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

Note by the Secretariat*

This Note introduces a proposal for a chapter in a draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement that would explain changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services, covering articles 49-51 of chapter V and provisions of chapter VI (last) of the 1994 Model Law.

* This document was submitted less than ten weeks before the opening of the session due to the need to finalize consultations.

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Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Part III. Changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services

(*continued*)

1994 CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT (2011 chapters IV to VII)

B. Article-by-article commentary

(*continued*)

Competitive negotiation (1994 article 49) (Competitive negotiations (2011 article 51); see also 2011 articles 24 and 34)

1. The provisions of paragraph (1) of the article have been reflected in article 34(3) of the 2011 Model Law [**hyperlink**] (on solicitation in competitive negotiations), to which 2011 article 51(1) cross-refers. A new requirement for an advance notice (as described in … above) has been added to the 2011 text, save where the use of competitive negotiations is justified by urgent needs (see 2011 article 34 (5) and (6) [**hyperlink**]).

2. Paragraph (2) has been expanded in time, through making reference to communications generated before and during the negotiations. It has also been amended to require that the relevant information is sent at the same time to all participants, save as regards information that is specific or exclusive to any supplier or contractor or where its communication would be in breach of the confidentiality provisions of article 24 of the 2011 Model Law.

3. The provisions of paragraph (3) have been reflected in 2011 article 24(3) (on confidentiality).

4. The provisions on competitive negotiations in 2011 article 51 also introduce an express prohibition of negotiations between the procuring entity and suppliers or contractors with respect to their best and final offers. They also introduce a definition of the successful offer (defined as the offer that best meets the needs of the procuring entity).

Request for quotations (1994 article 50; 2011 articles 34 and 46)

5. The first sentence of article 50 of the 1994 Model Law has been reflected in article 34(2) of the 2011 Model Law (on solicitation in request-for-quotations proceedings), to which 2011 article 46(1) cross-refers. The 1994 requirement to solicit quotations from a minimum of three suppliers or contractors “if possible” has been replaced with an absolute requirement to solicit from at least three suppliers or contractors in 2011 article 34(2); the 1994 provisions were considered to raise an excessive risk of abuse and subjectivity in selecting suppliers from which to solicit

quotations. In the light of the type of the subject matter for which the method has been designed — off-the-shelf items — at least three suppliers or contractors should always be capable of providing the subject matter of the procurement.

6. The remaining provisions of article 50 of the 1994 Model Law have been reflected in article 46 of the 2011 Model Law, largely unchanged except for the addition of the phrase "as set out in the request for quotations" in the end of 2011 paragraph (3). The phrase has been added to ensure equal treatment of suppliers or contractors by requiring that information about the needs of the procuring entity that has been provided to participating suppliers or contractors at the outset of the procurement remains valid throughout the procurement proceedings and is the basis for the selection of the successful quotation.

Single-source procurement (1994 article 51; 2011 articles 34 and 52)

7. The provisions of article 51 of the 1994 Model Law have been reflected in article 34(4) of the 2011 Model Law (on solicitation in single-source procurement), to which 2011 article 52 cross-refers. A new requirement for an advance notice (as described in … above) has also been added to the 2011 text, save where the use of single-source procurement is justified by urgent needs (see 2011 article 34 (5) and (6) [**hyperlink**]).

8. 2011 article 52 includes procedures for single-source procurement (there were no equivalent provisions in the 1994 text). They require the procuring entity to engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited, unless to do so is not feasible (see, further, the commentary to article 52 of the 2011 Model Law [**hyperlink**]).

1994 CHAPTER VI. REVIEW (2011 Chapter VIII. Challenge proceedings)

A. Summary of changes made in this chapter

9. A frequent criticism of the 1994 Model Law was that its review provisions were weak and ineffective: they were stated in a footnote to the Model Law to be optional and limited; there were many decisions exempt from review; the system was largely administrative and hierarchical rather than judicial; and there was no requirement for an independent review. In addition, the supporting guidance gave considerable discretion to the enacting State in implementing the provisions themselves. After the United Nations Convention against Corruption entered into force in 2005, UNCITRAL noted that the Model Law would also need to be amended to implement article 9 of the Convention, which requires (among other things) procurement systems to address "[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established … are not followed." The title of the chapter has therefore been amended to reflect this international requirement.

10. Chapter VIII of the 2011 Model Law strengthens the 1994 review provisions, notably by removing their optional nature. Unlike a footnote to the title of the chapter in the 1994 text that highlights the optional nature of the chapter, the equivalent footnote in the 2011 text does not diminish the status of the chapter as

compared to other chapters of the Model Law. It alerts enacting States to options in the text of the chapter (found in square brackets) that are intended to accommodate States with different traditions. Reflecting the more robust stance than the 1994 provisions, enacting States are encouraged in this Guide to incorporate all the provisions of the chapter to the extent that their legal system so permits (in this respect, the guidance replaces the suggestion in the footnote to the 1994 inviting States to use the articles on review to measure the adequacy of existing review procedures).

11. The 2011 provisions provide for an optional request to the procuring entity to reconsider a decision taken in the procurement process, unlike the 1994 Model Law that requires aggrieved suppliers or contractors to apply to the procuring entity first when the contract has not yet entered into force. The 2011 text gives an option to the aggrieved supplier or contractor in such case to apply either to the procuring entity, to an independent body or to the court; however the 2011 text (through the use of square brackets in article 64) and this Guide acknowledge that the sequence of application to review bodies will very much depend on legal traditions of enacting States (on this point see further paragraph 21 below). Given the requirements in the Convention against Corruption, States must have both a review and an appeal mechanism, but the Model Law is flexible so that enacting States can implement its provisions in accordance with their legal traditions.

12. The 2011 chapter also considerably strengthens the review provisions by deleting a lengthy list of decisions that were exempted from any review process as explained in paragraph 18 below. Under the 2011 regime, any decision or action by the procuring entity allegedly not in compliance with the provisions of the procurement law may be challenged by suppliers or contractors that claim to have suffered or claim that they may suffer loss or injury because of such alleged non-compliance.

13. The significantly enhanced scope of the challenge mechanism has necessitated the introduction of various mechanisms to ensure the efficacy of the procedure, and to appropriately balance the need to preserve the rights of suppliers and contractors and the integrity of the procurement process on the one hand and, on the other, the need to limit disruption of the procurement process. A new article 65 has therefore been introduced to provide for a general prohibition against taking any step to bring the procurement contract into force while a challenge remains pending. Urgent public interest considerations may be invoked by the procuring entity as a ground for lifting this prohibition. The 2011 text also contains a completely new regime for suspension of procurement proceedings providing for optional and mandatory suspension. These matters are discussed in detail in the introduction to chapter VIII [**hyperlinks**].

14. There are also supporting measures to encourage early and timely resolution of issues and disputes, enabling challenges to be addressed before stages of the procurement proceedings would need to be undone, including notice provisions throughout the Model Law, provisions on the standstill period discussed in paragraphs … of this Guide [**hyperlinks**], and new deadlines for submission of complaints.

15. The chapter in the 2011 text, which like in the 1994 text is final in the Model Law, is preceded by two additional chapters not found in the 1994 Model Law: on

electronic reverse auctions and framework agreements. They regulate procedures of these procurement techniques. The provisions of these chapters of the 2011 Model Law are not discussed in this part of the Guide since no provisions on these subjects are found in the 1994 Model Law. (For the commentary on those chapters, see … of this Guide [**hyperlinks**].)

B. Article-by-article commentary

Right to review (article 52) (Right to challenge and appeal (2011 article 64))

16. For the reasons set out in paragraph 9 above, the title of the article has been changed to the "Right to challenge and appeal".

17. The reference to "a breach of a duty imposed on the procuring entity by this Law" found in paragraph (1) of the 1994 text has been replaced by a reference to "the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law", to reflect the deletion of exceptions from review found in paragraph (2) of 1994 article 52 (see the immediately following paragraph) and thus the considerably expanded scope of decisions and actions that can be subject of challenge and appeal proceedings.

18. The exceptions from review found in paragraph (2) of the 1994 Model Law were deleted, the most notable of which were the selection of a procurement method or a selection procedure and the limitation of participation in procurement proceedings on the basis of nationality. This list of exceptions had raised criticism from practitioners and the donor community alike, in that it invited abusive practices and did not promote accountability in the procurement process. UNCITRAL considers it particularly important, as part of effective oversight of the use of the toolbox approach to the selection of the appropriate procurement method (discussed in the introduction to chapter II [**hyperlink**]), that this decision, as all others, should be subject to challenge. The deletion of the exceptions was also considered necessary in order to align the Model Law with the Convention against Corruption and other international and regional instruments regulating public procurement.

19. The first article in chapter VIII in the 2011 Model Law invites an enacting State in paragraphs (2) and (3) to specify the bodies before which challenge proceedings can be brought, and any sequence of such proceedings (e.g. whether the supplier or contractor must apply first to the procuring entity before approaching another administrative body or the court; and whether it must exhaust one forum before applying to another to prevent forum-shopping).

Review by procuring entity (or by approving authority) (1994 article 53) (Application for reconsideration before the procuring entity (2011 article 66))

20. The change in the title of the article reflects the deletion of the reference to the approving authority throughout the 1994 text, together with the provisions that provided for review by the head of the approving authority. This was in compliance with UNCITRAL's decision to remove, with a few exceptions, provisions from the Model Law requiring approval by another authority of the steps taken by the procuring entity in the procurement process.

21. UNCITRAL heard experience from some jurisdictions that the 1994 provisions requiring aggrieved suppliers or contractors to apply always first to the procuring entity when the contract has not yet entered into force had proved ineffective — merely delaying a further application. Consequently, the use of this mechanism in 2011 article 66 has been made optional (a supplier can choose whether to apply directly to a procuring entity, an independent body or a court). However, filing complaints in several bodies simultaneously is discouraged. It is for an enacting State to build in appropriate mechanisms according to their legal traditions and taken into account circumstances on the ground that would prevent unjustified disruptions of the procurement process while at the same time protect the rights of aggrieved suppliers or contractors.

22. The article has been revised to provide for a swift, simple and relatively low-cost procedure, which can allow applications to be resolved by the parties at an early, less disruptive stage, and with relatively low costs. The 20-day period for submission of complaints established in paragraph (2) of the 1994 text has been replaced with the following deadlines in paragraph (2) of the 2011 text: (a) prior to the deadline for presenting submissions (if applications for reconsideration concern the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings); and (b) within the standstill period or, if none was applied, prior to the entry into force of the procurement contract or the framework agreement (if applications for reconsideration concern other decisions or actions taken by the procuring entity in the procurement proceedings).

23. These new deadlines have been introduced to encourage early submission of challenges and to prevent disruption of the procurement process by late-stage challenges (for example, by suppliers or contractors that had been excluded from participation at an early stage (e.g. because of nationality or where disqualified). For further discussion of this point, see the commentary to article 66 [**hyperlink**]). No such safeguard was built in the 1994 text. The 1994 text dealt only with disruptions of the implementation of the procurement contract by allowing the procuring entity not to entertain a complaint or continue to entertain a complaint after the procurement contract entered into force (paragraph (3) of 1994 article 53).

24. The regime established in the 2011 Model Law also provides for appropriate safeguards to prevent the procuring entity from rushing, when a complaint is filed, towards taking steps to bring the procurement contract into force. This safeguard is found in the new 2011 article 65, as noted in paragraph 13 above, which prohibits the procuring entity from taking any step that would bring a procurement contract into force where there is a timely filing of a complaint or appeal, or notification thereof. This prohibition remains in effect for the entire duration of the consideration of the challenge and for an additional period to be established by the enacting State to allow an appeal against the decision taken on the challenge. The prohibition may be lifted on the ground of urgent public interest considerations, but such decision is to be taken either by an independent body or the court, and may itself be challenged (see article 65 of the 2011 Model Law and the commentary to that article [**hyperlink**]).

25. Paragraphs (4) to (6) of article 53 of the 1994 Model Law have been replaced with detailed regulation of challenges before the procuring entity, including

notification requirements, time periods for taking decisions and actions by the procuring entity, consequences of the failure of timely notification, grounds for dismissal of the application, and requirements as regards the form, content and recording of the decision taken by the procuring entity (see the commentary to 2011 article 66(3)-(8) [**hyperlink**]).

Administrative review (1994 article 54) (Application for review before an independent body (2011 article 67))

26. The change in the title of the article reflects a significant strengthening of the provisions for this type of challenge, namely a requirement that it be heard by an independent third party. For a discussion of the meaning of independence in this context, see paragraphs … of the commentary to article 67 above [**hyperlink**]. The footnote that accompanies the 1994 article, suggesting that States without such a legal tradition might not enact the provisions, has been deleted for reasons akin to those explained in paragraph 10 above: enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits.

27. The deadlines established in paragraph (1) of the 1994 text have been replaced with another set of deadlines (see 2011 paragraph (2)) which mirror where relevant the deadlines for submission of applications for reconsideration to the procuring entity (see paragraph 22 above). Unlike the 1994 Model Law, the 2011 text does not specify any time periods but invites enacting States to do so in the light of the circumstances on the ground (e.g. references to 20 days found in the 1994 text may be considered excessive in jurisdictions where electronic filing of applications is possible).

28. Paragraphs (2), (4) and (5) of the 1994 text have been replaced with detailed regulation of procedures, including mandatory and optional suspension of the procurement proceedings or the procurement contract or operation of the framework agreement, notification requirements, grounds for dismissal of applications, time periods for taking decisions or actions by the independent body, access by the independent body to all documents relating to the procurement proceedings and the form, content and recording of the decision taken by the independent body (see the commentary to 2011 article 67(3)-(8), (10) and (11) [**hyperlinks**]).

29. The list of actions that may be taken by the administrative body as regards the application, found in paragraph (3) of the 1994 text, has been significantly amended. The resulting 2011 article 67(9) is not exhaustive, in that after the prescribed actions, it includes a reference to such alternative action as may be appropriate in the circumstances. The provisions of subparagraph (a) of the 1994 list, regarding the applicable legal rules or principles, have been reflected in the chapeau provisions rather than in the list of available actions to reflect the reality that any declaration of such rules or principles would be a precursor to the action to be taken by the independent body.

30. Some items have been added to the list of available actions, such as confirmation of a decision of the procuring entity and overturning the award of a procurement contract or a framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, ordering the publication of a notice of the

overturning of the award (2011 article 67(9)(c)-(f)). These items are presented in square brackets (for the policy considerations that may guide enacting States in deciding whether or not to include them in their legislation, see paragraphs … of the commentary to that article [**hyperlink**]).

31. The options regarding the extent of financial compensation in 1994 subparagraph (f) have been merged, and are now in 2011 article 67(9) (i). Enacting States have the option of limiting any financial compensation to "the costs of the preparation of the submission or the costs relating to the application, or both". (The policy considerations that may guide enacting States in deciding whether or not to include this option in their legislation are set out in paragraphs … of the commentary to article 67 [**hyperlink**]). The 1994 reference to "injury" suffered has been replaced with a reference to "damages" suffered, the latter more commonly used and consistently understood in various legal systems. These amendments have been made to ensure the harmonization of the Model Law generally with other international instruments regulating public procurement.

Certain rules applicable to review proceedings under article 53 [and article 54] (article 55)

32. The provisions of paragraphs (1) and (3) of the 1994 article, except for the last part of paragraph (3), have been reflected in the notifications and record requirements found in 2011 articles 66 and 67 that address applications for reconsideration before the procuring entity and applications for review before an independent body, respectively [**hyperlinks**].

33. The provisions of paragraph (2) have been reflected in 2011 article 68 (on the rights of participants in challenge proceedings).

34. The provisions on confidentiality found in paragraph (3) of the article have been reflected in the new 2011 article 69 (on confidentiality in challenge proceedings).

Suspension of procurement proceedings (article 56)

35. There is no separate article in the 2011 Model Law addressing issues of suspension. The provisions on suspension are found in 2011 articles 66 and 67 that address applications for reconsideration before the procuring entity and applications for review before an independent body, respectively [**hyperlinks**].

36. The 1994 suspension regime has been completely revised in the 2011 Model Law. The provisions on 7-day automatic suspension found in paragraphs (1) and (2) and on a declaration of the type referred to in paragraph (1) of the 1994 Model Law have been deleted, as has the limit of maximum 30 days of suspension found in paragraph (3) of the article. The provisions on the certification by the procuring entity as regards urgent public interest considerations have been reflected in 2011 article 65(3)(a) in the form of a request by the procuring entity to the independent body to lift the article 65 prohibition to enter into contract; under the new 2011 regime, such request is to be considered by the independent body and the decision of the independent body can be challenged by aggrieved suppliers or contractors. This approach provides fundamental shift away from the position of the 1994 Model Law, which stated in paragraph (4) of the article that such certification is conclusive with respect to all levels of review except judicial review. Further on

the suspension regime under the 2011 Model Law, see the commentary to articles 65 to 67 [**hyperlinks**].

Judicial review (article 57)

37. The article has been deleted. The provisions on judicial review are found in 2011 article 64(2) and (3). They are put in square brackets for consideration by enacting States, as explained in paragraphs … of the commentary to that article [**hyperlink**].