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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 section and sub-section of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: II. Main features of the Model Law ("Challenges and appeals").

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part I. General remarks

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II. MAIN FEATURES OF THE MODEL LAW

(*continued*)

G. Challenges and appeals

110. A key feature of a transparent procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include audits and investigations, and prosecutions for criminal offences (which are matters not generally addressed in a procurement law and consequently are not provided for in the Model Law), and challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation.

111. An effective challenge mechanism is therefore an essential element towards ensuring the proper functioning of the procurement system and can promote confidence in that system. Such a mechanism helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for review to suppliers and contractors that have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law in each procurement procedure. An additional function of the challenge mechanism is to act as a deterrent: its existence is designed to discourage actions or decisions knowingly in breach of the law.

112. Challenges can address breaches of rules and procedures only at the instigation of suppliers, and so the other oversight mechanisms outlined above should be in place to deal with (a) non-compliance where a supplier chooses not to take action and (b) systemic issues. Suppliers may not wish to take action for many reasons: where the contract is of low value, larger suppliers may consider that losses may not justify the costs concerned; smaller suppliers may consider that the time and costs of any challenge are unaffordable; and all suppliers may be unwilling to challenge discretionary decisions because of the higher risk of failure, and may be concerned that a challenge will risk future relationships with the procuring entity. Systemic non-compliance may be overlooked if attention in challenge mechanisms is directed to individual cases, especially those involving relatively insignificant non-compliance.

113. A key feature of an effective challenge mechanism is to allow timely submissions of challenges: accordingly, the requirement for a standstill provision under article 21 (2) is designed to ensure that challenges can be brought before a procurement contract (or framework agreement) enters into force; the interaction between the provisions governing a standstill period and provisions of chapter VIII form part of the overall supervisory and enforcement mechanism under the Model Law.

114. Chapter VIII contains a minimum set of provisions aimed at ensuring an effective challenge process, and enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits.

1. International agreements addressing challenge mechanisms

115. Article 9 (1) (d) of the Convention against Corruption requires procurement systems to include an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to article 9 (1) of the Convention are not followed. The Commission, in seeking to ensure that the Model Law addresses the Convention's requirements, decided that the Model Law should require enacting States to provide all rights and procedures necessary (both at first instance and in appeals) for an effective challenge mechanism. Similarly, the Commission has sought to ensure consistency with the approach to challenge mechanisms under the GPA.

2. Ensuring challenge mechanisms operate in the context of an enacting State's legal traditions

116. The requirements of the Convention against Corruption and the Model Law are founded on the recognition that the procedures need to be implemented in a manner consistent with the legal tradition in the enacting State concerned. It is recognized that there exist in most States mechanisms and procedures for the challenge of acts of administrative organs and other public entities (often called a review function). In some States, such mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. States do, however, differ significantly in their approach to enforcement: in some countries, there is a long-standing system of review before specialist authorities and courts; in others there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some systems there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal, while in others there is a combination of administrative review, or quasi-judicial review, and/or judicial review of procurement decisions through the ordinary courts (accompanied by special criminal proceedings for violations of procurement laws by procuring entities).

117. The rules and procedures set out in chapter VIII of the Model Law are intended to be sufficiently flexible that they can be adapted to any of these approaches, without compromising their efficacy. Certain important aspects of challenge proceedings, such as the forum where an application or appeal is to be

filed and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of state administration in every country.

118. Some legal systems provide for challenge or review of acts of administrative organs and other public entities before an independent administrative body that exercises hierarchical authority or control over the organ or entity. In legal systems that provide for this type of review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the state administration. In other States, the challenge or review function is performed by specialized bodies whose competence is sometimes referred to as "quasi-judicial". Such a body is not, however, considered in those States to be a court within the judicial system. The procedures before an administrative or quasi-judicial body are set out in article [66] of the Model Law.

119. Whether the mechanism is administrative or quasi-judicial, a key feature is that it is independent. In this context, the notion of "independence" means independence from the procuring entity rather than independence from the Government as a whole. Nonetheless, enacting States are encouraged, within the scope of their national systems, to provide for as much autonomy and independence of action from the executive and legislative branches as possible, in order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and efficient, but, on the other hand, there may be difficulties in ensuring that effective remedies can be provided through other mechanisms in some vulnerable States.[1]

120. Many national legal systems provide for a judicial review of acts of administrative organs and public entities, either in addition to the quasi-judicial function outlined above, or instead of this function. In some legal systems where both quasi-judicial and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted; in other systems the two means of challenge or review are available as options. The provisions in the Model Law do not address this question, so that enacting States can provide for the desired approach through regulations.

121. Enacting States may wish to use the provisions of the Model Law to assess the effectiveness of challenge mechanisms already in operation in their country. As a general rule, the nature of procurement disputes indicates that specialized fora are beneficial. Where a system of effective and efficient court review is already present, there may be little benefit in introducing a new quasi-judicial body, and, on the

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[1] The Working Group may wish to consider whether further detail, such as on the ideal degree separation of powers between a procurement agency, regulatory bodies (e.g. existing anti-trust authorities) and independent bodies should be included in the Guide, whether here or in the general section on administrative infrastructure to support the Model Law. The Secretariat's understanding is that a supervisory body or central procurement board cannot be independent because it takes decisions for the procuring entity. A regulatory or oversight body, such as a public procurement authority, could discharge the function or, if scale and resources indicate, such functions could be delegated to a separate body.

other hand, there may be equally little benefit in promoting procurement specialization in the courts if there is a well-functioning quasi-judicial function.

122. In view of the above, and in order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world, the provisions in chapter VIII set out the principles and main procedures to be followed in order to constitute an effective challenge mechanism. Continuing the general approach of the Model Law as a framework text, they are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner. Particular importance should be given to the question of evidence and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard.[2]

123. Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative fora, since the use of arbitration in the context of procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which often involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting to arbitration, in appropriate circumstances, a dispute relating to the procedures in the Model Law.

124. Other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under chapter VIII, if, for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, enacting States may wish to ensure that appropriate guidance is provided to procuring entities and to suppliers, and that this information is publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

3. Importance of the balance between effective challenge mechanisms and avoiding excessive disruption of the procurement process

125. A key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the rights of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process. The provisions therefore limit the right to challenge to suppliers and contractors (including potential suppliers and contractors that have, for example, been disqualified); provide time limits for filing of applications and appeals, and for disposition of cases; and provide discretion in deciding in some circumstances whether a suspension of the procurement proceedings may apply. Nonetheless, article [64] contains a general prohibition preventing the entry into force of the procurement

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[2] The Working Group may wish to consider whether further detail is required, particularly to guide independent bodies that are being set up, on how to gather evidence (investigatory or adversarial approach) and the conduct of the proceedings. For example, the procuring entity is obliged to provide the procurement record, but an enforcement mechanism might be appropriate. Also, provisions on evidence to ensure that there is consistency in terms of the type of evidence required and the weight it will be given may be needed.

contract or framework agreement while a challenge remains involved (with limited exceptions). These matters are discussed in the commentary to that article.

4. Need for timely resolution of disputes

126. An important factor contributing to the efficient resolution of disputes and limiting the disruption of the procurement process is to encourage early resolution of issues and disputes, and to enable challenges to be addressed before stages of the procurement proceedings would need to be undone, of which the most significant is the entry into force of the procurement contract (or, where applicable, the conclusion of a framework agreement). There are several provisions in the Model Law to this end, notably the use of a standstill period (provided for in article [21 (2)]). The aim of imposing a standstill period is to require a short delay between the identification of the successful submission and the award of the procurement contract (or framework agreement), so that any challenges to the proposed award can be dealt with before the additional complications and costs of addressing an executed contract arise. As regards challenges to the terms of solicitation and other issues that arise prior to the submission of tenders or other offers, article [15] provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents. These provisions therefore support the challenge mechanism in chapter VIII.

5. Summary of the challenge provisions

127. The provisions in chapter VIII establish in the first place that suppliers and contractors have a right to challenge an act or decision of a procuring entity: there are no acts or decisions in a procurement procedure that are exempt from the mechanism. As to forum, the Model Law provides for three options. In the first instance, a challenge may be presented to the procuring entity itself under article [65], provided that the procurement contract is yet to be awarded. Significantly, this peer-based system is an option for suppliers, and not a mandatory first step in the challenge process. This option has been included so as to facilitate a swift, simple and relatively low-cost procedure. Speedy remedies that can be granted without significant time and cost are features that are highly desirable in a procurement challenge mechanism, and the fact that the procuring entity will be in possession of the facts relating to and in control of the procurement proceedings concerned, and may be willing and able to correct procedural errors of which it may perhaps not have been aware, contribute to achieving them. These features are important not only to the challenging supplier, but also in order to minimize disruption to the procurement process as a whole. A peer-based system may also lessen the perceived risk of jeopardizing future business through a legal procedure, which has been observed to operate as a disincentive to challenges. Enacting States are therefore encouraged to take steps to ensure that this mechanism, its operation (which includes formal procedures and is not a debriefing) and its benefits are widely disseminated, so that effective use can be made of it.

128. The second option is for an independent, third-party review of the decision or action of the procuring entity that the supplier alleges is not in compliance with the law. This independent review may operate as an administrative or quasi-judicial procedure. It is broader in scope than the peer system outlined above, because

challenges can be submitted after the entry into force of the procurement contract (or framework agreement). The independent body receiving the challenge may grant a wide range of remedies, and footnotes to the provisions concerned highlight those remedies that may not traditionally be available in certain legal systems, so that enacting States can ensure consistency between the independent review system and equivalent mechanisms before their courts.

129. The third option for suppliers is to commence proceedings in a competent court. The Model Law does not provide procedures for such proceedings, which will be governed by applicable national law. The footnotes to the various provisions identify issues and procedures that will need to be implemented in some manner so as to ensure the effective overall mechanism outlined above.

130. In this regard, enacting States are encouraged to review the scope of all forums available, to ensure that the system put in place indeed confers effective legal recourse and remedies (including appeals) as required by the Convention against Corruption and as is acknowledged to constitute best practice. In general terms, an effective mechanism involves the possibility of intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible (e.g. after the contract is awarded); and the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course.

[This completes the current draft of Part I. General remarks of the Guide. The Working Group is to consider which additional sections/sub-sections/issues for Part I. General remarks of the Guide are to be included. This may affect the sequence of sections/sub-sections/issues in the current draft of Part I.]