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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 Guide text to accompany chapter VIII (Challenges and appeals) of the UNCITRAL Model Law on Public Procurement.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

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CHAPTER VIII. CHALLENGES AND APPEALS

Article [63]. Right to challenge and appeal

1. The purpose of article [63] is to establish the basic right to challenge an act or a decision of the procuring entity in the procurement proceedings concerned, and the right to appeal a first-instance finding on a challenge where necessary.

2. Under paragraph (1), the right to challenge is given only to suppliers and contractors (including potential suppliers or contractors, such as those excluded through pre-qualification), and not to members of the general public. Sub-contractors are also omitted from the ambit of the right to challenge provided for in the Model Law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues. In addition, the article does not deal with the capacity of the supplier or contractor to seek review or with the nature or degree of interest or detriment that is required to be claimed for a supplier or contractor to be able to seek review. Those and other issues, such as whether State bodies may have the right to pursue challenge applications, are left to be resolved in accordance with the relevant legal rules in the enacting State.

3. Paragraph (1) refers to applications under articles [65 and 66] to the procuring entity and independent body, respectively, and to courts. A challenge that takes the form of a judicial review may be made under the relevant court procedures or authority, or under article [69] of the Model Law.

4. Paragraph (2) is limited to appeals from decisions made in proceedings under articles [65 and 66]. Appeals to courts and in court proceedings will be made under relevant court procedures and authority. The paragraph is silent on this matter, and enacting States may wish to make specific reference to the appropriate authority when transposing this provision into their domestic legislation.

Article [64]. Effect of an application for reconsideration or review or an appeal

1. The purpose of the article is to provide for prohibition to enter into a procurement contract or framework agreement while a challenge or an appeal remains pending. This ensures that the challenge or appeal cannot be nullified by making an award a fait accompli.

2. The procuring entity is prohibited from entering into a procurement contract (or framework agreement) where it receives within prescribed time limits an

application for reconsideration or is notified of a challenge or an appeal before an independent body or from the courts. The prohibition provided for in this article continues for a short period after a challenge or appeal has been decided and participants have been notified, as provided for in paragraph (2), in order to allow any disaffected party to appeal to the next level forum. Enacting States will wish to ensure that this period is as short as their systems will permit, so as to avoid excessive disruption to the procurement process.

3. The prohibition provided for is not absolute: there may be urgent public interest considerations that indicate that the better course of action would be to allow the procurement proceedings to continue and the procurement contract or framework agreement to enter into force, even while the challenge or appeal is still outstanding. An independent body may therefore order that the proceedings and contract or framework agreement may proceed. An option is provided in paragraph (3) (b) for enacting States to specify that an independent body may take a decision on this question without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial basis, but in other States, it may be less so. When drafting rules of procedure and guidance for the operations of the independent body, States will also wish to ensure that there are clear rules and procedures as regards the evidence that a procuring entity would need to adduce as regards urgent public interest considerations where it makes such an application, and how applications to permit the procurement to continue should be filed (including whether the application is to be made by the procuring entity ex parte, or inter partes).

4. The need for timely resolution of procurement disputes and effective challenge and appeal mechanism should be balanced with the protection of urgent public interest considerations. This is particularly important in jurisdictions where court systems in the enacting State do not allow for injunctive and interim relief and summary proceedings. Paragraph (3) (b) is drafted to ensure that any decision to permit the procurement contract or framework agreement to proceed in such circumstances can itself be challenged (by application of the general rights conferred under article 63). The procuring entity, on the other hand, should also be given opportunity to request the competent court to allow it to proceed with the procurement contract or framework agreement on the ground of urgent public interest considerations where the independent body ruled against granting an exemption to the prohibition to enter into a procurement contract or framework agreement.

5. An important requirement in this regard contained in paragraph (3) (b) is to ensure that prompt notice of the decision taken by the independent body is provided to all participants concerned, including the procuring entity. The provisions require disclosure of the decision and its reasons, which is essential to allow any further action (such as an appeal from the decision concerned). By the nature of an application under paragraph (3), there may be need for the protection of confidential information, the public disclosure of which will be restricted under article [68]. This however does not exempt the independent body from the obligation to notify all concerned (as listed in the provisions) of its decision and provide reasons therefor; any confidential information will have to be excluded to the extent and in the manner required by law.

Article [65]. Application for reconsideration before the procuring entity

1. Article [65] provides that a supplier or contractor that wishes to challenge a decision or act of the procuring entity may, in the first instance, request the procuring entity to reconsider the decision or action concerned. This application is optional, because its effectiveness will vary both according to the nature of the challenge at issue and the willingness of the procuring entity to revisit its steps in the procurement process. The procedure under this article is to be contrasted with a debriefing procedure [cross-refer to any discussion of debriefing in the Guide]. Enacting States may consider that it is desirable to promote the early resolution of disputes by promoting the use of the optional challenge mechanism envisaged by this article, in that so doing might also enhance efficiency and the long-term relationship between the procuring entity and suppliers or contractors.

2. The purpose of providing for this procedure is to allow the procuring entity to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs.

3. Nonetheless, the application for reconsideration is a formal procedure, and in this regard it is important for the scope of the application and the issues it raises to be clearly delineated at the outset (both to ensure their effective consideration and to avoid other issues being raised during the proceedings). The application must therefore be in writing. There are no rules presented in the Model Law as regards supporting evidence: the applicant will wish to present its best case to demonstrate why a reconsideration or corrective action is the appropriate course, but how that may be done will vary from case to case. Regulations and procedural rules, as noted above, should address evidentiary gathering where it is necessary. A general approach that permits the submission of a statement of application with any supporting evidence being filed later may defeat the aim of requiring prompt action on the application by the procuring entity (provided for under paragraph (3)), and accordingly these supporting rules and regulations should encourage the early submission of all available evidence.

4. The purpose of the two time limits in paragraph (2) is, in general terms, to ensure that grievances are promptly filed so as to avoid unnecessary delay and disruption in the procurement proceedings, and to avoid actions or decisions being unwound at a later stage. There are, broadly speaking, two types of challenge contemplated by the article: first, challenges to the terms of solicitation and to pre-qualification or pre-selection, which must be filed prior to the deadline for submissions for the reasons set out immediately above. In this context, the “terms of solicitation” encompass all issues arising from the procurement proceedings before the deadline for presenting submissions (including those arising in pre-qualification or pre-selection, separately mentioned in the subparagraph), such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from examination and evaluation of submissions. The terms of the solicitation, pre-qualification or pre-selection include the contents of any addenda issued pursuant to article [15]. The use of the term “prior to” the submission deadline is crafted in broad terms, so as to allow enacting States to provide in applicable regulations for a filing deadline that is a defined, short, period before the

submission deadline (and there may be the need for different periods for different procurement methods: the appropriate period for electronic reverse auctions would normally be shorter than for procurement methods with dialogue or negotiations). The reason for this approach is that there may be a need to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline.

5. The second type of challenge is likely to relate in some manner to the award, or proposed award, of the procurement contract (or framework agreement) and here the main aim is to ensure that the challenge is addressed before the additional complications of an executed contract (or an operating framework agreement) arise. The issues will commonly arise from the examination and evaluation of submissions, a step in the procurement process that may also include the assessment of qualifications of suppliers (but not pre-qualification). The deadline for submission of these challenges is the expiry of the standstill period where one applies, or the entry into force of the procurement contract (or framework agreement) as applicable. Reference in the text is made to the entry into force of the procurement contract, rather than to the despatch of the notice of acceptance, in order to allow for situations in which signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract is required (possibilities envisaged under article [21] and the articles throughout the Model Law describing the content of the solicitation documents).

6. The provisions do not refer to the procuring entity's competence to consider challenges to decisions to cancel the procurement. Although a decision to cancel the procurement is, in principle, no different from any other decision in the procurement process, the Commission considered that the issues involved are such that they should more appropriately be considered by the courts.

7. The policy rationale behind requiring the request for reconsideration before the procuring entity only if the procurement contract has not yet entered into force is that, thereafter, there are limited corrective measures that the procuring entity could usefully require. The latter cases would better fall within the purview of quasi-judicial or judicial review.[1]

8. Should an application be filed out of time, the procuring entity has no competence and should dismiss the application under paragraph (3) (a) of the article. Where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract, the provisions mean

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[1] The Working Group may wish to consider whether additional matters should be discussed. The restriction of the procuring entity's competence to pre-contract disputes is intended to avoid granting excessive powers to the procuring entity, and is also consistent with the approach of the Model Law that it does not address the contract administration stage, so that the natural consequence is that the procuring entity's powers cease when the contract comes into force. An alternative approach could be described in the Guide, such as that, if there is no independent body, enacting States might wish to expand the time limits by using the equivalent provisions in article 66 (because otherwise there might only be recourse to the courts). This may be considered to be a point of some significance as the procuring entity has the most detailed knowledge and might be in the best position to judge the challenge. On the other hand, safeguarding the integrity of the process is addressed through the standstill period and availability of other remedies.

that a challenge initiated after the expiry of the standstill period but before approval is granted is out of time.

9. The interaction of articles [65 and 64] means that upon the filing of an application for reconsideration, no procurement contract may be awarded (or framework agreement concluded) unless the procuring entity's request for an exemption from the prohibition on the grounds of urgent public interest is granted by the independent body under article 64 (3) or by courts.

10. Paragraph (3) requires the procuring entity to take several steps. First, promptly after receipt of the application, it must publish a notice of the application. There is no fixed time limit given for this step; the appropriate time will depend on the manner of publication and availability of the relevant forum. In the electronic environment, for example, the most effective place for publication to take place is the website where the initial notice of the procurement was published. The aim is to ensure that all participants in the procurement process (whose contact details may or may not be known to the procuring entity) are informed that the application has been filed.

11. In addition to this publication requirement, within three working days of receipt of the application, the procuring entity must notify all participants in the procurement proceedings known to it (i.e. whose contact details are made known to the procuring entity) about the submission of the application and its substance. Providing notice of the substance of the application permits the procuring entity to avoid the disclosure of potentially confidential information without the need for reviewing the entire application to redact confidential information.

12. The purpose of the publication and notification provisions is to make the suppliers or contractors aware that an application has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under article [67], which might include a request to lift a suspension that has been applied, and other steps that may be provided for under applicable regulations or procedural rules. The possibility of broader participation in the review proceedings is provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

13. Within the same period (three working days of receipt of the application), the procuring entity, must take further steps, which amount to an initial review of the application for reconsideration and notification of the applicant and other concerned of the result of such review. It must first decide whether it will entertain the application. Paragraph (3) (a) identifies the types of situation in which the procuring entity may decide not to entertain the application. The procuring entity will consider such issues as whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application (as noted in paragraph [2] of the commentary to article 63 above, sub-contractors and members of the general public, as opposed to potential suppliers, do not have standing); whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious. These issues may be particularly pertinent in those systems in which challenge mechanisms are in their infancy and where suppliers may be unsure about

the extent of their rights to file a challenge. Permitting early dismissal is important to minimize disruption to the procurement process and to minimize the costs of all concerned.

14. The decision on dismissal can be challenged under the competence granted by article [63], because, as paragraph (3) (a) of the article notes, the dismissal constitutes a decision on the application. It also allows the prohibition against entry into force of the procurement contract or framework agreement to lapse after the time period specified in article [64], unless a further challenge or an appeal against the dismissal is made. To allow further challenge or appeal in a timely fashion, the provisions require the procuring entity to notify the applicant about its decision on dismissal and reasons therefor not later than three days upon receipt of the application.

15. If the procuring entity decides to entertain the application, it must consider whether to suspend the procurement proceedings and, if so, the period that is required. The purpose of suspension is to enable the interests of the applicant to be preserved pending the disposition of the proceedings. The approach taken with regard to suspension — that is, to allow the procuring entity to decide on the matter — is designed to strike a balance between the right of the supplier or contractor to have a challenge reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way, without undue disruption and delay of the procurement process.

16. The Commission, in framing the suspension powers given to the procuring entity, was mindful that an automatic suspension would involve a cumbersome and rigid approach, and might allow suppliers to submit vexatious requests that would needlessly delay the procurement proceedings, and might cause serious damage to the procurement proceedings. This possibility would allow suppliers to pressurize the procuring entity to take action that might, albeit unwittingly, inappropriately favour the supplier concerned. Another possible disadvantage of an automatic suspension approach might be an increase in challenge mechanisms generally, resulting in disruption and delay in the procurement process.

17. Nonetheless, without a suspension, a supplier or contractor submitting a complaint might not have sufficient time to seek and obtain interim relief. The availability of suspension enhances the possibility of settlement of applications at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement.

18. For this reason, the procuring entity has discretion as to whether or not to suspend the procurement proceedings. The procuring entity's decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. For example, a challenge to certain terms of the solicitation made early in the proceedings may not have the type of impact that requires suspension even if some minor corrective action is ultimately required; a challenge to some other terms might warrant a suspension, where there is a possibility that corrective action might mean undoing steps taken and wasting costs; at the other extreme, a challenge to such terms a few days before the submission deadline would require quite different action and a suspension would be likely to be appropriate. The supplier concerned will have the burden of establishing why a suspension should be granted, though in

this regard it is important to note that the supplier may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved.

19. Although article [64] prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary in the situations described in the preceding paragraph, among others. In other words, suspension of the procurement proceedings is a broader notion than the prohibition under article [64]: it stops all actions in those proceedings.

20. An alternative approach, particularly where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance, would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. If such an approach is desired, enacting States may wish to redraft the provisions of paragraph (3) along the lines of the provisions of paragraphs (3) to (7) of article [66].

21. Given the overall aim of efficient dispute resolution, a further goal of the provisions on suspension is to ensure swift decisions on whether or not to apply a suspension, and accordingly the procuring entity is given a short period of three working days to decide whether or not to suspend the procurement and on the length of any suspension applied, and to notify the applicant and all participants in the procurement process of its decision. Where the procuring entity decides to suspend the proceedings, it need not give reasons for that decision, because it is not one that the applicant will wish to challenge. The key safeguard against abusive failures to suspend are transparency measures; first, under paragraph (3) (c) (ii), the procuring entity must advise the applicant of the reasons for its decision not to suspend the procurement and, secondly, it must put on the record all decisions in relation to suspension and the reasons for them. These safeguards ensure that the procuring entity's decision can itself be challenged and scrutinized (for example, by the independent body provided for in article [66], or by the courts).

22. Where a procuring entity decides not to grant a suspension, the applicant may consider that this decision is a likely predictor of the eventual decision on the application, and accordingly that its best course would be to terminate its application before the procuring entity and commence proceedings before an independent body or court (rather than appealing the decision not to suspend to that body). Paragraph (4) confers this right. While a procuring entity may consider that this option operates as a disincentive to treat applications with the seriousness the system is intended to confer, a subsequent challenge before another forum or action by another oversight body, which should be considered a probable consequence, should demonstrate that any such approach is unwise. Paragraph (4) also provides that a failure to abide by the three-day notification requirement permits the applicant to recommence proceedings with an independent body or court, a measure also intended to discourage dilatory conduct on the part of the procuring entity. Where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain further the application ceases.

23. Paragraphs (5) to (7) regulate the procuring entity's steps as regards the application that it entertains. Paragraph (5) confers a wide discretion on the procuring entity when deciding on the application. Possible corrective measures might include the following: rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

24. The decision of the procuring entity on the application that it entertains is to be issued and communicated to the applicant, and to all participants in the challenge and procurement proceedings, as required by paragraph (6). The enacting State is invited to specify the appropriate number of working days within which the decision must be issued. The period of time so specified should balance the need for a thorough review of the issues concerned and the need for an expeditious resolution of the application for reconsideration, in order to allow the procurement proceedings to continue.

25. If the application cannot be disposed of expeditiously, quasi-judicial review or judicial review may be the more appropriate course. To that end, in the absence of a timely decision, or if the decision is unsatisfactory to the applicant, paragraph (7) entitles the supplier or contractor that submitted the application to commence review or appeal proceedings under article [66] or proceedings before the court, as appropriate.

26. Paragraph (8) provides additional transparency mechanisms. All decisions of the procuring entity must be recorded in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of further disputes, and to facilitate any further challenge or appeal. Although in some systems silence by the procuring entity to an application can be deemed to be a rejection of such an application, the provisions require a written decision as an example of good practice. The application and all decisions must also be included in the record. The implication of this provision is that these documents (subject to confidentiality restrictions of article [24]), will be made available to the public in accordance with the provisions of article [24].

27. Where the enacting State provides that certain actions of the procuring entity are to be subject to the decision of an approving authority [cross reference to relevant discussion], the enacting State will need to ensure that appropriate provision is included in this article to allow that authority to receive an application for reconsideration and all information pertinent to the relevant challenge proceedings.

Article [66]. Application for review or an appeal before an independent body

1. Article 66 regulates review and appeal proceedings before an independent body. The Model Law intends that the enacting State should grant all the powers set out in this article, subject to permissible deviations described in the footnotes. These powers are required as a package in order to ensure the effectiveness of the system.

2. A footnote to this article records that States in which administrative or quasi-judicial review of administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article [69]) in addition to the peer system under article [65]. This flexibility is granted on the condition that the enacting State provides an effective system of judicial review, including an effective system of appeal, to ensure that a challenge can be made in compliance with the requirements of the Convention against Corruption. In those States in which effective independent review is already achieved through the court system, there may also be little advantage in introducing another layer of review; the peer system before the procuring entity may nonetheless provide a useful mechanism to assist in the early resolution of disputes.

3. In some legal systems that provide for both administrative or quasi-judicial review and judicial review, proceedings for judicial review may be instituted while quasi-judicial review proceedings are still pending, or vice versa, or judicial review may be sought only after opportunities for other challenges have been exhausted. Some States concerned may already provide rules that will guide those involved in challenge procedures on these matters. If not, the State may wish to establish them by law or by regulation; the Model Law, which does not regulate court procedures, does not address the issue. In this regard, the Model Law does not seek to encourage the filing of multiple applications. The aim of the provisions is to allow enacting States to address the issue consistent with its legal tradition.

4. An enacting State that wishes to set up a mechanism for administrative or quasi-judicial review will need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

5. As its name indicates, it is an important safeguard that the body exercising the review function be independent of the procuring entity and protected from political pressure. In this regard, an administrative body that, under the Model Law as enacted in the State, has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on procedures, will not fulfil the requirement for independence. In addition, States will wish to consider in particular whether the body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

6. Paragraph (1) is drafted to ensure broad competence on the part of the independent body. In addition to bringing an application for review as an original application to the independent body, a supplier that is dissatisfied with a decision of the procuring entity under article [65] can appeal that decision, or commence new proceedings before the independent body; the supplier can take either step if the procuring entity does not issue its decision as required by article [65 (3), (6) or (8)].

The paragraph is therefore one of the key provisions intended to give effect to the requirements of the Convention against Corruption for an effective system of review including an appeal mechanism.

7. Paragraph (2) establishes time limits for the commencement of review applications and appeals. Paragraph (2) (a) addresses challenges to the terms of solicitation and pre-submission matters, and provides the same time limits as apply in challenge proceedings before the procuring entity, guidance as to which is set out in paragraph [4] of the commentary to article [65]] above.

8. Under paragraph (2) (b) (i), applications regarding other decisions or steps in the procurement proceedings should be submitted within the standstill period prescribed in article [21(2)], where a standstill period has been applied. Under paragraph (2) (b) (ii), where a standstill period was not applied (either because the procuring entity was permitted not to apply a standstill period by article [21(3)], or failed to respect the requirements of a standstill period), a challenge must be filed within a specified number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. To avoid an indefinite period during which applications for review can be filed under such circumstances, the provisions also refer to the absolute maximum — the application cannot be filed upon expiry of a certain number of days after the entry into force of the procurement contract. Such a final deadline is required in order to provide a balance between the rights of suppliers to enforce the integrity of the process and the need for the procurement contract to continue undisrupted. It is also acknowledged that in most States, there is a determined limitation period for any civil claim. The absolute maximum period may be expressed in weeks or months rather than working days, where it would be more appropriate to do so. Enacting States are invited to specify these two time limits in the light of their local needs.

9. As regards the first time limit in paragraph (2) (b) (ii), the 1994 text of the Model Law specifies a period of 20 days for equivalent time limits; the [revised GPA] specifies a minimum 10 day period; and enacting States may wish to be guided by those provisions in considering the appropriate time period for their domestic legislation. As regards the second time limit in paragraph (2) (b) (ii), although in many cases the notice of the procurement contract award to be published under article [22] will probably alert the supplier or contractor submitting the application of the circumstances concerned, it will not necessarily be always the case. For example, the reasons for not applying a standstill period may also justify an exemption from the obligation to advertise the procurement contract award — such as where confidentiality is invoked for the protection of essential national interests of the State. Accordingly, it was decided not to refer to the publication of the notice of the award as the starting point for calculating the absolute maximum, since the publication will not take place in all cases, but to refer instead to the entry into force of the procurement contract.

10. As in article [65], the provisions do not refer to the independent body's competence to consider challenges to decisions to cancel the procurement. This reflects the Commission's decision, mentioned in paragraph [6] of the commentary to article [65], that challenges related to such decisions should be in the exclusive competence of the courts.

11. Paragraph (2) (c) envisages that a supplier may request the independent body to entertain an application after the expiry of the standstill period applied pursuant to article [21 (2)], on the grounds that the application raises significant public interest considerations. The absolute deadline for submission of such late applications is to be established by enacting States, which should be aligned with the final deadline to be established in paragraph (2) (b) (ii). It is up to the independent body to decide whether significant public interest considerations are indeed present and justify entertaining such late applications. As regards the type of issues that should permit entertaining applications after the standstill period, enacting States may consider that the most common will be the discovery of fraudulent irregularities or instances of corruption. The enacting State will wish to provide rules or guidance on these matters. The discretionary element of this provision does not bar entirely the independent body to consider this type of applications. Within the normal limitation period in the jurisdiction concerned, such applications can also be submitted directly to the courts. This provision is in particular important in situations in which the normal transparency safeguards of the Model Law do not apply.

12. Paragraph (2) (d) provides the time limit for the submission of appeals against a decision of the procuring entity and the absence of decisions under article [65]. When setting this time limit, enacting States are, again, left to determine the relevant number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. States will wish to ensure that all relevant time limits left to their determination are effectively aligned, both within chapter VIII and as regards the standstill period in article [21(2)].

13. Paragraphs (3) and (4) address issues of suspension. The main policy issues surrounding suspensions are discussed in [paragraphs [15 to 21] of the commentary to article [65]] and are also relevant here.

14. Paragraph (3) delineates the general discretion that is to be granted to the independent body to order the suspension of the procurement proceedings. This discretion is subject to the requirement to suspend the procurement proceedings under certain circumstances referred to in paragraph (4). In all other cases not covered by paragraph (4) where suspension is mandatory, the independent body may order a suspension for so long as it considers it necessary to protect the interests of the supplier presenting the application for review or appeal; it may also lift or extend any suspension so granted, and these powers may be exercised at any time during the challenge proceedings before the independent body. Recognizing that in some jurisdictions, the independent body may have limited powers as regards the procurement contracts or framework agreements that entered into force, the provisions of subparagraph (b) (like all other provisions throughout the article referring to procurement contracts or framework agreements that entered into force) are accompanied by a footnote indicating the optional nature of the provisions.

15. Paragraph (4) sets out two situations in which the procurement proceedings must be, as a general rule, suspended. Those are the situations considered to pose particularly serious risks to the integrity of the procurement process.

16. Under paragraph (4) (a), the suspension for a period of ten working days must be applied where the application or appeal is received prior to the deadline for

presenting submissions. The reason for this approach is to ensure to a large extent that such challenges are addressed before the submissions are received, when corrective action is easier to achieve. In such circumstances, the independent body may wish to take such steps as to extend the deadline for submission of tenders, and correct other actions as regards the terms of solicitation, pre-qualification or pre-selection.

17. Paragraph (4) (b) covers situations where no standstill was applied and a challenge is received after the submission deadline. No fixed period is provided for in the text, because circumstances may indicate different periods are appropriate. As the challenge may be received after the entry into force of the procurement contract, the optional power is given to suspend performance of a procurement contract or operation of a framework agreement, as the case may be.

18. In each case covered by paragraphs (3) and (4), the suspension is presumptive and not automatic, in that the independent body may decide that urgent public interest considerations may justify that the procurement contract or framework agreement should proceed. This is the same test as applies in article [64 (3)] (under which a procuring entity may seek to lift the prohibition to enter into the procurement contract or framework agreement), and enacting States should ensure that appropriate guidance is given on the circumstances that may so justify. Examples when this might be the case include natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. The rules of procedure for the independent body may provide permission for the body to make enquiry of the procuring entity if its decision on suspension must be taken before the full record of the procurement proceedings is provided to it (as required by paragraph (8) of this article).

19. In any event, the independent body should bear in mind that a suspension might ultimately prove less disruptive of the procurement process because it may avoid the need to undo steps taken in the procurement process if a decision is taken to overturn or to correct a decision of the procuring entity. In addition, the appropriate degree of incentive for suppliers to submit challenges should be ensured, in which the availability of suspension is an important consideration.

20. In order to mitigate the potentially disruptive effect of an application for review or appeal, paragraphs (5) and (6) together operate to require the independent body to undertake an initial consideration of the application or appeal filed, akin to that set out in paragraph (3) of article [65], guidance as to which is set out in the commentary to that paragraph (paragraphs [13-22] of the guidance to article [65]). This initial review of the application is intended to permit the independent body to assess the application swiftly and on a prima facie basis, so as to determine whether it should be entertained.

21. Paragraph (5) requires the independent body promptly to notify the procuring entity and all participants in the procurement proceedings whose identities are known to the independent body of the application for review or appeal, and of its substance. It is not required to notify other entities whose interests might be affected by the application or appeal (such as other government entities), but is required to publish a notice of the application or appeal so that such entities can take steps to protect their interests, as appropriate. As was discussed in the context of the challenge proceedings before the procuring entity, such steps may include

intervention in the challenge proceedings under article [67], might include a request to lift a suspension that has been applied, and such other steps that may be provided for under applicable regulations or procedural rules.

22. It must also take a decision on suspension, and notify all concerned about such decision (including, where relevant, the period of suspension). The independent body must also provide reasons for a decision not to suspend to the applicant or appellant (so as to facilitate any appeal against that decision) and to the procuring entity.

23. The powers to dismiss the application for review or appeal under paragraph (6) track those given to the procuring entity under article [65], as discussed in paragraph [13] of the commentary to that article. The same transparency safeguards as regards the notification of the decision and reasons therefor as in article [65] are also applicable.

24. Under paragraph (7), notices of the actions taken under paragraphs (5) and (6) must be given within three working days after the application or appeal was received, as is the case with applications for reconsideration to the procuring entity. The effect of the notices will vary with the decisions they notify, but notably the independent body may require the procuring entity to suspend the procurement proceedings.

25. Paragraph (8) requires the procuring entity to provide all documents relating to the procurement proceedings to the independent body; this obligation is subject to the confidentiality provisions in articles [23 and 24], in particular restrictions on disclosure of certain information, which however may be lifted by competent authorities identified by enacting States in those provisions. Enacting States may wish to provide rules or guidance to avoid excessive disruption of both procurement and review or appeal proceedings by providing secure and efficient means of transfer of such documents.

26. Paragraph (9) lists remedies that the independent body can grant under the Model Law with respect to the application for review or appeal that it decides to entertain. Paragraph (9) acknowledges that differences exist among national legal systems with respect to the nature of the remedies that bodies exercising quasi-judicial review are competent to grant. In enacting the Model Law, States are encouraged to enact all remedies that, under its legal system, can be granted to an independent body undertaking review, so as to ensure an effective system of review as required by the Convention against Corruption. The thrust of the provisions is to ensure that an appropriate decision on the application or appeal is taken (including, where circumstances so dictate, that the application is dismissed or rejected); as part of that exercise, any suspension existing when the application or appeal is disposed of must also be lifted or extended where the independent body considers it necessary.

27. Some provisions in this paragraph appear in parenthesis indicating their optional nature and possibility of their variation in accordance with the local circumstances of the enacting State. For example, sub-paragraphs (c) and (e) permit the independent body to overturn acts and decisions of the procuring entity, including award of a procurement contract. The term “overturn” does not carry any particular consequences (it need not be treated as declaring the decision of no effect), so that the enacting State may provide for the consequences appropriate in

the light of the legal tradition in the jurisdiction concerned. Nonetheless, footnotes to these sub-paragraphs as well as to sub-paragraph (d) note that, where an independent body cannot be granted the power to overturn a procurement contract or to substitute its own decision for that of a procuring entity, an alternative formulation would be to permit the independent body to quash the decision of the procuring entity, so that the procuring entity is then required to take another decision in the light of the decision of the independent body.

28. Corrective action should be regarded as the primary and most desirable remedy. This approach is reflected in the GPA. The early resolution of disputes through corrective action will reduce the need for financial compensation. Financial compensation may, however, be part of the appropriate remedy in a given case, for example where a contract has entered into force but it is not considered appropriate to interfere in the contract. A system without provision for any financial compensation (beyond the costs of filing a complaint) may therefore fail to provide adequate remedies in all situations, and the question of financial compensation should therefore be a part of the broader perspective of putting in place an effective remedies system.

29. Paragraph (9) (h) therefore makes provision for financial compensation, and sets out two alternatives for the consideration of the enacting State. Where the text in parenthesis is retained, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit lost because of non-acceptance of a tender, proposal, offer or quotation of the supplier or contractor submitting the complaint. The types of losses compensable under the second alternative (i.e. where provisions are enacted without the text in parenthesis) are broader, and might include future losses, including lost profit, in appropriate cases. Enacting States will wish to consider how purely economic loss is addressed in their domestic legal systems, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (such as whether the compensation should reflect the loss of a chance, and the extent to which financial compensation is contingent on the complainant proving that it would have won the procurement contract concerned). Since the possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process, it may be useful when a quasi-judicial system is in its infancy, to ensure that there is adequate incentive for suppliers to bring applications, but the mechanism should be reviewed as systems mature. In addition, the enacting State may wish to monitor the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals.[2]

30. Paragraph (10) provides for a maximum period within which the decision on the application or appeal that the independent body decided to entertain must be taken. It also provides for the requirement of prompt notification of that decision to all concerned. Together with paragraph (11) that requires all decisions taken by the independent body during the review or appeal proceedings to be in writing, complete, reasoned and put on the record, paragraph (10) sets out important

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[2] The Working Group has expressed the wish that the Guide should address the quantification of costs, and may wish to provide parameters for this discussion to the Secretariat.

transparency safeguards that also aim at ensuring efficient and effective review and appeal proceedings and possible further action by aggrieved suppliers in courts if need be. Paragraphs (10) and (11) are similar to paragraphs (6) and (8) of article [65]; the matters discussed in paragraphs [24] and [26] of the guidance to article [65] are therefore relevant here.

31. The examination of evidence, and the manner in which it is conducted (such as whether hearings are to take place), will be a significant determining factor as regards the necessary length of administrative or quasi-judicial proceedings, and will reflect the legal tradition in the enacting State concerned. If detailed rules governing procedures in administrative or quasi-judicial review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations, to cover such matters as the conduct of review proceedings, the manner in which applications are to be filed, and questions of evidence.

Article [67]. Rights of participants in challenge or appeal proceedings

1. The references in paragraph (1) to any supplier or contractor participating in the procurement proceedings and to any governmental authority whose interests may be affected by challenge proceedings or appeals establish a broad right of participation in challenge or appeal proceedings beyond the applicant or appellant. These rights of participation are intended to provide an appropriate balance between effective challenge proceedings and avoiding excessive disruption, as noted regarding general rights to commence challenge proceedings described in the commentary to article [64] above, and are predicated on the notion that participation is granted to the extent that the supplier or contactor, or other potential participant, can demonstrate that its interests may be affected by the challenge or appeal proceedings.

2. In this context, the "participants in challenge or appeal proceedings" can include a varying pool of participants, depending on the timing of the challenge or appeal proceedings and subject of the challenge or appeal, and can include other governmental bodies. A governmental body may include public sector bodies that would intend to use a framework agreement, or any approving authority that has participated in the procurement concerned. The reference to suppliers or contractors "participating in the procurement proceedings" is intended to permit all those that remain in the proceedings concerned, but to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge or appeal relates.

3. Paragraph (2) enshrines the right of the procuring entity to participate in challenge or appeal proceedings before an independent body.

4. Paragraph (3) sets out the fundamental rights of participants in the proceedings, of which the most significant are the right to be heard, to have access to all the proceedings and to present evidence. These rights accrue to those described in paragraphs (1) and (2) of the article, and not to anyone that may be present during hearings that take place in public (such as members of the press). The independent body may grant access to the record of the challenge or appeal proceedings (which will, under the provisions of article [66 (8)], include the record of the procurement proceedings). Participants in the proceedings will need to

demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid fishing expeditions. Access to records is also subject to the provisions on confidentiality in article [68]. There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion.

Article [68]. Confidentiality in challenge and appeal proceedings

The article has been included in chapter VIII to apply the principles of confidentiality found in article 23 to the challenge and appeal proceedings, in particular the review and appeal proceedings taking place in the independent body (to which article [23] does not apply).

Article [69]. Judicial review

[1. This section remains to be completed. The relevant part of the Guide to Enactment of the 1994 Model Law on the equivalent article is included here, together with comments made by the Working Group on the scope of judicial review and a footnote accompanying article 69 of the draft revised Model Law.

2. The commentary to article 57. Judicial review of the Guide to Enactment of the 1994 Model Law reads as follows:

> "The purpose of this article is not to limit or to displace the right to judicial review that might be available under other applicable law. Rather, its purpose is merely to confirm the right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 52. This includes appeals against decisions of review bodies pursuant to articles 53 and 54, as well as against failures by those review bodies to act. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. The law applicable to the judicial proceedings will govern the question of whether, in the case of an appeal of a review decision made pursuant to article 53 or 54, the court is to examine de novo the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding. The minimal approach in article 57 has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings."

3. Comments by the Working Group as regards the provisions of the revised Model Law on judicial review are contained in footnote 43 in document A/CN.9/WG.I/WP.75/Add.8. They can be summarized as follows:

> "The Model Law does not intend to interfere into the prerogatives of courts, which are regulated or should be regulated in a separate body of law in enacting States. The Model Law intends neither inadvertently to restrict broader powers may exist for courts under legislation of enacting States, such as powers to award compensation for anticipatory losses or to grant interim measures, including under a contract that has been executed and where performance has commenced, if the legal system of the enacting State so permits.

Since the Model Law does not deal with judicial review beyond outlining the framework and encouraging all remedies available in quasi-judicial proceedings to be available before the Court, article 66 does not purport to address the question of court ordered suspension, which may be available under the applicable law."

4. A footnote accompanying article [69] of the revised Model Law reads as follows:

"States may provide for the system of appeal judicially, or administratively, or both, to reflect the legal system in the jurisdiction concerned. States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. Such an effective system of judicial review shall in particular ensure: (i) that deadlines for submission of applications for judicial review or appeal of decisions of the procuring entity or the independent body, as the case may be, shall be appropriate in the procurement context, in particular the provisions of this Law on the standstill period shall be taken into account; (ii) that the court or courts with jurisdiction pursuant to article 63 may take any or any combination of the actions contemplated in article 66 (9) of this Law and to grant interim measures that it considers necessary to ensure effective review, including suspension of the procurement proceedings or performance of the procurement contract or the operation of the framework agreement, as applicable; and (iii) that minimum safeguards as regards the participation in the challenge or appeal proceedings, submission of evidence and protection of confidential information in the procurement context, contemplated in articles 67 and 68 of this Law, are in place."]