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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 the preamble and articles 1 to 7 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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Part II. Article-by-article commentary

Preamble

The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for suppliers or contractors. It is recommended that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law. (For the explanation of concepts encompassed by the objectives listed in the preamble of the Model Law, see paragraphs … of Part I of the Guide.)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide for the coverage of all types of public procurement, as that term is defined in article 2 of the Model Law. The broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in public procurement makes it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the Model Law contain provisions that intend to accommodate in particular procurement involving sensitive issues, such as procurement involving classified information. (See the commentary to articles … of the Model Law, and also paragraphs … of Part I for a general discussion of the issues relating to the scope of the Model Law and exemptions from its transparency provisions in these circumstances.)

2. [States in situations of economic and financial crisis may exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature).][1]

Article 2. Definitions

1. The purpose of article 2 is to define at the outset of the Model Law terms used often in the Model Law, in order to facilitate the reading and understanding of the text. The commentary to this article is supplemented by a glossary, contained in

[1] The provision of guidance to the Secretariat is requested as regards the need to retain the text put in square brackets.

[Annex …] to the Guide, which includes terms that have different meaning under the Model Law as compared to the meaning under other international or regional instruments regulating public procurement.

2. The definition of "electronic reverse auction" (definition (d)) encompasses all the main features of a reverse auction, in particular its online character. This broad definition is designed to emphasize that the Model Law does not regulate other types of auctions, even though they may be used in public procurement practice in some jurisdictions. The decision not to provide for other types of auctions in the Model Law was based on concerns over improprieties and the high risk of collusion inherent in them, arising in the main because the participants are identified. The term "successively lowered bids" in the definition refers to successive reductions in the price or in overall costs to the procuring entity.

3. The reference to "acquisition" in the definition of "procurement" (definition (h)) is intended to encompass purchase, lease and rental or hire purchase, with or without an option to buy. The definition refers to goods, construction and services. A strict classification of what would constitute goods, construction and services often is not possible and is not required under the Model Law, which uses an all encompassing term "subject matter of the procurement", and which does not provide different procurement methods for goods, construction and services. Nevertheless, as explained in the commentary to articles … of the Model Law, some procurement methods under the Model Law may be more appropriate for use in procurement of services than goods and construction. Enacting States may have a strict classification of items and general guidance, for example that "goods" usually mean objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves while "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself. "Services" may be classified as any object of procurement other than goods or construction.

4. The references in the plural to "contracts" and "supplier(s) or contractor(s)" in the definition of "procurement contract(s)" (definition (i)) are intended to encompass, inter alia, split contracts awarded as a result of the same procurement proceedings. For example, article 38 (g) of the Model Law stipulates that suppliers or contractors may be permitted to present tenders for only a portion of the subject matter of the procurement. In such situations, the procurement proceedings will result not in a single contract concluded with a single supplier or contractor but in several contracts concluded with several suppliers or contractors. The wording "at the end of the procurement proceedings" in the same definition is intended to encompass procurement contracts concluded under a framework agreement procedure, but not the awarded framework agreements.

5. The term "classified information" in the definition "procurement involving classified information" (definition (j)) is intended to refer to information that is

classified under the relevant national law in an enacting State. The term "classified information" is understood in many jurisdictions as information to which access is restricted under authority conferred by law to particular classes of persons. The need to deal with this type of information in procurement may arise not only in the sectors where "classified information" is most commonly encountered, such as national security and defence, but also in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example, where sensitive medical research and experiments may be involved). The term is used in the Model Law in the provisions that envisage special measures for protection of this type of information, in particular exceptions from public disclosure and transparency requirements. Because of the risk of abuse of exceptions to these requirements, the Model Law does not confer any discretion on the procuring entity to expand the scope of "classified information" and it is recommended that the issues pertaining to the treatment of "classified information" should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature. The definition, where it is used in the Model Law, is supplemented by the requirement in article 24 on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information.

6. With reference to the definition of "procuring entity" (definition (l)), the Model Law is intended primarily to cover procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State, reflecting differences in the allocation of legislative competence among different levels of government. Accordingly, subparagraph (l)(i), defining the term "procuring entity", presents options as to the levels of government to be covered. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central government as well as to provincial, local or other governmental subdivisions of the enacting State. This Option would be adopted by non-federal States, and by federal States that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national government. In subparagraph (l)(ii), the enacting State may extend the application of the Model Law to certain entities or enterprises that are not considered part of the government, if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

(a) whether the government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) whether the entity is managed or controlled by the government or whether the government participates in the management or control of the entity;

(c) whether the government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) whether the entity is accountable to the government or to the public treasury in respect of the profitability of the entity;

(e) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose, and whether the public law applicable to government contracts applies to procurement contracts entered into by the entity.

7. Procurement can be undertaken by groups or consortia of procuring entities, including from various States, and they can collectively be considered as a single "procuring entity". The definition of "procuring entity", with particular reference in the definition to a "multiplicity [of departments, agencies, organs and other units or subdivisions]" without indicating an association with any particular State, is therefore intended to accommodate participation by such groups or consortia, including in the transnational procurement context. In some jurisdictions, to ensure political accountability, even when procuring entities band together, one remains the lead procuring entity. In an international consortium, it is usual for a procuring entity from one State to act in its capacity as the lead procuring entity as an agent of procuring entities from other States.[2]

8. The primary purpose of the definition of "public procurement" (definition (m)) is to highlight that the Model Law deals with public procurement rather than with procurement in the private sector. The definition is built on the definitions of "procurement" and "procuring entity" (definitions (h) and (l) explained in paragraphs … above). The term "public procurement" is used only in the title, preamble and first two articles of the Model Law; thereafter the term "procurement" is used for simplicity.[3]

9. The definition of "socio-economic policies" (definition (n)) is not intended to be open-ended, but to encompass only those policies set out in the law of the enacting State, and those that are triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that socio-economic policies (a) are not determined on an ad hoc basis by the procuring entity, and (b) are applied across all government purchasing, so that their costs and benefits can be seen. Under authority of the law, there may be one or more organs in an enacting State with the power to promulgate socio-economic policies in an enacting State. Rules on the application of such policies should impose appropriate constraints on procuring entities, in particular by prohibiting the ad hoc adoption of policies at the discretion of the procuring entity; such policies are open to misuse and abuse, such as through favouritism.

10. At the end of the definition of "socio-economic policies", the enacting State is given an option to expand it by providing an illustrative list of socio-economic policies applicable in the enacting State. Such policies are usually of social,

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[2] The provision of guidance to the Secretariat is requested as regards whether the preceding two sentences should be presented in the Guide as the best practice.

[3] The need for the definition in the Model Law is to be reconsidered. The alternative approach may be to provide necessary explanation in the Glossary.

economic and environmental nature (rarer of political nature) and may be dictated by consideration of specific industrial sector development, development of SMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves.[4] It should be noted that such policies evolve over time and even if the list is intended to be exhaustive, it will become outdated. It is therefore recommended that the list should remain illustrative to avoid the need to update the law every time the socio-economic policies of the enacting State change. It should also be noted that the pursuit of such policies can bring additional costs to procurement and therefore the pursuit of socio-economic policies through public procurement should be carefully weighed against the costs involved in both the short and long term.[5] Many of such policies are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

11. The definition of "solicitation" (definition (o)) is intended to differentiate "solicitation" from "the invitation to participate in the procurement proceedings". The latter has a broader scope: it may encompass an invitation to pre-qualify (under article 17) or an invitation to preselection (under article 48). The meaning of "solicitation" in each procurement method is different: in tendering, solicitation involves the invitation to submit tenders (in open and two-stage tendering, the invitation is public, while in restricted tendering the invitation is addressed to a limited group); in request for proposals proceedings, solicitation involves an invitation to present proposals (which may be public or addressed to a limited group); in competitive negotiations, solicitation involves an invitation to a limited group to take part in negotiations; in request for quotations, solicitation involves addressing the request to a limited group but a minimum of three must be invited; in electronic reverse auctions used as a stand-alone procurement method, where initial bids are requested for assessment of responsiveness or evaluation, solicitation starts with an invitation to present initial bids (the invitation is public, as in open tendering); in simpler electronic reverse auctions used as a stand-alone procurement method, not involving assessment or evaluation of initial bids, solicitation takes place after the opening of the auction, when those participating in the auction are

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[4] The illustrative list of socio-economic policies is taken from A/64/17, para. 164. The illustrative list in article 34 (4)(c)(iii) of the 1994 Model Law referred to the balance of payments position and foreign exchange reserves of the enacting State, the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills. The provision of guidance to the Secretariat as regards the list to be included in the Guide is requested.

[5] At the nineteenth session of the Working Group, concern was expressed about the latter statement. The issue was noted to be politically sensitive and thus more appropriate for consideration by the Commission (A/CN.9/713, para. 124). The appropriateness of such statement in the Guide is therefore to be considered and, if it is to be retained, whether additional guidance should be provided as regards costs and benefits of such policies.

requested to bid; in single-source procurement, solicitation involves a request to present either a quotation or proposal, addressed to one supplier or contractor.

12. The definition of "solicitation documents" (definition (p)) is generic and encompasses essential features of the documents soliciting participation in any procurement method. These documents are issued by the procuring entity and set out the terms and conditions of the given procurement. In some procurement methods, the term "solicitation documents" is used; in others, alternative terminology appears. For example, in the provisions of the Model Law regulating request for proposals proceedings, the reference is to a "request for proposals", which contains the solicitation information. Regardless of the term used in each procurement method in the Model Law, the solicitation documents also encompass any amendments to the documents originally issued. Such amendments may be made in accordance with articles 14 and 15 of the Model Law; in two-stage tendering, additionally under the provisions of article 47 (4); and in request for proposals with dialogue proceedings, in accordance with article 48.

13. Although the Model Law refers to "tender security" (definition (t)), this reference does not imply that this type of security may be requested only in tendering proceedings. The definition does not intend to imply either that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.[6]

14. The expression "other provisions of law of this State", as used in article 2 and in other provisions of the Model Law, refers not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In some States, a general reference to "law" would suffice to indicate that all of the above-mentioned sources of law were being referred to. In others, a more detailed reference to the various sources of law is warranted in order to make it clear that reference is made not merely to statutes.

Article 3. International obligations of this State relating to procurement (and intergovernmental agreements within (this State))

1. The purpose of the article is to explain the effect of international treaties on national implementation of the Model Law. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the [WTO Agreement on Government Procurement], and the members of the European Union are bound by directives on procurement applicable throughout the geographic region. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by their regional groupings. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their

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[6] The guidance reflects the suggestion made in the Working Group. Article 16 on tender securities does not itself prohibit multiple tender securities. The commentary to that article however reflects the similar point that UNCITRAL discourages multiple tender securities in any given procurement.

loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to their respective guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law. The article thus establishes a general prevalence of international treaties over the provisions of the Model Law on the understanding, however, that more stringent requirements may be applicable under international treaties but international commitments should not be used as a pretext to avoid the safeguards of the Model Law.

2. The texts in parenthesis in this article are relevant to, and intended for consideration by, federal States. Subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

3. The provisions of the article need to be adapted to constitutional requirements of the enacting State. For example, reference in subparagraph (b) to "agreements entered into by this State" may need to be amended to clarify that agreements entered meant agreements that are not only signed but also ratified by the legislature, in order for them to be binding in an enacting State.

4. The enacting State may choose not to enact the provisions of the article if they conflict with its constitutional law.

Article 4. Procurement regulations

1. The purpose of article 4 is to highlight the need for procurement regulations to fulfil the objectives and to implement provisions of the Model Law. As noted in paragraphs … of Part I of the Guide, the Model Law is a "framework law", setting out basic legal rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate organ or authority of the enacting State. The "framework law" approach enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law (see below for the list of such provisions) expressly indicate that they should be supplemented by procurement regulations. Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the procurement regulations should not contradict the Model Law or undermine the effectiveness of its provisions. (For the discussion on importance of taking a holistic approach in regulations, guidance and other implementing texts to ensure that the system envisaged under the Model Law works in practice, see ... of Part I of the Guide.)

2. Reference to the "procurement regulations" should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes.

3. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 18 and 22); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5)); grounds for limiting participation in procurement (article 8); calculation of margins of preference and application of socio-economic criteria in evaluation of submissions (article 11); estimation of the value of the procurement (article 12); code of conduct (article 25); and limitation of the quantity of procurement carried out in cases of urgency using a competitive negotiations or single-source procurement method (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the commentary to the relevant provisions of article 29 (4) and (5) in paragraphs … below).

4. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings (article 8); authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 11); and use of the request-for-quotations method of procurement, since that method may be used only for procurement whose value is below threshold levels set out in the procurement regulations (article 28 (2)).

[A list of cross-references to all provisions of the Model Law containing references to the procurement regulations is to be inserted here or in an Annex to the Guide.]

Article 5. Publication of legal texts

1. The purpose of article 5 is to ensure transparency of all rules and regulations applicable to procurement in an enacting State. Any interested person should know which rules and regulations apply to procurement at any given time and where they can be found if necessary.

2. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision is considered to be particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful even where such a requirement exists, as a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.

3. In many countries, there exist official publications in which legal texts referred to in this paragraph are and can be routinely published. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and in a manner that will ensure the required level of outreach of relevant information to intended recipients and the

public at large. In order to ensure easy and prompt public access to the relevant legal texts, an enacting State may wish to specify the manner and medium of publication in procurement regulations or refer in those regulations to legal sources that address publicity of statutes, regulations and other public acts. This approach would also provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of the proliferation of media and sources of information as the use of traditional paper-based means of publishing information has declined. Transparency in practice may be considerably impeded if abundant information is available from many sources, whose authenticity and authority may not be certain.

4. The enacting State should envisage the provision of relevant information in a centralized manner at a common place (the "official gazette" or equivalent) and should establish rules to define the relationship of that single centralized medium with other media where such information may appear. Information posted in a single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in the centralized medium, and require that the same information published in different media must contain the same data. The centralized medium should be readily and widely accessible. Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, because this will be against objectives of the Model Law to foster and encourage competition, to promote the integrity of and public confidence in the procurement process and to achieve transparency in the procurement procedures.

5. Regulations or other supporting guidance should also spell out what the requirements for "promptly made accessible" and "systematic maintenance" in the paragraph entail, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user. The importance of the former requirement (to make the texts promptly accessible to the public) should be highlighted in the light of the effect of public publicity on the effectiveness of laws, regulations and other legal texts of general application: it is the usual requirement in the constitutional law of States that this type of texts are entering into force only after certain number of days from their publication in the officially designated public source of information. The term "accessible" should be understood as in article 7 of the Model Law where the same term is used: information must be readable and capable of interpretation and retention (see … below). The requirement "to make the texts promptly accessible to the public" is however different from the requirement in article 7 that provides, inter alia, that information must be in the form that is accessible so as to be usable for subsequent reference. The former implies proactive actions from designated States authorities (such as publication in the official media) to ensure that the intended information reaches the public.

6. Paragraph (2) of the article deals with a distinct category of legal texts — judicial decisions and administrative rulings with precedent value. The opening phrase in paragraph (1) is included to make it clear that the more stringent publicity requirements in paragraph (1) — to make the texts promptly accessible to the public and to systematically maintain them — do not apply to the legal texts dealt with in

paragraph (2). The texts covered by paragraph (2), unlike the texts referred to in paragraph (1) of the article, are not of the general application; they enter into force usually from the moment of their promulgation by the court or other designated organ. Special rules on access to them by the public usually apply. In addition, because of the static nature of these texts, the requirement of systematic maintenance does not apply to them. Paragraph (2) of the article therefore requires that these texts are to be made available to the public. This different requirement does not intend to replace the requirement of accessibility of these texts. While information in the texts covered by paragraph (2) must still be readable and capable of interpretation and retention (those are the elements of "accessibility" discussed in the preceding paragraph), the objective of paragraph (2) is to achieve the necessary level of publicity of these texts and accuracy of publicized texts with sufficient flexibility.

7. Depending on legal traditions and the procurement practices by various procuring entities in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information reduce the costs, time and administrative burden of publishing and maintaining information, it may be considered to be the best practice to publish other texts of relevance and practical use and importance to suppliers and contractors, in order to achieve transparency and predictability, and to foster and encourage suppliers and contractors to compete. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these texts, does not preclude an enacting State from expanding the list of texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

8. Laws and regulations of the enacting State shall regulate which State organs are responsible for fulfilling the obligations under this article. In accordance with a number of provisions of the Model Law (such as article 38 (t)), the procuring entity will be required to include in the solicitation documents references to laws, regulations and other legal texts directly pertinent to the procurement proceedings.

Article 6. Information on possible forthcoming procurement

1. The purpose of the article is to highlight the importance of proper procurement planning. The article recommends the publication of information on future procurement, which may contribute to transparency throughout the procurement process and eliminate any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way. The procuring entity should assess whether such publication is appropriate and would further transparency in particular in the light of the requirements of the United Nations Convention against Corruption (its article 9, which addresses public procurement).

2. Paragraph (1) of the article enables and is intended to encourage the publication of information on forthcoming procurement opportunities and procurement plans. The reference in paragraph (1) is made to long-term general plans rather than information about short-term procurement opportunities or any particular forthcoming procurement opportunity (the latter is subject of paragraph (2) of the article). The enacting State may consider it appropriate to highlight the benefits of publishing such information for strategic and operational planning. For example, publication of such information may discipline procuring entities in procurement planning, and diminish cases of "ad hoc" and "emergency" procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers and contractors to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation.

3. Enacting States may provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The enacting States may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period.

4. Paragraph (2), unlike paragraph (1), refers to an advance notice of a particular forthcoming procurement opportunity. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the procuring entity's needs before any procurement procedure is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the information technology sector) to see whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the procurement as planned by the procuring entity. On the basis of the data collected, the procuring entity may take a more informed decision as regards the most appropriate procurement method to be used in the forthcoming procurement. This advance notice should not be confused with a

notice seeking expressions of interest that is usually published in conjunction with the request for proposals proceedings (the latter is further discussed in …).

5. The optional publication referred to in paragraphs (1) and (2) is not intended to form part of any particular procurement proceeding. Publication under paragraph (1) is a step in a long or medium-term plan while publication under paragraph (2) may shortly precede the procurement proceedings. As stated in paragraph (3) of the article, when published either under paragraph (1) or (2), the publicised information does not bind the procuring entity in any way, including as regards future solicitations. Suppliers or contractors are not entitled to any remedy if the procurement as pre-publicised does not take place at all, or takes place on terms different from those pre-publicised.

6. The article is of general application: the procuring entity is encouraged to publish the information referred to in paragraphs (1) and (2) regardless of the type and method of procurement envisaged. Enacting States and procuring entities should be aware, however, that publication of this information is not advisable in all cases. Imposing a requirement to publish this type of information is likely to be burdensome; it may also interfere in the budgeting process and the procuring entity's necessary flexibility to handle its procurement needs. The publication of such information may also inadvertently facilitate collusion and lobbying. The position under the Model Law is therefore, as reflected in the article, that the procuring entity should have the discretion to decide on a case-by-case basis on whether such information should be published, but it is considered that the default position should be to publish, unless there are considerations indicating to the contrary.

7. The enacting State may wish to stipulate, in the procurement regulations, the place and means of publishing information referred to in the article. In regulating this issue, it may wish to take into account the commentary to article 5, which raises considerations relevant to article 6. Consistency in regulation of issues related to publication of all types of procurement-related information under the Model Law should be ensured (see in this context also commentary to articles 17, 18, 22 and 32-34 below).

Article 7. Communications in procurement

1. The purpose of article 7 is to seek to provide certainty as regards (i) the form of information to be generated and communicated in the course of the procurement conducted under the Model Law, (ii) the means to be used to communicate such information, (iii) the means of satisfying all requirements for information to be in writing or for a signature, and of holding any meeting of suppliers or contractors (collectively referred to as "form and means of communications"), and (iv) requirements and measures taken to protect classified information in procurement involving such information.

2. As regards the forms and means of communication, the position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time not to obstruct the evolution of technology and

processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that may be subject to regulation by other branches of law, such as tender securities.

3. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word "accessible" in the paragraph is meant to imply that information should be readable and capable of interpretation and retention.[7] The word "usable" is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. Adequate reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

4. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency,

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[7] The need for using in paragraph (1) of article 7 of the Model Law the phrase "accessible and available" to capture both terms as used in article 5 of the Model Law is to be considered. See the relevant considerations raised in paragraphs 5 and 6 of the commentary to article 5 of this draft.

integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist in verifying and enforcing compliance with this requirement. Therefore, the enacting State may wish to limit the use of the exception under paragraph (2) to those situations that are strictly necessary.[8] Overuse of this exception might create a risk of abuse, including corruption and favouritism.

5. Consistent with the general approach of the Model Law that the procuring entity is responsible for the design of the procurement proceedings, paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with chapter VIII of the Model Law, they may challenge the procuring entity's decision in this respect. The exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

6. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and the means of communications for a given procurement. These requirements may be changed by issuing an addendum to the originally published information, in accordance with article 15 of the Model Law. The procuring entity has to make it clear whether one or more than one form and means of communication can be used and, in the latter case, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper back-up when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may, at the outset of a given procurement, envisage that a change in the form requirements and/or means of communications may be required. This situation might arise, for example, in procurement processes that will extend over a relatively lengthy period, such as procurement of highly complex items or procurement involving framework agreements. In such a case, the procuring entity, apart from reserving the possibility to amend form requirements or the means of communication when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that the safeguards contained in article 7 (4) are complied with in any amended form and/or means of communications stipulated, and that all concerned are promptly notified about the change. Although theoretically possible, the use of several means of communication, or advising that the means may freely change during the procurement, will have negative implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should

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[8] The provision of guidance to the Secretariat is requested on whether situations captured in cross-references in paragraph (2) of the article are all that are strictly necessary or can be further limited by the enacting State.

envisage the use of only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned.

7. To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. "Fully and contemporaneously" in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of "capable of being utilized with those in common use by suppliers or contractors" found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities' information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of "commonly used means" in the context of a specific procurement under paragraph (4) of the article. (The term "information system" or the "system" in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.)

8. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

9. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

10. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 7 (4), of the Model Law.

11. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors.[9] They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

[continued in A/CN.9/731/Add.2]

[9] Some experts question appropriateness of this statement.