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

Note by the Secretariat

Addendum

This addendum sets out a proposal for the following section and subsections of Part I (General remarks) of a draft revised Guide to Enactment to the UNCITRAL Model Law on Public Procurement: II. Main features of the Model Law ("A 'framework' law to be supplemented by procurement regulations and supported by appropriate infrastructure", "E-procurement," and "Provisions on international participation in procurement proceedings, and the use of procurement systems to achieve other government policy goals").

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part I. General remarks

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II. MAIN FEATURES OF THE MODEL LAW

(*continued*)

D. A "framework" law to be supplemented by procurement regulations and supported by appropriate infrastructure

1. Legislative framework

53. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a "framework" law that does not itself set out all the rules and regulations that may be necessary to implement those procedures in an enacting State.

54. Accordingly, the Model Law envisages, as a first step, that enacting States will issue procurement regulations to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State (such as the real value of thresholds for request for quotations, for example, and accommodating technical developments). Naturally, caution is needed to ensure that regulations, which are derived from the Model Law, do not compromise its objectives and procedures. As regards other legal infrastructure, not only will procurement procedures under the Model Law raise matters of procedure that will be addressed in the procurement regulations, but answers to other legal questions arising will probably be found in other bodies of law (such as administrative, contract, criminal and judicial-procedure law). Procuring entities may need to take account of and apply employment and equality legislation, environmental requirements, and perhaps others. Enacting States will enhance their procurement efficacy to the extent that the many applicable provisions are clearly disseminated and they and their interaction with procurement law understood.

2. Implementation of legislative provisions

55. The legislative framework for procurement should form part of a coherent and cohesive procurement system. A second step to support legal reform is the use of measures to provide for effective implementation and operational efficacy. The use of guidance notes, manuals and developing standard forms and sample documents have proved an effective tool in practice. International and regional organizations

and other bodies are active in procurement reform, and resources discussing best practice and other guidance can be found at their Internet addresses.

56. The following section describes the institutional, administrative and legal infrastructure and adequate capacity are needed to support the legislative framework if the procurement system's overall objectives are to be achieved, and for it to fulfil the requirements of the Convention against Corruption, some of which are not generally, or ideally, addressed through legislation.

3. Institutional and administrative structures and adequate resources

57. Thirdly, the Model Law is based on an assumption that the enacting State has in place, or will put into place, the proper institutional and administrative structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law. At the administrative level, the interaction between good management of public finances and procurement (which is also a feature of the Convention against Corruption) is an issue of significance. Budgeting requirements or procedures may be found in a variety of sources, and enacting States will wish to ensure that procuring entities are aware of all relevant obligations, such as whether budgetary appropriation is required before a procurement procedure may commence, and whether or not those obligations are part of the procurement system per se.

58. At the institutional level, an enacting State may also find it desirable to set up a public procurement agency or other authority to assist in the implementation of rules, policies and practices for procurement to which the Model Law applies. The functions of such authority might include, for example:

(a) *Ensuring effective implementation of procurement law and regulations*. This may include the issue of procurement regulations, the code of conduct required under article [25] of the Model Law, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws.

(b) *Rationalization and standardization of procurement and of procurement practices*. This may include coordinating procurement by procuring entities, and preparing standardized procurement documents where appropriate, specifications and conditions of contract. This function may be particularly productive where the enacting State seeks to enhance the participation of SMMEs in the procurement process, in that the disincentive to participate where procedures are unknown, uncertain or long and complex will be significant.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies*. This may include examining the impact of procurement on the national economy (such as monitoring concentration in particular markets and potential risks to competition), analysing the costs and benefits of pursuing socio-economic goals through procurement, rendering advice on the effect of particular procurement on prices and other economic factors[, and verifying that a particular procurement falls within the programmes and policies of the Government].

(d) *Assisting and advising procuring entities and procurement officers*. Procurement officers may seek guidance on drafting internal documents for use

within a procuring entity, and interpretations of specific aspects of law and regulations. Legal advice may already be provided by the legal advisors to the Government, or within a particular procuring entity, but, otherwise, procurement officials may seek guidance as to whether their intended actions (for example using an alternative procurement method or recourse to direct solicitation) are in compliance with the legislative framework.

(e) *Training of procurement officers*. The agency or other authority could also be made responsible for training the procurement officers and other civil servants involved in operating the procurement system. This function will be particularly important (i) where the enacting State has included in its domestic legislation procurement methods that pre-suppose a high degree of professionalism in the procurement function, especially at the upper levels within procuring entities, where critical decisions are taken. There are various bodies at the international level that specialize in certification and training of procurement officers, information regarding which can be found through links on the UNCITRAL website, www.uncitral.org; and (ii) where the enacting State seeks to enhance SMME participation in procurement.

(f) *Approval requirement*. The agency or other authority may be charged with issuing approvals for particular procurements prior to the commencement of the procurement proceedings or prior to the award of the procurement contract, where the enacting State provides for such an approval function (see, further, paragraphs 66-68 below). Where this facility exists, the enacting State may wish to consider the use of flexibility in referral thresholds (so as to ensure that cases are not referred unnecessarily and that appropriate cases can be referred); the use of a guidance function as an alternative to an approval function (so as to ensure accountability in decision-making and to avoid impeding the development of capacity); and the appropriate structure of the agency and resources required.

(g) *Certification*. In some cases, such as high value or complex procurement contracts, the agency might alternatively be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the award is made or the contract enters into force.

59. Where procuring entities are autonomous of the governmental or administrative structure of the State, such as some State owned commercial enterprises, States may find it preferable for any approval, certification or guidance function to be exercised by an agency or authority that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect. Most importantly, where approval functions are concerned, the agency or authority must be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for these functions to be exercised by a committee of persons, rather than by one single person, to avoid the risk of abuse of the power conferred.

4. Oversight and enforcement

60. A related issue is the question of oversight and enforcement of individual procurement decisions. An oversight function will be effective only to the extent that it is exercised by an entity that is independent of the decision-taker — that is,

the procuring entity (see paragraphs 66-68 below for considerations relating to an approving body). An alternative structure for those systems in which the public procurement authority or agency exercises decision-making powers may be for oversight to be undertaken by a national audit body.

61. As regards enforcement of compliance with the provisions of legislation based on the Model Law, enacting States will be aware that chapter VIII of the Model Law requires an independent review function (administrative or judicial). Administrative review bodies will not be considered to be independent, and will face potential and actual conflicts of interest, if they are part of an agency or authority that can assist or advise procurement officials or procuring entities, and/or exercise decision-making powers. Although in some systems this review function has been exercised by a subsidiary body within the public procurement authority or agency with the general powers described above, it is generally considered undesirable to subject the review function to what will be perceived as effective political control on the part of the agency or authority itself. Finally, an advisory function will be compromised if procurement officers are reluctant to use it for fear of subsequent enforcement action on the basis of information they provide when seeking advice.

5. Structure of public procurement authorities or agencies

62. The nature of the agencies or other authorities that exercise administrative, oversight and review functions in a particular enacting State, and the precise functions that they will exercise, will depend, among other things, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of effectiveness, economy and efficiency in mind. Systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively. Enacting States may consider that investment in systems to ensure that procuring entities have sufficient capacity, and that they and procurement officers are adequately trained and resourced, will assist in the effective functioning of the system and in keeping the costs of administrative control proportionate.

63. The public procurement agency or authority may also be linked with existing regulatory authorities with expertise in related areas, such as those addressing competition. The latter may monitor collusion and bid-rigging, and concentration in public procurement markets. Enacting States may also wish to consider whether enforcement authority in competition-related and procurement-related matters is more effectively provided through one or more bodies.

64. Empirical evidence also indicates that there may be a risk of abuse of the powers of a public procurement agency or authority if there are insufficient controls to ensure its members are sufficiently independent from decision makers in the Government and in procuring entities.

65. It should be noted that by enacting the Model Law, a State does not commit itself to any particular administrative structure; neither does the adoption of such

legislation necessarily commit the enacting State to increased government expenditures.

6. Specific considerations relating to the optional prior-approval requirement for use of exceptional procedures

66. The Model Law provides an option to allow certain important actions and decisions by the procuring entity, in particular those involving the use of certain procurement methods and the entry into force of the procurement contract, be subject to prior approval from outside the procuring entity. The advantage of such a prior-approval system is that it fosters the detection of errors and problems before certain actions and final decisions are taken. In addition, it may provide an added measure of uniformity in a national procurement system.

67. The prior-approval requirement is presented in the Model Law as an option because a prior-approval system is not applied in all countries, and its use is decreasing. An alternative approach is to exercise oversight over procurement practices primarily through audit after the event. In this regard, a requirement for external approval may be particularly inappropriate in certain circumstances, such as in the use of two-stage tendering, given that there are precise conditions for use of that procurement method (see [cross refer to relevant article-by-article remark]), and in some instances of single-source procurement, such as for urgent situations.

68. Where it decides to enact an approval requirement, the enacting State will designate the agency or other body or bodies responsible for issuing the various approvals, and to delineate the extent of authority conferred in this regard. An approval function may be vested in an agency or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or public procurement authority) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. (See further considerations raised in paragraph 59 above, which are also relevant in this context.)

E. E-procurement

1. Background

69. E-procurement includes (inter alia) the presentation of submissions electronically and the use of new procurement methods facilitated by the Internet (electronic reverse auctions, electronic catalogues, and electronic framework agreements), the publication of procurement-related information on the Internet and the use of electronic systems throughout the procurement process (for the communication and exchange of information).

70. Terms such as “documents”, “written communication” and “documentary evidence” are becoming more commonly used to refer to all documents (whether electronic or paper-based) in those countries in which e-government and e-commerce are widespread, but, in others, the assumption may be that they infer a paper-based environment. Accordingly, the Model Law now contains provisions to ensure that all means of communication, transmission of information and retention of information can be used in procurement under legislation based on that text.

71. At the time the revised Model Law was issued by the Commission, non-paper information transfers were most commonly conducted using the Internet and related systems. However, the Commission noted the rapid pace of technological advance and assumed that new technologies would emerge. For convenience, the term e-procurement will be used in this Guide to refer to the use of e-communications and the electronic presentation of submissions, which involve the transfer of information using electronic or similar media. The policy issues are of general application for all emerging information technologies that can be used to transfer information and documents and to conduct procurement procedures.

2. Benefits of e-procurement

72. The potential benefits of e-procurement in terms of promoting the achievement of the objectives of the Model Law have been widely noted: they include increased administrative efficiency in terms of both time and costs (paper-related administrative costs and the time needed to send information in paper form are reduced); and repeated purchases can be standardized. The use of information technologies for the publication of procurement opportunities and of procurement rules and procedures enhances transparency and market access, facilitating both participation in the procurement process and competition. Similarly, the use of these technologies to enable suppliers to apply and participate in the procedure, to give and receive information, and to submit tenders and other offers online is not only administratively efficient, but can also open up the market to entrants located far away that might not otherwise participate. Automated processes are not only administratively efficient through introducing uniformity and standardization, but the electronic systems also provide new measures to support integrity, by reducing human interaction in the procurement cycle and the personal contacts between procurement officials and suppliers that can give rise to bribery opportunities.

73. While these benefits may be considerable, enacting States may wish to ensure that e-procurement is implemented in a way that does not impede market access — either generally, or to certain suppliers, such as SMMEs. The safeguards provided in the Model Law are discussed in particular in paragraphs [85-90] below. (Issues relating to the participation of SMMEs generally are discussed in [add appropriate reference].)

3. Approach of the Model Law to e-procurement

74. The general approach to the introduction of e-procurement in the Model Law is based on three key principles. First, given the potential benefits of e-procurement, the Model Law should, where appropriate and to the extent possible, encourage its use; secondly, as a consequence of rapid technological advance and of the divergent level of technical sophistication in States, the text should be technologically neutral (in that it does not recommend any particular technology, but describes the functions of available technologies); and, thirdly, further and more detailed guidance should be provided to assist enacting States in introducing and operating e-procurement.

75. The policy considerations arising from specific aspects of e-procurement are discussed in the article-by-article remarks (see [cross-reference to relevant article-by-article remarks]). The guidance in this section discusses possible legal and other obstacles to the use of e-procurement. The safeguards that are necessary to

ensure that it is not used to compromise the objectives of the Model Law are addressed in sections below.

76. As regards possible legal obstacles to the use of e-procurement, the extent to which individual States can use this resource depends on the availability of necessary electronic commerce infrastructure and other resources, including measures respecting electronic security, and the adequacy of the applicable law permitting and regulating electronic commerce. The general legal environment in a State (rather than its procurement legislation) may or may not provide adequate support for e-procurement. For example, laws regulating the use of written communications, signatures, what is to be considered an original document and the admissibility of evidence in court might be inadequate to allow e-procurement with sufficient certainty. While these issues may not diminish the desire to use e-procurement, the outcome may be unpredictable and commercial results will not be optimized.

77. An initial consideration in addressing this issue is whether the general regulation of, or permission to use, e-procurement is to be addressed in procurement law or in the general administrative law of an enacting State. As noted in Section [II.D] above, the Model Law is not a complete protocol for procurement: procurement planning, contact administration and the general supporting infrastructure for procurement are addressed elsewhere. Even if the Model Law were to provide for a general recognition of electronic documents and communications, it would not cover all documents, information exchange and communications in the procurement cycle, and there may be conflicts with other legal texts on electronic commerce. The solution adopted in the Model Law therefore, is to rely on laws of the enacting States, including general electronic commerce legislation to enable e-procurement, adapting them as necessary for procurement-specific needs. Enacting States will therefore first need to assess whether their general electronic commerce legislation enables e-procurement in their jurisdictions.

78. For this purpose, enacting States may wish to adapt the series of electronic commerce texts that UNCITRAL has issued: the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).[1] These texts provide a general recognition of electronic commerce and electronic signatures, and which, if enacted in a State, provide the general legal requirements for the use of e-procurement. They rely on what has been called a "functional equivalent approach" to electronic commerce, which analyses the functions and purposes of traditional requirements for paper-based documents and procedures, and fulfils those requirements using information technologies. This approach has also been followed for procurement-specific applications of e-commerce in the Model Law.

79. Because the approach is functional, it encompasses the notion of technological neutrality and avoids the imposition of more stringent standards on e-procurement than have traditionally applied to paper-based procurement. It is important to note

[1] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html (accessed January 2011).

that more stringent standards will operate as a disincentive to the use of e-procurement, and/or may elevate the costs of its use, and its potential benefits may be lost or diluted accordingly. Further, there will be risks of paralysis of a system should any technology that it mandates become temporarily unavailable. An additional reason for applying technological neutrality is to avoid the consequences of a natural tendency to over-regulate new techniques or tools in procurement or to follow a prescriptive approach, reflecting a lack of experience and confidence in the use of new technologies, which would also make their adoption more difficult than it needs to be.

80. Another implication of this approach is that no definitions of the terms "electronic", "signature", "writing", "means of communication" and "electronic data messages" are included in the Model Law. Definitions of the main terms needed for effective electronic commerce transactions do appear in the UNCITRAL electronic commerce texts described above. [For example, article 2 of the UNCITRAL Model Law on Electronic Commerce describes "data message" as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."] On the other hand, the Model Law no longer includes references or form requirements that pre-suppose a paper-based environment.

81. The Model Law itself addresses issues specific to procurement that are not addressed in general e-commerce legislation, such as the need for precise times of receipt for e-tenders, and the importance of preventing access to their contents until the scheduled opening time [add cross reference to relevant article-by-article remarks].

4. Practical considerations

82. Obstacles to the use of e-procurement may be logistical and/or technological. Although many Governments have moved to conducting some of their business online, reliable access to the Internet cannot always be assumed: there may be infrastructure deficiencies, and the relevant technologies may not be universally available, particularly if it involves or uses new technologies and their supporting infrastructures that are not yet used sufficiently widely, or that is beyond the reach of SMMEs.

83. A related issue is the use of proprietary information technology systems and specialist software for procurement. Market access is enhanced if procuring entities make these systems available to all potential suppliers without charge, but practical and commercial considerations may indicate otherwise. Procuring entities may be under significant pressure to amortize and or recoup the costs of investment in proprietary systems, and may contract out the management of e-procurement systems to third parties, which may then own any intellectual property in their systems or create the potential for conflicts of interest.

84. Consequently, the Model Law does not require procuring entities to provide all software or other technical requirements without charge, but it is strongly recommended that no charge is made. If it is necessary to apply charges, procuring entities should not levy disproportionate amounts or use proprietary systems or charges to restrict access to the procurement. For these reasons, too, enacting States may wish to consider the use of off-the-shelf or open software information systems.

An important consideration is that the systems should be easily harmonized with systems used by potential trading partners, should not involve multiple-user licence fees, and should be easily adaptable to local languages or to accommodate multilingual solutions. Interoperability considerations may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies, and in preventing the use of e-procurement systems to restrict international participation of suppliers in the procurement. Some e-procurement systems require potential users, i.e. suppliers, to provide domestic information as a prerequisite for authorization to use the system. While security and authenticity considerations must be accommodated, enacting States are encouraged to ensure that their systems do not impose unnecessary restrictions that will impede market access. (See further Section [II.F] below.) The [refer to the appropriate version] GPA requires that e-procurement systems be generally available and interoperable with other systems that are widely used in the relevant State. Enacting States may wish to ensure that they comply with those and any applicable regional trade agreements in this regard, many of which have similar requirements.

5. Safeguards to enhance the use of e-procurement

85. The take-up of e-procurement systems requires public confidence in the security of the information system to be used. Such public confidence itself requires adequate authentication of suppliers, sufficiently reliable technology, systems that do not compromise tenders or other offers, and adequate security to ensure that confidential information from suppliers remains confidential, is not accessible to competitors and is not used in any inappropriate manner. That these attributes are visible is particularly important where third parties operate the system concerned. At a minimum, the system must verify what information has been transmitted or made available, by whom, to whom, and when (including the duration of the communication), and must be able to reconstitute the sequence of events. It should provide adequate protection against unauthorized actions aimed at disrupting the normal operation of the public procurement process. Transparency to support confidence-building will be enhanced where any protective measures that might affect the rights and obligations of procuring entities and potential suppliers are made generally known to public or at least set out in the solicitation documents.

86. Applying the principles of functional equivalence and technological neutrality to safeguards is necessary to manage the requisite measures for e-procurement, as noted above. For example, specific safeguards for e-communications or confidentiality in tenders or other offers would inevitably set higher standards of security and for preserving integrity of data than those applicable to paper-based communications (because there are very few, if any, such standards set in the paper-based world), and they may fail to allow for the risks that paper-based communications have always involved.

87. The first safeguard is to ensure the authentication of communications, i.e. ensuring that they are traceable to the supplier or contractor submitting them, which is commonly effected by electronic signature technology and systems that address responsibilities and liabilities in matters of authentication. Relevant rules may either be specific to a procurement system or may be found in the State's general law on electronic systems. The concept of technological neutrality means in

practice that procurement systems should not be automatically restricted to any one electronic signature technology [(such as advanced electronic signatures based on cryptography and public key infrastructure, even if they are the pre-eminent technology at the relevant time)].[2] Some electronic signature systems are based on a local certification requirement. Accordingly, and in order to avoid the use of e-procurement systems as instruments to restrict access to the procurement, the system should ensure the recognition of foreign certificates and associated security requirements related to electronic signatures, by disregarding the place of origin of signatures. In this regard, enacting States will need to consider which communications, such as tenders or other offers, require full authentication, and that other mechanisms for establishing trust between the procuring entity and suppliers may be sufficient for other communications. This approach is not novel: the 1994 Model Law applied different requirements to lesser and more important communications in the procurement process, as does the revised Model Law (see article [7]).

88. Another requirement is for integrity, so as to protect the information from alteration, addition or manipulation or, at least, that any alteration, addition or manipulation that takes place can be identified and traced. A related issue is "security", meaning that time-sensitive documents, such as tenders, cannot be accessed until the scheduled opening time.

89. These issues are discussed in more detail in [cross-reference to the guidance on article [39]] below, in which they assume the greatest importance.

90. The rise in e-procurement has been accompanied by the introduction of new procurement methods and the overhaul of existing methods to take advantage of the new technologies. New methods include electronic reverse auctions and electronic catalogues, and the more traditional techniques such as framework agreements can be modernized to allow for e-submissions notably at the second stage of the procedure: these techniques can permit purchases to be completed in hours rather than weeks or months. The approach of the Model Law is, again, to facilitate these techniques where appropriate and subject to appropriate safeguards (see [cross-reference to commentary to chapters VI and VII] below).

6. E-procurement as a process issue

91. Some of the most significant economic benefits of e-procurement arise from its application to the procurement system as a whole: introducing uniformity into the procurement system through information technologies can enhance oversight, monitoring and evaluation capacities, particularly where procurement systems are integrated with planning, budgetary and contract administration and payment systems (which themselves may include electronic invoicing and payment). The introduction of e-procurement is an opportunity to reform the entire procurement system to this end: if paper communications are simply replaced with e-mails and Internet-based communications, and advertising procurement opportunities on a website, the benefits of e-procurement will not be as great. Without systemic reform, the risk is that whatever weaknesses may exist in a traditional procurement

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[2] The Working Group may wish to consider whether this reference is helpful given the pre-eminence of this technology.

system are transported to its new, digital system and the risks associated with e-procurement will not be adequately addressed.

92. Such an overhaul of an entire procurement system is a significant investment and the electronic systems shall also entail new governance processes. Empirical evidence suggests that most e-procurement systems that are introduced have taken many years to provide the benefits promised, and the most effective implementation has been often undertaken in a staged manner, which can also assist in amortizing the investment costs. Systems set up to be self-financing through charges to suppliers and outsourcing may be administratively efficient, but can involve risks: commentators have observed both decreasing participation and competition where charges are levied, and the potential for institutional conflicts of interest. These risks will be enhanced if the system is outsourced merely to introduce it swiftly and relatively cheaply. In other words, the costs and benefits of self-financing systems and outsourcing need to be carefully considered.

F. Provisions on international participation in procurement proceedings, and the use of procurement systems to achieve other government policy goals

1. Background

93. In line with the mandate of UNCITRAL to promote international trade, and with the Model Law's objectives of maximizing participation and competition so as to enhance value for money, the Model Law provides that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality, save to the extent the procurement regulations or other provisions of law in the enacting State exceptionally permit otherwise (article [(8) (1)]). This general rule is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation, and is given effect by a number of procedures designed, for example, to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors. They are further supported by article [(9) (6)], which states that, subject to article [8], "the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable," and by the rules on description of the subject matter of the procurement, which provide that, subject to article [8], no description of the subject matter of a procurement may be used that may restrict participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction on the basis of nationality (article [10 (2)]).

2. Direct limitation of international participation

94. The Model Law permits enacting States to provide legally for procurement limited to domestic suppliers, as an exceptional measure, by permitting the procuring entity under article [8 (1)] to declare that a procurement proceeding will exclude suppliers or contractors on the basis of nationality. However, the procuring entity can limit international participation only to the extent that other laws

(including treaty obligations) or the procurement regulations so permit. The aim of this restriction is to ensure that the procuring entity is not able to discriminate against particular suppliers or categories of suppliers at its own instance.

95. This latter point is reinforced by provisions that expressly prohibit discrimination through requirements regarding qualification, examination or evaluation criteria in articles [9], [10] and [11] of the Model Law, respectively.

96. This approach, together with the provisions in article [3] on the primacy of international obligations of the enacting State, permits the Model Law to take account of cases in which the funds being used for procurement are derived from a bilateral tied-aid arrangement. Such an arrangement may require that procurement should be from the donor country's suppliers or contractors. Similarly, recognition can be given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from sanctions imposed by the United Nations Security Council.

3. Indirect limitation of international participation

97. The above discussion refers to exceptional measures that are explicitly designed to limit foreign participation. Certain measures may indirectly give the same result, such as through the setting of minimum standards for qualification, in the description of the subject matter of the procurement and in the design of the evaluation criteria (in articles [9, 10 and 11]).

98. As is further explained in the commentary to articles [9, 10 and 11], the procuring entity can set minimum standards for qualification and responsiveness, and can include evaluation criteria, that do not relate to the subject matter of the procurement in order to promote government policies (such as environmental policies, industrial policies or social policies). Minimum standards might either restate legal requirements within the enacting State (such as the minimum wage for employees), or such standards or evaluation criteria might set higher standards than, or prefer submissions that exceed, the legal norms for the purpose of promoting a policy through procurement (such as higher environmental standards). These policies will have the effect of disfavouring international participation if the standards are higher than those applying in other States. Other policies may aim at promoting local capacity development through providing support for SMMEs, targeting particular sectors of the commercial sector that have historically been disadvantaged, and the promotion of community participation in procurement. Governments may also seek to place certain types of procurement contracts for strategic reasons. All such measures may be part of an explicit approach to sustainable or environmentally sensitive procurement. These terms are flexible notions, but in general seek to ensure that the environmental, social and developmental impact of procurement is taken into account [cross-reference to the section on sustainable procurement].

99. Article [11] permits the procuring entity to use the technique referred to as the "margin of preference" in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings

and fostering local capacities, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select a submission from a local supplier as the successful supplier when the difference in price (or price when combined with quality scores) between that submission and the overall lowest-priced or most advantageous submission falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition.

4. The use of procurement to promote government policies and objectives

100. A system based on the Model Law allows exceptions to procedures that would be considered to be those that guarantee optimum allocation of resources and value for money in order to allow other government objectives to be pursued, particularly to develop and enhance local capacities.[3]

101. The Model Law does not restrict the types of policies or objectives that enacting States may promote through procurement, but it applies rigorous transparency requirements to ensure that how the policies will be applied is clear to all participants in the process. Provisions of law or regulations in enacting States must set out the policies concerned. Examples of policies that have been encountered in practice include protecting the balance of payments position and foreign exchange reserves of a State, allowing for countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills, targeting specific industrial sector development, the development of SMMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, and the improvement of the rights of women, the young and the elderly, and people who belong to indigenous and traditional groups.

102. The approach of the Model Law is designed to ensure that the costs of the policies concerned can be calculated through comparison with established benchmarks, and so balanced against the benefits derived. Common considerations as regards the impact of such policies on the objectives of the Model Law set out in the Preamble include that, to the extent they impose a restriction on competition, they are likely to have an inflationary effect on the ultimate price paid and thus on the value for money; and the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some such policies may open the procurement market to sectors that have traditionally been excluded from procurement contracts (such as SMMEs) and may increase participation and

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[3] The Working Group may wish to consider whether the Guide should discuss whether these policies should be used only to the extent that they are engaged in for local capacity development or whether they may also appropriately include political considerations (which are equally valid in the view of some States).

competition, though in the longer term such benefits may not persist if suppliers choose not to expand beyond the level of an SMME.

103. Enacting States may wish to consider empirical evidence from States that have pursued such policies. For example, within relatively short periods, suppliers or contractors from supported areas of the economy may develop to such an extent, following or as a result of the implementation of such policies, that they become able to compete freely in the market. However, total insulation from foreign competition for an extended period of time or beyond the point that suppliers can compete freely can frustrate the capacity development that such policies are designed to achieve. For similar reasons, the results from the use of preference policies (such as the use of evaluation criteria to prefer a defined group) tends to be more positive than for set-aside policies (such as requiring subcontracting to a defined group). Enacting States will wish to ensure that pursuing government policies through procurement is both effective in achieving the policy objectives and efficient in operation. At the same time, enacting States should consider viable alternatives, such as targeted technical assistance, simplifying procedures and red tape, ensuring that adequate financial resources are available to all sectors of the economy, requiring procuring entities to pay suppliers regularly and on time, and providing other targeted support.

5. Sustainable procurement

104. [Further research/contributions are required if a section on this topic is to be included.]

6. International obligations

105. The Model Law is not an international text in the sense of being a negotiated international agreement, a situation that facilitates its flexible approach. Enacting States may be signatories to international agreements covering procurement (including the Convention against Corruption and the [appropriate references to the versions to be added] GPA, and regional trade agreements), which may have the effect of limiting the opportunity of pursuing government policies of the type described above through the procurement system.

106. The pursuit of certain government policies under the Model Law may run contrary to international agreements (such as the GPA and regional trade agreements), which generally require “national treatment”, i.e. that suppliers in all signatory countries will be treated no less favourably than domestic suppliers. [“Offsets”, i.e. measures to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements, are explicitly prohibited in the GPA. However, developing countries may negotiate (at the time of their accession) the use of offsets as qualification criteria, but offsets may not be used as evaluation or award criteria.] Enacting States will therefore wish to consider the extent of their international obligations when implementing the provisions allowing any direct or indirect restriction of international participation into their national procurement law[, and where they have based or will base their procurement legislation on the Model Law, to consider their domestic provisions when negotiating international obligations]. The provisions of many trade agreements mean that some, but not all, of the options available under the Model

Law that may have the effect of restricting international participation will be available to enacting States.

7. Exemptions from international publication of invitations to participate and procurement notices

107. The procurement regulations can exempt procuring entities from having to publish an initial invitation to participate in a low-value procurement in a newspaper of wide international circulation in a language customarily used in international trade, where the procuring entity considers that the low value is unlikely to attract cross-border interest [article 32 (4)]. It is important to note that low value alone is not a justification to exclude international participation of suppliers per se (by contrast with other reasons permitting domestic procurement set out in article [8]), so that international suppliers can participate if they so choose; for example, if they respond to a domestic advertisement.

108. The concept of low-value procurement in this regard should not be interpreted as conferring upon enacting States complete flexibility to set the appropriate threshold sufficiently high to exclude the bulk of its procurement from requirement of international publication. It is not possible for the Model Law to set out a single threshold that will be appropriate for all enacting States. Nonetheless, the enacting State may wish to take the following matters into account when setting the appropriate threshold or thresholds: whether one threshold should be applied for "low-value procurement", to address permissible exemptions from international publication and from the requirement to provide information about currency and languages in the solicitation documents, and whether this threshold should also serve as the upper limit for the use of request-for-quotations procedures.

109. Enacting States may also wish to encourage procuring entities to assess whether international participation is a likelihood in the circumstances of each given procurement (whether or not it is low-value), assuming that there is international publication, and what additional steps international participation might indicate. In this regard, the Model Law recognizes that in such cases of low-value procurement the procuring entity may or may not have an economic interest in precluding the participation of foreign suppliers and contractors: a blanket exclusion of foreign suppliers and contractors might unnecessarily deprive it of the possibility of obtaining a better price. On the other hand, international participation may involve translation costs, additional time periods to accommodate translation of the advertisement or responses from foreign suppliers, and might require the procuring entity to consider tenders or other offers in more than one language. The procuring entity will wish to assess the costs and benefits of international participation, where its restriction is permitted, on a case-by-case basis.