

5. The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform

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1. INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) is an intergovernmental body created by the United Nations General Assembly in 1966¹ with the aim of enabling the United Nations (UN) to play a more active role in reducing or removing obstacles to the flow of international trade. The Commission was charged with the mandate of furthering the progressive harmonisation and unification of the law of international trade and of enhancing broader participation by, in particular, developing states, in this process.² The Commission meets annually, but also works through working groups, each dealing with a specific subject. The International Trade Law Branch of the UN Office of Legal Affairs serves as the substantive secretariat of the Commission.

In pursuance of its mandate, the Commission has formulated a number of legal texts including conventions, model laws and legal guides.³ Work on the Model Law on Procurement of Goods, Construction and Services began in 1989 and was carried out by the Commission's Working Group on the New International Economic Order. A study carried out by the Commission Secretariat had revealed that in many countries, the existing legislation governing procurement was inadequate or outdated.⁴ This inadequacy resulted in inefficiency and ineffectiveness in the procurement process and

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¹ General Assembly resolution 2205(XXI) of 17 December 1966.

² *Ibid.*, Section 8.

³ Among the best known of these are International Conventions on Contracts for the Sale of Goods (CISG), Convention on the International Sale of Goods (Hamburg

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led to economic results whereby the public purchaser failed to get "value for money". Furthermore, the report revealed that many of these laws did not promote international competition in procurement and were therefore a hindrance to international trade. The Commission therefore decided to prepare a model law setting out what would be considered as transparent, competitive and efficient procurement procedures. These efforts culminated in the adoption by the UN General Assembly of the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁵ (hereinafter referred to as the Model Law).

Being a model law, and not a binding legal text, it is intended to "serve as model for states for the evaluation and modernisation of their procurement laws and practices and the establishment of procurement legislation where none presently exists".⁶ Having been prepared under the auspices of the UN, the Model Law is not only a widely acceptable legal text but has already had a significant impact on procurement legislation, in particular in those states where no procurement legislation previously existed, but also in states which are in the process of reforming existing procurement legislation. This chapter first discusses the main characteristics of the Model Law and then describes the impact the Model Law has had on procurement reform.

2. MAIN FEATURES OF THE MODEL LAW

2.1 Objectives and scope

The Model Law contains 57 Articles divided into six chapters.⁷ It begins with a preamble which states the main objectives of the Model Law. These objectives include maximising competition and efficiency, promoting fair and equitable treatment of all suppliers and contractors and promoting integrity and fairness in the procurement process mainly by bringing about increased transparency in procurement procedures. All the procedures in the law are therefore geared towards achieving the objectives as stated in the preamble. While it is recognised that a preamble may not be common legislative practice in many states, it was agreed that it would be useful to have a statement setting out what would be considered as the minimum criteria that good procurement legislation should aim to achieve.

⁵ Official Records of the General Assembly, Forty-Ninth Session, Supplement - No. 17 (A/49/17). For further readings on the Model Law, see J.J. Myers, "UNCITRAL Model Law on Procurement" (1993) 21 *International Business Lawyer* 179; D. Wallace, Jr., "The UN Model Law on Procurement" (1992) 1 *Public Procurement Law Review* 406; and G. Westring, "Multilateral and Unilateral Procurement Regimes: To Which Camp Does the UNCITRAL Model Law on Procurement Belong?" (1994) 3 *Public Procurement Law Review* 406.

⁶ *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services* (New York: United Nations, 1995) para 400, para 401.

As to Model Law, it is expected that legislation enacted on the basis of Model Law will be applicable to the procurement of all goods, construction and services that are financed by public funds. This should also include procurement by municipalities and regional governments. However, Article 1(2) recognises that some states may wish to exempt procurement involving national defence or national security from the application of the law. It is also recognised that procurement financed by external resources may often be subject to procurement procedures established by the source of the funds.⁸ It is expected, however, that any exemptions from the law would be narrowly proscribed and publicly notified either in the law or in procurement regulations.

2.2 Procurement methods

The Model Law establishes a number of procurement methods which procuring entities can use. For procurement of goods and construction, Model Law prescribes the use of public tendering as the main method of procurement and as the method that is best able to promote the objectives stated in the preamble.⁹ Recognising that there are significant differences between procurement of goods and construction and procurement of services, the Model Law also prescribes a separate "principal method of procurement of services".¹⁰

For those instances where tendering, in the case of goods or construction or the "principal method for procurement of services" in the case of services, may not be appropriate or feasible, the Model Law establishes alternative methods of procurement. These other methods may only be used when the conditions for their use are met. Such conditions for use of the other methods are clearly stated. The methods of procurement as set in the Model Law are as follows.

2.2.1 Tendering

It is expected that tendering proceedings will be used in most cases for procurement of goods or construction. The procedures for tendering in Model Law are therefore crafted so as to maximise the advantage of competition, transparency, and fairness in the procurement process. The objective of promoting competition is achieved by the provisions mandating the widest possible advertisement of upcoming procurement so as to enable as many potential bidders as possible to take part in the procurement.¹¹ All those who express an interest in so doing. A number of articles are geared towards promoting transparency, in particular by means of disclosure to all bidders of all relevant information regarding the tender

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process in the solicitation documents.¹² Particularly important in this regard is the pre-disclosure of all the criteria that will be used in the evaluation of the successful tender,¹³ the corollary of which is that only the criteria that have been pre-disclosed can be used during the actual evaluation.¹⁴ The other important clause in promoting transparency is the requirement that all tenders shall be opened in public at which point the tender prices will be announced¹⁵ and a record kept of the proceedings.¹⁶

These main features of tendering for goods or construction are also found in the principal method for procurement of services. The main reason for establishing a separate method for procurement of services is that, unlike the procurement of goods or construction, procurement of services involves the supply of intangible products whose quality and exact content may be difficult to quantify.¹⁷ The skill and expertise of the service provider may therefore be a more dominant factor than price in the evaluation process. Thus, the main difference between tendering and the main method for procurement of services is in the means of evaluating the successful proposal where, in the case of services, account is given to the predominant weight accorded to the qualifications and expertise of service providers.¹⁸

2.2.2 Other methods of procurement

While the Model Law recommends tendering as the method of procurement to be used in most cases, a number of other methods are provided for use in those instances when tendering may not be appropriate or feasible. For example, in those cases where it might not be feasible to formulate specifications to a degree of finality necessary to enable comparison of tenders, the Model Law provides three optional methods. These are two-stage tendering,¹⁹ a request for proposals²⁰ and competitive negotiations.²¹

With two-stage tendering, the procuring entity uses the first stage to seek various proposals relating essentially to the technical characteristics of the goods or construction to be provided. The procuring entity may then hold negotiations with the various suppliers or contractors with a view to clarifying the quality and technical specifications. At the second stage, the procuring entity issues a single set of specifications on which tenders can then be submitted. Regular tendering procedures are then used after this. With the request for proposals, the procuring entity approaches a number of bidders, solicits various proposals on how best to meet its needs and negotiates with these bidders to arrive at a closer understanding of the

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specifications. Following this process, the bidders are requested to submit their best and final offer. The successful proposal is then chosen from the best and final offers on the basis of pre-disclosed criteria.

These two methods are very useful, particularly in circumstances where the procuring entity wishes to benefit from technical knowledge and innovation that bidders may possess. This would be the case, for example, with the procurement of sophisticated information technology systems where the procuring entity would use the first stage to seek technical proposals from the industry and to discuss the possible solution to its needs on the basis of the technical proposals presented.

Competitive negotiation is different from these other methods in that the Model Law provides few structured rules on how it should be carried out. It merely stated that, after negotiations with a number of bidders, a successful bidder will be chosen on the basis of a "best and final offer" and therefore a rather open-ended method that may be considered as fitting with the opportunity for abuse.

For cases where the goods, construction or services are so technically complex as to be available only from a limited number of suppliers, or where the case of procurement of such low value that economy or efficiency are served by restricting the number of tenders, the procuring entity may resort to restricted tendering.²² Except for the requirement of wide advertisement, all the other procedures for open tendering apply to restricted tendering. In restricted tendering, the procuring entity is permitted to extend its invitation to tender to a limited number of suppliers or contractors or to invite tenders for the procurement of goods or services of a low value and which are standardised in nature, the Model Law provides for the use of restricted tendering for quotations²⁴ whereby the procuring entity solicits quotations essentially on price from a number of suppliers and makes an offer to the responsive supplier with the lowest bid.

Finally, for exceptional circumstances such as urgency or other exceptional events or whether the goods, construction or services may be available from one supplier, the Model Law provides for single-source procurement.²⁵

2.3 Participation by foreign bidders in the procurement process

One of the findings of the UNCITRAL Secretariat's research on procurement practices was that many procurement laws are a hindrance to participation by foreign suppliers. As an entity whose mandate includes the promotion of international trade, UNCITRAL aimed to encourage a participation by foreign states to set up procurement systems that encouraged participation by foreign contractors and suppliers. Therefore, one of the basic principles of the Model Law is that participation in the procurement process

should be open to all bidders without discrimination on the basis of nationality. The rationale underlying this position is that wider competition will ultimately enable the procuring entities to get better value for money.

However, recognising that there may exist legitimate situations where restrictions on the basis of nationality could be imposed,²⁶ the Model Law aims to make such restrictions as transparent and rational as possible by stating that any such restrictions, and the grounds on which they are imposed, should be notified in the law or in procurement regulations.

As a means of circumventing the negative effects of blanket exclusion of foreign bidders, the law allows for the use of a "margin of preference" in favour of local bidders during the evaluation process.²⁷ The benefit of using a "margin of preference" is that it provides local bidders with the chance to enhance their competitiveness against foreign bidders, while also providing them with an improved opportunity of being awarded some contracts.

Concern has been expressed that, while it ensures greater transparency, the emphasis of the Model Law on openness and non-discrimination on the basis of nationality and the preference for open over restricted tendering may impinge on the interest of economy and efficiency.²⁸ However, a case can be made that, while the Model Law leans heavily towards promoting transparency, there are also provisions that mitigate against excess pursuit of any one of the objectives stated in the preamble to the detriment of the others. For example, while the principle of non-discrimination on the basis of nationality as expressed in Article 8 may seem rather extreme, Article 23(b) allows for domestic tendering in cases where the procuring entity decides that, in view of the low value of the goods, construction or services to be procured, only domestic suppliers or contractors are likely to be interested in submitting bids. With regard to the preference for open over restricted tendering, Article 20(b) also provides that the procuring entity may resort to restricted tendering where the time and costs required to examine a large number of tenders would be disproportionate to the value of goods, construction or services to be procured. Thus, in both cases, the procuring entity is provided the opportunity to balance the benefits that accrue with more transparent procedures with the interests of cost, economy and efficiency.

2.4 Review procedures

One of the key features of the Model Law is that it provides for procedures through which bidders can seek review of the decisions of the procuring entity which are in violation of the Model Law.²⁹

Enabling bidders and potential bidders to have recourse against the decisions of the procuring entity not only encourages the procuring entity to make the right decisions but also makes the law largely policing since bidders have an opportunity to enforce compliance with law. It is, however, recognised that in some states, such procedures already exist as part of the larger body of administrative law or the law relating to review of the decisions of governmental entities. States therefore provided with a number of options on how to implement review procedures. It is also provided that some of the decisions of the procuring entity that do not directly impact negatively on the treatment accorded to suppliers or contractors are not open to review. These include decisions such as the selection of the method of procurement.³⁰

The provisions state that in the first instance, and if the procuring contract has not already entered into force, a complaint should be lodged with the procuring entity itself.³¹ Under this procedure, a complaint only be entertained if it is brought before the procuring entity within 20 days of the time that the supplier or contractor became aware (or should have become aware) of the circumstances giving rise to the complaint. Upon the lodging of a complaint, the head of the procuring entity has days within which to issue a written decision indicating any corrective measures taken if the complaint is upheld. An appeal on the decision of the procuring entity (or the failure of the procuring entity to act on a complaint) may be made under administrative review³² or through judicial review.

The provisions on review also provide for suspension of the procurement proceedings.³³ However, to guard against abuse of the complaint mechanism, which can lead to costly disruption to the activities of the procuring entity, suspension of the procurement proceedings only place under closely circumscribed circumstances. These safeguards include the requirement that the bidder have a *prima facie* case, a declaration by the bidder that irreparable injury would be caused in the absence of suspension and the limitation of any suspension to seven days. Furthermore, the procuring entity is provided with the opportunity to circumvent suspension by a certification that urgent public interest considerations require the procurement to proceed.

2.5 Other provisions

The Model Law contains other provisions that are worthy of note, including those on pre-qualification proceedings and on record-keeping. On qualification proceedings, the Model Law provides that the procuring entity must pre-disclose to all potential bidders the qualification

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²⁶ Article 52(2) of the Model Law.

²⁸ These may include, for example, primary trade boycotts or sanctions imposed by

prepared under the auspices of the UN. Since UNCITRAL is an organ of the UN General Assembly, participation in its work is open to states at various levels of economic development and with different legal and political systems. With regard to the Model Law, participation in the meetings of the Working Group, where most of the substantive work was carried out, involved not only many different states, but also multilateral institutions, other international organisations and even non-governmental organisations.³⁷ The Model Law received the imprimatur of the UN General Assembly which urged that all states "give favourable consideration to the Model Law" when reforming their procurement systems.³⁸

This wide acceptance has enabled the Model Law to have a significant impact on reform in the area of procurement. Wide participation in the preparation has ensured that the Model Law constitutes what is internationally recognised as the fundamental components of good procurement practice for most states, and sets the threshold by which procurement legislation should be measured. It establishes that a modern procurement system will normally promote openness, competition, transparency and also fairness and accountability to the public. Further, the Model Law states a view on some of the more controversial issues in procurement. One such issue is the manner in which procurement by invitation should address the issue of participation in procurement by suppliers and contractors and to what extent states should encourage international competition. The Model Law resolved that issue by establishing a system based on open international competition, thereby discouraging indiscriminate use of public procurement for protectionist purposes.

One specific issue on which the Model Law has had an impact is the decentralisation of procurement and the administrative or institutional framework needed to oversee implementation of a procurement system based on the Model Law. By providing that procurement shall be organised and carried out by the procuring entity, the Model Law proposes establishment of a procurement system that is decentralised and where decentralisation and accountability lie with the entity that is carrying out procurement and accountability lie with the entity, as opposed to one with a central agency that carries out procurement on behalf of other public agencies. The procurement and ensuring compliance with the provisions of the Model Law, while the Model Law itself does not deal with the institutional structure, the Guide to Enactment does mention that it may find it desirable to provide an institutional mechanism to ensure proper implementation of the law. In line with the structure of dec-

and the manner in which the evaluation of the qualified contractors or suppliers will be carried out.³⁴ During the pre-qualification evaluation, only those criteria as are necessary to establish the bidders' qualifications to perform the contract should be applied. In addition, only those criteria pre-disclosed in the pre-qualification documents can be used. All bidders who are qualified should then be granted an opportunity to submit tenders or proposals. The opportunity for post-qualification is also provided.

The provisions on the necessity to keep a record are key to increasing the transparency of the procurement process.³⁵ The two aspects that are of particular importance in this regard are the need to keep a record of bid-opening including the prices that are read out during bid-opening, and the requirement to maintain a record of the evaluation process. The necessity of keeping a record of the entire procurement process should, like the possibility of review, focus the procuring entity on the need to make correct decisions. Record-keeping is also important for purposes of facilitating review of decisions.

2.6 The Guide to Enactment

During the early stages of work on the Model Law, the Commission recognised that the text-to be finally adopted would need to be accompanied by a commentary to provide an explanation on the considerations that had been taken in arriving at a particular formulation in the Model Law. Earlier drafts of the Model Law were therefore accompanied by a commentary for each article. However, as the Commission finalised its work, it was decided that it would be more useful to prepare a Guide to Enactment which would provide background and explanatory information for those drafting or enacting legislation based on the Model Law.

A Guide to Enactment was thus produced, which is intended to explain the rationale underlying the provisions of the Model Law. In addition to the materials on each article, the Guide also contains other useful information. For example, recognising that the Model Law states the possibility of enactment of procurement regulations to provide further details on some aspects of the Model Law's provisions, the Guide discusses possible issues that such regulations could cover. Another important subject covered in the Guide is the type of administrative structures that states might need to put in place to oversee proper implementation of the Law.³⁶

3. THE IMPACT OF THE MODEL LAW ON PROCUREMENT REFORMS

the advantages of the Model Law, a state that has greatly

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used procurement that the Model Law proposes, the functions that are suggested for such an institution do not involve operational procurement but are mainly of an overall supervisory nature.

Adoption of the Model Law took place at a time when a significant number of states were in the process of reforming their procurement systems. There have essentially been three reasons why procurement reform has increased. One is the large number of states that are undergoing the transition from centrally planned socialist economies into market-based economies. The second is the need to modernise public expenditure management in emerging market economies. The third is the need felt by some states to update procurement systems that were adopted essentially during the colonial era and have therefore become outdated.

In the former socialist economies, the concept of competitive public procurement did not exist. The transition to a market-based economy necessitated the change from a system where the state essentially supplied itself through a system of "state orders" into a system where public entities purchased from the private sector through a competitive process. Many of these states have therefore had to enact procurement legislation so as to put in place a competition-based procurement system.

The other objective that has motivated these states in enacting procurement legislation is the desirability of complying with the World Trade Organization Government Procurement Agreement (GPA). The GPA mandates that each government acceding to the GPA should ensure that its procurement legislation conforms with the rules, procedures and practices contained in the GPA.³⁹ Enactment of legislation based on the Model Law ensures such conformity because the procedures contained in the Model Law are closely related to the provisions of the GPA. In addition, many states (including former socialist states) have signed association agreements with the European Union. These call for progress towards harmonisation with the European Union's procurement regime, and this has necessitated enactment of procurement legislation that is transparent and promotes competition.⁴⁰

The need to modernise public sector financial management has also been a factor in the enactment or review of procurement legislation of a significant number of states. In some of these states, in particular the emerging economies of Asia and Latin America, procurement reform is part of a larger effort aimed at increasing transparency in governmental functions and enhancing efficiency in the public and private sectors. In some other states, particularly in Africa, procurement reform is motivated by the need to update outdated procurement systems that were put in place during the colonial era and is also normally part of larger reforms in public sector financial management.

3.1 State practice

Many of these states that are reforming their public procurement systems have implemented legislation based on the Model Law. Among countries that have legislation based on the Model Law are the following:

3.1.1 Poland

Poland was the first of the former socialist states of Eastern Europe to enact procurement legislation based on the Model Law. It was also the first to place a comprehensive procurement system with a fully fledged professional Office of Public Procurement. The Polish Act on Public Procurement was enacted by the Polish Parliament on 10 June 1994. The Act closely reflects the principles and concepts of the Model Law and reflects some aspects of the European Community directives, in particular with regard to applicable thresholds. The draft had been widely discussed within Poland and views were sought from a number of international organisations including the World Bank, which financed some of the technical assistance activities for the preparation of the law.⁴¹

3.1.2 Russia

A decree on "Priority Measures to Combat Corruption and Reduce Budget Expenditures Through Organising Auctions to Procure Products for State Needs" was signed by the President of the Russian Federation on 8 August 1997.⁴² The decree states that procurement of goods and works and services shall be carried out by means of competitive bidding.⁴³ The decree approved a set of "Regulations on the Organisation of Procurement of Goods, Construction, Works and Services for State Needs". The Regulations, which are appended to and were approved together with the decree, form the substantive procurement law for Russia. The Regulations are closely modelled, both in substance and structure, on the Model Law. The main departure from the Model Law is that the Regulations do not contain separate provisions dealing with services. The terms of the decree are that it shall remain effective until the coming into force of a law on "Organisation of Auctions to Procure Goods, Construction, Works and Services for State Needs".⁴⁴

3.1.3 Latvia

The Law on Government and Municipal Procurement was passed by the Latvian Parliament on 24 October 1997 and came into effect on 1 January 1997. The law is largely based on the Model Law. The main differences

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that it does not contain separate provisions on services. The law also does not contain some of the procurement methods found in the Model Law such as two-stage tendering and restricted tendering. It does, however, contain the key principles found in the Model Law that are geared towards transparency, competition and fairness.

3.1.4 Albania

In 1993, a decree was passed in Albania which governed all procurement by public entities and provided that such procurement shall be carried out on a competitive basis.⁴⁵ With technical assistance from the World Bank, Albania then embarked on preparation of comprehensive procurement legislation. Such legislation was passed on 26 July 1995.⁴⁶ This law is closely modelled on the Model Law. However, rather than create an extra method of procurement for services, this law provides that "request for quotations" shall be used as the method to "obtain consulting services or other services for which tendering is not a suitable" method. This law entered into force on 1 November 1995.⁴⁷

Other countries which have passed legislation based on the Model Law include Kazakhstan⁴⁸ and the Kyrgyz Republic.⁴⁹ Many of these states that have already adopted such legislation were those where no competitive procurement systems had existed in the past. Other such states that are in the process of preparing legislation based on the Model Law include Tajikistan, the Ukraine, Turkmenistan, Croatia, Uzbekistan and Slovakia.

3.1.5 Other countries

There are also a number of states that have had competition-based procurement systems which are in the process of reforming their procurement legislation and are in the process of enacting legislation based on the Model Law. These include Pakistan, Ghana, Ecuador, Tanzania and Malawi.

4. CONCLUSION

The UNCITRAL Model Law has established the minimum threshold that good procurement legislation should meet. It has codified the common understanding that the public purchaser will most likely get the best value for money when the procurement procedures are characterised by

transparency, wide competition and economy and efficiency. Adoption of legislation based on the Model Law will not only enable states to put in place such modern and up-to-date procurement systems but will also have an impact on the institutional mechanisms that states will need to put in place to ensure compliance with the law. It is expected that many states will take up procurement reform as the push for greater transparency in the management of public resources becomes even more widespread. Further, as more states become parties to the WTO Government Procurement Agreement, the necessity to enact legislation that is in conformity with the GPA will lead states to use the Model Law as a readily available model for such legislation. The influence of the Model Law will, therefore, continue to be enhanced by these developments.

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