



# General Assembly

Distr.: Limited  
15 August 2005

Original: English

**United Nations Commission  
on International Trade Law**  
Working Group I (Procurement)  
Eighth session  
Vienna, 7-11 November 2005

## **Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement**

**Electronic publication of procurement-related information: study  
of national, regional and international practices with the  
publication of procurement-related information not covered by the  
Model Law**

**Addendum**

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Publication of information on forthcoming procurement opportunities . . . . .	1-17	3
A. Scope of the study . . . . .	1-2	3
B. Extent and purpose of publication of information on forthcoming procurement opportunities . . . . .	3-5	3
C. Terms of publication . . . . .	6-13	4
1. Mandatory or optional . . . . .	6-7	4
2. Deadline for publication . . . . .	8	4
3. Procurements covered . . . . .	9	5
4. Period covered . . . . .	10	5



---

5.	Information published .....	11	5
6.	Updating information published .....	12	5
7.	Form and manner of publication .....	13	6
D.	Value of publication .....	14-15	6
E.	Conclusion. ....	16-17	6
II.	Other issues suggested for consideration by the Working Group in connection with electronic publication of procurement-related information.....	18-33	7
A.	Content of information and its presentation and systematic maintenance ...	19-24	7
B.	Involvement of intermediaries in electronic publication .....	25-26	9
C.	Multi-posting of procurement-related information. ....	27-31	9
D.	Fees charged .....	32-33	10
III.	Drafting suggestions .....	34-42	10
A.	Article 5 .....	34-39	10
B.	Article 5 bis (publication of information on forthcoming opportunities) ...	40-41	12
C.	New provisions .....	42	13

## **I. Publication of information on forthcoming procurement opportunities**

### **A. Scope of the study**

1. The present study deals with the publication of information on forthcoming procurement opportunities presented as a list of procurements that a procuring agency intends to engage in within a certain forthcoming period of time, usually a budgetary year.<sup>1</sup> The study does not cover advance notices about a specific procurement or summaries of an invitation to tender required to be published in some jurisdictions reviewed before an invitation to tender.<sup>2</sup> Nor does it analyse provisions of international instruments, like the Agreement on Government Procurement (GPA)<sup>3</sup> of the World Trade Organization (WTO), that do not specifically address the subject but contain provisions that may be construed as implying the publication of such information.<sup>4</sup>

2. Unlike invitations to tender or various notices about a specific procurement that are binding on a procuring entity posting them and that inform potential suppliers or contractors about a specifically identified procurement, information on forthcoming procurement opportunities is neither binding nor specific.<sup>5</sup> The former forms the basis for the conduct of procurement proceedings and gives rise to enforceable rights and obligations, both to procuring entities and suppliers. The latter serves only an informative purpose and contains only general information about forthcoming opportunities available at the time the relevant information is published. In practice, the information on forthcoming procurement opportunities is often accompanied by a disclaimer where some or all of the following are usually stated: (i) all planned procurements are subject to revision or cancellation; (ii) that data is for planning purposes only; (iii) the indicative notice does not represent a pre-solicitation or constitute an invitation to tender or request for proposals, nor is it a commitment by the procuring entity to purchase the described suppliers, services or works; and (iv) the notice is not a fully exhaustive list.

### **B. Extent and purpose of publication of information on forthcoming procurement opportunities**

3. References to forthcoming procurement opportunities are found in those jurisdictions where systematic procurement planning exists. Such procurement planning has long existed in many countries while in some countries it is just being introduced. The publication of forthcoming opportunities in turn is a recent phenomenon enabled in some countries by the use of electronic means of communication for publication of procurement-related information.

4. Provisions requiring or encouraging the publication of information on forthcoming procurement opportunities are found, in particular, in Australia, Chile and EU countries.<sup>6</sup> The EU public procurement directive (the “EU directive”)<sup>7</sup> and legislation in a number of EU countries reviewed refer in that context to the publication of a “prior information or indicative notice (PIN)”.<sup>8</sup> In Australia and Chile, reference is made to the publication of annual procurement plans (APPs).<sup>9</sup>

Other terms, such as “order books”, “preliminary notices,” “informative notices”, or “announcement of intent” are also used.

5. Whereas procurement planning is aimed at disciplining procuring entities, the publication of information on forthcoming procurement opportunities is primarily effected to increase competition and save costs during the procurement by drawing suppliers’ early attention to potential procurement opportunities, which enables them to plan their bids in advance. Both procurement planning and publication of information on forthcoming procurement opportunities are strongly promoted by multilateral development banks (the “MDBs”), in particular through their e-GP initiatives, as being conducive, *inter alia*, to the elimination of “ad hoc” and “emergency” procurements and thus of recourses to less competitive methods of procurement.<sup>10</sup>

## **C. Terms of publication**

### **1. Mandatory or optional**

6. Most EU jurisdictions make the publication of PINs mandatory if the estimated total value of the covered procurements is equal to or exceeds a certain threshold.<sup>11</sup> It is also the case under the EU directive, but only when a procuring entity takes the option of shortening the time limits for the receipt of tenders.<sup>12</sup> The publication of PINs with respect to other procurements is optional.<sup>13</sup> Some types of procurements are excluded from the application of the provisions on PINs.<sup>14</sup>

7. In contrast, in Australia, a threshold for mandatory publication of APPs is established only for some private entities that are subject to the Commonwealth Government procurement policy framework.<sup>15</sup> For public procuring entities, except for those excluded from the application of the relevant provisions, publication of APPs is mandatory regardless of the estimated total value of expected procurements. Procuring agencies with no significant procurements planned in the forthcoming year should publish either APPs with no detail of planned procurement or a notice in the government procurement website (AusTender)<sup>16</sup> that they expect to have no significant procurement over the coming year.<sup>17</sup> For all entities, the publication of APPs on any procurement that would benefit from the early notice is explicitly encouraged “as a matter of better practice.”<sup>18</sup>

### **2. Deadline for publication**

8. It is common to establish the time frame for the publication of PINs and APPs usually linked to the beginning of the budgetary year. For instance, in Austria, the publication is to be made at the beginning of each fiscal or budgetary year.<sup>19</sup> In Australia, procuring agencies are to publish APPs annually by the beginning of the financial year, that is by 1 July, but not earlier than 1 June, but this is without prejudice to procuring entities’ obligation to make their APPs available on request.<sup>20</sup> Under the EU directive, where supplies and services are concerned, the publication is to be made as soon as possible after the beginning of the budgetary year; it is different as regards works, the publication in this case is to be made after the decision approving the planning of the works contracts or the framework agreement that the contracting authority intends to award is taken.<sup>21</sup> In Romania, the announcement of intent to procure is to be published not later than 30 days from the

date of the approval of the contracting authority's budget.<sup>22</sup> In some jurisdictions, except for the indication that PINs are to be published at least once a year, no specific deadline for the publication of PINs is found.<sup>23</sup>

### **3. Procurements covered**

9. Flexibility is given to procuring entities to exercise their judgment as to which anticipated procurements to include in the PINs and APPs. The Australian procurement guidelines draw the attention of procuring entities in this context to the objectives of APPs' publication, such as to facilitate procurement planning, increase competitiveness, and save costs during the procurement proceedings, and provide a set of factors that a procuring entity may wish to consider when deciding which procurement to publish in APPs. Although no value threshold is specified, the importance of drawing suppliers' early attention to major projects is particularly highlighted. Among other suggested factors bearing on publication are (i) expiration of existing contractual arrangements in the forthcoming financial year, (ii) the likelihood of the procurement actually occurring, (iii) the method of procurement, and (iv) additional value of the APP publication to the agency's relationship with industry, suppliers and contractors.<sup>24</sup>

### **4. Period covered**

10. In most jurisdictions, a specific reference is made to a certain period of time that PINs or APPs have to cover, usually a calendar or budgetary year.<sup>25</sup> In Australia, the APP must cover agencies' planned procurement for the forthcoming financial year, but may also have an outlook for more than the mandatory 12 months. The Australian procurement guidance explicitly provides that in the latter case APPs must still be published annually. In some jurisdictions, regulations imply that PINs may cover shorter periods.<sup>26</sup> In practice, PINs found on the websites of procuring entities may stretch beyond the term of one year.

### **5. Information published**

11. Apart from a few required fields, flexibility is given to procuring entities to decide what information and level of detail they should include to meet disclosure and transparency requirements and encourage competition while maintaining the integrity of information.<sup>27</sup> Information commonly required to be provided in the publication is: (i) the subject matter of any planned procurement with basic specifications, such as the nature and quantity or value of expected purchases and the place of execution; (ii) the estimated date of the publication of the invitation to tender; and (iii) information about where additional information could be obtained.<sup>28</sup> In addition, under the EU directive, it is necessary to indicate whether a framework agreement is involved.<sup>29</sup> In Chile, it is also required to indicate any procuring method that will be adopted.<sup>30</sup> In Australia, an APP has also to contain a strategic procurement outlook statement for the forthcoming financial year, which "should broadly discuss any key, major or strategic initiatives from which the agency expects procurement to arise."<sup>31</sup>

### **6. Updating information published**

12. Provisions on updating information published with respect to forthcoming procurement opportunities are found in Australia where procuring entities are

explicitly encouraged to amend APPs by inserting details of new planned procurements and amending or deleting inaccurate information to keep the indicative notices current and potential suppliers up to date.<sup>32</sup> In other jurisdictions reviewed, although no explicit provisions addressing the matter have been found, the objectives of the publication of PINs and APPs and taking advantage of the benefits of such publication (see paragraphs 14 and 15 below) may necessitate keeping information up to date. In some jurisdictions, an obligation to keep information on forthcoming opportunities up to date and accurate may be implied as the PIN is a constituent part of the solicitation documents and a reference thereto, i.e. where it was published, is to be included in the solicitation documents.<sup>33</sup>

#### **7. Form and manner of publication**

13. Standard forms for the publication of PINs are prescribed by the EU directive.<sup>34</sup> In Australia, the form is attached to procurement guidance for reference only. As regards the means and place of the publication of PINs and APPs, in all jurisdictions reviewed, they are to be published by electronic means in the same media where other procurement-related information is published.

### **D. Value of publication**

14. It is common to find provisions allowing procuring entities to shorten time frames for submission of tenders if their PINs or APPs meet requirements as to their minimum content and time of publication.<sup>35</sup> To satisfy the minimum content requirement in Australia, APPs must include a description of the procurement, estimated date of the invitation to tender and the procedure to obtain documents, while under the EU directive PINs must contain all the information required for the contract notice insofar as that information is available at the time the PIN is published. To satisfy the requirement as regards the time of publication, APPs, including any amendments thereof, are to be published in Australia between 30 days and 12 months, and under the EU directive, PINs are to be published between 52 days and 12 months before the invitation to tender.<sup>36</sup>

15. In some jurisdictions, procurement law allows procuring entities not to repeat information provided in the PIN unless requested by the suppliers.<sup>37</sup>

### **E. Conclusion**

16. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or the “Model Law”)<sup>38</sup> does not address the publication of forthcoming opportunities. Nor does it address procurement planning in general. The subjects were not discussed when the Model Law was prepared. As the Guide to Enactment states, the Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract and does not purport to address other procurement phases.<sup>39</sup> The publication of forthcoming procurement opportunities could be considered as a step in the procurement phase preceding those dealt with in the Model Law and therefore falling outside its current scope.

17. If the Working Group decides that the Model Law should promote the publication of information on forthcoming procurement opportunities, it shall consider (i) whether the Model Law should require the publication of such information or treat it as optional; (ii) whether there should be a threshold for the publication of such information; (iii) other terms of publication, such as the content of information published, the period covered and time frame for publication; and (iv) any other special conditions imposed on publication of such information. For the drafting suggestions, see section III below.

## **II. Other issues suggested for consideration by the Working Group in connection with electronic publication of procurement-related information**

18. Legislative provisions regulating publication of procurement-related information in jurisdictions reviewed do not often adequately deal with the publication of procurement-related information by electronic means. Electronic publication, besides bringing potential benefits for interested suppliers or contractors and the public in general, such as by providing easier access of broader audience to more procurement-related information, has enabled practices that raise a number of concerns, not found in paper-based environment, that may necessitate specific regulation. Some of them are described in subsections A to C below. Subsection D below intends to bring to the attention of the Working Group the issue of fees charged for access to procurement-related information posted online, deferred by the Working Group for consideration at a future session.

### **A. Content of information and its presentation and systematic maintenance**

19. As was noted in paragraphs 9 and 10 of document A/CN.9/WG.I/WP.39, in practice, more information than required to be published by legislation is made available to the public through electronic means of communication, usually by posting on the Internet. Some of such information may be authorized to be published by law while some is published at the discretion of various public bodies, including procuring entities and entities in charge of maintaining government procurement electronic systems. While the content and manner of publication of information required to be published by law are usually regulated, no similar regulation may exist with respect to information enabled or encouraged to be published or published in practice.

20. Unless some guidance is given as regards the scope and manner of publication, publication of abundant information may impede retrieval of procurement-related information that is necessary and useful. Systematic maintenance of such information and therefore its accuracy, consistency and relevance may also be jeopardized. As a result, although more procurement-related information may be made available in practice, easy public access to information of practical use and importance may be impeded considerably. The content of disclosure may also raise other concerns, including over legitimate commercial interests of the parties, law enforcement and fair competition.

21. These potential problems may be mitigated if the requirement for centralized, systematized and standardized posting of procurement-related information found in some jurisdictions reviewed were to apply to all procurement-related information published. However, in most jurisdictions reviewed, such a requirement extends only to procurement-related information required to be published by law (see sections B and C below).

22. The Working Group, in drafting the relevant provisions of the Model Law on publication of procurement-related information, may wish to consider formulating general rules with respect to the content and manner of publication of procurement-related information. In particular, guidance could be given that no information could be made available to the general public if such a disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition (see, for instance, a similar wording in article 55 (3) of the Model Law). Furthermore, the advantages of systematic and standardized presentation of information may be highlighted, in particular for ease of access, retrieval and systematic maintenance of procurement-related information.

23. With the increasing volume of information made available to the public through online publication, the need for systematic maintenance of information posted becomes more apparent to ensure its accuracy, relevance and consistency. Under the Model Law, the obligation of systematic maintenance extends only to legal texts published under its article 5. The obligation was incorporated in the article without in-depth consideration upon the adoption of the Model Law by the Working Group in 1993. The Working Group may wish to consider extending the obligation of systematic maintenance to all information published, and this could be reflected in the revised article 5 (see section III below), with the Guide to Enactment noting that in a non-paper-based environment, achieving systematic maintenance has become significantly less time- and cost-consuming. Alternatively, the Working Group may wish to decide to limit the obligation of systematic maintenance only to information required to be published under the Model Law.

24. The obligation of systematic maintenance of information published is closely linked to the issue of liability of procuring entities for the failure to provide accurate and up-to-date information to potential suppliers or contractors. The latter issue was discussed when the Model Law was prepared in the context of including references to laws and regulations directly pertinent to the procurement proceedings in solicitation documents (see article 27 (t) of the Model Law).<sup>40</sup> The conclusion reached at that time, as reflected in article 27 (t), was that the omission of reference to laws and regulations pertinent to the procurement proceedings should not constitute grounds for review or give rise to liability on the part of the procuring entity. The Working Group may wish to consider the issue of liability for inaccurate or outdated information in the context of revised article 5 or defer the consideration of that issue until its consideration of the subject of “review of procurement proceedings”.



## **B. Involvement of intermediaries in electronic publication**

25. Procuring entities may be authorized to post information directly without intermediaries or to send it to a designated advertising agent. The first method is practiced in Australia,<sup>41</sup> the second exists, for example, in the EU.<sup>42</sup> The latter, while ensuring standardization and consistency in posting the information, may result in delays and mistakes. The MDBs in the context of their e-government procurement (e-GP) initiatives<sup>43</sup> recommend that “from the very beginning, the procuring entities themselves must publish their information—directly, without third-party intervention—on the single website, abiding by its rules.”<sup>44</sup>

26. The Working Group may wish to consider elaborating on advantages and disadvantages of those options in the Guide to Enactment.

## **C. Multi-posting of procurement-related information**

27. Procurement-related information is frequently posted on a centralized government procurement website as well as on the websites of procuring entities. Even where a centralized system for publication of procurement-related information exists, procuring entities may still be allowed to use other media for publication.<sup>45</sup>

28. Multi-posting of procurement-related information on the Internet may have a negative impact on reliability and integrity of procurement-related information and the procurement process as a whole. In particular, it may cause the fragmentation of procurement-related information and confusion as regards authenticity and authoritativeness of procurement-related information. In addition, it may unintentionally put some potential suppliers getting access to the “correct” website to a more beneficial position than the others, as not the same information posted through the Internet is made available instantaneously to all interested suppliers.

29. These concerns are being addressed in legislation of some jurisdictions. Most of them prohibit the publication of various procurement-related information in different media before it is published in the specifically designated central medium.<sup>46</sup> Some of them specifically state that the same notices published in different media must contain the same information.<sup>47</sup>

30. The MDBs as well address those concerns and recommend that information be published on a single website, according to the rules applicable to the maintenance of the website. MDGs’ e-GP guidelines state that “a single website implies that all the information on procurement must disappear from the websites of the procuring entities. There is no reason why suppliers should visit many different physical or electronic sites in order to reach public sector procurement opportunities, or to establish an interoperability mechanism to substitute for the lack of basic standards. The disappearance of procurement information from individual sites may be gradual, inversely proportional to the development of the single website, but respecting the primacy of the single website, which must contain the original, legally binding information, as well as define the standards and general rules.”<sup>48</sup>

31. The Working Group may consider it useful to address these issues, either in the context of its consideration of the “accessibility standards” in draft article 4 bis (see A/CN.9/WG.I/WP.38 and addendum) or in revised article 5 (see section III

below). Alternatively, it may be decided that provisions in the Guide could sufficiently address those issues. Subject to the Working Group's position on the issue, the Guide could elaborate on desirability of a single centralized medium where all legally-binding, authentic and authoritative procurement-related information is to be consistently and in a timely manner made available to the public and systematically maintained, and a desirability of discontinuing websites of various procuring entities. Alternatively, it may provide specific guidance as regards multi-posting of procurement-related information on the Internet, in particular regarding the need of (i) establishing a clear hierarchy of existing websites and making such a hierarchy known in all websites where procurement-related information is posted by procuring entities or other authorities, (ii) including a mandatory disclaimer about unofficial nature of information posted in websites other than centrally designated website, (iii) providing an obligatory link to the central website, and (iv) defining timing for posting procurement-related information on various websites (e.g. no information could be posted on individual websites before its appearance on the central website).

#### **D. Fees charged**

32. The information disseminated through electronic means is usually made available to the public free of charge. Nevertheless, in some instances, subscription or other types of access fees may be charged that may hinder access to information.<sup>49</sup>

33. The Model Law envisages a possibility of charging a fee only for the provision of prequalification and solicitation documents and requests for proposals (articles 7, 26 and 37) and provides that the price that the procuring entity may charge in such cases must reflect only the cost of printing and providing information to suppliers or contractors, although the term "providing" is not defined. The issue of charging fees for information generally made available to the public was before the Working Group at its seventh session (see A/CN.9/WG.I/WP.34 and addenda). The Working Group deferred consideration of the issue. The Working Group may wish to consider whether the Guide to Enactment should contain a discussion regarding negative consequences that charging fees may have for access to general procurement-related information.

### **III. Drafting suggestions**

#### **A. Article 5**

34. At its seventh session, the Working Group agreed that general principles regulating the publication of procurement-related information under the Model Law should be consolidated in a revised article 5 of the Model Law, which as revised would apply not only to the publication of legal texts as article 5 currently does but also to the publication of information currently dealt with in other articles of the Model Law, such as invitations to participate in specific procurement (articles 24, 37, 46, 47 and 48 of the Model Law), and notices of contract awards (article 14 of the Model Law), as well as to other information, the publication of which may be envisaged in the revised Model Law. It was further agreed that revised article 5

would be based on the general principles that any means of publication or combination thereof could be chosen, and that the chosen means had not to be justified, provided that the chosen means of publication complied with certain “accessibility standards”, such as they should not unreasonably restrict access to procurement proceedings and should not discriminate against and among suppliers (A/CN.9/575, paragraphs 25-26). These general principles and the “accessibility standards” are dealt with in draft article 4 bis discussed in a note by the Secretariat (A/CN.9/WG.I/WP.38 and addendum).

35. At its seventh session, the Working Group also agreed that in the continuation of its deliberations regarding draft article 5 at a future session, the following text would be considered:

“Article 5. Public accessibility of procurement-related information

“(1) The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereto, as well as any other documents and information required to be published [or being published under this Law] shall be promptly made accessible to the public and systematically maintained.

“[(2) Any further information, such as regarding forthcoming opportunities, internal controls or guidance, that an enacting State or procuring entity chooses to publish shall be promptly made accessible to the public [and systematically maintained].]”

36. As regards paragraph 1 of the revised article, the wording in square brackets intends to cover the information that, for example, although not required to be published under the Model Law, is nevertheless required to be made available for inspection by the general public and is made available for such purpose through the publication (see article 55 (3) of the Model Law as regards the decisions taken in the course of procurement review proceedings). The Working Group may wish to consider adding a specific reference in the paragraph to judicial decisions and policies, procedures and practices related to procurement and expanding the commentary in the Guide to Enactment by drawing from the wording of paragraph 68 of the UNCITRAL Model Law on Electronic Commerce<sup>50</sup> that defines “the law” as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law, including common law rules.

37. Paragraph 2 of the revised article has not been considered by the Working Group. It is intended to cover other information that is made available to the public at the discretion of public authorities, including procuring entities. The Guide could elaborate on the value of publicizing all regulatory texts related to procurement specifying that, while such requirement might be too onerous when only paper means are available, this might not be the case when electronic means are used. It is expected that the advantages of the use of electronic means of communication in procurement, including for the publication of procurement-related information and its systematic maintenance, would be discussed in the Guide in the context of functional equivalence of all means of communicating, publishing, exchanging or storing information or documents, which is now addressed in draft article 4 bis. The commentary to revised article 5 could usefully cross-refer to the relevant discussions in the Guide.

38. A reference to information on forthcoming procurement opportunities in paragraph 2 of the revised article should be considered together with a proposed article 5 bis (see subsection B below). The way of treating such information in the revised article 5 will depend on whether the Model Law would deal with the subject at all and, if so, under what terms, in particular whether the publication of such information would be optional or mandatory (see paragraphs 16 and 17 above).

39. The Working Group, in conjunction with its consideration of the revised article 5, may wish to consider formulating general rules of publication of information, as discussed in section II above (see, in particular, paragraphs 22-24, 26 and 31 above), and its position as regards the charging of fees for information generally made available to the public (see paragraph 33 above), for inclusion in the Model Law or the Guide to Enactment. It may also wish to assess whether the same general principles of the publication of procurement-related information (see paragraph 34 above), any rules of publication that the Working Group may wish to formulate, “accessibility standards” (see A/CN.9/WG.I/WP.38 and addendum) and the obligation of “systematic maintenance” (see paragraphs 23-24 above) would equally apply to the information required to be published under paragraph 1 and information referred to in paragraph 2 of the revised article 5.

## **B. Article 5 bis (publication of information on forthcoming opportunities)**

40. At its seventh session, the Working Group expressed a preference for Variant B of the proposed article 5 bis “Notice of procurement opportunities”, as contained in A/CN.9/WG.I/WP.34/Add.2, which provided as follows:

“Within [the enacting State specifies a time-limit] after the begin of a fiscal year, procuring entities may publish notice of their expected procurement requirements for the following [the enacting State specifies a period].”

41. Subject to the Working Group’s decision on the publication of information on forthcoming procurement opportunities under the Model Law, Variant B could be expanded, in particular, to address other terms of publication of such information, or relevant guidance could be given in the Guide to Enactment (see paragraphs 16 and 17 above). The Guide could also draw the enacting State’s attention to the value of publication of such information. In particular, it could state that such information, while not being binding on procuring entities and therefore not having negative interference with the budgeting process, disciplines procuring entities in procurement planning, diminishes cases of “ad hoc” and “emergency” procurements and consequently, recourse to less competitive methods of procurement. The Guide could also elaborate that publication of such information enables more suppliers to learn about procurement opportunities, assess their interest in participation and plan their bids in advance accordingly, which also positively affects competition, transparency and cost-saving in procurement. The positive impact such information could have in a broader governance context, in particular in opening procurement for general public review and local community participation, could also be highlighted.

## C. New provisions

42. The Working Group may wish to consider publication of additional information, necessitated by specific procurement techniques and features, such as suppliers lists, framework agreements and electronic reverse auctions (see document A/CN.9/WG.I/WP.39, paragraph 12), together with other substantive issues involved in such procurement techniques and features that the Working Group will take up in due course.

### Notes

- <sup>1</sup> See, e.g., in Chile, article 2.19 of the Regulation of Law 19.886 of 29 August 2003 (known as “Ley de Compras”, available at [http://www.chilecompra.cl/portal/centro\\_informaciones/fr\\_ley\\_compras.html](http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html)), that defines the “annual procurement and contracting plan” as a list of “goods and/or services of reference character that a certain entity plan to procure or contract in a given calendar year”. The Regulation is available in Spanish at <https://www.chilecompra.cl/Portal/InicioPortal.aspx>.
- <sup>2</sup> For example, in Brazil, provisions are found requiring a procuring entity to publish in advance at least once before the invitation to a specific procurement an advertisement containing a summary of the upcoming invitation to tender. The advertisements are to indicate only the object of procurement and place, date and time where and when prospective participants can read and obtain the full text of the invitation to tender and all other information about the specific procurement. They are to be published in the Official Gazette and in other widely circulated newspapers and in addition can be disseminated by other means “in order to broaden the area of competition.” See article 21 of federal Law No. 8.666 of 21 June 1993 as amended. The text in Portuguese is available at <https://www.planalto.gov.br/> and <http://www.COMPRASNET.gov.br/legislacao/leis/lei8666.pdf>.
- <sup>3</sup> Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf).
- <sup>4</sup> See, e.g., the reference to “options for further procurement” in article IX, 6 (a), of the GPA.
- <sup>5</sup> This is specifically stated, for example, in article 10 of the Public Procurement Law of the Republic of Bulgaria of 25 June 1999, published in the State Gazette, No. 56 of 22 June 1999, available also at [http://www.wto.org/english/tratop\\_e/gproc\\_e/49.doc](http://www.wto.org/english/tratop_e/gproc_e/49.doc), as well as in article 15 (4) of Ordinance No. 20 of Romania of 24 January 2002 concerning public acquisitions by means of electronic bids.
- <sup>6</sup> See, in Australia, sub-clauses 7.16-7.17 of the Commonwealth Procurement Guidelines, January 2005 (hereinafter the “CPG”), available at [http://www.finance.gov.au/ctc/commonwealth\\_procurement\\_guide.html](http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html), and article 12 of the Procurement Guidance on Procurement Publishing Obligations, January 2005, available at [http://www.finance.gov.au/ctc/austender-annual\\_procurement\\_p.html](http://www.finance.gov.au/ctc/austender-annual_procurement_p.html) (hereinafter the “Australian Procurement Publishing Guidance”); in Chile, article 12 of Ley de Compras; and in the EU, article 35 (1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)), and in EU countries, e.g. in Austria, para. 38 of the Federal Act on the Award of Purchase Contracts (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>; in Germany, para. 18(a) of Ordinance on the procurement of supplies by the Minister of Economy (Verdingungsordnung für Leistungen (VOL)) of 17 September 2002, available in German at [http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/Homepage\\_2Fdownload\\_2Fwirtschaftspolitik\\_](http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/Homepage_2Fdownload_2Fwirtschaftspolitik_)

2FVOL.pdf,property=pdf.pdf, para. 9 (a) of Ordinance on the procurement of services by the Minister of Economy (Verdingungsordnung für freiberufliche Leistungen (VOF)), available in German at <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/V/verdingungsordnung-fuer-freiberufliche-leistungen,property=pdf.pdf>, and Part A, Section 2, para. 17 (a) of Ordinance on the procurement of construction contracts by the Minister of Traffic and Construction (Vergabe- und Vertragsordnung für Bauleistungen (VOB)), available in German at [http://www.bmvbw.de/Anlage/original\\_13076/VOB-2002-Teile-A-und-B.pdf](http://www.bmvbw.de/Anlage/original_13076/VOB-2002-Teile-A-und-B.pdf); and in Lithuania, article 18.2 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.

- <sup>7</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)) (hereinafter the “EU Public Procurement Directive”).
- <sup>8</sup> See, e.g., article 35 (1) of the EU Public Procurement Directive, and article 13 of the Public Procurement Law of Poland of 29 January 2004.
- <sup>9</sup> See sub-clause 7.16 of the Australian CPG, and article 12 of the Chilean Ley de Compras.
- <sup>10</sup> See, in particular, the Electronic Government Procurement Portal launched by the Asian Development Bank, the Inter-American Development Bank and the World Bank in November 2004 (available at <http://www.mdb-egp.org/data/default.asp>). It contains a number of documents prepared by the MDBs and used by many countries in designing their e-government procurement portals. One of the sections of the portal provides an e-GP Roadmap, in which the posting of procurement plans is addressed (p. 32).
- <sup>11</sup> See, e.g., para. 38 of the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>; § 29 of the Act of the Czech Republic on Public Contracts, available at <http://www.oecd.org/dataoecd/54/21/35013316.pdf>; para. 9(a) of the Ordinance on the procurement of services by the Minister of Economy of Germany (Verdingungsordnung für freiberufliche Leistungen (VOF)), available in German at <http://www.bmwa.bund.de/Redaktion/Inhalte/Pdf/V/verdingungsordnung-fuer-freiberufliche-leistungen,property=pdf.pdf>; section 22 (1) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003, available at <http://www.oecd.org/dataoecd/53/19/35014924.pdf>; article 18.2 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>; article 13 of the Public Procurement Law of Poland of 29 January 2004, available at <http://www.oecd.org/dataoecd/52/53/35015461.pdf>; and article 67 of the Public Procurement Act of the Republic of Slovenia of 5 May 2000.
- <sup>12</sup> Article 35 (1) of the EU Public Procurement Directive.
- <sup>13</sup> See, e.g., section 22 (2) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003.
- <sup>14</sup> See, e.g., article 35 (1) of the EU Public Procurement Directive, for instance, exempting negotiated procedures without the prior publication of a contract notice from the application of the provisions on the publication of PINs.
- <sup>15</sup> Those are bodies legally and financially separate from the State who nevertheless could be subject to the CPG. See article 1.3 of the CPG. For them, the requirement to publish APPs only applies to covered procurements which are non-construction procurements above \$400,000 and construction services procurements above \$6 million (in Australian dollars). See article 4.1 of the Australian Procurement Publishing Guidance and articles 3-4 of the Finance Minister’s (CAC Act Procurement) Directions 2004, available at [http://www.finance.gov.au/ctc/finance\\_minister\\_s\\_\\_cac\\_act\\_pr.html](http://www.finance.gov.au/ctc/finance_minister_s__cac_act_pr.html).

- <sup>16</sup> See <https://www.tenders.gov.au/federal/index.shtml>.
- <sup>17</sup> Article 4.1 of the Australian Procurement Publishing Guidance.
- <sup>18</sup> Ibid.
- <sup>19</sup> See § 38 (1) of the Federal Act on the Award of Purchase Contracts of Austria (Purchase Contracts Award Act 2002), available at <http://wko.at/rp/vergabe/gesetzestextbvergg2002.pdf>.
- <sup>20</sup> Article 4.1 of the Australian Procurement Publishing Guidance.
- <sup>21</sup> Similar provisions are found, for example, in article 18.4 of the Law on Public Procurement of the Republic of Lithuania.
- <sup>22</sup> Article 15 (2) of Ordinance No. 20 of 24 January 2002 concerning public acquisitions by means of electronic bids.
- <sup>23</sup> See, e.g., article 71 of the Public Procurement Law of the Republic of Serbia (available at <http://www.oecd.org/dataoecd/34/12/35016323.pdf>), and article 67 (1) of the Public Procurement Act of the Republic of Slovenia of 5 May 2000.
- <sup>24</sup> Article 4.2 of the Australian Procurement Publishing Guidance.
- <sup>25</sup> See, e.g., article 2.19 of the Regulation of Ley de Compras (see above, endnote 1).
- <sup>26</sup> For example, under article 71 of Public Procurement Law of the Republic of Serbia and article 67 (1) of the Public Procurement Act of the Republic of Slovenia of 5 May 2000, PINs are to be published at least once a year.
- <sup>27</sup> See, e.g., in Australia, article 7.17 of the CPG and article 4.2 of the Procurement Publishing Guidance.
- <sup>28</sup> See, e.g., annex 1 of Directive 2001/78/EC of the European Parliament and of the Council of 13 September 2001 on the use of standard forms in the publication of public contract notices (Official Journal of the European Union, No. L 285, 29 October 2001, p. 1) (hereinafter the “EU Public Contract Notices Directive”), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_285/l\\_28520011029en00010162.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_285/l_28520011029en00010162.pdf); and article 22 (3) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003.
- <sup>29</sup> The EU Public Procurement Directive, annex VII A, under “Prior information notice”.
- <sup>30</sup> See article 98 of Regulation of Ley de Compras (see above, endnote 1).
- <sup>31</sup> See article 4.2 of the Australian Procurement Publishing Guidance.
- <sup>32</sup> Ibid., article 4.4.
- <sup>33</sup> See, e.g., articles 20 (2) (21) and 20 (3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.
- <sup>34</sup> See the EU Public Procurement Directive, annex VIII, 1 (a). A standard form is annexed to the EU Public Contract Notices Directive (see above, endnote 28).
- <sup>35</sup> In Australia, the time frame may be shortened to not less than ten days in lieu of the standard 25-day minimum time limit, provided reasonable time is still available for potential suppliers to prepare their tenders (see article 4.3 of the Australian Procurement Publishing Guidance). Under article 38 (4) of the EU Public Procurement Directive, the time frame could be shortened to 36 days up to 22 days from usual 52-day time limit applicable in open procedures, and 37- and 40-day time limits applicable in other methods of procurement. See also section 25 (9) of the Law on Procurement for State or Local Government Needs of Latvia of 5 June 2003; articles 38, 39 and 48 of the Law on Public Procurement of the Republic of Lithuania; and articles 60 (3) and 63 of the Public Procurement Act of Slovenia of 5 May 2000.

- <sup>36</sup> See article 4.3 of the Australian Procurement Publishing Guidance and article 38(4) of the EU Public Procurement Directive.
- <sup>37</sup> See, e.g., article 20 (3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.
- <sup>38</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as “*UNCITRAL Yearbook*”), vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).
- <sup>39</sup> Part I, paragraph 10, of the Guide to Enactment.
- <sup>40</sup> For the consideration of the issue, see documents: A/CN.9/315, paras. 46-47, reproduced in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as the “*UNCITRAL Yearbook*”), vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A; A/CN.9/331, paras. 93-97, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; and A/CN.9/343, paras. 181-183, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A.
- <sup>41</sup> See AusTender User Guide, December 2004, available at [http://www.contracts.gov.au/docs/GaPSUserGuide\\_20040401.pdf](http://www.contracts.gov.au/docs/GaPSUserGuide_20040401.pdf).
- <sup>42</sup> The European Union operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Union, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard-copy form and in additional electronic media).
- <sup>43</sup> See, in particular, the Electronic Government Procurement Roadmap, pp. 32-40, available in the MDBs’ Electronic Government Procurement Portal (<http://www.mdb-egp.org/data/default.asp>).
- <sup>44</sup> *Ibid.*, p. 32.
- <sup>45</sup> See e.g., articles 3-A and 3-B of Law No. 8.666, of 21 June 1993 of Brazil; and article 19.2 of the Law on Public Procurement of the Republic of Lithuania. Article 3-A of the Brazilian Law, for example, read that “all organs of the Public Administration, autonomous entities and public foundations shall publish at the appropriate time through their own Internet sites or through specific sites of the Federal, State or Municipal Administration, data and information relating to procurement proceedings in course, and their results”. Article 3-B further states that State governments shall create specific Internet sites for the publication, under standing agreements, of information relating to procurement carried out by municipalities with less than 100,000 (one hundred thousand) inhabitants that do not possess the technical or financial resources necessary to comply with article 3-A.
- <sup>46</sup> See, e.g., article 23 (1) of the Public Procurement Act of the Republic of Croatia of 14 December 2001, available at <http://www.oecd.org/dataoecd/54/62/35013293.pdf>.
- <sup>47</sup> See, e.g., articles 35 and 36 of the EU Public Procurement Directive, and article 19.5 of the Law on Public Procurement of the Republic of Lithuania.
- <sup>48</sup> See the Electronic Government Procurement Roadmap, available in the MDBs’ Electronic Government Procurement Portal (<http://www.mdb-egp.org/data/default.asp>), p. 32.
- <sup>49</sup> See, e.g., South Africa ([http://origin.sundayobserver.lk/2001/pix/gov\\_gazette.html](http://origin.sundayobserver.lk/2001/pix/gov_gazette.html)).
- <sup>50</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I).



The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>).

---