



## General Assembly

Distr.: General  
13 May 2011

Original: English

---

**United Nations Commission  
on International Trade Law**  
Forty-fourth session  
Vienna, 27 June-8 July 2011

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

#### **Note by the Secretariat**

##### **Addendum**

This addendum sets out a proposal for the Guide text to accompany articles 23 to 25 of chapter I (General provisions) and articles 26 and 27 of chapter II (Methods of procurement and their conditions for use. Solicitation and notices of the procurement) of the UNCITRAL Model Law on Public Procurement.



# GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

...

## Part II. Article-by-article commentary

...

### Article 23. Confidentiality

1. The purpose of article 23 is to protect confidential information belonging to all parties to the procurement proceedings. The article imposes different types of confidentiality requirements on different groups of persons, depending on which type of information is in question. It is supplemented by article 68 of the Model Law, which addresses the protection of confidential information in challenge and appeal proceedings.

2. Paragraph (1) refers to information that the procuring entity is prohibited from disclosing to suppliers or contractors and to the public. This type of information encompasses, first, information that may not be disclosed so as to protect the essential security interests of the enacting State. These security interests could relate to procurement indispensable for national security or for national defence purposes and to the procurement of arms, ammunition, or war materials but also to procurement involving medical research experiment or procurement of vaccines during pandemics.<sup>1</sup> This type of information would probably be identified as classified information in the law of the enacting State. The commentary to the definition in article 2 of “procurement involving classified information” is therefore relevant in this context (see ... above).

3. Paragraph (1) also encompasses information whose disclosure would be contrary to law, would impede law enforcement or fair competition or would prejudice the legitimate commercial interests of the suppliers or contractors. The phrase “impede fair competition” should be interpreted broadly, referring not only to the procurement proceedings in question but also to subsequent procurement. Because of the broad scope of the provision and possibility of abuse if excess discretion in its application is left to the procuring entity, it is essential for the enacting State to enumerate in the procurement regulations, if not for an exhaustive list of such information, for at least the legal sources of such information. Paragraph (1) also provides that such information may be disclosed only by order of the court or other relevant organ designated by the enacting State (which can be, for example, the independent body referred to in article 66 of the Model Law). The identity of any organ with such power is to be specified in the law; the order issued by the court or other designated organ will regulate the extent to which this type of information can be disclosed and disclosure procedures.

---

<sup>1</sup> Some experts question the appropriateness of reference to “procurement of vaccines during pandemics” in this context. The provision of the guidance to the Secretariat is requested.

4. Paragraph (2) deals with information from suppliers or contractors contained in applications to pre-qualify or for preselection, or in submissions. By their nature, these types of documents contain commercially sensitive information; their disclosure to competing suppliers or contractors or to an unauthorized person could impede fair competition and would prejudice the legitimate commercial interests of the suppliers or contractors. Such disclosure is therefore generally prohibited. The term “unauthorized person” in this context refers to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized under the applicable provisions of law of the enacting State to have access to the information in question. The Model Law, however, recognizes that disclosure of some information from applications to pre-qualify or for preselection and from submissions — whether to competing suppliers or contractors or to the public in general — is important to ensure transparency and integrity in the procurement proceedings, meaningful challenge and appeal by aggrieved suppliers or contractors and proper public oversight. To ensure consistency with the relevant provisions of the Model Law addressing such permissible disclosure, paragraph (2) of the article sets out exceptions to the general prohibition. It cross-refers to the following requirements: under article 21 (2) and (10), to notify the results of evaluation and the procurement contract to suppliers or contractors that presented submissions; under article 22, to identify the winner and the winning price in the public notice of awards of public contracts; under article 24, to disclose certain information from applications and submissions through providing public access and access by relevant suppliers and contractors to certain parts of the documentary record of procurement proceedings; and under article 41 (3) of the Model Law, to announce certain information from submitted tenders during the opening of tenders.

5. Whereas paragraphs (1) and (2) have general application, regardless of the method of procurement used, paragraph (3) is restricted to procurement proceedings under articles 47 (3) and 48 to 50. Those procurement proceedings envisage discussion, dialogue or negotiations between the procuring entity and suppliers or contractors. Unlike paragraphs (1) and (2) that impose confidentiality obligations on the procuring entity, paragraph (3) broadens the obligation to any party, and the obligation encompasses information related to discussions, communications, dialogue or negotiations in the context of these procurement proceedings. Disclosure of any such information is permissible only with the consent of the other party, or when required by law or ordered by the court or other relevant organ designated by the enacting State, or when permitted in the solicitation documents. Reference to orders by the court or other relevant organ designated by the enacting State is identical to the one found in paragraph (1) of the article. The enacting State in designating the relevant organ should ensure consistency between paragraphs (1) and (3) of the article. Reference to permission for disclosure in the solicitation documents should be interpreted narrowly. Envisaging a blanket permission in the solicitation documents to disclose all types of information would violate the provisions of the Model Law, such as paragraphs (1) and (2) of the article. The solicitation documents should request suppliers or contractors to identify in their submissions information they consider confidential.

6. Paragraph (4) is also of restricted application, applying only to procurement involving classified information (for the definition of “procurement involving classified information”, see article 2 (j) and the relevant commentary in ... above).

It envisages that the procuring entity, in addition to measures that may be required to be taken by the procuring entity under law of the enacting State to protect classified information (such measures include a general prohibition of public disclosure covered by paragraph (1) of the article), may take additional measures to protect classified information in the context of a specific procurement. Such additional measures may concern only suppliers or contractors or may be extended through them to their subcontractors. They might be justified by the sensitive nature of the subject matter of the procurement or by the existence of classified information even if the subject matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

### **Article 24. Documentary record of procurement proceedings**

1. The purpose of the article is to promote transparency and accountability in procurement by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing access thereto by interested and authorized persons. This record summarizes key information concerning the procurement proceedings; ensuring timely access thereto by interested and authorized persons is essential for any challenges and appeals by aggrieved suppliers and contractors to be meaningful and effective. This supporting measure in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements in the procurement law facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities to the public at large as regards the disbursement of public funds.
2. The article does not prescribe the form and means in which the record must be maintained. These issues are subject to article 7 regulating the form and means of communications in procurement, in particular the standards set out in paragraphs (1) and (4) of that article (see the commentary to the relevant provisions of that article in ... above).
3. The list of information to be included in the record under paragraph (1) of the article is not intended to be exhaustive as the chapeau provisions of paragraph (1) (the word “includes”) and paragraph (1)(w) indicate. The latter is intended to be a “catch-all” provision in the end of the list, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor have to be put on the record. Some such decisions, although not listed in paragraph (1) of the article, are to be included in the record under other provisions of the Model Law. For example, article 34 (3) requires the decision and reasons to resort to direct solicitation as opposed to open solicitation in request for proposals proceedings to be recorded. Articles 52 (2) and 59 (7) require the decision and reasons for limiting participation in the auctions and open framework agreements, respectively, on the ground of technological constraints to be recorded. Paragraph (1)(w) refers also to information that the procurement regulations may require to be recorded.
4. The reference in the chapeau of paragraph (1) to maintaining the record should be interpreted as requiring the record to be updated once information is provided. Information is therefore included to the extent it is known to the procuring entity.

For example, in procurement proceedings in which not all proposals were fully developed or finalized by the proponents, in particular where some of the proposals did not survive to the final stages of the procurement proceedings, the procuring entity under paragraph (1)(s) would be able to include a summary of all terms and conditions of each submission as they are known to the procuring entity at the relevant time in the procurement proceedings. The reference in the same paragraph to “a basis for determining the price” is meant to reflect the possibility that in some instances, particularly in procurement of services, the submissions would contain a formula by which the price could be determined rather than an actual price quotation.

5. An aspect of enacting record requirements is to specify the extent, and the recipients, of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of procuring entities, of full disclosure; the need to provide suppliers and contractors with information necessary to permit them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking challenge; and the need to protect the confidential commercial information of suppliers and contractors. In view of these considerations, article 24 provides two levels of disclosure. It mandates in paragraph (2) disclosure to any member of the general public of the information referred to in paragraph (1)(a) to (k) of the article — basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated under paragraph (3) of the article for the benefit of suppliers and contractors that presented submissions, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the Model Law.

6. The pool of suppliers or contractors under paragraph (3) is limited to those that presented submissions because suppliers or contractors that were disqualified as a result of pre-qualification or preselection should not have access to information relevant to the examination and evaluation of submissions. The reasons for their disqualification will be communicated to them in accordance with articles 17 (10) and 48 (3)(e) and this should give them sufficient information to consider whether to challenge under chapter VIII of the Model Law their exclusion.

7. The purpose of the provision in paragraph (3) allowing disclosure to the suppliers or contractors of the relevant parts of the record at the time when the decision to accept a particular submission (or the decision to cancel the procurement proceedings) has become known to them is to give efficacy to the right to challenge under article 63 (which falls within chapter VIII of the Model Law). In order to make this provision effective, the procuring entity must permit prompt access by the suppliers or contractors concerned to the relevant parts of the record.<sup>2</sup> Delaying disclosure until, for example, the entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy. The provisions also intend to capture two situations when the decision to accept a particular

---

<sup>2</sup> The relevant provisions of the Model Law do not require that the portions of the record be made promptly available. The Commission may consider the need for amending paragraph (3) in this respect.

submission becomes known to the relevant suppliers or contractors: one is when it becomes known through a standstill period notification under article 21 (2), and the second when it may become known under other circumstances,<sup>3</sup> including when no such notification has been served.

8. The disclosure of information either to the public or to relevant suppliers or contractors is without prejudice to paragraph (4)(a) of this article, which sets out grounds that would allow the procuring entity to exempt information from disclosure, and to paragraph (4)(b) listing information that cannot be disclosed. (See the commentary to article 22 in ... above addressing issues relevant to paragraph (4)(a).) As regards paragraph (4)(b), as mentioned in the commentary to article 22 and to this article above, among the necessary objectives of these provisions is avoiding the disclosure to suppliers and contractors confidential commercial information; the need is particularly acute with respect to what is disclosed concerning the evaluation of submissions, as the information may naturally involve commercially sensitive information, which suppliers and contractors have a legitimate interest in protecting. Accordingly, the information referred to in paragraph (1)(t) involves only a summary of the evaluation of submissions, while paragraph (4)(b) restricts the disclosure of more detailed information that exceeds what can be disclosed in such a summary.

9. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the application of other statutes in the enacting State, conferring on the public at large a general right to obtain access to Government records, to certain parts of the record. For example, the disclosure of the information in the record to oversight bodies may be mandated as a matter of law in the enacting State.

10. Paragraph (5) of the article reflects a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3) of the Convention). The requirement to preserve documents related to the procurement proceedings and applicable rules on documentary records and archiving, including the period of time during which the record and all the relevant documents pertaining to a particular procurement should be retained, should be stipulated in other provisions of law of the enacting State. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations may so require.

## **Article 25. Code of conduct**

1. The purpose of the article is to emphasize the need for States to enact a code of conduct for officers and employees of the procuring entities, which should

---

<sup>3</sup> A more detailed explanation of such possible circumstances may be required, in particular whether they intend to refer only to the public notice of the contract award or something broader (rumours, media reports, etc.). The provision of guidance to the Secretariat is requested.

address actual and perceived conflicts of interest, and increased risks of impropriety on the part of officers and employees of the procuring entities in such situations, as well as measures to mitigate such risks, including by filing declarations of interest. Enacting such a code should be considered as a measure to implement certain requirements of the United Nations Convention against Corruption. Although the Convention is of general rather than procurement-specific application, as mentioned in paragraphs ... of Part I of the Guide, some of its provisions, such as those found in articles 8 and 9, have direct relevance to public procurement, and to measures to regulate matters regarding personnel responsible for procurement (the “procurement personnel”). Enacting States may ensure that gaps in regulation and in enacting measures for the effective implementation of the relevant provisions of the Convention are eliminated through such codes of conduct.

2. Depending on the legal traditions of enacting States, codes of conduct may be enacted as part of the administrative law framework of the State, either at the level of statutory law or regulations, such as the procurement regulations. They may be of general application to all public officials regardless of the sector of economy or may be enacted specifically for the procurement personnel, and some may be part of the procurement laws and regulations. When a general code of conduct for public officials is enacted, it is expected that some provisions will nevertheless contain provisions addressing specifically the conduct of the procurement personnel. The enacting State, in considering enacting or modernizing a code of conduct for its public officials or specifically for the procurement personnel, may wish to consult the relevant documents of international organizations, such as the Organization on Economic Cooperation and Development.

3. The provisions of article 25 focus on the conflicts of interest situations in procurement, in the light of particularly negative effects of conflicts of interest on transparency, objectivity and accountability in public procurement. Without intending to be exhaustive, the provisions list only some measures to regulate the conduct of the procurement personnel in conflicts of interest situations, such as requiring them to file declarations of interest, undertake screening procedures and be involved in training. This is in line with article 8 (5) of the United Nations Convention against Corruption, referring to: “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”. The Model Law provides only general principles, recognizing that setting out in the Model Law exhaustive provisions on conflict of interest situations, including measures to mitigate the risks of impropriety in such situations, would be impossible in the light of varying ways of addressing conflicts of interest in different jurisdictions.

4. In addition to conflicts of interest situations and measures explicitly identified in the article to mitigate risks of impropriety in such situations, a code of conduct should address other matters, such as the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals that are potential participants in procurement proceedings). Although the provisions do not purport to mandate the enacting State to enact a code of conduct for suppliers or contractors in their relations with the procuring entity, some provisions of the code of conduct, such as those related to the concept of the “revolving door”, should indirectly establish

boundaries for the behaviour of private sector entities or individuals with public officials.

5. The provisions of the article requiring the code of conduct to be promptly made accessible to the public and systematically maintained are to be read together with article 5 (1) of the Model Law, in which a similar requirement applies to legal texts of general application. The commentary to article 5 (1) is therefore relevant in the context of the relevant provisions of article 25 (see ... above).

### **Article 26. Methods of procurement**

1. The purpose of article 26 is to list all methods and techniques available for procurement procedures provided for in the Model Law. These methods and techniques are included to provide for the variety of circumstances that may arise in practice. They are designed to allow the procuring entity, when considering how to conduct a procurement procedure, to take account of what it is that is to be procured (the subject matter), the market situation (the number of potential suppliers, degree of concentration in the market, the extent to which the market is competitive, and any degree of urgency) and the appropriate level of procurement technology (such as whether electronic means of procurement are appropriate).

2. Paragraph (1) lists these available methods of procurement. The first such method is open tendering. It is considered under the Model Law to be the method of the first resort (the default procurement method). This is because its procedures most closely support the achievement of the goals and objectives of the Model Law, through implementing the principles of competition, objectivity and transparency (as further discussed in ...). The procuring entity must therefore use this method unless the use of alternative methods of procurement is justified. As further elaborated in the commentary to article 27, the main mechanism for justifying the use of alternative methods is through satisfying conditions for use of these alternative methods.

3. The alternative procurement methods comprise all other methods listed in paragraph (1). They are designed to accommodate procurement of various subject matter, from off-the-shelf items to highly complex products, for which the use of open tendering may not be appropriate. Some of them are tendering-based methods (restricted tendering, two-stage tendering [and open framework agreements]) that require a description of the subject matter based on technical specifications and in which the procuring entity retains control of, and responsibility for, the technical solution. Some are request for proposals methods (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations) by means of which the procuring entity seeks proposals from suppliers or contractors to meet its needs, formulated in the form of minimum technical requirements and standards, and in which the suppliers or contractors are responsible for ensuring that their proposed solutions in fact meet the procuring entity's needs. Some methods are less structured or regulated (request for quotations, competitive negotiations and single-source procurement) in the light of particular circumstances in which they can be used (very low-value procurement, urgency, emergency, etc.) that make the use of more structured and regulated methods less appropriate or inappropriate. Although listed in paragraph (1)(i) as a



stand-alone procurement method, electronic reverse auctions may also be used as a technique (similarly to [closed] framework agreements referred to in paragraph (2)), as the final phase preceding the award of the procurement contract in any method of procurement listed in paragraph (1), as well as in the award of procurement contracts under framework agreements.<sup>4</sup>

4. Paragraph (2) refers to [closed] framework agreement procedures. The [closed] framework agreement procedure is not a method of procurement as such but a procurement technique consisting of the award of a [closed] framework agreement by means of the methods of procurement listed in paragraph (1) and of the subsequent placement of purchase orders under the awarded agreement.<sup>5</sup>

5. The available methods and techniques can be considered together as a toolbox, from which the procuring entity should select the appropriate tool for the procurement concerned. It is however recognized that conditions for use and the functionality of certain methods will overlap, as explained further in the commentary to article 27 below. For example, it may be considered that the circumstances envisaged for the use of request for proposals procedures can be accommodated by the use of output-based or performance specifications in tendering proceedings.<sup>6</sup> The procedures for restricted tendering under article 28 (1)(a) can be effectively accommodated through open tendering. (Restricted tendering involves the publication of a notice at the outset, and the invitation to participate must be provided to all those that wish to participate; they may participate unless they are assessed to be unqualified. From this perspective, the procedural benefits of restricted over open tendering may not be significant (and from an institutional perspective, there will be an additional overhead cost in ensuring that the rules on solicitation in restricted tendering procedures are properly understood and applied). It is also likely that where the conditions for use for restricted tendering on the basis of article 28 (1) (b) apply, a low-value or simple procurement method such as request for quotations or ERA will also be available and appropriate.)

6. Further guidance on selection among alternative procurement methods is provided in the commentary to article 27 below, and in the commentary to each procurement method. The guidance presupposes adequate professional judgement and experience on the part of procuring entities to select the appropriate procurement method and to operate it successfully.

7. As the footnote to article 26 records, enacting States may choose not to incorporate all the methods provided for in the Model Law into their national legislation. However, as it is also noted, enacting States should always provide for open tendering which, as noted above, is the default procurement method.

8. In deciding which of the other methods to provide for, enacting States should provide for sufficient options to address the normal situations in which it engages in procurement, by reference to the circumstances described above and others that may

---

<sup>4</sup> The paragraph may need to be amended if it is decided that open framework agreements are to be listed as procurement methods in paragraph (1) of the article.

<sup>5</sup> Ibid.

<sup>6</sup> The provision of guidance to the Secretariat is requested as regards the need for further detail of this point and, if so, the content thereof.

be relevant in their jurisdiction. At a minimum, enacting States should provide (in addition to open tendering) a method that can be used for low-value and simple procurement, a method that can be used for emergency and other urgent procurement, and a method that can be used for more specialized or complex procurement. Where the enacting State is introducing procurement legislation for the first time, it may be appropriate to base the system on a more limited number of methods than the full range available under the Model Law, and it may be considered that they should include tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these procedures will allow the introduction of methods including request for proposals procedures involving negotiations or dialogue, at a later stage.

9. Where enacting States consider that further capacity to choose among procurement methods may be required, a hierarchy of procurement methods may be set out in the procurement regulations, supported by detailed guidance on the identification of the appropriate procurement method. The rules and guidance should focus in particular on how to select the appropriate procurement method where the conditions for use for several methods and/or techniques may apply.

10. As some methods may be considered to be more vulnerable to abuse and corruption than others, and some methods require greater levels of capacity to function successfully, the guidance to each procurement method in [...] is designed to assist enacting States in considering which methods are appropriate for their jurisdictions, to highlight issues that may arise in their use and capacity issues that they raise, and to be a resource for those that draft regulations and guidance. Finally, enacting States will wish to consider whether any international agreements to which they are party, or donor requirements, require the adaptation of the conditions for use and use of the procurement methods set out in the Model Law, as further discussed in particular in the guidance to request for proposals procurement methods.

### **Article 27. General rules applicable to the selection of a procurement method**

1. The purpose of article 27 is to guide the procuring entity in selection of the procurement method appropriate in the circumstances of any given procurement.

2. Paragraph (1) provides for the basic rule that open tendering is the default procurement method. There are no conditions for its use: it is always available. The implication of open tendering as the default procurement method is that the use of any other procurement method requires justification, through a consideration of whether the conditions for its use are satisfied. Paragraph (1) sets out therefore the general requirement that these other methods can be used only where the conditions for their use set out in articles 28-[31] of the Model Law so permit. Thus the procuring entity does not have an unfettered discretion to choose which tool alternative to open tendering it wishes, but is required, as a first step, to see whether it is available in the circumstances of the procurement at hand — that is, whether the conditions for use of the tool(s) under consideration are satisfied. The conditions for use contain safeguards in particular against abusive resort to less structured and

regulated methods of procurement in avoidance of open tendering or other methods of procurement that, although involving lengthier procedures, ensure more transparency, objectivity and competition.

3. As noted above, the conditions for use are intended to reflect the distinct and commonly encountered circumstances that may justify use of one or other of the alternative procurement methods. For example, one of the conditions justifying use of restricted tendering (article 28 (1)(a)) refers to the procurement of highly complex products where there are limited sources of supply. Where it is not feasible or appropriate to formulate a full description (including technical specifications) of the subject matter of the procurement at the outset of the procurement proceedings, two-stage tendering or request for proposals with dialogue may be appropriate. Where quality aspects may be highly significant (which is commonly the case in procurement of non-quantifiable, intellectual types of services), request for proposals without negotiations or with consecutive negotiations may be used. Competitive negotiations are intended for procurement involving national security issues and under situations of urgency, while resort to single-source procurement can be justified only on the listed and objective grounds (apart from situations of emergency, they include that there is only a single supplier in a given market capable of meeting the needs of the procuring entity).<sup>7</sup>

4. Guidance on the conditions for use for each alternative procurement method under the Model Law is set out in [...], including, in each case, an explanation of the conditions for use for the method concerned. The guidance also considers some of the specific circumstances in which each method is appropriate, and details of the procedures for each method (which themselves can have a bearing on the choice of procurement method). The conditions for use set out whether a particular procurement method or technique is available for a given procurement procedure, but such conditions alone will not answer the question of whether the method is appropriate for the procurement procedure under consideration.

5. The main reason why conditions for use do not provide a complete guide to choice of procurement method is that the conditions for use for more than one method may apply in the circumstances (in addition to open tendering, which is always available). A possible overlap of conditions for use under the Model Law is illustrated in the example provided in [Annex [...] to this Guide]. What is the appropriate, or the most appropriate, procurement method can only be determined through a consideration of all the circumstances of the procurement. This is reflected in paragraph (2) of the article, which requires the procuring entity to select an alternative method of procurement to accommodate the circumstances of the given procurement. Such circumstances will differ from procurement to procurement and, as noted above in the commentary to article 26, the procuring entity will need to possess appropriate professional knowledge, experience and skills to select the procurement method most suitable for the circumstances of the given procurement from among the full range of procurement methods available under the Model Law.

---

<sup>7</sup> The commentary to the use of these procurement methods (competitive negotiations and single-source procurement) will state that enacting States may consider that certain circumstances envisaged for the use of competitive negotiations and single-source procurement are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion.

6. For example, in deciding whether to use open tendering or two-stage tendering or request for proposals with dialogue, the procuring entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively complex subject matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure through discussions with suppliers during the procurement process to achieve the best solution, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach. (A consultancy may precede the two-stage tendering procedure, to produce the design of the initial description and technical specifications.) Where the procuring entity is incapable or considers it undesirable to retain such control, the request for proposals with dialogue will be appropriate. The capacity required to operate request for proposals with dialogue, which involves the ability to assess and monitor different solutions, and to engage in dialogue on technical and commercial terms including price, is generally considered to be in excess of that required to operate two-stage tendering (particularly where a design consultancy has preceded the two-stage tendering procedure).

7. Paragraph (2) of the article requires in addition to “seek to maximize competition to the extent practicable” when selecting the procurement method. Competition in this context means, first, a preference for open solicitation to maximize the potential pool of participating suppliers, and, secondly, ensuring that the procedure does not restrict the number of participants below the number required to ensure that they in fact compete (and do not collude).

8. The requirement to maximize competition will determine the most appropriate method among those available in some situations. For example, in cases of urgency following a natural disaster or similar catastrophe, two methods are available under the Model Law: competitive negotiations and single-source procurement. The conditions for use of these methods are almost identical: they refer respectively to “an urgent” and “an extremely urgent” need for the subject matter of the procurement as a result of the catastrophe, in each case subject to the caveat that the urgency renders it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using them. Although both competitive negotiations and single-source procurement are considered to provide less competition (as well as objectivity and transparency) than other procurement methods, it is clear that competition is to some degree present in competitive negotiations, and is essentially absent in single-source procurement. For this reason, only where there is an extreme degree of urgency can single-source procurement be used: such as for the needs that arise in the immediate aftermath of the catastrophe (for example, for clean water, emergency food and shelter or immediate medical needs). Other needs, which still arise as a direct result of the catastrophe, including these same items needed several weeks or months after the event, involve a time-frame that allows the use of competitive negotiations rather than single-source procurement (and, the further in time from the catastrophe, the less likely it is that either of these methods remains available because there will be time to use other methods). The guidance to both methods discusses this issue, and other steps that can be taken to mitigate the risks that they pose; the guidance to framework agreements also highlights the use of that technique as a manner of planning for emergencies.

9. Paragraph (3) of the article reinforces the need for justification for resort to alternative procurement methods by requiring that the statement of reasons and circumstances for such resort be included in the record of the procurement proceedings. The same requirement is repeated in article 24 (1)(e).

**Annex [...]****The purchase of laptop computers**

1. The conditions for use of request for quotations, ERA, restricted tendering, single-source procurement and framework agreements that may apply to this type of purchase are repeated below, and the following discussion of how the methods and techniques may be available and appropriate for the procurement of laptops reflects those conditions; the discussion also draws on the guidance to each of these methods and techniques contained at [...].

<i>Method</i>	<i>Condition for use</i>
Request for quotations	Procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations
ERA (stand-alone)	Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement; AND Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; AND Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms
Restricted tendering (article 28 (1)(a))	The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors
Restricted tendering (article 28 (1)(b))	The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement
Single-source procurement	The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question OR The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible
ERA (phase in a procurement method)	Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.
Framework agreements (in conjunction with procurement methods)	The need for the subject matter of the procurement is expected to arise on an indefinite basis during a given period of time.

2. If the laptops needed are available as standard items in the market, without the need for any particular design for the procuring entity (such as specialized software), and the estimated value of the procurement falls below the threshold

established in the procurement regulations, request for quotations is available. Where the time and cost required to examine and evaluate the likely number of tenders may be disproportionate to the value, whether or not it exceeds the request for quotations threshold, restricted tendering is also available. In addition, it will normally be feasible for the procuring entity to formulate a description in the manner required for ERAs, the market will presumably be competitive, and the evaluation criteria will be quantifiable, so a stand-alone ERA will also be available. An ERA is likely also to be available as a phase in request for quotations or restricted tendering, because the evaluation criteria are quantifiable as its conditions for use require. The laptops may not be a one-off purchase — if so, a framework agreement will be available. Less commonly, the laptops may require highly specialized software used by the procuring entity concerned, which may be available from one developer or a limited number of developers under licence; restricted tendering or even single-source procurement may then be indicated.

3. Assuming no specialized customization is required, the requirement to maximize competition in article 27(2) indicates that the stand-alone ERA, which is an open procedure, may be considered to maximize competition. However, if sufficient numbers are invited to participate in restricted tendering, an equivalent level of competition may be assured; the nature of the market may be such that even the numbers invited to participate in a request for quotations procedure will also ensure equivalent competition.

4. The procuring entity will additionally wish to consider the administrative efficacy of the procedure itself to determine the appropriate method (an issue implied in the condition for use of restricted tendering under article 28 (1) (b)). Relevant issues may include the fact that the overheads of running an ERA (even if ERAs systems are well established) may exceed those of running other methods, particularly the procedurally simple request for quotations. On the other hand, the qualifications and responsiveness of the successful supplier alone can be assessed under an ERA. Choosing between restricted tendering and request for quotations, for example, includes a consideration as to whether any specialized software or other customization requirements or offers would be enhanced by the issue of a “particular design” by the procuring entity, and the estimated value of the procurement. The appropriate procurement method, therefore, will be determined by the facts of the case at hand.