper form and those communicating in electronic form). Nonetheless, the Model Law and free trade regimes proceed on the basis that opening domestic procurement markets to international competition is of benefit, and that the obligations between States under those agreements should therefore be reciprocal.

4. Integrity

31. Integrity in procurement involves both the avoidance of corruption and abuse and the notion of personnel involved in procurement acting ethically and fairly, avoiding conflicts of interest in particular.

32. General standards of conduct for civil servants may be addressed by enacting States in other national laws and regulations. Since the Convention against Corruption requires procurement systems to address conflicts of interest of personnel in procurement, article [25] of the Model Law highlights the need to enact a code of conduct for such personnel that will address conflicts of interest and other relevant issues. Enacting States, in accordance with their national legislation, may wish to add further provisions addressing integrity and prevention of corruption, or to include references to other laws regulating these issues.

5. Transparency

33. Transparency in procurement involves five main elements: the disclosure of the rules that apply in the procurement process; the publication of procurement opportunities; the prior determination and publication of what is to be procured and how offers are to be considered; the visible conduct of procurement according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed (and to enforce officials to follow them if necessary). Transparency is considered a key element of a procurement system that is designed, in part, to limit the discretion of officials, and thereby to avoid abuse and corruption. It is thus a critical support for integrity in procurement and for public confidence in its operation, and a tool to facilitate the accountability of those engaged in the procurement process.

34. Transparency measures feature throughout the Model Law. They include requirements that all legal texts regulating procurement should be made promptly and publicly available (article [5]), the determination of evaluation criteria at the outset of the procurement and their publication in the solicitation documents (article [11]), the publication of the deadline for presentation of submissions (article [14]), the disclosure to all participants of significant further information provided during the procurement to any one participant (article [15]), the publication of contract award notices (article [22]), the wide publication of invitations to participate and conditions of participation (articles [32 and 34]), including in an appropriate language (article [13]), and, in tendering proceedings, an opening of tenders in the presence of suppliers or contractors submitting them (article [41]). Further, certain information regarding the conduct of a particular procurement must be made publicly available ex post facto, and participants are entitled to further information, all of which must be included in a record of the procurement (article [24]). The Model Law also sets out requirements for non-discriminatory methods of communication (article [7]), stipulates the manner of entry into force of the procurement contract (article [21]), and allows alleged non-compliance with these requirements to be challenged under its chapter VIII.

35. Nonetheless, the provisions in the text have also been formulated to allow for discretion where appropriate and necessary. Taking account of the differing stages of development and maturity of procurement systems in enacting States, this Guide comments on features of certain procurement methods that are intended to permit more or less discretion, and the capacity and infrastructure needed to operate them effectively, so as to enable enacting States to decide whether or not each method is appropriate for its local circumstances. Significant steps in the procurement process that are intended to constitute legal obligations towards suppliers are governed by rules so as to limit the use of discretion (such as the choice of procurement methods,

which is discussed in detail in section […] below). Other steps involve much broader discretion, such as designing evaluation criteria, which can be crafted to favour price above quality, or vice versa, in a highly flexible manner. The use of discretion under the Model Law involves a balance that allows the procuring entity to identify what to procure and how best to conduct the procurement, but discretion is then circumscribed in that the procuring entity must subsequently follow the prescribed rules and procedures in implementing the decisions involved (so the evaluation criteria and their constituent elements must be published in advance and then adhered to). Transparency is therefore a tool that allows the exercise of discretion to be monitored and evaluated (and, where necessary, challenged).

B. Scope of the Model Law

1. Application to all public procurement

36. The Model Law is designed to be applicable to all public procurement within an enacting State: the objectives of the Model Law are best served by the widest possible application of its provisions. Consequently, article [1] of the text provides that the Model Law applies to all public procurement in the enacting State. There are various options provided in the text to define the concept of the "procuring entity", reflecting different extent of the public sector in States (see, further, the commentary to the relevant provisions of article [2]).

37. For the same reason, there is no general threshold below which the Model Law's provisions do not apply. The Commission is aware that the costs of full compliance with all the provisions of the Model Law may exceed their benefits in some low-value procurement, and presents several options for procuring entities in such cases. First, the request-for-quotations procedure in article [45], a simple and speedy method particularly where conducted electronically, is available below a threshold set by the enacting State; auctions and framework agreements under chapters VI and VII, respectively, can also be used to amortise transaction costs and are thus useful for low-value procurement. Secondly, for procurements below [the same threshold], the standstill period envisaged under article [21 (2)] and individual contract award notices under article [22 (2)] can be dispensed with, provided that a notice of all below-threshold procurement is published at least once a year. Certain detailed publicity requirements relating to languages and currencies are optional for such procurement (see, for example, articles [13 (1) and 32 (4)]).

2. Defence and sensitive procurement

38. Defence procurement is a significant sector of the domestic procurement market in many enacting States. Traditionally (including in the 1994 Model Law), such procurement was exempted as a whole from legislation and supporting rules governing procurement. The present text brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law, so as to promote a harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law's provisions. However, it is acknowledged that the Model Law's extensive transparency obligations might not be compatible with all defence procurement: some

procurement in the defence and national security arena will require appropriate modifications to accommodate sensitive or confidential information.

39. The Model Law permits such modifications, however, not because the procurement involves defence per se, but because it involves classified information and can thus be referred to as sensitive procurement. Enacting States will observe that modifications are permitted on a case-by-case basis, in order to avoid a blanket exemption arising whether by design or accident. "Classified information" refers to information designated as classified by an enacting State in accordance with the relevant national law, understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons. The term, and therefore the flexibility conferred as regards classified information, refer not only to procurement in the sectors where "classified information" is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector. Importantly, the provisions do not confer any discretion on the procuring entity to expand the definition of "classified information": to do so would invite abuse. Generally, issues pertaining to the treatment of "classified information" are regulated at the level of statute, and are therefore subject to scrutiny by the legislature.

40. The authorization granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting an exemption for the procurement from provisions requiring public disclosure of information, applies only to the extent permitted by the procurement regulations or by other provisions of law in the enacting State. Under article [7] of the Model Law, the procuring entity is required to specify, when first soliciting participation in a procurement procedure involving classified information, if any measures and requirements are needed to protect that information at the requisite level, and what those measures are. If it does so, the procuring entity must provide reasons in the record: these safeguards are designed to ensure that the potential significance of the exemptions is appropriately considered, and that the procuring entity (which determines whether sufficient grounds exist to lift normal transparency requirements) can explain and justify its actions.

41. As an application of the general principle described in paragraphs 11-14 above, the provisions in the Model Law allowing for exceptions to transparency mechanisms for the protection of essential security interests, such as relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes, are flexible and allow for States to comply with relevant international obligations.

42. Other issues that are of particular concern in defence procurement include the complexity of some procurement, and the need to ensure security of both information and supply. The Model Law's provisions, in chapters V and VII in particular, allow for these needs to be accommodated (including the appropriate protection of classified information as necessary).

[3. International obligations

43. It is also important to note that article [3] gives deference to the international obligations of the enacting State at the intergovernmental level. It provides that such

international obligations (e.g., loan or grant agreements with multilateral and bilateral aid agencies containing specific procedural requirements for the funds involved; procurement directives of regional economic integration groupings) prevail over the Model Law to the extent of any inconsistent requirements.]

4. Procurement planning and contract administration

44. The Model Law includes the essential procedures for the selection of suppliers and contractors for a given procurement contract, consistent with the objectives described in paragraphs 18-35 above, and provides for an effective challenge mechanism if the rules or procedures are broken or not respected. The Model Law does not purport to address the procurement planning, or contract performance or implementation phase. Accordingly, issues such as budgeting, needs assessment, market research and consultations, contract administration, resolution of performance disputes or contract termination are not addressed in its provisions.

45. Nonetheless, the Commission recognizes the importance of these phases of the procurement process for the overall effective functioning of the procurement system. The enacting State will need to ensure that adequate laws and structures are available to deal with these phases of the procurement process: if they are not in place, the aims and objectives of the Model Law may be frustrated.

46. As regards procurement planning, international and regional procurement regimes have moved towards encouraging the publication of information on forthcoming procurement opportunities, and some enacting States may require the publication of such information as part of their administrative law. Some other systems reduce time limits for procurement advertisements and notices where there has been such advance publication. The benefits of this practice accrue generally through improved procurement management, governance and transparency. Specifically, it encourages procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements.

47. [The Model Law does not require the publication of such information — its provisions in article [6] are permissive. Flexibility is needed because information and needs may change with circumstances; not only may the procuring entity's time and costs be wasted, but suppliers or contractors may also incur unnecessary costs. Making available abundant, irrelevant or misleading information, rather than carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information. Similarly, the publication of procurement plans for the forthcoming months is also encouraged, subject to these caveats. The commentary to article [6] provides further detail of the approach of the Model Law.]

48. The contract administration stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the

performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000):[9] many of the points made in that instrument equally apply to all contract administration, particularly where the contract relates to a complex project. The UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987),[10] addresses provisions specific to an industrial works contract.[11]

C. General approach of the Model Law

49. The Model Law provisions set out general requirements for a sound procurement system, and procedures for each procurement. Consistent with its intended application for all regions, the approach of the text is flexible and non-prescriptive. States can adapt the text to local circumstances, such as defining the extent of public sector procurement, without compromising the Model Law's essential principles and procedures.

50. The Model Law offers procedures that provide a balance between allowing some commercial discretion on the part of the procurement official (with the aim of empowering him or her to maximize value for money) and regulating or restricting the use of such discretion (by means of transparency and rules for the conduct of procurement) to avoid poor and corrupt decisions.

51. The Model Law's general prescriptions for the procurement system can be summarized as follows:

(a) That the applicable law, procurement regulations and other relevant information are to be made publicly available (article [5]);

(b) The prior publication of announcements for each procurement procedure (with relevant details) (articles [32-34]) and ex post facto notice of the award of procurement contracts (article [22]);

(c) Items to be procured are to be described in accordance with article [10] (that is, objectively, and without reference to specific brand-names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis);

(d) That qualification procedures and permissible criteria to determine which suppliers will be able to participate are set out in the law, and the particular criteria that will determine whether or not suppliers are qualified in a particular procurement procedure are to be advised to all potential suppliers (articles [9 and 17]);

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[9] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html (accessed January 2011).

[10] Id.

[11] The Working Group may consider that further discussion is warranted on procurement planning and contract administration and, if so, to provide guidance to the Secretariat on the parameters for such discussion.

(e) That open tendering is the recommended procurement method and that the rules require the objective justification for the use of any other procurement method (article [27]). The law must set out the particular conditions for use of each such method (articles [28-30]);

(f) Standard procedures for the conduct of each procurement procedure are prescribed in the law (chapters III-VII);

(g) Communications with suppliers are to be in a form and manner that does not impede access to the procurement (article [7]);

(h) There is a legal requirement for a standstill period between the identification of the winning supplier and the award of the contract, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any procurement contract entering into force (article [21 (2)]); and

(i) There is a legal requirement for challenge and appeal procedures if rules or procedures are breached (chapter VIII).

52. As regards the obligations on the procuring entity for each procurement proceeding, the procuring entity is to:

(a) Determine and advise potential suppliers of all relevant information for the procurement at the beginning of the procedure in accordance with the rules set out in the Model Law (articles [36, 38, 46, 48, 52 and 57-60], for example). This information includes the procedures for each procurement method and the criteria and procedures for awarding the procurement contract;

(b) Use open and fully competitive procedures unless there is justification to do otherwise (chapter II, sections I and II);

(c) Follow the prescribed procedures for each procurement procedure (chapters III-VII); and

(d) Advertise the award of the procurement contract (article [22]).