

and that the aggrieved tenderer's tender should have been accepted, it might be appropriate to enable the tenderer to recover compensation.

X. CONCLUDING DISCUSSION

122. It was generally agreed that the model procurement law should not be confined to international procurement; rather, it should be suitable for application both to domestic and to international procurement. Implementing States could decide whether to apply it to procurement in general or only to international procurement. It was also agreed that the model procurement law should take into account the particular needs and interests of foreign participants in procurement proceedings.

123. A view was expressed that the number of alternative versions of provisions in the model procurement law should be kept to a minimum. In that connection it was noted that the mandate of the Commission was to harmonize the law relating to international trade, rather than to perpetuate the existing disparities in national laws. Thus, the Working Group should endeavour to agree upon and formulate specific provisions reflecting the appropriate solutions to the issues addressed in order to assist States in improving their procurement laws or introducing new laws on a sound basis.

124. According to another view, it was important for the model procurement law to contain alternative versions of provisions dealing with various issues, particularly those that involved fundamental features of the legal and administrative systems of States, so that States could adopt versions that were compatible with those systems.

125. The Working Group requested the Secretariat to prepare a first draft of the model procurement law and an accompanying commentary, taking into account the discussions and decisions at the present session. It was generally agreed that the model procurement law should not attempt to be too detailed or set forth too many rules, since that would make it less acceptable to States.

126. It was observed by the Working Group that it would have been desirable to have had at the present session greater participation by developing countries. The hope was expressed that more developing countries would be able to contribute to the further stages of the work on the model procurement law.

127. It was noted that drafts of the model procurement law to be considered at sessions of the Working Group would be circulated to Governments as a matter of course, and a suggestion was made that developing countries that faced difficulties in sending delegations or observers to those sessions should send to the Secretariat their written comments on those drafts.

B. Procurement: report of the Secretary-General^a (A/CN.9/WG.V/WP.22) [Original: English]

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^aWorking paper submitted to the Working Group on the New International Economic Order at its tenth session.

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INTRODUCTION

1. At its nineteenth session in 1986, the Commission had before it a note by the Secretariat (A/CN.9/277) setting forth possible topics in the context of the new international economic order that the Commission might take up upon the completion of its work on the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*.¹ Among the conclusions of the note was a suggestion that the Commission should undertake work on procurement. The note proposed that, at least as an initial stage of that work, the Commission might engage in a study of the major issues arising in connection with procurement. Such a study would be valuable in informing Governments and government entities of relevant policy considerations in relation to procurement and would enable them to assess the adequacy of their procurement laws and practices. It would also help Governments in improving their procurement laws and practices or in formulating procurement laws where none presently exists. Furthermore, the study would assist in evaluating whether further work in the area of procurement was desirable and feasible and would serve as a basis for any further work decided upon. After considering the note by the Secretariat, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted this work to the Working Group on the New International Economic Order (A/41/17, para. 243).² It was noted at the twenty-first

session of the Commission that the Working Group might be expected at its present session to outline the nature of the work to be performed (A/43/17, para. 37).

2. In December, 1987, the UNCITRAL secretariat convened a group of experts on procurement, composed of individuals from various countries experienced in this field from the points of view of procuring entities and of contractors and suppliers, and representatives of international financing and other organizations. The group of experts assisted the secretariat in identifying and analyzing the significant issues in connection with procurement policies and practices.

3. The present report contains a study of procurement along the lines envisaged in the note by the Secretariat. In preparing the study the UNCITRAL secretariat consulted a number of sources, for example, guidelines and similar documents of global and regional lending institutions and of bilateral development funding agencies governing procurement with funds provided by them; procurement agreements, directives, practices and other texts formulated by intergovernmental economic and trade organizations; national procurement laws of a number of countries, selected so as to be representative of the major legal and economic systems of the world and of various levels of economic development; and actual tender documents issued in connection with procurement. The secretariat also consulted literature on procurement by academics and practitioners in the area.

4. The Working Group may wish to use the present report as a basis for its recommendation to the Commission as to what further work in the area of procurement should be undertaken, and as a basis for that work. In

¹United Nations publication, Sales No. E.87.V.10.

²Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 243. Hereinafter references to reports of the Commission to the General Assembly will refer only to the document symbols of the relevant Official Records of the General Assembly (A/-/17).

particular, it may wish to propose to the Commission the formulation of a model procurement code in order to assist countries in evaluating their procurement laws and practices and in improving their procurement laws or establishing such laws where none presently exist. These suggestions are more fully discussed below in paragraphs 227 to 235.

I. PROCUREMENT AND PROCUREMENT LAW

A. Definition of "procurement"

5. In this study the term "procurement" refers to the systematized acquisition by an entity, on a commercial basis, of the items or services it needs in order to perform its functions or fulfil its objectives. Entities engaging in procurement include those in the public sector, such as ministries and other organs of the governmental administration, State enterprises (e.g., a telecommunications service) and State-owned independent enterprises (e.g., a State-owned airline or manufacturing enterprise), as well as enterprises in the private sector. The term covers the full range of items and services acquired by those entities, including, for example, industrial works (e.g., a hydro-electric plant; a pharmaceutical plant); civil works (e.g., a dam; a highway), buildings, equipment (e.g., a generator; motor vehicles), supplies (e.g., spare parts; furniture) and services (e.g., consultant services; insurance).

B. Procurement law

6. Procurement law which is the subject of this study is the body of legal rules regulating the procedures for procurement. More particularly, these rules regulate the procedures for selecting the contractor or supplier from which the works, goods or services are to be procured, for settling the price and other terms of the contract between the procuring entity and the contractor or supplier, and for entering into the contract by the parties. The rules also sometimes deal with the rights of recourse by participants in procurement proceedings who are aggrieved by actions or decisions of the procuring entity that are contrary to the applicable rules and procedures. While procurement is basically governed by national procurement laws, international procurement rules are becoming increasingly important.

1. National procurement laws

7. There exist in many countries laws, regulations and other legal norms (hereinafter collectively referred to as "procurement laws") regulating public procurement. The sources, form and nature of these laws are discussed more fully in paragraphs 30 to 38, below. In some countries procurement laws and procedures are subject to overriding rules of constitutional law and other legal rules (e.g., rules of natural justice or rules prohibiting government entities from acting arbitrarily or in bad faith). In addition, there have emerged in some countries bodies of decisional law from courts or administrative tribunals interpreting and applying the country's procurement laws.

8. Procurement laws in some developing countries that were formerly colonies were promulgated prior to independence by their former colonial powers. Some of these laws may in certain respects be inappropriate for post-independence conditions, or may take insufficient consideration of the needs of developing countries or of procuring entities in those countries.

2. International procurement rules

9. Many global and regional lending institutions and bilateral development funding agencies have established guidelines or other requirements governing procurement with funds provided by them. These institutions and agencies usually require proceedings for the procurement to be conducted in accordance with their guidelines or requirements, even if national procurement laws differ. Loans by international lending institutions and grants by some development funding agencies are made pursuant to agreements entered into between the institution or agency and the borrower or recipient country. In these agreements the borrower or recipient country usually undertakes to conduct proceedings for procurement with funds provided by the institution or agency in accordance with the institution's or agency's guidelines or requirements (see, also, paras. 38 and 54, below). However, some international lending institutions permit borrowing countries to conduct the procurement proceedings in accordance with national procurement laws in cases where there is likely to be little interest by foreign contractors or suppliers in participating in the proceedings, as long as the national procurement laws are acceptable to the institution.

10. In some cases, States are obligated to conform their procurement procedures to international agreements entered into by them or to rules issued by international institutions of which they are members. For example, several States and the European Economic Community (EEC) are parties to the Agreement on Government Procurement adopted in 1979 by the General Agreement on Tariffs and Trade (GATT).³ The Agreement provides an agreed framework of rights and obligations with respect to laws, regulations, procedures and practices regarding the procurement of products by governmental entities designated by each party to the agreement, when the procurement exceeds a stipulated value. Also, the Council of the EEC has adopted a series of directives dealing with the liberalization and the co-ordination of procedures for the procurement of works⁴ and of supplies⁵ over stipulated values by Governments, local authorities and entities subject to public law in member States of the EEC.

³GATT document MTN/NTM/W/211/Rev. 1. The Agreement entered into force on 1 January 1981.

⁴Council Directive 71/305 of 26 July 1971, *Official Journal of the European Communities* 1971, L 185/5.

⁵Council Directive 77/62 of 21 December 1976, *Official Journal of the European Communities* 1977, L 13/1, amended by Council Directive 80/767 of 22 July 1980, *Official Journal of the European Communities* 1980, L 215/1.

II. SCOPE OF STUDY

11. The present study focuses on national procurement laws governing the procurement of works and goods by entities in the public sector. Reference will also be made to requirements or guidelines of international lending institutions and of bilateral development funding agencies, where relevant. In terms of value, public sector procurement is substantial in all countries, and accounts for the greatest proportion of all procurement in a number of countries. Although private sector procurement is not covered by the study, private enterprises might nevertheless derive benefit from it since private and public sector enterprises and entities will often have similar overall procurement policy objectives (e.g., economy and efficiency; see section III, below), and will take into account similar considerations in structuring their procurement procedures.

12. This study covers laws governing the procurement of works and goods, but does not cover laws governing the procurement of consultants or other services. Under national procurement laws the procurement of works and the procurement of goods are generally subject to the same or similar procedures, in which price is usually a major factor. The procurement of consultants and other services, however, is subject to different considerations. Instead of price, the qualities of the providers of the services and of their proposals are of prime importance. Procurement laws in some countries treat the procurement of services separately from the procurement of works and goods, and laws in other countries do not deal with the procurement of services at all. Nevertheless, procurement laws covering the procurement of works and goods often also cover services that are incidental to the works and goods (e.g., transport; insurance).

13. Research and consultations by the secretariat have revealed that the procurement of consultant services is of great importance to economic development and industrialization, and it has been suggested that the Commission could make a valuable contribution by undertaking work in that area. However, due to the considerations discussed above, an effort to deal at the present stage with the procurement of consultant services would require a separate study of a depth comparable to the present study of the procurement of works and goods, as well as commensurate attention by the Working Group and the Commission. The judgment of the secretariat is that it would be preferable and more feasible at the present stage for the Commission to devote attention to the procurement of works and goods. After completing its work in that area, the Commission could, if it wished, turn to the procurement of consultant services.

14. The present study covers public procurement in general, and is not restricted to international procurement. It is not possible to draw a clear delineation between "international" procurement and "domestic" procurement. Rather, one can only identify situations in which participation by foreign entities in procurement proceedings is anticipated or sought. Until tenders or offers have been received, it will not be known whether or not foreign

entities will participate in individual procurement proceedings. National procurement laws normally do not have separate sets of rules or procedures governing international procurement on the one hand and domestic procurement on the other. Instead, they typically establish a single procedural framework by which they seek to attract participation by competent contractors and suppliers in general—whether foreign or domestic. Many national procurement laws include certain procedural details to facilitate foreign participation in cases where such participation is anticipated or sought (e.g., where the value of the works or goods to be procured exceeds a specified amount), or leave it to the procuring entity to incorporate into the procedures details of that nature when it believes that foreign participation would be desirable. This is true even in cases where preferences are given to procurement from domestic sources (see, also, para. 25, below).

III. POSSIBLE OBJECTIVES OF PROCUREMENT POLICIES

A. Possible national procurement policy objectives

15. National procurement laws and procedures are usually designed to advance various policy objectives. The possible objectives are to a large degree interrelated and in some cases come into conflict with one another. The task of drafters of procurement laws is therefore to identify the objectives sought to be achieved, to establish priorities with respect to those objectives, and to structure the procurement laws and procedures so as to maximize the prospects of achieving their objectives and to minimize the conflicts between them. Possible procurement policy objectives are discussed in the following paragraphs.

1. *Economy and efficiency in procurement*

16. Economy and efficiency in expenditures of public funds are important to all countries; but they are particularly important to developing countries where public funds are scarce. Economy refers to procurement of an item of the desired quality at the most advantageous price and upon the most advantageous contractual terms. It is promoted by procedures that provide a favourable climate for participation in the procurement process by competent contractors or suppliers, and that provide incentives to them to offer their most advantageous quality, price and other terms.

17. In many cases, economy is best achieved by means of procedures that promote competition among contractors or suppliers. Competition provides incentives to contractors or suppliers to offer their most advantageous quality, price and other terms, and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so.

18. In some cases, economy will be maximized by allowing all interested contractors and suppliers to compete

for the supply of the works or goods. In other cases, it may be preferable for the competitive field to be restricted, e.g., to keep the numbers of tenders or offers with which the procuring entity must deal to a manageable level, or to establish a core of contractors or suppliers that are familiar with the needs of the procuring entity and the procurement procedures followed by it.

19. Economy in procurement can often be promoted through participation by foreign contractors or suppliers in procurement proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the procuring entity and its country of technologies that are not available locally. Foreign participation in procurement proceedings may be necessary where there exist no domestic sources for certain works or goods needed by the procuring entity. A country desiring to achieve the benefits of foreign participation should ensure that its procurement laws and procedures are conducive to such participation, or at least do not hinder it.

20. Efficiency refers to procurement of the desired item within a reasonable amount of time, with minimal administrative burdens and at reasonable costs both to the procuring entity and to participating contractors or suppliers. In addition to the losses that can accrue directly to the procuring entity from inefficient procurement procedures (e.g., due to delayed procurement or high administrative costs), excessively costly and burdensome procedures could lead contractors or suppliers to offer higher prices than they would be able to offer if the procedures were more efficient. Some competent contractors or suppliers could even be discouraged from participating altogether in procurement proceedings where the procedures are excessively burdensome or costly.

2. Promotion of integrity of and confidence in procurement process

21. Another important objective of procurement policies is to promote the integrity of and confidence in the procurement process. Thus, procurement laws often contain provisions designed to ensure fair treatment of contractors and suppliers participating in procurement proceedings, to reduce or discourage unintentional or intentional abuses of the procurement process by persons administering it or by contractors or suppliers participating in it, and to ensure that procurement decisions are taken on a proper basis.

22. Promoting the integrity of the procurement process will help to promote public confidence in the process, and in the public sector in general. Confidence in the procurement process on the part of competent contractors and suppliers is necessary for their participation in procurement proceedings, and thus to achieve economy in procurement. Contractors and suppliers, particularly foreign ones, will often refrain from spending the time and sometimes substantial sums of money to participate in procurement proceedings unless they are confident that they will be treated fairly and that their tenders or offers have a reasonable chance of being accepted. Those that do participate in procurement proceedings in which they do not have that confidence have a tendency to increase their

prices to cover the higher risks and costs of participation. Ensuring that procurement proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable prices to the procuring entity.

3. Specific economic and social objectives

23. In many countries procurement laws and procedures are used as a vehicle to advance specific economic and social objectives in addition to those already mentioned. Procurement procedures in these countries contain features designed, for example, to stimulate national economic development, encourage the development of indigenous industries and improve the competitiveness and profitability of those industries, develop national economic self-reliance, promote the transfer of technology, improve the country's balance of trade, conserve foreign exchange, or promote the development of certain economic sectors (e.g., engineering; research and development), groups (e.g., small businesses; artisans) or regions (e.g., economically disadvantaged regions) within the country. These features typically involve preferences for procurement from domestic contractors or suppliers or those from the economic sectors or regions which the procurement policies seek to benefit, or for the procurement of domestically-produced works or goods, as well as other types of advantages given to those sources in the procurement process (see paras. 145 and 182 to 188, below).

24. The economic and social objectives sought to be promoted by such provisions are important matters of policy in a number of countries, both developed and developing. Indeed, various provisions of that nature are contained in the procurement laws of countries of virtually every level of economic development. These objectives, especially the development of indigenous industries and of national economic self-reliance, are of particular importance to developing countries. However, the procurement law features used to advance those objectives restrict competition and could in some cases result in the procuring entity having to pay higher prices or to settle for a lower level of quality, and thus conflict with the objective of economy in procurement. Nevertheless, these consequences are often regarded by Governments as legitimate costs of pursuing the desired objectives. It is for each country to determine the appropriate balance to be maintained between economy and efficiency and other economic and social objectives.

25. It is not necessarily inconsistent for national procurement laws to contain some features designed to promote foreign participation in procurement proceedings and other features, such as preferences for procurement from domestic contractors or suppliers, designed to promote the development of indigenous industries and to achieve similar objectives. Indeed, this may be a desirable combination in many cases. It would enable procuring entities to take advantage of participation by foreign contractors or suppliers when their tenders or offers are so superior to tenders or offers from domestic sources that they outweigh the benefits of procuring from domestic sources.

4. *Transparency of procurement laws and procedures*

26. Transparency of procurement laws and procedures will help to achieve various of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the procuring entity and by contractors and suppliers participating in the procurement proceedings are fully disclosed, particularly to such participants. Transparent procedures are those which enable a participant to ascertain what procedures have been followed by the procuring entity and the basis of decisions taken by the procuring entity.

27. Transparent procurement laws and procedures create predictability, enabling contractors and suppliers to calculate the costs and risks of their participation in procurement proceedings and thus to offer their most economical prices. They also help to guard against arbitrary or improper actions or decisions by the procuring entity or its officials and thus help to promote confidence in the procurement process. Transparency of procurement laws and procedures is of particular importance where foreign participation in procurement is sought, since foreign contractors and suppliers may be unfamiliar with a country's procurement practices.

B. *Policy objectives of international lending institutions, bilateral development funding agencies and international trade and economic institutions*

28. Rules formulated by international lending institutions, bilateral development funding agencies and international trade and economic institutions are designed to advance particular policy objectives of those institutions and agencies, which in some respects may coincide with policy objectives of their individual borrower, recipient or member countries, but in other respects may differ from those objectives. Guidelines and rules of international lending institutions often seek to promote economy and efficiency in procurement with funds provided by them. They also often seek to ensure that contractors and suppliers from countries that are members of the institutions have an opportunity to compete on an equal basis with contractors or suppliers from the borrowing country in proceedings for procurement with funds provided by the institutions. In addition, they frequently seek to promote the development of the economies of borrower countries and of industries in those countries. Bilateral development funding agencies, too, seek to promote economic and industrial development in recipient countries. It is also often a strong policy of those agencies that procurement with funds provided by them should be from contractors or suppliers from their countries, or at least that those contractors or suppliers should have an opportunity to compete in the procurement.

29. With respect to the policy objectives of international trade and economic institutions, the GATT Agreement on Government Procurement (see para. 10, above) seeks to promote freer trade by eliminating discrimination in procurement by governmental procuring entities from one party to the Agreement against contractors or suppliers

from other parties to the Agreement, both in the form of express discriminatory practices and in the form of procedures that *de facto* discriminate against those contractors or suppliers. It also seeks to address the special needs of developing countries. The directives of the EEC (see para. 10, above) seek to promote the freedom of movement of goods, the right of establishment and the right to perform services within member countries and competition within those countries in the area of public works and supply contracts by liberalizing and co-ordinating the procedures for procurement in connection with those contracts.

IV. MAIN FEATURES OF NATIONAL PROCUREMENT LAWS AND DISCUSSION OF THESE FEATURES IN CONTEXT OF POSSIBLE OBJECTIVES OF PROCUREMENT POLICIES

A. *Sources, form and nature of national procurement laws*

30. The sources, form and nature of national procurement laws are generally influenced by such factors as the legal and constitutional system of the country concerned, its legislative and administrative practices and traditions, and the size and complexity of its public administration. Thus, the sources, form and nature of national procurement laws throughout the world are by no means uniform. Nevertheless, it is possible to identify certain patterns, as discussed in the following paragraphs.

31. In many countries there exists one or more legislative texts governing procurement. Depending upon the country, the text may be in the form, for example, of a statute emanating from the parliament or a decree emanating from the Government or head of State. In some countries there exists a single legislative text setting forth procurement procedures. In other countries, particularly those with large and complex administrative structures, there exist separate legislative texts covering procurement by different elements of the Government or public sector (e.g., defence procurement; civilian procurement).

32. In some countries the legislative text or texts contain all of the country's procurement laws. In other countries, the legislative texts set forth a basic legal framework with respect to procurement procedures that is implemented by detailed regulations issued by administrative authorities. The procurement laws established by legislative texts or administrative regulations may be further supplemented by rules contained in internal memoranda and circulars within each procuring entity. In some countries, there exists no legislative text and the procurement laws are contained only in administrative regulations.

33. Administrative regulations concerning procurement are, in some countries, issued by a governmental authority whose central function is to administer the procurement laws or to supervise procurement in the country, such as a national procurement board (see paras. 43 to 50, below). In other countries, the administrative regulations are

issued by the ministries or other governmental authorities responsible for financial or commercial matters. In still others, regulations are issued by individual ministries or authorities that engage in procurement or under whose auspices procurement is engaged in.

34. The technique of establishing a basic procedural framework by means of a legislative text and implementing that framework by means of more detailed administrative regulations may present certain advantages in some countries. For example, it may be an efficient division of law-making functions for the legislative organ to set forth a basic text reflecting the underlying policies and objectives relating to procurement, and for a specialist administrative organ, composed of persons with experience in the field of procurement, to implement that text by detailed regulations that reflect the practical aspects of procurement. In addition, it may become desirable from time to time to change certain details of procurement procedures, and it may be easier to do so by amending administrative regulations than by amending a legislative text.

35. The procurement laws discussed in the foregoing paragraphs are normally binding both on the procuring entity on the one hand and on contractors and suppliers participating in procurement proceedings on the other hand, and create mutual legal obligations of those parties towards each other. The laws are usually mandatory, in the sense that the procuring entity and participating contractors or suppliers cannot waive or depart from them by agreement. In general, contractors and suppliers wishing to participate in procurement must do so in accordance with procurement laws of the country of the procuring entity.

36. Some countries do not have laws governing procurement in the sense described above. The underlying principle in those countries is that the Government and public entities should be able to contract with other parties through whatever procedures and upon whatever terms they deem appropriate. However, there sometimes exist in those countries, either for the governmental administration as a whole or specifically for individual governmental or public entities, rules and regulations of internal management that officials of procuring entities must observe in performing their procurement functions. In general, those internal rules and regulations do not create obligations towards or confer rights on contractors or suppliers participating in procurement proceedings. In many cases the internal rules and regulations are not readily available, or are not available at all, to contractors or suppliers. In the case of a violation of an internal rule or regulation by a procuring entity, a contractor or supplier that is aware of the rule or regulation might be able to bring the violation to the attention of the procuring entity or of a supervisory authority, which could in some cases result in a rectification of the violation or in disciplinary measures being taken against the official responsible for the violation. However, the contractor or supplier has no legal right to redress for the violation.

37. Establishing a binding and mandatory legal framework for the conduct of public procurement can help to

create predictability and confidence in the procurement process, thus promoting the policy objectives mentioned in paragraphs 16 to 22, above. Transparency of procurement laws is promoted when the laws are published and kept up to date and made available to potential participants in procurement procedures.

38. The rules and procedures established by national procurement laws may differ from those which the country is bound to apply pursuant to its international obligations (see paras. 9 and 10, above). In order to avoid a legal conflict between national procurement laws and those international obligations, and to establish the primacy of the international obligations, the procurement laws of some countries contain a general provision to the effect that international obligations with respect to procurement that are binding on the country prevail over the country's procurement laws.

B. Scope of national procurement laws

1. *Types of procuring entities covered by national procurement laws*

39. National procurement laws usually apply only to procurement by entities in the public sector. Thus, in most countries, private enterprises generally have much greater freedom with respect to the procedures that they follow for their own procurement. However, some national procurement laws cover procurement by private enterprises in certain limited situations, e.g., in cases of procurement by private enterprises that participate in joint ventures or other associations with public enterprises or that receive government subsidies for work in connection with which the procurement is engaged in, or where the Government of the procuring entity provides a credit or a guarantee with respect to the procurement.

40. National procurement laws usually apply to procurement by ministries, departments and agencies of the central Government. Most procurement laws also apply to procurement by State-owned enterprises, although in some countries those enterprises are allowed to establish their own procurement rules and procedures.

41. In many countries, the procurement laws cover procurement by regional and local governments and authorities; in other countries those governments and authorities follow their own rules and procedures. In countries with federal systems, units of the federation (e.g., states, provinces) usually have their own procurement laws governing procurement carried out by them.

2. *Types of procurement covered by national procurement laws*

42. National procurement laws typically apply to the procurement of both works and goods. Some procurement laws apply only to the procurement of works and goods over a stipulated value. Below that value the procuring entity may have the freedom to follow whatever procedures it considers appropriate for the procurement.

Procurement laws following this approach sometimes contain provisions designed to prevent the procuring entity from dividing the procurement into several individual contracts, each below the stipulated value, in order to avoid the application of the procurement laws.

C. Administrative control over procurement laws and procedures

1. Governmental bodies and bodies within procuring entities

43. There exists in many countries a centralized governmental authority with responsibility over procurement by the public sector and the administration of the procurement laws. In some countries this responsibility is vested in a particular ministry or department, such as the ministry of planning, the ministry of finance, the ministry of foreign trade, or in the financial controller. In a number of other countries, an interministerial or interdepartmental body—hereinafter referred to as a national procurement board—performs this role.

44. Typically, a national procurement board is composed of the heads of various relevant ministries or departments or their designees, (e.g., those mentioned in the previous paragraph, the ministries of public works, labour, industry, and justice, and the central bank). In some cases a representative of the head of Government is also a member of the board.

45. The specific functions of national procurement boards vary from country to country. The functions of most boards fall within the following categories.

46. *Formulation and development of procurement laws.* This may include formulating and amending procurement laws, monitoring implementation of procurement laws and making recommendations for their improvement, and issuing interpretations of those laws.

47. *Rationalization and standardization of procurement.* This may include co-ordinating procurement by government entities and State-owned enterprises; serving as a centralized procuring entity for governmental departments; and preparing standardized tender documents, specifications and conditions of contract.

48. *Monitoring procurement and the functioning of procurement laws from the standpoint of broader government policies.* This may include examining the impact of procurement on the national economy, rendering advice on the effect of particular procurements on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government.

49. *Participating in or exercising supervisory authority over individual procurements by public entities.* This may include examination of tender documents issued by a procuring entity and the procedures followed by the entity to verify their conformity with the procurement laws;

soliciting and opening tenders for a procuring entity; rendering advice to a procuring entity on tenders received by the entity; approving of a decision of a procuring entity to accept a tender or offer; examining, evaluating and comparing tenders and deciding upon the acceptance or rejection of tenders; and auditing expenditures of funds in connection with the procurement.

50. *Handling disputes arising in connection with procurement.* This may include adjudicating claims by contractors or suppliers that have been aggrieved as a result of a failure of the procuring entity to comply with the procurement laws or imposing sanctions on contractors or suppliers for violations of the procurement laws.

51. In some countries, regional or local governmental units have their own procurement boards. Typically, the composition of these boards is, like that of the national procurement board, interministerial or interdepartmental, and the boards have functions in relation to procurement carried out by those governmental units comparable to the functions of the national procurement board. Often, however, procurement by regional or local governmental units in excess of a certain value is placed under the jurisdiction of the national procurement board, rather than of the regional or local board.

52. It is common in many countries for each ministry, department, State-owned enterprise and other procuring entity to have its own internal body or bodies to exercise functions with respect to procurement engaged in by those entities. These functions often include, for example, soliciting tenders or offers; opening, examining, evaluating and comparing tenders; rendering advice to the competent decision-making authority as to the acceptance or rejection of tenders; deciding upon the acceptance or rejection of tenders; rendering advice as to the overall procurement policy of the ministry, department, enterprise or other procuring entity concerned.

53. A system of administrative control over procurement laws and procedures and of checks and balances can help ensure the economical, efficient and fair functioning of the procurement process. It is advantageous in many cases for the body exercising control to be independent of the procuring entity, or at least independent of the section and personnel of the procuring entity that carry out the procurement. A control mechanism should itself be structured with the objectives of economy and efficiency in mind, since mechanisms that are excessively costly or burdensome to either the procuring entity or to participants in procurement procedures, 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 procedures could in some cases stifle their ability to act effectively.

2. Supervisory and other functions performed by international lending institutions

54. It is useful to mention in the present context the supervisory and other functions performed by international

lending institutions in respect of procurement carried out with funds provided by them. For example, many of these institutions review the procurement procedures proposed to be followed by the procuring entity and the documents to be used by it to ensure that the procurement is carried out in accordance with the institution's guidelines or requirements. The institution may require the procuring entity to modify non-conforming procedures or documents. Many institutions also review the procuring entity's examination, evaluation and comparison of tenders and its intended decision to accept a particular tender or offer to ensure consistency with the institution's guidelines or requirements. The ultimate sanction for non-compliance with the guidelines or requirements of many institutions is withholding of the borrowed funds or cancellation of the loan agreement.

55. Some institutions perform other functions in relation to procurement, such as providing for advertisement of the solicitation of tenders, approving a margin of preference to be granted to domestic tenderers (see paras. 185 to 187, below) and approving the use of procurement methods other than open competitive tendering.

D. Methods of procurement

56. Two main methods of procurement are provided for in national procurement laws—tendering and negotiation. Within each of these methods there exist certain variants. In addition, some procurement laws provide for methods that do not fit easily within either category, such as competitive negotiation, "shopping" and single-source procurement, and "jury" or "concours" methods. The essential features of the various methods will be considered in the following paragraphs.

1. Tendering

57. The tendering method is characterized by competition among contractors and suppliers within structured, formal procedures. The following basic features are typical of this method. The procuring entity solicits tenders from a range of contractors or suppliers. Tenderers must formulate their tenders on the basis of technical specifications and contractual terms and conditions specified by the procuring entity in tender documents made available by it to tenderers. Tenders are examined, evaluated and compared and the decision of which tender to accept is made in accordance with essentially objective criteria and procedures that are set forth in the procurement laws or in the tender documents.

58. There exist two basic systems of the tendering method: open tendering and restricted tendering. In open tendering the procuring entity solicits tenders by means of a widely advertised invitation to tender directed to all contractors or suppliers wishing to participate in the tender proceedings. In restricted tendering the procuring entity solicits tenders only from certain contractors or suppliers selected by it.

2. Negotiation

59. Under the second main method of procurement, the procuring entity engages in negotiations with one or more contractors or suppliers with a view to entering into a contract with one of them. In contrast to the tendering method, procurement by negotiation is characterized by a high degree of flexibility as to the procedures involved and discretion on the part of the procuring entity. Procurement laws that deal with procurement by negotiation establish few rules and procedures governing the process by which the parties negotiate and conclude their contract. Many procurement laws allow procurement to be conducted by negotiation only in specifically defined, exceptional cases. In countries that do not have procurement laws, most or all procurement is done by negotiation.

3. Other methods of procurement

(a) Competitive negotiation

60. It is sometimes believed to be difficult to use the tendering method in cases where the procuring entity cannot formulate its requirements as to the works or goods to be procured in terms of sufficiently detailed and precise technical specifications or contractual terms and conditions to permit tenders to be formulated, evaluated and compared uniformly on the basis of those specifications, terms and conditions. An example may be a case where the procuring entity seeks to procure a piece of non-standardized, technologically-advanced equipment for which only general performance criteria can be set forth, and relies on contractors or suppliers to propose designs and develop technologies to meet those criteria. Procurement laws in some countries provide for a method of procurement to be used in such cases that combines certain basic features of the tendering and negotiation methods. In at least one national procurement law this method is referred to as "competitive negotiation". In one developed country, where most procurement by the Government is of complex equipment involving advanced technologies, a major portion of government procurement is conducted using this method.

61. When this method of procurement is used, the procuring entity solicits proposals from a limited number of contractors or suppliers believed to have the appropriate qualifications and expertise. It also sets forth general criteria that proposals are requested to meet (e.g., general performance objectives; time for delivery). The procuring entity identifies the proposals that appear to meet those criteria, and engages in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the procuring entity. The price of each proposal does not enter into those discussions. When the proposals have been finalized, the purchasing entity requests the author of each proposal to submit a firm price offer in respect of its proposal. The procuring entity selects the proposal of the contractor or

supplier offering the lowest price or lowest evaluated price (see para. 171, below).⁶

(b) *"Shopping"; single-source procurement*

62. Some national procurement laws provide particular procedures for the procurement of standardized or mass-produced items of relatively low value, the prices of which are essentially non-negotiable. In these procedures, sometimes referred to as "shopping", the procuring entity solicits quotations from a small number of suppliers and purchases the item from the supplier that quotes the lowest price. Procurement laws that provide for this procedure usually set forth a very few basic rules to govern it. For example, some procurement laws require the procuring entity to solicit a certain number of quotations; others require generally that a sufficient number of quotations be solicited to ensure competition. Some procurement laws authorize the procuring entity to approach a single source to obtain the works or goods in limited circumstances (see para. 68, below).

(c) *Special methods for procurement of items involving basic research, or aesthetic or artistic aspects ("jury" or "concours" methods)*

63. There exist in some procurement laws particular procedures specially designed for procurement involving basic technical or scientific research, or involving essentially aesthetic or artistic aspects. These procedures typically function as follows. Proposals are solicited by the procuring entity. The proposals are evaluated by a jury composed of experts in the relevant field according to the technical, aesthetic or artistic merit (as relevant) of the proposals. In some countries adopting such methods a contract is concluded with the author of the proposal selected by the jury; in other countries the jury merely recommends a particular proposal to the procuring entity. Procurement laws that provide for this method set forth few rules to govern it; the applicable procedures are usually established by the procuring entity.

4. *Circumstances in which particular methods of procurement or their variants may be used*

64. National procurement laws often provide for two or more methods of procurement or variants thereof. In a typical basic pattern, the procurement laws provide for both open and restricted tendering and for procurement by negotiation. Many national procurement laws contain refinements or expansions of this basic pattern. For example, in some countries the procurement laws provide for more than one variant of the tendering method (e.g., one variant in which the tender offering the lowest tender price must be accepted and another in which the procuring entity may take into account criteria in addition to the tender price)

and for both open and restricted tendering in respect of each variant. Some procurement laws also provide for one or more of the additional methods of procurement described in the preceding sub-sections.

65. Some national procurement laws leave to the discretion of the procuring entity the choice of which method to use for a particular procurement. However, once the procuring entity chooses a particular method, it must conform to the rules and procedures set forth in the procurement law with respect to that method. Other national procurement laws set forth certain criteria relative to the choice of the method to be used. Sometimes these criteria simply serve to guide the procuring entity in the exercise of its discretion. In other cases, however, the criteria are exclusive and mandatory and the procuring entity must make its choice on the basis of those criteria alone. Where more than one variant of the tendering method is provided for, procuring entities usually have the discretion to choose the variant most appropriate for a particular procurement.

66. Tendering is the preferred method of procurement in many procurement laws. This reflects a policy determination that procurement policy objectives (e.g., economy and efficiency) are best promoted by the formal competitive procedures of the tendering method. In at least one country tendering and competitive negotiation are equally-preferred methods and the procuring entity may use whichever method it considers to be appropriate.

67. Within the tendering method, some procurement laws prefer open tendering, and permit the use of restricted tendering only in limited cases, such as when the item to be procured is available only from a limited class of contractors or suppliers; when, due to the existence of a limited market, open tendering will not facilitate competition; when an international agreement (e.g., with a bilateral development funding agency) requires the item to be procured from a contractor or supplier from a particular country or region; when the works or goods to be procured are below a certain value; or when participation in the procurement proceedings must be limited to certain contractors or suppliers in order to promote or preserve their research or production capacity so as to be available in cases of national need or emergency or to prevent other contractors or suppliers from gaining a monopoly. Some procurement laws require the procuring entity to obtain the approval of a higher supervisory authority for the use of restricted tendering. In other countries, the decision of whether to use open or restricted tendering is left to the discretion of the procuring entity.

68. Many national procurement laws permit the negotiation method to be used only in exceptional cases. Procurement laws typically specify some or all of the following situations: where the value of the works or goods to be procured is below a certain value (reflecting a policy decision that in respect of those works and goods, procurement policy objectives are less compelling than with respect to works or goods over that value and that the cost and time involved in administering more formal and competitive tendering procedures are not justified); where

⁶In some countries a procedure similar to this is followed for certain types of procurement, except that, in addition to the technical aspects of each proposal, price is also discussed with the contractor or supplier. Such a procedure is regarded in this study as a variant of the negotiation method.

the works or goods are available only from one or very few sources (e.g., due to patent or other proprietary rights); where there is a need for confidentiality or secrecy in respect of the procurement making more widespread publication of the procuring entity's procurement needs inappropriate; in cases of national emergency or other cases of urgency, where there is no time to engage in more time-consuming tendering procedures; where the procurement is for spare parts which it is necessary or desirable to procure from the original supplier of the goods or works; where uncompleted works are to be completed, or existing works are to be extended, and it is desirable for the work to be done by the original contractor; where tendering procedures have not been successful (some procurement laws require two attempts at tendering before negotiation can be resorted to); where tendering procedures would not be appropriate (e.g., where the contract involves research and development); where it is necessary to maintain particular sources of supply or their capacity to ensure their availability in cases of national need or emergency. Some procurement laws require the procuring entity to obtain approval of a higher supervisory authority for the use of the negotiation method. Procurement laws that provide for procurement by "shopping" and for single-source procurement restrict the use of those methods to situations generally similar to those that justify the use of the negotiation method.

69. Under some procurement laws, as an exception to a general requirement to use the tendering method, the procuring entity is permitted to procure from certain categories of domestic contractors or suppliers (e.g., artisans, production co-operatives, agricultural producers, small businesses owned by minority groups) by the negotiation method or by the single-source procurement method. The purpose of such provisions is to promote the growth and development of the categories of contractors or suppliers to which the provisions apply.

70. In practice, there appears to be some correlation between the level of a country's economic development and the methods of procurement used by its public sector. Tendering is the method more frequently used for procurement in many developing countries; open tendering is often used. In developed countries, less competitive methods (e.g., restricted tendering and methods involving negotiation) seem to predominate. These tendencies are probably due in part to the fact that a high proportion of public procurement in developed countries involves technologically advanced works or goods, for which tendering may be less well-suited than other methods, while the proportion of that type of procurement in developing countries is significantly less. In addition, in several developed countries, a high proportion of public sector procurement is of items for military application, which are usually procured through negotiation or similar methods because of their technologically advanced nature, the limited number of military contractors or suppliers, the need for secrecy and other considerations of national security. In developing countries with broad public sectors, that type of procurement constitutes a proportionally smaller component of total public sector procurement.

5. Methods of procurement and their variants in context of promotion of procurement policy objectives

71. In many cases, economy and efficiency in procurement are best promoted through competition among a range of contractors and suppliers (see paras. 17 to 19, above). The formal procedures and the objectivity and predictability that characterize the tendering method generally provide optimal conditions for this competition. These characteristics also increase the prospects of fair and equal treatment of participants in procurement proceedings and minimize the scope for improprieties or abuse by procuring entities, thus promoting the integrity of and confidence in the procurement process. It is therefore desirable for national procurement laws to include tendering among the methods of procurement provided for in those laws.

72. Although open tendering will maximize the competitive base, considerations of efficiency may make it desirable for procurement laws to enable restricted tendering to be used in appropriate cases. Open tendering may produce a large number of tenders—some from contractors or suppliers that may not be qualified to supply the works or goods—that the procuring entity will have to examine, evaluate and compare. This can be costly and time-consuming. In addition, competent contractors or suppliers are sometimes deterred from participating in open tendering, particularly for the procurement of high value works or goods. Firstly, the statistical odds of their tenders being accepted are reduced. Secondly, they face the risk that their tenders will be undercut by an unrealistically low price offered by an unqualified or disreputable contractor or supplier. For these reasons, it may be useful for national procurement laws to provide for both open and restricted tendering, and to contain rules or guidelines as to when restricted tendering may be used.

73. Restricted tendering procedures can be designed so as to promote competition and economy as much as possible. For example, the procurement laws could require procuring entities to solicit tenders from a minimum number of contractors or suppliers, or to solicit a sufficient number of tenders to ensure effective competition.

74. Since the circumstances of some types of procurement may make it difficult or inappropriate to use the tendering method, or make it more appropriate to use some other method, it is often useful for procurement laws also to provide for methods such as those discussed in paragraphs 59 to 63, above. It is desirable for procurement laws to establish rules or guidelines as to when the various methods provided for may be used, particularly where tendering is a preferred method of procurement, so that less formal and competitive methods would be used only when appropriate, and would not be used to the detriment of procurement policy objectives.

E. Tendering procedures in national procurement laws

75. This section discusses specific features of tendering procedures that are typically dealt with in national

procurement laws. It should be noted that certain of these features (e.g., provisions relating to formal eligibility requirements (sub-section 1, below), lists of approved contractors and suppliers (sub-section 4, below) and approval and formation of the contract (sub-section 16, below)) also often apply in respect of other methods of procurement.

1. *Formal eligibility requirements*

(a) *Affirmative and exclusionary requirements*

76. Many national procurement laws establish formal eligibility requirements for participation by contractors and suppliers in procurement proceedings. Eligibility requirements found in a number of national procurement laws include the following: that a participant have the legal capacity to enter into a contract; that a participant be registered on a commercial or trade register in the country of the procuring entity; that a foreign contractor or supplier be associated with a domestic enterprise in the form of a joint venture or similar association (requirements such as these seek to promote the development of domestic industries and the transfer of technology); and that a foreign contractor or supplier have a local agent (the policy of this requirement is to ensure a local presence and accountability in the event of problems concerning the performance of the contract).

77. National procurement laws often disqualify contractors or suppliers from participating in procurement proceedings on various grounds. These grounds include the following: defective performance of a previous procurement contract or non-performance of such a contract without justification; fraud, obstruction or dishonesty in connection with previous procurement proceedings or the performance of a previous contract (e.g., bribery, collusion); conviction of a serious crime, or of a crime in relation to the State. In addition, some procurement laws disqualify bankrupts or insolvents, debtors to the State who are in arrears in their payments and delinquents with respect to tax and social security payments (some procurement laws permit such debtors or delinquents to participate if they furnish a security to cover their obligations) and civil servants (some procurement laws restrict this exclusion to civil servants involved in the procurement proceedings).

78. In some countries participation in certain procurement proceedings is restricted to domestic contractors or suppliers. Such restrictions are discussed below in paragraphs 183 and 184.

79. In some cases participation in procurement proceedings is restricted to contractors or suppliers from certain countries pursuant to an international agreement, such as an agreement with an international lending institution that requires procurement with funds provided by it to be open only to participants from member States of the institution, an agreement with a national development funding agency requiring procurement to be from sources from the country of the agency, and an agreement pertaining to a regional

or international project (e.g., an agreement among countries of a particular region for the joint development and production of an aircraft).

(b) *Certification of formal eligibility*

80. Procurement laws that establish formal eligibility requirements usually require participants to submit with their tenders appropriate evidence that they meet those requirements. Some procurement laws require certifications to that effect to be obtained from relevant governmental officials or institutions in the country of the procuring entity (e.g., commercial or trade registries, courts, tax authorities, police).

(c) *Formal eligibility requirements in context of procurement policy objectives*

81. Formal eligibility requirements are imposed to protect or promote certain interests of the procuring entity or of the State. However, since the effect of these requirements is to preclude certain contractors or suppliers, or categories thereof, from participating in procurement proceedings, they have the potential of reducing the competitive field and thus inhibiting economy in procurement. This consequence can be reduced by limiting such requirements to those that are necessary to protect or promote clearly identified relevant interests where the importance of the interests to be protected outweighs the potential disadvantages of such requirements. In addition, formulating the requirements as clearly and explicitly as possible would help to avoid uncertainty and would reduce the possibility of misapplication or abuse by officials of procuring entities. Eligibility requirements that are vague present the possibility of being improperly applied to favour or exclude particular contractors or suppliers.

82. If participation in procurement proceedings is restricted to contractors and suppliers that are registered on a commercial or trade register, the potential hindrances to competition and economy would be reduced if the opportunity to register were made available to all interested and qualified contractors or suppliers and if registration formalities were not too costly or burdensome.

83. It may be advantageous to purchasing entities to permit a contractor or supplier to participate in tender proceedings even if it had not satisfied certain eligibility requirements or proved its eligibility by the time its tender was submitted, as long as it appeared to be capable of satisfying those requirements or proving its eligibility. This would enable a procuring entity to consider an advantageous tender from a qualified contractor or supplier that did not have sufficient time to fulfil the eligibility requirements or provide the required proof by the deadline for submitting tenders, or was unable to do so for other reasons, so long as it did fulfil all the requirements by the time the contract was to be entered into if it was the successful tenderer. Foreign participants in particular can encounter delays or difficulties in meeting such requirements.

84. It is desirable that the means by which a contractor or supplier must establish its formal eligibility not be

complex or lower value contracts. In addition, competent tenderers are sometimes reluctant to participate in tendering proceedings for high value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable tenderers. For less complex or lower value contracts, it is often more efficient to evaluate the qualifications of tenderers after the opening of tenders than to conduct separate pre-qualification proceedings.

91. The procedures for pre-qualification provided for by national procurement laws are typically as follows. The procuring entity advertises an invitation to pre-qualify. The requirements with respect to the scope and method of the advertisement are often similar to those in respect of the advertisement of the invitation to tender (see paras. 96 and 97, below). The advertisement contains basic information about the procurement and the contract to be concluded, such as the name and address of the procuring entity, a description of the works or goods to be procured, the desired time for performance of the contract, the criteria for pre-qualification, the place and means for obtaining the pre-qualification documents, and the place and deadline for submitting the application to pre-qualify. The pre-qualification documents supplied by the procuring entity to applicants typically include a questionnaire as described in paragraph 89, above. They also include further information and instructions with respect to the matters addressed in the invitation to pre-qualify (e.g., the manner in which the qualifications of contractors or suppliers will be evaluated).

92. The applications to pre-qualify are opened by personnel of the procuring entity and evaluated in accordance with the criteria set forth in the procurement laws or in the pre-qualification documents. After this evaluation the procuring entity notifies applicants as to whether or not they have been pre-qualified, and provides a full set of tender documents to applicants who have been pre-qualified.

93. Since pre-qualification is intended to reduce expenses for tenderers and for the procuring entity and is not intended to reduce competition among qualified tenderers, it is desirable that the pre-qualification procedures be open to all eligible contractors or suppliers that wish to apply. When it is desired to restrict participation in tendering, restricted tendering procedures may be appropriate; when those procedures are used, pre-qualification will be unnecessary. In addition, when maximum competition is desired, the pre-qualification procedures should be designed to encourage, and to avoid obstacles to, broad participation. For example, the invitation to pre-qualify should be given widespread publicity, and the deadline for submitting applications to pre-qualify should allow sufficient time for the completion and submission of applications by potentially diverse and distant applicants. Attention to aspects such as these is particularly important when it is desired to attract the participation of foreign contractors or suppliers. The desirability that the qualifications of contractors or suppliers be evaluated in accordance with objective criteria and in an objective manner, and that the

criteria and methods of evaluation be set forth in the pre-qualification documents, has already been mentioned (see paras. 87 and 88, above).

4. Lists of approved contractors and suppliers

94. Government departments and individual procuring entities sometimes maintain lists of approved contractors and suppliers that are found to be qualified to perform particular types of contracts. In some cases, contractors and suppliers are not eligible to participate in procurement procedures unless they are on such a list. In other cases, the list merely serves as a mailing list for the distribution of invitations to tender in open tendering or as one source for the selection of contractors or suppliers to be invited to participate in restricted tendering, negotiation, shopping or single-source procurement proceedings. The criteria for being included on the list are usually fairly basic; thus a procuring entity will normally evaluate the qualifications of tenderers in a more detailed manner in one or more of the ways mentioned in paragraph 85, above, even if a tenderer has been included in an approved list of contractors and suppliers. Many of the considerations discussed in paragraph 93, above, with respect to pre-qualification procedures, are also generally relevant with respect to lists of approved contractors and suppliers.

5. Solicitation of tenders

95. Except where pre-qualification proceedings are conducted, a procuring entity begins tender proceedings by issuing an invitation to tender. The purpose of the invitation to tender is to provide potential tenderers with basic information about the procurement to enable them to determine whether to obtain the tender documents and pursue the matter further. Many national procurement laws specify the types of information that must be contained in an invitation to tender. Typically, this includes the name and address of the procuring entity; a basic description of the works or goods to be procured; the eligibility requirements, if any; the technical, financial and other qualifications required of tenderers; the amount of the tender guarantees, performance guarantees, and other guarantees, if such guarantees are required; the means of obtaining the tender documents and the price of those documents; the place and deadline for submitting tenders; and the place and time where the tenders will be opened.

96. National procurement laws usually require an invitation to tender in connection with open tendering to be advertised in a manner designed to bring it to the attention of prospective tenderers. These laws typically require the invitation to be advertised in a newspaper of national circulation and in the country's official gazette. Many laws also require the invitation to be advertised in relevant trade publications or technical journals and to be posted on official or public notice boards.

97. When foreign participation in the tender proceedings is desired, it is important for the invitation to receive international distribution. Thus, procurement laws often

require the invitation to tender in connection with the procurement of works or goods over a specified value to be advertised in internationally circulated newspapers, trade publications or technical journals. If the procurement is with funds provided by an international lending institution, the institution will often require advertisement of the invitation to tender in particular publications. Some institutions, for example, require advertisement in the business edition of *Development Forum*.⁷ It may also be advantageous to circulate the invitation to tender to chambers of commerce, foreign trade missions in the country of the procuring entity and trade missions abroad of the country of the procuring entity.

98. In restricted tendering, the invitation to tender is typically sent to the contractors or suppliers that have been selected by the procuring entity. Some procurement laws regulate the choice of contractors or suppliers from which tenders will be solicited. For example, procurement laws sometimes require a minimum number of tenders to be solicited (e.g., 3; 5); they also sometimes require tenders to be solicited only from contractors or suppliers on a list of approved contractors or suppliers maintained by the procuring entity or by the Government. The invitation is sometimes accompanied by a set of the tender documents; in other cases the invitation specifies the manner of obtaining the documents.

99. When pre-qualification procedures have been used there is usually little need to issue an invitation to tender. Many national procurement laws merely provide for a set of the tender documents to be provided to contractors or suppliers that have been pre-qualified.

6. Tender documents

(a) Types of tender documents

100. National procurement laws usually require the procuring entity to provide a set of tender documents to prospective tenderers. These documents are intended to provide tenderers with the information they need to prepare their tenders and to inform the tenderer of the rules and procedures according to which the tender proceedings will be conducted. The types of documents that are typically included are discussed in the following paragraphs.

101. *Instructions to tenderers.* Procurement laws usually require the procuring entity to provide to prospective tenderers various types of information in relation to the procurement and to the formulation and submission of tenders. Much of this information is contained in a tender document often referred to as instructions to tenderers. The required information typically includes the following: a description of the works or goods to be procured; the desired or required time for completion of construction or delivery; the eligibility requirements, if any; the technical, financial and other qualifications required of tenderers and the criteria according to which these qualifications will be

evaluated; certifications and documents to be submitted with the tender in order to establish the tenderer's eligibility and qualifications; the manner of formulating tenders (e.g., the language to be used; the manner and currency in which the price is to be expressed); the requirements as to the signature of tenders; the manner in which the various documents comprising the tender are to be organized (e.g., where a two-envelope system is used—see paras. 180 and 181, below); the manner, place and deadline for submitting tenders; the nature, amount, terms and conditions of guarantees required (e.g., tender guarantees, performance guarantees, guarantees for the repayment of an advance payment (hereinafter referred to as "repayment guarantees")); the period of time during which tenders must remain valid; matters in addition to price in respect of which offers are sought; the procedures that will be followed for opening, examining, evaluating and comparing tenders and for concluding the contract; the criteria and methods according to which tenders will be examined, evaluated and compared; the extent to which tenders deviating from the specifications, terms, conditions and other requirements set forth in the tender documents will be considered; and the means by which tenderers can obtain clarifications of the tender documents. Procurement laws that authorize procuring entities to reject all tenders (see para. 193, below) may require the instructions to tenderers to contain a statement to that effect. Transparency of procurement procedures will be promoted by requiring the instructions to tenderers to alert tenderers to any relevant laws or regulations relating to the procurement (e.g., relating to taxes, import restrictions, and exchange control regulations) and to any formalities relating to the procedures (e.g., a requirement that a copy of the tender be provided to a particular government office) that may not appear in the main texts of the country's procurement laws.

102. *Technical specifications, drawings, plans, designs.* These will be necessary for procurement in connection with a complex construction or manufacturing contract. In less complex supply contracts, the description in the instruction to tenderers of the goods to be procured may suffice.

103. *Contractual terms and conditions.* These include general conditions of contract and special conditions for the particular contract in question. The procuring entity may seek from tenderers offers with respect to particular terms and conditions (e.g., the time of completion of construction or of delivery of the goods; terms and conditions governing the payment of the price or portions thereof (hereinafter referred to as "payment conditions")).

104. *Qualification questionnaire.* This may be required in cases where the technical and financial qualifications of the tenderers are to be evaluated after the opening of tenders or in post-qualification proceedings.

105. *Form of tender.* This is the form on which tenderers are to set forth their tender prices and other basic elements of their tenders, and which tenderers are to sign. Providing such a form is often desirable in order to achieve uniformity of presentation and efficiency in the examination, evaluation and comparison of the tenders.

⁷*Development Forum* is published by the Division for Economic and Social Information of the United Nations Department of Public Information, and the United Nations University.

106. *Forms of any required guarantees.* These may include, for example, tender guarantees, repayment guarantees and performance guarantees. Providing forms for these guarantees with the tender documents will inform tenderers as to the nature of the guarantees required and will ensure that the guarantees submitted by the tenderers meet the procuring entity's requirements.

(b) *Price charged for tender documents*

107. A set of tender documents for large or complex contracts can be voluminous and costly to produce. National procurement laws frequently authorize procuring entities to charge prospective tenderers for sets of tender documents supplied to them. Charging for the tender documents could also help to ensure that the documents are distributed only to those with a *bona fide* interest in the procurement.

108. Some procurement laws provide that the price for the tender documents is to be based only on the cost of producing and mailing them. Under other procurement laws, the price is a stipulated percentage of the anticipated value of the works or goods to be procured. Still other procurement laws establish a fixed charge for the tender documents, which is sometimes graduated in accordance with the value of the works or goods to be procured.

109. From the point of maximizing competition and promoting economy and efficiency in procurement, it is desirable that the prices that procuring entities may charge for tender documents be sufficient to cover the costs of producing and mailing the documents but not so high as to discourage qualified contractors or suppliers (particularly those from developing countries) from participating in the tendering proceedings.

(c) *Preparation and formulation of tender documents*

110. In general, the procuring entity is responsible for formulating and preparing the tender documents. In many countries, however, the procuring entity uses certain standard forms or models prepared by other authorities. For example, in a number of countries administrative authorities have prepared standardized general contractual conditions for particular types of procurement, and model forms of various other tender documents (e.g., instructions to tenderers; tender guarantees). In addition, for some types of procurement a procuring entity will use standard forms or models prepared by relevant trade organizations. However, even when standard forms or models are used, the procuring entity will usually have to supplement the standard forms or models and formulate additional documents with relevant details in respect of a particular procurement.

111. Although responsibility for formulating and preparing many or all of the tender documents normally rests with the procuring entity, it is possible, and often desirable, for procurement laws to set forth certain requirements to help ensure that the tender documents are formulated in an optimal manner. One requirement may be that, to the greatest extent possible, tender documents should be

formulated in a clear, complete and objective manner, particularly with respect to the description of the works or goods to be procured and the criteria and methods to be used for the evaluation and comparison of tenders. Tender documents with these characteristics enable tenderers to formulate tenders that respond to the needs of the procuring entity, to forecast accurately the risks and costs of their participation in the procurement proceedings and of the performance of the contract to be concluded and thus to offer their most advantageous prices and other terms and conditions. They enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity.

112. National procurement laws frequently require in particular that technical specifications for the works or goods to be procured be formulated objectively, by referring to their functional or performance characteristics, rather than by referring to particular brand names, catalogue numbers of a particular supplier, or other devices that can favour particular tenderers. These laws often further provide that, where the use of brand names and similar devices cannot be avoided, the specifications must provide that works or goods of an equivalent standard are also acceptable. In these cases, the procuring entity may require the tenderer to provide adequate information about the equivalent works or goods offered.

113. In addition, procurement laws frequently require the use of recognized standards prepared by technical or trade organizations—when relevant standards exist—in the formulation of technical specifications. Under some procurement laws national standards must be used; if no national standards exist, recognized regional or international standards must be used. Where participation by foreign contractors or suppliers in tendering proceedings is anticipated or sought, it may be preferable to require international standards to be used, if available, since using national standards might give an advantage to contractors or suppliers from that country.

114. When foreign participation in tender proceedings is anticipated or sought, procurement laws often regulate the language in which the tender documents must appear. In general, foreign participation is facilitated when the tender documents are issued in at least one language customarily used in international trade. Some national procurement laws require the tender documents to be issued in such a language in addition to the official language or languages of the country.

(d) *Clarification and amendment of tender documents*

115. National procurement laws frequently provide for a mechanism whereby tenderers can obtain clarifications of discrepancies, ambiguities or inconsistencies in the tender documents. Some procurement laws provide that tenderers may seek such clarifications by addressing their requests in writing to the procuring entity by a stipulated deadline. The procuring entity is to provide the clarifications in a

written response. In the interests of fairness, the procuring entity is required to provide a copy of the response to all contractors and suppliers that have received the tender documents. The procurement laws specifically provide that the response is deemed to be a part of the tender documents. It might be useful for procurement laws to require the procuring entity to designate in the tender documents a particular officer (e.g., the procuring entity's chief procurement officer) to whom written inquiries should be directed and to provide that only responses and clarifications issued by him are valid.

116. Some procurement laws provide for a pre-tender conference to be held by the procuring entity for the purpose of clarifying the tender documents. The conference is to be held at the place and time stipulated in the tender documents and all contractors and suppliers that have received the tender documents are entitled to participate. Written minutes of the conference must be prepared and they become part of the tender documents. In some procurement laws this procedure is provided for as an alternative to the written inquiry procedure, and the procuring entity is to use whichever is more appropriate for a particular procurement. A pre-tender conference may be more appropriate for the procurement of high value or complex works or goods.

117. Foreign tenderers may experience difficulties in participating in a pre-tender conference. Therefore, if that procedure is used, it may be desirable to give tenderers the option to submit inquiries in writing prior to the conference and for the procuring entity's response to be included in the written minutes.

118. Some procurement laws require responses to written inquiries to be issued or the pre-tender conference to be held sufficiently in advance of the deadline for submitting tenders to enable tenderers to take the clarifications into account in formulating their tenders.

119. Sometimes, a procuring entity may need to make material amendments to the tender documents (e.g., to the technical specifications, the design or the contractual terms and conditions). Some national procurement laws permit the procuring entity to do so prior to the deadline for submission of tenders. These laws usually require amendments to be communicated in writing to all contractors or suppliers that have received the tender documents. It may be useful for such laws to provide that, where it is necessary for the purchaser to make material amendments to the tender documents at a time close to the date for submitting tenders, the procuring entity may extend the date in order to enable tenderers to evaluate the amendments and amend their tenders. If the date is extended, however, the time of opening of tenders will also have to be extended (see para. 157, below) and the procuring entity may have to request tenderers to extend the period of validity of their tenders (see para. 141, below; see, also, para. 153, below). Other procurement laws provide that if the tender documents must be amended materially the procuring entity must engage in a new solicitation of tenders.

7. Formulation and submission of tenders

120. National procurement laws usually contain rules as to the formulation and submission of tenders by contractors and suppliers. Matters typically dealt with are discussed in the following paragraphs.

(a) Language of tenders

121. The language in which tenders are to be formulated is dealt with by procurement laws where foreign participation is anticipated or sought. Most of those laws require the tenders to be formulated in an official language of the country of the procuring entity. Where an official language is not one customarily used in international trade, requiring tenders to be formulated in that language could inhibit participation by foreign contractors or suppliers to which the language is unfamiliar, and thus have an anti-competitive effect. Therefore, procurement laws in some countries permit tenders to be formulated in a specified language that is customarily used in international trade.

122. Some laws that permit tenders to be formulated in a language other than that of the country of the procuring entity require those tenders also to be translated into an official language of the country. Such a requirement could in some cases place a difficult burden on foreign tenderers. If that approach is adopted, it would be desirable for the procurement laws to provide that, in the event of discrepancies between the two language versions, one of the versions is to prevail.

(b) Formulation of tender price

123. Many national procurement laws set forth requirements as to the manner in which the tender price is formulated; in particular, the role of taxes, customs duties and similar charges levied by the country of procurement, pricing terms (e.g., whether on ex-works, FOB or CIF terms) and the currency in which the price is to be expressed are often dealt with. Such provisions can help ensure that tender prices will be formulated on a common basis and that they will therefore be susceptible of uniform comparison. They are useful in particular when tendering by foreign contractors or suppliers is anticipated or sought. It is desirable for applicable requirements of this nature to be set forth in the tender documents.

124. Various approaches are found in national procurement laws with respect to the role of taxes, customs duties and similar charges levied by the country of the procuring entity. Under one approach tenderers are required to include all such charges in their tender prices, and tenderers may not claim reimbursement from the procuring entity for any charges not included. Another approach requires tenderers to formulate their prices excluding such charges, and permits them to claim reimbursement from the procuring entity for any charges actually paid by them. The latter approach may be more desirable when foreign participation in the tendering proceedings is anticipated or sought. It may be difficult and time-consuming for foreign tenderers to obtain the information necessary to calculate those charges, particularly with respect to taxes imposed by the

country of the procuring entity. In addition, charges such as those are sometimes uncertain; for example, procuring entities are sometimes able to obtain tax reductions or other fiscal advantages, particularly where high value contracts or other contracts of special interest to the Government are involved. Thus, different tenderers may calculate these charges differently, making it difficult or impossible to make a true comparison of their tender prices. It may be useful for a procurement law to allow the procuring entity to decide which approach to follow in respect of a particular procurement, as long as all tenderers are required to formulate their tender prices on the same basis.

125. With respect to pricing terms, various approaches are found in national procurement laws. Under one approach the price is to be the total price for delivery to the procuring entity, including, for example, freight and insurance charges. In some cases, however, the procuring entity may wish to provide the transport or insurance (e.g., it may wish to use domestic carriers or insurers in order to promote these domestic industries or to conserve foreign exchange). Thus, some procurement laws permit the procuring entity to require tenderers to base their prices on, for example, FOB terms, or to base their prices on CIF terms but to show separately the FOB price, freight charges to the port of entry in the procuring entity's country, costs of delivery to the procuring entity, and insurance costs. In the latter case the procuring entity can then decide whether to contract with the successful tenderer on the CIF terms or to contract on the FOB terms and to provide its own transport or insurance. Here, too, it may be useful for the procuring entity to be allowed to decide which approach to adopt for a particular procurement, as long as all tenderers are required to formulate their tender prices on the same basis.

126. Procurement laws frequently specify the currency or currencies in which tender prices must be expressed. These include, for example, the currency of the country of the procuring entity, the currency of the tenderer's country and a currency customarily used in international trade. Some procurement laws also specify that a tenderer may express portions of the tender price in two or more different currencies in which it will incur its expenditures in respect of the works or goods that it offers to supply. Permitting tender prices to be expressed in currencies other than the currency of the country of the procuring entity can promote economy in procurement when foreign tenderers participate in the tendering procedures because they enable those tenderers to reduce the risk of exchange rate fluctuations to which they would be subject if their tenders were expressed in the currency of the country of the procuring entity. This can enable the tenderers to offer their most economical prices, without having to include an increment to cover the exchange rate risk. On the other hand, the submission of tenders with tender prices expressed in various currencies will complicate the process of evaluating and comparing tenders, since the tender prices will have to be converted to a single currency (see para. 179, below).

(c) *Manner, place and deadline for submission of tenders; consideration of late tenders*

127. Procurement laws often stipulate the manner by which and the place where tenders must be submitted. These laws typically require tenders to be submitted by post addressed to a particular office of the procuring entity, and that tenders be received at that office by the stipulated deadline. Some tender documents also permit tenders to be hand delivered by depositing the tenders in a locked box supplied for that purpose at the office stipulated in the tender documents. When widespread or foreign participation in tendering is anticipated or sought, it may be desirable not to require tenders to be hand delivered, since distant tenderers may have difficulties in complying. Other tender laws leave it to the procuring entity to decide upon the manner and place for the submission of tenders. Whether or not the time, place and deadline for submission of tenders are specified in the procurement laws, it is desirable to require that they be specified in the tender documents.

128. National procurement laws usually provide for a deadline by which tenders must be submitted to the procuring entity. Some procurement laws fix particular periods of time for particular types of works. Other procurement laws leave it to the procuring entity to determine the period of time that is reasonable taking into account the circumstances of each procurement. Those laws, however, sometimes establish general guidelines that the procuring entity must follow in fixing the deadline.

129. The deadline is usually expressed as a period of time after the date of advertising (for open tendering) or issuing (for restricted tendering) the invitation to tender. It is generally desirable that the period of time be long enough to enable potential tenderers to obtain and adequately analyze the tender documents, prepare their tenders, and accomplish any necessary formalities that are pre-conditions to tendering (see, however, para. 83, above), and for procedures such as pre-tender conferences or (in the case of works) site visits to be conducted. A period of time that is too short could serve to inhibit participation in the tendering proceedings by some qualified contractors or suppliers.

130. The appropriate amount of time will vary depending upon the type of procurement. For example, for the procurement of simple, low value goods, which is not likely to attract the interest of foreign suppliers, a period of 30 days may be sufficient. However, for the procurement of complex, high value works, in which foreign participation is anticipated or sought, considerably more time—e.g., 90 days or more—may be reasonable for the submission of tenders.

131. Procurement laws often permit the procuring entity to extend the deadline for the submission of tenders in certain exceptional cases, such as when the tender documents need to be amended at a time too close to the deadline (see para. 119, above) or when, due to unforeseen circumstances, it is not possible for tenderers to submit their tenders by the stipulated deadline. Allowing the deadline to be extended too liberally or too frequently

could result in inefficiency and facilitate abuse (e.g., by enabling the procuring entity to favour a particular late tenderer).

132. Under many national procurement laws tenders submitted after the deadline for submission cannot be considered. However, in some countries where the opening of tenders does not take place until some time after the deadline for submission (see para. 157, below), tenders received after the deadline but before the commencement of the opening may be considered.

133. A rule prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening would enable tenderers to learn of other tenders before submitting their own tenders (which could happen whether the proceedings for opening tenders are open or closed). This could lead to higher prices and could facilitate collusion between tenderers. It would also be unfair to the other tenderers. In addition, it could interfere with the orderly and efficient process of opening tenders.

134. A few procurement laws permit the procuring entity to consider tenders received after the deadline for submission in exceptional circumstances (e.g., where the tender was submitted late due to reasons beyond the tenderer's control). In at least one country the procuring entity must obtain the approval of a higher supervisory authority to consider a late tender, which may be given only if the late submission was for *bona fide* reasons and would not result in an undue preference or advantage to the tenderer. In some other countries, the procuring entity has greater discretion to consider late tenders.

8. *Alternative tenders and partial tenders*

135. As a general rule, under most national procurement laws tenders must be responsive to the specifications and contractual terms and conditions set forth in the tender documents, although under some procurement laws tenders that deviate in certain respects from those specifications, terms and conditions may be considered (see paras. 164 to 168, below). However, some procurement laws allow tenderers to submit alternative tenders if they believe they can offer substantially superior works or goods or substantially more favourable terms and conditions than those set forth in the tender documents. These procurement laws usually require the tenderer to submit one tender that is responsive to the specifications, terms and conditions in the tender documents, and another tender containing its alternative offer. The procuring entity must first evaluate and compare the responsive tenders and identify the most acceptable of those tenders in accordance with the criteria and methods set forth in the tender documents. It may then accept an alternative tender submitted by the tenderer that submitted the most acceptable responsive tender.

136. The policy underlying this procedure is to enable the procuring entity to consider and take advantage of a

more favourable alternative tender while maintaining optimum competitive conditions in the tendering proceedings and fairness to tenderers. In principle, it would be contrary to the competitive nature of tendering for a procuring entity to be able to consider and accept a tender that did not conform to the terms of the competition, and it would be unfair to tenderers that submitted tenders conforming to those terms and that did not have an opportunity to compete on the basis of the alternative. Enabling the procuring entity to accept an alternative tender only if the tenderer had submitted the most acceptable responsive tender would to a large degree neutralize these uncompetitive and unfair aspects.

137. For procurement of works or goods containing two or more separate elements (e.g., a hydroelectric plant consisting of construction of a dam and supply of the generator), some procurement laws authorize tenderers to submit tenders either for the entire works or goods or for different combinations of elements, at their option. This approach has the advantage of encouraging participation by large contractors or suppliers, including foreign ones, that prefer to tender for higher value contracts and would be attracted by the ability to tender for the entire works or goods, as well as by smaller contractors or suppliers, that may have the capacity to tender only for certain elements. The procuring entity evaluates and compares all tenders in accordance with the criteria and evaluation methods set forth in the tender documents to ascertain the most advantageous tender or combination of tenders.

9. *Period of validity of tenders; withdrawal and modification of tenders*

(a) *Period of validity of tenders*

138. National procurement laws usually provide that tenders are to remain valid for a period of time beyond the deadline for submitting tenders. This is because it usually takes some time after the opening of tenders for them to be processed and for the contract to be entered into. The procuring entity must be assured that, after completion of these procedures, the tenderer chosen by the procuring entity will remain obligated to enter into a contract on the terms of its tender. In addition, the procuring entity must be sure that if, for some reason, the chosen tenderer fails to enter into a contract other tenders will remain valid and available to be accepted (see para. 199, below).

139. Some procurement laws leave it to the procuring entity to establish the period of validity appropriate for each procurement, subject to certain guidelines. Other procurement laws establish minimum periods of validity for particular types of contracts (e.g., 1 month for the procurement of simple, routine supplies; 3 months for the procurement of complex equipment; 6 months or more for the procurement of works).

140. It is desirable that the period of validity be long enough to cover the amount of time it should realistically take to open, evaluate and compare the tenders, decide upon which tender to accept, obtain all necessary approvals (which may include the approval of a lending

institution) and enter into the contract. However, if the period of validity is excessively long, higher tender prices may result since tenderers will have to include in their prices an increment to compensate for the costs and risks to which they are exposed during such a period (e.g., the costs of the tender guarantee; the necessity to keep their resources committed to the project; the risks of higher construction or manufacturing costs).

141. In cases where the tender proceedings cannot be concluded and the contract cannot be entered into within the specified period of validity of tenders, the procuring entity will have to seek an extension of the period. Under many procurement laws, tenderers continue to be bound by their tenders after the expiration of the stipulated period of validity only if they so agree. Under other laws, however, the procuring entity can extend the period of validity by so notifying tenderers prior to the expiration of the original period. Although that approach may provide greater security for procuring entities, it may result in higher tender prices for reasons expressed in the previous paragraph. It may therefore be more consistent with the objectives of economy and efficiency to fix a period of validity that is realistic and to provide that tenderers will not be bound by their tenders after the period expires unless they so agree.

(b) Withdrawal and modification of tenders

142. Many national procurement laws permit tenderers to withdraw or modify their tenders only up to the deadline for submission or the commencement of the opening of tenders (which should be soon after the deadline for submission). Withdrawal or modification of tenders after that time could conflict with the objective of economy in procurement and could impair confidence in the procurement process. For example, where tenders are opened in public, it would enable a tenderer that offered a substantially lower tender price than the others to raise its price to a level just below that of the next lowest tender; it would also be unfair to other tenderers. Even where tenders are not opened publicly or in the presence of representatives of tenderers, permitting tenders to be withdrawn or modified after the submission deadline or the commencement of the opening of tenders could complicate and prolong the process of examining, evaluating and comparing tenders. At least one country permits tenders to be modified after the opening in the event of a genuine and honest mistake.

143. Several national procurement laws permit certain minor corrections to be made to tenders and clarifications of tenders to be given after the opening of tenders. For example, these laws permit the procuring entity to correct arithmetical errors, in some cases on its own initiative and in other cases in consultation with the tenderer. They also permit the tenderer to correct other clerical errors (e.g., by affixing tax stamps that have been omitted). In addition, some laws permit the tenderer to change information in the tender that is obviously erroneous (e.g., a figure for a price component that has been mistranscribed), and permit the procuring entity to obtain clarifications from the tenderer as to ambiguities in or omissions from the tender

(see, however, paras. 189 to 192, below, relative to negotiations with tenderers).

10. Tender guarantees

144. Most national procurement laws require tenderers to submit tender guarantees with their tenders in certain or all types of procurement. The basic purpose of a tender guarantee is to provide funds to cover at least a portion of the losses that a procuring entity would suffer if the tender was withdrawn prematurely, or if the tenderer whose tender had been accepted failed to enter into a contract with the procuring entity or to provide a performance guarantee, if such a guarantee was required. These losses could include, for example, the costs of having to engage in new tendering procedures, the difference between the tender price of the defaulting tenderer and a higher price that the procuring entity ultimately must pay, and losses due to delays in procurement. Other possible purposes of requiring a tender guarantee are to discourage the tenderer from committing one of the above-mentioned defaults and to discourage financially unsound contractors or suppliers from participating in the procurement (e.g., because of the cost of providing a tender guarantee and because, if the guarantee must be issued by a third person, such as a financial institution, a financially impaired contractor or supplier could have difficulties in obtaining the guarantee).

145. The security provided by tender guarantees is usually important when the procurement is of relatively high-value works or goods. In the procurement of low-value items, the risks faced by the procuring entity and its potential losses are generally lower, and the cost of providing a tender guarantee—which will normally be reflected in the contract price—will be less justified. A number of procurement laws therefore require tender guarantees only when the item to be procured exceeds a specified value. In at least one country, the procuring entity may relieve a particular tenderer of the obligation to provide a guarantee if the procuring entity determines that the tenderer presents no risk of committing one of the defaults mentioned above. However, such a provision could lead to undesirable consequences if it were used improperly to favour a particular tenderer. Some national procurement laws favour particular categories of tenderers (e.g., State-owned enterprises in the country of the procuring entity; workers' and artisans' co-operatives) by exempting them from the requirement of providing a tender guarantee.

146. Tenderers often have several tender guarantees outstanding at the same time in connection with several different tendering proceedings. Since a tenderer will recover the cost of providing a tender guarantee only if its tender is accepted and it enters into a contract with the procuring entity, a tender price may include an increment reflecting not only the cost of providing the guarantee in respect of that particular tender, but also the cost of providing guarantees in respect of unsuccessful tenders. It may therefore be desirable to require tender guarantees only when needed to protect the interests of the procuring entity.

147. Many procurement laws require the tender guarantee to be in the form of a guarantee from a bank, surety company or other financial institution, although in at least one instance the guarantee of a State-owned enterprise has been accepted. A number of these procurement laws stipulate that the institution must be one that has been designated or approved by a relevant government department for the issuance of tender guarantees, such as the ministry of finance or the central bank.

148. Under a few procurement laws, the institution issuing a tender guarantee must be in the country of the procuring entity. Such a requirement could hinder the submission of tenders by foreign contractors and suppliers and thus may be undesirable where foreign participation is anticipated or sought, since foreign tenderers may have difficulty in obtaining tender guarantees from institutions in the country of the procuring entity. In addition, it could result in higher tender prices in cases where foreign tenderers could obtain satisfactory guarantees at lower cost from institutions in their own countries. Thus, some procurement laws permit foreign tenderers to provide a tender guarantee issued by a reputable foreign bank. In at least one procurement law the foreign bank must issue the guarantee through a local correspondent bank. In countries where there exists a policy to require that tender guarantees be issued by local institutions, it would be desirable to offer a range of institutions from which guarantees would be acceptable.

149. Several procurement laws permit the tenderer to supply a tender guarantee in a form other than a guarantee issued by a financial institution, such as an irrevocable letter of credit, bank draft, certified cheque, cash deposit with a financial institution as stake-holder, or cash deposit with the procuring entity. This flexibility may facilitate participation by some tenderers; it could also result in somewhat lower tender prices where a particular form (e.g., a certified cheque) is less costly to provide than others.

150. It is desirable that the required amount of the tender guarantee be high enough to give the procuring entity a reasonable level of protection, but not so high that the cost of obtaining it dissuades qualified tenderers, including those from developing countries, from participating in the tender proceedings. The amounts of tender guarantees in connection with the procurement of works typically fall within the range of 1 to 3 per cent of the tender price; for goods, the amounts typically range from 2 to 5 per cent. Some tender laws specify the amount of the tender guarantee that must be supplied. Sometimes a range of amounts is specified, and the procuring entity is to fix the amount required for a particular procurement. Some of those laws specify different amounts for works and for goods, and in some laws the required percentage is graduated in accordance with the tender price.

151. It may be desirable in some cases for the required amount of the tender guarantee to be expressed as a specified sum of money, rather than as a percentage of the tender price. The percentage approach could enable a tenderer to ascertain the tender prices offered by other

tenderers if it were able to discover the amounts of the tender guarantees supplied by them.

152. National procurement laws typically provide that the procuring entity may claim the amount of the tender guarantee if the tender commits one of the defaults mentioned in paragraph 144, above. Guarantees that are to be issued by a third party, such as a financial institution, and guarantees in the form of a sum of money deposited with a third party, are usually required to be first demand guarantees—that is, those under which the issuer of the guarantee or the depositary of the sum of money is obligated to make payment upon a simple demand by the procuring entity or its bare statement that the tenderer has committed one of the specified defaults. The issuer or depositary is normally not to question or verify whether a default entitling the procuring entity to claim the guarantee has in fact been committed; however, a tenderer whose guarantee is called by the procuring entity without justification would be able to claim against the procuring entity. In some legal systems, the issuer or depositary may be able to refuse to pay the guarantee sum, or the contractor or supplier may be able to obtain a court order that the sum not be paid, in limited circumstances.

153. It is generally desirable to require the tender guarantee to be valid for the entire period of time during which tenders must remain valid, plus an additional short period of time to enable the procuring entity to take action to claim the guarantee amount. In some national procurement laws the validity period of the tender guarantee and the validity period of tenders are not co-ordinated, which can create difficulties for procuring entities. It is desirable to provide that, if the period of validity of tenders is extended, the validity period of the tender guarantees should also be extended.

154. Many procurement laws provide that the tender guarantees must be returned to the tenderers when the successful tenderer enters into the contract with the procuring entity and provides the performance guarantee, if one is required. Even if a guarantee is not returned, it will expire at the time provided for in the guarantee. A few laws provide that the guarantees must be returned to unsuccessful tenderers when a tender is accepted. Those provisions may not give sufficient protection to the procuring entity (e.g., where the contract does not come into existence until a formal contract document is signed (see para. 197, below); or where the successful tenderer fails to provide the performance guarantee). In some cases a procuring entity may be sufficiently protected if, after a tender is accepted, it is permitted to retain the tender guarantees only of the successful tenderer and of the next two acceptable tenderers, and is required to return the guarantees submitted by the other tenderers. It may be desirable for a procurement law to give to the procuring entity flexibility with respect to whether and under what circumstances the tender guarantees of unsuccessful tenderers are to be returned prior to the time the contract with the successful tenderer comes into existence, as long as the practice to be followed in individual tender proceedings is made known to tenderers in the tender documents.

11. *Opening, examination, evaluation and comparison of tenders*

155. Under many national procurement laws, the opening, examination, evaluation and comparison of tenders, particularly in connection with the procurement of complex or high value works or goods, is under the responsibility of a committee, sometimes referred to as a tender committee. In addition to representatives of the procuring entity, some tender committees also include representatives of various relevant ministries, departments or other governmental organs, such as the ministries of trade and of finance, the central bank and the financial controller. However, for the procurement of simple works or goods, where the opening, examination, evaluation and comparison of tenders is routine (e.g., where the only variable in tenders is the tender price and where the procuring entity must accept the tender of the eligible and qualified tender offering the lowest price), these functions may be performed by a single official of the procuring entity, often referred to as the procurement officer. The procedures and other aspects of the opening, examination, evaluation and comparison of tenders typically provided for in national procurement laws are described in the following sub-sections.

156. Many national procurement laws require the procurement officer or the tender committee to prepare minutes of the proceedings for the opening, examination, evaluation and comparison of tenders. These minutes are to contain, for example, the names of the tenderers, the eligibility and qualifications of tenderers, the tender prices of each tender, a summary of each tender (when the decision of which tender to accept is to be made on the basis of criteria in addition to price), the decision of which tender to accept and the reasons for the decision. The minutes also sometimes contain or summarize the report of the evaluation committee (see para. 161, below). The requirement that minutes be prepared can help to promote transparency of procurement proceedings, especially if the minutes are made public (see paras. 159 and 200, below).

(a) *Opening of tenders*

157. National procurement laws typically provide that tenders are to be opened at the time and place stipulated in the tender documents. It is desirable for the time of opening to be at or promptly after the deadline for the submission of tenders.

158. Procurement laws vary as to the extent to which the proceedings for opening tenders are open to the public. In some countries, the proceedings may be attended by any person who wishes to be present. In other countries, only representatives of tenderers may attend. In still other countries the proceedings are closed, even to representatives of tenderers.

159. Permitting at least representatives of tenderers to be present at the opening proceedings, where they can learn who the other tenderers are and the tender prices and other aspects of the tenders (see para. 160, below), contributes to transparency of procurement procedures. Open proceedings enable tenderers to observe that the procure-

ment laws are being complied with, and help to promote confidence that decisions will not be taken on an arbitrary or improper basis. A rationale that is sometimes given for closing the proceedings to outside participation is that the possibility of collusion between tenderers will be reduced if they do not know the identities of other tenderers or the contents of their tenders. However, that objective might be achieved equally well by requiring tenders to remain sealed until the time of opening and prohibiting tenderers from withdrawing or modifying their tenders after that time. If the proceedings are closed, transparency could nevertheless be promoted by requiring minutes of the proceedings to be prepared and made public (see paras. 156, above, and 200, below).

160. In proceedings that are open to the public or to representatives of tenderers, it is common for the official who opens the tenders to announce the name of each tenderer, the tender price and other relevant aspects of the tender. After all the tenders have been opened, they are examined, evaluated and compared.

(b) *Examination, evaluation and comparison of tenders*

161. In many cases, where the examination, evaluation and comparison of tenders will be a complex process or will involve technical factors, the tenders are submitted to an evaluation committee to perform those tasks. This committee is typically composed of technicians or engineers in the relevant fields and, in some cases, representatives of relevant ministries or governmental departments or organs. The deliberations of the evaluation committee are usually confidential and closed to non-members of the committee. The evaluation committee reports its conclusions, which may include a recommendation as to which tender should be accepted, to the tender committee or the procurement officer. On the basis of that report, the tender committee or procurement officer decides which tender it wishes to accept. The procedures and sequence of events in the examination, evaluation and comparison of tenders is in many cases as follows (see, however, paras. 180 and 181, below, concerning the two-envelope system).

(i) *Examination of tenders*

162. Tenders are first examined for completeness, that is, to verify that all required components of the tender (e.g., documents relative to the tenderer's eligibility and qualifications, the tender form, a tender guarantee and a power of attorney) have been included. Tenders are also examined for compliance with the other formal requirements set forth in the procurement laws and the tender documents (e.g., requirements with respect to signature). Tenders that are incomplete or that do not comply with the formal requirements are eliminated. Computational errors and other errors and ambiguities in tenders are resolved (see para. 143, above).

163. Next, the eligibility of tenderers is verified. In some cases, the qualifications of tenderers are also evaluated at this stage (see, however, para. 172, below). Tenders submitted by tenderers that are not eligible or that are not qualified in accordance with the established qualification criteria are eliminated.

164. The remaining tenders are then examined to determine whether or not they are responsive, i.e., whether they are based upon and conform to the specifications, contractual terms and conditions and other substantive requirements set forth in the tender documents. Some national procurement laws do not permit any deviations from those specifications, terms, conditions or other requirements, and provide that tenders that contain deviations must be rejected as non-responsive. (This situation should be distinguished from the situation where the tender documents seek the tenderer's offer with respect to certain specifications, terms or conditions; see para. 103, above). Some laws, however, permit tenders to be considered if they are substantially responsive, that is, if they contain only minor deviations which do not materially alter the specifications, contractual terms and conditions or other requirements set forth in the tender documents. In the evaluation process those deviations are quantified and added to or subtracted from the tender price, as appropriate.

165. The approach described in the preceding paragraph seeks to create optimal competitive conditions for tender proceedings and to maximize fairness to tenderers. The underlying theory is that allowing tenders with deviations to be considered would distort the competition among tenderers, and would be unfair to tenderers that submitted tenders responsive to the stipulated specifications, terms, conditions and other requirements and that did not have an opportunity to compete on the basis of the deviating specifications, terms, conditions or requirements.

166. In many procurement laws that require tenders to be rejected if they contain deviations, the requirement applies even when the tender offers to supply works or goods with technical characteristics superior to those specified by the procuring entity in the tender documents, or offers more advantageous contractual terms or conditions than those specified by the procuring entity. The theory behind this policy is that the tender documents should set forth the procuring entity's requirements with sufficient accuracy and precision so that more favourable specifications, terms and conditions—which could be more costly—are not necessary to meet the procuring entity's needs. Other procurement laws, however, permit tenders to be considered if the deviations are advantageous to the procuring entity.

167. Still other national procurement laws permit the procuring entity to consider tenders that contain deviations if the tender documents so provide. Under some of these laws it is sufficient for the procuring entity simply to stipulate that tenders containing deviations may be considered. Under others, the tender documents are to stipulate the matters in respect of which deviations will be considered (e.g., time for completion or delivery; payment conditions). Deviations that are accepted by the procuring entity are quantified and added to or subtracted from the tender price, as appropriate.

168. The approach under which tenders may be considered even if they contain deviations seeks to give the purchasing entity the flexibility to take advantage of the most favourable offer received. The distortion of

competition and the unfairness to tenderers that could potentially arise from that approach are sought to be minimized by requiring the procuring entity to disclose to tenderers in the tender documents that tenders with certain deviations may be considered.

(ii) *Evaluation and comparison of tenders*

a. *Criteria and methods for evaluation and comparison of tenders*

169. National procurement laws provide for varying degrees of flexibility, specificity and objectivity with respect to the criteria and methods that the procuring entity is to use in evaluating and comparing tenders. Under some procurement laws the decision of which tender to accept is based exclusively on the tender price, i.e., the tender offering the lowest tender price must be accepted. Some of these laws provide for the procuring entity to establish maximum or minimum prices or estimated prices; tenders that fall outside the maximum or minimum prices or outside a specified range based on the estimated price are to be rejected. Of the remaining tenders, the one offering the lowest tender price is to be accepted.

170. The rationale for establishing a maximum price is to set a limit to the amount that the procuring entity will pay for the works or goods. This limit sometimes reflects a maximum budgetary appropriation for the procurement. The rationale for establishing a minimum price is that a tenderer would be unlikely to be able to perform the contract at a price below that amount, or could do so only by using substandard workmanship or materials or by suffering a loss. An abnormally low price could also in some cases indicate collusion between tenderers. From the point of view of transparency, it would be desirable for the procurement laws to require the tender documents to disclose that a maximum or minimum price or a range of prices will be applied.

171. Some procurement laws provide for criteria in addition to the tender price to be taken into account in evaluating and comparing tenders. Under one typical pattern, the procurement laws set forth objective and quantifiable criteria, including, for example, the cost of operating, maintaining and servicing the works or goods over their expected useful life (including, e.g., the cost of spare parts); the efficiency and productivity of the works or goods; the time for completion of construction or for delivery of the goods; the payment conditions; the extent to which the price may be adjusted (e.g., in accordance with a price adjustment formula); the terms and conditions of the quality guarantee and the length of the guarantee period. Although, in individual tender proceedings, the procuring entity need not necessarily use all of the criteria set forth in the procurement laws, the procuring entity has relatively little flexibility to use criteria other than those set forth. It must specify in the tender documents for each tender proceedings the criteria that it will use for evaluating and comparing tenders. With respect to the method to be used for evaluating and comparing tenders, the procuring entity is to calculate the "evaluated price" of each tender by quantifying the various aspects of each tender in relation to the criteria set forth in the tender documents

and combining these quantifications with quantifications of permitted deviations in the tender (see paras. 164 and 167, above) and with the tender price. The tender offering the lowest evaluated price is to be accepted. Sometimes the choice of the lowest evaluated price is subject to maximum, minimum or estimated prices.

172. Under another pattern, the procurement laws provide that the procuring entity is to accept the tender that it finds to be the most "interesting" or "advantageous". These laws, too, set forth certain criteria that the procuring entity may take into consideration in making that determination. These criteria typically include many of those mentioned in the preceding paragraph, and sometimes also include criteria relative to the qualifications of tenderers. However, the criteria are, in general, intended merely to provide guidance to the procuring entity; the procuring entity may use criteria other than those set forth in the procurement law as long as it specifies in the tender documents the criteria that it will use. With respect to the method to be used for evaluating and comparing tenders, some of these procurement laws provide for the procuring entity to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the tender documents. Other procurement laws provide little or no guidance as to the method to be used. Under yet another pattern, the procurement laws provide that the procuring entity is to accept the most advantageous tender without providing any guidance or imposing any restrictions as to the criteria or methods to be used for evaluating and comparing tenders.

173. Among the various approaches described above, basing the decision of which tender to accept on the tender price alone provides the greatest objectivity and automaticity in the choice of which tender to accept. However, it is also the least flexible of the approaches discussed, since factors other than price that may make certain tenders more or less advantageous than others cannot be taken into account. Under this approach, therefore, the procuring entity must take care to formulate its technical specifications and contract terms and conditions with sufficient completeness and precision so that all tenders conforming to them will satisfactorily meet the procuring entity's needs, and so that the relative advantages of the tenders will be reflected in the tender prices alone.

174. This approach has the additional advantage of being the easiest to administer. It may therefore be attractive to countries that do not have personnel with sufficient expertise and experience with more complex criteria and methods of evaluating and comparing tenders. However, a procuring entity wishing to employ one or more complex approaches might engage a professional experienced in the evaluation and comparison of tenders to assist and advise it. This could have an additional advantage of enabling the country to develop its own expertise and experience in the evaluation and comparison of tenders.

175. An approach under which the procuring entity may take into account criteria in addition to the tender price offers greater flexibility than the approach based on tender

price alone. It permits the relative advantages of tenders to be compared along a broader spectrum of parameters, and thus with greater subtlety. This may be increasingly important the less standardized are the works or goods to be procured and the higher their value. From the point of view of various procurement policy objectives it would be desirable for the procurement laws to require that the criteria be formulated and applied in an objective manner, that the criteria and the methods of their application for the evaluation and comparison of tenders be set forth in the tender documents and that the procuring entity evaluate and compare tenders strictly in accordance with those criteria and methods. It would be useful for the procurement laws either to set forth the applicable criteria and methods, or at least to provide guidance to the procuring entity in formulating the criteria and methods to be used in individual tender proceedings.

176. Some procurement laws call for the procuring entity, in evaluating tenders from foreign tenderers, to take into consideration certain criteria relating to broad national economic interests. These include, for example, the impact of the acceptance of a particular tender on the national economy, the extent to which domestic industry will participate in the manufacture of components of the works or goods to be procured and the degree of transfer of technology to the country of the procuring entity that will result from the tender. Under a few procurement laws an advantage in the evaluation and comparison of tenders may be given to tenders that offer credit terms. Under other laws an advantage may be given to tenders offering "offset" terms, that is, offering to purchase works, goods or services from the procuring entity or its country or to invest in that country.

177. Although criteria such as those mentioned in the preceding paragraph are intended to advance certain important national policy objectives, the use of such criteria in evaluating and comparing tenders can in some cases impair competition, economy in procurement and confidence in the procurement process, since they do not easily lend themselves to objective quantification. In particular, giving advantages to tenders that offer credit or offset terms are sometimes criticized as distorting competition.⁸ Some procurement laws expressly discourage the use of certain of these criteria.

178. When criteria such as those are to be used, their undesired consequences could be reduced somewhat by requiring the procuring entity to indicate in the tender documents the weight that will be given to them. Alternatively, instead of incorporating such criteria in the evaluation process, the desired objectives might be achieved by setting forth the criteria as affirmative, concrete obligations that a successful tenderer would have to undertake (e.g., by requiring a foreign tenderer to form a joint venture with local contractors or suppliers, or to engage local subcontractors; see para. 188, below).

⁸With respect to credit terms, it is said that such a provision would favour tenderers from countries that have export guarantee schemes. With respect to offset terms, it is said that such a provision would distort competition both in respect of the procurement by the procuring entity and the offsetting procurement by the tenderer.

b. *Conversion of tenders to single currency*

179. When foreign tenderers participate in tender proceedings and different currencies are used in expressing tender prices (see para. 126, above), the tender prices will have to be converted to a single currency in order to permit tenders to be compared on a common basis. It appears that few national procurement laws deal with this matter, with the result that the procuring entity has the discretion to make the conversion applying whatever exchange rate it deems appropriate. It may be desirable for procurement laws that anticipate or seek participation by foreign tenderers to require the procuring entity to specify in the tender documents the currency that will be used for evaluating and comparing tenders and either to specify the exchange rate that will be used for the conversion or to specify that the rate issued by a named institution prevailing on a specified date (e.g., the deadline for submission of tenders; the date of expiration of the period of validity of tenders) will be used. Restricting in this manner the discretion of the procuring entity would, for example, prevent the procuring entity from arbitrarily selecting an exchange rate during the process of evaluating and comparing tenders so as to favour particular tenderers, and would reduce the necessity for tenderers to include increments in their tender prices to cover the greater uncertainties and risks that would exist without such a restriction.

12. *Two-envelope system*

180. For tender proceedings where tenderers are called upon to submit proposals that are to be evaluated and compared on the basis of technical criteria as well as price, a "two-envelope system" is sometimes used. Under this system the tenderer must organize its tender into two envelopes. The first envelope is to contain the tenderer's proposal concerning the technical aspects of its tender, and the second envelope is to contain the tender price. In some cases (e.g., where pre-qualification procedures have not been used), the documents and information relative to the tenderer's qualifications are also to be included in the first envelope. During the evaluation process the procuring entity begins by opening the first envelope and examining and evaluating the tenders. Where the first envelope contains documents and information relative to the tenderer's qualifications, those qualifications are also evaluated. The second envelope of the tenders found to be responsive are opened and the tender offering the lowest tender price or lowest evaluated price is selected.

181. The two-envelope system is sometimes favoured because it permits the procuring entity to evaluate the technical quality of tenders without being influenced by price. However, the method has been criticized as being contrary to the objective of economy in procurement. In particular, there is said to be a danger that, by selecting tenders initially on the basis of technical merit alone and without reference to price, a procuring entity might be tempted to select upon the opening of the first envelopes tenders offering technically superior works or goods that, however, exceeded the procuring entity's requirements and that were relatively expensive and to reject tenders offering less sophisticated works or goods that neverthe-

less met its needs at a lower cost. That danger might be reduced, however, to the extent that the technical specifications of the works or goods were formulated in a precise and objective manner.

13. *Preferences for procurement from domestic sources or of domestic works or goods and other provisions to achieve economic and social objectives*

182. Many national procurement laws grant preferences or accord other advantages to favour procurement from domestic contractors or suppliers, or certain categories thereof, or to favour the procurement of domestically produced works or goods. Provisions of this nature are designed to promote various economic and social objectives, as discussed in paragraphs 23 to 25, above. Some laws also contain other requirements designed to promote those objectives.

183. Some procurement laws require the procuring entity to procure works or goods from domestic contractors or suppliers, or from particular categories of domestic contractors or suppliers (such as economically weak contractors or suppliers, contractors or suppliers from regions of unemployment, State-owned enterprises, artisans, production co-operatives, agricultural groups, blind or handicapped persons) unless there exists no such qualified contractor or supplier that can supply the works or goods. Similarly, under some procurement laws, the works or goods to be procured must have a minimum amount of domestic content or domestic value-added (e.g., 50 per cent).

184. Requirements of that nature are used by several countries, representing nearly every level of economic development, to further national economic and social policies. It may be noted, however, that such requirements often have the effect of inhibiting economy in procurement, not only because they reduce the competitive field, but also more particularly because the prices of works or goods from domestic sources can in some cases be higher than those from foreign sources. It may therefore be desirable for the use of such requirements to be considered carefully. For example, a country might consider limiting the application of such requirements to types of procurement where that protection is really needed (e.g., to particular industries or particular types of works or goods). In addition, it may be preferable in some cases to employ less exclusionary techniques to achieve the desired objectives, such as those discussed in the following paragraphs. Although techniques of that nature restrict competition to a certain extent and potentially reduce economy in procurement, they usually do so to a lesser degree than the restriction of procurement to domestic sources or to works or goods with minimum domestic content.

185. A commonly used method of promoting the development of domestic industry and related economic objectives is to grant a margin of preference to tenders submitted by domestic tenderers or by specific categories of domestic tenderers that it is sought to benefit (such as

those mentioned in para. 183, above), or to tenders offering to supply works or goods having a certain minimum domestic content or value added, when comparing those tenders with tenders submitted by foreign tenderers. A margin of preference is also sometimes applied to the benefit not only of domestic tenderers or domestically produced works or goods but also of tenderers, works or goods from countries that participate in regional economic groupings with the country of procurement.

186. Typically, the margin of preference is applied by adding to the foreign tender a stipulated percentage (which in several countries is 15 per cent, but in at least one country is as high as 50 per cent in certain cases) of the tender price excluding customs duties, import taxes and similar levies. In several countries the amount of customs duties, import taxes and similar levies is applied if that amount is lower than the margin of preference. Tenders are then compared on the basis of the resulting prices.

187. When a margin of preference is to be applied, greater transparency and objectivity will be achieved if the amount of the margin is quantified (i.e., as a percentage of the tender price) in the procurement law and in the tender documents, and if the method by which the margin is to be applied is described.

188. Other techniques employed in some procurement laws to promote the economic and social objectives in question include, for example, requiring foreign tenderers to use domestic labour, components or materials in constructing the works or in manufacturing the goods to be supplied, to the extent that domestic labour, components or materials are available; to engage domestic subcontractors; to use domestic carriers and insurers; to be associated with a domestic contractor or supplier in the form of a joint venture or similar associations; and to purchase works, goods or services from the procuring entity or from the country of procurement or to invest in that country. In at least one country where the procurement law requires the procuring entity to accept the tender offering the lowest tender price, if the lowest tender price is offered by a foreign tenderer, the procuring entity may accept the tender of a domestic tenderer offering a higher tender price if that tenderer agrees to supply the works or goods at the lower tender price offered by the foreign tenderer. Yet other techniques have been mentioned above in paragraphs 69 and 145.

14. Negotiations with tenderers

189. Under some national procurement laws, the procuring entity is not permitted to negotiate with tenderers with a view towards obtaining a lower price, more favourable contractual terms or conditions or more favourable technical characteristics with respect to the works or goods to be procured. These laws seek to maximize the competitive aspects of tendering, on the assumption that such competition will automatically induce tenderers to submit their most favourable tenders.

190. Other national procurement laws, however, permit the procuring entity to negotiate with tenderers under

certain conditions. These laws seek to give a degree of flexibility to the procuring entity in order to enable it to obtain the most favourable price, contractual terms or conditions or technical characteristics with respect to the works or goods to be procured. For example, some of these laws permit the procuring entity to negotiate a lower price with the tenderer that submits the lowest tender price if that tender price exceeds a maximum price established by the procuring entity, or if the tender price exceeds by a substantial amount an estimated price established by the procuring entity. Under other procurement laws, the procuring entity may negotiate a lower price with two or more tenderers that have submitted identical lowest tender prices, or can request those tenderers to offer rebates. Yet other laws permit the procuring entity to negotiate with the tenderer offering the lowest tender price with respect to certain technical or contractual aspects of the tender, e.g., to remove deviations from the technical specifications or contractual terms or conditions set forth in the tender documents. Still other procurement laws provide a significantly broader scope for negotiations between the procuring entity and tenderers.

191. In considering whether or not the procuring entity should be permitted to negotiate with tenderers, and if so, to what extent, it may be useful to take note of the fact that some tenderers may be reluctant to participate in formal tender proceedings when their tenders are subject to negotiations of a broad scope, particularly when a high value contract is involved or where the tenderer does not have experience in dealing with the procuring entity and, therefore, does not have confidence that the negotiations will be conducted on a fair commercial basis. Tenderers that do participate may have a tendency to submit inflated tender prices, expecting that the prices will be reduced during the negotiations.

192. It follows from the foregoing that, when it is desired to give a degree of flexibility to the procuring entity to negotiate with tenderers without significantly undermining the nature and aims of the tendering method, it is desirable for the scope of and conditions for the negotiations to be restricted (see, e.g., para. 190, above). For procurements where negotiations of a greater scope may be appropriate, the procurement law might provide for, in addition to the tendering method, a method involving such negotiations (see paras. 59 to 63, above). It is generally desirable to prevent the procuring entity from conducting an "auction" within the framework of the tendering method, in which a tender offered by one tenderer is used in the negotiations to extract a lower price or an otherwise more favourable tender from another tenderer. Many contractors and suppliers, particularly those in the international market, refrain from participating in tendering where such techniques are used.

15. Rejection of all tenders

193. Some procurement laws permit the procuring entity to reject all tenders for the convenience of the procuring entity or of the State, or in the public interest. From the point of view of promoting confidence in the procurement

process and encouraging participation by contractors or suppliers in procurement proceedings, it may be useful for the procurement laws to contain provisions designed to prevent the procuring entity from exercising the right to reject all tenders in an arbitrary or abusive manner (e.g., by using the pricing or other information derived from the tenders to purchase the works or goods elsewhere). To this end, the procurement laws might contain an illustrative list of situations in which the right to reject all tenders might be exercised. For example, procurement laws might specify that the procuring entity may reject all tenders where there exists a lack of competition in the tendering proceedings or collusion between tenderers, where the procuring entity's need for the works or goods ceases, where fewer than a stipulated minimum number (e.g., 2; 3) of tenders have been submitted,⁹ or where all of the tenders exceed a maximum price fixed by the procuring entity. In addition, it would be useful for the procurement laws to require the procuring entity to set forth in the tender documents the circumstances in which all tenders may be rejected, and the procedures to be followed thereafter.

194. With respect to the procedures to be followed if no tender is accepted, some procurement laws require new tendering procedures to be conducted, and, if the new procedures are also unsuccessful, permit the procuring entity to procure the works or goods by other methods (e.g., negotiation; single-source procurement). Other procurement laws permit the procuring entity to resort to those other methods even if the initial attempt at tendering is unsuccessful. In some countries, only the original tenderers may participate in the subsequent proceedings; in other countries no such restriction exists.

16. *Acceptance of tender and formation of contract*

195. Under some national procurement laws, the procuring entity takes the final decision as to which tender (if any) to accept. Under other procurement laws, the decision of the procuring entity to accept a tender is only provisional and is subject to approval by a higher authority. Under yet other laws the final decision is to be taken by the procuring entity when the works or goods are below a stipulated value and is subject to approval by a higher authority when they are over that value. The approving authorities under different national procurement laws vary and include, for example, the ministers of economy, finance or industry or the national procurement board. Some procurement laws require decisions with respect to major contracts to be approved (or further approved) by the prime minister, the president or parliament. When approval of a higher authority is required, it would be desirable for the procurement laws to require that the tender documents so stipulate.

⁹The appropriateness of requiring a minimum number of tenders is sometimes questioned on the theory that it is the knowledge of tenderers that tender proceedings are open to competition among a range of potential tenderers, and not the existence of a minimum number of actual tenders, that induces tenderers to offer their most competitive tenders; according to this view, even a single tender should be sufficient and should be accepted if it is responsive and if the tenderer is eligible and qualified.

196. Many national procurement laws establish when the contractual relationship between the tenderer and the procuring entity comes into existence. It is often very useful for the procurement laws to clarify this point. Otherwise, the time at which the contract comes into existence will be governed by general legal rules, which in many cases have evolved to deal with the formation of simple contractual relationships and which may not clearly indicate the relevant time in relation to the formation of a contract as a result of tender proceedings. It would be particularly useful for this matter to be clarified for foreign tenderers that may be unfamiliar with the applicable general legal rules relating to the formation of a contract.

197. Under some procurement laws, the contract comes into existence when the tenderer is notified that its tender is accepted (e.g., upon a final decision by the procuring entity that is not subject to approval or upon the giving of final approval by a higher authority). This approach may be satisfactory when there are no outstanding issues concerning the contract to be resolved and where the contract covers all relevant terms. With respect to the form in which the notice must be given, it would be desirable for national procurement laws to take account of modern data transmission techniques. Under other procurement laws, the tenderer, upon notification that its tender has been accepted, becomes obligated to sign a formal contract document; no contract exists until the document has been signed by both parties. However, a tenderer that fails to sign the contract forfeits its tender guarantee and may otherwise be liable to the procuring entity for the failure.

198. In a few countries, the procuring entity sometimes issues to the successful tenderer a "letter of intent" to enter into a contract. This may be done, for example, when the procuring entity wishes the tenderer to begin to perform the contract immediately, without waiting for the details of the contract to be finally settled and the contract to be signed. It may be unclear in some legal systems what legal consequences, if any, arise from a letter of intent. For example, in some legal systems, it creates no contractual obligations, but may constitute authority to the tenderer to incur expenses preliminary to commencing to perform the contract, and to be compensated under the contract if one is entered into or to be reimbursed if a contract is not entered into. In other legal systems, a letter of intent might be regarded as obligating the procuring entity to enter into a contract with the tenderer. If a procurement law authorizes the issuance of a letter of intent, it would be desirable for the law to specify the legal consequences of the letter.

199. Some national procurement laws specify the procedures to be followed if the tenderer whose tender has been accepted fails to sign the contract document or to supply a performance guarantee, when those actions are required, or improperly withdraws its tender. Under some laws the procuring entity is to conduct new tender proceedings. Other laws authorize the procuring entity to accept the next most favourable tender. Under at least one law the tenderer may offer to the tenderer submitting the next most favourable tender to enter into a contract upon the terms and conditions offered in the most favourable tender.

200. Some procurement laws require the name of the successful tenderer, the tender price and other basic information about the accepted tender and the tender procedures to be publicized (e.g., in the country's official gazette). Some countries go further by providing that the minutes of the opening, examination, evaluation and comparison of tenders, and in some cases the tenders themselves and all other documentation relating to the tender proceedings, become public information at the conclusion of the proceedings. In at least one country, an unsuccessful tenderer may request the procuring entity to supply it with the reasons for the rejection of its tender. Provisions of this nature help to promote transparency of procurement procedures and to ensure that procurement officials will act in accordance with the procurement laws, and may be of particular importance where proceedings for the opening, evaluation and comparison of tenders are closed (see paras. 158 and 161, above). Such provisions will also assist an aggrieved tenderer to exercise a right of recourse against improper procedures used or decisions taken by the procuring entity. Under other procurement laws, however, the tender documentation and the reasons for rejecting a tender are confidential and may not be disclosed.

F. Negotiation and other procedures in national procurement laws

1. Negotiation

201. The negotiation method of procurement accounts for a significant proportion of procurement in some countries. In countries that do not have procurement laws, most or all procurement is done by negotiation. However, due to its nature, the procedures for this method of procurement are far less formal and subject to far less regulation in national procurement laws than tendering procedures. It is for this reason alone that the treatment of procurement by negotiation in this study is substantially shorter than the treatment of procurement by tendering.

202. Some procurement laws that provide for procurement by negotiation allow procuring entities virtually unrestricted freedom to conduct the negotiations as they see fit. Other procurement laws establish basic legal frameworks, of varying degrees of comprehensiveness and formality, within which the negotiations are to take place. One objective of such a framework is to incorporate a degree of competition into the negotiation proceedings. In fact, some procurement laws contain a general instruction to procuring entities to select their negotiating partners and to conduct the negotiations in a manner that promotes competition to the greatest extent possible. Some of the matters relating to procurement by negotiation addressed in procurement laws are discussed in the following paragraphs.

(a) Selection of negotiating partners

203. The same formal eligibility rules that apply to participants in tender proceedings usually also apply to participants in negotiation proceedings (see paras. 76 to 84, above).

204. Under many procurement laws, subject to the formal eligibility requirements set forth in these laws, the procuring entity has complete freedom to choose the contractors or suppliers with which it will negotiate. It will often make its choice on the basis of its past dealings with particular contractors or suppliers, or on the basis of the reputations of various contractors and suppliers, without taking further steps to verify their qualifications. The procuring entity may ask potential negotiating partners with which it is not familiar to establish that they have sufficient technical and financial resources and capacity to perform the contract in question. Sometimes a procuring entity will select its negotiating partners from a list of approved contractors or suppliers (see para. 94, above) (this is required by a few procurement laws).

205. Under some procurement laws the procuring entity simply contacts the contractors or suppliers with which it wishes to negotiate by whatever means it deems appropriate and invites them to participate in negotiations or to submit offers or proposals. In order to introduce an element of competition, some laws require the procuring entity to negotiate with, or to solicit offers or proposals from, a minimum number of contractors or suppliers (e.g., 3), unless this is not practicable. A few procurement laws establish more formalized procedures, and require the procuring entity to solicit offers or proposals by means designed to bring the solicitation to the attention of a range of contractors and suppliers (e.g., by publication). From the responses received the procuring entity may establish a short list of contractors or suppliers with which it will negotiate.

(b) Rules and procedures relating to conduct of negotiations

206. Some procurement laws establish basic rules and procedures relating to the conduct of negotiations. Even when the procurement law does not establish such rules and procedures, it is often desirable for the procuring entity to do so in order to help ensure that the negotiations proceed in an efficient manner.

207. For the procurement of complex, non-standardized works or goods, it is often desirable for the procuring entity to prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the works or goods to be procured, and the desired contractual terms and conditions. Although many of these characteristics, terms and conditions will be subject to negotiation, they at least can serve as an indication of the desires of the procuring entity and a starting point for the discussions. Documents of this nature will be particularly useful where the procuring entity solicits proposals from contractors or suppliers.

208. It is useful in many cases for the procuring entity, prior to the commencement of negotiations, to establish an estimated price for the works or goods to be procured. That price should cover the cost to the contractor or suppliers of constructing, manufacturing or supplying the works or goods, plus a reasonable profit. Establishing an estimated price will serve as a guideline to the procuring entity in negotiating and agreeing upon a price that is fair

and reasonable. Such a guideline is desirable because the competitive forces that would lead to a fair and reasonable price in the tendering method are generally absent in the negotiation method.

209. Some procurement laws require contractors or suppliers to disclose to the procuring entity certain types of information, such as details regarding pricing and profit with respect to the work or goods that are the subject of negotiations. This is intended to enable the procuring entity accurately to estimate a fair and reasonable price, and otherwise to negotiate satisfactory terms and conditions. Some laws require contractors or suppliers to permit the procuring entity to inspect their relevant books or financial records, and their construction, manufacturing or supply facilities. Certain contractors or suppliers may, however, object to such inspections by the procuring entity, and may be inhibited from participating in negotiations where such inspections must be permitted, except in certain cases (e.g., where the contract is to be priced on a cost-reimbursable basis).

210. With respect to the criteria to be applied by the procuring entity in the negotiations, many procurement laws leave it to the procuring entity to negotiate the most advantageous contract according to whatever criteria it deems appropriate, it being assumed that the procuring entity will do so consistently with its own interests. Some laws, however, specify certain general criteria for the procuring entity to follow, e.g., by requiring it to negotiate the most "economical" contract, or to take into account factors such as price and operating and maintenance costs, as well as the effect of the contract terms on the contractor or supplier and its profitability and development potential.

211. As further guidelines for the negotiations, it may be useful for the procurement laws to establish, or for the negotiating parties to agree at the outset, that the parties are not to be contractually bound unless and until they execute a written contract. In addition, it is sometimes considered desirable to provide that, when the procuring entity negotiates with more than one contractor or supplier, the offer of and discussions with each contractor or supplier are to be confidential and are not to be revealed to other contractors or suppliers.

212. A few national procurement laws establish a much more elaborate procedural framework for the conduct of negotiations for use where particularly complex works or goods are to be procured. These laws, for example, regulate the solicitation of offers or proposals, establish time limits for the submission of offers or proposals, require the procuring entity to disclose the criteria to be considered and the relative weights to be given to the criteria, and regulate the conduct of the discussions between the negotiating parties.

2. *Competitive negotiation; "shopping"; single-source procurement; other methods*

213. The general procedures for procurement by these methods have been outlined in paragraphs 60 to 63, above.

Procurement laws that provide for competitive negotiation establish rules and procedures that address many of the matters addressed by the rules and procedures governing procurement by tendering. Procurement laws that provide for "shopping" and single-source procurement usually set forth few, if any, rules and procedures to govern those methods other than the ones mentioned in paragraph 62, above.

G. *Recourse by aggrieved participants in procurement proceedings*

214. Many national procurement laws provide a means of recourse for contractors and suppliers that have been aggrieved as a result of a failure of the procuring entity to comply with the procurement laws. In many cases these will be participants in tender proceedings whose tenders have been rejected, as well as contractors and suppliers that have been denied pre-qualification when pre-qualification procedures are employed. In some cases a tenderer whose tender has been found to be the most acceptable might be aggrieved if, for example, it is required to sign a formal contract document that contains terms or conditions that differ materially from those in its tender.

215. A tenderer might also claim to be aggrieved prior to a decision to reject its tender if the procuring entity follows procedures that do not conform to the procurement laws. It may be advantageous to enable or require such a tenderer to bring its claim when it arises, so that the alleged nonconformity can be remedied at an early stage, rather than requiring the tenderer to wait until after its tender has been rejected. The tenderer would be assisted in bringing such a claim if the procedures used by the procuring entity were transparent, e.g., open or otherwise ascertainable by the tenderer. On the other hand, to the extent that the bringing of such claims can interrupt the tender proceedings (see paragraphs 224 and 225, below), the ability to bring them at an early stage could be disruptive and could be abused by tenderers.

216. Participants in procurement proceedings other than tender proceedings can also be aggrieved by a failure of the procuring entity to conform to the applicable rules and required procedures; although, the less a procurement method is formalized and regulated by the procurement laws, and the more the procedures to be followed and the decision-making are left to the discretion of the procuring entity, the less scope there will be for a participant to obtain redress for a failure of the procuring entity to conform to the applicable rules and required procedures. In fact, a few procurement laws expressly provide a means of recourse only in respect of tender proceedings. Even where the procurement laws do not expressly provide a means of recourse, an aggrieved participant can in some legal systems seek redress under general legal principles (e.g., on grounds of arbitrary governmental or administrative actions, abuse of rights or denial of fundamental justice).

217. Providing an effective means of recourse against procurement procedures and decisions that are not in

conformity with the procurement laws is frequently regarded as necessary in order to promote the integrity of and confidence in the procurement process and to provide a favourable climate for participation by contractors and suppliers in procurement proceedings. Indeed, the lack of an effective means of recourse seems to be a significant factor that discourages participation in procurement proceedings, particularly by foreign contractors and suppliers. Moreover, the effectiveness and benefits of a framework of mandatory procurement rules and procedures will be reduced if there exist no means to ensure compliance with it.

218. In some countries an underlying principle of procurement policy is that a procuring entity should have the freedom to engage in procurement in the manner it deems most appropriate without the possibility of challenge or recourse by an aggrieved participant, except perhaps in limited cases (e.g., in cases of arbitrary governmental or administrative actions, abuse of rights or denial of fundamental justice). In most of these countries, however, procurement is subject to few or no mandatory legal rules (in several of these countries procurement is governed only by rules and regulations of internal management; see para. 36, above); thus, in these countries there is little basis for a legal provision granting a right of recourse for a failure to comply with applicable rules and procedures.

1. *Forum for recourse*

219. Procurement laws that provide a means of recourse usually designate the forum or forums where recourse may be sought. In most countries an aggrieved participant can in the first instance protest an allegedly nonconforming procedure or decision to the procurement officer or other official of the procuring entity concerned, or to the minister or head of the governmental department that has direct authority over the procuring entity, and seek to have the alleged nonconformity corrected. In some countries this is a precondition to further rights of recourse.

220. In addition to the procedures just mentioned, laws in some countries provide for recourse to be made to designated administrative bodies (e.g., the national procurement board, the financial controller or other government department exercising financial oversight over the activities of governmental organs, or a special tribunal established within a relevant ministry or government department). Laws in some countries provide for hierarchical levels of recourse within the administrative structure, and in at least one country an appeal can be made to the President when the value of the works or goods in question exceeds a stipulated amount.

221. In other countries procurement claims are dealt with judicially within the court system. In still other countries both administrative and judicial proceedings are available—in some cases as optional means of recourse and in other cases as hierarchical levels of recourse (e.g., the claimant being compelled to exhaust its administrative remedies before seeking judicial relief).

222. In some countries procurement claims are to be resolved before an arbitral tribunal, the composition of which is sometimes provided for in the procurement law. In at least one country this procedure applies in particular in respect of tender proceedings involving participation by foreign contractors or suppliers.

223. It may be generally useful for a procurement law to include an independent administrative body within the recourse mechanism. This would enable procurement claims to be dealt with by persons with particular expertise in the area of procurement and who are familiar with the often complex procedural, technical and financial aspects involved. These claims might be handled more efficiently and expeditiously by such an administrative body than by a court whose jurisdiction covers a range of subject matters much broader than just procurement. Administrative review may be desirable in particular in countries where an aggrieved participant can request a *de novo* review of a procurement decision (see para. 226, below).

2. *Status of procurement proceedings during recourse proceedings*

224. Some procurement laws provide that the commencement of recourse proceedings prior to the time when contract is entered into interrupts the procurement proceedings. A contract cannot be entered into until the recourse proceedings have ended. In at least one country, if the recourse proceedings are commenced after the contract has been entered into (this can be done only if the claimant did not know and could not reasonably have known before the contract was entered into of the grounds giving rise to the right of recourse), the performance of the contract is interrupted until the recourse proceedings have ended.

225. Competing considerations may be relevant to the question of the status of the procurement proceedings when recourse proceedings are commenced before the contract is entered into. On the one hand, a recourse mechanism would lose much of its effectiveness if the contract could be entered into notwithstanding the fact that the procurement procedures or decision had been challenged and might be defective. On the other hand, permitting the procurement proceedings to be interrupted will usually delay the procurement and could result in losses to the procuring entity (particularly where the delay prevents the contract from being entered into within the period of validity of tenders), which would be unjustified if the procedures or decision complained of were found to be proper. It may be possible to reconcile these competing considerations by, for example, requiring a claimant that seeks an interruption of the procurement proceedings to meet whatever requirements are imposed by general rules of the legal system with respect to the availability of interim judicial relief (e.g., by requiring the claimant to show a reasonable probability that its claim will succeed and to show that an interruption would not cause undue or irreparable harm to the procuring entity), or by making the claimant responsible for losses of the procuring entity if the claim is not successful and by requiring it to post a bond or other security to cover those possible losses.

3. Nature of review and of relief

226. In many countries, the mandate of the forum seized of the recourse claim is limited to determining whether or not the applicable legal rules and required procedures were complied with. When the recourse proceedings are commenced before the procurement proceedings have been completed, the forum may require the procuring entity to comply with the required procedures and to take its decisions in conformity with the procurement laws. If the procurement proceedings have been completed but a contract has not been entered into, the forum may require new procurement proceedings to be conducted. If a contract has been entered into, the forum can often require the payment of damages to the claimant. In some countries, when a recourse claim is brought before a court, the court in extreme cases may declare the contract to be void or cancelled, in which case the procuring entity will have to engage in new procurement proceedings. The procurement laws of at least one country empower an administrative body to engage in a *de novo* review of the entire procurement proceedings and order that a particular tender be accepted.

V. CONCLUSIONS

227. This seems to be an opportune time for Governments to review their policy objectives in relation to procurement, and to evaluate their procurement laws and procedures in the light of those objectives or to consider the desirability of introducing procurement laws where none presently exists. Some Governments are already undertaking such a review and evaluation. It is hoped that the study of procurement contained in this report will assist in this process. The Working Group may consider it desirable to assist further by proposing to the Commission the preparation of a model procurement code. A model procurement code could serve as a standard for the evaluation by countries of existing procurements laws and a model for the improvement or formulation of procurement laws on a sound basis.

228. A model procurement code could be of benefit both to individual countries and to international trade as a whole. It could, for example, assist countries whose objectives call for participation in procurement proceedings by foreign contractors and suppliers to make their procurement laws and procedures more conducive to such participation. Countries whose objectives call for favouring procurement from domestic sources could be assisted in devising ways to do so and yet to minimize unnecessary restrictions on participation by foreign contractors and suppliers in procurement proceedings. In addition, greater harmonization of national laws relating to procurement would facilitate international trade.

229. It would seem to be feasible to formulate a model procurement code acceptable to a broad range of countries. As revealed in the foregoing study, although national procurement laws differ widely in numerous respects, they reflect few differences of basic principle. The major difference of that nature is between countries that consider

that their procurement policy objectives can best be realized by means of a comprehensive and mandatory legal framework governing procurement, and those that consider that their objectives are best realized by imposing minimal or no controls on procurement by governmental and public entities. Differences in national procurement laws often reflect differing priorities with respect to procurement policy objectives. It does not appear that there exist among national procurement laws differences of a fundamental juridical nature.

230. An approach to the formulation of a model procurement code that the Working Group might wish to consider is to prepare a "framework law", which would set forth basic mandatory legal rules governing public procurement to be implemented by detailed regulations. It could be envisaged that these detailed regulations would in many cases be promulgated by administrative authorities. Other countries might consider it more appropriate or desirable for the regulations to be promulgated by the same legislative authority that enacted the code, either as separate regulations or as an expanded procurement law based upon the model procurement code.

231. The approach just described might be regarded as desirable for the following reasons. Firstly, it would be very difficult, if not impossible, to regulate procurement procedures in detail in a code designed for worldwide application. Instead, it would be preferable for the code to establish basic mandatory legal rules and enable enacting countries to tailor the detailed rules and procedures to their own procurement policy priorities and their other needs and circumstances (e.g., their governmental and administrative structures). The study of procurement contained in the present report could assist countries in the formulation of detailed regulations. Secondly, the technique of enacting a framework law to be implemented by detailed administrative regulations is familiar to many countries. Thirdly, this technique could make the model procurement code acceptable even in countries that considered it desirable to establish only basic legal rules governing procurement and to leave broad discretion to procuring entities with respect to detailed procurement procedures; these countries might, for example, adopt the model procurement code without promulgating any further implementing regulations.

232. The formulation of a model procurement code could complement the activities of other international organizations in the area of procurement. Mention has been made above, for example, of the existence of procurement guidelines and other requirements issued by international lending institutions (see paras. 9 and 28, above). Those guidelines and requirements generally cover only procurement conducted in connection with projects funded by them, which are usually projects of high value; they thus cover only a relatively small portion of procurement by public entities throughout the world. With most public procurement conducted in accordance with national procurement laws and practices, there remains substantial scope for useful work by the Commission directed towards assisting countries to create an improved and more harmonious climate for public procurement.

233. In addition, some of these institutions permit certain types of procurement with funds provided by them to be carried out in accordance with the borrowing country's own procurement laws, rather than the institution's guidelines, as long as those laws are acceptable to the institution (see para. 9, above). Work by the Commission directed towards assisting countries to improve or formulate national procurement laws on a sound basis could help borrowing countries in their relations with lending institutions.

234. The formulation of a model procurement code would not duplicate the work of organizations such as GATT or the EEC. The orientations of the GATT Agreement on Government Procurement and the EEC directives on the subject (see paras. 10 and 29, above) are narrower than that of the envisaged UNCITRAL model procurement code. The central policy behind those instruments is to remove discriminatory practices and other barriers to participation by contractors and suppliers from parties to the GATT Agreement or members of the EEC, respectively, in proceedings for procurement by a procuring entity from another such party or member country. In contrast, the UNCITRAL model procurement code would take into account a variety of possible national policy objectives. Participation by foreign contractors or suppliers in procurement proceedings would play a role in some of those objectives, but would be regarded as only one feature to be considered and weighed together with others in the formulation of procurement laws and procedures that met national procurement policy objectives.

Furthermore, as a model for national procurement laws, the UNCITRAL model procurement code would not be based on the element of reciprocity that is inherent in the GATT Agreement and the EEC directives. In addition, the scope of the GATT Agreement and the EEC directives is, as a result of their particular orientations mentioned above, narrower than that of the envisaged UNCITRAL model procurement code. The GATT Agreement and the EEC directives apply only in respect of procurement exceeding stipulated values, and the GATT Agreement applies only in respect of procurement by certain governmental procuring entities designated by each party to the Agreement.

235. The Working Group may wish to use the study of procurement in this report as a basis for its formulation of the model procurement code. In order to prepare for the drafting of the model procurement code, the Working Group may wish to discuss the general principles that should underlie the code. It might regard, in particular, the suggested principles for sound national procurement laws relating to the procurement of works and goods, which have been distilled from the study of procurement and which are set forth in the annex to this report, as a useful basis for that discussion. The Working Group may also wish to discuss the issues to be addressed in the model procurement code and the approaches to be taken with respect to those issues. Upon completing those discussions the Working Group may wish to request the secretariat to prepare a first draft of the model procurement code.

ANNEX

SUGGESTED PRINCIPLES FOR SOUND NATIONAL PROCUREMENT LAWS RELATING TO THE PROCUREMENT OF WORKS AND GOODS

1. It is desirable for the procedures for public procurement to be governed by national procurement laws that are mandatory and binding on procuring entities and on contractors and suppliers participating in procurement proceedings.

2. National procurement laws and the procedures established by them should be designed to maximize economy and efficiency in procurement and to promote the integrity of and confidence in the procurement process.

3. National procurement laws may also be designed to achieve other specific economic and social objectives, such as national economic development, development of domestic industries, and development of particular geographic regions or economic sectors.

4. It is for each country to determine the priorities to be accorded to the various objectives referred to in Principles number 2 and 3, taking into account its needs and interests.

5. National procurement laws and procedures should be "transparent". Procurement laws should make known to contractors and suppliers participating in procurement proceedings the rules and procedures to be followed by the procuring entity and by the participants. Procurement laws should be published and kept up to date and made available to those participants. Participants in procurement proceedings should be able to ascertain

what procedures have been followed by the procuring entity and the basis of its decisions.

6. National procurement laws and procedures should not be excessively detailed or complex, or unnecessarily costly or burdensome to procuring entities or to contractors or suppliers participating in procurement proceedings.

7. Where participation by foreign contractors or suppliers in procurement proceedings is anticipated or sought, the procurement laws and procedures should avoid unnecessary obstacles to their participation.

8. It is desirable for national procurement laws to include competitive tendering among the methods of procurement provided for. It would be desirable for tender procedures to be formulated, in particular, in accordance with the following principles:

(a) tender procedures should be designed to maximize competition among a range of contractors or suppliers;

(b) requirements and provisions that have the effect of restricting participation in tender proceedings should be included in national procurement laws and in tender documents only when the desirability of such requirements and provisions overrides their potential disadvantages. Such requirements and provisions should be carefully formulated so as to limit the

restrictions on participation to those that are needed in order to achieve the intended aims of the requirements and provisions;

(c) except to the extent necessary to achieve relevant and clearly defined national policy objectives, procuring entities should be required to deal with all tenderers and tenders on the basis of equality. This principle of equality should not be departed from except as authorized by the procurement laws, and any such departure should be specified in the tender documents;

(d) procuring entities should be required to set forth in the tender documents in a clear and complete manner all rules and procedures to be followed in the tendering; a description of the works or goods to be procured, which should be formulated by reference to objective characteristics, specifications and standards; the criteria and the methods to be used in evaluating the qualifications of tenderers and in evaluating and comparing tenders; and all other information necessary to enable tenderers to formulate their tenders;

(e) procuring entities should be required to base their evaluation of the qualifications of tenderers and their evaluation and

comparison of tenders on objective criteria, and to conduct the evaluation and comparison in an objective manner;

(f) procuring entities should be required to examine, evaluate and compare tenders strictly in accordance with the criteria, methods and procedures set forth in the procurement laws and in the tender documents.

9. When a national procurement law provides for two or more methods of procurement, it should set forth rules or guidelines to govern the choice of the method to be used. It would be desirable for the procurement laws to require that procurement by methods other than competitive tendering be conducted in accordance with procedures that result in a reasonable price and that otherwise promote economy and efficiency in procurement and the integrity of and confidence in the procurement process.

10. National procurement laws should provide for an effective means of recourse against actions taken or decisions made by the procuring entity that are not in conformity with the procurement laws or with the rules and procedures set forth in the tender documents.