United Nations A/CN.9/WG.I/WP.64

General Assembly

Distr.: Limited
2 July 2008

Original: English

[Start1]

United Nations Commission on International Trade Law
Working Group I (Procurement)
Fourteenth session
Vienna, 8-12 September 2008

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Remedies, conflicts of interest and services procurement in the Model Law

Note by the Secretariat

Contents

V.08-55242 (E)

I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) is set out in paragraphs 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments.

2. At its ninth session, the Working Group noted that the United Nations Convention against Corruption[1] had recently entered into force and that although the main elements of its provisions addressing procurement were consistent with those of the Model Law, its requirements for domestic review or remedies provisions and those addressing conflicts of interest went beyond the current provisions of the Model Law, and might warrant the further attention of the Working Group in due course.[2]

3. At its sixth session, the Working Group decided that it would consider additional guidance to support the principal method for the procurement of services under Chapter IV of the Model Law at a future session (see, further, paragraphs 34-37 below).

4. This note has been prepared for the Working Group's fourteenth session, to address the topics of domestic review or remedies provisions, conflicts of interest in procurement and services procurement, which the Working Group at its thirteenth session agreed would be considered by the Working Group at its fourteenth session.[3]

II. Remedies (domestic review provisions)

5. At its sixth session, the Working Group also considered the remedies provisions contained in Chapter VI of the 1994 text of the Model Law. It noted that because remedies and enforcement in procurement touched on the legality of government acts and upon the interaction of executive and the judicial branches of a particular State, the provisions of Chapter VI had been drafted to be limited to general guidance, and to be optional.

6. The Working Group decided on a preliminary basis at that session that:

(a) It would be useful to provide further guidance, probably in the Guide to Enactment, on review provisions that national laws could incorporate;

(b) Recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent

---

[1] The text of UNCAC is available at http://www.unodc.org/unodc/en/treaties/CAC/index.html. UNCAC entered into force on 14 December 2005, following the ratification of its text by 30 signatories. The objectives of UNCAC are to promote, facilitate and support: (i) measures to prevent and combat corruption more efficiently and effectively, (ii) international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and (iii) integrity, accountability, and proper management of public affairs and property.

[2] A/CN.9/595, para. 10.

[3] A/CN.9/648, para. 17, and Annex.

administrative review, the Working Group should leave various options open for enacting States, taking into account that the Model Law was sufficiently flexible in this regard and that the independence of the reviewer would be paramount. If there were a need for additional comments on independence, they could be reflected in the Guide;

(c) Provisions related to the judicial review process should be left for enacting States; and

(d) The list of exceptions in article 52 (2) should be deleted. However, the Guide to Enactment should indicate that enacting States might wish to exclude some matters from the review process, which could include some of those currently listed in that article and other matters. The Guide to Enactment should indicate the rationale for such exclusions and explain the implications of any exclusions, such as the risk that they might preclude effective review and control of the proper management of the procurement process.[4]

7. At its fourteenth session, the Working Group agreed to consider these issues by reference to the existing provisions of Chapter VI of the Model Law, focusing in particular on the exception relating to the selection of the procurement method under article 52 (2) (a). This exception has been criticized on the ground that lack of accountability in respect of the selection of procurement methods is one of the areas that has led to most abuses in practice. However, concern has also been expressed within the Working Group and by commentators that allowing the choice of procurement tools within procurement methods to be subject to review (such as the use of electronic reverse auctions and framework agreements to award procurement contracts) might interfere with the proper conduct of the procurement process. In addition, the Working Group may wish to consider the impact of the filing of a review procedure on the conduct of a procurement, and whether suspension of the procurement pursuant to article 56 would always be appropriate.

8. In considering these issues, the Working Group may also recall that UNCAC article 9 (1) (d) requires procurement systems to include "[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 pursuant to this paragraph are not followed". This requirement is more stringent than the equivalent current rules of the Model Law, in that it is mandatory and not optional. The Working Group may also wish to consider a new European Union Directive relating to review procedures in procurement.[5] This Directive contains detailed provisions, a "standstill period" similar to that found in article 56 of the Model Law, and gives national courts the ability under certain conditions to set aside a signed contract, by rendering the contract "ineffective". The Directive also seeks to combat illegal direct awards of public contracts, which the European Commission considers to be the most serious infringement of EU procurement law. It also seeks to strengthen remedies through damages in addition to nullifying awards. Commentators have expressed the view that one of the express aims of the new Directive, effectiveness,

---

[4] A/CN.9/568, paras. 102-113.

[5] Directive 2007/66/EC, of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, available at http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

means that the resulting national systems should be robust as well as harmonized. In this regard, the Working Group may wish to consider the degree of consistency between the UNCAC and EU provisions, whose review provisions are not optional, and the Model Law, whose review provisions are optional. The former provide a more recent reflection of the current approach to remedies in procurement.

9. The Working Group may also wish to consider whether the guidance to support the Model Law's review provisions should be expanded. The current guidance addresses the need for a review system, the challenges of drafting provisions of universal application, and the procedures themselves, but does not focus on other policy issues, such as the government entity in which to locate the review body, the scope or jurisdiction of the review, whether persons other than suppliers or contractors should be able to initiate a review, evidence and the standard of proof, and the remedies that the review body can order.[6] Although there would be significant variations from system to system, the Working Group may consider that a discussion of these policy questions might assist those crafting legislation in individual enacting States.

III. Conflicts of interest in procurement

A. Background

10. The term "conflict of interest" is widely used in commercial and legal transactions, and is addressed in many professional codes of conduct. As noted by the International Federation of Consulting Engineers (FIDIC), however, "[d]espite international use of the term, a great deal of confusion and serious problems, both real and perceived, have materialized because there is no universally accepted definition of conflict of interest."[7]

11. Nonetheless, there is a degree of consensus on the notion of an actual conflict of interest. Conflicts of interest in procurement have been described as "circumstances or situations in which the advice, findings or recommendations under a given assignment or the selection process for the assignment in question may be influenced by extrinsic considerations stemming from another assignment or the private interest of officials in charge in the procuring entity."[8] FIDIC has a working definition of conflict of interest regarding consultants as follows: "A consultant conflict of interest (COI) is a situation in which a consultant provides biased professional advice to a client in order to obtain from that client an undue benefit for himself, herself or an affiliate and in so doing, places the consultant in a position where its own interests could prevail over the interests of the client." These

---

[6] For a fuller discussion of the policy choices regarding review mechanisms, see "Constructing a bid protest process: the choices that every procurement challenge system must make", Gordon. D.I., Public Contract Law Journal, Spring, 2006. The Working Group may wish to consider whether an express reference to this article might assist legislators.

[7] See http://www1.fidic.org/about/statement21.asp. UNCAC does not contain a definition of the term "conflict of interest".

[8] This description was provided to the Secretariat in consultations with the World Bank.

provisions therefore focus on actual, rather than perceived, or potential, conflicts of interest.[9]

12. The Sigma Programme (Support for Improvement in Governance and Management, a joint initiative of the Organisation for Economic Co-operation and Development (OECD) and the European Union), on the other hand, takes a stricter view of conflicts of interest, considering them "not only the situation where in fact there is an unacceptable conflict between a public official's interests as a private citizen and his/her duty as a public official, but also those situations where there is an apparent conflict of interest or a potential conflict of interest."[10]

13. It has also been observed that "[w]hile conflicts of interest may ultimately lead to corrupt or collusive behaviour, or to fraud by deliberate lack of disclosure of conflicting interests, they do not, by themselves, constitute corruption, collusion or fraud,"[11] and accordingly they are generally addressed as a part of the promotion of integrity. In other words, as part of the implementation of a general principle that procurement decisions should be taken in a manner that is fair, transparent, free from bias or discrimination, and unaffected by self-interest or personal gain.

14. An example of this approach is found in the OECD's "Integrity in public procurement: Good practice from A to Z", which contains guidance on the avoidance and handling of conflicts of interest situations.[12] The World Trade Organization's draft revised Agreement on Government Procurement (GPA)[13] contains the following statement of principle on conflicts of interest:

---

[9] The definition is found at http://www1.fidic.org/about/statement21.asp.

[10] "Conflict-of-interest policies and practices in nine EU member states: a comparative review", SIGMA Paper no. 36, GOV/SIGMA(2006)1/REV1, available at http://www.olis.oecd.org/olis/2006doc.nsf/linkto/gov-sigma(2006)1-rev1 (the "SIGMA paper"). The SIGMA paper continues that "An apparent conflict of interest refers to a situation where there is a personal interest that might reasonably be considered by others to influence the public official's duties, even though in fact there is no such undue influence or there may not be such influence. The potential for doubt as to the official's integrity and/or the integrity of the official's organisation makes it obligatory to consider an apparent conflict of interest as a situation that should be avoided. The potential conflict of interest may exist where an official has private-capacity interests that could cause a conflict of interest to arise at some time in the future. An example is the case of a public official whose spouse would be appointed in the coming weeks as executive director or CEO of a company concerned by a recent decision made by the official, and the public official is aware of the spouse's appointment. The basic definition used here therefore assumes that a reasonable person, knowing all of the relevant facts, would conclude that the official's private-capacity interest could improperly influence his/her conduct or decision-making."

[11] This comment was provided to the Secretariat in consultations with the World Bank.

[12] Integrity in Public Procurement: Good Practice from A to Z (OECD, 2007). The text is available at http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html.

[13] According to the WTO website, in December 2006, negotiators reached provisional agreement on a revision of the text of the 1994 plurilateral Agreement. The agreement of the negotiators is provisional in that it is subject to (i) a legal check; and (ii) a mutually satisfactory outcome to the other aspect of the negotiations on a new Government Procurement Agreement, namely those on an expansion of coverage (i.e. the lists of government entities whose procurement is opened up). The revised text is available at http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc.

"Conduct of Procurement

"4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

"(a) Is consistent with this Agreement, using methods such as open tendering, selective tendering, and limited tendering;

"(b) Avoids conflicts of interest; and

"(c) Prevents corrupt practices."

15. The United Nations Convention against Corruption ("UNCAC") requires procurement systems to address, inter alia, the issue of conflicts of interest in procurement. Article 9 (1) of the text provides, in material part, as follows:

"Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia …

"(e) [w]here appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements."

16. It was in the light of this requirement that the Working Group "considered the recommendation by the Commission at its thirty-ninth session that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11)."[14]

B. The nature of conflicts of interest in procurement

17. Examples of conflicts of interest in public procurement provided to the Secretariat include:

(a) Conflict between consulting activities and the procurement of goods or construction;

(b) Certain conflicts within consulting assignments, for example the preparation of terms of reference and participation in the resulting tenders;

(c) The execution of a project or study execution and the evaluation of the same project or study;

(d) The design of a project and the study of its impact on the environment;

[14] A/CN.9/623, para. 4.

(e) Advice given to both government and buyer in, for example, privatization;

(f) A conflict arising from family or other personal relationships, such as supplier fully or partly owned by a procurement official or his family, or where a consulting assignment is supervised by a relative of a key expert in the project concerned;

(g) Other situations in which the prospect of private gain may affect the objectiveness of a procurement decision.[15]

18. The Working Group has also noted that conflicts of interest can arise in particular where procurement is outsourced to commercial agencies, such as may be the case in systems that make use of procurement tools such as framework agreements (through the use of centralized purchasing agencies) and electronic reverse auctions, in connection with which the Working Group noted "that the use of ERAs had also raised a number of concerns, in particular that such use: (e) might create conflicts of interest in market players, such as software firms and 'market makers' or 'e-market operators', and fee-charging centralized purchasing agencies."[16]

C. The requirements of UNCAC

19. The requirements of article 9 (1) (e) of UNCAC, together with provisions in its article 8 ("Codes of Conduct for Public Officials"), which require each State Party to promote (inter alia) "integrity, honesty and responsibility" among its public officials, and to endeavour to apply codes or standards of conduct,[17] are commonly considered to mean that procurement legislation or regulation should require all interests, assets, hospitality and gifts to be declared and registered. The purpose of the disclosure is to identify potential conflicts between an employee's official position and the employee's private interests, so that appropriate protections against such conflicts can be fashioned. This approach is generally the one taken by national legislatures that address conflicts of interest, that is, the use of disclosure provisions to assess whether a real rather than a potential conflict may exist, against which action can be taken.[18]

---

[15] Examples taken from the FIDIC guidance (see footnote 1, supra), and provided to the Secretariat to the World Bank.

[16] A/CN.9/575, para. 54.

[17] Article 8 (5) provides that "Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials."

[18] See, for example, the Canadian provisions available at http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0813_e.asp, and the Australian provisions available at http://www.nt.gov.au/dcis/procurement_policy/documents/policy/po7_conflict_interest.pdf.

D. Approach to regulation of conflicts of interest

20. In addition to the general statements of procurement system objectives set out above, addressing the principle of integrity and avoidance of conflicts of interest in procurement, there are recent examples of enacting States passing legislation that addresses conflicts of interest as a distinct topic. In Canada, for example, conflicts of interest are addressed in the Conflict of Interest Act, which came into force on July 9, 2007.[19] The provisions applicable to procurement, contained in sections 14, 15, 35 and 36 of the Act, prohibit public servants of their relevant employing departments from entering into contracts in which family members of the public servant have an interest, as follows: "14. (1) No public office holder who otherwise has the authority shall, in the exercise of his or her official powers, duties and functions, enter into a contract or employment relationship with his or her spouse, common-law partner, child, sibling or parent." Similar provisions apply to specific categories of office-holder. The sections also prohibit public servants from engaging in outside activities, including outside employment or professional or commercial activity, holding office in a union or professional association, engaging in paid consultancies or being an active partner in a partnership. The legislation also prevents public officials from accepting employment with entities with which they formerly had "direct and significant official dealings" "for one year from ceasing their public duties".[20]

21. In Australia, the Public Sector Employment and Management Act, Employment Instruction 13, contains a code of conduct that applies to all procurement officials (as public servants). There are criminal sanctions for breaches of legislative and procedural requirements, along with civil penalties such as dismissal from employment.[21]

22. In the United States, the Procurement Integrity Act[22] addresses conflicts of interest, and further regulation is found in the Federal Acquisition Regulations. The general principle is to avoid any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. The provisions both place restrictions on the actions of public servants and require their official conduct to be such that they would have no reluctance to make a full public disclosure of their actions.[23]

23. The World Bank's policy on conflicts of interest is set out in paragraph 1.08 (b) of its "Guidelines: Procurement under IBRD Loans and IDA Credits" (the "Procurement Guidelines") and in paragraphs 1.9 and 4.12 of the

---

[19] The full text of the law is available at http://laws.justice.gc.ca/en/showdoc/cs/C-36.65//20070709/en?command=search&caller=SI&search_type=all&shorttitle=conflict%20of%20interest%20act&day=9&month=7&year=2007&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50.

[20] The sections are set out in full at http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2007/0813_e.asp.

[21] See http://www.nt.gov.au/dcis/procurement_policy/documents/policy/po7_conflict_interest.pdf.

[22] See "Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law", Yukins, C. R., Public Contract Law Journal, Vol. 36, No. 3, 2007, footnote 46, citing 41 U.S.C., 423.

[23] Federal Acquisition Regulation 3.101, 3.104-1 et seq. See, further, Yukins, op. cit., footnotes 46 and 47.

Guidelines: Selection and Employment of Consultants by World Bank Borrowers (the "Consultant Guidelines").[24] The Bank notes that the provisions, which are set out below, can be transposed or used as a set of model provisions in national legislative instruments, and are generally accepted by suppliers as sound, fair and predictable:

(a) Procurement Guidelines, section 1.8 (b), addressing eligibility or qualification: "A firm which has been engaged by the Borrower to provide consulting services for the preparation or implementation of a project, and any of its affiliates, shall be disqualified from subsequently providing goods, works, or services resulting from or directly related to the firm's consulting services for such preparation or implementation. This provision does not apply to the various firms (consultants, contractors, or suppliers) which together are performing the contractor's obligations under a turnkey or design and build contract";

(b) Consultant Guidelines, section 1.9, addressing conflict of interest: "Bank policy requires that consultants provide professional, objective, and impartial advice and at all times hold the client's interests paramount, without any consideration for future work, and that in providing advice they avoid conflicts with other assignments and their own corporate interests. Consultants shall not be hired for any assignment that would be in conflict with their prior or current obligations to other clients, or that may place them in a position of being unable to carry out the assignment in the best interest of the Borrower. Without limitation on the generality of the forgoing, consultants shall not be hired under the circumstances set forth below:

"(i) Conflict between consulting activities and procurement of goods, works or services (other than consulting services covered by these Guidelines): A firm that has been engaged by the Borrower to provide goods, works, or services (other than consulting services covered by these Guidelines) for a project, and each of its affiliates, shall be disqualified from providing consulting services related to those goods, works or services. Conversely, a firm hired to provide consulting services for the preparation or implementation of a project, and each of its affiliates, shall be disqualified from subsequently providing goods, works or services (other than consulting services covered by these Guidelines) resulting from or directly related to the firm's consulting services for such preparation or implementation;

"(ii) Conflict among consulting assignments: Neither consultants (including their personnel and sub-consultants) nor any of their affiliates shall be hired for any assignment that, by its nature, may be in conflict with another assignment of the consultants. As an example, consultants hired to prepare engineering design for an infrastructure project shall not be engaged to prepare an independent environmental assessment for the same project, and consultants assisting a client in the privatization of public assets shall neither purchase, nor advise purchasers of, such assets. Similarly, consultants hired to

---

[24] The Procurement Guidelines are available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html, and the Consultant Guidelines at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060656~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html?.

prepare Terms of Reference (TOR) for an assignment shall not be hired for the assignment in question;

"(iii) Relationship with Borrower's staff: Consultants (including their personnel and sub-consultants) that have a business or family relationship with a member of the Borrower's staff (or of the project implementing agency's staff, or of a beneficiary of the loan) who are directly or indirectly involved in any part of: (i) the preparation of the TOR of the contract, (ii) the selection process for such contract, or (iii) supervision of such contract may not be awarded a contract, unless the conflict stemming from this relationship has been resolved in a manner acceptable to the Bank throughout the selection process and the execution of the contract";

(iv) Consultant Guidelines, section 1.10, addressing unfair competitive advantage: "Fairness and transparency in the selection process require that consultants or their affiliates competing for a specific assignment do not derive a competitive advantage from having provided consulting services related to the assignment in question. To that end, the Borrower shall make available to all the short-listed consultants together with the request for proposals all information that would in that respect give a consultant a competitive advantage."

24. The SIGMA paper lists what it refers to as: "[T]he most important instruments to prevent and avoid conflict of interest … :

"(a) Restrictions on ancillary employment;

"(b) Declaration of personal income;

"(c) Declaration of family income;

"(d) Declaration of personal assets;

"(e) Declaration of family assets;

"(f) Declaration of gifts;

"(g) Security and control of access to internal information;

"(h) Declaration of private interests relevant to the management of contracts;

"(i) Declaration of private interests relevant to decision-making;

"(j) Declaration of private interests relevant to participation in preparing or giving policy advice;

"(k) Public disclosure of declarations of income and assets;

"(l) Restrictions and control of post-employment business or NGO activities;

"(m) Restrictions and control of gifts and other forms of benefits;

"(n) Restrictions and control of external concurrent appointments (e.g. with an NGO, political organisation, or government-owned corporation);

"(o) Recusal and routine withdrawal of public officials from public duty when participation in a meeting or making a particular decision would place them in a position of conflict);

"(p) Personal and family restrictions on property titles of private companies;

"(q) Divestment, either by the sale of business interests or investments or by the establishment of a trust or blind management agreement."[25]

25. The Working Group may wish to consider, as a first step, the question of whether any or all of the requirements of UNCAC contained in article 9 (1) (e) should be addressed in the text of the Model Law, or by way of regulations or other guidance. It may be recalled that UNCAC requires that the procurement system (and not necessarily its primary procurement legislation) should address these issues, and implementation of the relevant requirements is to be effected "in accordance with the fundamental principles of [the State Party's] legal system."

26. The Working Group may also recall that the scope of the Model Law, as described in its accompanying Guide to Enactment, is as follows: first, it is "a framework law, to be supplemented by procurement regulations to fill in the procedural details for the procedures authorized by the Model Law",[26] and it addresses the "procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract".[27] Consequently, it does not address the supporting administrative structure, or other legal questions that might be found in other bodies of law (administrative, contract and judicial-procedure law).[28] The Guide to Enactment states that the text "assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate the type of procurement procedures provided for in the Model Law,"[29] which matters are accordingly not addressed in the text of the Model Law itself. The Guide to Enactment nonetheless continues with a discussion of the administrative and oversight functions that the enacting State might wish to put in place. The training of personnel is noted as an important consideration in paragraph 37 (d) of the Guide to Enactment, as an example of functions relating to the overall supervision of procurement that could be delegated to a central organ or authority (e.g., ministry of finance or of commerce, or central procurement board), or more than one such entity.

27. If the Working Group considers that the text of the Model Law should contain provisions addressing conflicts of interest, it may then wish to consider whether to formulate provisions based on the principle of integrity, such as is found in the GPA, or to provide a more rules-based approach, such as is present in the other provisions cited in the preceding paragraphs. If it chooses the latter approach, the Working Group may wish to address the level of detail for the rules concerned: for example, whether a list such as that provided in the SIGMA paper might provide useful guidance, or whether that level of detail might be more appropriate for the

---

[25] SIGMA paper, op. cit.

[26] Guide to Enactment, *A framework law to be supplemented by procurement regulations*, paragraph 12.

[27] The Guide to Enactment also states that the Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase (*Introduction*, paragraph 12), including resolution of contract disputes, and by implication, the procurement planning phase.

[28] Guide to Enactment, *A framework law to be supplemented by procurement regulations*, paragraph 14.

[29] Guide to Enactment, paragraph 36.

Guide or regulations. In addition, the Working Group may wish to make provision for a period during which a former procurement official is prohibited from accepting employment with entities whose business is linked to the official's former duties.[30]

28. The Working Group may also wish to consider the extent to which the Model Law or Guide to Enactment should address consequences for breaches of any provisions on conflict of interest. By way of example of a consequence for inappropriate actions already contained in the Model Law, the Working Group may recall the provisions of article 15 (Inducements from suppliers or contractors), which provide that, "a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly … an offer of employment or any other thing of service or value, as an inducement …" during the procurement process. The World Bank notes that the appropriate consequence should reflect the conflict issue concerned: for example, ineligibility of a supplier for the procurement if the conflict arises during the procurement process, and ineligibility of a supplier for future procurement if the process has been completed (noting, however, that the latter is considered difficult to enforce because the legal or natural persons concerned may change).

29. As regards relationships that may give rise to conflicts, the World Bank provisions are to the effect that either the procurement official should disqualify himself from participating in the procurement process, or else the provider of services should be disqualified from being awarded the contract.[31] These relationship-based conflicts of interest cannot be mitigated, and accordingly sanctions such as those above are the only effective consequence, whereas an unfair competitive advantage given to one supplier, for example, can be remedied through disclosure of the information concerned to other suppliers.

---

[30] UNCAC article 12 (2) (e) requires States parties to prevent conflicts of interest by "imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure". Canada, as noted above, has similar provisions, as does the United States in 5 C.F.R., 2635.604, and as is recommended by the OECD in its "Integrity in Public Procurement". Indeed, the United States regulation is both detailed and extensive: for example, it prevents an offer of employment from a contractor to an official overseeing that contractor's business, or to the official's child (see, Yukins, op. cit., citing 18 U.S.C., 208, and referring to a compendium of U.S. statutes governing ethics in government service, see U.S. Office of Government Ethics, Compilation of Federal Ethics Laws (2004), available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf).

[31] The World Bank incorporates rules to this effect in its tender and contract documents. The United Kingdom's National Audit Office addressing audit-related conflicts of interest in procurement, notes as follows: "7.27 When selecting suppliers, consideration should be given to the extent to which conflicts of interest exist involving firms and the individuals they employ, and the extent to which they may affect the work being undertaken. "Chinese Walls" within the firm are not considered to be an effective way of managing conflicts alone. However, they may be used in conjunction with other methods. When drawing up contracts, contractual terms to prevent the firms increasing their conflict of interest should be considered. The Central Procurement Team should be consulted in difficult cases, in order to maintain consistency and avoid creating inappropriate precedents." (see http://www.nao.org.uk/manuals/procurement/chapter7.htm#conflict).

30. UNCAC, in the provisions of its criminalization and law enforcement chapter, contains sanctions that would be appropriate for cases of corruption (articles 19-50), but the Working Group may consider that they would be of limited assistance to a conflict of interest situation per se.

31. The Working Group may alternatively, or in addition, wish to address the topic of conflicts of interest in the Guide to Enactment, for example, by expanding on the comments found in paragraphs 36 and 37 of the current text.[32] An example of additional guidance is found in the OECD's Integrity in Public Procurement,[33] which contains a chapter on "Preventing conflict of interest and corruption". It addresses the topic from a functional standpoint, and is introduced as follows. It is noted that procurement systems require: "… a clear set of values and ethical standards clarifying how to achieve these objectives. Specific ethical guidance has been developed in several countries defining clear restrictions and prohibitions for procurement officials in order to avoid conflict-of-interest situations and prevent corruption both at individual and organisational levels." Its text then addresses the following aspects of conflict-of-interest provisions: organizational aspects (separation of duties and authorizations), defining ethical standards for public officials, defining specific standards for procurement officials, applying those standards, and partnering with bidders to prevent conflict of interest and corruption. Examples are given of steps and measures taken in various OECD countries and others that were surveyed for the publication itself.

32. Guidance can also discuss, for example, appropriate terms and conditions of service, procedural controls (such as benchmarking performance, or the rotation of staff, to avoid the risk of inducements from lengthy incumbency), regular appraisals, and confidential reporting, and can permit the assessment of past standards of conduct when considering candidates for procurement posts. Regulations can mandate specialist training in procurement and ethical conduct.

33. Guidance at interpreting affiliations, family and other relationships, unfair competitive advantage, and whether an application should be strict or retain some flexibility may also be considered useful,[34] but the Working Group may wish to consider whether reference to other publications might be a preferable solution than setting out detailed guidance in the Guide to Enactment itself, particularly in the light of the continuing developments in this aspect of procurement regulation. In this regard, the Working Group may recall that paragraph 40 of the current Guide to Enactment refers the reader to "Improving Public Procurement Systems", Guide No. 23 issued by the International Trade Centre UNCTAD/GATT (Geneva), which publication, it is noted, "discusses a variety of the institutional, staff development and training and policy issues affecting public procurement".

---

[32] Paragraph 26 and footnote 29, above.

[33] OECD, Integrity in Public Procurement, op. cit.

[34] Flexibility can be appropriate where the behaviour can be remedied. Thus where an unfair competitive advantage to one supplier has been given, disclosure of the relevant information to all suppliers can mitigate the concern, and further action within the procurement may not be needed (as compared to the position of the relevant procurement official, which may warrant further steps).

IV. Services procurement

34. At its sixth session, the Working Group focused on the question of whether the Model Law should be revised so as to narrow the scope of services for which the "principal method for procurement of services" provided for in articles 37-45 of the Model Law could be used. The Working Group considered that the services provisions had worked satisfactorily in practice particularly for the procurement of intellectual services (services that do not lead to measurable physical outputs, such as consulting or other professional services), but that where the procuring entity could provide quality and quantity specifications in advance of the procurement concerned, the services provisions might be less appropriate. It was also observed that considering services separately in the Model Law had led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.[35]

35. At the sixth session, having considered whether (a) the use of the principal method for procurement of services should be restricted to intellectual services; (b) tendering should be the principal method for the procurement of services; and (c) whether tendering should be the second preferred alternative after the request for proposals procedure (or vice versa), the Working Group agreed on a preliminary basis that the Model Law should retain all the various options in methods for the procurement of services currently provided. Hence, the Working Group did not consider that the text of the Model Law should be revised. However, support was expressed for the provision of further guidance in the Guide to Enactment for the use of each of the three selection procedures within the services provisions, depending on the type of services at issue and the relevant circumstances. Thus, for example, the guidance could address the desirability of using the principal method for the procurement of services primarily for intellectual services, how to address definitions (of "intellectual services" and other services concepts), how to address projects that might comprise several stages and mixed projects, and how detailed should the guidance be, in the light of the Working Group's desire to avoid excessive prescription in the Model Law and the Guide to Enactment.

36. In addition, and in order to address some of the concerns raised at the sixth session about overuse or inappropriate use of the services provisions, the Guide could expand on the philosophy behind Chapter II of the Model Law (which requires procurement of goods and construction to be conducted using tendering proceedings, unless one of the alternative methods is justified) and how that philosophy could be applied to the procurement of services. For example, the Guide could refer to a presumption in favour of tendering for services procurement (rather than the freer choice currently available), unless the circumstances would justify the use of the more flexible services provisions. Those circumstances might include those discussed in paragraphs 88-93 of the Working Group's report of its sixth session.[36]

37. The Working Group may therefore wish to provide further guidance to the Secretariat on the question of procurement of services, drawing on its discussion at the sixth session and paragraphs 41 to 44 of a note prepared by the Secretariat for

---

[35] A/CN.9/568, paras. 79-93.

[36] A/CN.9/568.

that session (A/CN.9/WG.I/WP.32), in particular as regards the level of detail of further guidance to be set out in the Guide to Enactment.