

# Guide to Enactment of the UNCITRAL Model Law on Public Procurement



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# Guide to Enactment of the UNCITRAL Model Law on Public Procurement



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## *Preface*

The United Nations Commission on International Trade Law (UNCITRAL) has prepared this *Guide* to enactment of its 2011 Model Law on Public Procurement (the Model Law) to provide background and explanatory information on the policy considerations reflected in the Model Law.

The information presented in this *Guide* is intended to explain both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The *Guide* is thus intended to enhance the effectiveness of the Model Law as tool for modernizing and reforming procurement systems, particularly where there is limited familiarity with the type of procurement procedures the Model Law contains.

In addition, and in accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law and this *Guide*. This approach also serves to ensure that the texts reflect best practice, and that the provisions of the Model Law are universally applicable. Nonetheless, as there are wide variations among States in such matters as size of the State and the domestic economy, in legal and administrative traditions, in levels of economic development and in geographical factors, options are provided for in the Model Law to suit local circumstances, and the *Guide* explains the issues that may be taken into account in deciding how those options may be exercised. The information in this *Guide* is also intended to assist States in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular local circumstances.

Taking into account that the Model Law is a framework law in that it provides only essential principles and procedures, this *Guide* discusses the need for regulations, rules and additional guidance to support legislation based on the Model Law, identifies the main issues that should be addressed therein, and discusses the legal and other infrastructure that will be needed to support the effective implementation of the text.

This *Guide* is intended as a reference tool for policymakers and legislators, regulators and those providing guidance to users of a procurement system

based on the Model Law. The primary focus of these readers will vary: for policymakers and legislators, it may be on whether to engage in procurement reform and, if so, the scope of the reform to be undertaken and which provisions to enact. For regulators and those providing guidance to users, it may be on specific issues of implementation and use of the provisions of the Model Law. For this reason, the *Guide* separates, to the extent possible, commentary on policy issues and on issues of implementation and use of the Model Law.

This *Guide* is also intended to assist users of the earlier UNCITRAL Model Law in the area of public procurement—the Model Law on Procurement of Goods, Construction and Services (adopted in 1994, the “1994 Model Law”)—in updating their legislation to reflect recent developments in public procurement. It therefore addresses the expanded scope of the Model Law as compared with its 1994 counterpart, and also explains, as necessary, the main recent developments in procurement policies and practice that underlie the revisions made to that 1994 Model Law.

Taking the above into account the *Guide* has been structured as follows:

(a) Part I, containing General Remarks in three sections: a first, addressing the context that States may wish to take into account when enacting the provisions of the Model Law; a second, discussing the main features of the Model Law; and a third discussing the main issues relating to its effective implementation and use. (Other parts of the *Guide* include issues that may also be of interest to policymakers and legislators, as they discuss, among other things, the legal infrastructure necessary to support the Model Law);

(b) Part II, Commentary on the text of the Model Law, starting with commentary on the objectives of the Model Law set out in its Preamble, and continuing with commentary to each chapter, comprising:

- (i) An Introduction to the chapter concerned, setting out the main policy considerations and suggested policy approaches to them, and a discussion of implementation and use of the provisions in the chapter; and
- (ii) Article-by-article commentary; and

(c) Part III. Commentary on the changes made to the 1994 Model Law: this part explains the revisions made when compiling the 2011 Model Law.

The commentary for each procurement method has been consolidated so that the reader can consider each procurement method as a whole: that is, the detailed commentary on the conditions for use of each method, the relevant solicitation rules and the procedures for each method are located together, with appropriate cross references to general principles.

Part I, the commentary to the Preamble and the Introduction to each chapter in part II can be read sequentially to provide a general statement of the policy considerations addressed in the Model Law. The commentary to each chapter can also be read in full where the reader wishes to consider in more detail the policy considerations and issues of implementation and use regarding the topics covered in that chapter. The commentary on the changes to the 1994 Model Law does not contain points of general application to users of the (2011) Model Law.

This *Guide* contains extensive cross references, so that the manner in which the objectives and principles of the Model Law are implemented throughout the text can be followed. The *Guide* is published in electronic format, on the UNCITRAL website, so that those cross references can be supported by hyperlinks, allowing easy navigation through the text. Hard copies are also published and available as a United Nations publication.

This *Guide* cannot be, and is not intended, to be exhaustive. It makes reference to the work of other international bodies active in procurement reform, so as to assist readers in considering issues in more detail than can be covered in the *Guide*. Finally, it is noted that practices and procedures in public procurement will develop and change to adapt to changing economic and other circumstances. For this reason, UNCITRAL may update this *Guide* from time to time, to reflect new practices and procedures, and experience gained in the implementation and use of the Model Law in practice. The electronic version of this *Guide* available on the UNCITRAL website should therefore be considered to be the up-to-date and authoritative version.



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*Part one*

**GENERAL REMARKS**



## Note

*This part of the Guide contains general remarks, separated into three sections. The first section discusses the context that States may wish to take into account when enacting the provisions of the Model Law. The second discusses the main features of the Model Law. These first two sections are primarily aimed at legislators and policymakers. The third section discusses the implementation and use of the Model Law, including how it operates as the legal framework in a procurement system, and is primarily aimed at regulators and those providing guidance to users of a procurement system based on the Model Law (e.g. a public procurement agency or other body).*

### **A. Context of the 2011 UNCITRAL Model Law on Public Procurement<sup>1</sup>**

#### ***1. History, purpose and mandate***

1. At its twenty-seventh session (New York, 31 May-17 June 1994), UNCITRAL adopted a Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law),<sup>2</sup> and an accompanying Guide to Enactment.<sup>3</sup> The decision by UNCITRAL to formulate model legislation on procurement was motivated by a wish to address inadequate or outdated legislation that had been observed in many countries, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the consequent

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<sup>1</sup>The text of the 2011 Model Law is found in annex I to the report of UNCITRAL on the work of its forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*), and is also available at [www.uncitral.org](http://www.uncitral.org).

<sup>2</sup>The text of the 1994 Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*), and is also available at [www.uncitral.org](http://www.uncitral.org). The first UNCITRAL text on public procurement was the UNCITRAL Model Law on Procurement of Goods and Construction, adopted in 1993 at the twenty-sixth session of UNCITRAL (annex I to the report of UNCITRAL on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*)). This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services

<sup>3</sup>For the text of the Guide accompanying the 1994 Model Law, see document A/CN.9/403, reproduced in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV: 1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form at the UNCITRAL website: <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>.

failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

2. Inadequate procurement legislation at the national level also creates obstacles to international trade, the promotion of which is a major aspect of the mandate of UNCITRAL, and a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may impose a partial limitation on the extent to which Governments can access the competitive price and quality benefits available through international procurement. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

3. The 1994 Model Law served as a tool to reform and modernize procurement law in all regions. It proved to be widely used and successful. It formed the basis of procurement law in more than thirty countries across the world, and its general principles have been reflected to a greater or lesser degree in many more.

4. At its thirty-seventh session (New York, 14-25 June 2004), UNCITRAL decided that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic public procurement (see part III of this *Guide*), and the experience gained in the use of the 1994 Model Law as a basis for law reform, without departing from its basic principles. The UNCITRAL Model Law on Public Procurement, adopted by UNCITRAL at its forty-fourth session (Vienna, 27 June-8 July 2011) is the result of UNCITRAL's work to reform the 1994 Model Law.

5. The purpose of the Model Law is twofold: first, to serve as a model for all States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The potential of the Model Law as an instrument to fulfil these purposes will be fully realized to the extent that it is used by all types of States, further highlighting the importance of the fact that the text has not been designed with any particular groups of countries or particular state of development in mind, and that it does not promote the experience in or approach of any one region. In addition, and for economies in transition, the introduction of procurement legislation is part of a process of increasing the market orientation of the economy and, in this regard, the Model Law can serve as a tool to allow for effective coordination of the relationship between the public and private sectors in such economies.

6. The Model Law is primarily intended to be used in designing legislation at the national level. UNCITRAL is aware, however, that other international texts and agreements addressing public procurement impose obligations that affect national procurement legislation in States that are parties to those texts and agreements. UNCITRAL has sought to allow the widest possible use of the Model Law and enhance its usefulness by harmonizing the text to the extent possible with these other international texts and agreements. UNCITRAL has taken their requirements into account when drafting the Model Law, as explained further in the section on the “**International context of the Model Law and promotion of international participation in procurement proceedings**” below.

## 2. Objectives of the Model Law

7. The Model Law is predicated on six main objectives that should underpin legislation on public procurement, which are set out in its Preamble. The objectives can be summarized as follows:

- (a) Achieving economy and efficiency;
- (b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- (c) Maximizing competition;
- (d) Ensuring fair, equal and equitable treatment;
- (e) Assuring integrity, fairness and public confidence in the procurement process; and
- (f) Promoting transparency.

8. These objectives are, to a large extent, mutually supporting and reinforcing. The procedures and safeguards in the Model Law are designed to promote objectivity in the procurement proceedings which, in turn, facilitate participation, competition, fair, equal and equitable treatment and transparency. These notions are the key principles that facilitate achieving the overarching aims of the Model Law: value for money and avoidance of abuse in public procurement. They also underlie article 9 (1) of the United Nations Convention against Corruption (New York, 31 October 2003),<sup>4</sup> which contains provisions on public procurement, the Agreement on Government

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<sup>4</sup>United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (accessed January 2011).

Procurement of the World Trade Organization (WTO GPA),<sup>5</sup> and regional agreements addressing public procurement. However, the relative emphasis on each of the objectives may vary among public procurement systems, notably as regards the degree of transparency required. The objectives and how they are implemented in the Model Law, including as regards its approach to the appropriate balance between them, are discussed in more detail in the **commentary to the Preamble** in part II of the *Guide*.

### ***3. Balancing procurement policy expressed in the Model Law and overall objectives and policies of enacting States***

9. The objectives of the Model Law relate to procurement as if it involved an independent system. UNCITRAL recognizes, however, that procurement policymaking and implementation are not undertaken in isolation, whether at the domestic level, or where international obligations are involved. The following subsections consider most common objectives and policies implemented through procurement. Although some of them are not listed in the Preamble of the Model Law as its specific objectives, the Model Law enables the pursuit and implementation of other government policies and objectives through the procurement system. The subsections below and the **commentary in the Introduction to chapter I** in part II of this *Guide* describe the relevant mechanisms envisaged by the Model Law for this purpose.

#### *(a) Sustainable procurement*

10. Sustainable procurement is included as a declared objective of some procurement systems. UNCITRAL has noted that there is no agreed definition of sustainable procurement, but that it is generally considered to include a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment, for example through the promotion of life-cycle costing, disposal costs and environmental impact. In this regard, sustainability in procurement can be considered to a large extent as the application of best practice as envisaged in the Model Law. The Model Law allows sustainability to be promoted through procurement via qualification criteria (under article 9, which expressly allows the procuring entity to impose environmental qualifications, and ethical and other

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<sup>5</sup>The plurilateral Agreement on Government Procurement of the World Trade Organization (the GPA), negotiated in parallel with the Uruguay Round in 1994, entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

standards that could include fair trade requirements). For this reason, sustainability is not listed as a separate objective in the Preamble of the Model Law, but is addressed as an element of processes under the Model Law.

11. The term sustainable procurement can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement, such as “social” factors: employment conditions, social inclusion, anti-discrimination; “ethical” factors: human rights, child labour, exploitation of labour; and environmental/green procurement. The Model Law’s flexibility in allowing such socio-economic policies to be implemented in this way is discussed in detail in the next section and in the commentary on socio-economic policies in the **Introduction to chapter I** in part II of this *Guide*.

*(b) Socio-economic policies*

12. A significant part of procurement in an enacting State may arise in connection with projects that are part of policies to support economic and social development (procurement may also enhance such development and capacity-building), and/or the procurement system may be chosen as the vehicle to deliver government support to particular groups within the economy. Other government policies may include the support of private enterprise from certain sectors of the economy that cannot compete as suppliers or contractors in the procurement market or that are not able to participate freely in the wider economy, so that they become able to compete and participate fully in the markets concerned. Yet other policies may aim at promoting local capacity development through providing support for small- and medium-sized enterprises (SMEs) and the use of community participation in procurement. Governments may also seek to place certain types of procurement contracts for strategic reasons. Such policies are usually of a social, economic or environmental nature and may be aimed at a specific sector or general development, environmental improvements, enhancement of the position of disadvantaged groups and economic factors.

13. The Model Law defines such policies and objectives collectively as “socio-economic policies” (see the definition of “socio-economic policies” in article 2 (o)) and accommodates pursuing and implementing them in procurement through its articles on participation, qualification, description of the subject matter of the procurement and evaluation criteria and procedures (articles 8-11), and by permitting the exceptional use of single-source procurement for this purpose (article 30 (5) (e)). Through the measures envisaged in these provisions, procurement may be set aside for particular groups or sectors of the economy, or those sectors or groups may receive a preferential treatment in the procurement procedure concerned.

14. The pursuit and implementation of these policies may have an impact on the performance of the procurement system itself, as, in essence, they are implemented through restrictions on competition for a particular procurement. For this reason, the pursuit of socio-economic policies involves exceptions to the principle of full and open competition and can bring additional costs to procurement, as it may increase the ultimate price paid. Additionally, the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some policies of this type may open the procurement market to groups or sectors that have traditionally been excluded from procurement contracts (such as SMEs) and may increase participation and competition, though in the longer term such benefits may not persist (e.g. if suppliers or contractors choose artificially to remain SMEs). Consequently, the pursuit and implementation of socio-economic policies through procurement should be carefully weighed against the costs that the policies may involve in both the short and long term.

15. In this regard, while there are indications that the results from the use of some preference policies (such as the use of evaluation criteria to prefer a defined group) tend to be more positive than from set-aside policies (such as restricting qualification or requiring subcontracting to a defined group, or resorting to domestic procurement), the main concern is that total insulation from competition for an extended period of time or beyond the point that suppliers or contractors can compete freely can also frustrate the capacity development that such policies are designed to achieve. Consequently, such policies may be considered to be appropriate as transitory measures, only for the purposes of granting market access to emergent suppliers or contractors, opening the national economy, such as through capacity-building, and should not be used as a form of protectionism. The policies should accommodate a progressive exposure to unlimited competition.

16. As it involves exceptions to full and open competition, the promotion of socio-economic policies through procurement systems in the Model Law is therefore to be considered an exceptional measure. It is also subject to two major caveats.

17. The first caveat is that the socio-economic policies may be pursued through procurement only to the extent that the international obligations of the enacting State so permit. Pursuing socio-economic policies may have the effect of discriminating against foreign suppliers and contractors, either because they are so intended or because they have such an effect (e.g. where standards imposed are higher than those applying in other States), and so also runs counter to the Model Law's objectives of maximizing participation regardless of nationality and promoting competition, and the Model Law's

general rule that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality. (This general rule also follows the principles underlying the WTO GPA (see paragraph 8 above) and other international and regional texts on procurement.)

18. This caveat is given effect in the Model Law through the provisions of article 3, which provide that the Model Law is expressly subject to any international agreements entered into by the enacting State. In practice, the provisions of many trade agreements—which include requirements that suppliers and contractors in all signatory countries will be treated no less favourably than domestic suppliers and contractors, and prohibit offsets and similar measures—mean that some options will not be available to enacting States that are parties to these trade agreements.

19. The second caveat is that the policies concerned can be pursued through procurement only insofar as they are set out in other provisions of the law of the enacting State, or in the procurement regulations: they cannot be policies of the procuring entity alone.

20. Although the Model Law does not restrict the type of socio-economic policies that can be pursued, it also applies rigorous transparency requirements to ensure that the manner in which the policies will be applied in the procurement process is clear to all participants (see in particular the requirements on disclosure of qualification, examination and evaluation criteria and the manner of their application in the procurement proceedings in articles 8-11 and 39, 47 and 49 and the commentary thereto in part II of this *Guide*).

21. In addition, the Model Law's restrictions and the stringent transparency requirements are designed to ensure that the impact of the policies can be assessed by suppliers or contractors considering whether to participate in a procurement proceeding. They may also enable the certain costs of the policies concerned to be calculated and assessed through comparison with established benchmarks (i.e. to calculate the premium paid for pursuing the policy concerned) and to balance it against the benefits to be derived. Enacting States are therefore encouraged to consider whether pursuing socio-economic policies through procurement is both effective in balancing and implementing the various policy objectives and efficient in operation. States may also be able to assess their own performance by comparison with empirical evidence from other States, though it is considered that an empirical assessment of costs and results is likely to be difficult. Other viable alternatives to the use of socio-economic criteria may include targeted technical assistance, simplifying procedures and red tape, ensuring that adequate financial resources are available to all sectors of the economy, and requiring procuring

entities to pay suppliers and contractors regularly and on time. Providing training and other information on the procurement system may address the disincentive to participate where procedures are unknown, uncertain or long and complex, and so enhance the effectiveness of supporting particular groups within the economy.

22. Further commentary on the implementation and use of socio-economic policies, where they are permitted by the law in the enacting State concerned, is found in the **commentary in the Introduction to chapter I**, and in the **commentary to articles 8-11 in part II** of this *Guide*.

### *Community participation in procurement*

23. It is generally the case that the authority to carry out projects with the participation of the local community is normally derived from rules and regulations governing public expenditure rather than the procurement law per se. The Model Law does not address such participation. The main part of the procurement cycle regulated by the Model Law, the selection phase of the procurement process, does not provide for community participation because the Model Law does not regulate the internal structure of either procuring entity or suppliers and contractors. It is important to ensure that any measures within the procuring entity to enable community participation in the selection phase do not compromise the provisions and procedures of the Model Law.

24. Community participation in the public oversight of procurement proceedings is, however, enabled in the Model Law through a number of provisions, such as by requiring timely public notices on key decisions relevant to procurement proceedings, the provision of information about such decisions to any person upon request, as well as mandatory public access to records of procurement proceedings.

25. In addition, the ability to apply socio-economic policies as explained above would allow the involvement of the local community in the implementation of a project. The latter could be achieved through imposition on suppliers or contractors of requirements to employ local labour or materials and corporate social responsibility measures as qualification criteria under article 9, the use of evaluation criteria to pursue socio-economic policies of the enacting State under article 11, or the use of single-source procurement to ensure community participation (under article 30). Some ways of enhancing community participation may result in the imposition of restrictions on the participants in the delivery of the project, and so there is a potential to undermine transparency, to add costs or to reduce competition. The caveats as regards socio-economic policies discussed above will therefore be relevant when addressing the question of community participation in procurement.

26. The participation of the local community in the implementation phase of the procurement, such as through public scrutiny of public expenditure, may enhance the design and delivery of the project. Experience has shown that community control can be effective if the community in question has sufficient knowledge of the subject matter of the project, which is typically the case for small-scale projects.

27. Wherever participation of the local community is envisaged, the procuring entity should also exercise caution in determining what constitutes the local community, and who can speak for it, so as to avoid the risk of legal challenge or conflict, and may wish to engage in prior outreach activities to this end.

*(c) Protecting classified information*

28. As noted in the section on the **“Scope of the Model Law”** below, the scope of a procurement system following the Model Law includes defence and security-related procurement, but recognizes that such procurement may require modifications to the Model Law’s transparency provisions to accommodate classified information. Such modifications will involve balancing the goal of protecting the information concerned and the normal transparency obligations under the Model Law, which are key to achieving value for money and other objectives of the Model Law listed in its Preamble. UNCITRAL has therefore sought to ensure that the modifications provided for do not go beyond what is necessary, through the requirements for case-by-case consideration and reasons for the modifications invoked to be set out in the record of the procurement, so as to prevent such a key principle of the Model Law from being compromised. For further detail on the protection of classified information, notably in the context of defence and security-related procurement, see the section on “Classified information” in the **commentary in the Introduction to chapter I** in part II of this *Guide*.

**4. *The potential of electronic procurement (e-procurement) as a tool to promote public procurement policy objectives in the context of the Model Law***

29. E-procurement means the procurement of goods, works and services through Internet-based information technologies (IT). Given the rapid pace of technological advance, and as new technologies may emerge, the term “e-procurement” is used in this *Guide* to refer to the use of electronic communications (e-communications) involving the transfer of information using

electronic or similar media and to the recording of information using electronic media. The policy issues arising in the introduction and use of e-procurement are of general application for all emerging information technologies that can be used to transfer and record information and documents, and to conduct procurement procedures.

30. UNCITRAL has recognized the potential benefits of e-procurement for promoting the achievement of the objectives of the Model Law. For example, it has been reported to UNCITRAL that the financial gains from such benefits may exceed 5 per cent of the value of public procurement, and that the potential to reduce corruption and abuse is also significant.

31. In summary, e-procurement can enhance value for money of the procurement system overall and can contribute to better governance in this significant area of government activity. UNCITRAL has therefore drafted the Model Law so that it would enable the use of e-procurement.

32. However, there are risks and constraints in introducing e-procurement, which may make a staged approach to implementation desirable. These risks and constraints, and the safeguards and processes that the Model Law envisages be put in place to address them, are discussed in the section on **“Specific issues arising in the implementation and use of e-procurement”** below. The particular circumstances of each enacting State, its technical capacity, its governance capabilities and its capacity in public procurement and financial management as a whole will dictate how e-procurement policies are to be implemented. Additionally, the political will to engage in the significant reforms involved, and to open up public procurement to transparency and scrutiny by suppliers and contractors and civil society, are vital if e-procurement is to achieve its potential to enhance procurement system objectives.

##### ***5. Purchasing by groupings of procuring entities, including in the cross-border context, under the Model Law***

33. The Model Law has been drafted to accommodate procurement by groupings of procuring entities, which may be economically advantageous (see in particular the definition of the “procuring entity” in article 2 and the provisions on framework agreement procedures in chapter VII of the Model Law). This type of arrangement can be referred to as centralized purchasing, and framework agreement procedures (provided for under chapter VII) may be used to support it. Such centralized purchasing should not be confused with a procurement system that centralizes procurement decision-making

within the procurement agency or other body, as discussed in the section on **“Institutional support”** below.

34. While the Model Law enables groupings of purchasing entities, it does not regulate these purchasing arrangements in detail. It is left to the enacting State to regulate such issues as distribution of roles in administration, legal responsibility and legal representation, among others, in order to allow such arrangements to succeed. For example, in some systems, and to ensure accountability, one entity may act as the lead procuring entity; in others, the procuring entity may comprise all the purchasing bodies.

35. The groupings may be more commonly encountered within the enacting State, but the Model Law also allows groupings from different States. In the cross-border context, a purchaser or procuring entity from one State may act in the capacity of lead procuring entity and as an agent of purchasers or procuring entities from other States. In this situation, additional issues such as the choice of law and the applicable law will also be relevant, as this type of cooperation may or may not fall within the scope of a particular national law and may alternatively be regulated by international agreements. Similar considerations may apply to powers of administration, legal responsibility and legal representation, among others. In this regard, article 3 of the Model Law that gives primacy to international agreements is relevant.

## ***6. International context of the Model Law and promotion of international participation in procurement proceedings***

36. A key concern of UNCITRAL is to allow the widest possible use of the Model Law. In this regard, it has sought to enhance its usefulness by harmonizing the text to the extent possible with other international texts on procurement, so that it can be used by parties to them without major amendment.

37. Notably, the United Nations Convention against Corruption (see paragraph 8 above) addresses the prevention of corruption by setting mandatory minimum standards for procurement in its article 9 (1). It requires each State party to take the “necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption”.

38. The WTO GPA (see paragraph 8 above) is designed to open up as much of public procurement as possible to international competition, through national treatment and non-discrimination obligations and by following

transparency and competition requirements. There are also regional trade agreements and procurement directives applicable in other economic or political groupings of States.

39. UNCITRAL has taken their requirements into account when drafting the Model Law so that the Model Law may be used by States parties to those texts and agreements without major amendment of their national procurement legislation. In case of possible conflicts, article 3 of the Model Law gives deference to the international obligations of the enacting State. These obligations and the implications for enacting States are discussed in the **commentary to article 3** in part II of this *Guide*.

## **B. Main features of the 2011 UNCITRAL Model Law on Public Procurement**

### ***1. Scope of the Model Law***

#### *(a) Application to all public procurement*

40. The Model Law is designed to be applicable to all public procurement within an enacting State: the objectives of the Model Law are best served by the widest possible application of its provisions. Consequently, article 1 of the text provides that the Model Law applies to all public procurement in the enacting State and the Model Law includes provisions that are suitable for all types of procurement, including defence and other sensitive procurement, as discussed in subsection *(b)* below.

41. For the same reason, and unlike in some other systems, there is no general threshold below which the Model Law's provisions do not apply, as explained in the **commentary in the Introduction to chapter I** in part II of this *Guide*, though there are some exemptions for low-value procurement as that commentary also explains.

42. The Model Law includes procedures for other circumstances that may be expected to arise in public procurement: standard procurement, urgent and emergency procurement and the procurement of specialized or complex items or services. Each method is tailored to the circumstances for which it is intended to be used, as explained in the commentary to section I of chapter II and each procurement method concerned in part II of this *Guide*.

43. The Model Law applies to procurement conducted in any form, be it traditional paper-based procurement, e-procurement or procurement using other emerging technologies. The same requirements of form and other standards apply to all such procurement.

44. The provisions of the Model Law can be adapted to provide appropriate rules and procedures for procurement systems in other contexts, whether at the sub-sovereign level or within publicly-funded organizations. In addition, in developing countries and countries whose economies are in transition, many projects may be funded by multilateral donors or by foreign direct investment. The Model Law includes procurement methods suitable for large-scale and complex projects, which may be adapted for the procurement aspects of privately-financed or donor-funded projects.

45. The Model Law provides a legal framework for the procedures to select a winning supplier or contractor, but does not regulate other phases of the procurement cycle or other aspects of a procurement system. The enacting State will therefore need to consider those other elements, many of which are considered in the section on **“Implementation and use of the UNCITRAL Model Law on Public Procurement”** below.

*(b) Inclusion of defence and security-related procurement*

46. Security-related procurement forms a significant sector of the domestic procurement market in many enacting States, including the procurement of arms, ammunition or war materials, procurement essential for national security or for national defence purposes and procurement involving other security-related items, such as those that might arise in the construction of prison facilities.

47. Traditionally (including in the 1994 Model Law), such procurement was exempted as a whole from legislation and supporting rules governing procurement. The present text brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law, so as to promote a harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law’s provisions. However, UNCITRAL is aware of the need for flexibility in such procurement and to allow for States to comply with relevant international obligations.

48. First, it is acknowledged that the Model Law’s extensive transparency obligations might not be compatible with all such procurement: some steps in the procurement process will require modification to accommodate

classified information, which by its nature may be sensitive or confidential. The modifications are permitted not because the procurement involves defence or other sensitive procurement per se, but because it involves classified information, as discussed in the section on **“Protecting classified information”** above and in more detail in the **Introduction to chapter I** in part II of this *Guide*.

49. Defence and other sensitive procurement often involve not only issues of security of information but also other particularities, such as the complexity and the need to ensure security of supply. For these reasons, the Model Law allows the use of such alternatives to open tendering as request for proposals with dialogue, competitive negotiations and single-source procurement if the procuring entity determines that the selected method is the most appropriate for the protection of essential security interests of the State. The commentary to chapter II discusses the use of procurement methods (among other things) in the context of defence and other sensitive procurement. Security of supply can also be addressed through the use of framework agreement procedures under chapter VII.

## *2. Essential elements and procedures of the Model Law*

50. At a minimum and in order to fulfil the objectives of the Model Law described above, the primary text regulating public procurement should include the following essential principles and procedures:

(a) That the applicable law, procurement regulations and other relevant information are to be made publicly available (article 5);

(b) Requirements for prior publication of announcements for each procurement procedure (with relevant details) (articles 33-35) and ex post facto notice of the award of procurement contracts (article 23);

(c) Requirements for items to be procured to be described in accordance with article 10 (that is, objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis);

(d) Requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, and the particular criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure to be advised to all potential suppliers or contractors (articles 9 and 18);

(e) A requirement for open tendering to be the recommended procurement method and for the objective justification for the use of any other procurement method (article 28);

(f) The availability of other procurement methods to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services) and conditions for use of these procurement methods (articles 29-31);

(g) A requirement for standard procedures for the conduct of each procurement procedure (chapters III-VII);

(h) A requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement (article 7);

(i) A requirement for mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force (article 22 (2)); and

(j) Mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII).

51. While it is intended that States should adapt the Model Law to local circumstances, including their legislative tradition, they should not compromise the Model Law's essential principles and procedures in so doing.

### 3. *Structure of the Model Law*

52. The Model Law comprises eight chapters, following the essential principles and procedures described immediately above.

53. Chapters I and II contain provisions of general application, and so delineate the main principles and procedures under which the system envisaged by the Model Law is intended to operate. In chapter I, provisions identify how the objectives set out in the Preamble are implemented, by regulating such matters as ensuring that all terms and conditions of any procurement procedure (notably, the rules under which it will operate, what is to be procured, who can participate and how responsive submissions and the winning supplier or contractor will be determined) are determined and publicized in advance. They also include institutional and administrative requirements—such as the issue of regulations and the maintenance of documentary records, which are necessary to allow the procurement system overall to function as intended. The **commentary in the Introduction to chapter I** and that on individual articles in part II of this *Guide* provide further detail of the general principles and their implementation.

54. The provisions governing a major decision in preparing for the selection/award phase of the procurement cycle—the choice of procurement method—are found in section I of chapter II. The Model Law contains a variety of procurement methods, reflecting developments in the field and evolving government procurement practice in recent years. The **commentary to section I of chapter II** and the procurement methods themselves in part II of this *Guide* discuss reasons for including various procurement methods in the Model Law, principles for selection among them and conditions for use of each procurement method.

55. Section II of chapter II contains provisions regulating the manner of solicitation for each procurement method, designed to ensure that the Model Law’s key principle of transparency is followed, as further elaborated in the commentary to that **section in part II** of this *Guide*.

56. Chapters III-VII contain the procedures for the procurement methods and techniques under the Model Law. These provisions are not intended to provide an exhaustive set of procedures for each method or technique, but to set out the framework for it, and the critical steps in the process. They are therefore intended to be supplemented by more detailed regulations, rules and/or guidance, as explained in the next section as well as in the **commentary to article 4** and in the commentary to each chapter in part II of this *Guide*.

57. Chapter VIII sets out a series of procedures that enable decisions in the procurement process to be challenged by potential suppliers and contractors. As the **commentary in the Introduction to that chapter** in part II of this *Guide* explains, there are wide variations among enacting States’ administrative and legal traditions concerning appeals against administrative decisions taken by or on behalf of a Government. The chapter provides for flexibility and guidance in this respect to allow those traditions to be reflected without compromising the essential principle—an effective forum must exist to allow all decisions in the procurement process, including choice of procurement method, to be challenged and, if necessary, appealed.

## **C. Implementation and use of the UNCITRAL Model Law on Public Procurement**

### ***1. The Model Law as a “framework” law: elements of a procurement system***

58. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In this

regard, the Model Law is a “framework” law that does not itself set out all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, legislation based on the Model Law should form part of a coherent and cohesive procurement system that includes regulations, other supporting legal infrastructure, and guidance and other capacity-building tools.

59. Addressing the procurement system in such a holistic manner will assist in developing the capacity to operate it, an important issue as the Model Law envisages that procurement officials will exercise limited discretion throughout the procurement process, such as in designing qualification, responsiveness and evaluation criteria and in selecting the procurement method (and manner of solicitation in relevant cases).

*(a) Regulations and other laws required to support the Model Law*

60. As a first step, the Model Law envisages that enacting States will issue procurement regulations to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State (such as the real value of thresholds for request for quotations, for example, and accommodating technical developments). Article 4 of the Model Law requires that the entity responsible for issuing procurement regulations be identified in the text of the law itself (as further explained in the **commentary to that article** in part II of this *Guide*. UNCITRAL intends to issue and publish on its website a paper highlighting the main issues that should be considered for the procurement regulations.

61. As regards other legal infrastructure, not only will procurement procedures under the Model Law raise matters of procedure that will be addressed in the procurement regulations, but answers to other legal questions arising will probably be found in other bodies of law (such as administrative, contract, criminal and judicial-procedure law). Procuring entities may need to take account of and apply employment and equality legislation, environmental requirements, and perhaps other requirements. The paper to be issued on procurement regulations referred to in the preceding paragraph will not consider issues that may need to be addressed in other regulations; other such regulations may include those on anti-corruption measures, on the authority to share information between agencies, those implementing international agreements, those on e-commerce and those addressing rules of procedure in challenges to procurement decisions. The

approach to regulating procurement should also be consistent with the enacting State's legal and administrative tradition, so that the procurement system operates under a cohesive body of law. Enacting States will enhance their procurement efficacy to the extent that the various legal and implementation issues are clearly disseminated and they and their interaction with procurement law are understood.

62. Considerations relating to the implementation of e-procurement are found in the section on **“Specific issues arising in the implementation and use of e-procurement”** below.

*(b) Additional guidance to support the legal structure*

63. Not all issues that will arise in the procurement process are capable of legal resolution such as through regulation: effective implementation and the operational efficacy of the Model Law will be enhanced by the issue of internal rules, guidance notes and manuals. These documents may operate to standardize procedures, to harmonize specifications and conditions of contract and to build capacity.

64. Rules and guidance notes on all aspects of procurement will themselves be further strengthened and supported by standard forms and sample documents. A combination of these measures has proved an effective toolkit in practice. Manuals and standard documents are used by international and regional organizations and other bodies active in procurement reform, both in the systems that they recommend and in their own internal systems. Those supporting documents are as a rule publicly available on the websites of those organizations and bodies.

*Debriefing*

65. One procedure that is not expressly mentioned in the Model Law, but is an important way of supporting the implementation of its objectives, is debriefing. Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful, as discussed in the **commentary to article 22** in part II of this *Guide*.

*(c) Institutional and administrative support for the legal structure*

66. The Model Law is also based on an assumption that the enacting State has in place, or will put into place, the proper institutional and administrative

structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law. However, it should be noted that by enacting the Model Law, a State does not commit itself to any particular administrative structure. The following discussion summarizes the types of support envisaged for the Model Law.

### *Administrative support*

67. At the administrative level, appropriate interaction between the systems for the management of public finances and procurement is a feature of good governance, and is also necessary to ensure compliance with the United Nations Convention against Corruption (and in particular, its article 9) (see paragraph 8 above). Budgeting requirements or procedures may be found in a variety of sources, and enacting States will wish to ensure that procuring entities are aware of all relevant obligations, such as whether budgetary appropriation is required before a procurement procedure may commence, and whether or not those obligations are part of the procurement system per se.

68. At the macroeconomic level, the actions of the Government as a buyer could lead to the consolidation of the market and consequential reduction of the number of participating suppliers or contractors, particularly where the Government purchases constitute a significant percentage of the market by volume or value. At the extreme, oligopolies or monopolies could be created or maintained. Procuring entities, taking decisions at the micro-economic level, will generally not be in a position to consider the longer-term macro-economic impact. For this reason, ensuring reporting and cooperation between agencies responsible for monitoring the public procurement function (such as a public procurement agency or other body as discussed in the next section) and that responsible for competition policy should be ensured. The competition agency may monitor collusion and bid-rigging, and concentration in public procurement and other markets.

69. As discussed in the **commentary to article 21** in part II of this *Guide*, the Model Law provides that seeking to give inducements, or having a conflict of interest or unfair competitive advantage leads to the exclusion of the supplier or contractor concerned from the procurement proceedings at issue. Enacting States, as that commentary also notes, may wish to introduce a system of sanctions, which may involve temporary or permanent exclusion from future procurements (and which may be called an administrative debarment or suspension process in some systems). Coordination of the procedures, including due process safeguards and transparency mechanisms, should be ensured among bodies that can invoke a debarment or suspension, and information on any suppliers or contractors that have been debarred or suspended should be available to all such bodies.

70. Enacting States may also wish to consider whether enforcement authority in competition-related and procurement-related matters is more effectively provided at a centralized rather than a decentralized level.

### *Institutional support*

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

(a) *Ensuring effective implementation of procurement law and regulations.* This may include the issue of the procurement regulations required by article 4 of the Model Law, the code of conduct required under article 26, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, issuing interpretations of those laws, and addressing conflicts of interest and other issues that may give rise to sanctions or enforcement action. Further discussion of these issues is found in the **commentary to articles 21 and 26** in part II of this *Guide*.

(b) *Rationalization and standardization of procurement and of procurement practices.* This may include coordinating procurement by procuring entities, and preparing standard documents and procedures as noted in the section on **“Additional guidance to support the legal structure”** above. This function may be particularly productive where the enacting State seeks to enhance the participation of SMEs in the procurement process.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include oversight of individual procurement procedures and the public procurement system (discussed later in this subsection), examining the impact of procurement on the national economy (such as monitoring concentration in particular markets and potential risks to competition, in conjunction with competition bodies as noted earlier in this section), analysing the costs and benefits of pursuing socio-economic objectives through procurement, rendering advice on the effect of particular procurement on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government.

(d) *Capacity-building.* The body could also be made responsible for training the procurement officers and other civil servants involved in operating the procurement system. A key feature of an effective procurement system based on the Model Law is the establishment of a cadre of procurement officials with a high degree of professionalism, especially at upper levels

within procuring entities, where critical decisions are taken. The advantages of considering procurement as a professional, rather than an administrative function, with its officials being on a par with other professionals in the civil service (engineers, lawyers and so forth and the members of tender committees) are well-documented at the regional and international level, both in terms of avoidance of corruption and in achieving economy or value for money. There are various bodies at the international level that specialize in certification and training of procurement officers, information regarding which is publicly available. Capacity-building programmes should be tailored to specific needs—to reflect existing levels of capacity, development needs, and the acquisition of more in-depth skills over time. Capacity-building is also needed in the private sector, to ensure that suppliers and contractors are familiar with and can participate in the procurement system, and may be particularly important where the enacting State seeks to enhance the participation of new entrants in the procurement market, including on the part of SMEs and historically disadvantaged groups.

(e) *Assisting and advising procuring entities and procurement officers.* Procurement officers may seek guidance on drafting internal documents for use within a procuring entity, and interpretations of specific aspects of law and regulations, or whether there is expertise elsewhere in the enacting State in the procurement of highly specialized or complex items or services. Technical or legal advice may already have been provided by the advisers to the Government, or within a particular procuring entity, but procurement officials may seek guidance from the body as to whether their intended actions (e.g. using an alternative procurement method or recourse to direct solicitation) are in compliance with the legislative framework. As noted below, advisers will not be effective as such if they also have an enforcement role.

In addition, practical difficulties commonly encountered in the work of the procurement personnel should also be addressed in the guidance from the body. For example, it may be difficult for procurement personnel to establish in their work the fact of corruption as opposed to a bribe, as the former might consist of a chain of actions over time rather than a single action. Differentiating conflicts of interest (which refers to a situation) from corruption (which is a wrongdoing) might also pose difficulties in practice. The enacting States may wish therefore to ensure monitoring practical difficulties encountered by the procurement personnel with the implementation of the code of conduct. It should ensure the involvement of the procurement personnel in regular training devised, where necessary with the involvement of other relevant agencies, to address these difficulties.

(f) *Certification.* In some cases, such as high-value or complex procurement contracts, the agency might alternatively be empowered to review the procurement proceedings to ensure that they have conformed to the

procurement law and to the procurement regulations, before the award is made or the contract enters into force.

72. A feature of many procurement systems in the past was the use of a prior-approval mechanism that required obtaining approval from outside the procuring entity for certain important actions and decisions of procuring entities (sometimes referred to as a centralized procurement function). The advantage of such a prior-approval system is to foster the detection of errors and problems before certain actions and final decisions are taken. In addition, it can provide an added measure of uniformity in a national procurement system and operate as capacity-building through the justification and consideration of the actions or decisions concerned. However, its use is decreasing. It is no longer encouraged by many donor agencies engaged in procurement reform and capacity-building, which advocate an approach that delegates decision-making to procuring entities themselves (sometimes referred to as a decentralized procurement function). The main reason given is that the use of a prior-approval system may prevent the longer-term acquisition of decision-making capacity, and may dilute accountability.

73. In some situations, such as urgent procurement, prior approval may be particularly inappropriate. One alternative to an external approval mechanism is to exercise oversight over procurement practices through ex post facto monitoring, including audit and evaluation. This approach can allow procurement officials to develop decision-making skills, and reporting mechanisms can allow the decisions to be assessed on both the individual and system-wide levels.

74. Accordingly, there is no provision for mandatory prior external approval in the Model Law at all. The Model Law does provide for an option to include an external approval mechanism in article 30 (2) (in the context of conditions for use of request for proposals with dialogue) and (5) (e) (in the context of conditions for use of single-source procurement to promote socio-economic policies), as further explained in the **commentary to that article** in part II of this *Guide*. In addition, the entry into force of the procurement contract can also be made subject to prior approval under article 22, as explained in the **commentary to that article** in part II of this *Guide*.

75. Where it decides to enact an external approval requirement, the enacting State will need to ensure that the requirement is set out in the procurement law. It should also designate the agency or other body or bodies responsible for issuing the various approvals, and to delineate the extent of authority conferred in this regard. An approval function may be vested in an agency or authority that is wholly autonomous of the procuring entity

(e.g. Ministry of Finance or of Commerce, or public procurement agency or other body) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. An approval decision is subject to challenge under chapter VIII of the Model Law, as are all decisions in the procurement process.

76. Where procuring entities are independent of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, States may find it preferable for any approval, certification or guidance function to be exercised by a body that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect.

77. Most importantly, where approval functions are concerned, the body must be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for these functions to be exercised by a committee of persons, rather than by one single person, to avoid the risk of abuse of the power conferred.

78. The procedures for any approval requirement should be clear and transparent, so as to avoid the use of the requirement to hold up the procurement process. In this regard, and in deciding on the level of external approval, if any, the enacting State will wish to take account of such matters as whether there is a large public sector with complex functions. In a federal State or one in which access to centralized authorities may be difficult, the potential delays where external approval is required may be significant.

79. Thresholds or guidance for types of procurement in which external approval may be sought can assist in allowing the use of a prior-approval mechanism without jeopardizing capacity acquisition over the longer term, though diluted accountability may result if decision-making responsibilities are divided or not clear. Any decision by an external approving body to disallow the use of a particular procurement method, or to reject the award of a contract, should be justified and included in the record of the procurement proceedings concerned as well as in their own records.

80. A related issue is the question of oversight and enforcement of procurement procedures and of the procurement system as a whole. Oversight structures and mechanisms may vary, but will be effective only to the extent that they are exercised by an entity that is independent of the decision taker—that is, of the procuring entity or any approving body. An alternative

structure for those systems in which the public procurement agency or other body exercises decision-making powers may be for oversight to be undertaken by a national audit body, which can also foster decision-making and capacity-building, and can allow the impact of procurement procedures to be assessed at the macroeconomic level. Similarly, and as regards the enforcement of compliance with the provisions of legislation based on the Model Law, enacting chapter VIII of the Model Law requires an independent review function. As noted above, an advisory function will be compromised if procurement officers are reluctant to use it for fear of subsequent enforcement action on the basis of information they provide when seeking advice.

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

## ***2. Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management***

82. The Model Law includes the essential procedures for the selection of suppliers and contractors for a given procurement contract, consistent with the objectives of the Model Law described above, and provides for an effective challenge mechanism if the rules or procedures are broken or not respected. The Model Law does not purport to address the procurement planning, or contract performance or implementation phase. Accordingly, issues such as budgeting, needs assessment, market research and consultations, contract administration, resolution of performance disputes or contract termination are not addressed in its provisions.

83. Nonetheless, UNCITRAL recognizes the importance of these phases of the procurement process for the overall effective functioning of the procurement system. The enacting State will need to ensure that adequate laws and structures are available to deal with these phases of the procurement process: if they are not in place, the objectives of the Model Law may be frustrated.

84. As regards procurement planning, international and regional procurement systems have moved towards encouraging the publication of information on forthcoming procurement opportunities, and some enacting States may require the publication of such information as part of their administrative law. Some other systems reduce time limits for procurement advertisements and notices where there has been such advance publication. The benefits of this practice accrue generally through improved procurement management, governance and transparency. Specifically, it encourages procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements. The Model Law encourages, but does not require, the publication of information on forthcoming procurement opportunities, as explained in the **commentary to article 6** in part II of this *Guide*.

85. The contract management phase, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of fair, equal and equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000)<sup>6</sup> and the accompanying *Model Legislative Provisions* (2004): many of the points made in these instruments apply equally to the management of all procurement contracts, particularly where the contract relates to a complex project.

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<sup>6</sup>The *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* and the *UNCITRAL Legislative Guide* on the same subject, available at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html).

### **3. Specific issues arising in the implementation and use of e-procurement**

86. Many of the benefits arising through e-procurement are derived from enhanced transparency. Advertising procurement opportunities on the Internet and the publication of procurement rules and procedures allows more relevant information to be made available at an acceptable cost than was the case in the paper-based world. E-advertising also enables suppliers or contractors to apply to participate in the procedure, and then to give and receive information, and to present tenders and other submissions online, yielding better market access as the market is opened up to entrants located far away and that might not otherwise participate. All these measures consequently lead to better participation and competition.

87. IT tools can enhance administrative efficiency in terms of both time and costs. The use of e-communications allows paper-related administrative costs and the time needed to send information in paper form to be reduced. Presenting tenders and other submissions online and e-procurement tools (e-reverse auctions and e-framework agreements, including e-catalogues) allow the procedures for purchases to be completed in hours or days rather than weeks or months.

88. Repeated purchases can be conducted using standard procedures and documents available to all system users through IT, enhancing uniformity and generating efficiencies. Automated processes can also provide additional measures to support integrity, by reducing human interaction in the procurement cycle and the personal contacts between procurement officials and suppliers and contractors that can give rise to bribery opportunities.

89. A longer-term, but equally important, potential benefit, is that the use of IT allows a more strategic approach to procurement, harnessing the data that IT can generate. This allows the pursuit of goals and performance to be guided by information and analyses rather than by procedures alone. Benefits through internal transparency, integrity support and efficiency savings can be achieved. Internal transparency and traceability—meaning better records of each procurement process—support performance evaluation, particularly where procurement systems are integrated with planning, budgetary and contract administration and payment systems—which themselves may include e-invoicing and payment. They give the ability to monitor, evaluate and improve not only individual procurement procedures but overall system performance and trends.

90. In the light of the above considerations, the general approach to the implementation and use of e-procurement in the Model Law is based on

three key considerations. First, given the potential benefits of e-procurement, and subject to appropriate safeguards, the Model Law facilitates and, where appropriate and to the extent possible, encourages its introduction and use. Secondly, as a consequence of rapid technological advance and of the divergent level of technical sophistication in States, the Model Law is technologically neutral (i.e. it is not based on any particular technology). Thirdly, detailed guidance is needed to support enacting States in introducing and operating an e-procurement system effectively.

91. UNCITRAL recognizes that a fully-integrated e-procurement system and linking it with other public financial and asset management systems will involve a lengthy reform programme. Such a system will encompass budgeting and planning, the selection or award process, contract management and payment systems, with different considerations for each phase of the procurement process and for integration with other parts of the overall system. In practice, many e-procurement systems that are introduced have taken years to provide the full benefits envisaged, and the most effective implementation has been often undertaken in a staged manner, which can also assist in amortizing the investment costs. However, significant benefits in terms of enhancing transparency and competition can be obtained in the early stages of the introduction of e-procurement, which generally focus on making more and better information available on the Internet.

92. As regards the facilitation and encouragement of e-procurement, the Model Law provides for the publication of procurement-related information on the Internet, the use of IT for the communication and exchange of information throughout the procurement process, for the presentation of submissions electronically and for the use of procurement methods facilitated by IT and the Internet (in particular, e-reverse auctions, and e-framework agreements, including e-catalogues). The detailed considerations arising from specific aspects of e-procurement are discussed in part II of this *Guide*: in the commentary to articles 5 and 6 as regards e-publication, to article 7 as regards means and form of communication in procurement, to article 40 as regards e-tenders, to chapter VI as regards e-reverse auctions and to chapter VII as regards e-framework agreements, including e-catalogues.

93. As regards technological neutrality, the Model Law does not recommend any particular technology, but describes the functions of available technologies. It has been drafted to present no obstacle to the use of any particular technology. The Model Law does not include any references or form requirements that presuppose an exclusively paper-based environment (see, further, the commentary to **article 7** on communications in procurement and **article 40** on the presentation of tenders). It does contain references to “documents”, “written communication”, “documentary evidence” and “signature”

but these terms are becoming more commonly used to refer to all information and documents (whether electronic or paper-based) in those countries in which e-government and e-commerce are widespread, but, in others, the assumption may be of a paper-based environment. The Model Law is drafted so that all means of communication, transmission of information and recording of information can be used in procurement procedures carried out under legislation based on the Model Law, and so these terms in the text should not be interpreted to imply a paper-based environment.

94. As regards guidance to introduce and operate an e-procurement system effectively, it will be clear from the foregoing that the reforms concerned involve far more than simply digitizing existing practices: if paper communications are simply replaced with e-mails, Internet-based communications, and advertising procurement opportunities on a website, many of the above benefits will not materialize. Further, weaknesses in a traditional procurement system will be transported to its new, digital equivalent. An overhaul of an entire procurement system to introduce e-procurement involves a significant investment, but it should be considered as an opportunity to reform the entire procurement process, to enhance governance standards, and to harness IT tools for the purpose.

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

96. An initial consideration in addressing this issue is whether the general regulation of, or permission to use, e-procurement is to be addressed in procurement law or in the general administrative law of an enacting State. As noted in the preceding section, the Model Law is not a complete protocol for procurement: procurement planning, contract administration and the general supporting infrastructure for procurement are addressed elsewhere. Even if the Model Law were to provide for a general recognition of electronic documents and communications, it would not cover all documents, information exchange and communications in the procurement cycle and there may be conflicts with other legal texts on electronic commerce. The solution

adopted in the Model Law therefore, is to rely on laws of the enacting States, including general electronic commerce legislation to enable e-procurement, adapting them as necessary for procurement-specific needs. Enacting States will therefore first need to assess whether their general electronic commerce legislation enables e-procurement in their jurisdictions.

97. For this purpose, enacting States may wish to adapt the series of electronic commerce texts that UNCITRAL has issued: the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).<sup>7</sup> These texts provide a general recognition of electronic commerce and electronic signatures: if enacted in a State, they provide the general legal requirements for the use of e-procurement. They rely on what has been called a “functional equivalent approach” to electronic commerce, which analyses the functions and purposes of traditional requirements for paper-based documents and procedures and assumes fulfilling those requirements using information technologies. This approach has also been followed for procurement-specific applications of e-commerce in the Model Law.

98. Because the approach is functional, it encompasses the notion of technological neutrality (as described above) and avoids the imposition of more stringent standards on e-procurement than have traditionally applied to paper-based procurement. It is important to note that more stringent standards will operate as a disincentive to the use of e-procurement, and/or may elevate the costs of its use, and its potential benefits may be lost or diluted accordingly. Further, there will be risks of paralysis of a system should any technology that it mandates become temporarily unavailable. An additional reason for applying technological neutrality is to avoid the consequences of a natural tendency to over-regulate new techniques or tools in procurement or to follow a prescriptive approach, reflecting a lack of experience and confidence in the use of new technologies, which would also make their adoption more difficult than it needs to be.

99. Another implication of this approach is that no definitions of the terms “electronic”, “signature”, “writing”, “means of communication” and “electronic data messages” are included in the Model Law. Definitions of the main terms needed for effective electronic commerce transactions do appear in the UNCITRAL electronic commerce texts described above. For example, article 2 of the UNCITRAL Model Law on Electronic Commerce describes “data message” as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to,

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<sup>7</sup>Available at [http://www.uncitral.org/uncitral/uncitral\\_texts/electronic\\_commerce.html](http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html).

electronic data interchange, electronic mail, telegram, telex or telecopy”. The Model Law itself addresses issues specific to procurement that are not addressed in general e-commerce legislation, such as the need for precise times of receipt of e-tenders, and the importance of preventing access to their contents until the scheduled opening (see the **commentary to article 40** in part II of this *Guide*).

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

101. Indeed, the use of IT can impede market access in some circumstances, posing a constraint on full implementation of e-procurement. The problem may be temporary, and can arise directly and generally (e.g. where the electricity supply or broadband access is unreliable, or where electronic documents have doubtful legal validity), or can be an indirect consequence of e-procurement and limited to certain suppliers or contractors, such as SMEs and small suppliers or contractors that might not have the resources to purchase suitably fast Internet access or to participate in larger contracts that e-procurement can encourage. The Model Law contains safeguards to address the risks and constraints, which are discussed in the **commentary to article 7** in part II of this *Guide*.

102. As regards the setting-up of procurement systems, a first issue is the structure and financing of the system. Some systems are set up to be self-financing through outsourcing to a third-party agency, which levies charges on suppliers or contractors that use them, an approach that has been on the rise as e-procurement systems have been implemented. Outsourcing may be administratively efficient, and particularly so where specialist IT systems need to be designed, run and administered, but can involve risks. Commentators have observed both decreasing participation and competition where charges are levied, and the potential for institutional conflicts of interest (that is, the agency or body running the system seeks to increase its revenues by encouraging procuring entities to overuse the system). These risks may be enhanced if designing a system is outsourced, with the main aim of introducing it swiftly and relatively cheaply, to those that will run it. Enacting States will therefore wish to consider the costs and benefits of self-financing systems and outsourcing parts of the procurement system while designing a reform programme that includes e-procurement.

103. A related issue is the use by procuring entities of proprietary information technology systems and specialist software for e-procurement. Market access is enhanced if procuring entities allow all potential suppliers or contractors to participate without charge. But procuring entities using proprietary information technology systems and specialist software may be under significant pressure to recoup the costs of their e-procurement systems (including the costs of managing them) and the only way they can do so is by charging participants a fee for such use. The Model Law does not require procuring entities to allow all potential suppliers or contractors to participate in e-procurement opportunities at no charge, but it is strongly recommended that they do so. Enacting States may wish to consider using off-the-shelf or open-source software or other non-proprietary IT in their e-procurement systems, as long as such systems do not impose unnecessary restrictions or otherwise impede market access. If they are not already required to do so, enacting States may wish to comply with the interoperability requirements of the WTO GPA (see paragraph 8 above) or of regional trade agreements, many of which have interoperability requirements similar to those of the WTO GPA.

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

105. Applying the principles of functional equivalence and technological neutrality discussed above to safeguards is also necessary to manage the requirements for e-procurement. For example, specific safeguards for communication and confidentiality of e-tenders or other e-submissions would inevitably set higher standards of security and integrity than those applicable in paper-based environment (because there are very few, if any, such

standards set in the paper-based world). Such specific standards may fail to allow for the risks that paper-based communications have always involved.

106. The first safeguard is to ensure the authentication of communications, i.e. ensuring that they are traceable to the supplier or contractor submitting them, which is commonly effected by electronic signature technology and systems that address responsibilities and liabilities in matters of authentication. Relevant rules may either be specific to a procurement system or may be found in the State's general law on electronic systems. The concept of technological neutrality means in practice that procurement systems should not be automatically restricted to any one authentication technology. Some such systems are based on a local certification requirement. Accordingly, and in order to avoid the use of e-procurement systems as instruments to restrict access to the procurement, the system should ensure the recognition of foreign certificates and associated authentication and security requirements, by disregarding the place of origin (as recommended in the UNCITRAL e-commerce texts (see paragraph 97 above)). In this regard, enacting States will need to consider which communications, such as tenders or other submissions, require full authentication, and which communications could allow other mechanisms for establishing trust between the procuring entity and suppliers or contractors. This approach is not novel: the 1994 Model Law applied different requirements to lesser and more important communications in the procurement process (see article 9 (2)), and the Model Law has preserved this distinction (see article 7).

107. Another requirement is for integrity, so as to protect the information from alteration, addition or manipulation or, at least, that any alteration, addition or manipulation that takes place can be identified and traced. A related issue is "security", meaning that time-sensitive documents, such as tenders, cannot be accessed until the scheduled opening time. These issues are discussed in more detail in the **commentary to article 40** in part II of this *Guide*. Enacting States may also wish to consider the functional and technical requirements for e-tendering systems by reference to the standards set by a working group of the multilateral development banks dealing with issues of electronic government procurement, which can be found on the working group's website.

*Part two*

**COMMENTARY ON THE TEXT OF  
THE UNCITRAL MODEL LAW  
ON PUBLIC PROCUREMENT**



## *Note*

*This part of the Guide contains commentary on the text of the Model Law, starting with the Preamble. Thereafter, it sets out commentary on each chapter of the Model Law. The commentary to each chapter commences with an introduction comprising a summary, a discussion of enactment policy considerations, and a discussion of issues regarding implementation and use, and continues with a more detailed consideration of each article. This approach has been slightly modified as regards the provisions of chapter II of the Model Law to allow for easier reading.*

## **PREAMBLE**

### **A. Introduction**

1. The Model Law commences with a Preamble that sets out the objectives of the text. The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for suppliers or contractors. It is recommended that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law.
  
2. The effective implementation of the objectives can only take effect through cohesive and coherent procedures based on the underlying principles, and where compliance with them is evaluated and, as necessary, enforced. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State will create an environment in which the public is better assured that the government purchaser will spend public funds with responsibility and accountability, and thus will obtain value for money. It will also be the environment in which parties offering to sell to the Government are confident of receiving fair, equal and equitable treatment and that abuse is addressed. The six objectives of the Model Law as set out in the Preamble are considered separately below. It should be noted that the objectives have not been assigned a priority. That is, all are important but not every objective can always be achieved in every procurement; much will depend on the circumstances.

## B. Commentary on the objectives of the Model Law

### 1. *Maximizing economy and efficiency in procurement*

3. “Economy” in procurement means an optimal relationship between the price paid and other factors, which include the quality of the subject matter of the procurement, and presupposes that the public purchaser’s needs are in fact met. “Efficiency” in procurement means that the relationship between the transaction costs and administrative time of each procurement procedure and its value are proportionate. “Efficiency” also includes the notion that the costs of the procurement system as a whole are also proportionate to the value of all procurement conducted through that system. These concepts may be referred to differently in other systems (“economy” often being termed “value for money” or “best value”). As noted elsewhere, for example in the **commentary in the Introduction to chapter VII on framework agreement procedures**, there may occasionally be situations in which the objectives of economy and efficiency may conflict.

4. As regards economy, the Model Law allows the procuring entity the flexibility to determine what will constitute value for money in each procurement and how to conduct the procurement procedure in a way that will achieve it. Specifically, the procuring entity has a broad discretion to decide what to purchase, and in determining what will be considered responsive to the procuring entity’s needs (article 10), who can participate and on what terms (articles 9, 18 and 49) and the criteria that will be applied in selecting the winning submission (article 11).

5. Article 11 also allows the procuring entity to include in the evaluation criteria that will determine the winning supplier or contractor a broad range of elements relating to the subject matter of the procurement, including price, life-cycle costs and quality considerations. Subject matter-related criteria may also include disposal (sale or decommissioning) costs. Evaluation criteria can also reflect socio-economic policies, which themselves may include the social and environmental impact of procurement. See, further, the **section on “Socio-economic policies”** in part I of this *Guide* and the **commentary to article 11**. The procuring entity also has the discretion to decide which relative weights to assign to the elements included in its evaluation criteria.

6. While the Model Law mandates open tendering as the default procurement method for normal circumstances not involving special needs, it permits the use of alternative procurement methods where justified and in the circumstances set out in articles 29-31, as explained in the commentary to

**section I of chapter II.** The main such situations envisaged include simple and low-value procurement, repeated or indefinite procurement, procurement of complex items or services and urgent/emergency procurement. The procuring entity's discretion therefore extends, within prescribed limitations, to the identification of the appropriate procurement method, allowing the method that is most likely to lead to best value for money to be selected. Prescribed rules and procedures are also applied for the conduct of each procurement method, so as to ensure that the method operates as intended to allow value for money to be achieved, and to avoid abuse and corruption.

7. The flexibility offered by the Model Law and the use of discretion as outlined above are subject to rigorous transparency mechanisms that, among other things, allows the oversight of the decisions concerned, discussed in the commentary to the articles of chapter I noted above and on each procurement method.

8. As regards efficiency, the Model Law provides flexible procedures to ensure that the administrative time and costs of conducting each procurement procedure are proportionate to the value of that procurement. The procedures for low-value or simple procurement and for repeated or indefinite procurement (restricted tendering, request for quotations, electronic reverse auctions and framework agreements) are procedurally simpler and may be quicker to operate, particularly when operated electronically, than open tendering. The benefits of e-procurement in terms of efficiency are discussed in **part I** of this *Guide*.

9. The Model Law mandates public and unrestricted solicitation as a general rule. Direct solicitation, which involves inviting a limited number of suppliers or contractors to participate so as to facilitate effective competition in the procurement proceedings, imposes a lesser administrative burden, and is either an inherent feature of certain procurement methods, or an option in some others (and in the latter case, the use of direct solicitation has itself to be justified). These issues are further explained in the commentary to **section II of chapter II**.

10. The Model Law also provides tools designed to facilitate the oversight of the procurement process and so to allow economy and efficiency to be assessed. Among them is the record of each procurement process required by article 25, the advance notice required in most cases of direct solicitation under articles 34 (5) and 35 (4) and a public notice of the award required to be given under article 23. Where the records are maintained electronically, evaluating the performance of the procurement system as a whole also becomes possible, as discussed in the section on **"Specific issues arising in the implementation and use of e-procurement"**

in part I of this *Guide*. The proceedings and results of any debriefing (described in the **commentary to article 22 under subheading “Debriefing”**) and of any challenges under chapter VIII, which should and must be included in the record respectively, can support such evaluations.

11. The flexibility and the use of discretion indicated above also presuppose a certain level of skills and experience on the part of the individuals conducting the procurement concerned. The sections of this *Guide* discussing selection of a procurement method and solicitation under chapter II will assist those engaged in designing and implementing the procurement system in deciding whether some elements of flexibility as described above should be restricted through more detailed regulation and guidance (e.g. while capacity-building takes place).

***2. Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade***

12. As an instrument designed to support and promote international trade, the default rule under the Model Law is that procurement is “open” to all potential suppliers or contractors irrespective of nationality. There are limited circumstances in which international participation can be restricted (directly or indirectly), which are set out in articles 8-11 of the Model Law. The effect of these provisions is that, and as the **Introduction to chapter I** below discusses in the context of implementing socio-economic policies, there can be no restrictions on participation based on nationality unless such restrictions have been designed within the limited constraints available under the Model Law. The relevant provisions allow the procurement to be declared domestic-only (see article 8 and its **commentary**), and the inclusion of restrictions on overseas participants in the qualification requirements, description or evaluation criteria (see articles 9-11 and the **commentary** thereto). All such restrictions may be included only to the extent that the procurement regulations or other laws in the enacting State so permit. As that commentary also notes, enacting States will need to take into account any relevant international trade obligations regarding international participation in their procurement, if they wish to implement these restrictions into their domestic legislation.

13. International participation is encouraged through the default requirement for international advertisement in all procurement proceedings, with limited exceptions, so that foreign suppliers or contractors can become aware of procurement opportunities. International advertisement and exceptions to the default rule are discussed in the **commentary to section II of chapter II**.

14. Broad participation in procurement proceedings is a pre-requisite for effective competition. Consequently, the Model Law's provisions are also based on the notion that the procurement is open to all potential suppliers or contractors unless they are found not to be qualified (under articles 9 and 18). A key feature of qualification requirements under these articles is that they must be appropriate and relevant in the circumstances of the procurement, so as to prevent the unfair exclusion of suppliers or contractors. The other permissible exception to the principle of open participation is where the circumstances of the procurement justify restricting participation (as explained regarding open and direct solicitation in the **section on "Maximizing economy and efficiency in procurement"** above and in the **commentary to section II of chapter II**).

15. The principle of public and unrestricted participation is implemented in the Model Law in that direct solicitation (other than in competitive negotiations and single-source procurement) does not mean that the procuring entity may simply select its favoured suppliers or contractors and invite them to participate. The Model Law requires all suppliers or contractors in the market concerned to be invited to participate in restricted tendering proceedings under article 34 (1) (a) and in request-for-proposals proceedings under article 35 (2) (a). Where the procuring entity is granted the discretion to set a limit on the number of participants, in restricted tendering proceedings under article 34 (1) (b) and in request-for-proposals proceedings under article 35 (2) (b), the number must be set and the participants chosen in a non-discriminatory manner. Finally, in request-for-quotations proceedings under article 34 (2), at least three suppliers or contractors must be invited to participate. These requirements are discussed in detail in the **commentary in the Introduction to chapter IV**. During the procurement procedure, participating suppliers or contractors have a right to present submissions, and those submissions must be examined and evaluated.

16. The Model Law also encourages the participation of suppliers or contractors by requiring the terms and conditions of the procurement to be determined and publicized at the outset and, to the extent feasible, to be objective (see, further, the next section).

### ***3. Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement***

17. Competition in procurement means that all potential suppliers or contractors engage in a rigorous contest for the opportunity to sell to

the Government, or that a sufficient number of suppliers or contractors present submissions to ensure that there is such a contest. Competition is therefore a key element of a system geared to maximizing value for money in public procurement. Suppliers or contractors will compete in fact where they are confident that they have all necessary information to allow them to submit their best offers, and where they are confident that their submissions will be objectively assessed. The Model Law's measures to instil "integrity, fairness and public confidence in the system", and to require "fair, equal and equitable treatment" (objectivity) and "transparency" (see the next sections) are therefore examples of mutually supporting obligations.

18. There are few explicit references to the notion of competition in the text of the Model Law; nonetheless the promotion of the broadest and most rigorous competition appropriate in the circumstances of the given procurement is an implicit feature of the text. The following measures are examples of how the Model Law creates the conditions for effective competition. The selection of procurement method, which is a key area in this regard, must be made with a view to "maximizing competition" in the circumstances of the procurement (article 28). In practical terms, and among other things, this requirement means permitting the broadest appropriate participation, as a manner of creating the conditions in which rigorous competition can take place. There are also express requirements to have a sufficient number of participants to ensure effective competition in electronic reverse auctions (article 31 (1) (b)), restricted tendering (article 34 (1) (b)), competitive negotiations (34 (3)) and request for proposals with dialogue (article 49 (3) (b)), because in those methods the procuring entity can limit the numbers of participating suppliers or contractors.

19. In certain circumstances, such as the procurement of highly complex items, however, competition is best assured by limiting the number of participants. This apparently paradoxical situation arises where the costs of participating in the procedure are high—unless the suppliers or contractors assess their chances of winning the ultimate contract as reasonable, they will be unwilling to participate at all. In the methods designed under the Model Law to accommodate the procurement of such highly complex items—restricted tendering and request for proposals with dialogue—the procuring entity can limit the numbers of participating suppliers or contractors, as noted above, to ensure effective competition.

20. Procurement of larger and more complex items and services may naturally take place in a more limited market with fewer players, often known to each other. This could increase risks of collusion. Collusion occurs when two or more suppliers or contractors, or one or more suppliers or

contractors and the procuring entity, work in tandem to manipulate and influence competition in the procurement concerned or in subsequent procurement procedures. Collusion may therefore lead to or be a result of the corruption of the procuring entity. The manipulation may affect the price, keeping it artificially high, or the response to the terms and conditions of the procurement (such as the quality offered). Other manipulations could involve agreements to share the market by artificially inflating prices or artificially distorting other terms and conditions of the procurement, or agreements not to present submissions, or otherwise to distort the process of competition. A result of collusion is an erosion of the State's purchasing power.

21. Enacting States should also be aware of risks of creating oligopolies where there are repeated procurements or long-term procurements in markets without many potential suppliers or contractors.

22. Measures in the Model Law to address risks of operating in markets with relatively few players include broadening the market by advertising internationally, allowing foreign participants to participate, and scaling the Government's purchases to avoid excessively consolidating or concentrating the market concerned. They are explained in more detail in the commentary to Restricted tendering and Request for proposals with dialogue, and in the commentary to chapter VI. Electronic reverse auctions and to chapter VII. Framework agreement procedures, below.

23. While procurement laws and regulations can impose such measures as obligations to advertise and conduct open procurement on procuring entities, considering the macroeconomic effects of government purchasing will need to be undertaken at a central level. Enacting States should establish capacity in its procurement and competition agencies to monitor the extent of real competition in public procurement and potential cases when the benefits of economies of scale can be outweighed by disadvantages of large-scale contracting.

24. Enacting States should be aware of practical difficulties and lack of specialized capacity in procuring entities to identify and prevent collusive practices, in particular because there is no automatic link between the extent of competition and the presence or absence of collusion. The absence of competition may be due to an absence of expertise on the part of suppliers or contractors, or suppliers or contractors may be ignorant about procurement opportunities. The collusion involves more than a lack of competition; it involves an intention to distort the market. An apparently competitive process might hide collusion among some suppliers and contractors. Enacting States should therefore devise mechanisms for cooperation and coordination among

competent authorities of the State in this respect. (See in this context the discussion in part I of this *Guide* on “**Institutional support**” for the legal structure envisaged in the Model Law.)

25. Achieving the objectives discussed in the next sections will enhance the likelihood of ensuring effective competition in fact.

#### ***4. Providing for the fair, equal and equitable treatment of all suppliers and contractors***

26. The phrase “fair, equal and equitable treatment” is an umbrella term used to denote the concept of non-discrimination and objectivity in taking procurement decisions that affect suppliers and contractors. UNCITRAL has decided to include the notion of “equal treatment” in the Model Law to make it clear that this notion is no less part of this objective than it is in other systems that refer expressly to equal treatment. The Model Law includes many provisions implementing this objective, designed to ensure that all participants are aware of the rules governing procurement in the system concerned and have an equal opportunity to enforce them. They include the requirement for open participation in procurement, with limited exceptions, as described in the section on “**Fostering and encouraging participation...**” above. Full and unrestricted participation is supported by provisions in article 9 requiring qualification criteria to be appropriate and relevant to the procurement at hand, and those in article 10 requiring descriptions of what is to be procured to be objective, functional and generic to the extent practicable, to use standard terms where possible and to avoid references to trademarks, trade names and likes. Along with the safeguards requiring the evaluation criteria under article 11 to relate as a general rule to the subject matter of the procurement, these provisions are aimed at ensuring that suppliers or contractors compete on an equal footing. Article 7 on the rules of communication is designed not to allow suppliers or contractors to be excluded from the procurement process through discriminatory application of rules on the form or means of communication.

27. The procedures under the Model Law are also designed to ensure equality and fairness. There are rules addressing the clarification of information submitted (article 16), rules to ensure that requirements for tender securities are objective (article 17), procedures to be followed for rejection of abnormally low submissions (not as such but because they create a contract performance risk) (article 20) and rules stating that late tenders must be rejected (article 40) and that the award of contract is to be made only on

the basis of pre-disclosed criteria (article 11, applied in procedural articles in chapters III-VII). At that stage, the successful submission must be accepted and the contract must be awarded to the winning supplier or contractor unless that supplier or contractor is determined to be unqualified, has submitted an abnormally low tender, is excluded for reasons of inducement or unfair competitive advantage or a conflict of interest, or the procurement is cancelled (articles 22 (1) and 43 (5)). Finally, all potential suppliers or contractors can challenge the procuring entity's decisions under chapter VIII, including a decision to exclude them from the procurement.

### ***5. Promoting the integrity of, and fairness and public confidence in, the procurement process***

28. Integrity in procurement involves both the avoidance of corruption and abuse and the notion of personnel involved in procurement applying the rules of the Model Law and, in so doing, acting ethically and fairly, avoiding conflicts of interest. It requires the procurement system to be devoid of institutionalized discrimination or bias against any particular group, as the rules on participation discussed in the relevant sections above reflect, and that the application of the Model Law's provisions by the procuring entity does not bring results contrary to the objectives of the Model Law.

29. The Model Law's procedures to ensure objectivity, and fair, equal and equitable treatment, are also designed to promote integrity. They are supported by: express requirements for a code of conduct to address conflicts of interest (article 26, implementing the requirement in the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) for a system to address declarations of interest of personnel in procurement); rules providing for the mandatory exclusion of a supplier or contractor where there is an attempt to bribe a procurement official, or where a supplier or contractor has an unfair competitive advantage or a conflict of interest (article 21); provisions ensuring the protection of confidential information (article 24); the requirement for all decisions in the procurement process to be recorded in the record of procurement proceedings (article 25); rules on disclosure of information from the record to participants and (ex post facto) to any person (article 25, subject to confidentiality restrictions, and as further discussed in the section on "Achieving transparency" below); and the challenge mechanism that is open to all suppliers or contractors, with public notifications (in chapter VIII).

30. The oversight mechanisms to oversee the discretion inherent in the system (as described in the section on **"Maximizing economy and**

**efficiency in procurement”** above) will support integrity, particularly where they are accompanied by public reporting of relevant findings. Integrity may be further enhanced by linking the code of conduct referred to in article 26 of the Model Law with applicable general standards of conduct for civil servants and any further provisions addressing integrity and prevention of corruption in other national laws and regulations. Public confidence will also be enhanced where enforcement of the rules is clearly visible, and transgressions appropriately punished.

31. In addition, the institutional support described in the section **“Additional guidance to support the legal structure”** in part I of this *Guide* are designed to ensure the appropriate separation of responsibilities and appropriate conduct on the part of agencies and officials. The applicable requirements of other branches of law in the enacting State should be made clear to procuring entities so as to avoid inconsistent development within the system. These steps will also encourage public confidence in the public procurement system as will a Government that takes enforcement proceedings when breaches of the law occur.

## ***6. Achieving transparency in the procedures relating to procurement***

32. Transparency in procurement involves five main elements: the public disclosure of the rules that apply in the procurement process; the publication of procurement opportunities; the prior determination and publication of what is to be procured and how submissions are to be considered; the visible conduct of procurement according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed and to enforce them if necessary.

33. As noted in the section on **“Maximizing economy and efficiency in procurement”** above, the use of discretion under the Model Law involves a balance that allows the procuring entity to identify what to procure and how best to conduct the procurement. Transparency is a tool that allows this exercise of discretion to be monitored and, where necessary, challenged; it is considered a key element of a procurement system that is designed, in part, to limit the discretion of officials, and to promote accountability for the actions or decisions taken. It is thus a critical support for integrity in procurement and for public confidence in the system, as well as a tool to facilitate the evaluation of the procurement system and individual procurement proceedings against their objectives.

34. Transparency measures therefore feature throughout the Model Law. They include requirements that all legal texts regulating procurement should

be made promptly and publicly available (article 5), non-discriminatory methods of communication (article 7), the determination of qualification, examination and evaluation criteria at the outset of the procurement and their publication in the solicitation documents (articles 8-11), the wide publication of invitations to participate and all conditions of participation (e.g. in articles 33, 39 and 47-49) in an appropriate language (article 13), the publication of the deadline for presentation of submissions (article 14), the disclosure to all participants of significant further information provided during the procurement to any one participant (article 15), the public notice of any cancellation of the procurement (article 19), the regulated manner of entry into force of the procurement contract, including a “standstill” period (article 22), and the publication of contract award notices (article 23) and notices of procurement involving direct solicitation (articles 34 (5) and 35 (4)). The Model Law also contains prescribed and publicly available procedures for each method of procurement and procurement technique (in chapters III-VII), including in tendering proceedings an opening of tenders in the presence of suppliers or contractors that submitted them (article 42). In addition, certain information regarding the conduct of a particular procurement must be made publicly available *ex post facto*, and participants are entitled to further information, all of which must be included in a record of the procurement (article 25).

35. Some specific transparency requirements, such as on the public opening of tenders, the publication of contract award notices and the exhaustive contents of the mandatory record of the procurement, allow compliance with the prescribed procedures to be assessed. In particular, the provisions on the record of procurement proceedings promote traceability of the procuring entity’s decisions, a key function. A divergence from the rules may be apparent from examining the records of meetings, further underscoring the benefits of electronic data maintenance in procurement, as discussed in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*.

## **CHAPTER I. GENERAL PROVISIONS**

### **A. Introduction**

#### *1. Summary*

1. The commentary to chapter I of the Model Law discusses the manner in which the Model Law implements its objectives (see, also the commentary to the Preamble).

2. Articles 1 to 6 of the chapter provide the framework for the procurement system envisaged in the Model Law, regulating its scope, general features, and the interaction of the Model Law and an enacting State's international and any federal obligations. It requires the issue of procurement regulations by a body identified in the law (to support the implementation of the Model Law in the enacting State concerned) (article 4) and the publication of legal texts of general application applicable to procurement (article 5). It also encourages publicity of information on possible forthcoming procurement (article 6). Related to that general framework for the procurement system is the final article in the chapter (article 26), which requires the issue and disclosure of a code of conduct for officers or employees of procuring entities.

3. The remainder of the chapter (articles 7-25) sets out the general principles that apply to each procurement procedure carried out under the Model Law. The articles are presented to follow the chronological order of a typical procurement procedure as closely as is feasible in a text that addresses a variety of such procedures. These articles require all terms and conditions of the procedure to be both determined prior to the commencement of the procedure and disclosed at the outset. The terms and conditions include a description of what is to be procured and who can participate; how communications during the procurement procedure will be made; they regulate what information is to be communicated and the manner in which responsive submissions and the winning supplier or contractor will be determined; they also regulate any exclusion of a supplier or contractor, any rejection of abnormally low submissions and any cancellation of the procurement; and how the procurement contract comes into force (articles 7-22). Article 23 requires the award of the contract (with limited exceptions) to be publicized; and article 24 addresses the

confidentiality of information communicated during the procurement process. Article 25 links the procurement process with the administrative requirement for a documentary record of the procedure, which allows effective oversight of the procedure and of the performance of the system as a whole. Article 25 also contains provisions requiring the disclosure of many parts of that record to participants and more limited elements to the general public, subject to any necessary confidentiality restrictions.

4. These provisions, taken together, are designed to ensure that the rules for procurement under a Model Law-based domestic law are clear and available to all participants and to the general public. They are therefore a key element of transparency, and also help to promote public confidence and integrity in the system

## ***2. Enactment: policy considerations***

5. The policy considerations arising in connection with each article are discussed in the commentary to each article in the chapter. In this section, certain policy issues that arise more generally in the chapter, and the interaction of a procurement law based on the Model Law with other laws in the enacting State concerned, are considered.

6. Recalling that the chapter regulates the general legal framework for the procurement system envisaged under the Model Law, as described in the preceding section, the main objective is to ensure a level and competitive playing field for each procurement procedure, supporting wide market access and encouraging participation in the process through rigorous requirements for objectivity and transparency. The procedures concerned also facilitate the accountability of procurement officials, by providing a clear statement of the main rules that govern their duties. (The general rules governing the selection of procurement method and manner of solicitation are addressed in chapter II.)

7. The nature of this general legal framework is such that there are fewer options in chapter I for enacting States than are found in subsequent chapters of the Model Law. As a result, and in order to ensure that the law is of sufficient breadth and rigour, enacting States are encouraged to enact the chapter in full, subject to any changes necessary to ensure a coherent body of law in the State concerned, and assuming the issue of procurement regulations required by article 4.

8. As regards interaction with other domestic law, article 2 contains minimum definitions that UNCITRAL recommends for the proper functioning of a procurement law. Enacting States may wish to adapt the number and style of definitions to ensure consistency with their general body of law and the State's approach to legal drafting. Guidance on the scope of individual elements of the suggested definitions is set out under the **commentary to article 2** below. Where the tradition in an enacting State would indicate a more comprehensive set of definitions, enacting States may wish to draw upon the descriptions of procurement-related terms used in the Model Law in a glossary that UNCITRAL will issue and publish on its website. This glossary will include descriptions of terms that have not been defined in the Model Law, but are commonly used as procurement terms by suppliers, contractors, procuring officials and their advisers; it will also discuss terms that may carry a different meaning under the Model Law from those in other international or regional instruments regulating public procurement.

9. The Model Law uses legal terms that may not be the norm in all enacting States. For example, the terms relating to types of insolvency in article 9 may not be those used in insolvency laws of some countries. (Here, the Model Law draws on the terminology used in the UNCITRAL texts on insolvency, such as the *Legislative Guide on Insolvency Law and the Model Law on Cross-Border Insolvency*,<sup>8</sup> which include explanations of the proceedings involved). In addition, the Model Law also presumes that the scope of classified information (referred to in, for example, articles 7 and 24) is clear in the legal system of the enacting State, as further explained in the **commentary to article 2**. Enacting States should ensure consistent terminology across their legislation to avoid confusion and ensure consistency in interpretation and application.

10. Certain provisions contained in chapter I are intended to operate in conjunction with other laws in the enacting State. The Model Law therefore presumes that such laws are in force or will be enacted in the State concerned in conjunction with its procurement law. If this approach is not possible in the enacting State, the procurement law should address the issues concerned. In addition to the assumption of general authority allowing the State to act as a contracting party, the main other laws that are referred to in chapter I are summarized in the following paragraphs.

11. First, the provisions in article 7 allowing for all means of communication in and around the procurement process, including e-communications, assume that the enacting State has effective legislation to allow for

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<sup>8</sup> Available at [http://www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html).

e-commerce. As the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide* and the **commentary to article 7** below explain, the UNCITRAL texts on e-commerce (see paragraph 97 of part I of this *Guide*) provide the necessary legal recognition for e-communications and are a readily available tool to facilitate e-procurement which, as noted in the section and the commentary referred to above, has significant potential to support and enhance the achievement of the objectives of the Model Law.

12. Secondly, the provisions in articles 8-11 that permit the enacting State to use its procurement system to pursue socio-economic policies, as explained in **subsection 3 (b) of this section** and in the commentary to articles 8 to 11 below, permit only those socio-economic policies to be accommodated through procurement that are set out in the procurement regulations or other provisions of law. Article 11 also cross-refers to a margin of preference that can be applied when evaluating submissions, which must similarly be authorized in the procurement regulations or other provisions of law of the enacting State.

13. Thirdly, article 17 on tender securities cross-refers to any law that may require the non-acceptance of a security issued outside the enacting State. More generally, the form and means of issue of tender securities may be subject to other laws in the enacting State.

14. Fourthly, in some States, the norms applicable to civil servants will require the procuring entity to substantiate decisions taken in the procurement process by reference to the reasons and circumstances and legal justifications. Article 25 on the documentary record of procurement proceedings lists the decisions concerned (cross-referring to the articles that deal with those decisions) and can serve as a checklist to ensure that the appropriate requirements are reflected in relevant domestic enactments as necessary. The list of information in article 25 is not exhaustive: the procurement law or procurement regulations of the enacting State may require further information to be included in the record (this could be necessary in order to transpose from contracts law or other branches of law of the enacting State relevant requirements to the procurement legal framework).

15. As regards the domestic implications of international agreements and obligations of an enacting State, article 3 is designed to allow the procurement law to take due account of those agreements and obligations, as explained in the section on the **“International context of the Model Law”** in part I of this *Guide* and in the **commentary to article 3** below.

### 3. *Issues regarding implementation and use*

16. The main requirements for effective implementation and use of the Model Law, in addition to the issue of complementary laws as described in the preceding section, are the issue of regulations to complete the legal framework, and the provision of adequate administrative and institutional support for the Model Law, as explained in the section on **“Institutional and administrative support for the legal structure”** in part I of this *Guide*. In subsections (a)-(c) of this section, certain implementation and use issues that arise more generally in the chapter are considered.

17. The issue of regulations is discussed in detail in the **commentary to article 4** below, and the **commentary on “Regulations and other laws required to support the Model Law”**. As noted in that section, UNCITRAL intends to issue and publish on its website a paper highlighting the main issues that should be considered for regulation.

18. In the section **“Institutional and administrative support for the legal structure”** in part I of this *Guide*, procuring entities are encouraged to share information and otherwise coordinate with the public procurement agency or other body described in that section and other bodies addressing competition, corruption and sanctions for breaches of laws and procedures. Regulations or legal authority may be required to allow for sharing information between agencies. Relevant provisions in chapter I include article 21 on the exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements, an unfair competitive advantage or conflicts of interest, article 24 on confidentiality and article 25 on documentary record of procurement proceedings, in particular requirements contained therein on the disclosure of parts of the procurement record. Coordination between the procuring entity and other bodies may also be appropriate, for example, to ensure that the code of conduct required under article 26 functions appropriately with general rules governing the conduct of civil servants in the enacting State.

19. This discussion of institutional and administrative support also notes that such support includes rules and guidance for the users of the Model Law, to be issued by a public procurement agency or other body (and to be supported by training).

20. The nature of the chapter, which sets out the general principles that apply to each procurement procedure, is such that many issues of implementation and use arise in the context of each such general principle. Regulators and those providing guidance on the institutional and administrative support for the legal structure may wish to consider the relevant issues in the light of the commentary to each article.

21. More generally, and as noted in the preceding section, the definitions in article 2 are not intended to provide an exhaustive list of procurement-related terms used in the Model Law. For this reason, UNCITRAL intends to issue the glossary referred to above. The public procurement agency or other body may be required to adapt the glossary to local circumstances and ensure its wide dissemination.

22. There are three main issues regarding implementation and use of chapter I that arise from groups of articles in the Model Law and that are further highlighted in this section: they are the issue of low-value procurement and thresholds, the implementation in practice of socio-economic policies through procurement and the measures designed to protect classified information. They are considered in the following subsections.

*(a) Low-value procurement and thresholds*

23. As noted in the section on “**Scope of the Model Law**” in part I of this *Guide*, the Model Law is intended to be of general application to all public procurement in an enacting State. Consequently, there is no general threshold amount for the application of the Model Law. However, chapter I does refer to threshold amounts below which certain requirements of the Model Law are relaxed. Article 22 (3) (b) exempts low-value procurement from the mandatory application of a standstill period and article 23 (2) exempts such procurement from the requirement for public notice of the contract award. (Chapter II also contains an upper threshold for the use of request for quotations under article 29 (2).) In all these cases, the Model Law defers the identification of the threshold to be applied to the procurement regulations. This is because it is not possible for the Model Law to set out a single threshold for low-value procurement that will be appropriate for all enacting States, and the appropriate thresholds for each State may change with inflation and under other economic circumstances. It is for the body that issues the procurement regulations to consider the appropriate value or values for all such thresholds.

24. In other instances where references to low-value procurement are found, the Model Law does not require explicit thresholds to be set out in the procurement regulations. For example, invitations to pre-qualification and tendering proceedings need not be published internationally where the procuring entity decides that, in view of the low value of the subject matter of the procurement, only domestic suppliers or contractors will be interested in presenting submissions (articles 18 (2) and 33 (4)). The commentary to those articles explains that the exemption from the requirement to publish internationally does not affect the right of suppliers and contractors, wherever located,

to participate in the procurement advertised only domestically should they so choose.). In addition, one of the grounds justifying the use of one type of restricted tendering and direct solicitation in request-for-proposals procedures is that the time and cost required to examine and evaluate a large number of submissions would be disproportionate to the value of the subject matter of the procurement (see articles 29 (1) (b) and 35 (2) (b)).

25. The agency or body issuing the procurement regulations should consider the appropriate approach to what is treated as “low-value” procurement, notably whether there can and should be one amount below which procurement is treated as low-value. For example, should the procurement regulations fix one threshold for all instances where the procurement law refers to a low-value threshold (including the upper limit for the use of request for quotations), whether that value should apply to all instances of “low-value procurement” references found in the law (even those that do not contain explicit references to a low-value threshold, as explained above), or whether circumstances indicate that different thresholds and amounts are appropriate.

*(b) The implementation in practice of socio-economic policies through procurement*

26. As noted in the section on “**Socio-economic policies**” in part I of this *Guide*, the procuring entity may implement the enacting State’s socio-economic policies through procurement, to the extent that the international obligations of the State concerned so permit and that the policies are set out in the law of that State, or in its procurement regulations.

27. Examples of socio-economic policies that have been encountered in practice and objectives commonly pursued and implemented through procurement include allowing for the extent of local content, including manufacture, labour and materials, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment and innovation, the transfer of technology and the development of managerial, scientific and operational skills, the development of SMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, and the improvement of the rights of women, the young and the elderly, and people who belong to indigenous and traditional groups.

28. The Model Law accommodates pursuing such policies through several articles in chapter I. The main provisions concerned are found in articles 8-11. They permit the procuring entity, in limited circumstances, and

solely in order to promote the Government's socio-economic policies, to restrict procurement to domestic suppliers (in article 8 (1)), and to impose minimum qualification requirements relating to socio-economic policies (in article 9). Article 9 expressly allows the procuring entity to impose environmental qualifications, and ethical and other standards that could include fair trade requirements. Alternatively, or in addition, the procuring entity can define its minimum requirements regarding those policies, which will (among other criteria) determine whether a submission is responsive (in article 10), and can design its evaluation criteria to give credit for compliance with socio-economic policies beyond any required minimum (in article 11). Finally, a need to pursue a particular socio-economic policy can operate to justify the use of single-source procurement under article 30 (5) (*e*).

29. The provisions of article 8 (1) constitute an exception to the general rule that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality. (Article 8 (2) of the Model Law permits limitations in participation on other grounds; e.g. set-aside projects for disabled.) The general rule is meant to promote transparency and to prevent arbitrary and excessive restriction of foreign participation, and is given effect by a number of provisions, such as: procedures designed to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify or for pre-selection are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors (article 18 (2) and 33 (2)); a declaration on limitation of participation is to be made by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings (article 8 (3)); the part of the record of procurement proceedings open for public inspection must include a statement of the reasons and circumstances on which the procuring entity relied to impose such limitations (articles 8 (4) and 25 (1) (*d*) and (2)); and the procuring entity must provide its reasons for limiting the participation to any person, upon request (article 8 (5)).

30. The general rule is also reflected in the express prohibitions against discrimination through qualification requirements, or examination or evaluation criteria in articles 9-11: article 9 (6) states that, subject to article 8, "the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable". The rules on description of the subject matter of the procurement provide that, also subject to article 8, no description of the subject matter of a procurement may be used that may restrict participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction on the basis of nationality (article 10 (2)).

31. Further procedures designed to ensure transparency in the process are found in the requirements of articles 39, 47 and 49 to set out socio-economic criteria in the solicitation documents in exactly the same manner as other criteria for qualification, and examination and evaluation of submissions.

*Preferences on the basis of nationality or the place of origin of the subject matter of the procurement*

32. One of the commonly encountered ways of pursuing and implementing socio-economic policies through public procurement is to grant preferences to suppliers or contractors on the basis of their nationality or on the basis of the origin of the subject matter of procurement. These preferences are usually given to domestic suppliers or contractors or domestically produced or provided items or services, but may be extended to suppliers or contractors of other nationalities as well. For example, the funds being used for procurement can be derived from a bilateral tied-aid arrangement. Such an arrangement may require that procurement should be from the donor country's suppliers or contractors. Similarly, recognition can be given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from sanctions imposed by the United Nations Security Council. All of these possibilities have been considered by UNCITRAL when drafting the Model Law.

33. While the provisions of article 8 apply to all procurement, as explained above, the provisions of article 11 also permit the procuring entity to use the technique referred to as the "margin of preference" in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering local capacities, without resorting to purely domestic procurement. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. The margin of preference permits the procuring entity to select a submission from a local firm as the successful supplier or contractor when the difference in price (or price when combined with quality scores) between that submission and the overall lowest-priced or most advantageous submission falls within the range of the margin of preference.

(c) *Classified information*

34. As noted in the section on **“Protecting classified information”** in part I of this *Guide*, the provisions in the Model Law allow for exceptions to transparency mechanisms for the protection of classified information. “Procurement involving classified information” itself is defined in article 2 (l) and discussed in the **commentary to that definition**. As the definition provides, “classified information” refers to information designated as classified by an enacting State under national law. It is often understood as information to which access is restricted by law or regulation to particular classes of persons. The term, and therefore the flexibility conferred as regards classified information, refers not only to procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector in which protection is conferred (such as in designing sensitive construction facilities or addressing certain medical issues). Importantly, and to avoid abuse, the provisions do not confer any discretion on the procuring entity to expand the definition of “classified information”. (Classified information should therefore be contrasted with more general confidential information that is protected under article 24.)

35. The authority granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting public disclosure exemptions, applies only to the extent permitted by the procurement regulations or by other provisions of law in the enacting State. The requirement for a case-by-case consideration is applied by article 7, which requires the procuring entity to specify, when first soliciting participation in a procurement involving classified information, if any measures and requirements are needed to protect that information at the requisite level, and what those measures are. If it takes these steps, the procuring entity must provide reasons in the record under article 25 (1) (v): these safeguards are designed to ensure that the potential significance of the exemptions is appropriately considered and that the procuring entity (which determines whether sufficient grounds exist to lift normal transparency requirements) can explain and justify its actions.

36. Examples of the measures that may be invoked include the protection of certain parts of the record from disclosure under articles 25 (4) and 7 (3) (b), which permit the procuring entity to make special provision to protect classified information when setting out the means and form of communications in a particular procurement procedure. The procuring entity may also impose requirements to protect classified information on suppliers and contractors and subcontractors under article 24 (4).

37. Nonetheless, various parts of the Model Law impose certain transparency mechanisms in procurement involving classified information: in particular, the solicitation documents must set out where the law relating to classified information can be found (see, for example, articles 39 (t), 47 (4) (f), 49 (5) (i) and 53 (1) (q)).

## **B. Article-by-article commentary**

### *Article 1. Scope of application*

The purpose of article 1 is to delineate the scope of application of the Model Law. The Model Law covers all types of public procurement, as that term is defined in article 2 of the text. The broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in public procurement makes it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the Model Law contain provisions that are intended to accommodate in particular procurement involving sensitive issues, such as procurement involving classified information. (See the **discussion of classified information** in part I of this *Guide* and in the Introduction to this chapter above; see also the commentary to articles 2 (1), 7 and 24 (4) below).

### *Article 2. Definitions*

1. The purpose of article 2 is to define at the outset of the Model Law terms used repeatedly in the Model Law, in order to facilitate the reading and understanding of the text. The commentary to this article is intended to be supplemented by a glossary, as noted in the Introduction to this chapter above.
2. The definition of “electronic reverse auction” (definition (d)) encompasses all the main features of a reverse auction, in particular its online character. This broad definition is designed to emphasize that the Model Law does not regulate other types of auctions, even though they may be used in public procurement practice in some jurisdictions, as explained in the Introduction to chapter VI below.
3. The reference to “acquisition” in the definition of “procurement” (definition (j)) is intended to encompass purchase, lease and rental or hire purchase, with or without an option to buy. The definition also refers to goods, construction and services, though the Model Law does not require a strict classification

of what would constitute goods, construction and services as it does not provide different procurement methods for goods, construction and services. The Model Law uses the term “subject matter of the procurement” to address what is to be procured, also because a strict separation between goods, construction and services is often not possible. Nevertheless, as explained in the **commentary to** section I of chapter II of the Model Law, some procurement methods under the Model Law may be more appropriate, for example, in the procurement of services than of goods and construction. Enacting States may traditionally have used a strict classification of items and general guidance. If the enacting State wishes to continue with this approach to classification, the public procurement agency or other body should ensure that the law is adapted to allow for it, and the classification is available to all potential users of the system.

4. The references in the plural to suppliers and contractors in the definition of “procurement contract” (definition (*k*)) are intended to encompass, inter alia, split contracts awarded as a result of the same procurement proceedings. For example, article 39 (*g*) of the Model Law stipulates that suppliers or contractors may be permitted to present tenders for only a portion of the subject matter of the procurement. In such situations, the procurement proceedings will result not in a single contract concluded with a single supplier or contractor but in several contracts concluded with several suppliers or contractors. The wording “at the end of the procurement proceedings” in the same definition is intended to encompass procurement contracts concluded under a framework agreement procedure, but not the awarded framework agreements.

5. The term “classified information” in the definition “procurement involving classified information” (definition (*l*)) is intended to refer to information that is classified under the relevant national law in an enacting State. As noted in the Introduction to this chapter, the term “classified information” is understood in many jurisdictions as information to which access is restricted under authority conferred by law to particular classes of persons. The need to deal with this type of information in procurement may arise not only in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (e.g. where sensitive medical research and experiments may be involved). The term is used in the Model Law in the provisions that envisage special measures for protection of this type of information, in particular exceptions from public disclosure and other transparency requirements. Because of the risk of abuse of exceptions to these requirements, the Model Law does not confer any discretion on the procuring entity to expand the scope of “classified information” and

it is recommended that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature. The definition, where it is used in the Model Law, is supplemented by the requirement in article 25 on the documentary record of procurement proceedings to include in the record any requirements imposed during the procurement proceedings for the protection of classified information.

6. With reference to the definition of “procuring entity” (definition (n)), the Model Law is intended primarily to cover procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State, reflecting differences in the allocation of legislative competence among different levels of government. Accordingly, subparagraph (n) (i), defining the term “procuring entity”, presents options as to the levels of government to be covered. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central government as well as to provincial, local or other governmental subdivisions of the enacting State. This option would be adopted by non-federal States, and by federal States that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national government. In subparagraph (n) (ii), the enacting State may extend the application of the Model Law to certain entities or enterprises that are not considered part of the government, if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

(a) Whether the Government provides substantial public funds to the entity, or a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) Whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) Whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) Whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(e) Whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) Whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose, and whether the public law applicable to government contracts applies to procurement contracts entered into by the entity.

7. As noted in the section on **“Purchasing by groupings of procuring entities ...”** in part I of this *Guide*, procurement can be undertaken by groups or consortia of procuring entities, including from various States, and they can collectively be considered as a single “procuring entity”. The definition of “procuring entity”, with particular reference in the definition to a “multiplicity [of departments, agencies, organs or other units or subdivisions]” without indicating an association with any particular State, is therefore intended to accommodate participation by such groups or consortia, including in the transnational procurement context.

8. As noted in the **discussion of socio-economic policies** in part I of this *Guide* and in the Introduction to this chapter above, the definition of “socio-economic policies” (definition (o)) is not intended to be open-ended, but to encompass only those policies set out in the law of the enacting State or in the procurement regulations, and those that are triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that socio-economic policies (a) are not determined on an ad hoc basis by the procuring entity, and (b) are applied across all government purchasing, so that their costs and benefits can be seen. Under authority of the law, there may be one or more organs in an enacting State with the power to promulgate socio-economic policies in an enacting State. Rules on the application of such policies should impose appropriate constraints on procuring entities, in particular by prohibiting the ad hoc adoption of policies at the discretion of the procuring entity; such policies are open to misuse and abuse, such as through favouritism. For the use of such policies, which are generally implemented to confer some advantage to national suppliers or contractors, see articles 8-11 and the **commentary thereto**.

9. At the end of the definition of “socio-economic policies”, the enacting State is given an option to provide an illustrative list of socio-economic policies applicable in the enacting State. A discussion of the types of policies that have been encountered in practice, and which may be used to form the basis of such a list, is found in the discussion of socio-economic policies in the Introduction to this chapter above. It should be noted that such policies evolve over time and even if were such a list drafted as an exhaustive list, it would become outdated. It is therefore recommended that any list should remain illustrative to avoid the need to update the law every time the socio-economic policies of the enacting State are amended.

10. The definition of “solicitation” (definition (*p*)) is intended to differentiate “solicitation” from “the invitation to participate in the procurement proceedings”. The latter has a broader scope: it may encompass an invitation to pre-qualify (under article 18) or an invitation to pre-selection (under article 49). The meaning of “solicitation” in each procurement method is different: in tendering, solicitation involves the invitation to submit tenders (in open and two-stage tendering, the invitation is public, while in restricted tendering the invitation is addressed to a limited group); in request-for-proposals proceedings, solicitation involves an invitation to present proposals (which may be public or addressed to a limited group); in competitive negotiations, solicitation involves an invitation to a limited group to take part in negotiations; in request for quotations, solicitation involves addressing the request to a limited group but a minimum of three must be invited; in electronic reverse auctions used as a stand-alone procurement method, where initial bids are requested for assessment of responsiveness or evaluation, solicitation starts with an invitation to present initial bids (the invitation is public, as in open tendering); in simpler electronic reverse auctions used as a stand-alone procurement method, not involving assessment or evaluation of initial bids, solicitation takes place after the opening of the auction, when those participating in the auction are requested to bid; and in single-source procurement, solicitation involves a request to present either a quotation or proposal, addressed to one supplier or contractor. The notions of “public and unrestricted” and “direct” solicitation are explained in the commentary to section II of chapter II.

11. The definition of a “solicitation document” (definition (*q*)) is generic and encompasses essential features of the documents soliciting participation in any procurement method. These documents are issued by the procuring entity and set out the terms and conditions of the given procurement. In some procurement methods, the term “solicitation documents” is used; in others, alternative terminology appears. For example, in the provisions of the Model Law regulating request-for-proposals proceedings, the reference is to a “request for proposals”, which contains the solicitation information. Regardless of the term used in each procurement method in the Model Law, the solicitation documents also encompass any amendments to the documents originally issued. Such amendments may be made in accordance with articles 14 and 15; in two-stage tendering, additionally under the provisions of article 48 (4); and in request-for-proposals-with-dialogue proceedings, in accordance with article 49.

12. Although the Model Law refers to “tender security” (definition (*u*)), this reference does not imply that this type of security may be requested only in tendering proceedings. The definition is not intended to imply either that more than one tender security can be requested by the procuring entity

in any single procurement proceeding that involves the presentation of revised proposals or bids. As the **commentary to article 17** on tender securities below explains, the article does not itself prohibit more than one tender security per proceeding. However, it explains why UNCITRAL discourages such “multiple” tender securities in any given procurement.

13. The expression “other provisions of law of this State”, as used in article 2 and in other provisions of the Model Law, refers not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In some States, a general reference to “law” would suffice to indicate that all of the above-mentioned sources of law were being referred to. In others, a more detailed reference to the various sources of law is warranted in order to make it clear that reference is made not merely to statutes.

*Article 3. International obligations of this State relating to procurement  
[and intergovernmental agreements within [this State]]*

1. The purpose of the article is to explain the effect of international treaties on national implementation of the Model Law. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the WTO GPA (see **paragraph 8 of part I** of this *Guide*) and the members of the European Union are bound by regulations on procurement applicable throughout the Union. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by their regional groupings. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to their respective guidelines or rules. The purpose of subparagraphs (a) and (b) of the article is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law. The article thus establishes a general prevalence of international treaties over the provisions of the Model Law on the understanding, however, that more stringent requirements may be applicable under international treaties or agreements but international commitments should not be used as a pretext to avoid the safeguards of the Model Law.

2. The article also allows States to adhere to international requirements, such as those imposed by United Nations Security Council anti-terrorism

measures or sanctions regimes. Such measures or regimes may require States to refrain from dealing with certain States or individuals, including in the procurement context. Article 8 on participation by suppliers or contractors supplements article 3 in this respect by envisaging ways of reflecting and enforcing such international requirements through procurement.

3. The text in square brackets in this article is relevant to, and intended for consideration by, federal States. Subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to inter-governmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

4. The provisions of the article need to be adapted to constitutional requirements of the enacting State. For example, reference in subparagraph (b) to “agreements entered into by this State” may need to be amended to clarify that agreements entered meant agreements that are not only signed but also ratified by the legislature, in order for them to be binding in an enacting State.

5. It is envisaged that the enacting State will enact the provisions of the article only to the extent that they do not conflict with its constitutional law.

#### *Article 4. Procurement regulations*

1. The purpose of article 4 is to highlight the need for procurement regulations to fulfil the objectives and to implement provisions of the Model Law. As noted in the section on **“Implementation and use of the UNCITRAL Model Law on Public Procurement”** in part I of this *Guide*, the Model Law is a “framework law”, setting out basic legal rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate organ or authority of the enacting State. The “framework law” approach enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly indicate that they should be supplemented by procurement regulations (see paragraph 3 of this section below for examples of such provisions, and a paper highlighting the main issues for the procurement regulations is to be found on the UNCITRAL website). Furthermore,

the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the procurement regulations should not contradict the Model Law or undermine the effectiveness of its provisions.

2. Reference to the “procurement regulations” should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes. Those legal traditions may also delineate issues that are more commonly addressed through guidance. For a discussion on importance of taking a holistic approach in regulations, rules, guidance and other implementing texts to ensure that the system envisaged under the Model Law works in practice, see the section on **“The Model Law as a ‘framework’ law...”** in part I of this *Guide*, the relevant commentary in the Introduction to this chapter above, and the paper highlighting the main issues for the procurement regulations referred to above.

3. The main examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 18 (2), 23, 33 (1) and 34 (5)); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5)); grounds for limiting participation in procurement (article 8); calculation of margins of preference and application of socio-economic policies in evaluation of submissions (article 11); estimation of the value of the procurement (article 12); requirements as regards the duration of a stand-still period (article 22 (2) (c)); requirements as regards the documentary record of procurement proceedings (article 25 (1) (w) and (5)); the maximum duration of closed framework agreements (article 59 (1) (a)); code of conduct (article 26); and limitation of the quantity of procurement carried out in cases of urgency using competitive negotiations or single-source procurement (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the **commentary to the relevant provisions of article 30 (4) and (5)**).

4. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings (article 8); authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 11); and use of request for quotations, since that method of procurement may be used only for procurement whose value is below threshold levels set out in the procurement regulations (article 29 (2)).

*Article 5. Publication of legal texts*

1. The purpose of article 5 is to ensure the transparency of all rules and regulations applicable to procurement in an enacting State. Any interested person should know which rules and regulations apply to procurement at any given time and where they can be found if necessary.
2. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision is considered to be particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful even where such a requirement exists, as a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.
3. In many countries, there exist official publications in which legal texts referred to in the paragraph are and can be routinely published. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and in a manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. In order to ensure easy and prompt public access to the relevant legal texts, an enacting State may wish to specify the manner and medium of publication in procurement regulations or refer in those regulations to legal sources that address publicity of statutes, regulations and other public acts. This approach would also provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of the proliferation of media and sources of information as the use of traditional paper-based means of publishing information has declined. Transparency in practice may be considerably impeded if abundant information is available from many sources, whose authenticity and authority may not be certain.
4. The enacting State should envisage the provision of relevant information in a centralized manner at a common place (the “official gazette” or equivalent) and should establish rules to define the relationship of that single centralized medium with other media where such information may appear. Information posted in a single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in the centralized medium, and require that the same information published in different media must contain the same data. The centralized

medium should be readily and widely accessible. Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by the procurement law, and all amendments thereto, because this will be against objectives of the Model Law to foster and encourage competition, to promote the integrity of and public confidence in the procurement process and to achieve transparency in the procurement procedures.

5. Regulations, rules or other supporting guidance should also spell out the meaning of the requirements in the paragraph for documents promptly to be made “accessible” and “systematically maintained”. The requirement for prompt public access includes timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user.

6. In practical terms, the requirement for the information to be “accessible” means that the information must be capable of being accessed, and read without having to request access. It must remain readable, comprehensible and capable of retention. It implies proactive actions from designated State authorities (such as publication in official media) to ensure that the intended information reaches the public. The requirement for “systematic maintenance” means that the designated State authority must ensure that the information is in fact up-to-date and so reliable: the manner in which this obligation is discharged should be itself documented so that compliance can be monitored.

7. Paragraph (2) of the article deals with a distinct category of legal texts—judicial decisions and administrative rulings with precedent value. These legal texts do not fall within the scope of paragraph (1) since their nature and source are different. The texts covered by paragraph (2), unlike the texts referred to in paragraph (1), generally enter into force usually from the moment of their promulgation by a court or a competent administrative body of the State. No strict requirements like those appearing in paragraph (1) of the article apply to the access to information envisaged in paragraph (2) of the article. This is because access to judicial decisions, for example, may be regulated by the judicial branch without interference from other branches of government. The public may need to request a copy of a judicial decision from the court concerned or judicial decisions may be made freely available by courts to the public. It is understood that information covered by paragraph (2) may not be available as promptly as that covered by paragraph (1). Nonetheless, for the provision to have the intended positive effect, delays in giving access to the information concerned are to be discouraged. Although the requirement for systematic maintenance does not apply to the texts covered by paragraph (2), enacting States are encouraged to ensure that

relevant and timely updates about them are provided (e.g. where decisions or rulings are overturned in whole or in part or they are subject to the ongoing appeal). The information covered by paragraph (2) like the one covered by paragraph (1) must remain readable and capable of interpretation and retention.

8. Depending on legal traditions and the procurement practices by various procuring entities in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraphs (1) or (2) of the article: such matters may include interpretations of the items discussed in the Introduction to this chapter above. The enacting State may wish to consider making amendments to the article to ensure that they are covered.

9. In addition, taking into account that non-paper means of publishing information reduce the costs, time and administrative burden of publishing and maintaining information, it may be considered to be best practice to publish other texts of relevance and practical use and importance to suppliers and contractors, in order to achieve transparency and predictability, and to encourage suppliers and contractors to compete. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect the general rights and obligations of suppliers and contractors.

10. The Model Law, while not explicitly addressing the publication of these texts, does not preclude an enacting State from expanding the list of texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

11. Laws and regulations of the enacting State shall regulate which State organs are responsible for fulfilling the obligations under this article. In accordance with a number of provisions of the Model Law (such as

article 39 (t)), the procuring entity will be required to include in the solicitation documents references to laws, regulations and other legal texts directly pertinent to the procurement proceedings.

### *Article 6. Information on possible forthcoming procurement*

1. The purpose of article 6 is to highlight the importance of proper procurement planning for procuring entities and suppliers and contractors alike. The article recommends the publication of information on future procurement, which may contribute to transparency throughout the procurement process and eliminate any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way.

2. Article 6 does not require the publication of such information—the provisions are permissive. Flexibility is needed because information and needs may change with circumstances; not only may the procuring entity's time and costs be wasted, but suppliers or contractors may also incur unnecessary costs. Making available abundant, irrelevant or misleading information, rather than carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information. The procuring entity should assess whether such publication is appropriate and would further transparency in particular in the light of the requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*).

3. Paragraph (1) of the article enables and is intended to encourage the publication of information on forthcoming procurement opportunities and procurement plans. The reference in paragraph (1) is made to long-term general plans rather than information about short-term procurement opportunities or any particular forthcoming procurement opportunity (the latter is the subject of paragraph (2) of the article). The enacting State may consider it appropriate to highlight the benefits of publishing such information for strategic and operational planning. For example, publication of such information may discipline procuring entities in procurement planning, and diminish cases of “ad hoc” and “emergency” procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers and contractors to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation.

4. Enacting States may provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The enacting States may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period.

5. Paragraph (2), unlike paragraph (1), refers to an advance notice of a particular forthcoming procurement opportunity. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the procuring entity's needs before any procurement procedure is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the IT sector) to see whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the procurement as planned by the procuring entity. On the basis of the data collected, the procuring entity may take a more informed decision as regards the most appropriate procurement method to be used in the forthcoming procurement. This advance notice should not be confused with a notice seeking expressions of interest that is usually published in conjunction with request-for-proposals proceedings.

6. The optional publication referred to in paragraphs (1) and (2) is not intended to form part of any particular procurement proceeding. Publication under paragraph (1) is a step in a long or medium-term plan while publication under paragraph (2) may shortly precede the procurement proceedings. As stated in paragraph (3) of the article, when published either under paragraphs (1) or (2), the publicized information does not bind the procuring entity in any way, including as regards future solicitations. Suppliers or contractors are not entitled to any remedy if the procurement as pre-publicized does not take place at all, or takes place on terms different from those pre-publicized.

7. The article is of general application: the procuring entity is encouraged to publish the information referred to in paragraphs (1) and (2) regardless of the type and method of procurement envisaged. Enacting States and procuring entities should be aware, however, that publication of this information is not advisable in all cases. Imposing a requirement to publish this type of information is likely to be burdensome; it may also interfere in the budgeting process and the procuring entity's necessary flexibility to handle its procurement needs. The publication of such information may also

inadvertently facilitate collusion. The position under the Model Law is therefore, as reflected in the article and paragraph (2) of this section, that the procuring entity should have the discretion to decide on a case-by-case basis on whether such information should be published, but it is considered that the default position should be to publish, unless there are considerations indicating to the contrary.

8. The enacting State may wish to stipulate in the procurement regulations the place and means of publishing information referred to in the article. In regulating this issue, it may wish to take into account the **commentary to article 5** above, which raises considerations relevant to article 6. Consistency in regulation of issues related to publication of all types of procurement-related information under the Model Law should be ensured (see also the commentary to articles 18 (2), 23 and 33-35 below).

#### *Article 7. Communications in procurement*

1. The purpose of article 7 is to seek to provide certainty as regards (i) the form of information generated and communicated in the course of procurement proceedings under the Model Law; (ii) the means to be used to communicate such information; (iii) the means of satisfying all requirements for information to be in writing or for a signature, and of holding any meeting of suppliers or contractors (collectively referred to as “form and means of communication”); and (iv) requirements and measures taken to protect classified information in procurement involving such information.

2. As regards the form and means of communication, the position under the Model Law is that, in relation to the procuring entity’s interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to encourage the participation of suppliers and contractors in procurement proceedings, without obstructing the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of any particular technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that may be subject to regulation by other branches of law.

3. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word “accessible” in the paragraph is meant to imply that the reader has direct access to the

information concerned, which should also be readable and capable of interpretation and retention. The word “usable” in the article is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. Adequate reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in the UNCITRAL e-commerce texts (see **paragraph 97 of part I of this Guide**): like those texts, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph (3) (a) of the article.

4. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross references to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (e.g. when the procuring entity asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in the form prescribed in paragraph (1) of the article (i.e. that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair, equal and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist in verifying and enforcing compliance with this requirement and overuse of this exception might create a risk of abuse, including corruption and favouritism. Therefore, the enacting State may wish to monitor the use of this exception as part of its general oversight of the procurement process.

5. Consistent with the general approach of the Model Law that the procuring entity is responsible for the design of the procurement proceedings, paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or a combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with chapter VIII of the Model Law, they may challenge the procuring entity's decision in this respect. The exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

6. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and the means of communications for a given procurement. These requirements may be changed by issuing an addendum to the originally published information, in accordance with article 15 of the Model Law. The procuring entity has to make it clear whether one or more than one form and means of communication can be used and, in the latter case, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper backup when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may, at the outset of a given procurement, envisage that a change in the form requirements and/or means of communications may be required. This situation might arise, for example, in procurement processes that will extend over a relatively lengthy period, such as procurement of highly complex items or procurement involving framework agreements. In such a case, the procuring entity, apart from reserving the possibility to amend form requirements or the means of communication when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that the safeguards contained in article 7 (4) are complied with in any amended form and/or means of communications stipulated, and that all concerned are promptly notified about the change. Although theoretically possible, the use of several means of communication, or advising that the means may freely change during the procurement, will almost inevitably have negative implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should envisage the use of only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned.

7. To make the right of access to procurement proceedings under the Model Law a meaningful one, paragraph (4) of the article requires that the means specified in accordance with paragraph (3) of the article must be in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. “Fully and contemporaneously” in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement that means of communication must be in common use by suppliers or contractors in the context of the particular procurement found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e. capability effectively to operate together) to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities’ communication systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using communication systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement that they be in “common use” in the context of the particular procurement under paragraph (4) of the article. (The term “communication system” or the “system” in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.)

8. Paragraph (4) of the article does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country’s communication system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the

basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is/are indeed in “common use” in the context of a specific procurement and thus whether the requirement of the paragraph is satisfied.

9. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to using it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g. by providing training or longer time limits for suppliers or contractors to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

10. The provisions of the Model Law do not address the technologies that may be used by procuring entities. As long as they are in common use by suppliers or contractors, their use will comply with the conditions of paragraph (4). Software adapted to the needs or preferences of a specific procuring entity, or designed for the use of a specific procuring entity, may contain technical solutions different and incompatible with other technologies in common use: it may, for example, require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same technology as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. Technologies not in common use could have a significantly negative effect on the participation of suppliers and contractors in procurement.

11. On the other hand, off-the-shelf technologies, where they are readily available and reasonably easy to install and to use, provide appropriate choice. They are also much more likely to be in common use by suppliers or contractors, and so may foster and encourage participation and reduce

risks of discrimination. Such technologies are also more user-friendly for the public sector itself as they allow public purchasers to use what has been proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party providers, which may involve inflexible licences or royalties. They can also be easily adapted to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal systems among different government agencies.

12. The Model Law does not address the issue of charges for accessing and using the procuring entity's communications systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Ideally, no fees should be charged for access to, and use of, the procuring entity's communications systems. If charged, they should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings.

13. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the communication system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel,

management and administration issues in the procuring entity and the public sector as a whole.

14. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Systems to mitigate the risk of human and other disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to the public. The system should guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties needs to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings. (Further aspects relevant to the provisions of article 7 on the form and means of communication are discussed, for example, in the commentary to articles 40 and 42 below.)

15. In addition to imposing requirements on the form and means of communication, the article deals with measures and requirements that the procuring entity may impose in procurement involving classified information to ensure the protection of such information at the requisite level. Provisions to that effect are found in paragraph (3) (b). For example, it is common in procurement containing classified information, to include the classified information in an appendix to the solicitation documents, which is not made public. If such a measure or any other exception to transparency requirements of the Model Law or any other measure for protection of classified information is taken, it is to be disclosed at the outset of the procurement in accordance with paragraph (3) of the article. (For the definition of "procurement involving classified information", see article 2 (1) and the [commentary thereto](#).)

16. The requirements or measures referred to in paragraph (3) (b) are to be differentiated from the requirements and measures referred to in paragraph (5) of the article. While the latter referred to general requirements and measures applicable to any procurement, regardless of whether classified information is involved, paragraph (3) (b) refers to technical requirements and measures addressed to suppliers or contractors to ensure the integrity of classified information, such as encryption requirements. They would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. These requirements and measures would be authorized by the procurement regulations or other provisions of law of the enacting States only in procurement involving classified information and only with respect to that type of information.

#### *Article 8. Participation by suppliers or contractors*

1. The purpose of article 8 is to provide for full, unrestricted and international participation in public procurement. Paragraphs (1) and (2) of the article set out the exceptional conditions under which the procuring entity may limit the participation of certain categories of suppliers or contractors in procurement proceedings. Paragraphs (3) to (5) of the article provide procedural safeguards when any such limitation is imposed.

2. A decision to impose a limitation on participation in procurement proceedings may be taken in different situations. As explained in the Introduction to this chapter, such a situation may arise because of socio-economic policies of the State. Other issues of concern to the State, such as safety and security, may justify the limitation of participation. In particular, as noted in the **commentary to article 3** above, the limitation of participation may be necessary for implementation of United Nations Security Council sanctions regimes.

3. Both paragraphs (1) and (2) are aimed at accommodating these various situations. Whereas paragraph (1) refers to a limitation of participation in procurement proceedings on the basis of nationality, paragraph (2) is opened as regards the criteria that may justify imposition of a limitation on participation.

4. The application of paragraph (1) of the article would not necessarily lead to “domestic procurement” (i.e. situations where domestic suppliers or contractors alone, however they may be defined in the enacting State, are permitted to participate in the procurement proceedings). It may involve the exclusion of nationals of only one State or group of States subject

to international sanctions: the procurement will otherwise be open to international competition.

5. Paragraph (2) is intended to cover situations in which limiting participation in procurement proceedings is undertaken wholly or partly for other reasons, such as set-aside programmes for SMEs or entities from disadvantaged areas. As is the case with the application of paragraph (1), the application of paragraph (2) would not necessarily lead to domestic procurement: procurement may be international but limited to certain groups of suppliers or contractors (e.g. persons with disabilities).

6. When applying domestic procurement as permitted by this article, the procuring entity may invoke certain exemptions from the requirements of the Model Law. For example, it is not required to publish an invitation to participate in the procurement proceedings internationally (see article 33 (4) and the **commentary thereto**).

7. Both paragraphs (1) and (2) of the article refer to the procurement regulations or other provisions of law of the enacting State as the source of the procuring entity's authority to limit the participation of suppliers or contractors in any procurement proceedings. An enacting State, when formulating policies involving such authority, must consider their consequences in the light of the State's international obligations, taking into account that any limitation of participation of suppliers or contractors in procurement proceedings risks violating free trade commitments of States under relevant international instruments, such as the WTO GPA (see **paragraph 8 of part I** of this *Guide*).

8. When any ground in the procurement regulations or other provisions of law is invoked by the procuring entity as a justification for limiting participation in procurement proceedings, paragraph (3) requires the procuring entity to make a declaration to such effect at the outset of the procurement proceedings. This declaration is to be published as part of the invitation to participate in the procurement proceedings (e.g. the invitation to pre-qualification or to tender; see for example articles 18 (3) and 37) or, where the latter is not published, as part of the notice of the procurement (see article 34 (5)). To ensure fair, equal and equitable treatment of suppliers or contractors, the declaration cannot be altered thereafter.

9. Paragraphs (4) and (5) contain other procedural safeguards. Under paragraph (4), the procuring entity is required to put on the record the reasons and circumstances on which it relies to justify its decision, indicating in particular the legal authority to limit participation. The same information is required to be provided to any person upon request under paragraph (5) of

the article. Such a decision is an example of the type for which the enacting State may decide to impose on the procuring entity a requirement to substantiate the reasons and circumstances with legal justifications, as discussed in the Introduction to this chapter and in the **commentary to article 25** on the procurement record below.

### *Article 9. Qualifications of suppliers and contractors*

1. The purposes of article 9 are: to set out an exhaustive list of criteria that the procuring entity may use in the assessment of qualifications of suppliers or contractors at any stage of the procurement proceedings (paragraph (2)); to regulate other requirements and procedures that it may impose for this assessment (paragraphs (3)-(7)); and to list the grounds for disqualification (paragraph (8)). The provisions are aimed at preventing procuring entities from formulating excessively demanding qualification criteria or from reducing the pool of participants for the purpose of limiting their own workload.
2. The article is also intended to prevent the qualification procedure from being misused to restrict market access through the use of hidden barriers to the market (whether at the domestic or international level). Requirements for particular licences, obscure diploma requirements, certificates requiring in-person attendance or adequate past experience may be legitimate for a given procurement, or may be an indication of an attempt to distort participation in favour of a particular supplier or contractor or group of suppliers or contractors. The provisions are therefore permissive in scope, and the risk of misuse is mitigated through the transparency provisions of paragraph (2), which enable the relevance of particular requirements to be evaluated. Of particular concern would be unnecessary requirements that discriminate directly or indirectly against overseas suppliers or contractors, used as a non-transparent manner of limiting their participation (other than through the permitted limitation on participation under article 8). Requirements that could be considered unnecessary in this sense include a requirement to establish a local presence (a branch, representative office or subsidiary) as a pre-condition for participation in procurement proceedings. (See also below the commentary to paragraphs (2) (e) and (6) of the article for other examples of requirements that may intentionally or inadvertently distort or restrict international participation). Compliance with other standards applicable in enacting States (including under other laws or the procurement regulations) may involve security clearances, environmental considerations, international labour law and human rights standards and sustainability issues. In this regard, the caveats regarding the pursuit of socio-economic policies discussed in the section on **“Balancing procurement policy expressed in the Model Law and overall objectives and policies of enacting States”** in part I of this *Guide*

should be taken into account when drafting the qualification requirements for relevant procurement procedures.

3. As stated in paragraph (1) of the article, the provisions of the article may be applied at any stage of the procurement proceedings. Qualifications may be assessed: (i) at the outset of the procurement through pre-qualification in accordance with article 18 or pre-selection in accordance with article 49 (3); (ii) during the examination of submissions (the grounds for rejection of a tender in article 43 (2) (a) include that the supplier or contractor is unqualified); (iii) at any other time in the procurement proceedings when pre-qualified suppliers or contractors are requested to demonstrate again their qualifications (see paragraph (8) (d) of this article and the relevant commentary below); and/or (iv) at the end of the procurement proceedings when the qualifications of only the winning supplier or contractor are ascertained (see article 57 (2)) or when that supplier or contractor is requested to demonstrate again its qualifications (article 43 (5)).

4. The Model Law promotes open competition unless there is a reason to limit participation. Pre-qualification, which may limit competition, is available for use in all procurement methods and its benefits are discussed in the **commentary to article 18**; however, procuring entities should be encouraged to use pre-qualification only when the costs and benefits of doing so indicate that its use is appropriate.

5. Paragraph (2) lists the qualification criteria that can be used in the process. The criteria must be relevant and appropriate in the circumstances of the particular procurement. It is not necessary to apply all the criteria listed in paragraph (2); the procuring entity should use only those that are appropriate for the purposes of the specific procurement. The criteria to be used must be specified by the procuring entity in any pre-qualification or pre-selection documents, and in the solicitation documents; in addition to enabling the relevance of the criteria to be evaluated, such early disclosure allows a challenge to them to be made on time in order to be effective.

6. The requirement in paragraph (2) (a) that suppliers or contractors must possess the “necessary equipment and other physical facilities” is not intended to be a tool for restriction of the participation of SMEs in public procurement. Often such enterprises would not themselves possess the required equipment and facilities; they can ensure nevertheless through their subcontractors or partners that the equipment and facilities are available for the implementation of the procurement contract.

7. The reference in paragraph (2) (b) to “other standards” is intended to indicate that the procuring entity is entitled to satisfy itself about compliance

with standards applicable in an enacting State (e.g. that suppliers or contractors have all the required insurances). Where a procuring entity wishes to impose such standards as security clearances, environmental standards, international labour law and human rights standards, it may do so subject to the caveats set out in the section on **“Balancing procurement policy expressed in the Model Law and overall objectives and policies of enacting States”** in part I of this *Guide*. All qualifications standards imposed under this article must relate to the standards and processes followed by suppliers or contractors generally, rather than to the characteristics of the subject matter of the procurement (which are addressed in the commentary to articles 10 and 11 below).

8. Paragraph (2) (e) should be implemented bearing in mind its potentially discriminatory effect on foreign suppliers or contractors without any local presence in the enacting State. Foreign suppliers or contractors would generally not have any obligation to pay taxes or social security contributions in the enacting State; article 8 prohibits the procuring entity from imposing requirements, other than those permitted in the procurement regulations or other provisions of law of the enacting State, that would have the effect of deterring participation in the procurement proceedings by foreign suppliers or contractors.

9. Paragraph (2) (f) refers to the disqualification of suppliers and contractors pursuant to administrative suspension or debarment proceedings. Such administrative proceedings—in which alleged wrongdoers should be accorded due process rights such as an opportunity to refute the charges—are commonly used to suspend or debar suppliers and contractors found guilty of wrongdoing such as submitting false accounting statements, making misrepresentations or committing fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (2) (f) should disqualify a supplier or contractor from being considered for a procurement contract.

10. Paragraph (3) allows the procuring entity to demand from suppliers or contractors appropriate documentary evidence or other information for assessing their qualifications. Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licences to engage in certain types of activities and certificates of compliance with applicable standards and confirming legal standing. Depending on the subject matter of the procurement and the stage of the procurement proceedings at which qualification criteria are assessed, a self-declaration from suppliers or contractors may or may not be sufficient. For example, it may be sufficient to rely on this type of declaration at the opening of simple stand-alone electronic reverse auctions as long as it is

envisaged that a proper verification of the winning supplier's or contractor's compliance with the applicable qualification criteria will take place after the auction. Requirements imposed as regards the documentary evidence or other information must apply equally to all suppliers or contractors and must be objectively justifiable in the light of the circumstances of the particular procurement (see paragraphs (4) and (6) of the article).

11. Paragraph (4) requires all criteria and requirements to be used in the assessment of qualifications to be set out in any pre-qualification or pre-selection documents and in the solicitation documents. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/pre-selection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and fair, equal and equitable treatment, the Model Law requires all requirements to be set out in the relevant documents; however, the policy goals of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks).

12. Paragraph (6) prohibits any measures that may have a discriminatory effect or that are not objectively justified in the assessment of qualifications, unless they are expressly authorized under the law of the enacting State. This provision is in compliance with the requirements of article 8 as explained in the **commentary to that article**. Despite these prohibitions in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may be considered to discriminate against or among suppliers or contractors or against categories thereof; enacting State should ensure that permissible and prohibited measures are clear.

13. In order to facilitate participation by foreign suppliers and contractors, paragraph (7) bars the imposition of any requirement for the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than by the supplier or contractor presenting the successful submission. Those requirements must be provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by the winning supplier or contractor are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

14. Paragraphs (8) (a)-(c) address the consequences where suppliers or contractors submit information that is false, constitutes a misrepresentation, or that is inaccurate or incomplete. Subparagraph (a) requires the disqualification of a supplier or contractor for the submission of false information

or for misrepresentation. The concept of “misrepresentation” will be further explained in the glossary to be issued by UNCITRAL in due course. Subparagraph (b) permits the procuring entity to disqualify a supplier or contractor if information submitted by that supplier or contractor concerning its qualifications is “materially inaccurate or materially incomplete”. A “material” inaccuracy or incompleteness is based on a threshold concept: it refers to inaccuracies or omissions that affect the integrity of the competition or procurement process generally. Subparagraph (c) allows the procuring entity to disqualify a supplier or contractor for non-material inaccuracies or incompleteness in the information that the supplier or contractor submitted concerning its qualifications only where the supplier or contractor, when so requested, does not remedy the inaccuracy or incompleteness.

15. The purpose of paragraphs 8 (a)-(c) is to safeguard both the interests of suppliers and contractors in receiving fair, equal and equitable treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors. Decisions on disqualification may be challenged in accordance with the provisions of chapter VIII. Those taken in the pre-qualification or pre-selection proceedings may be challenged before the deadline for presenting submissions so that the procurement proceedings will not be disrupted at later stages for reasons not related to those stages. In such cases, stricter provisions on suspension of the procurement proceedings will apply (see article 67 (4)).

16. The purpose of paragraph (8) (d) is to provide for reconfirmation, at a later stage of the procurement proceedings, such as at the time of examination of submissions, of the qualifications of suppliers or contractors that have been pre-qualified. It is intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification, or if qualification is considered separately early in the procedure, remains valid and accurate, again with the procedural safeguards described in the preceding paragraph. In most procurement (with the exception perhaps of complex and time-consuming multi-stage procurement), the application of these provisions should be limited to the supplier or contractor presenting the successful submission as envisaged in articles 43 (5) and 57 (2) of the Model Law.

*Article 10. Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement*

1. The purpose of article 10 is to emphasize the importance of the principle of clarity, sufficient precision, completeness and objectivity in the description

of the subject matter of procurement in any pre-qualification or pre-selection documents and in the solicitation documents. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings. They enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts or framework agreement to be concluded, and thus to offer their most advantageous prices and other terms and conditions that meet the needs of the procuring entity. Furthermore, properly prepared descriptions of the subject matter of procurement 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. In addition, the application of the rule that the description of the subject matter should be set out so as not to favour particular suppliers or contractors will make it more likely that the procurement needs of the procuring entity may be met by a greater number of suppliers or contractors, thereby facilitating the use of as competitive a method of procurement as is feasible under the circumstances (and in particular helping to limit abuse of single-source procurement).

2. Paragraph (1) contains the procedural requirement to set out a description of the subject matter of the procurement in the pre-qualification or pre-selection documents and in the solicitation documents. Whereas subparagraph (a) allows a description to be set out in the pre-qualification or pre-selection documents in general terms, subparagraph (b) requires the solicitation documents to contain the detailed description of the subject matter of the procurement. Where such a detailed description is not possible to provide at the outset of the procurement proceedings, as in request-for-proposals-with-dialogue proceedings (the use of which is predicated on the impossibility of drafting a “detailed” description of the subject matter of the procurement (see article 30 (2) (a)), the minimum requirements must be set out in the solicitation documents in the description of the subject matter of the procurement (such a requirement is found for example in article 49 (5)). (For a more detailed consideration of this issue, see **the commentary to the provisions regulating request for proposals with dialogue**, and the **commentary to chapter VII on framework agreement procedures** where the issue is raised in the context of the need to provide the appropriate level of detail in the description of the subject matter of the procurement at the outset of the first stage of the framework agreement procedure.)

3. Paragraph (2) prohibits a description of the subject matter of a procurement that may restrict the participation in or access to the procurement proceedings, unless measures producing such an effect are expressly authorized under the law of the enacting State. This provision is in compliance with the

requirements of article 8 as explained in the **commentary thereto**. Despite these prohibitions in the Model Law, and as noted in the **commentary to article 9** above, some practical measures may be considered to restrict participation and limit access to procurement. For example, requirements as regards environmental characteristics of the subject matter of the procurement may be higher in one State than in others; clarity in permissible and prohibited measures is again required.

4. Paragraphs (3)-(5) of the article do not impose absolute obligations as regards elements of the description. Paragraph (3) sets out a possible range of such elements. Paragraph (4) requires the description to be objective, functional and generic to the extent practicable, and allows the procuring entity the flexibility of using technical, quality and performance characteristics as the circumstances warrant. This may cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.

5. The description can be based on what the subject matter is made up of (input-based) or what it should do (output-based). Where descriptions are input-based, the risk of using brand names or trademarks that will limit access to the procurement is more likely to arise. Hence paragraph (4) continues that such use is permitted only where there is no other sufficiently precise or intelligible description and then only if the solicitation specifies the salient features of the subject matter being sought, and states specifically that the brand name item “or equivalent” may be offered. The procurement regulations, rules or guidance from the public procurement agency or other body may usefully discuss the extent of the procuring entity’s discretion to use brand names in such circumstances, given the potential breadth of this provision. In this regard, the interaction between paragraphs (4) and (5) should be considered; where there is a generally used industry standard (which may be reflected in standardized trade terms), permitting the use of a brand name or a trademark instead of a very long and technical description may improve suppliers’ or contractors’ understanding of the procuring entity’s needs. However, in such cases, monitoring of the procuring entity’s willingness to accept equivalents will be a necessary safeguard, and guidance on how suppliers or contractors are to demonstrate equivalence, and objectivity in this regard, will be required.

6. In some jurisdictions, practices that require including in any pre-qualification or pre-selection documents and in the solicitation documents a reference source for technical terms used (such as the United Nations Standard Product and Services Classification or the European Common Procurement Vocabulary have proved to be useful, supporting the requirement in paragraph (5) for standardized trade terms.

*Article 11. Rules concerning evaluation criteria and procedures*

1. The purpose of article 11 is to set out the requirements governing the formulation, disclosure and application by the procuring entity of evaluation criteria.
2. The main rule as set out in paragraph (1) of the article is that, except for socio-economic criteria covered by paragraph (3) of the article, all evaluation criteria applied by the procuring entity must relate to the subject matter of the procurement (see paragraph (1)). This rule is a cornerstone to ensure best value for money and objectivity in the process, and to avoid misuse of the procedure through using other, irrelevant, criteria for the purpose of favouring a particular supplier or contractor or group of suppliers or contractors. This rule also assists in differentiating criteria that are to be applied under paragraph (2) of the article from the exceptional criteria that may be applied only in accordance with paragraph (3) of the article, as explained in paragraphs (7)-(13) below.
3. Paragraph (2) sets out an illustrative list of evaluation criteria on the understanding that not all evaluation criteria listed would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article—they must relate to the subject matter of the procurement.
4. Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria (“near-price criteria”, for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of the procurement that relate to environmental protection). Accordingly, the Model Law provides illustrations for a range of criteria and enables the procuring entity to select the successful submission on the basis of the criteria that the procuring entity considers appropriate in the context of the procurement concerned. The enacting State may wish to provide rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria. Such rules or guidance should emphasize that paragraph (5) requires price to be an evaluation criterion for all procurement.
5. The criteria set out in paragraph (2) (c) (the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement)

would be applicable only in request-for-proposals proceedings. This is because request-for-proposals proceedings have traditionally been used for procurement of consulting services (e.g. advisory services), such as legal and financial, design, environmental studies, engineering works, and the provision of office space for government officials, where experience, reliability and professional and managerial competence of persons delivering the service is of the essence. It is important to note that these criteria are evaluation criteria and not qualification criteria—while the same types of characteristics may be described as qualification and evaluation criteria, qualification criteria represent minimum standards. The evaluation criteria describe the advantages that the procuring entity will assess on a competitive basis in awarding the contract.

6. Requiring in paragraph (4) that the non-price criteria must, to the extent practicable, be objective, quantifiable and expressed in monetary terms is aimed at enabling submissions to be evaluated objectively and compared on a common basis. This reduces the scope for arbitrary decisions. The wording “to the extent practicable” has been included in recognition that in some procurement proceedings, such as in request for proposals with dialogue (article 49 of the Model Law), expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate. The enacting State may wish to spell out in the procurement regulations and/or guidance how factors are to be quantified in monetary terms where to do so is practicable.

7. A special group of evaluation criteria comprise those set out in paragraph (3). Through them the enacting State pursues its socio-economic policies (see the relevant definition in article 2 (o) of the Model Law, the **commentary to that article** and the section on **“The implementation in practice of socio-economic policies through procurement”** in the Introduction to this chapter). Paragraph (3) encompasses two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources require the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under paragraph (2) in that they will ordinarily not relate to the subject matter of the procurement. Examples may include the manner in which the procuring entity may dispose of by-products of a manufacturing process or offset carbon emissions from the production of the goods or services at issue, the extent to which particular groups of society will be employed or be engaged as subcontractors and so forth. By contrast, the environmental requirements for the production of the subject matter of the procurement relates to that subject matter, and can therefore be included as an evaluation criterion under paragraph (2): no authorization under the procurement regulations or other laws is required. The rules or guidance issued by the public

procurement agency or other body should direct procuring entities to other relevant laws and rules, so that they are aware of any mandatory socio-economic criteria to be applied and of the extent of their discretion in applying other socio-economic criteria.

8. The socio-economic criteria are therefore listed separately from the criteria set out in paragraph (2). They may be less objective and more discretionary than those referred to in paragraph (2) (although they may be quantifiable and expressed in monetary terms as required under paragraph (4) of the article). Subjective criteria may pose risks to good procurement practice and their application may reduce confidence in the procurement process. For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement—that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State.

9. Caution is therefore advisable in providing a broad list of socio-economic criteria in paragraph (3) (a) or circumstances in which a margin of preference referred in paragraph (3) (b) may be applied. The cumulative effect of application of socio-economic criteria and margins of preference and the risks of inadvertent duplication should be considered carefully. In specifying socio-economic criteria, references to broad categories, such as environmental considerations, should be avoided. For example, as already envisaged in paragraph (2) (b) of the article, some environmental considerations, such as the level of carbon emissions of the subject matter of procurement (e.g. cars), are related to the subject matter of the procurement and the procuring entity could therefore consider them under paragraph (2) (b). In such cases, the considerations concerned need not be specifically authorized under procurement regulations or other provisions of law of the enacting State. When however they are not so related, they may still be considered but only under the conditions of paragraph (3) of the article.

10. The procurement rules or guidance from the public procurement agency or other body should not only provide for any criteria that may be used but that are not authorized elsewhere in the law of the enacting State, but should also regulate or guide how the criteria under paragraph (3) may be used in individual procurements to ensure that they are applied in an objective and transparent manner. Since environmental standards in particular may have the effect of excluding foreign suppliers or contractors (where, for example, national standards are higher than those prevailing in other States), the agency or other body may wish to issue regulations, rules and/or guidance on the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures.

11. In addition, in the case of margins of preference, the procurement regulations must provide for a method of their calculation. That method of calculation may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable; the enacting State will wish to decide how to balance quality considerations and the pursuit of socio-economic policies. The procurement regulations should set out rules concerning the calculation and application of a margin of preference. (Various publicly-available sources, including those of the World Bank, provide examples of applying margins of preference in practice).

12. The procurement regulations should also establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (e.g. that they contain a minimum domestic content or value added). In addition, they should fix the amount of the margin of preference, which might be different for different subject matter of procurement (goods, construction and services). In this regard, the provisions of the WTO GPA (see **paragraph 8 of part I** of this *Guide*) on offsets and price preference programmes, available as negotiated transitional measures to developing countries, may assist States in understanding how the concepts of “domestic” suppliers or contractors and “local content” have been applied in practice.

13. As with any other evaluation criteria, the use of socio-economic criteria under paragraph (3) (a) or the margin of preference under paragraph (3) (b) and the manner of their application must be pre-disclosed in the solicitation documents (under paragraphs (5) and (6) of the article). In addition, the use and manner of application of any socio-economic criterion or margin of preference is to be reflected in the record of the procurement proceedings (see article 25 (1) (i) and (t)). These transparency provisions are essential to allow the appropriate use of the flexibility conferred in these articles to be evaluated; another benefit is that the overall costs of pursuing socio-economic policies can potentially be compared with their benefits. (For this and other issues related to paragraph (3) of the article, see the **discussion of socio-economic policies** in part I of this *Guide* and in the Introduction to this chapter, in particular as that discussion addresses using a margin of preference as a technique for achieving national economic objectives while still preserving competition. That discussion also refers to restrictions imposed by some international and regional treaties on States parties to such treaties as regards application of socio-economic criteria in the procurement proceedings, in particular with the aim to accord preferential treatment.)

14. Paragraph (5) sets out information about the evaluation criteria and procedures that must be specified, at a minimum, in the solicitation documents. This minimum information comprises: (i) the basis for selecting the

successful submission (price or price and other criteria); (ii) the evaluation criteria themselves; and (iii) the manner of application and relative weight given to each criterion. A basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some more subjective elements (e.g. the relative value that the procuring entity places on speedy delivery or green production lines), amalgamated into an overall quality ranking. Thus, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price other than in request for proposals with dialogue under article 49, in which case the criteria may be set out in descending order of priority.

15. The provisions of paragraph (5) are intended to ensure full transparency, so that suppliers or contractors will be able to see how their submissions will be evaluated, and to allow the relative values of all criteria to be understood, which is a particularly important feature where there are subjective criteria whose significance might otherwise be over- or under-estimated. The importance of setting out the appropriate level of detail of the evaluation criteria is reiterated by the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method (see articles 39, 47 and 49).

16. Paragraph (5) is supplemented by an additional rule in paragraph (6) that only those criteria and procedures that are set out in the solicitation documents may be applied by the procuring entity in the evaluation; further, they must be applied only in the manner specified in those documents. This rule further supports the transparency provisions earlier in the article and allows the objectivity of the process to be evaluated and, where necessary, challenged.

#### *Article 12. Rules concerning estimation of the value of procurement*

1. The purpose of article 12 is to prevent the procuring entity from manipulating the estimated value of procurement by artificially reducing its value, for example to limit competition and use low-value exemptions under the Model Law. Such exemptions include exemptions from the required standstill period (article 22 (3) (b)), from the requirements to publish a contract award notice (article 23) and to advertise the invitation to participate in the procurement proceedings internationally under articles 18 (2) and 33. In addition, under some provisions of the Model Law, the estimated value of procurement may have a direct impact on the selection of a method of procurement. Under article 29 (1) (b), restricted tendering as opposed to open tendering is available where the time and cost required to examine and

evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement. Under article 29 (2), request for quotations is available for certain low-value procurement. In all such cases, the method selected by the procuring entity for estimation of the value of procurement will determine the extent of its obligations under the Model Law. Without provisions to avoid manipulation, the procuring entity might choose to divide the procurement for abusive purposes.

2. To avoid subjectivity in the calculation of the value of procurement and anti-competitive and non-transparent behaviour, paragraph (1) sets out the basic principle that neither division of the procurement can take place nor can any valuation method be used for the purpose of limiting competition or avoiding obligations under the Law. The prohibition is therefore directed at both (i) any division of a procurement contract that is not justified by objective considerations, and (ii) any valuation method that artificially reduces the value of procurement.

3. Paragraph (2) requires all forms of remuneration (including premiums, fees, commissions and interest receivable) to be taken into account in the estimated value of the maximum total value of the procurement contract over its entire duration, whether awarded to one or more suppliers or contractors. In framework agreements, the estimated value is the maximum total value of all procurement contracts envisaged under the framework agreement. In procurement with option clauses, the estimated value is the estimated maximum total value of the procurement, including optional purchases.

4. Estimates are intended to be used for internal purposes. The procuring entity should exercise caution in revealing them to potential suppliers or contractors: if the estimate is higher than market prices, suppliers or contractors might price submissions as close to the estimated value of the procurement as possible and so compromise competition; if the estimate is below market prices, good suppliers or contractors may choose not to compete, and quality and competition may be compromised. A blanket prohibition against revealing such estimates to suppliers or contractors may, however, be inappropriate: providing an estimated value of a framework agreement may be necessary to allow suppliers or contractors to stock the subject matter concerned and to ensure security of supply.

### *Article 13. Rules concerning the language of documents*

1. The purpose of article 13 is to establish certainty as regards the language of documents and communication in procurement proceedings in the enacting State. This provision is especially valuable for foreign suppliers or

contractors so that, by reading the procurement law of the enacting State, they can determine the costs (translation and interpretation) required to participate in procurement proceedings in that State. The overriding aim is to facilitate access to the procurement and the participation of suppliers or contractors regardless of nationality, through the use of appropriate language or languages in the context of the procurement concerned.

2. Paragraph (1) provides a general rule that documents issued by the procuring entity in the procurement proceedings are to be in the official language(s) of the enacting State. An enacting State whose official language is not customarily used in international trade has the option to require, by retaining in the article the words in the second set of square brackets, that the documents also be issued as a general rule in a language customarily used in international trade. The enacting State may wish to consider implications of doing so, and in particular the costs and relevant language capacities in the light of local circumstances. It may also wish to consider that the requirement is usually imposed in the context of procurement projects financed by multilateral development donors and that it is found in the WTO GPA (see **paragraph 8 of part I** of this *Guide*). The provisions in the second set of square brackets allow exemptions: the procuring entity may decide not to issue documents in a language customarily used in international trade in the circumstances referred to in article 33 (4): in domestic procurement (see the **commentary to article 8**) and in low-value procurement where in, the view of the procuring entity, only domestic suppliers or contractors are likely to be interested in presenting submissions. For the discussion of what would constitute low-value procurement for such a purpose, see the commentary in the Introduction to this chapter and to **article 33 (4)** below.

3. In States in which solicitation documents are issued in more than one language, it may be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity may also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight, or whether any language is to prevail in cases of inconsistency. The fair, equal and equitable treatment objective of the Model Law would indicate that the first approach is negotiable.

4. The basic rule, as reflected in paragraph (2) of the article, is that the language of documents presented by suppliers or contractors in any given procurement must correspond to the language or any of the languages of the procuring entity's documents. However, the provisions do not exclude situations where the documents issued by the procuring entity may permit the documents to be presented in another language.

*Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions*

1. The purpose of article 14 is to ensure certainty as regards the manner, place and deadline for presenting the main documents in the procurement process—applications to pre-qualify or for pre-selection and submissions (tenders, proposals, offers or quotations). Significant legal consequences may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements (e.g. the procuring entity must return a submission presented late or that otherwise does not comply with the applicable requirements (see, for example, article 40 (3)).
2. Paragraph (1) therefore provides important safeguards to ensure that the rules on the manner, place and deadline for submission of documents apply equally to all suppliers or contractors, and that they are specified at the outset of the procurement proceedings. If such information is changed subsequently, all such changes must be brought to the attention of suppliers or contractors to which the pre-qualification, pre-selection or solicitation documents were originally provided (see paragraph (5) of the article and articles 15 (2) and 18 (6)). If those documents were made available to an unknown group of suppliers or contractors (e.g. through a download from a website), information on the changes made must, at a minimum appear in the same place at which they could be downloaded.
3. An important element in fostering participation and competition is granting to suppliers and contractors a sufficient period of time to prepare their applications or submissions. Paragraph (2) recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the procurement, the extent of subcontracting anticipated, and the time needed for transmitting applications or submissions. Thus, it is left up to the procuring entity to fix the deadline by which applications or submissions must be presented, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow (particularly where its international commitments may so require). These minimum periods should be established in the light of each procurement method, the means of communication used and whether the procurement is domestic or international. Such a period must be sufficiently long in international and complex procurement to allow suppliers or contractors reasonable time to prepare their applications or submissions.
4. In order to promote competition and fairness, paragraph (3) requires the procuring entity to extend the deadline in certain circumstances: first, where

clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline, so that it is necessary to extend the deadline in order to allow suppliers or contractors to take the relevant information into account in their applications or submissions; and secondly, in the cases stipulated in article 15 (3): that is, where any amendment to the information about procurement published at the outset of the procurement renders that information materially inaccurate. Publication of the amended information is required in such cases, as explained in the **commentary to article 15** (3). As noted in the **commentary to article 9** (8), a “material” inaccuracy is a threshold concept. In the context of article 15 (3), the threshold would be met if the information, as a result of changes made, became sufficiently inaccurate to compromise the integrity of the competition and the procurement process. Changes as regards the manner, place and deadline for presenting applications to pre-qualify or for pre-selection or for presenting submissions will always constitute material changes, and would oblige the procuring entity to extend the originally specified deadline, to reflect the extended deadline in the amended pre-qualification, pre-selection or solicitation documents, as applicable, and to publish the amended information as required by article 15 (3).

5. Paragraph (4) permits, but does not compel, the procuring entity to extend the deadline for presenting applications or submissions in other cases, i.e. when one or more suppliers or contractors is or are unable to present their applications or submissions on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. However, given the risks of abuse in the exercise of this discretion, the regulations or rules or guidance from the public procurement agency or other body should address what “circumstances beyond [the supplier’s or contractor’s] control” may involve, how they should be demonstrated, and the default response from the procuring entity.

6. The Model Law does not address the issue of the potential liability of a procuring entity should its communication systems fail. Failures in automatic communication systems may occur; where such a failure occurs, the procuring entity will have to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and, if so, to decide whether any extension of the deadline for presenting applications or submissions is necessary. Paragraphs (3) and (4) of the article give sufficient flexibility to procuring entities to extend the deadlines in such cases. Alternatively, the procuring entity may determine that a failure in the system will prevent it from proceeding with the procurement and the proceedings will therefore need to be cancelled. The procurement regulations or rules or guidance from the public procurement agency or other body may provide further details on

failures in communication systems and the allocation of risks. Failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions it takes to address consequences of system failure, including on extensions of deadlines, could give rise to a challenge under chapter VIII of the Model Law.

*Article 15. Clarifications and modifications of solicitation documents*

1. The purpose of article 15 is to establish efficient, fair and effective procedures for clarification and modification of the solicitation documents. The right of the procuring entity to modify the solicitation documents is important to ensure that the procuring entity's needs will be met, but should be balanced against ensuring that all terms and conditions of the procurement are determined and disclosed at the outset of the procedure. Article 15 therefore provides that questions and responding clarifications, and modifications, must be communicated by the procuring entity to all suppliers or contractors to which the procuring entity has provided the solicitation documents. Permitting them to have access to clarifications upon request would be inadequate: they would have no way of discovering that a clarification had been made. If, however, the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly-available website), the clarifications and modification must at a minimum appear where downloads were offered. The procuring entity is also obliged to inform individual suppliers or contractors of all clarifications and modifications to the extent that the identities of the suppliers or contractors are known to the procuring entity.

2. The rules are also meant to ensure that the procuring entity responds to a timely request from suppliers or contractors in time for the clarification to be taken into account. Prompt communication of clarifications and modifications also enables suppliers or contractors, for example under article 41 (3), to modify or withdraw their tenders prior to the deadline for presenting submissions, unless there is no right to do so in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly, so that they too can be taken into account in the preparation of submissions.

3. Paragraph (3) deals with the situations in which, as a result of clarifications and modifications, the originally published information becomes materially inaccurate (in the sense described in the **commentary to article 14**). The provisions oblige the procuring entity in such cases promptly to publish the amended information in the same place where the original information appeared. This requirement is in addition to that in paragraph (2)

to notify the changes individually to each supplier or contractor to which the original set of solicitation documents was provided, where applicable. The provisions of paragraph (3) also repeat the obligation on the procuring entity in such cases to extend the deadline for presentation of submissions (see article 14 (3), and the **commentary thereto**).

4. This situation should be differentiated from a material change in the procurement. For example, as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement. However, if as a result of such changes, the pool of potential suppliers or contractors is affected (e.g. as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” in the context described above has taken place. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient—the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A “material change” is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

5. Although in paragraph (4) a reference is made to “requests submitted at the meeting”, nothing under the Model Law prevents the procuring entity from also reflecting during a meeting of suppliers or contractors any requests for clarification of the solicitation documents submitted to it before the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will also apply to such requests.

#### *Article 16. Clarification of qualification information and of submissions*

1. The purpose of article 16 is to allow for uncertainties in qualification information and/or submissions to be resolved. An uncertainty may involve an error in the information submitted that could be corrected. If it is uncorrected and the qualification information or submission is accepted, significant contract performance problems could result. Secondly, the procedures allow for fairer treatment of suppliers and contractors that make minor errors. Thirdly, where the procedures lead to an error being corrected, they may allow the best qualified supplier or contractor to participate in the

procurement, and the best submission to be accepted. Fourthly, the procedures can avoid the otherwise unnecessary disqualification of a supplier or contractor or rejection of a submission, or the unnecessary cancellation of the procurement. Fifthly, they can avoid a re-tendering or other repeat procedure, which could allow suppliers or contractors to revise prices upwards in the knowledge of the prices submitted earlier, and so avoid the collusive behaviour that repeat procedures may facilitate. Finally, the procedures can avoid the issues that can arise if submissions contain errors that mean that the procurement contract may be void or voidable.

2. The article therefore allows the procuring entity to clarify qualification information or submissions presented by suppliers or contractors (paragraph (1)) and requires the procuring entity to correct purely arithmetical errors discovered during the examination of submissions (paragraph (2)). Paragraphs (3) to (6) contain procedural safeguards against possible abuses of these provisions, taking into account specifics of some procurement methods.

3. Paragraph (1) of the article permits the procuring entity to seek clarification of qualification information or submissions presented by a supplier or contractor. The purpose of the clarification request is to assist in the assessment of qualifications and the examination and evaluation of submissions, and not to allow for improvements in the information previously submitted to be made. The clarification procedures are therefore to be triggered by the procuring entity, not by a supplier or a contractor. Enacting States may wish to provide in regulations or rules or guidance from the public procurement agency or other body that the manner of seeking clarifications under the article should be akin to the procedures for investigating abnormally low submissions under article 20, and that the provisions of article 7 on communications require, in effect, the use of a written procedure.

4. Points in time when the need for clarification of qualification information or submissions may arise would vary depending on procurement methods and when qualifications are assessed (for the latter point, see the **commentary to article 9** (1)). The provisions have therefore been drafted to allow the procuring entity to seek clarifications at any stage of the procurement proceedings.

5. The existence of an error may be confirmed that may trigger the application of paragraph (2) of the article. Paragraph (2) requires the procuring entity to correct purely arithmetical errors that are discovered during the examination of submissions. It is for the procuring entity to correct such errors and to give prompt notice of the correction to the supplier or contractor concerned. In tendering proceedings (open, restricted and two-stage), if the supplier or contractor does not accept the correction made by the

procuring entity, its tender must be rejected under article 43 (2) (b). The provisions of paragraph (2) are not applicable to some procurement methods, such as to request for quotations where correction of arithmetical errors would be prohibited under article 46 (2), and to request for proposals with consecutive negotiations where the financial aspects of proposals are crystallized during negotiations. They would not apply either to the auction stage of electronic reverse auctions where purely arithmetical errors may lead to the automatic rejection by the system of the bid containing such an error (though the bidder concerned may bid further unless the auction is closed) or to suspension or termination of an auction under article 56 (5).

6. Arithmetical errors, if discovered, must be corrected so that tenders may be compared objectively and fairly. A correction of an arithmetical error cannot, however, lead to a substantive change in a submission, in particular one that would make an unresponsive submission responsive (see paragraph (3) of the article).

7. The application of paragraphs (1) and (2) may give rise to discriminatory practices. The enacting State needs therefore to build procedural safeguards to mitigate the risks of such practices, for example by requiring the procuring entity to put on the record any arithmetical errors discovered during the examination and evaluation process and steps taken in connection with them. Any decision resulting from the application of the paragraph will be subject to possible challenge under chapter VIII of the Model Law.

8. Paragraph (3) prohibits seeking, offering or permitting substantive changes to qualification information or to a submission as a result of the application of the article. It illustrates substantive changes by reference to changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive. An enacting State may wish to provide further examples in the procurement regulations or rules or guidance from the public procurement agency or other body.

9. Paragraph (4) prohibits negotiations and any changes in price pursuant to a clarification that is sought under the article. This is however on the understanding that some procurement methods, as noted above, involve negotiations, including negotiations of financial aspects of submissions, such as price. Paragraph (5) of the article takes into account specific features of those methods of procurement by exempting them from the application of paragraph (4). Paragraph (6) requires including all communications generated under the article in the documentary record of the procurement proceedings.

10. The Model Law and this *Guide* do not seek to address exhaustively all issues of errors or omissions in qualification information or submissions

presented by suppliers or contractors and possible clarification and corrections of such errors and omissions either by the procuring entity or a supplier or contractor. Some such issues may be regulated in the contract law of an enacting State. Enacting States may also wish to take into account the relevant provisions of the WTO GPA (see **paragraph 8 of part I** of this *Guide*) aimed at ensuring fair, equal and equitable treatment of all participating suppliers and contractors where the procuring entity provides a supplier or contractor with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract.

### *Article 17. Tender securities*

1. The procuring entity may suffer losses if suppliers or contractors withdraw their submissions or if a procurement contract with the supplier or contractor whose submission had been accepted is not concluded due to fault on the part of that supplier or contractor (e.g. the costs of new procurement proceedings and losses due to delays in procurement). Article 17 authorizes the procuring entity to require suppliers or contractors participating in the procurement proceedings to provide a tender security so as to cover such potential losses and to discourage them from defaulting.
2. The purpose of the article is to set out the requirements for tender securities as defined in article 2 (*u*), in particular their acceptability by the procuring entity, the conditions that must be present for the procuring entity to be able to claim the amount of the tender security, and the conditions under which the procuring entity must return or procure the return of the security document. As stated in the **commentary to the definition of “tender security” in article 2**, the Model Law refers to “tender security” as the commonly used term in the relevant context, without implying that this type of security may be requested only in tendering proceedings. The definition also excludes from the scope of the term any security that the procuring entity may require for performance of the procurement contract (under article 39 (*k*), for example). The latter may be required to be provided by the supplier or contractor that enters into the procurement contract while the requirement to provide a tender security, when it is imposed by the procuring entity, applies to all suppliers or contractors presenting submissions (see paragraph (1) of the article).
3. Requesting a tender security should not be considered to be a routine requirement, taking into account that the formalities and expenses involved in connection with presentation of a tender security may discourage the participation of suppliers and contractors in procurement proceedings. The procuring entity should consider all the implications of requiring tender

securities (positive and negative), on a case-by-case basis, prior to deciding whether or not to require them. The procurement regulations or rules or guidance from the public procurement agency or other body may stipulate cases justifying request-for-tender securities and illustrate cases where a tender security could be considered an excessive safeguard by the procuring entity and, conversely, where it might be justified.

4. Tender securities may be important in the procurement of high-value goods or construction. In the procurement of low-value items, although it may be of importance to require a tender security in some cases, the risks of delivery or performance faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security—which will normally be reflected in the contract price—will be less justified. Requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure: not only may a tender security be unadvisable, it may be impossible in practice to obtain one, given the probably uncertain extent of the obligations of the supplier or contractor concerned.

5. Although practices might continue to evolve, at the time of preparing this *Guide*, little experience on the use of tender securities in electronic reverse auctions has been accumulated and existing practices were highly diverse. It might be problematic to obtain a security in the context of electronic reverse auctions, as banks generally require a fixed price for the security documents. There also may be procurement methods in which tender securities are inappropriate, for example in request for proposals with dialogue, as tender securities would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue stage (to be contrasted with the best and final offer (BAFO) stage of the procedure). (See the relevant discussion in the **commentary to the relevant provisions of article 49.**)

6. Safeguards have been included to ensure that a tender-security requirement is imposed fairly and for the intended purpose alone: that is, to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the submissions they have presented, and to post a security for performance of the procurement contract if required to do so.

7. Paragraph (1) (c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. Although in domestic procurement the procuring entity may require that the tender security should be issued domestically, in other cases as stated in paragraph (1) (c) a tender security cannot be rejected on the ground that

it was not issued by an institution in the enacting State. The tender security issued abroad can be rejected if its acceptance would be in violation of a law of the enacting State.

8. The reference to confirmation of the acceptability of a proposed issuer or confirmer of a tender security in paragraph (1) (d) is intended to take account of the practice in some States of requiring local confirmation of foreign issuers. The confirmation may be needed to address difficulties in enforcing securities from foreign issuers and where there may be uncertainty about the creditworthiness of such issuers. The provision, however, is not intended to encourage such a practice. Not only would it discriminate among tender securities on the basis of the location of the issuer alone, it would also create an obstacle to participation by foreign suppliers and contractors in procurement proceedings because obtaining local confirmation prior to the deadline for presenting submissions may be impractical; moreover, there would be added costs for foreign suppliers and contractors alone.

9. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry.

10. Paragraph (2) (a) is intended to prohibit the procuring entity from calling on any tender security after its expiry provided pursuant to article 41 (2). As a result, procuring entities will also need to secure extensions of the tender security where the period of validity of the tender has been extended, if the procuring entities intend to be able to call on the tender security during the extension period. Any refusal by a supplier or contractor to extend the effectiveness of its tender security or provide a new tender security is to be regarded as a refusal to extend the period of effectiveness of its tender, but is not a calling event under the original tender security. In such a case, therefore, the effectiveness of the tender and tender security will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents.

11. As in article 41 (3), paragraph (2) (d) of this article reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation

documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for presenting submissions is not subject to forfeiture of the tender security

12. In the light of the cost of providing a tender security, which will normally be reflected in the contract price, the use of alternatives to a tender security should be considered and encouraged where appropriate. In some jurisdictions, a bid securing declaration is used in lieu of tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for contingencies that normally are secured by a tender security. (Sanctions do not generally include debarment, as debarment should not be concerned with commercial failures (see the [commentary to article 9](#).)

### *Article 18. Pre-qualification proceedings*

1. The purpose of article 18 is to set out the required procedures for pre-qualification proceedings. Pre-qualification proceedings are intended to identify, at an early stage, those suppliers or contractors that are suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but of a highly specialized nature. The reason in each case is that the evaluation of submissions in those cases is much more complicated, costly and time-consuming than for other procurement. Competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the submission may be high, if the competitive field is too large and where they run the risk of having to compete with submissions presented by unqualified suppliers or contractors. The use of pre-qualification proceedings may narrow down the number of submissions that the procuring entity will evaluate to those from qualified suppliers or contractors. It is thus a tool to facilitate the effective procurement of relatively complex subject matter. Nonetheless, it constitutes an exception to the general rule under the Model Law that requires public and unrestricted solicitation, and so may limit competition; its costs and benefits should be considered before pre-qualification is used. In addition, the limitations on qualification criteria, notably that they must be relevant to the procurement at issue (as discussed in the commentary to article 9), which are designed to avoid the procedure being misused to restrict market access, apply equally to pre-qualification criteria.

2. Pre-qualification under paragraph (1) of the article is optional and may be used regardless of the method of procurement used. Because of an

additional step and delays in the procurement caused by pre-qualification and because some suppliers or contractors may be reluctant to participate in procurement involving pre-qualification, given the expense of so doing, pre-qualification should be used only when appropriate, such as in the situations described in the immediately preceding paragraph.

3. The pre-qualification procedures set out in article 18 are made subject to a number of important safeguards. These safeguards include the limitations in article 9 (in particular on the assessment of qualifications, applicable equally to pre-qualification procedures) and the procedures found in paragraphs (2)-(10) of article 18. This set of procedural safeguards is included to ensure that pre-qualification procedures are conducted using objective terms and conditions that are fully disclosed to participating suppliers or contractors; they are also designed to ensure a minimum level of transparency and to facilitate the exercise by a supplier or contractor that has not been pre-qualified of its right to challenge its disqualification.

4. The first safeguard is that procedures for inviting participation in pre-qualification procedures follow those for open solicitation. Paragraph (2) therefore requires the publication of the invitation to pre-qualify. The publication in which this invitation is to be advertised is set out in the procurement regulations, rather than in the Model Law, in common with the provisions in articles 33 (1) and 34 (5) on the publication of the invitation to tender or prior notice of the procurement, as the case may be. Although such publication is likely in many enacting States to be required in the official gazette, the reason for this more flexible approach is to allow for procedures in enacting States to change. As the official gazette has traditionally been a paper publication, the approach also follows the Model Law's principle of technological neutrality (i.e. avoids favouring a paper-based environment). See, further, the discussion of ensuring effective access to information published regarding procurement in the [commentary to the above articles](#), and [article 5](#) on publication of legal texts.

5. The default rule also requires international publication in a manner that will ensure that suppliers or contractors from overseas will have proper access to the invitation, unless (as in the case of an invitation to tender under article 33 (4)), the procuring entity decides that suppliers or contractors from outside the State concerned are unlikely to wish to participate in the light of the low value of the procurement concerned. The Introduction to chapter I above considers the general issues arising in the setting of low-value thresholds under the Model Law, urging consistency in the designation of low-value procurement (whether there is an explicit threshold or not). The concept of low-value procurement in this case should not be interpreted as conferring upon enacting States complete flexibility to set the appropriate

threshold sufficiently high to exclude the bulk of its procurement from requirements of international publication. The procurement regulations or guidance from the public procurement agency or other body should therefore provide further detail of how to interpret “low-value” in this case. In addition, it should be emphasized that low value alone is not a justification for excluding international participation of suppliers or contractors per se (by contrast with domestic procurement set out in article 8): international suppliers or contractors can participate in a procurement that has not been advertised internationally if they so choose, for example, if they respond to a domestic advertisement or one on the Internet.

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

7. The term “address” found in paragraph (3) (a), as elsewhere in the Model Law, is intended to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address and so forth as appropriate).

8. While the provisions of the article allow for charges for the pre-qualification documents, development costs (including consultancy fees and advertising costs) are not to be recovered through those provisions. It is understood, as stated in paragraph (4) of the article, that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate). In addition, enacting States should note that best practice is not to charge for the provision of such documents.

9. The reference to the “place” found in paragraph (5) (d) includes not the physical location but rather an official publication, portal and so forth, where authoritative and up-to-date texts of laws and regulations of the enacting State are made available to the public. The issues raised in the **commentary to article 5** on ensuring appropriate access to up-to-date legal texts are therefore also relevant in the context of this paragraph.

10. The references to “promptly” in paragraphs (9) and (10) should be interpreted to mean that the notification required must be given to suppliers and contractors prior to solicitation. This is an essential safeguard to ensure that there can be an effective review of decisions made by the procuring entity in the pre-qualification proceedings. For the same reason, paragraph (10) requires the procuring entity to notify each supplier or contractor that has not been pre-qualified of the reasons therefor.

11. The provisions of the article on disclosure of information to suppliers or contractors or the public are subject to article 24 on confidentiality (which contains limited exceptions to public disclosure).

12. Pre-qualification should be differentiated from pre-selection, envisaged under the Model Law only in the context of request-for-proposals-with-dialogue proceedings under article 49. In pre-qualification, all pre-qualified suppliers or contractors may present submissions. In the case of pre-selection, the maximum number of pre-qualified suppliers or contractors that will be permitted to present submissions is set at the outset of the procurement proceedings, and the maximum number of participants is made known in the invitation to pre-selection. The identification of qualified suppliers or contractors in pre-qualification proceedings is on the basis of whether applicants pass or fail pre-established qualification criteria, while pre-selection involves additional, generally competitive, selection procedures when the established maximum of suppliers or contractors would be exceeded (e.g. the pre-selection may involve, after a pass/fail examination, a ranking against the qualification criteria and the selection of the best qualified up to the established maximum). This measure is taken (even though the drafting of rigorous pre-qualification requirements may in fact limit the number of pre-qualified suppliers or contractors) for the reasons explained in the **commentary to article 49** (3) below.

### *Article 19. Cancellation of the procurement*

1. The purpose of article 19 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so prior to the acceptance of the successful submission. After that point, it may do so only if the

supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security (see paragraph (1) and article 22 (8) and the **commentary thereto**, outlining the other options available in such circumstances).

2. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in government policy or a withdrawal of funding or because all the submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that the public interest may be best served by allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed.

3. In the light of the unconditional right given to the procuring entity to cancel the procurement up to acceptance of the successful submission, the article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision.

4. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring entity's practices in the enacting State.

5. Some provisions in paragraphs (1) and (2) of the article are designed for submissions presented but not yet opened by the procuring entity (e.g. when the decision on cancellation is made before the deadline for presenting tenders). After a decision on cancellation is taken, any unopened submission must be returned unopened to the presenting supplier or

contractor. This requirement avoids the risk that information supplied by suppliers or contractors in their submissions will be used improperly, for example by being revealed to competitors. This provision is also aimed at preventing abuse of discretion to cancel the procurements for improper or illegal reasons, such as after the desired information about market conditions was obtained or after the procuring entity learned that a favoured supplier or contractor will not win.

6. In many jurisdictions, decisions to cancel the procurement would not normally be amenable to review, in particular by administrative bodies, unless abusive practices were involved. The Model Law however does not exempt any decision or action taken by the procuring entity in the procurement proceedings from challenge or appeal proceedings under chapter VIII (although a cautious approach has been taken in the drafting of article 67 to reflect that in some jurisdictions the administrative body would not have jurisdiction over this type of claim). What the Model Law purports to do in paragraph (3) of this article is to limit the liability of the procuring entity for its decision to cancel the procurement to exceptional circumstances. Under paragraph (3), the liability is limited towards suppliers or contractors having presented submissions to any situation in which the cancellation was a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

7. Under chapter VIII of the Model Law, the right to challenge the decision of the procuring entity to cancel the procurement proceedings may be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case. Paragraph (3) is considered important in this respect because it provides protection to the procuring entity from unjustifiable protests and, at the same time, safeguards against an unjustifiable cancellation of the procurement proceedings by the procuring entity. It is however recognized that, despite the limitations of liability under paragraph (3), the procuring entity may face liability for cancelling the procurement under other branches of law. In particular, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened even in circumstances not covered by paragraph (3).

8. Administrative law in some countries may restrict the exercise of the right to cancel the procurement, for example, by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice. Administrative law in some other countries may, on the contrary, provide for an unconditional right to cancel the procurement at any stage of the procurement proceedings, even when the successful submission was accepted,

regardless of the provisions of the Model Law. Law may also provide for other remedies against abusive administrative decisions taken by public officials. The enacting State may need therefore to align the provisions of the article with the relevant provisions of its other applicable laws. The glossary referred to above, to be issued by UNCITRAL in due course, will provide examples of the type of conduct intended to be caught by this provision, and the public procurement agency or other body may wish to issue more detailed guidance to procuring entities on the scope of their discretion and potential liability both under the procurement law and any other laws in the enacting State that may confer liability for administrative acts.

9. The cancellation of the procurement by the procuring entity under this article should be differentiated from termination of the procurement proceedings as a consequence of challenge proceedings under article 67 (9) (g). The consequences of both are the same—no further actions and decisions are taken by the procuring entity in the context of the cancelled or terminated procurement after the cancellation or termination becomes effective.

#### *Article 20. Rejection of abnormally low submissions*

1. The purpose of article 20 is to enable the procuring entity to reject a submission whose price is abnormally low and gives rise to concerns as to the ability of the supplier or contractor concerned to perform the procurement contract. The article applies to any procurement proceedings under the Model Law.

2. The article provides safeguards to protect the interests of both parties. On the one hand, it enables the procuring entity to address possible abnormally low submissions before a procurement contract has been concluded, avoiding the risk that the contract cannot be performed, or performed at the price submitted, and additional costs, delays and disruption to the project.

3. On the other hand, the procuring entity cannot automatically reject a submission simply on the basis that the submission price appears to be abnormally low: such a right would introduce the possibility of abuse, as submissions could be rejected without giving the supplier or contractor concerned the opportunity to explain the reasons for the price submitted, or on the basis of a purely subjective assessment. Such a risk could be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another.

4. For these reasons, the article allows the rejection of an abnormally low submission only when the procuring entity has taken steps to substantiate

its performance concerns. This ability, however, is without prejudice to any other applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations or collusion) are involved.

5. Accordingly, paragraph (1) of the article specifies the steps that the procuring entity has to take before an abnormally low submission may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

6. First, a written request for clarification must be made to the supplier or contractor concerned. The request may concern information, samples and so forth, proving the quality of the subject matter offered; the methods of any relevant manufacturing process; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution of the contract, to allow the procuring entity to conclude whether the supplier or contractor would be able to perform the procurement contract for the price submitted.

7. The enacting State may choose to regulate which type of information the procuring entity may require for this price explanation procedure. It should be noted in this context that the assessment is whether the price is realistic, and using such factors as pre-procurement estimates, market prices or prices of previous contracts, where available. The emphasis is to request information about the price itself, and not the underlying costs that will have been used by suppliers and contractors to determine it. This approach reflects the fact that the ability of the procuring entities accurately to assess performance risk, which is the aim of the exercise, cannot be carried out on the basis of an analysis of those underlying costs alone.

8. Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier or contractor refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low submission; it is one element to take into consideration when considering whether a submission is abnormally low.

9. Only after the steps outlined in paragraph (1) of the article have been fulfilled may the procuring entity reject the abnormally low submission. The article does not oblige the procuring entity to reject an abnormally low submission. The enacting State may wish to retain this flexibility, which recognizes that the assessment of performance risk is inherently highly subjective. It may alternatively decide to circumscribe the discretion to accept

or reject such submissions in order to ensure consistency and good practice, and to avoid abuse.

10. The decision on the rejection of the abnormally low submission must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. This decision may be challenged in accordance with chapter VIII of the Model Law.

11. Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low submissions. Thoroughly assessing suppliers, or contractors' qualifications and examining and evaluating their submissions can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of the description of the subject matter of the procurement. Procuring entities should be aware of the need to compile accurate and comprehensive information about suppliers, or contractors' qualifications, including information about their past performance, and to pay due attention in evaluation to all aspects of submissions, not only to price (such as to maintenance and replacement costs). These steps can effectively identify performance risks.

12. Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low submissions; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low submissions and promote responsible behaviour on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents that submissions may be rejected if they are abnormally low and raise performance concerns.

*Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest*

1. The purpose of article 21 is to provide the grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings for reasons not linked to qualification or to the content of a submission. The article does not use the term "corruption" itself but refers to examples of corrupt behaviour (inducement, unfair competitive advantage and conflicts

of interest). These examples are commonly cited examples of corrupt behaviour, and the article is therefore an important anti-corruption measure.

2. The article is intended to be consistent with international standards and to outlaw any corrupt practices regardless of their form and how they were defined. Such standards may be found in international instruments, such as the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*), or documents issued by international organizations, such as the Organisation for Economic Co-operation and Development (OECD) and multilateral development banks. They may evolve over time. In the light of article 3 of the Model Law that gives prominence to international commitments of enacting States, enacting States are encouraged to consider international standards against corrupt practices applicable at the time of the enactment of the Model Law. Some of them may be binding on the enacting State if it is a party to the international instruments concerned.

3. Although the procedures and safeguards in the Model Law are designed to promote transparency and objectivity and thereby to reduce corruption, a procurement law alone cannot be expected to eradicate corrupt practices in public procurement in the enacting State. Procuring entities should also not be expected to deal with all issues of such corruption. The enacting State should therefore have in place generally an effective system of sanctions against corruption by government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process, aimed at enhancing governance throughout the system.

4. The term “inducement” in the title of the article can be generally described as any attempt by suppliers or contractors improperly to influence the procuring entity. In some jurisdictions, practice is to define an inducement by reference to a *de minimis* threshold; enacting States that wish to take this approach are encouraged to ensure that the threshold is appropriate in the prevailing circumstances.

5. What would constitute an unfair competitive advantage or a conflict of interest for the purpose of applying paragraph (1) (b) is left to determination by the enacting State. The provisions address conflicts of interest only on the side of the supplier or contractor; those on the side of the procuring entity are subject to separate regulation, such as under article 26 on the code of conduct for procuring officials. To avoid an unfair competitive advantage and conflicts of interests, the applicable standards of the enacting State should, for example, prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. The applicable standards should also regulate participation of subsidiaries in the same procurement proceedings. Some aspects of

these concepts may be regulated in other branches of law of the enacting State, such as anti-monopoly legislation.

6. “An unfair competitive advantage” is an open-ended concept, reflecting the fact that the scope of existing definitions varies from system to system. Nonetheless, it involves issues of fairness, anti-monopoly legislation and market conditions. It may, but need not, stem from a conflict of interest. A situation where a supplier or contractor employs a former procurement official with specialist knowledge of procedures and organizational structures might be classed as a conflict of interest, as conferring an unfair competitive advantage or both, depending on the definitions involved. In the context of the Model Law, however, conflicts of interest and unfair competitive advantage are distinct concepts. The essence of an unfair competitive advantage as addressed in the Model Law is that a supplier or contractor is in possession of information to which other suppliers or contractors have not been given access; it may also arise where certain suppliers or contractors may have been treated unfairly by a procuring entity that sets a threshold or terms of reference to favour a particular supplier or contractor.

7. In this regard, the fairness of the process would be distorted were the procuring entity to discuss potential technical solutions with one potential supplier or contractor, and as a result formulate a statement of its technical requirements to suit that supplier or contractor. The supplier or contractor concerned would be considered to have a conflict of interest during the discussions with the procuring entity if it were planning to participate in the subsequent procurement process, and a subsequent unfair competitive advantage compared with other participating suppliers or contractors. Consequently, the supplier or contractor concerned should be excluded from the procurement. The risk may arise both in discussions in the procurement planning stage, and if the transparency and equal treatment safeguards are not respected during the procurement process.

8. What constitutes an unfair competitive advantage and consequences thereof might however need to be determined by competent authorities of the State on a case-by-case basis.

9. The Model Law does not require definitions of the concepts covered by the article. If an enacting State decides to define them, it may wish to take the considerations raised in this section of the *Guide* into account. Where there are relevant legal definitions of these concepts in an enacting State, they should be disseminated as part of the legal texts governing procurement (see, in this regard, article 5 and the **commentary thereto**). Where there are no definitions, examples of what will and will not constitute practices intended to be covered by the article should be provided.

10. The provisions of the article are without prejudice to any other sanctions that may be applied to the supplier or contractor, such as exclusion or debarment (as to which, see the **commentary to article 9**). However, sanctions—including criminal convictions—are not prerequisites for the exclusion of the supplier or contractor under this article.

11. To guard against any abusive application of article 21, the decision on exclusion and reasons are to be reflected in the record of procurement proceedings and to be promptly communicated to the supplier or contractor concerned to enable a challenge. The procurement regulations or rules or guidance from the public procurement agency or other body should assist in assessing whether or not a factual basis for exclusion has arisen. For further discussion of these issues, see the **commentary to article 26 on the code of conduct**.

12. The implementation of the article is also subject to other anti-corruption law in an enacting State, to avoid unnecessary confusion, inconsistencies and incorrect perceptions about its anti-corruption policies. Here, information-sharing and coordination between government agencies should be encouraged and facilitated, as discussed in the section on **“Institutional support”** in part I of this *Guide* and in the Introduction to chapter I.

*Article 22. Acceptance of the successful submission and entry into force of the procurement contract*

1. The purpose of article 22 is to set out detailed rules for: (i) the acceptance of the successful submission; (ii) a safeguard in the form of a standstill period to enable suppliers or contractors to file a challenge before the contract or framework agreement enters into force; and (iii) the entry into force of the procurement contract. The article is supplemented by transparency requirements in the Model Law regarding information to be provided to suppliers and contractors at the outset of the procurement proceedings. For example, article 39 (v) requires the solicitation documents to provide information about the application and duration of the standstill period. Article 39 (w) requires the solicitation documents to specify any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force which, in accordance with article 22, may include the execution of a written procurement contract and approval by another authority.

2. Paragraph (1) provides that the successful submission, as a general rule, is to be accepted by the procuring entity, meaning that the procurement contract or framework agreement must be awarded to the supplier or contractor presenting that successful submission (referred to as the winning

supplier), reflecting the terms and conditions of the submission. (There is no single definition of the successful submission. The articles regulating the procedures for each procurement method define the term in the context of each procurement method. See articles 43 (3) (b), 46 (3), 47 (10), 49 (13), 51 (5) and 57 (1).) The exceptions to the general rule set out in paragraph (1) are listed in subparagraphs (a)-(d) (disqualification of the winning supplier or contractor, cancellation of the procurement, rejection of the successful submission on the ground that it is abnormally low in accordance with article 20, or exclusion of the winning supplier or contractor on the grounds of inducements from its side, an unfair competitive advantage or conflicts of interest in accordance with article 21).

3. The ground for not accepting the successful submission set out in subparagraph (a) (disqualification) should be understood in the light of the provisions in article 9 (1) that allow the qualifications of suppliers or contractors to be ascertained at any stage of the procurement proceedings, article 9 (8) (d) allowing the procuring entity to require any pre-qualified supplier or contractor to demonstrate its qualifications again, and articles 43 (5) and 57 (2) that specifically regulate the assessment of the qualifications of the winning supplier.

4. It is understood that the list of exceptions in paragraph (1) (a)-(d) is not exhaustive: it refers only to the grounds that may be invoked by the procuring entity. Additional grounds may appear as a result of challenge and appeal proceedings, for example when the independent body, under article 67, orders the termination of the procurement proceedings, requires the procuring entity to reconsider its decision, or otherwise requires corrective steps. These grounds should also not be confused with the grounds that justify the award of the procurement contract to the next successful submission under article 22 (8): the latter grounds would appear after the successful submission was accepted, and not at the stage when the procuring entity decides whether the successful submission should be accepted.

5. Paragraph (2) regulates the application of the standstill period, defined in article (2) (r) as “the period starting from the dispatch of a notice as required by paragraph (2) of article 22 of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified”. The primary purpose of the standstill period is therefore to avoid the need for an annulment of a contract or framework agreement that has entered into force.

6. The notification of the standstill period is served on all suppliers or contractors that presented submissions, including the winning supplier or

contractor. (This notification should not be confused with the notice of acceptance of the successful submission addressed only to the winning supplier or contractor under paragraph (4) of the article.) The information notified under paragraph (2) includes that listed in its subparagraphs (a)-(c). The provisions of article 24 on confidentiality will indicate if any information about the successful submission under subparagraph (b) should be withheld for confidentiality reasons. Although the need to preserve confidentiality of commercially sensitive information may arise in setting out the characteristics and relative advantages of the successful submission, it is essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make meaningful use of the standstill period.

7. Because the standstill period starts running from the time of dispatch of the notification, to ensure transparency, integrity, and the fair, equal and equitable treatment of all suppliers and contractors in procurement proceedings, the provisions require prompt and simultaneous dispatch of an individual notification to each supplier or contractor concerned. Putting a notice on a website, for example, would be insufficient.

8. The provisions do not include any requirement for the procuring entity to notify (or debrief) unsuccessful suppliers or contractors about the grounds upon which they were unsuccessful. However, debriefing upon the request of a supplier or contractor represents best practice and should be encouraged by the enacting State. (On **debriefing**, see the discussion at the end of the commentary to this article.)

9. The provisions of paragraph (2) also require the procuring entity to specify the duration of the standstill period in the notification, which will have been set out in the solicitation documents. Providing this information in the notification under paragraph (2) is important not only as a reminder but also for precision—since the standstill period runs from the notice of the dispatch, the notification will specify the starting and ending dates of the standstill period reflecting the entire duration of the standstill period indicated in the solicitation documents.

10. Certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period is critical for ensuring both that the suppliers and contractors can take such action as is warranted and that the procuring entity can award the contract without risking an upset. The date of dispatch creates the highest level of certainty and is specified in the Model Law as the starting point for the standstill period. The same approach is taken as regards other types of

notifications served under this article (see paragraphs 17 and 19 below). Paragraph (9) of the article explains the meaning of the “dispatch.”

11. The Model Law leaves it to the procuring entity to determine the exact duration of the standstill period on a procurement-by-procurement basis, depending on the circumstances of the given procurement, in particular the means of communication used and whether procurement is domestic or international. To ensure equality of treatment, additional time may need to be allowed for example for a notification sent by post to reach overseas suppliers or contractors.

12. The discretion of the procuring entity to fix the duration of the standstill period is not unlimited. It is subject to the minimum to be established by the enacting State in the procurement regulations. A number of general considerations should be taken into account in establishing this minimum duration, including the impact that the duration of the standstill period would have on the overall objectives of the Model Law. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. Enacting States may wish to set more than one standstill period for different types of procurement, reflecting the complexity of assessing whether or not the applicable rules and procedures have been followed, but should note that excessively long periods of time may be inappropriate in the context of electronic reverse auctions and open framework agreements, which presuppose speedy awards and in which the number and complexity of issues that can be challenged are limited. On the other hand, the situation in infrastructure procurement may require a longer period of consideration.

13. The length of the standstill period may appropriately be reflected in working or calendar days, depending on the length and likely intervention of non-working days. It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to challenge the procuring entity’s intended decision to accept the successful submission. The standstill period is, therefore, expected to be as short as the circumstances allow, so as not to interfere unduly with the procurement itself. If a challenge is submitted, the provisions in chapter VIII of the Model Law would address any suspension of the procurement procedure and other appropriate remedies.

14. Paragraph (3) sets out exemptions from the application of the standstill period. The first refers to contracts awarded under framework agreements without second-stage competition: as the award of the contracts under such

framework agreements takes place under pre-determined terms and conditions, a standstill period is considered superfluous (see the definition in article 2 (e) (v)). (In the conclusion of a framework agreement itself and in all contracts awarded under any framework agreement involving second-stage competition the standstill period will apply.)

15. The second exemption applies to low-value procurement. As discussed in the Introduction to chapter I above, the enacting State should consider aligning the low-value threshold in the procurement regulations under paragraph (3) (b) of article 22 with other thresholds, such as those justifying an exemption from public notices of contract awards (under article 23 (2)) and the use of request-for-quotations proceedings (under article 29 (2)).

16. The third exemption is urgent public interest considerations, the nature of which are discussed in the **commentary to article 65** (3) on justifications for lifting the prohibition against bringing the procurement contract into force.

17. The purpose of paragraph (4) is to specify when the notice of acceptance of the successful submission is to be sent to the winning supplier or contractor. There may be various scenarios. First, where a standstill period was applied and no challenge or appeal is outstanding, the notice is dispatched by the procuring entity promptly upon the expiry of the standstill period. Secondly, where a standstill period was applied and a challenge or appeal is outstanding, the procuring entity is prohibited from dispatching the notice of acceptance (under article 65 of the Model Law) until it receives notification from appropriate authorities ordering or authorizing it to do so. Thirdly, if no standstill period was applied, the procuring entity must dispatch the notice of acceptance promptly after it has identified the successful submission, unless it receives an order not to do so from a court or another authorized authority.

18. The Model Law provides for different methods of entry into force of the procurement contract, recognizing that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances.

19. Under one method (set out in paragraph (5)), and but for a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the winning supplier. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the procuring entity has to give notice of acceptance while the submission is in force so as to bind the supplier or contractor to perform the contract. Under the “receipt” approach, if the notice were properly transmitted, but the

transmission was delayed, lost or misdirected through no fault of the procuring entity, and the period of effectiveness of the submission expires, the procuring entity would lose its right to bind the supplier or contractor. Under the “dispatch” approach, in the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its submission that the submission had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

20. A second method (set out in paragraph (6)) ties the entry into force of the procurement contract to the signature by the winning supplier or contractor of a written procurement contract conforming to the submission. This is possible only if the solicitation documents included such a requirement, and should not be considered the norm in all procurement proceedings. Enacting States are encouraged to indicate in the procurement regulations the type of circumstances in which a written procurement contract may be required, taking into account that such a requirement may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authenticity of the signature.

21. A third method (in paragraph (7)) provides the prior approval of the procurement contract by another authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g. only for procurement contracts above a specified value). Paragraph (7) reiterates the role of the solicitation documents in giving notice to suppliers or contractors of the formalities required for entry into force of the procurement contract. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful submission or of any tender security is designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed to avoid that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

22. As a matter of best practice, paragraph (8) makes it clear that, if the winning supplier or contractor fails to sign a procurement contract when required, the procuring entity may choose to cancel the procurement or to award the contract to the next successful submission. That submission will be identified in accordance with the provisions applicable to the selection of the successful submission in procurement concerned. The flexibility given to the procuring entity to cancel the procurement in such cases is intended,

among other things, to allow the consequences of collusion among suppliers or contractors to be mitigated. The procurement regulations or rules or guidance from the public procurement agency or other body should guide the decision on the appropriate course of action, and discuss avoiding abuse of the discretion conferred.

### *Debriefing*

23. Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful or, less commonly, to successful suppliers or contractors. The overall aims are to reduce the potential for challenges, to hold the procurement officials accountable for their decisions, and to enhance the effectiveness of the procurement process and the quality of future submissions.

24. Debriefings can be provided, on request or offered routinely, to suppliers or contractors excluded through pre-qualification, or after award, but should be provided as soon as practically possible. Debriefings may be done orally (such as at meetings), in writing, or by any other method acceptable to the procuring entity. Although oral debriefings may be appropriate or necessary, the recording of the information provided is important for good governance purposes, and may be provided to the supplier or contractor that is given the debriefing (the “requesting supplier or contractor”).

25. At a minimum, the debriefing information should include:

(a) The procuring entity’s evaluation of the significant weaknesses or deficiencies in the requesting supplier’s or contractor’s qualifications or submission, as applicable;

(b) A comparison of the information in subparagraph (a) of this paragraph and the procuring entity’s evaluation of the characteristics, price and other quality elements, and relative advantages, of the successful submission;

(c) The qualifications, overall evaluated price and technical rating, if applicable, of any successful supplier or contractor and the requesting supplier or contractor, and qualification information regarding the requesting supplier or contractor;

(d) The overall ranking of all suppliers or contractors, when any ranking was developed by the agency during the procurement process;

(e) A summary of the rationale for any qualification decision or award; and

(f) Reasonable responses to relevant questions about whether the procurement procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.

26. A key issue is that the debriefing must not reveal any commercially sensitive information—whether prohibited by the procurement law or not, and from whatever source—from disclosure. The procuring entity will therefore need to find the appropriate balance between providing helpful information to the requesting supplier or contractor and protecting confidential information.

27. A summary of the debriefing should be included in the documentary record of the procurement proceedings. This is not only part of good governance and administrative practice, but can also help mitigate the risk of disclosure of confidential information, which in extreme cases might lead to legal action. The issues of due process arising in debriefings are not dissimilar to those arising in some challenge proceedings, notably an application for reconsideration made to the procuring entity (see article 66). A discussion of those issues is found in the Introduction to chapter VIII.

*Article 23. Public notice of the award of a procurement contract or framework agreement*

1. In order to promote transparency in the procurement process, and the accountability of the procuring entity, article 23 requires prompt publication of a notice of award of a procurement contract or a framework agreement. This obligation is separate from the notice of the procurement contract (or framework agreement as applicable) required to be given under article 22 (10) to suppliers or contractors that presented submissions, and from the requirement that the information about the concluded procurement contract or framework agreement from the documentary record of procurement proceedings should be made available to any person under article 25 (1) (b) and (2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State to regulate in the procurement regulations under paragraph (3) of the article. For the minimum standards for publication of this type of information, see the **guidance to article 5**, which is relevant in this context.

2. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts irrespective of their value,

the procurement regulations will set out a monetary value threshold below which the publication requirement would not apply. Paragraph (2) requires periodic publication of cumulative notices of such awards, which must take place at least once a year.

3. While the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would probably exceed any low-value threshold.

#### *Article 24. Confidentiality*

1. The purpose of article 24 is to protect the confidential information of all parties to procurement. The article imposes different types of confidentiality requirements on different groups of persons, depending on which type of information is in question. It is supplemented by article 69, which addresses the protection of confidential information in challenge proceedings.

2. Paragraph (1) refers to information that the procuring entity is prohibited from disclosing to suppliers or contractors and to any other person. This information includes, first, information whose non-disclosure is necessary for the protection of the essential security interests of the enacting State, which may be legally identified as classified information. Essential security interests may concern not only the national defence of a State but any other sectors and issues, for example security related to public health and welfare. See, further, paragraph 8 below.

3. The information covered by paragraph (1) also includes information whose disclosure may “impede fair competition”. The phrase should be interpreted broadly, referring not only to current but also to subsequent procurement. Because of the broad scope of the provision and possibility of abuse, it is essential for the enacting State to set out in the procurement regulations, if not an exhaustive list of such information, at least its legal sources.

4. The information covered by paragraph (1) may be disclosed only by order of the court or the relevant organ designated by the enacting States (e.g. the independent body referred to in article 67). The identity of any organ with such power is to be specified in the law; the order issued by the court or other designated organ will regulate the extent of disclosure and relevant procedures.

5. Paragraph (2) deals with information submitted by suppliers or contractors. By their nature, such documents contain commercially sensitive

information; their disclosure to competing suppliers or contractors or to an unauthorized person could impede fair competition and would prejudice legitimate commercial interests. Such disclosure is therefore generally prohibited. The term “unauthorized person” in this context refers to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized in the enacting State to have access to the information in question. The Model Law, however, recognizes that disclosure of some information submitted—whether to competing suppliers or contractors or to the public in general—is important to ensure transparency and integrity in the procurement proceedings, meaningful challenge by suppliers or contractors and proper public oversight. Accordingly, paragraph (2) of the article sets out exceptions to the general prohibition. It cross-refers to the requirements under article 22 (2) and (10) to notify the intended award to suppliers or contractors that presented submissions; under article 23, to identify the winning supplier or contractor and the winning price in the public notice of contract award; under article 25, to disclose information through permitting access to certain parts of the documentary record; and, under article 42 (3), to announce certain information in tenders during their public opening.

6. Whereas paragraphs (1) and (2) have general application, paragraph (3) is restricted to procurement proceedings under articles 48 (3) and 49-52. These proceedings envisage interaction between the procuring entity and suppliers or contractors. Paragraph (3) imposes the obligation to respect confidentiality not only on the procuring entity but on any party and with respect to all information arising in the interaction in these proceedings. Disclosure of any such information is permissible only with the consent of the other party, or when required by law or ordered by the court or the relevant organ designated by the State. The reference to orders by the court or the relevant organ designated by the enacting State is identical to the one found in paragraph (1) of the article (see paragraph (4) above). The enacting State in designating the relevant organ should ensure consistency between paragraphs (1) and (3) of the article.

7. The procuring entity may seek blanket consent to disclosure of all information submitted by suppliers or contractors, such as by providing in the solicitation documents that participation in the procurement requires such consent, but this approach is at risk of abuse and requires additional authority. Any consent given should therefore be construed narrowly, as a broader interpretation may violate paragraphs (1) or (2) of the article.

8. Paragraph (4) is also of restricted application, applying only to procurement involving classified information (for the definition of “procurement involving classified information”, see article 2 (1) and the **discussion of**

**classified information** in part I of this *Guide* and in the **Introduction to chapter I**). It envisages that the procuring entity may take measures to protect classified information in the context of a specific procurement additional to the general legal protection under paragraph (1). Such additional measures may concern only suppliers or contractors or may be extended through them to their subcontractors. They might be justified by the sensitive nature of the subject matter of the procurement or by the existence of classified information even if the subject matter itself is not sensitive (e.g. when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

*Article 25. Documentary record of procurement proceedings*

1. The purpose of article 25 is to promote transparency and accountability by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing appropriate access to it. This record summarizes key information concerning the procurement proceedings; ensuring timely access where access is authorized is essential for any challenge by suppliers and contractors to be meaningful and effective. This in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities.
2. The article does not prescribe the form and means in which the record must be maintained. These issues are subject to article 7 on communications in procurement, in particular the standards set out in paragraphs (1) and (4) of that article (see, further, the **commentary thereto**).
3. The list of information to be included in the record under paragraph (1) is not intended to be exhaustive as the chapeau provisions (through the word “includes”) and paragraph (1) (*w*) indicate. The latter is intended to be a “catch-all” provision, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor are recorded. Some decisions, although not listed in paragraph (1) of the article, are to be included in the record under other provisions of the Model Law. For example, article 35 (3) requires the decision and reasons for using direct solicitation in request-for-proposals proceedings to be recorded. Articles 53 (2) and 60 (7) require the decision and reasons for limiting participation in electronic reverse auctions and open framework agreements on the ground of technological constraints to be recorded. Paragraph (1) (*w*) refers also to information that the procurement regulations may require to be recorded.

4. The reference in the chapeau of paragraph (1) to maintaining the record also requires it to be updated. Information is therefore included to the extent it is known to the procuring entity. For example, in procurement proceedings in which not all proposals were finalized by the proponents, or where the latter left the proceedings without submitting a BAFO, the procuring entity under paragraph (1) (*s*) should include a summary of each submission at the relevant time in the procurement proceedings. The reference to the price should be interpreted to allow for the possibility that in some instances, particularly in procurement of consulting (e.g. advisory) services, the submissions would contain a formula by which the price could be determined rather than an actual price quotation.

5. Record requirements should specify the extent of the disclosure, and the recipients of relevant information, from the record. Such goals as transparency and accountability, and the need to provide suppliers and contractors with the information necessary to permit them to assess their performance and consider a challenge where appropriate, must be balanced with the need to protect the legitimate commercial interests of the suppliers or contractors. In view of these considerations, article 25 provides two levels of disclosure. It mandates in paragraph (2) disclosure to any person of the information referred to in paragraph (1) (*a*)-(*k*) of the article—basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated under paragraph (3) of the article for the benefit of suppliers and contractors that presented submissions, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the law. The procuring entity may not decline to disclose such information even if it considers that the disclosure would impede fair competition (e.g. by facilitating collusion in subsequent procurements, or driving suppliers or contractors out of business). However, it is recommended that the regulations or rules or guidance from the public procurement agency or other body should require the procuring entity to notify suppliers or contractors of its intention to disclose portions of the record relevant to them: those suppliers or contractors may wish to challenge under the provisions of chapter VIII the decision of the procuring entity to do so, on the basis of a breach of article 24 on confidentiality.

6. The pool of suppliers or contractors under paragraph (3) is limited to those that presented submissions: other suppliers or contractors, including those disqualified, should not have access to information on the examination and evaluation of submissions. As regards disqualified suppliers or contractors, the reasons for their disqualification will have been communicated to them under the requirements of articles 18 (10) and 49 (3) (*e*), and should give them sufficient information to consider whether to challenge their exclusion.

7. The purpose of the provision in paragraph (3) allowing disclosure to the suppliers or contractors that presented submissions of the relevant parts of the record at the time when the decision to accept a particular submission has become known to them is to give efficacy to the right to challenge under article 64. The procurement regulations should require the procuring entity to grant prompt access to those records since delaying disclosure until, for example, the entry into force of the procurement contract might deprive suppliers and contractors of a meaningful remedy. The provisions are also intended to capture two situations when the decision to accept a particular submission becomes known to the relevant suppliers or contractors: one is when it becomes known through a standstill period notification under article 22 (2), and the second when it may become known despite no such notification having been served, through the publication of a contract notice as required by article 23, or through disclosure, among others, by civil society, or media or monitoring reports.

8. The disclosure of information either to the public or to relevant suppliers or contractors is without prejudice to paragraph (4) (a) of the article, which sets out grounds that would allow the procuring entity to exempt information from disclosure (see the **commentary to article 24**), and to paragraph (4) (b) of the article listing information that cannot be disclosed. The latter concerns information relating to the examination and evaluation of submissions, which may naturally involve commercially sensitive information; suppliers and contractors that presented submissions have thus a legitimate interest in protecting this type of information. Among the objectives of paragraph (4) (b) is therefore the avoidance of disclosure of confidential commercial information to competing suppliers and contractors. The need is particularly acute with respect to information concerning the evaluation of submissions. Accordingly, paragraph (4) (b) restricts the disclosure of more detailed information than that put on the record in the form of a summary of the evaluation of submissions as required under paragraph (1) (t) of the article.

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

10. Paragraph (5) of the article reflects a requirement in the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial

statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3) of the Convention). The requirement to preserve documents related to the procurement proceedings and applicable rules on documentary records and archiving, including the period of time during which the record and all the relevant documents pertaining to a particular procurement should be retained, should be stipulated in other provisions of law of the enacting State. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations or rules or guidance from the public procurement agency or other body may so require.

### *Article 26. Code of conduct*

1. The purpose of article 26 is to emphasize the need for States to enact a code of conduct for officers and employees of procuring entities (the “procurement personnel”). Depending on the legal traditions of enacting States, codes of conduct may be enacted as part of the administrative law framework of the State, either at the level of statutory law or as regulations, such as the procurement regulations. They may be of general application to all public officials regardless of the sector of economy or may be enacted specifically for the procurement personnel, and some may be part of the procurement laws and regulations. When a general code of conduct for public officials is enacted, it is expected that such a general code will contain provisions addressing specifically the conduct of the procurement personnel.
2. The provisions of the article requiring the code of conduct to be promptly made accessible to the public and systematically maintained are to be read together with article 5 (1) of the Model Law, in which a similar requirement applies to legal texts of general application. The **commentary to article 5** (1) is therefore relevant in the context of the relevant provisions of article 26.
3. Enacting a code of conduct should be considered as a measure to implement certain requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*), articles 8 and 9 of which have direct relevance to public procurement, including procurement personnel. Article 8 (5) of the Convention in particular refers to: “measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result”.
4. There are other international regulations addressing corrupt practices in the procurement context, such as those of the Organisation for Economic

Co-operation and Development. These regulations evolve, and the enacting State is encouraged, in considering enacting or modernizing a code of conduct for its public officials or specifically for the procurement personnel, to consult these regulations as applicable at the time of enactment of the Model Law.

5. The article is intended to ensure that enacting States eliminate through such codes of conduct any gaps in regulation and in measures enacted to implement the relevant provisions of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) and other applicable international regulations. The code of conduct so enacted should therefore, consistent with applicable international standards, outlaw any corrupt practices regardless of their form and how they were defined. It should address appropriate measures to regulate matters regarding the procurement personnel and situations that pose risks to the integrity of the procurement process. Without intending to be exhaustive, the article mentions only some of such measures, such as declarations of interest, screening procedures and training requirements, and focuses on the conflicts of interest situations in procurement, in the light of particularly negative effects of conflicts of interest on transparency, objectivity and accountability in public procurement. The Model Law provides only general principles, recognizing that setting out in the Model Law exhaustive provisions, including measures to mitigate the risks of impropriety in various situations, would be impossible.

6. The code of conduct enacted by the State should not be limited to measures and situations addressed in article 26. It should address actual and perceived conflicts of interest, increased risks of impropriety on the part of the procurement personnel in such and other situations, and measures to mitigate such risks.

7. Although the provisions of article 26 do not purport to mandate the enacting State to enact a code of conduct for suppliers or contractors in their relations with the procuring entity, some provisions of the code of conduct may establish boundaries for the behaviour of private sector entities or individuals with public officials. The code of conduct may address further how a subsidiary of the consultant would be treated in the procurement proceedings concerned and other matters, such as the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals that are potential participants in procurement proceedings). A code of conduct enacted under article 26, in addition to the topics set out in that article, may also address the relationship between the procuring entity and suppliers and contractors, including appropriate internal controls within those suppliers and contractors.

8. In addressing these matters in a code of conduct, the enacting States should take into account their close relation with other branches of law, in particular criminal law and anti-monopoly legislation, and therefore the need for a close cooperation and coordination with relevant State agencies.

## CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE; SOLICITATION AND NOTICES OF THE PROCUREMENT

### Section I. Methods of procurement and their conditions for use

#### A. Introduction

##### 1. *Summary*

1. The methods and techniques presented in section I of chapter II are included to provide for the variety of circumstances that may arise in procurement in practice. They are designed to allow the procuring entity, when considering how to conduct a procurement procedure, to take account of what it is that is to be procured (the subject matter), the market situation (the number of potential suppliers or contractors, degree of concentration in the market, the extent to which the market is competitive), any degree of urgency, and the appropriate level of technology (to assess, for example, whether electronic procurement is appropriate).

##### 2. *Enactment: policy considerations*

2. Taking account of the differing stages of development of procurement systems in enacting States, this section of the *Guide* comments on features of certain procurement methods that are intended to permit more or less discretion on the part of the procuring entity, and the capacity and infrastructure needed to operate them effectively. The aim is to enable enacting States to decide whether or not each method is appropriate for their local circumstances, by reference also to the issues raised in the commentary on implementation and use in the following section.

3. The Model Law requires that open tendering be always enacted, as the **commentary to article 27** explains. Enacting States should provide in addition to open tendering sufficient options to address the normal situations in which it engages in procurement. At a minimum, enacting States should

provide (in addition to open tendering) a method that can be used for low-value and simple procurement, a method that can be used for emergency and other urgent procurement, and a method that can be used for more specialized or complex procurement.

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

5. The available methods and techniques can be considered together as a toolbox, from which the procuring entity should select the appropriate tool for the procurement concerned. It is, however, recognized that the conditions for use and the functionality of certain methods will overlap, as explained further in the **commentary to article 28** below. For example, restricted tendering under article 29 (1) (b), request for quotations or electronic reverse auctions may all be available and appropriate for relatively low-value and simple procurement. Enacting States are encouraged to consider the extent to which the enactment of overlapping procurement methods are appropriate in their local circumstances: the greater the number of available procurement methods, the more complex the decision-making as regards the selection of the most appropriate method of procurement in the circumstances of the given procurement becomes.

6. For this reason, where the enacting State is introducing procurement legislation for the first time, it may be appropriate to base the system on a more limited number of methods than the full range available under the Model Law. The decision regarding which procurement methods to enact should itself be based on a full consideration of local circumstances. It may also be considered

that the methods to be enacted should include tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these methods will allow the introduction at a later stage of methods involving negotiations or dialogue, including request for proposals.

7. As some methods may be considered to be more vulnerable to abuse and corruption than others, and some methods require greater levels of capacity to function successfully, the guidance to each procurement method below is designed to assist enacting States in considering which methods are appropriate for their jurisdiction. It highlights issues that may arise in the use of various procurement methods and capacity issues that the various procurement methods raise. The guidance can also be used for reference by those that draft regulations and guidance.

8. Under the Model Law, the selection of procurement method is based not on whether it is goods, construction or services that are procured, but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (see article 28 (2) and its **commentary**). These provisions have been crafted in a flexible manner, balancing the needs of borrowers, ongoing developments in procurement policies and practices and capacity development.

9. Enacting States will wish to consider whether any international agreements to which they are party, or donor requirements, require the adaptation of the conditions for use of the procurement methods set out in the Model Law, as further discussed in particular in the commentary to request-for-proposals procurement methods. For example, enacting States may wish to take into account that, historically, the procurement rules of some multilateral development banks have not included procurement methods equivalent to request for proposals with dialogue or competitive negotiations as provided for in the Model Law. These multilateral donors have included methods with the features of the Model Law's request for proposals without negotiation and request for proposals with consecutive negotiations only for the procurement of consulting (e.g. advisory) services. Consequently, and in the light of possible developments, enacting State—potential borrowers from the multilateral development banks—should verify the public procurement policies of those donors at the relevant time that will be applicable to procurement projects financed by such donors.

### ***3. Issues regarding implementation and use***

10. In considering which methods of procurement to enact, enacting States should give particular consideration to whether the procuring entities possess

adequate professional judgement and experience to select the appropriate procurement method from among the available options, and to operate it successfully. Further guidance on selection among alternative procurement methods, which highlights the capacity issues concerned, is provided in the **commentary to article 28** and in the **commentary to each procurement method** below.

11. Where enacting States consider that capacity development to enhance the quality of decision-making on these matters would be of assistance, it should ensure that regulations, rules or guidance from the public procurement agency or other body focus in particular on how to select the appropriate procurement method where the conditions for use for several methods and/or techniques may apply. Consequently, enacting States may wish to consider the use of a typology of procurement methods and guidance on the identification of the appropriate procurement method in the circumstances concerned.

12. The footnote to article 27 provides that “States may consider whether, for certain methods of procurement, to include a requirement for high-level approval by a designated organ.” The issues relating to whether or not to include such an ex ante approval mechanism are considered in the discussion of “**Institutional support**” in part I of this *Guide*.

## **B. Article-by-article commentary**

### *Article 27. Methods of procurement*

1. The purpose of article 27 is to list all methods and techniques of procurement provided for in the Model Law. Paragraph (1) lists available methods of procurement and paragraph (2) refers to a procurement technique defined in the Model Law as a framework agreement procedure (see the definition in article 2 (*e*)).

2. Article 27 contains a footnote advising enacting States that they “may choose not to incorporate all the methods of procurement listed in this article into their national legislation,” and continues that “an appropriate range of options, including open tendering, should be always provided for.” In other words, enacting States should always provide for open tendering, which is considered under the Model Law to be the method of the first resort (the default procurement method). This is because its procedures most closely support the achievement of the goals and objectives of the Model Law, through implementing the principles of competition, objectivity and

transparency (as further discussed in the commentary to chapter III). The procuring entity must therefore use this method unless the use of alternative methods of procurement (that is, all methods other than open tendering), is justified. As further elaborated in the commentary to article 28, the main mechanism for justifying the use of alternative methods is through satisfying conditions for use of these alternative methods.

3. Although listed in paragraph (1) (i) as a stand-alone procurement method, electronic reverse auctions may also be used as a technique (similarly to framework agreement procedures referred to in paragraph (2)), as the final stage preceding the award of the procurement contract in any method of procurement listed in paragraph (1), as well as in the award of procurement contracts under framework agreements (see further the commentary to chapter VI).

4. Paragraph (2) refers to framework agreement procedures. The framework agreement procedure is not a method of procurement as such but a procurement technique consisting of the award of a framework agreement by means of the methods of procurement listed in paragraph (1), or through the conclusion of an open framework agreement, and of the subsequent placement of purchase orders under the awarded agreement (see further the commentary to chapter VII).

*Article 28. General rules applicable to the selection of  
a procurement method*

1. The purpose of article 28 is to guide the procuring entity in selection of the procurement method available in the circumstances of any given procurement.

2. Paragraph (1) provides for the basic rule that open tendering is the default procurement method. There are no conditions for its use: it is always available. The implication of open tendering as the default procurement method is that the use of any other procurement method requires justification, through a consideration of whether the conditions for its use are satisfied. Paragraph (1) sets out therefore the general requirement that these other methods can be used only where the conditions for their use set out in articles 29-31 of the Model Law so permit. Thus the procuring entity does not have an unfettered discretion to choose which alternative to open tendering it wishes, but is required, as a first step, to see whether any alternative is available in the circumstances of the procurement at hand. The conditions for use contain safeguards, in particular against abusive use of less structured and regulated methods of procurement to avoid open

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

3. The conditions for use are intended to reflect the distinct and commonly encountered circumstances that may justify use of one or other of the alternative procurement methods. For example, one of the conditions justifying use of restricted tendering (article 29 (1) (a)) refers to the procurement of highly complex products where there are limited sources of supply. Where it is not feasible or appropriate to formulate a full description (including technical specifications) of the subject matter of the procurement at the outset of the procurement proceedings, two-stage tendering or request for proposals with dialogue may be appropriate. Where quality aspects may be highly significant (which is commonly the case in the procurement of consulting (e.g. advisory) services), request for proposals without negotiations or with consecutive negotiations may be used. Competitive negotiations are intended for procurement involving essential security interests of the enacting State and under situations of urgency, while resort to single-source procurement can be justified only on the listed and objective grounds (e.g. in situations of emergency or where there is only a single supplier in a given market capable of meeting the needs of the procuring entity).

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

5. The main reason why conditions for use do not provide a complete guide to selection of procurement method is that the conditions for use for more than one method may apply in the circumstances (in addition to open tendering, which is always available). What is the appropriate, or the most appropriate, procurement method can only be determined through a consideration of all the circumstances of the procurement. This is reflected in paragraph (2) of the article, which requires the procuring entity to select an alternative method of procurement to accommodate the circumstances of the given procurement. Such circumstances will differ from procurement to procurement and, as noted above in the **Introduction to section I**, the procuring entity will need to possess appropriate professional knowledge,

experience and skills to select the procurement method most suitable for the circumstances of the given procurement.

6. For example, in deciding whether to use open tendering, two-stage tendering or request for proposals with dialogue, the procuring entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively complex subject matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure to achieve the best solution through discussions with suppliers or contractors, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach. (A consultancy may also precede the two-stage tendering procedure, to produce the design of the initial description and technical specifications.) Where the procuring entity cannot or considers it undesirable to retain such control, the request-for-proposals-with-dialogue procedure will be appropriate. The capacity required to operate request for proposals with dialogue, which involves the ability to assess and monitor different solutions, and to engage in dialogue on technical and commercial terms, including price, is generally considered to be in excess of that required to operate two-stage tendering.

7. Paragraph (2) of the article requires the procuring entity, in addition, to “seek to maximize competition to the extent practicable” when selecting the procurement method. In other words, the Model Law promotes the broadest and most rigorous competition appropriate in the circumstances of the given procurement. Competition in this context means, first, a preference for public and unrestricted solicitation to maximize the potential pool of participating suppliers and contractors, and, secondly, ensuring that the procedure does not restrict the number of participants below the number required to ensure that they in fact compete.

8. The requirement to maximize competition will determine the most appropriate method among those available in some situations. For example, in cases of urgency following a natural disaster or similar catastrophe, two methods are available under the Model Law: competitive negotiations and single-source procurement. The conditions for use of these methods are almost identical: they refer respectively to “an urgent” and “an extremely urgent” need for the subject matter of the procurement as a result of the catastrophe, in each case subject to the caveat that the urgency renders it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using them. Although both competitive negotiations and single-source procurement are considered to provide less competition (as well as objectivity and transparency) than other procurement methods, it is clear that competition is to some degree present in competitive negotiations, and is essentially absent in single-source

procurement. For this reason, only where there is an extreme degree of urgency can single-source procurement be justified: such as for the needs that arise in the immediate aftermath of the catastrophe (e.g. for clean water, emergency food and shelter or immediate medical needs). Other needs, which may still arise as a direct result of the catastrophe, involve a time-frame that allows the use of competitive negotiations rather than single-source procurement (and, the further in time from the catastrophe, the less likely it is that either of these methods remains available because there will be time to use other methods). The guidance to both methods discusses this issue, and other steps that can be taken to mitigate the risks that they pose; the guidance to framework agreements also highlights the use of that technique as a manner of planning for emergencies.

9. Paragraph (3) of the article reinforces the need for justification for resort to alternative procurement methods by requiring that the statement of reasons and circumstances for such a resort be included in the record of the procurement proceedings. The same requirement is repeated in article 25 (1) (e). The importance of such records is a key requirement that allows for the traceability of the decisions concerned, and their oversight as necessary.

*Articles 29–32. Conditions for use of procurement methods  
and techniques*

The commentary on the conditions for use of each procurement method and technique has been located with the commentary on the procedures for each such method and technique. The commentary can therefore be found as follows:

- (a) **Open tendering;**
- (b) **Restricted tendering;**
- (c) **Request for quotations;**
- (d) **Request for proposals without negotiation;**
- (e) **Two-stage tendering;**
- (f) **Request for proposals with dialogue;**
- (g) **Request for proposals with consecutive negotiations;**
- (h) **Competitive negotiations;**
- (i) **Electronic reverse auction;**
- (j) **Single-source procurement; and**
- (k) **Framework agreements**

## **Section II. Solicitation and notices of the procurement**

### **A. Introduction**

#### *1. Summary*

1. Section II of chapter II, comprising articles 33, 34 and 35 of the Model Law, sets out the rules that govern solicitation in all procurement methods under the Model Law. The Model Law mandates public and unrestricted solicitation as the general rule. Such solicitation is required in open tendering under chapter III, two-stage tendering under article 48, electronic reverse auctions under chapter VI and open framework agreements under chapter VII. It is also the default rule in request-for-proposals procurement methods under articles 47, 49 and 50. In other procurement methods (restricted tendering under article 45, request for quotations under article 46, competitive negotiations under article 51 and single-source procurement under article 52), direct solicitation, which involves the issue of the invitation to participate in the procurement proceedings to suppliers or contractors identified by the procuring entity, is an inherent feature of the procurement method. The commentary to each such method, however, sets out safeguards to ensure effective participation and competition in such procurement.

#### *2. Enactment: policy considerations and issues regarding implementation and use*

2. The issues regarding implementation and use of the provisions on solicitation are inextricably linked with the policy issues concerned. The main requirement for effective implementation and use is for a clear and detailed explanation of the policy issues and how they delineate the elements of discretion involved in decisions regarding the manner of solicitation. For this reason, policy considerations and issues regarding the implementation and use are considered together in this section.

3. The default rule under the Model Law is for public and unrestricted solicitation, which involves a public advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the consideration of the qualifications and submissions of suppliers and contractors that present tenders or other submissions.

4. In order to promote transparency and competition, the first aspect of public and unrestricted solicitation (see, for example, paragraph (1) of article 33) involves minimum publicity procedures to be followed for soliciting tenders or other submissions from an audience wide enough to provide an effective level of competition. These procedures require the invitation to tender or to present other submissions to be advertised in a publication identified in the procurement regulations. The reasons for naming the publication in the procurement regulations rather than in the Model Law are to provide flexibility should procedures in an enacting State change and to provide an official source of procurement-related information, and also to ensure technical neutrality by avoiding a reference to a publication that requires a particular medium. The Model Law does not regulate the means and media of publication, which are left to be determined by enacting States. There may be paper or electronic media or a combination of both, as further explained in the **commentary to article 5**.

5. In view of the objective of the Model Law of fostering and encouraging international participation in procurement proceedings, the second aspect of public and unrestricted solicitation is the additional publication of the invitation internationally, i.e. in the media with international circulation. These procedures are designed to ensure that the invitation is issued in such a manner that it will reach and be understood by an international audience of suppliers and contractors. In this regard, there is no requirement for the invitation to be published in any particular language, but it is implicit in the provisions that publication should be made in a language that will make the invitation in fact accessible to all potential suppliers or contractors in the context of the procurement concerned. As noted in the **commentary to article 13**, the requirements of certain multilateral development banks include that the invitation must be published in a language customarily used in international trade, which may in practice imply the use of English. Similar provisions are found in the WTO GPA (see **paragraph 8 of part I** of this *Guide*) and are considered to be an important safeguard towards achieving transparency and competition. Enacting States will wish to consider the need to follow requirements of any international agreements to which they are party, or donor requirements, when adopting the provisions on solicitation.

6. There are exceptions to this general rule on publication of the invitation internationally. The first arises where the procuring entity engages in domestic procurement, and the second arises in cases of procurement whose low value, in the judgement of the procuring entity, means that there is unlikely to be interest on the part of foreign suppliers or contractors. In such cases, the procuring entity may still solicit internationally but is not required to do so; however, where foreign suppliers or contractors wish to participate (if

they have seen an advertisement on the Internet, for example), they must be permitted to do so.

7. The first exception—the use of domestic procurement—is possible, under article 8 of the Model Law, only on the grounds specified in the procurement regulations or in other provisions of law of the enacting State (see, further, the **commentary to that article**). The second exemption—low-value procurement—relies largely on the judgement of the procuring entity. See, further on low-value thresholds, the commentary on that topic in the **Introduction to chapter I**.

8. The publication requirements in the Model Law are only minimum requirements. The procurement regulations may additionally require procuring entities to publish the invitation to tender by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, a contracts bulletin and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity. Where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a weblink to the solicitation documents themselves: this approach is proving beneficial in terms of both efficiency and transparency.

9. The requirements of article 33 for public and unrestricted solicitation do not apply to pre-qualification, but this is a technicality only, as article 18 on pre-qualification repeats the requirements for such solicitation as closely as possible (see the **commentary to article 18**). Wide international outreach to potentially interested suppliers and contractors is therefore ensured also when pre-qualification is involved, in the same way as in public and unrestricted solicitation. Exclusion of pre-qualification proceedings from the application of article 33 reflects the fact that the solicitation, where there have been pre-qualification proceedings, follows a different pattern: the invitation to tender or to present submissions follows the pre-qualification proceedings and is issued only to pre-qualified suppliers or contractors, under the provisions of article 18.

10. As noted in the **Introduction to section II**, direct solicitation is an inherent feature of some procurement methods; in procurement methods where it is not, the need for direct solicitation may be dictated by specific circumstances of the procurement, such as the need to protect classified information. The Model Law recognizes these differences in articles 34 and 35. It provides for direct solicitation in several procurement methods: where the subject matter of the procurement by reason of its highly complex or

specialized nature is available from a limited number of suppliers or contractors (in restricted tendering and request for proposals under articles 34 (1) (a) and 35 (2) (a) respectively); where the time and cost required to examine and evaluate a large number of tenders or other submissions would be disproportionate to the value of the procurement (in restricted tendering and request for proposals under articles 34 (1) (b) and 35 (2) (b) respectively); in request-for-proposals procedures involving classified information under article 35 (2) (c); in request for quotations under article 34 (2); in competitive negotiations under article 34 (3); and in single-source procurement under article 34 (4). In all cases, except as regards request for quotations, and competitive negotiations and single-source procurement in cases of urgency, direct solicitation must be preceded by an advance notice of the procurement, as explained below, so as to introduce transparency into the process.

11. Because direct solicitation impedes the objectives of the Model Law of fostering and encouraging open participation in procurement proceedings by suppliers and contractors and promoting competition among them, the Model Law requires the procuring entity to include in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request-for-proposals procedures (see, for example, article 35 (3)). Together with the requirement for an advance notice of the procurement, discussed below, this provision is included to provide for transparency and accountability when direct solicitation is used. Where the procurement takes place in a concentrated market, or on a repeated basis, an assessment should be made and recorded as to the likelihood of collusion before a decision to engage in direct solicitation is made (that is, at the outset of the procedure), bearing in mind, however, there may be fierce competition even in highly concentrated markets where the participants are known to each other.

#### *Advance notice of the procurement*

12. Articles 34 (5) and 35 (4) promote transparency and accountability as regards the decision to use restricted tendering, competitive negotiations and single-source procurement and direct solicitation in request-for-proposals procedures by requiring publication of a notice of the procurement in the media to be specified by the enacting State in its procurement regulations. Also relevant in this regard is the rule in articles 28 (3) and 35 (3) (which is of general application), read together with the provisions of article 25 (1) (e), which require the procuring entity to include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of the procurement method con-

cerned and direct solicitation in request-for-proposals procedures.

13. The provisions mandate the publication of a notice prior to the direct solicitation. The notice is therefore distinct from a public notice of the award of a procurement contract or framework agreement required under article 23 of the Model Law. (See the discussion in the preceding subsection on the means and media of publication).

14. The information to be published in the advance notice of procurement is the minimum needed to ensure effective public oversight and possible challenge by aggrieved suppliers or contractors under chapter VIII of the Model Law. In particular, the selected method of procurement may be challenged by any affected supplier or contractor if, for example, single-source procurement or restricted tendering were selected on the ground that a particular supplier or contractor or limited group of suppliers or contractors existed in the market and was or were capable of supplying the subject matter of the procurement. Any other suppliers or contractors capable of delivering the subject matter of the procurement in the market concerned may challenge the use of the procurement method relying on the information in the notice of the procurement. Under chapter VIII, they would be able to do so before the deadline for presenting submissions, and there may be a suspension of the procurement proceedings as a result. As is discussed in the commentary to chapter VIII, and in order to avoid vexatious challenges that can be highly disruptive when filed at the last minute, a challenging supplier or contractor has to show that its interests may have been affected at the point in time concerned: thus, for example, it may have to show a real intention to participate in the circumstances described above (e.g. by presenting a draft tender or other submission).

15. The requirement for an advance notice of the procurement in restricted tendering, request for proposals, competitive negotiations and single-source procurement is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII, it enables and encourages aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited.

16. The requirement to publish an advance notice of the procurement is not applicable in request-for-quotations proceedings in the light of the very restrictive conditions for use of that method, which will constrain any excessive or abusive use of that method. Nor does it apply in the case of competitive negotiations and single-source procurement when those methods are used in urgent or extremely urgent situations due to catastrophic events (i.e. under the

conditions for use of these procurement methods under articles 30 (4) (a) and (b) and 30 (5) (b)). In the normal case, when an advance notice is in principle required, an exemption may nevertheless apply under article 24 (confidentiality), in particular in procurement involving classified information. (For guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see the discussion of classified information in **part I** of this *Guide* and in the **Introduction to chapter I** and the commentary to articles 2, 24 and 25).

## **B. Article-by article commentary**

### *Articles 33–35. Solicitation in each procurement method*

The commentary on the particular issues of solicitation in each procurement method has been located in the commentary on the procedures for each procurement method. The commentary can therefore be found as follows:

- (a) **Open tendering;**
- (b) **Restricted tendering;**
- (c) **Request for quotations;**
- (d) **Request for proposals without negotiation;**
- (e) **Two-stage tendering;**
- (f) **Request for proposals with dialogue;**
- (g) **Request for proposals with consecutive negotiations;**
- (h) **Competitive negotiations;**
- (i) **Electronic reverse auction;**
- (j) **Single-source procurement; and**
- (k) **Framework agreements.**



## CHAPTER III. OPEN TENDERING

### A. Introduction

#### *1. Summary*

1. Open tendering is widely recognized as generally the most effective method of procurement in promoting the objectives of the Model Law as set out in its Preamble. The Model Law therefore mandates it as the default procurement method for the circumstances other than those described in articles 29, 30, 31 and 32. The key features of open tendering include the unrestricted solicitation of participation by suppliers or contractors; a comprehensive description and specification in the solicitation documents of what is to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender; the strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; the public opening of tenders at the deadline for submission; and the disclosure of any formalities required for entry into force of the procurement contract. Suppliers and contractors can enforce compliance with these requirements, where necessary, through the challenge mechanism provided under chapter VIII of the Model Law.

2. The provisions on open tendering, with few exceptions, are applicable under the Model Law to two-stage restricted tendering and tendering proceedings under articles 45 and 48 respectively. The guidance provided in this section should therefore also be considered when addressing those procurement methods.

#### *2. Enactment: policy considerations*

3. As the footnote to article 27 explains, the Model Law requires that open tendering always be enacted, reflecting that the key features of this procurement method described in the Summary above ensure the most effective way of promoting the objectives of the Model Law. Accordingly, and subject to

any amendment necessary to ensure coherence in the enacting State's body of law, it is recommended that the solicitation rules in article 33 regarding open tendering and the procedures in articles 36-44 be enacted in full.

### ***3. Issues regarding implementation and use***

4. The regulations or rules or guidance from the public procurement agency or other body on the use of the method should emphasize the importance of the key features set out in the Summary above, the benefits of the method, and the implications of the rule under article 28 that the procuring entity must use open tendering unless the use of an alternative method of procurement is justified. It will then be apparent that the justifications for the alternative methods are intended to be not the norm, but the exception.

5. In addition to the guidance that is recommended in the article-by-article commentary below, the general provisions in chapter I are key to ensuring that open tendering functions as intended.

## **B. Article-by-article commentary**

### ***Conditions for use of open tendering (article 28 (1))***

There are no conditions for the use of open tendering. Article 28 (1) provides that a procuring entity must conduct procurement through open tendering unless the conditions for use of another procurement method set out in articles 29 to 31 of the Model Law are satisfied. Open tendering is therefore the default procurement method and is always available for any procurement.

### ***Solicitation in open tendering (articles 33 and 36-39)***

38. Solicitation in open tendering proceedings is regulated by article 33, which sets out public and unrestricted international solicitation as the default rule (for a further explanation of that concept, see the **commentary to section II of chapter II**). There are no exceptions to the requirement for such public and unrestricted solicitation. Where pre-qualification procedures precede open tendering, as is permitted by article 18, they ensure public and unrestricted solicitation since they require an invitation to participate in the pre-qualification proceedings to be published in the manner prescribed for an invitation to open tendering. Thus the principle of public and unrestricted

solicitation is preserved even though solicitation after pre-qualification proceedings is addressed only to pre-qualified suppliers or contractors.

1. There are limited exceptions to the requirement for international solicitation under article 33 (4) for domestic and low-value procurement only, as explained in the **commentary to section II of chapter II**. In all other cases, therefore, the invitation to tender must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

#### *Article 36. Procedures for soliciting tenders*

Article 36 applies the provisions of article 33 to solicitation in open tendering. The main requirement is for public and unrestricted international solicitation as the default rule, as that concept is further explained in the commentary immediately above.

#### *Article 37. Contents of invitation to tender*

In order to promote efficiency and transparency, article 37 requires that invitations to tender should contain all information necessary for suppliers or contractors to be able to ascertain whether the subject matter being procured is of a type that they can provide and, if so, how they can participate in the open tendering proceedings. The specified information is the required minimum, and so does not preclude the procuring entity from including additional information that it considers appropriate.

#### *Article 38. Provision of solicitation documents*

1. The solicitation documents are intended to provide suppliers or contractors with the information they need to prepare their tenders and to inform them of the rules and procedures according to which the open tendering proceedings will be conducted. Article 38 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the open tendering proceedings and that comply with the procedures and requirements set out by the procuring entity are provided with the solicitation documents. These procedures and requirements are to be set out in the invitation to tender in accordance with article 37 and may concern such matters as the means of obtaining the solicitation documents, the place where they may be obtained, the price to be paid for the

solicitation documents, the means and currency of payment as well as the more substantive matter referred to in subparagraph (d) of article 37 that the participation in the given procurement proceedings may be limited in accordance with article 8 (with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be entitled under article 38 to obtain the solicitation documents).

2. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of, for example, printing and providing those documents, but to avoid excessively high charges that could inhibit eligible suppliers or contractors from participating in open tendering proceedings. Development costs (including consultancy fees and advertising costs) are not to be recovered through this provision. The costs should be limited to the charges incurred in fact in providing the documents.

3. This provision appears in other articles of the Model Law in a similar context and may be considered as referring to good practice that is aimed at preventing the procuring entity from applying excessively high charges for the solicitation documents. The negative effect of such charges on the participation of suppliers or contractors, in particular SMEs, and prices that suppliers or contractors participating in the procurement would eventually offer, should be carefully considered. Enacting States may wish to make express provision to such effect in the procurement regulations required under article 4.

### *Article 39. Contents of solicitation documents*

1. Article 39 contains a listing of the minimum information required to be included in the solicitation documents. This minimum information enables suppliers and contractors to submit tenders that meet the needs of the procuring entity and to verify that the procuring entity can compare tenders in an objective and fair manner. Many of the items listed in article 39 are regulated or dealt with in other provisions of the Model Law, such as article 9 on qualifications, article 10 on the description of the subject matter of the procurement and the terms and conditions of the procurement contract (or framework agreement) and article 11 on evaluation criteria and procedures. The enumeration in this article of items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a “checklist” in preparing the solicitation documents. The need for all information listed is however to be assessed by the procuring entity on a case-by-case basis: some information listed (such

as in subparagraphs *(i)*, *(j)* and *(s)*) may not be necessary in domestic procurement (see the **commentary to article 8**) or, as in the case with information in subparagraph *(g)*, where presentation of partial tenders is not permitted.

2. One category of items listed in article 39 concerns the subject matter of the procurement and terms and conditions of the procurement contract (subparagraphs *(b)*-*(f)* and *(w)*). The purpose of including these provisions is to provide all potential suppliers or contractors with sufficient information about the procuring entity's requirements as regards suppliers or contractors, the subject matter of the procurement, terms and conditions of delivery and other terms and conditions of the procurement contract (or framework agreement). This information is essential for suppliers or contractors to determine their qualifications, ability and capacity to perform the procurement contract in question. Although the specification of the exact quantity of the goods is generally required under subparagraph *(d)*, where tendering proceedings are used for the award of framework agreements the procuring entity will be in the position to specify at the outset of the procurement only an estimated quantity and will be permitted to do so under provisions of chapter VII of the Model Law (for further guidance, see the **commentary to the relevant provisions of chapter VII** below). The reference to "the form of contract" in subparagraph *(e)* is linked to the formalities referred to in subparagraph *(w)* of this article: whereas under subparagraph *(w)* the procuring entity may specify that a procurement contract is to be concluded in writing, under subparagraph *(e)* the procuring entity will be required to specify in addition, where applicable, whether a contract in a standard form is to be signed (which itself may provide, for example, standard terms and conditions of delivery, a standard warranty period, a standard schedule of payments and so forth).

3. The second category of items listed concerns instructions for preparing and submitting tenders (subparagraphs *(a)*, *(g)* through *(p)* and *(u)*, such as the manner, place and deadline for presenting tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers or contractors would be placed at a disadvantage or their tenders even rejected due to lack of clarity as to how the tenders should be prepared.

4. The Model Law recognizes that, for procurement actions that are separable into two or more distinct elements (e.g. the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers or contractors to submit tenders either for the entirety of the procurement or for one or more portions thereof. That approach

might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost-effective. Permitting partial tenders may also facilitate participation by SMEs, who may have the capacity to submit tenders only for certain portions of the procurement. Article 39 (g) is therefore included to allow such partial tenders and make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the procurement into separate contracts merely as it sees fit after tenders are submitted.

5. Some other items in article 39 (subparagraphs (b), (c) and (q)-(s)) concern in particular the manner in which qualifications of suppliers and contractors will be ascertained and the tenders will be examined and evaluated and the applicable criteria; their disclosure is required to achieve transparency and fairness in the tendering proceedings. The relevance of information listed in subparagraph (s) should however be assessed in domestic procurement (see paragraph 1 of this section).

6. The information referred to in subparagraphs (t) and (v) is an application of the general principle of transparency underpinning the Model Law: it informs suppliers and contractors about the legal framework applicable to public procurement in the enacting States in general and specific rules that may be applicable to the particular procurement proceedings (e.g. if any classified information is involved); it also informs suppliers or contractors about the possibility of challenging and appealing the procuring entity's decisions or actions, alerting them in particular whether a specifically dedicated and defined time frame (standstill period) will be provided enabling them to challenge the procuring entity's decisions and actions as regards examination and evaluation of tenders before the procurement contract enters into force. The place where applicable laws and regulations may be found, referred to in subparagraph (t), intends to refer not to the physical location but rather to an official publication or portal where authoritative texts of laws and regulations of the enacting State are made accessible to the public and systematically maintained (see the [commentary to article 5](#)).

7. The article lists only the minimum information that must be provided. The procuring entity may decide to include additional information.

8. All categories of items listed in article 39, supplemented by items listed in article 37 (contents of invitation to tender) comprise terms and conditions of solicitation. Any or all of them may be challenged under chapter VIII of the Model Law before the deadline for presenting submissions.

## ***Procedures for open tendering (articles 40–44)***

### *Article 40. Presentation of tenders*

1. Paragraph (1) ensures fair, equal and equitable treatment of all suppliers and contractors by requiring that the manner, place and the deadline for submission of tenders be specified in the solicitation documents (under article 2, the solicitation documents are defined as encompassing any amendments thereto). This requirement is further elaborated in article 14 on the rules concerning the manner, place and deadline for presenting application to pre-qualify or applications for pre-selection or for presenting submissions. Particular safeguards are included in that article, as well as in article 15 (3), to address situations in which changes are made to the information originally issued about the procurement procedure concerned. Where those changes make the originally published information materially inaccurate, with consequences analogous to those explained in the **commentary to article 15 (3)**, the amended information is to be published in the same manner and place in which the original information about procurement was published. Under articles 14 (5) and 15 (2), notice of any modifications to the information originally issued about the procurement, including any extension of the submission deadline, is also to be given to each supplier or contractor to which the procuring entity provided the solicitation documents. The procuring entity may also decide to publish the modified information in the same media source as the initial advertisement or notice. (See, further, the commentary to articles **14** and **15**.)

2. Paragraph (2) contains specific requirements as regards the form and manner of presentation of tenders that complement the general requirements of form and means of communication found in article 7 (see the **commentary to that article**). The article provides that tenders have to be presented in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement for “writing” seeks to ensure the compliance with the form requirement found in article 7 (1) (tenders have to be presented in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference). The requirement for a “signature” seeks to ensure that suppliers or contractors presenting a tender identify themselves and confirm their approval of the content of their presented tenders, with sufficient credibility. The requirement of “authenticity” is intended to provide the appropriate level of assurance that a tender presented by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus is aimed at ensuring that there would be tangible evidence

of the existence and nature of the intent on the part of the suppliers or contractors presenting the tenders to be bound by the information contained in their tenders. Additionally, that evidence would be preserved for record-keeping, control and audit. The requirements for “security”, “integrity” and “confidentiality” of tenders are intended to ensure that the information in presented tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

3. In the paper-based environment, all the requirements described in the preceding paragraph of this *Guide* are met by suppliers or contractors presenting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders presented are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper-based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial technologies that are available at any given time but this will not be appropriate for low-risk small-value procurement. The choice should therefore be based on the cost-benefit analysis. Caution should also be exercised not to impose higher security measures than otherwise would be applicable in the paper-based environment since

these measures can discourage the participation of suppliers or contractors in non-paper-based procurement. These and other issues will have to be addressed in the procurement or other appropriate regulations. (For a general discussion of issues arising from the use of e-procurement, see commentary on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*)

4. Paragraph (2) (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the paper-based environment, this usually is achieved through the procuring entity’s written confirmation on paper that the tender has been received with a stamp indicating day, time and place of receipt. In the non-paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, this element of discretion should be regulated by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity. Whatever the method of recording the date and time will be used in any given procurement, it must be disclosed at the outset of the procurement proceedings in the solicitation documents. With these safeguards, the certification of receipt provided by the procuring entity should be conclusive. When the submission of a tender fails prior to receipt, particularly arising from the protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made, as an application of the general rule that the submission of tenders is at the risk of the suppliers or contractors. Suppliers or contractors whose tenders cannot be received by the procuring entity’s system should be instantaneously informed about the event in order to allow them where possible to re-submit tenders before the deadline for submission has expired. No re-submission after the expiry of the deadline may be allowed.

5. Paragraph (2) (c) raises issues of security, integrity and confidentiality of presented tenders, discussed above. Unlike subparagraph 2 (a) (ii), it does not include a requirement for authenticity of tenders (such issues are relevant at the presentation of tenders only). It is presumed that, upon receipt of a tender by the procuring entity at the date and time recorded in accordance with paragraph 2 (b) of the article, adequate authenticity has already been assured.

6. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by

procurement or other appropriate regulations. Under the provisions of article 14 (4), the procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control. In such a case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 14 (5) of the Model Law). Thus, where a failure occurs, the procuring entity has to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under chapter VIII of the Model Law.

7. The rule in paragraph (3) 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 might enable suppliers or contractors to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other suppliers or contractors. In addition, it could interfere with the orderly and efficient process of opening tenders. The provisions therefore require that any late tenders would be returned unopened to suppliers or contractors submitting them. Enacting States may require recording the submission of late tenders in the documentary record of procurement proceedings under article 25 (1) (w).

*Article 41. Period of effectiveness of tenders;  
modification and withdrawal of tenders*

1. Article 41 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders are to remain in effect.
2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into

account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable and lengthy period of effectiveness, with the aim of covering the needs of most if not all tendering proceedings. So doing would be inefficient since in many cases the period would be longer than necessary. Excessively lengthy periods may result in higher tender prices, since suppliers or contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g. tied capacity and inability to tender elsewhere; the risks of higher manufacturing or construction costs).

3. Paragraph (2) has been included to enable the procuring entity to deal with delays in tendering proceedings by allowing requests for extensions of the tender validity period. The procedure is not compulsory on suppliers and contractors, so as not to force them to remain bound to their tenders for unexpectedly long durations—a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order also to prolong, where necessary, the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender. In such a case, the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents.

4. Paragraph (3) is an essential companion of the provisions in article 15 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders. However, in order to take account of a contrary approach found in the existing law and practice of some States, paragraph (3) permits the procuring entity to depart from the general rule and to impose forfeiture of the tender security for modifications and withdrawals prior to the deadline for submission of tenders, but only if so stipulated in the solicitation documents. (See also the [commentary to article 48](#).)

#### *Article 42. Opening of tenders*

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may

create opportunities for misconduct (e.g. disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of an opportunity to minimize the risk of such misconduct by submitting a tender at the last minute, immediately prior to the opening of tenders.

2. Paragraph (2) sets out a rule that the procuring entity must permit all suppliers or contractors that have presented tenders, or their representatives, to participate in the opening of tenders. The participation may be in person or otherwise by any means that complies with requirements of article 7 of the Model Law. In accordance with those requirements, that are consistent with requirements found in other international instruments addressing the same matter, the means of communication that can be used in any meetings with suppliers or contractors, in addition to be in common use, must ensure that suppliers or contractors can fully and contemporaneously participate in the meetings (for a discussion of the relevant requirements, see the **commentary to article 7 (4)**).

3. The opening of tenders constitutes a meeting for the purposes of article 7 (4). Accordingly, suppliers or contractors must be given the opportunity to follow the opening of tenders virtually (either by hearing or reading). The term “fully and contemporaneously” means that suppliers or contractors must be given a contemporaneous opportunity to receive all and the same information given out during the opening. The information concerned includes the announcements made in accordance with paragraph (3) of the article. Suppliers or contractors must also be able to intervene where any improprieties or inaccuracies are observed, to the extent that they would be able to do so if they were physically present. Regardless of the method used, all pertinent information must be communicated to suppliers or contractors sufficiently in advance to enable them, in accordance with the provisions of article 7 (4), to participate in the opening of tenders.

4. The modalities for the opening of tenders established by the procuring entity (the place, manner, time and procedures for the opening of tenders) should also allow for the physical and virtual presence of suppliers or contractors, taking into account such factors as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring the presence of those who cannot be present at the physical location or opting for a virtual location.

5. The rule requiring the procuring entity to permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence

that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have presented tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

6. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same timespan shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no unauthorized access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely presentation.

7. Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State.

#### *Article 43. Examination and evaluation of tenders*

1. Paragraphs (1) and (2) of article 43 regulate the examination of tenders, which encompasses ascertaining whether the suppliers and contractors

presenting tenders are qualified, assessing whether their tenders are responsive (“examination”), and determining whether any ground for rejection of tenders in accordance with paragraph (2) of the article is present. As required by the various provisions of the Model Law, including articles 10 and 39 (*q*), all examination criteria and procedure are to be disclosed to suppliers or contractors at the outset of the procurement proceedings.

2. The purpose of paragraph (1) is to set out the rules to be followed in determining whether tenders are responsive and to permit a tender to be regarded as responsive even if it contains minor deviations or errors or oversights that can be corrected without touching on the substance of the tender. Those minor deviations or errors or oversights include any deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents.

3. Permitting the procuring entity to consider tenders with minor deviations and errors and oversights that can be corrected without touching on the substance of the tender (paragraph (1) (*b*) of the article) promotes participation and competition in tendering proceedings as well as a fairer treatment of suppliers and contractors that make minor technical errors. Otherwise, the procuring entity may face undesirable consequences, such as the rejection of the best tender from the best qualified supplier or contractor for what the WTO GPA (see **paragraph 8 of part I** of this *Guide*) calls “unintentional errors of form”.

4. In no case, however, can there be a correction of errors or oversights that involves a substantive change to the submissions concerned. In particular, no change that would make an unresponsive submission responsive can be made. An enacting State may wish to provide examples of changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive in rules or guidance from the public procurement agency or other body.

5. Paragraph (1) (*b*) of the article does not cover purely arithmetical errors. Purely arithmetical errors must be corrected by the procuring entity under article 16 (2) (see the **commentary thereto**). By referring to errors and oversights, the paragraph refers to a broader notion of errors and corrections. The procurement regulations or rules or guidance from the public procurement agency or other body should address differences between the two concepts and illustrate them with reference to practical examples.

6. Quantification of minor deviations and errors and oversights is required under paragraph (1) (*b*) of the article, to the extent possible. They must be

appropriately taken into account in the examination and evaluation of tenders so that tenders may be compared objectively and fairly.

7. The implementation of paragraph (1) (b) would most likely in practice lead to a clarifications procedure under article 16, to assist the procuring entity in identifying whether there is an error, oversight or deviation and its importance. Article 16 prohibits negotiations with a supplier or contractor in such a process. In the context of the tendering proceedings, this prohibition is reinforced by the prohibition under article 44 of any negotiations with suppliers or contractors with respect to a tender presented by the supplier or contractor (see the **commentary to article 44** below).

8. As is the case with the correction of arithmetical errors under article 16 (see the **commentary thereto**), the application of paragraphs (1) (b) may give rise to discriminatory practices. The enacting State needs therefore to build procedural safeguards to mitigate the risks of such practices, for example by requiring the procuring entity to put on the record any minor deviations and errors and oversights discovered during the examination and evaluation process and steps taken in connection with them. Any decision resulting from the application of the paragraph will be subject to possible challenge under chapter VIII of the Model Law.

9. As noted in the **commentary to article 16**, the Model Law and this *Guide* do not seek to address exhaustively all issues of errors or omissions in submissions and possible clarification and corrections either by the procuring entity or a supplier or contractor. Some such issues may be regulated in contract law of an enacting State or an international agreement to which the enacting State may be a party, such as the WTO GPA (see **paragraph 8 of part I** of this *Guide*).

10. Paragraph (2) lists the grounds for the rejection of tenders. The list is exhaustive and refers only to such grounds as are explicitly provided for in the Model Law. The ground listed in subparagraph (a)—the absence of qualifications—is to be implemented in the light of article 9 listing permissible qualification requirements and grounds for disqualification. The ground listed in subparagraph (b)—refusal by the supplier or contractor to accept the correction of the arithmetical error—is to be read together with provisions of article 16 that permits the procuring entity to correct purely arithmetical errors and requires it in such a case to give notice of such correction to the supplier or contractor that submitted the relevant tender. As noted in the **commentary to article 16**, in tendering proceedings no further discussion between the procuring entity and supplier or contractor on the corrected arithmetical error should be permitted: the supplier or contractor concerned can either accept the correction made or its tender will be rejected. The

ground listed in subparagraph (c)—unresponsiveness of the tender—is to be understood in the light of article 10 and paragraph (1) of the article that set out the legal framework for the procuring entity to apply in deciding on responsiveness or unresponsiveness of tenders. The grounds listed in subparagraph (d) originate from article 20 that permits the procuring entity to reject an abnormally low submission and from article 21 that requires the procuring entity to exclude a supplier or contractor from the procurement proceedings on the grounds of inducements from that supplier or contractor, an unfair competitive advantage or conflicts of interest.

11. Paragraphs (3) and (4) regulate the evaluation of tenders, i.e. comparison of all tenders that have not been rejected as a result of examination. As required under various provisions of the Model Law, such as articles 11 and 39 (r) and paragraph (3) (a) of this article, responsive tenders are evaluated against the pre-disclosed evaluation criteria and in accordance with the pre-disclosed evaluation procedures. The successful tender, as reiterated in paragraph (3) (b) of the article, may be the tender with the lowest tender price or the most advantageous tender. In accordance with article 11 (5) (a) of the Model Law, whether the successful submission will be ascertained on the basis of only price or of price and other criteria is to be defined in the solicitation documents at the outset of the procurement and cannot be subsequently varied.

12. The rule in paragraph (4) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity. That single currency is to be defined in the solicitation documents, as required under article 39 (s), together with any applicable exchange rate or the method to be used for determination of the applicable exchange rate. These provisions may be irrelevant in domestic procurement.

13. Paragraph (5) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding.

14. In order to make the reconfirmation procedure effective and transparent, paragraph (6) mandates the rejection of a tender if the supplier or contractor fails to reconfirm its qualifications, and establishes the procedures to be followed by the procuring entity to select the successful tender in such a case. That paragraph also reiterates the right of the procuring entity to

cancel the procurement in such cases, which is an essential safeguard against risks of collusive behaviour by suppliers or contractors.

*Article 44. Prohibition of negotiations with suppliers or contractors*

Article 44 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender it has submitted. This rule has been included because such negotiations might result in an “auction”, in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used or, if they do participate, they raise their tender prices in anticipation of the negotiations. The prohibition of negotiations does not intend to cover discussions that may take place between the procuring entity and a supplier or contractor for the purpose of clarifying its tender in accordance with article 16 of the Model Law, or for concluding the procurement contract.

## **CHAPTER IV. PROCEDURES FOR RESTRICTED TENDERING, REQUEST FOR QUOTATIONS AND REQUEST FOR PROPOSALS WITHOUT NEGOTIATION**

### **A. Introduction**

#### *1. Summary*

1. Chapter IV of the Model Law sets out the procedures for three procurement methods that are alternatives to open tendering: restricted tendering under article 45, request for quotations under article 46 and request for proposals without negotiation under article 47. The typical use of these methods is in situations in which the procuring entity's needs can be determined and described in accordance with the requirements of article 10 at the outset, and in which there is no requirement for discussions, dialogue or negotiations between the procuring entity and suppliers or contractors; in other respects, these methods address a wide range of circumstances. These circumstances, which form the basis upon which the use of these methods rather than open tendering is justified (in accordance with articles 28 and 29), can be summarized into three broad categories, according to the situations in which they can be used. The first is for the procurement in a limited market of a specialized or complex products or services; the second is for the procurement of products or services that may be of low-value, already available in the market and/or available in a market with numerous suppliers or contractors; and the third is for the procurement of products and services for which technical and quality considerations are particularly important. In addition, the conditions for use of the procurement methods under chapter IV are very closely linked with the rules on solicitation for each method. These rules and categories are explained further in the following sections.

#### *2. Enactment: policy considerations*

2. A common feature of chapter IV procurement methods is that they can involve direct solicitation, either as a necessary feature of the method itself (restricted tendering and request for quotations) or as an option (request for proposals without negotiation). The default rule under the Model Law is for

public and unrestricted solicitation, as is explained in the **commentary to section II of chapter II**. Such solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the consideration of the qualifications and submissions of suppliers and contractors that present tenders or other submissions.

3. Direct solicitation in chapter IV procurement methods involves risks of abuse in that the identification of the market and hence of the suppliers and contractors to be invited to participate in procurement proceedings involves assessments that are essentially subjective. It is also at risk of abuse to favour one or more suppliers or contractors, or to restrict competition. To mitigate these risks and to introduce transparency, articles 34 (5) and 35 (4) require an advance notice of the procurement to be published, so that potential suppliers and contractors can contact the procuring entity and request to participate in the procurement.

4. Direct solicitation in restricted tendering and request for proposals without negotiation is available in procurement of specialized or complex goods, construction or services that are available in a limited market (the first category described above) and where the time and cost of examining and evaluating a large number of tenders would be disproportionate to the value of the procurement (the second category described above). Direct solicitation in request for proposals without negotiation is also available in procurement involving classified information (article 35 (2) (c)).

5. Where procurement involves specialized or complex subject matter available in a limited market, the solicitation is to be addressed to all suppliers and contractors from which the subject matter is available. The second situation, where the time and cost of examining and evaluating a large number of tenders would be disproportionate to the value of the procurement, refers to cases where the market includes so many participants that are likely to be qualified that a cost-effective procedure cannot be guaranteed. The solicitation rules therefore allow the number of participants to be capped by the procuring entity, subject to safeguards to address the risks in identifying the appropriate number of invited participants and in the manner in which the suppliers or contractors to be invited to participate are chosen.

6. The first safeguard is found in the requirement of articles 34 (5) and 35 (4) for an advance notice of the procurement described in paragraph (3) above. This requirement is applicable to all situations justifying the use of direct solicitation described above. The second safeguard is that the procuring entity must solicit tenders or proposals from a sufficient number of suppliers or contractors to ensure effective competition and must select the

participating suppliers or contractors in a non-discriminatory manner (see articles 34 (1) (b) and 35 (2) (b)).

7. It should be noted that requiring the procuring entity to follow pre-qualification procedures in such cases would add administrative steps, but would not address the central issue, which is that the number of potentially qualified suppliers or contractors is excessive. The requirement under articles 34 (1) (b) and 35 (2) (b) is to find a way of selecting from among the large numbers of potentially qualified suppliers or contractors a sufficient number, without discrimination, to ensure effective competition. The requirement must also be read in the light of article 28 (2) to maximize competition to the extent possible.

8. The implications of the above requirements for the effective use of these procurement methods using direct solicitation are discussed in the following section together with mechanisms for ensuring objectivity, avoiding discrimination and maximizing competition in such solicitation.

9. Request-for-quotations procedures, which by their nature involve direct solicitation, do not include the above safeguards, as further discussed in the **commentary to that procurement method** below. In particular, there is no requirement for an advance notice of the procurement or for publication of the terms and conditions of the procurement. It is also likely that, where a procurement falls below the low-value threshold for the use of this procurement method, it will also fall below the threshold for publication of a contract award notice under article 23 (see the commentary on low-value procurement and thresholds in the **Introduction to chapter I**, which in particular emphasizes the need to ensure consistency in the approach to such procurement). As a result, the method is flexible but not transparent; this is the policy reason for restricting it so that it is an exceptional method, as the commentary to the method also explains.

10. The use of e-procurement means that many elements of the examination and evaluation of tenders can be automated, saving both time and costs, and reducing the administrative burden that underlies some justification for direct solicitation in chapter IV procurement methods. In addition, the e-procurement and the tools it offers—such as electronic reverse auctions under chapter VI, and framework agreements and e-catalogues under chapter VII—provide techniques that should diminish the need for the request-for-quotations method.

11. The issues arising from the third category of chapter IV procurement methods—those in which technical and quality considerations are particularly important—include the solicitation questions discussed for the first category of chapter IV procurement methods described above. The use of

the method to ensure that technical and quality considerations are appropriately treated is discussed in the commentary to request for proposals without negotiation below.

12. In the light of all the above considerations, enacting States may wish to consider whether their local circumstances require all chapter IV procurement methods, as well as framework agreements and electronic reverse auctions. Where all these methods are provided for, enacting States may wish to regulate their use in more detail than the Model Law provides, to ensure that the methods are not used where more transparent and objective procedures could be used in the alternative. The issues that might inform regulations, rules or guidance to such end are discussed in the following section.

### ***3. Issues regarding implementation and use***

13. It will be evident that assessing whether the conditions for use of the chapter IV procurement methods apply involves significant discretion on the part of the procuring entity. As the above discussion of the policy issues regarding the chapter IV procurement methods indicates, the main issues to be addressed in ensuring effective implementation and use of these methods are:

(a) To emphasize the requirement for the publication of an advance notice of the procurement where direct solicitation is used, other than in request for quotations, as a transparency safeguard;

(b) To ensure that, where direct solicitation is used for highly complex or specialized procurement in a limited market, the market in which the items or services are available is correctly defined;

(c) To ensure that, where direct solicitation is used because of the likely excessive numbers of qualified suppliers or contractors (see the preceding section), the identification of the number of participants to be invited and the participants to be invited is carried out objectively; and

(d) To discuss ways of reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition.

14. As regards advance notices, there is no threshold below which the requirement for advance notices in restricted tendering and request for proposals without negotiation is relaxed. This safeguard is particularly important in situations of low-value procurement (articles 34 (1) (b) and 35 (2) (b)) since, as noted in policy considerations above, the estimated value of such procurement may well fall below the threshold for publication of a contract award notice under article 23 (see the commentary on low-value procurement and thresholds in the **Introduction to chapter I**).

15. Advance notices in effect test the procuring entity's view of the extent of the market. They provide an oversight mechanism for the exercise of the procuring entity's discretion in assessing the markets and participants for the procurement concerned and mitigate the risk of abuse in market definition or identification of appropriate participants. To guarantee the intended impact of advance notices, the enacting State may wish to ensure that the oversight of such procurements includes the monitoring of responses to such notices.

16. The requirement for advance notices is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII, advance notices enable and encourage aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited. As regards the question of market definition, the importance of a consistent approach and the safeguard that the procuring entity must invite all potential suppliers or contractors to participate should be emphasized in the procurement regulations or rules or guidance from the public procurement agency or other body. As market definition is also a feature of competition law and policy, the suggested interaction between the competition authorities and the public procurement agency or other body in the section on **"Institutional support"** in part I of this *Guide* may allow the competition authorities to assist the public procurement agency or other body in drafting the relevant rules and guidance, keeping in mind the need to ensure effectiveness and objectivity in their implementation by procuring entities.

17. Procuring entities should also be encouraged to bear in mind the risks of failing to identify all potential suppliers and contractors in limited markets. The risks include a challenge under chapter VIII of the Model Law from a supplier or contractor that considers that it is able to supply the subject matter of the procurement but has not been invited to participate. If previously unknown suppliers or contractors respond to the advance notice, they must be permitted to submit a tender or proposals unless they are disqualified or otherwise do not comply with the terms of the notice (e.g. overseas suppliers or contractors where the procurement is purely domestic under article 8 of the Law). Where the extent of the market is not fully known or understood, in particular as regards the pool of overseas suppliers or contractors and the extent of their interest in procurement proceedings of the enacting State, public and unrestricted solicitation or pre-qualification may be appropriate alternatives.

18. In addition, the link between the requirement to invite all potential suppliers and contractors and the provisions of articles 14 and 15 of the Model Law should be highlighted: they raise the risks of an additional

administrative burden and delays in the procurement should an additional supplier or contractor emerge. These articles require a submission deadline that provides sufficient time for suppliers or contractors to present their submissions, and permit the extension of the submission deadline if required. Although the provisions do not expressly require the extension of the submission deadline where new suppliers or contractors emerge, such an obligation may arise from the requirement for sufficient time to present submissions. The procurement regulations or rules or guidance from the public procurement agency or other body should elaborate on the implementation of articles 14 and 15 in the light of the requirements for an advance notice and to invite all suppliers and contractors from which the subject matter of procurement is available. A practical way to minimize the risk of late requests to participate is to include, in the advance notice, a statement requesting interested suppliers or contractors to identify themselves to the procuring entity before the date upon which the solicitation documents will be issued.

19. As regards direct solicitation used to avoid the disproportionate costs of examining a large number of tenders or proposals as against the value of the procurement, both identifying the appropriate maximum and the manner of selection of the suppliers or contractors to be invited to participate will be key in avoiding misuse or overuse. The procuring entity will have significant discretion in deciding the appropriate maximum by reference to the circumstances of the procurement concerned. The procurement regulations or rules or guidance from the public procurement agency or other body should also discuss a reasonable minimum. Here, they may also refer to the requirement under article 28 (2) of the Model Law to seek to maximize competition to the extent possible when selecting and using any method of procurement. In request for quotations the minimum number of participants is three suppliers or contractors, but that method is available in a far narrower range of circumstances than other chapter IV procurement methods. Many commentators consider that a minimum of five invited participants is a reasonable number to avoid in most circumstances collusion and the ability to direct the procurement towards a favoured supplier or contractor.

20. Objectivity in identifying the suppliers or contractors within the stated number can be achieved by various methods, such as “first-come, first-served,” the drawing of lots, rotation or other random choice in a commodity-type market. The goal should be to achieve maximum effective competition to the extent practicable.

21. The manner in which the suppliers or contractors will be selected to participate may be challenged under chapter VIII of the Model Law. The mere fact that a supplier or contractor was not selected is not of itself sufficient to demonstrate non-compliance with the provisions of the Model Law

(as success in challenge proceedings requires). However, a challenge may succeed where it can be demonstrated that a supplier or contractor was not selected because of a discriminatory manner of selection. In the cases contemplated by these provisions, therefore, as long as the procuring entity has selected a sufficient number of suppliers or contractors in an objective manner to ensure effective competition, it may decline to admit additional suppliers or contractors responding to the notice of procurement to the procurement proceedings concerned. The essence of the provisions is to enable the procuring entity to limit the pool of participating suppliers or contractors to save time and costs in proportion to the value of the subject matter of the procurement. Compliance with the safeguards discussed above is therefore an important safeguard for the procuring entity.

22. Where repeated procedures are concerned, and the same limited group is repeatedly selected, it may be easier to show a lack of objectivity in the selection. In such cases, the procuring entity should be advised to take particular care to be demonstrably objective in its selection of the suppliers or contractors to be invited to participate (or may wish to consider the use of a procurement technique such as a framework agreement procedure (see below and the commentary to chapter VII). Rules or guidance from the public procurement agency or other body should emphasize that the desired goal of saving time and costs could be frustrated in the event of a challenge.

23. While the requirements for direct solicitation in request for quotations are less stringent, the provisions stipulating that as many suppliers and contractors as practicable, but at least three, should be invited to participate, should also be read together with that in article 28 (2) to seek to maximize competition to the extent possible. In addition, and as explained in the **guidance to that procurement method** below, the rules on estimation of the value of the procurement under article 12 should clarify how a series of low-value procurements over a given period should be aggregated for the purposes of applicable thresholds.

24. As regards reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition, the Model Law contains several procurement methods and techniques that can be procedurally efficient. For example, framework agreement procedures are designed for repeated procurements, which may well be the situation in the types of relatively simple and low-value procurement that characterize the second category of the chapter IV procurement methods (request for quotations and some types of situations justifying the use of restricted tendering and request for proposals without negotiation). Framework agreement procedures allow many mandatory procedural steps to be conducted once

for what would otherwise be a series of procurements: these steps involve examination and evaluation of submissions, as further explained in the **commentary to that procurement technique**. In addition to framework agreement procedures, electronic reverse auctions can involve administratively simpler procedures than tendering, as further explained in the **commentary to that procurement method**. E-procurement techniques and methods generally involve higher levels of transparency than traditional requests for quotations, and as they require public and unrestricted solicitation as a general rule, they also ensure higher levels of transparency than the restricted tendering and request-for-proposals methods where direct solicitation is used.

## **B. General description and main policy issues regarding chapter IV procurement methods; commentary to their conditions for use, solicitation rules, and procedures**

In order to assist the reader, the commentary to each of the chapter IV procurement methods below is presented per procurement method. It includes a general description of each method and its main policy issues, and commentary to its conditions for use, its solicitation rules, and procedures. The relevant provisions applicable to these procurement methods, found in chapters II (the conditions for use and solicitation rules) and IV (procedures) of the Model Law are thus discussed together.

### ***1. Restricted tendering***

#### *General description and main policy issues*

1. As noted in the Introduction to this chapter, restricted tendering has been included in order to enable the procuring entity, in two exceptional cases, to solicit participation only from a limited number of suppliers or contractors. Those exceptional cases are: the procurement of technically complex or specialized subject matter that is available from only a limited number of suppliers or contractors; or where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement. As explained in the Introduction to this chapter, a requirement for public and unrestricted solicitation in those exceptional cases would be inappropriate.

2. Although the use of restricted tendering is subject to transparency safeguards, such as an advance notice of the procurement required under the

provisions of article 34 (5), and application of open tendering rules to all stages of restricted tendering procedures except for solicitation, strict and narrow conditions for use have been included for restricted tendering, which have to be read together with the rules on solicitation in article 34 (1). These conditions and rules are based on the notion that the use of restricted tendering other than in the limited situations set out in the Model Law would fundamentally impair the objectives of the Model Law.

### *Conditions for use of restricted tendering (article 29 (1))*

1. Article 29 (1) sets out the conditions for use of restricted tendering that are also noted in the preceding subsection. Typical examples of the first type of restricted tendering include the procurement equipment for nuclear power plants (subparagraph (a)); and the supply of badges or pins intended to be traded at sporting events (subparagraph (b)).
2. Restricted tendering under paragraph (1) (a) is available only where all suppliers or contractors that can supply the subject matter are invited to participate. Restricted tendering under paragraph (1) (b) can be used only where the procuring entity solicits tenders from a sufficient number of suppliers or contractors to ensure effective competition, and chooses the selected participants in a non-discriminatory fashion. The risks to the efficiency and effectiveness of the procurement process if these rules are not respected, in terms of procedural delays, additional steps in the process and challenges under the Model Law are highlighted in the Introduction to this chapter.
3. The procuring entity runs fewer risks if recourse to restricted tendering has been justified on the ground referred to in paragraph (1) (b), that is the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement. As long as it has selected a sufficient number of suppliers or contractors in an objective manner to ensure effective competition, the procuring entity in such cases may decline to consider requests to tender coming from additional suppliers or contractors responding to the notice published in accordance with article 34 (5), as more fully explained in the **commentary to that article**.
4. The provisions of subparagraph (b) should be read together with article 12 of the Model Law containing rules on estimation of the value of the procurement. That article contains essential safeguards against the artificial division of the subject matter of the procurement for the purpose, for example, of justifying the use of restricted tendering on the ground set out in subparagraph (1) (b), i.e. that the time and cost required to examine and evaluate a large

number of tenders would be disproportionate to the value of the subject matter of the procurement. The procuring entity should be provided with guidance on aggregation rules where there are repeated procurements.

5. The procuring entity, under article 28 (3) read together with the provisions of article 25 (1) (e), is required to put on the record a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of restricted tendering instead of open tendering, in such detail as would allow the decision to be overseen or challenged where appropriate. There is no requirement in the Model Law to include such a statement in the advance notice of the procurement required under article 34 (5) as described further below (to avoid inaccurate summaries or excessively long notices). (See article 25 and the **commentary** on issues of access to the record by suppliers or contractors, to enable them inter alia to challenge the selection of the procurement method.)

#### *Solicitation in restricted tendering (article 34 (1) and (5))*

1. Article 34 (1) sets out solicitation rules for restricted tendering. They have been drafted in order to give effect to the purpose of article 29 (1), i.e. limiting the use of restricted tendering to truly exceptional cases while maintaining the appropriate degree of competition. They are tailored specifically to each of the two exceptional conditions for use of restricted tendering.

2. The rule on solicitation in article 34 (1) (a) requires that, where restricted tendering is used for procurement of technically complex or specialized subject matter available from only a limited number of suppliers or contractors, all the suppliers or contractors that could provide that subject matter must be invited to participate. The rule on solicitation in article 34 (1) (b) requires that, where restricted tendering is used where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition. The requirement for selection in a non-discriminatory manner presupposes notification to the public in accordance with article 34 (5) of not only the procuring entity's decision to use restricted tendering but also of the maximum number of participants to be selected, and the manner of selection up to the maximum number notified. For further discussion of the concept of "non-discrimination" in this context, see the Introduction to this chapter.

3. As noted in that commentary, the advance notice of the procurement is to be published in all situations justifying the use of restricted tendering in

accordance with article 34 (5). The minimum information to be included in such notice is listed in that article.

4. The policy and implementation issues, in particular the risks to the efficiency and effectiveness of the procurement process if the solicitation rules are not respected, in terms of procedural delays, additional steps in the process and challenges under the Model Law, are also highlighted in the Introduction to this chapter.

### *Procedures for restricted tendering (article 45)*

1. Article 45 regulates the procedures for restricted tendering. The provisions are very short, in that they apply the provisions of chapter III governing open tendering to restricted tendering, save as regards solicitation.

2. Paragraph (2) therefore excludes articles 36 to 38 from application to restricted tendering. Article 36 regulates procedures for soliciting tenders in open tendering and is therefore not applicable to restricted tendering. Article 37 regulates the contents of an invitation to tender to be published in open tendering. In restricted tendering, it is not necessary to issue an invitation to tender; where one is issued, it need not include all information listed in article 37. As regards article 38, the solicitation documents in restricted tendering will be provided to all suppliers or contractors that were directly invited and that expressed interest in tendering.

3. Despite the exclusion of article 38 from application to restricted tendering, some of its provisions will apply to restricted tendering. If the procuring entity decides to charge a price for the solicitation documents in restricted tendering, it will be bound by the provision in the last sentence of article 38 (“the price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors”) (see the commentary to article 38).

## ***2. Request for quotations***

### *General description and main policy issues*

1. The request-for-quotations procedure provides a procurement method appropriate for low-value purchases of a standardized nature (commonly referred to as “off-the-shelf items”). In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified.

2. In enacting article 29 (2), it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. Article 28 containing the requirement to maximize competition and to have regard for the circumstances surrounding the procurement when selecting a procurement method, together with the conditions for use of other procurement methods that might be appropriate, will guide the procuring entity in considering alternatives to request for quotations (see the **commentary to article 28**).

3. In particular, the method is not intended to be used for repeated purchases, because of the risk of restricting the market and of abuse in so doing (such as through an abusive selection of participating suppliers or contractors or in justifying the need for repeated purchases by, for example, splitting procurement to avoid exceeding the threshold under article 12 (see, further, below). For repeated purchases, establishing an open framework agreement or, if more complex items are involved, concluding a closed framework agreement as a result of tendering proceedings, is a preferred alternative (see, further, the commentary to chapter VII). The use of electronic catalogues may assist in promoting transparency where the procedure is used on a periodic basis. For example, the procurement of spare parts for a fleet of vehicles may be for a single purchase that is unlikely to recur, in which case request for quotations may be appropriate; for regular purchases of such spare parts, a framework agreement would be more appropriate.

4. Where procurement of more complex items is involved, tendering with its greater transparency safeguards should be used, and restricted tendering on the ground set out in article 29 (1) (b) may be appropriate in such cases. Where initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system or to repeat purchases of similar items, the use of other methods of procurement, perhaps in conjunction with framework agreements, is recommended. For procurement of commodities, simple services and similar items, an alternative approach may be to use an electronic reverse auction (see the **commentary to article 29 (1) (b)**; to **chapter VI on electronic reverse auctions** and to **chapter VII on framework agreement procedures**).

#### *Conditions for use of request for quotations (article 29 (2))*

1. Article 29 (2) limits the use of request for quotations strictly to procurement of a value below the threshold set out in the procurement regulations. (On low-value thresholds, including the need to ensure consistency in approach to what is considered “low-value” procurement in the enacting State, see the **commentary on that topic in the Introduction to chapter I**).

The conditions for use of request for quotations in addition include the requirement that the subject matter of the procurement is not produced or provided to the particular description of the procuring entity, i.e. the subject matter must be readily available in an established market.

2. The conditions for use should be read together with article 12 of the Model Law containing rules on estimating the value of the procurement. That article gives added and important effect to the intended limited scope for the use of request for quotations. It does so by prohibiting the artificial division of the subject matter of the procurement for the purpose of circumventing the value limit on the use of request for quotations with a view to avoiding the use of the more competitive methods of procurement, a prohibition that is essential to the objectives of the Model Law.

#### *Solicitation in request for quotations (article 34 (2))*

1. Article 34 (2) regulates solicitation in request-for-quotations proceedings. The objectives of the Model Law of fostering and encouraging participation and competition are applicable to procurement regardless of its value. Thus, the procuring entity is bound to request quotations from as many suppliers or contractors as practicable, but from at least three, without exception. This minimum requirement is present in the light of the type of the subject matter supposed to be procured by means of request for quotations—readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market (article 29 (2)). For this type of procurement, it should always be possible to request quotations from at least three suppliers or contractors that are capable of providing the subject matter of the procurement. The use of electronic procurement would allow the procuring entity to reach a broader audience and ensure that a sufficient number of quotations is sought.

2. Enacting States may wish to provide guidance to ensure that the selection of participants in request-for-quotations procedures is not carried out in a way so as to restrict market access or to allow abuse of the procedures, as there are no provisions in the Model Law that regulate the manner in which the participants are to be identified. Examples of abuse include the selection of two suppliers or contractors whose prices are known to be high, or two suppliers or contractors that are geographically remote, so as to direct the procurement towards a third, chosen supplier or contractor, or suppliers or contractors belonging to a corporate group or that are otherwise under some form of common financial and managerial control. The considerations raised as regards the manner of selection of participating suppliers or contractors in the context of the use of restricted tendering on the ground of

article 29 (1) (b) are relevant here (see the **relevant commentary in the Introduction to this chapter**). In addition, procedures that require the comparison of historical offers and rotation among suppliers or contractors, where the same items may be procured occasionally, are useful. Oversight procedures should identify the winning suppliers or contractors under this method, so that repeat awards can be evaluated.

3. Although request for quotations is available in a far narrower range of circumstances than other chapter IV procurement methods (the conditions being designed to ensure that the scope for use and consequently misuse of the method is limited), enacting States may alternatively consider a cautious approach and set out in the procurement regulations or rules or guidance from the public procurement agency or other body the same requirements for objectivity and ensuring effective competition as for those other methods. So doing may to some extent reduce the flexibility in the method, but will enhance consistency and should make easier oversight of transparency, competition, and fair, equal and equitable treatment that underpin the Model Law. Where this approach is combined with e-procurement, the additional administrative burden may be negligible.

4. Electronic methods of requesting quotations may generally be particularly cost-effective for low-value procurement and ensuring also more transparent selection. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers or contractors from which to request quotations, in that such selection can be evaluated against those suppliers or contractors offering relevant items in catalogues (see, also, the commentary to chapter VII on framework agreements as regards the repeated procurement of low-cost items). Ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement and may fall below the threshold for an individual public announcement of the contract award under article 23 (see the **relevant relevant commentary in the Introduction to this chapter**).

5. The requirement to request quotations from at least three suppliers or contractors should not however be interpreted as invalidating the procurement process where only one or two quotations are received.

#### *Procedures for request for quotations (article 46)*

1. Article 46 sets out the procedures for request for quotations. In the light of the nature and low value of the subject matter to be procured, only minimum procedural requirements are included, designed to provide for the fair, equal and equitable treatment of suppliers or contractors participating in the

procurement. Overseeing the use of the method, using electronic tools where possible to amortize the costs of so doing in low-value procurement, can introduce transparency and safeguards against abuse in practice.

2. With respect to the requirement in paragraph (1) that suppliers or contractors from which quotations are requested should be informed as to the charges to be included in the quotation, the procuring entity may wish to consider using recognized trade terms, in particular INCOTERMS, or other standard trade descriptions in common use—such as those in the information technology and communications markets—so that the off-the-shelf items for which the method is designed can be defined by reference to industry standards. So doing will both enhance transparency and reduce the administrative burden of submitting and reviewing quotations (see the **commentary to the solicitation in request for quotations** (article 34 (2)) above for additional safeguards).

### ***3. Request for proposals without negotiation***

#### *General description and main policy issues*

1. Request for proposals without negotiation is a procurement method that may be used where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects. This approach is appropriate where the procuring entity does not wish to be influenced by the financial aspects of proposals when it examines and evaluates quality and technical aspects of proposals. These circumstances may arise, for example, where the procuring entity wishes to assess the quality of key personnel. The method is therefore suitable for procurement of a subject matter of a relatively standard nature, where all aspects of the proposals can be evaluated without resort to discussions, dialogue or negotiations with suppliers or contractors.

2. In this regard, it is important to delineate clearly the scope of “technical, quality and performance” characteristics of the proposals from their “financial aspects”. The term “financial aspects” in this context includes all the commercial aspects of the proposals as well as the final price. The financial capabilities of the suppliers or contractors, which will be assessed as part of the examination of their proposals and qualifications, are part of the “technical, quality and performance” characteristics of proposals. The delineation between technical, quality and performance characteristics of the proposals and their financial aspects must be made on a case-by-case basis. For example, insurance or guarantee requirements, and delivery times and warranty

terms may determine whether or not a proposal meets the minimum requirements of the procuring entity, in which case these aspects of the proposal are part of the technical, quality and performance characteristics. In other cases, they will be expressed as part of the commercial terms of the contract, in which case they fall within “financial” aspects. The procurement regulations or rules or guidance from the public procurement agency or other body should be sufficiently articulate to assist procuring entities to ensure that they are clear and transparent in their requirements; otherwise, the quality of proposals will be impaired. There may be delays in the procurement process where uncertainties need to be resolved, in particular using the mechanisms provided in articles 15 and 16.

3. Request for proposals without negotiation is not appropriate in procurement where price is the only award criterion or one of the main award criteria, or where a complete evaluation would not be possible without evaluating price and non-price criteria together. In such circumstances, a tendering procurement method that focuses on the price, and which does not provide for a sequential examination and evaluation of technical, quality and performance characteristics and of financial aspects, would be appropriate. The procuring entity may find that a tendering-based procurement method is also more appropriate where it has many technical requirements. The method is also not appropriate where there is a need to negotiate on any aspects of proposals (be they technical, quality, performance or financial) since the method, like tendering, does not allow for dialogue or negotiations (for the types of procurement in which dialogue or negotiations may be appropriate and necessary, see the commentary to chapter V procurement methods).

4. In practical terms, technical, quality and performance characteristics of proposals will be submitted in one envelope (this term is not intended to imply a paper-based system, but includes an electronic or other system), and will be evaluated before envelopes containing financial aspects of proposals are opened. For those proposals that respond to the minimum requirements with respect to technical, quality and performance characteristics set out by the procuring entity at the outset of the procurement, a second envelope containing the financial aspects of the proposal concerned is opened. As is noted in the **commentary to article 31 regarding electronic reverse auctions**, the technical, quality and performance characteristics may be less susceptible to automated evaluation than the financial aspects.

5. Under the Model Law, request for proposals without negotiation is available, subject to its conditions for use, for all types of procurement, in conformity with UNCITRAL’s decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and

to maximize competition to the extent practicable (article 28 (2) of the Model Law; see the relevant **commentary in the Introduction to section I of chapter II**). Enacting States should be aware nevertheless that some multi-lateral development banks have historically recommended the use of procurement methods sharing the features of the Model Law's request for proposals without negotiation for the procurement of well-defined services that are neither complex nor costly, including consulting services such as the development of curricula.

*Conditions for use of request for proposals without negotiation  
(article 29 (3))*

1. Article 29 (3) provides for the conditions for use of request for proposals without negotiation. By stating that the method is available where the procuring entity "needs to" consider the financial aspects of proposals separately and only after completion of examination and evaluation of the technical, quality and performance characteristics of proposals, the conditions for use require an objective and demonstrable need for this approach.
2. As the procedures for this method in article 47 indicate (see the **commentary** below), the method involves a sequential examination and evaluation procedure, in which the technical, quality and performance characteristics of proposals are considered first. Only if such characteristics fully respond to the minimum requirements stipulated by the procuring entity at the outset of the procurement proceedings will the procuring entity continue to consider the price and financial aspects of the proposal concerned. See the **commentary on the general description and main policy issues of request for proposals without negotiation** above for a discussion of the delineation between technical, quality and performance characteristics of proposals and their financial aspects.

*Solicitation in request for proposals without negotiation (article 35)*

1. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted international solicitation in these methods, as that term is explained in the **commentary to section II of chapter II**. Public and unrestricted international solicitation in request for proposals without negotiation involves a public advertisement, including internationally, to invite participation in the procurement, the issue of the request for proposals to all those that respond to the advertisement, and the consideration of the qualifications and proposals of suppliers and contractors that submit them. The exceptions to the

default rule requiring international solicitation mirror the exceptions in case of open tendering in article 33 (4): that is, for domestic and low-value procurement where the benefits of international solicitation will be outweighed by its costs, or where it is irrelevant. Where request for proposals without negotiation are preceded by pre-qualification proceedings, article 18 applies, the provisions of which also require international solicitation subject to the same exceptions for domestic and low-value procurement. After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers or contractors. (See further the commentary to article 18, to section II of chapter II and to article 33).

2. Paragraph (2) of article 35 offers a choice between open and direct solicitation in three situations where the requirement of public and unrestricted international solicitation might be inappropriate or might defeat the objectives of cost-efficiency: first, where the subject matter of the procurement, by reason of its highly complex or specialized nature, is available from a limited number of suppliers or contractors (article 35 (2) (a)); second, where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the procurement (article 35 (2) (b)); and third, in procurement involving classified information (article 35 (2) (c)).

3. The first two situations are the same as those justifying the use of restricted tendering: the considerations raised in the **commentary to solicitation in restricted tendering** are therefore relevant here. Where direct solicitation is used on the first ground noted above (i.e. under article 35 (2) (a)), the procuring entity must solicit proposals from all suppliers or contractors from which the subject matter of the procurement is available. Where direct solicitation is used on the second ground noted above (i.e. under article 35 (2) (b)), the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition and must select them in a non-discriminatory manner. Where direct solicitation is used to protect classified information (i.e. under article 35 (2) (c)), the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

4. In all cases of direct solicitation, the procuring entity must include in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request-for-proposals proceedings (article 35 (3)). It must also issue an advance notice of the procurement (article 35 (4)) unless classified information would thereby be compromised.

5. For a discussion of these requirements and their consequences, notably from the combination of a requirement in article 35 (2) (a) to solicit proposals from all potential suppliers or contractors for the subject matter concerned, the risk of unknown suppliers or contractors emerging as a result of the advance notice and the fact that the procuring entity cannot reject unexpected or unsolicited proposals, see the **commentary to section II of chapter II** and the commentary on solicitation in the Introduction to this chapter. That latter commentary also addresses mechanisms for ensuring a non-discriminatory manner of selecting the suppliers or contractors to participate where direct solicitation is used under article 35 (2) (b).

#### *Procedures for request for proposals without negotiation (article 47)*

1. Article 47 regulates the procedures for procurement using request for proposals without negotiation. Paragraph (1), by cross-referring to article 35 (1) of the Model Law, reiterates the default rule of public and unrestricted international solicitation. The exceptions to that rule are set out in the **commentary on solicitation in request for proposals without negotiation**.

2. The invitation to participate in the request-for-proposals-without-negotiation proceedings must include the minimum information listed in paragraph (2). Providing that minimum information is designed to assist suppliers or contractors in determining whether they are interested and eligible to participate and, if so, how they can participate. The relevant requirements are similar to those applicable to an invitation to tender (article 37). They contain the required minimum and do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account that it is usual practice to keep the invitation brief and include in it the most essential information about procurement, which is most pertinent to the initial stage of the procurement proceedings. All other information about the procurement, including further details of the information contained in the invitation, is included in the request for proposals (see article 47 (4)). This approach helps to avoid repetition, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. Nonetheless, where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a weblink to the request for proposals itself: this approach is proving beneficial in terms of both efficiency and transparency.

3. Subparagraph (2) (e) refers to the minimum requirements with respect to technical, quality and performance characteristics that proposals must meet in order to be considered responsive. This provision covers both the

threshold that is to be established for rejecting proposals and assigning scores to proposals that meet or exceed the minimum requirements. Ensuring an accurate statement of minimum requirements and the evaluation criteria (which must also be disclosed by virtue of this paragraph) will be key to facilitating the submission of quality proposals.

4. Paragraph (3) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, such suppliers or contractors may comprise the entire group of suppliers or contractors that respond to the invitation in accordance with the procedures and requirements specified in it; if pre-qualification has taken place, only to those that were pre-qualified; or in the case of direct solicitation, only to those that are directly invited. The provisions contain a standard clause, found also in other provisions of the Model Law in similar context, that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to suppliers or contractors (see the **commentary to article 38** above for a further discussion of this limitation).

5. Paragraph (4) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. The list is again largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 39). The differences reflect the procedural specifics of this procurement method, and are aimed at ensuring that the financial aspects of proposals are presented, although simultaneously, separately from technical, quality and performance characteristics of the proposals. The procuring entity will not have access to the financial aspects of proposals until after it has evaluated their technical, quality and performance characteristics. The procuring entity may omit information about currency of payment referred to in subparagraph (4) (c) in domestic procurement, if it would be unnecessary in the circumstances (see the **commentary to article 8**).

6. Paragraphs (5) to (10) of the article regulate the sequential examination and evaluation procedure in this procurement method. They ensure that the procuring entity will not be influenced by the financial aspects of proposals when it evaluates technical, quality and performance characteristics of proposals and assigns scores to suppliers or contractors as a result of that evaluation. A number of provisions in those paragraphs are aimed at ensuring transparency and integrity in the process. Paragraphs (6) to (8), for example, contain requirements that the results of the evaluation of technical, quality and performance characteristics of the proposals are to be promptly

reflected in the record of procurement proceedings and communicated to all suppliers or contractors that presented proposals. Special rules are designed for suppliers and contractors whose technical, quality and performance characteristics of proposals were rejected: they are to receive promptly not only information about the fact of rejection but also the reasons therefor, and the unopened envelopes containing financial aspects of their proposals are returned to them. These provisions are essential for the timely debriefing of, and effective challenge by, aggrieved suppliers or contractors. (For a discussion of the benefits of, and procedures for debriefing, see the **commentary to article 22** and the Introduction to chapter VIII.)

7. Paragraphs (8) and (9) allow suppliers or contractors to be present at the opening of the second envelopes (those containing the financial proposals), provided that their technical, quality and performance characteristics meet or exceed the minimum requirements. Suppliers or contractors can thus verify the accuracy of the information announced by the procuring entity at the opening of second envelopes that is relevant to them, such as on the scores assigned and the financial aspects of their proposals, and can observe whether the successful proposal is identified in accordance with the criteria and the procedure set out in the request for proposals.

8. The Model Law regulates complex scenarios involving the separate evaluation of all aspects of proposals and combining the results of those evaluations in order to determine the successful proposal. Paragraph (10) therefore defines the successful proposal in this procurement method as the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. Enacting States should be aware however that in the procurement of a simpler subject matter, the procuring entity may select the successful proposal on the basis of the price of the proposals that meet or exceed the minimum technical, quality and performance requirements, provided that the statement of the evaluation criteria in the invitation and request for proposals have so provided. This approach may be appropriate in situations where the procuring entity does not need to evaluate technical, quality and performance characteristics of proposals and assign any scores but rather establishes a threshold by which to measure technical, quality and performance characteristics of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price.

## CHAPTER V. PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT

### A. Introduction

#### *I. Summary*

1. Chapter V of the Model Law sets out the procedures for five of the various procurement methods that are alternatives to open tendering: two-stage tendering under article 48, request for proposals with dialogue under article 49, request for proposals with consecutive negotiations under article 51, competitive negotiations under article 51 and single-source procurement under article 52. There is no one typical use of these methods, though they have a common feature in that discussions, dialogue or negotiations between the procuring entity and suppliers or contractors is envisaged.

2. In the case of two-stage tendering and request for proposals with dialogue, the main circumstances indicating the use of either method are that, first, it is not feasible for the procuring entity to determine and describe its needs with the precision and detail required by article 10 of the Model Law, and, secondly, the procuring entity assesses that interaction with suppliers or contractors is necessary (*a*) to refine its statement of needs and present them in a common description (two-stage tendering); or (*b*) to define its statement of needs and invite proposals to meet them (request for proposals with dialogue). These methods are also both available where tendering has failed; request for proposals with dialogue is also available in other circumstances, as the **commentary to that procurement method** below notes.

3. In the case of request for proposals with consecutive negotiations, the circumstances indicating the use of the method are that the procuring entity needs to consider and negotiate the financial aspects of proposals only after assessing their technical, quality and performance characteristics; the negotiations take place only with suppliers or contractors submitting responsive proposals.

4. Competitive negotiations and single-source procurement are highly exceptional procurement methods, available in limited circumstances that are quite different from the above chapter V procurement methods. Competitive negotiations and single-source procurement should not therefore be considered as alternatives to the other methods described above. They are included in chapter V essentially because they involve interaction between the procuring entity and suppliers or contractors. The circumstances indicating the use of these methods are varied: the main uses are for urgent or extremely urgent procurement, and in order to protect essential security interests of the enacting State; single-source procurement is also available in other exceptional circumstances, such as where there is an exclusive supplier or contractor or where there is the need for consistency with previous purchases, as the **commentary to that procurement method** below notes. Negotiations take place with all participants (competitive negotiations, on a concurrent basis) or with the only participant (single-source procurement).

## *2. Enactment: policy considerations*

5. As the circumstances in which the chapter V procurement methods can be used vary widely, the majority of the policy issues arising in each method are discussed in the commentary to each such method itself. However, there are some issues of general application that can be identified.

6. The first main policy consideration is that enacting States should provide for a method of procurement that allows the procuring entity to interact with potential suppliers or contractors or the commercial market where it is not feasible for it to provide a description of its needs and the terms and conditions of the procurement as required by article 10 and the requirements for disclosure in the solicitation documents (such as in article 39 on open tendering). One way of identifying what is available in the market is for the procuring entity to engage a participant in the market concerned or other consultant to draft the description of procurement needs, in a procedure separate from the procurement at issue (which may then be open tendering, generally with pre-qualification). There are several risks to this approach, which may compromise value for money and efficiency. First, there may be additional administrative time and cost arising from conducting two procedures rather than one. Secondly, the fact that this interaction is limited to one supplier or contractor or consultant raises the risk of failing to identify the latest market possibilities. Thirdly, the rules on unfair competitive advantage under article 21 prevent the consultant from participating in the subsequent procurement: suppliers or contractors may be unwilling to participate in the consultancy because of those rules, and from the procuring entity's perspective, the same supplier or contractor cannot be engaged both in the description of

procurement needs and the ultimate delivery of the subject matter of procurement to meet those needs. Consequently, an alternative to this approach is appropriate.

7. Two-stage tendering, as the commentary to that article below discusses, allows technical, quality and performance characteristics (but not the financial aspects) of the procuring entity's needs to be discussed between the procuring entity and potential suppliers or contractors within the framework of a transparent and structured process, which results in a single, common description of the needs (the technical, quality and performance characteristics of the subject matter of the procurement) and other terms and conditions of the procurement to be issued after the discussions; suppliers and contractors then submit tenders against that description. In this regard, the procuring entity will be responsible for producing that description and will examine and evaluate tenders against it. The successful use of the method presupposes that the participants will in fact disclose their proposed technical solutions and that the procuring entity is able to amalgamate them to finalize the description of the procurement needs and other terms and conditions of the procurement.

8. Request for proposals with dialogue is procedurally similar to two-stage tendering as the **commentary** below indicates, but with several distinguishing features. The method allows the technical, quality and performance characteristics and financial aspects of the procuring entity's needs to be discussed between the procuring entity and potential suppliers or contractors, again within the framework of a transparent and structured process. The process results in a request for BAFOs to meet the procuring entity's needs, but there is no single, common set of technical specifications beyond stated minimum technical requirements. The BAFOs can present a variety of technical solutions to those needs; in this sense, the suppliers and contractors are responsible for designing the technical solutions. The procuring entity examines those solutions to ascertain whether they meet its needs; evaluating them on a competitive but equal basis is a more complex procedure than in two-stage tendering.

9. Given the need to provide for a mechanism to allow the procuring entity to seek input from the market on the way of responding to its needs, enacting States are encouraged to provide for at least one of two-stage tendering or request for proposals with dialogue. Circumstances for which two-stage tendering has proved to be appropriate include the procurement of technically complex items, the supply and installation of plant, building roads and the procurement of specialist vehicles (further examples are set out below). In these examples, formulating detailed specifications from the outset of the procurement may be possible but, after discussions with suppliers or

contractors, the procuring entity may refine some technical aspects of the subject matter reflecting the information supplied (such as on more sophisticated materials or methods available in the market). The method requires the capacity to explain the procuring entity's needs and assess the resulting input from suppliers or contractors, and structures to avoid the abusive selection of the technical solution from a favoured supplier or contractor as the preferred one.

10. Circumstances in which request for proposals with dialogue has proved productive include infrastructure projects (e.g. the provision of accommodation with different technical construction methods and scope, and different commercial issues), and some high-technology procurement where the market is developing rapidly. The method requires the capacity to engage in the type of dialogue envisaged, notably as regards the presentation and explanation of needs, the examination and evaluation of different technical solutions, and structures to avoid the possibility of abuse in favouring certain suppliers or contractors by providing different information to each of them during the dialogue.

11. A second major policy consideration, reflecting the inherent lack of transparency in negotiated procurement, is to provide a structure and procedural safeguards for the use of procurement methods involving negotiations. (Negotiations in this sense involve bargaining between the procuring entity and suppliers or contractors.) The first method concerned is request for proposals with consecutive negotiations. Circumstances in which this method has proved effective in practice include consulting (e.g. advisory) services. The method requires the capability to negotiate—in the sense of bargaining as set out above—with the private sector regarding the financial or commercial aspects of the proposals. Enacting States should be aware nevertheless that some multilateral development banks have historically recommended the use of procurement methods sharing the features of the Model Law's request for proposals with consecutive negotiations, as is discussed in the **commentary to that procurement method** below, for the procurement of well-defined services that are neither complex nor costly, including consulting (e.g. advisory) services.

12. The common feature of the remaining procurement methods under chapter V—the highly exceptional competitive negotiations and single-source procurement—is that such negotiations are also envisaged. The circumstances in which these methods may be used are varied, and particular issues arising in their use, are set out in the commentary below. Enacting States should ensure that the safeguards set out in the procedures are not watered down, so as to avoid compromising the main objectives of the Model Law.

13. The risk of corrupt practices is present in all procurement methods but may be elevated in methods involving some type of interaction with the market, as envisaged in the chapter V procurement methods. This is because they involve a back-and-forth process during which compliance with basic requirements of the Model Law aimed at transparency, objectivity and fair, equal and equitable treatment of suppliers or contractors is difficult to monitor even if safeguards are built into the regulatory framework. There may therefore be reluctance to use or participate in these methods. Enacting States should ensure that the appropriate regulatory framework is supplemented by adequate institutional measures that allow monitoring the use of these procurement methods and rectifying promptly improprieties where those occur, in order to build confidence of both the procuring entity and suppliers or contractors in using and participating in them (see further the commentary in the next section).

14. The methods of solicitation in chapter V procurement methods do not raise new issues; enacting States are directed to the relevant **commentary in the Introduction to section II of chapter II** and in the **Introduction to chapter IV**, addressing among others the issues arising out of direct solicitation.

### ***3. Issues regarding implementation and use***

15. It will be evident that assessing whether the conditions for use of chapter V procurement methods apply involves significant discretion on the part of the procuring entity. The procurement regulations or rules or guidance from the public procurement agency or other body can assist in enhancing objectivity in the assessment of the circumstances that necessitate the use of a chapter V procurement method. Since this assessment will take place at the procurement planning stage, the enacting State should ensure that appropriate safeguards are built in at that stage, including that the procurement planning stage is to be fully documented and recorded.

16. A second issue that arises in chapter V procurement methods is the capacity to engage in discussions, dialogue or negotiations—both to explain the procuring entity's needs in a way that can be fully and equally understood by all participants, and to assess the resulting tenders, proposals and BAFOs. An aspect of this capacity is that the procuring entity must have the facility to engage successfully in negotiations with the private sector such that its needs are properly met. Where there is no or limited in-house expertise in these matters, the procurement regulations or rules or guidance from the public procurement agency or other body should address external

expert assistance that can be provided centrally or from other sources to assist the procuring entity.

17. These capacities outlined in the preceding section require more elucidation than a Model Law can provide. Enacting States should recognize that regulatory and procedural safeguards alone will not be sufficient. They must be supported by an appropriate institutional framework, measures of good governance, high standards of administration and highly-skilled procurement personnel.

18. Enacting States should note the particular importance of the provisions of article 24 on confidentiality in the context of all procurement methods under chapter V. The risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors (not limited to price) are an inherent feature of the chapter V procurement methods other than single-source procurement. Other risks include the provision of important information to some but not all suppliers or contractors. Enacting States are encouraged to include oversight measures, including post-procedure audits, to consider encouraging the presence of observers during the procedures, to assess the use of the methods in practice, and to formulate guidance on appropriate managerial tools for the effective use of these procurement methods. These measures should also assist in avoiding abuse and corruption in the use of these procurement methods, particularly where delicate issues or highly competitive contracts are concerned; for this reason, it is important that any observers should come from outside the procuring entity's structure and rigorous confidentiality measures should be in place. The importance of such safeguards should not be underestimated if the integrity of, and fairness and public confidence in, the procurement process is to be preserved, and the participation of suppliers or contractors in the ongoing and any future procurement proceedings involving interaction between the procuring entity and the market is to be ensured.

### **B. General description and main policy issues of chapter V procurement methods; commentary to their conditions for use, solicitation rules, and procedures**

In order to assist the reader, the commentary to each of the chapter V procurement methods below is presented per procurement method. It includes a general description of each method and its main policy issues, and commentary to its conditions for use, its solicitation rules, and procedures. The

relevant provisions applicable to these procurement methods, found in chapters II (the conditions for use and solicitation rules) and V (procedures) of the Model Law, are thus discussed together.

### ***1. Two-stage tendering***

#### *General description and main policy issues*

1. The rationale behind the use of two-stage tendering is to combine two elements: first, to allow the procuring entity, through the examination of the technical aspects of tenders and optional discussions on them, to refine and finalize the terms and conditions of the procurement that the procuring entity may not have been able to formulate adequately—that is, in the level of detail required by article 10 of the Model Law—at the outset of the procurement; and secondly, to ensure that the high degree of objectivity and competition provided by the procedures of open tendering under chapter III will apply to the selection of the successful tender through two-stage tendering.

2. This procurement method is of long-standing in various systems (including the 1994 Model Law, and in procurement under the guidelines of the multilateral development banks). Examples of its successful use include procurement of high-technology items, such as large passenger aircraft or communication systems, technical equipment and infrastructure procurement, including large complex facilities or construction of a specialized nature. In such situations, it may be evident that obtaining best value for money is unlikely if the procuring entity draws up a complete description of the procurement setting out all the technical specifications, all quality and performance characteristics of the subject matter, all relevant competencies of the suppliers or contractors, and all terms and conditions of the procurement at the outset and without examining what the market can offer.

3. At the first stage, the procuring entity issues the solicitation documents with a full or partially developed set of technical specifications and details of other characteristics of the subject matter, competencies of the suppliers or contractors and terms and conditions of the procurement. Prospective suppliers and contractors are invited to submit initial tenders in response to the solicitation documents. Those initial tenders will propose technical solutions indicating what is available in the market, and may propose refinements to technical specifications or to the other characteristics, competencies or terms or conditions, or a combination thereof.

4. The procuring entity may seek clarifications from and discuss the initial tenders with responsive suppliers or contractors under articles 16 and 48,

respectively, and may use the information obtained in this way to inform its decision on a revised set of terms and conditions of the procurement giving the exact characteristics required. This process illustrates the main aim of the two-stage tendering—to enhance the precision of specifications of the subject matter of the procurement, to narrow down the possible options to the one that would best meet the procuring entity’s needs, and on that basis to finalize a single set of terms and conditions of the procurement.

5. At the second stage, suppliers or contractors present their final tenders (which then include price commitments) against this revised set of terms and conditions of the procurement, which are issued as part of the request to present final tenders. Thus the procuring entity remains responsible for the design of the technical solution and determining the scope of work and setting the terms and conditions of the procurement throughout the procedure; the responsibility for the delivery of that design and fulfilment of the terms and conditions are subsequently borne by the supplier or contractor that is awarded the procurement contract. In this context, it should be noted that the initial statement of needs in the solicitation documents is likely to focus on the functional aspects of the items to be procured, so that the second stage allows for the technical aspects to be refined and included in the final request for tenders.

6. The procuring entity is not permitted to solicit price commitments from participating suppliers or contractors for their respective proposed solutions at the first stage of the procedure; suppliers and contractors do not make price commitments at that stage, and the procuring entity may not request such information from them during the discussions.

7. The reference to holding “discussions” reflects the iterative nature of the process. In addition, the term distinguishes the nature of talks that may be held in this method—which may not include the tender price or other financial aspects of the procurement—from the bargaining that may take place in other chapter V procurement methods. Allowing suppliers or contractors to assist in defining the technical specifications and scope of work (as well as the absence of seeking or obtaining price commitments from suppliers or contractors at the first stage of the proceedings) is a way in which this method differs from other chapter V methods. Nonetheless certain technical or quality requirements may have a commercial impact. For example, there may be a requirement in the solicitation documents for solutions to the use of intellectual property (e.g. such rights could be licensed or acquired). If so, these requirements form part of the technical aspects of the procurement; although they have commercial impact, they can be discussed with suppliers or contractors. Such discussions will allow the procuring entity to estimate what premium must be paid for a particular refinement and what benefits

might be obtained for paying that premium, and thereby inform its decision on whether or not to include such a refinement in the revised set of terms and conditions of the procurement. Otherwise, the related costs for the use of the intellectual property concerned will be simply part of the tender price submitted at the second stage.

8. The flexibility and potential benefits described above are not risk-free. In particular, there is a risk that the procuring entity may tailor the revised set of terms and conditions of the procurement to one particular supplier or contractor (regardless of whether discussions are held or not, though it should be acknowledged that this risk is also present in open tendering proceedings, particularly where informal market consultations precede the procurement). The transparency provisions applicable to all tendering proceedings should mitigate the risks of distorting the procurement to favour a particular supplier or contractor.

9. This method is a structured one. The rules of open tendering regulate the solicitation procedure and the selection of the successful tender in two-stage tendering (see articles 33 and 48 of the Model Law, and the **commentary to section II of chapter II**, and to **chapter III on open tendering**).

#### *Conditions for use of two-stage tendering (article 30 (1))*

1. Article 30 (1) provides for conditions for use of two-stage tendering. Subparagraph (a) deals with the procurement of technically sophisticated and complex items. The need for use of the procurement method in these circumstances may become clear at the procurement planning stage, as noted in the Introduction to this chapter. After its examination of the initial tenders, the procuring entity may hold discussions with suppliers and contractors whose proposed technical solutions met the minimum requirements set out by the procuring entity.

2. Subparagraph (1) (b) deals with a different situation—where open tendering was engaged in but it failed. (This condition also allows the use of request for proposals with dialogue, under subparagraph (2) (d) of article 30). In such situations, the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that its difficulties in formulating sufficiently precise terms and conditions of the procurement were the reasons for the failure, it may consider that a two-stage tendering procedure in which suppliers or contractors are involved is the appropriate course. The reasons for the earlier failure should also guide the procuring entity in selecting between two-stage tendering under subparagraph (1) (b) and request for proposals with dialogue under subparagraph (2) (d): if formulating a single

set of terms and conditions (including a single technical solution) of the procurement will be possible and appropriate, two-stage tendering will be the appropriate procurement method. The procuring entity will be able to engage with suppliers or contractors in order to be able to formulate those terms and conditions as necessary. (By contrast, the procuring entity may conclude that it is not possible or not appropriate to formulate a single technical solution, in which case request for proposals with dialogue may be the better course—see the **guidance to that procurement method**).

### *Solicitation in two-stage tendering (article 33)*

1. Solicitation in two-stage tendering proceedings is regulated by the rules governing open tendering under article 33, as article 48 applies the provisions of chapter III to two-stage tendering. (The application of chapter III is subject to derogations under that article 48.) A key feature of open tendering—public and unrestricted international solicitation of participation by suppliers or contractors—is therefore present in two-stage tendering.

2. The concept of public and unrestricted international solicitation is explained in the **commentary to section II of chapter II**. There are no exceptions to the requirement for public and unrestricted solicitation. Where pre-qualification procedures precede two-stage tendering, as permitted by article 18, the pre-qualification procedures ensure that the public and unrestricted invitation to pre-qualification takes place. Although the solicitation after the pre-qualification proceedings is addressed only to pre-qualified suppliers or contractors, the principle of open solicitation is preserved when the invitation to pre-qualification is issued.

3. There are limited exceptions to the requirement for international solicitation under article 33 (4), also as explained in the commentary to section II of chapter II. These exceptions are permitted only to accommodate domestic and low-value procurement. In all other cases, the invitation to tender must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

4. Further guidance on solicitation is set out in the commentary to section II of chapter II.

### *Procedures for two-stage tendering (article 48)*

1. Article 48 regulates the procedures for two-stage tendering. Paragraph (1) serves as a reminder that the rules of open tendering apply to two-stage

tendering, except where modification is required by the procedures particular to the latter method. Some of the open tendering rules will be applicable without modification, such as the procedures for soliciting tenders (article 36), the contents of invitation to tender (article 37) and the provision of the solicitation documents (article 38). Some other rules of chapter III will require modification in the light of the specific features of two-stage tendering described in paragraphs (2)-(4) of article 48. For example, the provisions of article 39 referring to price in the solicitation documents will not be relevant when initial tenders are solicited. The provisions of article 41 on the period of effectiveness of tenders and modification and withdrawal of tenders are to be read together with paragraph (4) (d) of article 48, which allows a supplier or contractor not wishing to present a final tender to withdraw from the proceedings without forfeiting any tender security.

2. Some provisions of chapter III, such as article 42 on the opening of tenders and the provisions of article 43 on the evaluation of tenders, will be applicable only to final tenders submitted in response to the revised set of terms and conditions of the procurement. The provisions on the presentation of tenders in article 40 and on the examination of tenders in article 43 will, on the other hand, be applicable to both initial and final tenders. The provisions of article 44, prohibiting negotiation with suppliers or contractors after tenders have been submitted, should be interpreted in the context of the interaction in two-stage tendering being discussions rather than negotiations as described above. The prohibition of negotiations per se applies throughout two-stage tendering proceedings (including to the period after final tenders have been submitted, should the procuring entity seek clarification of the submission under article 16, as explained in the **commentary to that article**).

3. Paragraph (2) contains specific rules for the solicitation of initial tenders. They modify the rules on solicitation of chapter III. At this stage, the procuring entity may solicit suggested technical refinements with respect to any terms and conditions of the procurement other than tender price. In the light of the conditions for use of this procurement method (see article 30 (1), as explained in the **commentary thereto**), it is expected that the procuring entity will solicit such suggested refinements relating to the technical, quality and/or performance characteristics of the subject matter of the procurement and, where relevant, to the professional and technical competence and qualifications of the suppliers or contractors.

4. The article does not provide for any specific rules on presentation and examination of initial tenders. The relevant provisions of chapter III apply. In particular, the applicable provisions of article 43 (2) will regulate the instances in which initial tenders will be rejected. They are: where the

supplier or contractor that presented a tender is not qualified; where the tender presented is not responsive (including where it contains a tender price); or where a supplier or contractor is excluded from the procurement proceedings on the grounds specified in article 21 (inducement, unfair competitive advantage or conflicts of interest). The other grounds for rejection specified in article 43 (2) are not applicable; they apply to situations when tender prices are examined, which is not the case at the first stage of two-stage tendering. All suppliers or contractors whose tenders are not rejected are entitled to participate further in the procurement proceedings.

5. Paragraph (3) provides for the possibility of holding discussions with suppliers or contractors whose initial tenders have not been rejected, concerning any aspect of their initial tenders. Discussions may involve any aspect of the procurement but price. Discussions will not always be necessary: the procuring entity may be able to refine and finalize the terms and conditions of the procurement itself, on the basis of the initial tenders received. The provisions of paragraph (3) require that, when the procuring entity decides to engage in discussions, it must extend an equal opportunity to discuss to all suppliers or contractors concerned. An “equal opportunity” in this context means that the suppliers or contractors are treated as equally as the requirement to avoid disclosure of confidential information and the need to avoid collusion allow. The rules or guidance from the public procurement agency or other body should focus on this key aspect of the two-stage tendering process. In addition, the rules or guidance should highlight the need to record the details of the discussions in the record of the procurement required under article 25.

6. Paragraph (4) regulates the procedural steps involved at the subsequent stages of the two-stage tendering to the extent that they are different from the rules of open tendering in chapter III of the Model Law. It also regulates issues arising from the preparation and issue of a final revised set of terms and conditions of the procurement, such as the extent of permissible changes to the terms and conditions originally advertised.

7. Subparagraph (4) (a) imposes the obligation on the procuring entity to extend the invitation to present final tenders, following the issuance of a revised set of terms and conditions of the procurement, to all suppliers or contractors whose initial tenders were not rejected at the first stage. Final tenders are equivalent to the tenders submitted in open tendering: that is, they will be assessed for responsiveness to the solicitation and will include prices.

8. Subparagraph (4) (b) addresses the extent of permissible changes to the terms and conditions of the procurement originally advertised. Changes (such

as deletions, modifications or additions) are permitted to the technical, quality and performance characteristics of the subject matter of the procurement and to the criteria for examining and evaluating tenders, on the condition that the subject matter of the procurement is not itself thereby modified. Changes that lead to a modification of the subject matter of the procurement itself constitute “material” changes as explained in the **commentary to article 15 (3)**; in such cases, a new procurement procedure is required. This condition limits the discretion of the procuring entity in refining aspects of the description of the subject matter of the procurement originally advertised and is an important safeguard for providing for the fair, equal and equitable treatment of all suppliers and contractors. So, if at the end of the first stage of two-stage tendering, the procuring entity decides that a change in the description of the subject matter is needed, new procurement proceedings must be initiated. This will allow new suppliers or contractors to participate (including suppliers or contractors whose initial tenders were rejected or that would now become qualified). See also the **commentary to procedures for request-for-proposals-with-dialogue procurement method** below for a related discussion.

9. Subparagraph (4) (b) (i) explains the extent of permissible changes to the description of the subject matter of the procurement, by referring to technical, quality and performance characteristics of the subject matter of the procurement. The types of changes that are envisaged include alterations in technical characteristics—such as the grade of building material components, wood or steel fixings, the quality of wood for flooring or the manner in which to mitigate acoustic problems in sports facilities. This type of refinement is sometimes termed “value engineering”.

10. Changes to the technical, quality or performance characteristics of the subject matter of the procurement may necessitate changes to the examination and/or evaluation criteria. Subparagraph (b) (ii) therefore provides that those changes may be introduced to the examination and evaluation criteria that are necessary as a result of changes made to the technical, quality or performance characteristics of the subject matter of the procurement. Other changes are not permitted. Making changes to the examination and/or evaluation criteria beyond those that are permissible under subparagraph (b) (ii) would lead to the examination and evaluation criteria not corresponding to the refined technical, quality and performance characteristics. This would also raise a risk of abuse.

11. Subparagraph (c) requires any changes made to the terms and conditions of the procurement as originally advertised to be communicated to suppliers or contractors, through the medium of the invitation to present final tenders.

12. Subparagraph (d) permits suppliers or contractors to refrain from submitting a final tender without forfeiture of any tender security that may have been required for participation in the procurement proceedings. The latter provision is included to enhance participation by suppliers or contractors since, upon the deadline for submission of initial tenders, the suppliers or contractors cannot be expected to know what changes to the terms and conditions of the procurement may subsequently be made. In the light of the features of this procurement method, tender securities most likely will be required however in the context of presentation of final tenders rather than of initial tenders. As noted in the **commentary to the definition of “tender security”** and **article 17**, requesting more than one tender security within any single procurement proceeding should be discouraged.

13. Subparagraph (e) subjects the procedural steps involved in examination and evaluation of final tenders and determination of the successful tender to the rules of open tendering in chapter III of the Model Law.

14. As regards confidentiality in the context of this procurement method, the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement. Examples include the use of requirements, symbols and terminology to describe the revised technical, quality and performance characteristics of the subject matter, which may inadvertently reveal the source of information, and the communication of changes made to the terms and conditions originally advertised to the suppliers or contractors (required under subparagraph (4) (c)). In conformity with the requirements of article 24, the procuring entity must respect the confidentiality of the suppliers’ or contractors’ technical proposals throughout the process.

## ***2. Request for proposals with dialogue***

### *General description and policy considerations*

1. Request-for-proposals-with-dialogue is a procedure designed for the procurement of relatively complex items and services. The typical use for this procurement method is procurement aimed at seeking innovative solutions to technical issues such as saving energy, achieving sustainable procurement, or infrastructure needs. In such cases, there may be different technical

solutions: the material may vary, and may involve the use of one source of energy as opposed to another (wind versus solar versus fossil fuels).

2. The procurement method is a procedurally similar to but substantively different from two-stage tendering. It involves a dialogue, the nature of which is explained in the Introduction to this chapter; in summary, the objective is to enable suppliers and contractors to understand, through the dialogue with the procuring entity, the needs of the procuring entity as outlined in its request for proposals. The dialogue, which may involve several stages, is an interaction between the procuring entity and the suppliers or contractors on both technical, quality and performance characteristics of their proposals and the financial aspects of their proposals. The dialogue may involve a discussion of the financial implications of particular technical solutions, including the price or price range. However, as in two-stage tendering, it is not intended to involve binding negotiations or bargaining from any party to the dialogue. The Model Law regulates this procurement method in considerable detail to mitigate the risks and difficulties that it can involve where used inappropriately or without the degree of care and capacity required to use it effectively.

3. Methods based on this type of dialogue have proved to be beneficial to the procuring entity in the procurement of relatively complex items and services where the opportunity cost of not engaging in dialogue with suppliers or contractors is high, while the economic gains of engaging in the process are evident. In addition to the typical uses described above, they may be appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the procuring entity's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through dialogue. The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. The method has enabled the procuring entity in such situations to identify and obtain the best solution to its procurement needs.

4. Since the dialogue normally involves complex and time-consuming procedures, the method should be utilized only when its benefits are appropriate, and not for simple items that are usually procured through procurement methods not involving interaction with suppliers or contractors. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the Model Law). It does not address the type of negotiations that seek only price reductions as in request for proposals with consecutive negotiations. Nor it is intended to apply in

situations in which two-stage tendering proceedings should be used in accordance with paragraph (1) of article 30—i.e. when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) of the procurement, against which tenders can be presented.

5. As with all procurement methods under the Model Law, the use of this method is not intended exclusively for any type of procurement (be it procurement of goods, construction or services). Also in common with all procurement methods under the Model Law, the procuring entity will be able to choose this procurement method when the conditions for use are satisfied, and when it assesses that the method is best suited to the given circumstances. As the Introduction to this chapter notes, rules or guidance from the public procurement agency or other body may assist the procuring entity in that assessment.

6. The method requires the procuring entity to issue a statement of needs with minimum technical requirements, to understand technical solutions that are proposed and to evaluate them on a comparative basis, and so may require capacity in procurement officials that is not required in other procurement methods, particularly to avoid the method's use as an alternative to appropriate preparation for the procurement. A particular risk is that the responsibility of defining procurement needs may be shifted to suppliers and contractors or the market. Although the suppliers or contractors, not the procuring entity, make proposals to meet the procuring entity's needs, they should not take a lead in defining those needs.

7. Article 49 contains detailed rules regulating the procedures for this procurement method, which are designed to include safeguards against possible abuses or improper use of this method and robust controls. Nonetheless, they also preserve the necessary flexibility and discretion on the part of the procuring entity in the use of the method, without which the benefits of the procedure disappear. The provisions have been aligned with the UNCITRAL instruments on privately financed infrastructure projects (see paragraph 85 of part I of this *Guide*).

8. The safeguards in particular aim at: (a) transparency by requiring proper notification of all concerned about the essential decisions taken in the beginning, during and at the end of the procurement proceedings, at the same time preserving confidentiality of commercially sensitive information as required under article 24; (b) objectivity, certainty and predictability in the process, in particular by requiring that all methods of limiting or reducing a number of participants in the procurement proceedings are made known

from the outset of the procurement, and also by regulating the extent of permissible modifications to the terms and conditions of the procurement and by prohibiting negotiations after the submission of BAFOs; (c) promoting effective competition through the same mechanisms; (d) enhancing participation and ensuring the fair, equal and equitable treatment of suppliers and contractors by requiring that the dialogue be held on a concurrent basis and be conducted by the same representatives of the procuring entity, by regulating communication of information from the procuring entity to the participating suppliers or contractors during the dialogue stage and by setting rules for the stages following the completion of the dialogue; and (e) accountability by requiring comprehensive record-keeping in supplementing provisions of article 25.

9. Similarly, suppliers or contractors will not be willing to participate if their proposals, which have a commercial value, are subsequently turned into a description available to all potential participants. The procedures for the method, as explained above, provide safeguards since they do not envisage the issue of a complete set of terms and conditions of the procurement against which proposals can be presented at any stage of this procurement method (by contrast with the position in two-stage tendering under article 48 as explained in the **commentary thereto**). A single set of minimum requirements and a list of evaluation criteria with their relative weights or, where not possible, in descending order of importance are made available at the outset of the procurement, which cannot be varied during the proceedings.

10. The procedure itself involves two stages. At the first stage, the procuring entity issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers or contractors in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. By comparison with two-stage tendering, it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject matter of the procurement.

11. The second stage of the procedure involves the dialogue, which is to be conducted “concurrently”. This term is used in the text to stress that all suppliers and contractors are entitled to an equal opportunity to participate in the dialogue, and there are no consecutive discussions. The term also seeks to avoid the impression that the dialogue is to be conducted at precisely the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials, are engaged in dialogue. Such a stance has been considered undesirable as it may lead to the unequal treatment of

suppliers and contractors. For guidance on the conduct of the dialogue, see the **commentary to procedures for this procurement method** below.

12. Upon conclusion of the dialogue, the suppliers and contractors make BAFOs to meet the procuring entity's needs. BAFOs of different suppliers or contractors may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the procuring entity the opportunity of comparing different technical solutions to meet its needs.

*Conditions for use of request for proposals with dialogue (article 30 (2))*

1. Article 30 (2) provides the conditions for use of request for proposals with dialogue. The conditions in paragraph (2) may mitigate concerns over the inappropriate use of this procurement method, by effectively preventing its use to procure items that should be procured through tendering or other, less flexible, methods of procurement.

2. Paragraph (2) (a) of the article sets out what is expected to be the main condition for use of request for proposals with dialogue: that it is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement at the outset of the procedure as required under article 10, and the procuring entity assesses that it needs to engage in dialogue with suppliers or contractors to obtain the most satisfactory solution to its procurement needs. In practice, the procuring entity must be able to describe its broad needs at the outset of the procurement at the level of functional (or performance or output) requirements. Under article 49, the procuring entity is required to set out the minimum requirements that proposals must meet in order to be considered responsive. This requirement allows the effective participation of suppliers or contractors and reflects the fact that inadequate planning is likely to mean that the procurement will be unsuccessful.

3. Similarly, the situation described in subparagraph (b) refers to procurement in which a tailor-made solution is needed (e.g. a communication system for the archiving of legal records, which may need particular features such as long-term accessibility), and where technical excellence is an issue. The third condition, in subparagraph (c), refers to procurement for the protection of essential security interests of the State. This condition would usually cover the security and defence sectors where the need may involve the procurement of highly complex subject matter and/or conditions for supply, at the same time requiring measures for the protection of classified information.

4. The last condition for use of this method, in subparagraph (d), is the same as one of the conditions for use of two-stage tendering—open tendering was engaged in but it failed. In such situations the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that using open tendering again or using any of the procurement methods under chapter IV would not be successful, it may also conclude that it faces difficulties in formulating sufficiently precise terms and conditions of the procurement at the outset of the procurement. The reasons for the earlier failure should guide the procuring entity in selecting between two-stage tendering under subparagraph (1) (b) of article 30 and request for proposals with dialogue under subparagraph (2) (d) of the same article. In order to use request-for-proposals-with-dialogue proceedings, the procuring entity would have to conclude that formulating a complete single set of terms and conditions of the procurement would not be possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

5. Apart from imposing exhaustive conditions for use of this procurement method, the Model Law refers to the possibility of requiring external approval for the use of this procurement method. If an enacting State decides to provide for ex ante approval by a designated authority for such use, it must enact the opening phrase put in square brackets in the chapeau provisions of paragraph (2). (For the general policy considerations regarding ex ante approval mechanisms, see the section on “**Institutional support**” in part I of this *Guide*.) The exceptional reference to an ex ante approval mechanism was made in this case to signal to enacting States that higher measures of control over the use of this procurement method may be justifiable in the light of the particular features of this procurement method that make it at risk of abusive behaviour, which may be difficult to mitigate in some enacting States. If the provisions are enacted, it will be for the enacting State to designate an approving authority and its prerogatives in the procurement proceedings, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled.

### *Solicitation in request for proposals with dialogue (article 35)*

1. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted international solicitation in these methods, as that term is explained in the **commentary to section II of chapter II**. Public and unrestricted international solicitation in request for proposals with dialogue involves a public advertisement, including internationally, to invite participation in the

procurement, the issue of the request for proposals to all those that respond to the advertisement, and the consideration of the qualifications and proposals of suppliers and contractors that submit them. The exceptions to the default rule requiring international solicitation mirror the exceptions in case of open tendering in article 33 (4): that is, for domestic and low-value procurement where the benefits of international solicitation will be outweighed by its costs, or where it is simply irrelevant.

2. As also explained in the **commentary to section II of chapter II**, and in the **commentary to article 18**, pre-qualification proceedings identify qualified suppliers or contractors, but are not a method to limit the numbers participating, as qualifications are assessed on a pass/fail basis. Inherent in the request-for-proposals-with-dialogue method in particular is the fact that participating suppliers or contractors will invest significant time and resources in their participation. Participation will be discouraged if there is no reasonable chance of winning the contract to be awarded at the end of the procurement process; the risk for the procuring entity is that too many potential suppliers and contractors may be pre-qualified and all pre-qualified suppliers or contractors must be admitted to the proceedings. The procedures for request-for-proposals-with-dialogue proceedings therefore set out a process that enables the procuring entity to limit the number of participants to an appropriate number—called “pre-selection”, which is described in the **commentary to procedures for request for proposals with dialogue** below. Public and unrestricted international solicitation is however ensured in the pre-selection proceedings, as an invitation for pre-selection must follow the requirements for invitations to pre-qualify under article 18 (2). Where pre-selection procedures are followed, the request for proposals must be provided to all pre-selected suppliers or contractors.

3. Paragraph (2) of article 35 offers a choice between public and unrestricted solicitation and direct solicitation in three situations where a requirement for the former might be inappropriate or might defeat the objectives of cost-efficiency: first, where the subject matter of the procurement, by reason of its highly complex or specialized nature, is available from a limited number of suppliers or contractors (article 35 (2) (a)), a situation that is likely to arise in the circumstances in which request for proposals with dialogue is available; second, where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the procurement (article 35 (2) (b)); and third, in procurement involving classified information (article 35 (2) (c)).

4. The first two situations are the same as those justifying the use of restricted tendering: the considerations raised in connection with **solicitation in restricted tendering** above are therefore relevant here. Where direct

solicitation is used on the ground stipulated in article 35 (1) (a), the procuring entity must solicit proposals from all suppliers or contractors from which the subject matter of the procurement is available. Where direct solicitation is used on the ground stipulated in article 35 (1) (b), the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition and must select them in a non-discriminatory manner. Where direct solicitation is used on the ground stipulated in article 35 (1) (c), the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

5. In all cases of direct solicitation, the procuring entity must include in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request-for-proposals proceedings (article 35 (3)). It must also issue an advance notice of the procurement (article 35 (4)) unless classified information would thereby be compromised.

6. For a discussion of these requirements and their consequences, notably from the combination of a requirement in article 35 (2) (a) to solicit proposals from all potential suppliers or contractors for the subject matter concerned, the risk of unknown suppliers or contractors emerging as a result of the advance notice and the fact that the procuring entity cannot reject unexpected or unsolicited proposals, see the **commentary to section II of chapter II** and the commentary on solicitation in the Introduction to chapter IV procurement methods. That latter commentary also addresses mechanisms for ensuring a non-discriminatory manner of selecting the suppliers or contractors to participate where direct solicitation is used under article 35 (2) (b).

#### *Procedures for request for proposals with dialogue (article 49)*

1. Article 49 regulates the procedures for request for proposals with dialogue. The steps involved in this procedure are: (a) an optional request for expressions of interest, which does not confer any rights on suppliers or contractors, including any right to have their proposals evaluated by the procuring entity. In this sense, it resembles an advance notice of possible future procurement referred to in article 6 (2) (see the **commentary to article 6**); (b) pre-selection when it is expected that more than the optimum number of qualified candidates would express interest in participating; if pre-selection is not involved, open or direct solicitation as regulated by article 35; (c) issue of the request for proposals to those responding to the open or direct solicitation or to those pre-selected, as the case may be; (d) concurrent dialogue, which as a general rule is held in several rounds or phases;

(e) completion of the dialogue stage with a request for BAFOs; and (f) award. The article regulates these procedural steps in the listed chronology, except for an optional request for expressions of interest, which, as stated, is covered by provisions of article 6.

2. Paragraph (1), by cross-referring to article 35 (1) of the Model Law, reiterates the default rule of public and unrestricted international solicitation. The exceptions to that rule are set out in the **commentary on solicitation in request for proposals with dialogue**.

3. When public and unrestricted solicitation without pre-selection is involved, an invitation to participate in the request for proposals with dialogue is issued, which must contain the minimum information listed in paragraph (2). This minimum information is designed to assist suppliers or contractors to determine whether they are interested and eligible to participate in the procurement proceedings and, if so, how they can participate. The information specified is similar to that required for an invitation to tender (article 37).

4. Paragraph (2) lists the required minimum information and does not preclude the procuring entity from including additional information that it considers appropriate. A description of the procurement needs and the terms and conditions of the procurement, to the extent known, are required to be included in the invitation in order to allow suppliers or contractors to assess their interest in participating in the procurement proceedings. The procuring entity should take into account however that it is the usual practice to keep the invitation brief and include in it the most essential information about procurement, which is the most relevant to the initial stage of the procurement proceedings. All other information about the procurement, including further detail of the information contained in the invitation, is included in the request for proposals (see paragraph (5) of this article). This approach helps to avoid repetitions, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. It is in particular advisable in this procurement method since some information may become available or be refined later in the procurement proceedings (to the extent permitted by paragraph (9) of the article).

5. Paragraph (3) regulates pre-selection proceedings, as an option for the procuring entity to limit a number of suppliers or contractors from which to request proposals. The provisions have been aligned generally with the provisions on pre-selection found in the UNCITRAL instruments on privately financed infrastructure projects (see paragraph 85 of part I of this *Guide*). Pre-selection proceedings allow the procuring entity to specify from the outset of the procurement that only a certain number of best qualified

suppliers or contractors will be admitted to the next stage of the procurement proceedings. This tool is available as an option where it is expected that many qualified candidates will express interest in participating in the procurement proceedings. The Model Law provides for this possibility only in this procurement method: it is considered justifiable in the light of the significant time and cost that would be involved in examining and evaluating a large number of proposals. It is therefore an exception to the general rule of open participation.

6. Pre-selection is held in accordance with the rules applicable to pre-qualification proceedings. The provisions of article 18 therefore apply to pre-selection, to the extent that they are not derogated from in paragraph (3) (to reflect the nature and purpose of pre-selection proceedings). For example, to ensure transparency and the fair, equal and equitable treatment of suppliers and contractors, paragraph (3) requires the procuring entity from the outset of the procurement to specify that the pre-selection proceedings will be used, the maximum number of pre-selected suppliers or contractors from which proposals will be requested, the manner in which the selection of that number of suppliers or contractors will be carried out and criteria that will be used for rating suppliers or contractors, which should constitute qualification criteria and should be objective and non-discriminatory.

7. The maximum number of suppliers or contractors to be pre-selected must be established by the procuring entity in the light of the circumstances of the given procurement to ensure effective competition. When possible, the minimum should be at least three. If the procuring entity decides to regulate the number of suppliers or contractors to be admitted to the dialogue (see paragraph (5) (g) of the article), the maximum number of suppliers or contractors from which proposals will be requested should be established taking into account the minimum and maximum numbers of suppliers or contractors intended to be admitted to the dialogue stage as will be specified in the request for proposals under paragraph (5) (g) of this article. It is recommended that the maximum number of suppliers or contractors from which proposals will be requested should be higher than the maximum to be admitted to the dialogue stage, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue stage. To enable effective challenge, the provisions require promptly notifying suppliers or contractors of the results of the pre-selection and providing to those that have not been pre-selected reasons therefor.

8. Paragraph (4) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, this group could constitute the entire group of suppliers or contractors that respond to the invitation to participate in request

for proposals with dialogue; or, if pre-selection was involved, to only those that were pre-selected; or in the case of direct solicitation, the group would comprise only those that are directly invited. The provisions also contain a standard clause in the Model Law that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to the suppliers or contractors concerned (see the **commentary to article 38**).

9. Paragraph (5) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare them on an equal basis. The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (see article 39) and contents of the request for proposals in request-for-proposals-without-negotiation proceedings (see article 47 (4)). The differences reflect the specific procedures of this procurement method.

10. Information about the proposal price may be less significant in procurement of consulting (e.g. advisory) services where the cost is not a significant evaluation criterion and in such cases initial proposals need not contain financial aspects or price. Instead, in the context of evaluation criteria referred to in subparagraph (h), the emphasis in this type of procurement will be placed on the service provider's experience for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications of the key staff proposed, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the terms and conditions of the procurement, and when applicable, the extent of participation by nationals among key staff in the performance of the services (see the **commentary to article 11 (2) (c)**).

11. These evaluation criteria may be in addition to a minimum requirement for skills and experience expressed as qualification criteria under article 9 and paragraph (2) (e) of this article. Whereas by virtue of article 9 the procuring entity will reject proposals of suppliers or contractors that do not meet a minimum requirement for skills and experience, the procuring entity will evaluate skills and experience of qualified suppliers or contractors admitted to the dialogue stage: the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others and on the basis of such a comparison, it may be more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the project.

12. While the primary focus of dialogue typically may be on technical, quality and performance aspects or legal or other supporting issues, the

subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria. Thus a preliminary price may be required to be provided in the proposals. The price is always included in the BAFOs.

13. Paragraph (5) (g) is applicable in situations when the procuring entity, in the light of the circumstances of the given procurement, decides that a minimum and/or maximum number of suppliers or contractors with whom to engage in dialogue should be established. Those limits should aim at reaching the optimum number of participants, taking into account that in practice holding concurrent negotiations with many suppliers or contractors has proved to be very cumbersome and unworkable, and may discourage participation. The provisions refer to a desirable minimum of three participants. They are supplemented by provisions of paragraphs (6) (b) and (7).

14. Paragraph (5) (h) refers to the criteria and procedures for evaluating the proposals in accordance with article 11 that in particular sets out exceptions to default requirements as regards assigning the relative weights to all evaluation criteria, to accommodate the specific features of this procurement method. These features may make it impossible for the procuring entity to determine from the outset of the procurement the relative weights of all evaluation criteria. It is therefore permitted under article 11 to list the relevant criteria in the descending order of importance. Where subcriteria are also known in advance, they should be specified as well and assigned relative weight if possible; if not, they should also be listed in the descending order of importance. It is recognized that different procurements might require different levels of flexibility as regards specification of evaluation criteria and procedures in this procurement method. However, providing a true picture of the evaluation criteria and procedure from the outset of the procurement proceedings is a fundamental requirement of article 11.

15. In the context of paragraph (5) (m) requiring the procuring entity to specify in the request for proposals any other requirements relating to the proceedings, it may be beneficial to include the timetable envisaged for the procedure. The proceedings by means of this procurement method are usually time- and resource-consuming on both sides—the procuring entity and suppliers or contractors. An estimated timetable of the proceedings in the request for proposals encourages better procurement planning and makes the process more predictable, in particular as regards the maximum period of time during which suppliers or contractors should be expected to commit their time and resources. It also gives both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs and so forth) would be relevant, and should be made available, at which stage.

16. After the provision of the request for proposals to the relevant suppliers or contractors, sufficient time should be allowed for suppliers or contractors to prepare and submit their proposals. The relevant time frame is to be specified in the request for proposals and may be adjusted if need be, in accordance with the requirements of article 14.

17. Paragraph (6) regulates the examination (assessment of responsiveness) of proposals. All proposals are to be assessed against the established minimum examination criteria notified to suppliers or contractors in the invitation to the procurement and/or request for proposals. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings dialogue may fall as a result of the rejection of non-responsive proposals, i.e. those that do not meet the established minimum criteria. As in the case with pre-qualification proceedings (see the **commentary to article 18**), examination procedures cannot be used for the purpose of limiting the number of suppliers or contractor to be admitted to the next stage of the procurement proceedings. If all suppliers or contractors presenting proposals turn out to be responsive, they all must be admitted to the dialogue unless the procuring entity reserved the right to invite only a limited number. As stated in the context of paragraph (5) (g) (see paragraph (13) above), such a right can be reserved in the request for proposals. In this case, if the number of responsive proposals exceeds the established maximum, the procuring entity will select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals. The Model Law itself does not regulate this procedure and criteria, which may vary from procurement to procurement. A certain level of subjectivity in the selection cannot be excluded in this procurement method. The risk of abusive practices should be mitigated by the requirement to specify the applicable selection procedure and criteria in the request for proposals, and to provide prompt notification of the results of the examination procedure, including reasons for rejection when applicable. These requirements should allow the aggrieved suppliers or contractors effectively to challenge the procuring entity's decisions. Managerial techniques to oversee the procedure can also support these regulatory tools.

18. In accordance with paragraph (7), the number of suppliers or contractors invited to the dialogue in any event must be sufficient to ensure effective competition. The desirable minimum of three suppliers or contractors mentioned in paragraph (5) (g) is reiterated in this paragraph. The procuring entity will not however be precluded from continuing with the procurement proceedings if only one or two responsive proposals are presented. The reason for allowing the procuring entity to continue with the procurement in such a case is that, even if there is a sufficient number of responsive proposals, the procuring entity has no means of ensuring that the competitive

base remains until the end of the dialogue stage: suppliers or contractors are not prevented from withdrawing at any time from the dialogue.

19. Paragraph (8) sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the procuring entity should be involved to ensure consistent results. The reference to “representatives” of the procuring entity is in plural in these provisions since the use of committees comprising several people is considered to be good practice, especially in the fight against corruption. This requirement does not prevent the procuring entity from holding dialogue with only one supplier or contractor, as explained above. Dialogue may involve several rounds or phases. By the end of each round or phase, the needs of the procuring entity are refined and participating suppliers or contractors are given a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the procuring entity during dialogue.

20. The references in subsequent paragraphs of this article to “participating suppliers or contractors” and “suppliers or contractors remaining in the proceedings” indicate that the group of suppliers or contractors entering the dialogue at the first phase may decline throughout the dialogue process. Some suppliers or contractors may decide not to participate further in dialogue, or they may be excluded from further dialogue by the procuring entity on the grounds permitted under the Model Law or other provisions of applicable law of the enacting State. Unlike some systems with similar procurement methods, the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. The dialogue stage involves constant modification of solutions and it would be unfair to eliminate any supplier or contractor only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. Although terminating the dialogue with such a supplier or contractor might allow both sides to avoid wasting time and resources (which could turn out to be significant in this type of procurement), and might consequently reduce the risk of reduced competition in future procurements, UNCITRAL has proceeded on the basis that the risks to objectivity, transparency and fair, equal and equitable treatment significantly outweigh the benefits.

21. On the other hand, the procuring entity should not be prohibited from terminating dialogue with suppliers or contractors on the grounds specified in the Model Law or through other provisions of applicable law of the enacting State. Some provisions in the Model Law would require the procuring entity to exclude suppliers or contractors from the procurement

proceedings. For example, they must be excluded on the basis of article 21 (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue stage from the minimum responsive requirements or other key elements that were identified as not being the subject of dialogue at the outset of the procurement. In such cases, the possibility of a meaningful challenge under chapter VIII is ensured since the procuring entity will be obligated to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide grounds for that decision. It may be useful to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

22. Paragraph (9) imposes limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings. Unlike article 15 that regulates modification of the solicitation documents before the submissions/proposals are presented, paragraph (9) deals with restriction on modification of any aspect of the request for proposals after the proposals have been presented. The possibility of making such modifications is inherent in this procurement method; not allowing sufficient flexibility to the procuring entity in this respect will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

23. At the same time, the negative consequences of unfettered discretion may significantly outweigh the benefits in terms of flexibility. The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making changes to those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. They are the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (*f*) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement. The provisions would not prevent suppliers or contractors from making changes in their proposals as a result of the dialogue; however, deviation from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum requirements or the requirements identified as not being the subject of dialogue) may become a ground for the exclusion from the procurement of the supplier or contractor proposing such unacceptable deviations.

24. Paragraph (10) provides an essential measure to achieve fair, equal and equitable treatment of suppliers and contractors in the communication of information from the procuring entity to suppliers or contractors during the dialogue stage. It subjects any such communication to the provisions of article 24 on confidentiality, some of which are specifically designed for chapter V procurement methods. Concerns over confidentiality are particularly relevant in this procurement method in the light of the format and comprehensive scope of the dialogue. The general rule is that no information pertinent to any particular supplier or contractor or its proposal should be disclosed to any other participating supplier or contractor without consent of the former. Further exceptions are listed in article 24 (3) (disclosure is required by law, or ordered by the court or a designated organ, or permitted in the solicitation documents) (see the **commentary to article 24**).

25. Achieving fair, equal and equitable treatment of all participants during the dialogue requires implementing a number of practical measures. The Model Law refers only to the most essential ones, such as those in paragraph (10), and the requirement that the dialogue be held on a concurrent basis by the same representatives of the procuring entity (paragraph (8) as explained above). Other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, should be thought through by the procuring entity when preparing for the dialogue stage. Enacting States may wish to provide for other practical measures in the procurement regulations.

26. Upon completion of the dialogue stage, all the remaining participants must be given an equal chance to present BAFOs, which are defined as best and final with respect to each supplier's or contractor's proposal. This definition highlights one of the main distinct features of this procurement method—the absence of any complete single set of terms and conditions of the procurement beyond the minimum requirements against which final submissions are evaluated.

27. Paragraphs (11) and (12) regulate the BAFOs stage. The safeguards contained in these paragraphs are intended to maximize competition and transparency. The request for BAFOs must specify the manner, place and deadline for presenting them. No negotiation with suppliers or contractors is possible after BAFOs have been presented and no subsequent call for further BAFOs can be made. Thus the BAFO stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict an undesirable situation in which the procuring entity uses the offer made by one supplier or contractor to pressure another supplier or contractor, in particular as regards the price offered. Otherwise, in anticipation of such pressure, suppliers or contractors

may be led to raise the prices offered, and there is a risk to the integrity of the marketplace.

28. Paragraph (12) prohibits negotiations on the terms of the BAFOs. It should be read in conjunction with the provisions of article 16, which allow the procuring entity to seek clarification of BAFOs as other submissions, but do not allow price or other significant information to be altered as part of the clarification process, as the **commentary to that article** explains. The dialogue stage means that the article 16 procedure is unnecessary as regards the proposals, unless there are queries as to whether or not they meet the minimum criteria set out in the request for proposals itself.

29. Paragraph (13) deals with the award of the procurement contract under this procurement method. It is to be awarded to the successful offer, which is determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals. The reference to the criteria and procedure for evaluating the proposals as set out in the request for proposals in this provision reiterates the prohibition of modification of those criteria and procedures during the dialogue stage, found in paragraph (9) of the article as explained in paragraphs 22 and 23 above.

30. The procuring entity will be required to maintain a comprehensive written record of the procurement proceedings, including a record of the dialogue with each supplier or contractor, and to give access to the relevant parts of the record to the suppliers or contractors concerned, in accordance with article 25. This is an essential measure in this procurement method to ensure effective oversight, including audit, and possible challenges by aggrieved suppliers or contractors.

### ***3. Request for proposals with consecutive negotiations***

#### *General description and main policy issues*

1. The conditions for use and procedures of this method resemble those of the request for proposals without negotiation referred to in article 29 (3) of the Model Law. The difference between this procurement method and request for proposals without negotiation is in the need to hold negotiations on the financial aspects of the proposals, reflecting that the method is appropriate for the procurement of a subject matter that is designed for the procuring entity, rather than for the procurement of a subject matter of a fairly standard nature. The request-for-proposals-with-consecutive-negotiations procedure is thus appropriate for use in the procurement of more complex subject matter

where holding negotiations on commercial or financial aspects of proposals is indispensable—there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations. Examples of the use of this method in practice include consulting (e.g. advisory) services.

2. All stages in this procurement method preceding the stage of negotiations are the same as in the request for proposals without negotiation: the procuring entity sets a threshold on the basis of the technical, quality and performance characteristics of the proposals, and then ranks those proposals that are rated at and above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the required subject matter of the procurement. The procuring entity then holds negotiations on financial aspects of the proposals first with the supplier or contractor that was ranked highest; if negotiations with that supplier are terminated, the procuring entity holds negotiations with the next highest-ranked supplier and so forth, to the extent necessary, until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains fair and reasonable financial proposals. The format of consecutive, as opposed to concurrent or simultaneous, negotiations has proved to be the most appropriate in the context of this procurement method in the light of the scope of negotiations covering exclusively financial or commercial aspects of the proposals. When the need exists to negotiate on other aspects of proposals, this procurement method may not be used.

3. Request for proposals with consecutive negotiations is not reserved exclusively for the procurement of services. This approach is in conformity with UNCITRAL's decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 28 (2) of the Model Law; see the relevant **commentary in the Introduction to section I of chapter II**). Enacting States should be aware nevertheless that some multilateral development banks have historically recommended the use of procurement methods sharing the features of the Model Law's request for proposals with consecutive negotiations for the procurement of well-defined services that are neither complex nor costly, including consulting (e.g. advisory) services.

*Conditions for use of request for proposals with consecutive negotiations  
(article 30 (3))*

Article 30 (3) sets out conditions for use of request for proposals with consecutive negotiations. Like request for proposals without negotiation, this

method has proved to be beneficial where technical, quality and performance characteristics may be the main priority and where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their technical, quality and performance characteristics, so that the procuring entity is not influenced by the financial aspects when it examines and evaluates technical, quality and performance characteristics of proposals. The words “needs to” in the provisions are intended to convey that there is an objective and demonstrable need for the procuring entity to follow this sequential examination and evaluation procedure. Thus, like request for proposals without negotiation, this procurement method is appropriate for use only where the examination and evaluation of technical, quality and performance characteristics of the proposals separately from consideration of financial aspects of proposals is possible and needed.

*Solicitation in request for proposals with consecutive negotiations*  
(article 35)

Article 35 regulates solicitation in request-for-proposals procurement methods; its application to request for proposals with consecutive negotiations raises identical issues to those discussed in the commentary to request for proposals without negotiation. The **commentary to solicitation in request for proposals without negotiation** is therefore relevant here.

*Procedures for request for proposals with consecutive negotiations*  
(article 50)

1. Article 50 regulates the procedures of request for proposals with consecutive negotiations. All stages in this procurement method preceding the stage of negotiations are the same as in request for proposals without negotiation. Paragraph (1) therefore makes reference to the applicable provisions of article 47. The **commentary to those provisions** is therefore relevant here.
2. Paragraphs (2)-(6) regulate the distinct procedures of this procurement method. Paragraph (2) addresses issues of ranking and the invitation to consecutive negotiations. The ranking is set on the basis of the scores assigned to the technical, quality and performance characteristics of the proposals.
3. As noted in the **commentary to solicitation in request for proposals without negotiation**, it is important to delineate clearly what is caught by the terms “technical, quality and performance characteristics” and “financial aspects” of proposals. The reference in paragraph (2) (b) to “financial

aspects” in this context includes all the commercial aspects of the proposals that cannot be set out in the request for proposals at the outset of the procurement, as well as the final price; the financial aspects are intended to exclude any technical, quality and performance characteristics of proposals that have been considered as part of the examination and evaluation of the technical, quality and performance characteristics of proposals. Practical examples of elements of proposals that might fall into one or other category are provided in the **commentary to solicitation in request for proposals without negotiation**.

4. Paragraphs (3) and (6) refer to the notion of “termination of negotiations”. This notion means the rejection of a supplier’s or contractor’s final financial proposal and the consequent exclusion of that supplier or contractor from further participation in the procurement proceedings. Thus, no procurement contract can be awarded to the supplier(s) or contractor(s) with which the negotiations have been terminated as provided for in paragraphs (3) and (4).

5. UNCITRAL decided to include this feature of this procurement method in order to emphasize competition on the technical, quality and performance characteristics of proposals. When the procurement method is used in appropriate circumstances, this distinct feature of the procurement method may impose discipline on both suppliers or contractors and procuring entities to negotiate in good faith. The first-ranking supplier or contractor faces a risk that negotiations with the procuring entity may be terminated at any time, leading to the permanent exclusion of the supplier or contractor from the procurement proceedings. That supplier or contractor may also consider that negotiations with the lower-ranked suppliers or contractors are more likely to succeed since such suppliers or contractors will have an incentive to improve their position to win, and it is in the interest of the procuring entity to have the procurement contract at the end of the process. Thus the highest-ranked supplier or contractor will be under some pressure to negotiate while the procuring entity, facing the risk of rejecting the best technical proposal, will exercise restraint in putting an excessive focus on the financial aspects of proposals at the expense of technical, quality and performance considerations. Fixing a period for the negotiations in the solicitation documents may be considered another effective discipline measure on both sides in negotiations.

6. Nevertheless, this feature may be considered inflexible. Only at the end of a process of negotiation with all suppliers or contractors may the procuring entity know which proposal in fact constitutes the best offer; that offer however may have been rejected as a result of the termination of negotiation with the supplier or contractor submitting it. In addition, the procedure does

not necessarily ensure a strong bargaining position on the part of the procuring entity since the highest-ranked supplier or contractor, knowing its preferred status, may in some situations have little incentive to negotiate (despite the statement to the contrary in paragraph 5 above), particularly as regards price. The pressure that a procuring entity may be able to exert in concurrent negotiations is not present. However, this method has been restricted to consecutive negotiations in the Model Law in order to avoid the risk of abuse that may arise in concurrent negotiations which are provided for only in the limited circumstances in which competitive negotiations are available under article 51 (see, further, the **commentary to that article** below).

7. Whether the procuring entity is willing to compromise on technical, quality and performance considerations by terminating negotiation with a better-ranked supplier or contractor and beginning negotiations with the next ranked supplier or contractor will very much depend on the circumstances of procurement, in particular the results of the examination and evaluation of the technical, quality and performance characteristics of proposals. The extent of the gap between the proposals of various suppliers or contractors may vary widely, and the procuring entity's strategies in negotiations must be adjusted accordingly. The procuring entity can always cancel the procurement if it faces unacceptable proposals.

#### **4. Competitive negotiations**

##### *General description and main policy issues*

1. Competitive negotiations constitute a procurement method that may be used only in the exceptional circumstances set out in article 30 (4) (a)-(c): urgency, catastrophic events and the protection of essential security interests of the enacting State. As noted in the Introduction to this chapter, it is not to be considered as an alternative to any other method in the Model Law, including where the circumstances may indicate the use of two-stage tendering or request-for-proposals procurement methods, with one exception. The participation of more than one supplier means that competitive negotiations are considered to offer more competition than single-source procurement and, in accordance with article 28 (2), should be used in preference to single-source procurement whenever possible.

2. The restrictions in the use of the method are necessary in the light of its very flexible procedures. Those procedures do not provide the same levels of transparency, integrity and objectivity in the process as are present in other competitive procurement methods, and the method is therefore at greater risk of abuse and corruption.

3. The unstructured nature of the procedures in competitive dialogue, as described in article 51 and explained in the **commentary to procedures for competitive negotiations** below, means managing the use of the method will be the key to ensuring its success in appropriate circumstances. The issues discussed regarding managerial techniques in the context of chapter V procurement methods (see the commentary in the Introduction to this chapter) will apply to competitive negotiations, particularly given the heightened integrity risks that this method involves. Issues of capacity, in particular, should be addressed as a general matter, especially since this procurement method is most commonly used for urgent procurement.

*Conditions for use of competitive negotiations (article 30 (4))*

1. Article 30 (4) sets out the conditions for use of competitive negotiations. Subparagraph (a) addresses situations of urgency not caused by the conduct of the procuring entity, and that do not arise out of foreseeable circumstances. Subparagraph (b) refers to urgency arising out of catastrophic events. Both situations imply that the use of open tendering proceedings or any other competitive method of procurement is impractical, because of the time involved in using those methods. The cases of urgency contemplated in both situations are intended to be truly exceptional, and not merely cases of convenience, and include the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. The method is not available if the urgency is due to a lack of procurement planning or other (in)action on the part of the procuring entity. The extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.

2. Subparagraph (c) refers to the procurement for the protection of essential security interests of the State, where the procuring entity determines that the use of any other method of procurement is not appropriate.

3. The provisions in subparagraphs (a)-(c) are without prejudice to the general principle contained in article 28 (2), according to which the procuring entity must seek to maximize competition to the extent practicable when it selects and uses a procurement method, and must have regard to the circumstances of the procurement. It is therefore to be understood that where an alternative to competitive negotiations is available, the procuring entity must select that other method so as to ensure the greatest level of competition as is compatible with other circumstances of the procurement (such as the urgent need for the subject matter concerned).

4. In conformity with the same principle, subparagraph (b) dealing with cases of urgency owing to a catastrophic event, and subparagraph (c) dealing with procurement for the protection of essential security interests of the State, prevent the procuring entity from using single-source procurement where competitive negotiations are available. In situations covered by these subparagraphs, the procuring entity is required first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must use competitive negotiations, not single-source procurement, unless it concludes that there is extreme urgency or another distinct ground justifying the use of single-source procurement under paragraph (5) of article 30 (e.g. the absence of a competitive base, exclusive rights involved). This is because competitive negotiations are inherently more competitive than single-source procurement and more safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement. This method can therefore be considered the preferred alternative to single-source procurement in situations of urgency owing to a catastrophic event and for the protection of the essential security interests of the State.

5. Enacting States may consider that certain circumstances envisaged for the use of competitive negotiations are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion in their domestic law.

6. Enacting States may also wish to impose additional requirements for the use of competitive negotiations. The procurement regulations or rules or guidance from the public procurement agency or other body may require that the procuring entity take steps such as: establishing basic rules and procedures for the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out a description of the subject matter to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing offers.

#### *Solicitation in competitive negotiations (article 34 (3), (5) and (6))*

1. Article 34 (3) regulates solicitation in competitive negotiations. Direct solicitation is an inherent feature of this procurement method. The solicitation in this procurement method is addressed to a limited number of

suppliers or contractors identified by the procuring entity. The Model Law does not regulate the solicitation in detail; it only requires the procuring entity to engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. (For general considerations relating to the exceptional nature of direct solicitation under the Model Law (and for an explanation of the term “public and unrestricted solicitation”), see the **commentary to section II of chapter II**.)

2. Article 34 (3) is coupled with the requirement of article 34 (5) for an advance notice of the procurement. The advance notice must specify, in particular, that competitive negotiations will be used and must also provide a summary of the principal terms and conditions of the procurement contract envisaged. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of competitive negotiations where a more transparent and regulated procurement method is available. This safeguard is particularly important in the context of this procurement method and of single-source procurement, both of which are considered exceptional and justified for use only in the very limited cases provided for in article 30 of the Model Law.

3. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency (article 30 (4) (a) and (b)). This exemption is set out in paragraph (6) of article 34. When competitive negotiations are used in procurement for the protection of essential security interests of the State referred to in article 30 (4) (c), the advance notice of the procurement is required subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. (For guidance on the provisions of the Model Law on confidentiality and procurement involving classified information, see the discussion of classified information in part I of this *Guide*, in the Introduction to chapter I and in the commentary to articles 2 and 24).

4. For a discussion of the advance notice requirement and its consequences, notably the emergence of unknown suppliers or contractors requesting participation of competitive negotiations, see the **commentary to section II of chapter II** and the **commentary on solicitation in the Introduction to chapter IV**. That latter commentary also addresses mechanisms for ensuring a non-discriminatory manner of selecting the suppliers or contractors, some of which may be relevant in the competitive negotiations context.

*Procedures for competitive negotiations (article 51)*

1. Article 51 regulates the procedures for competitive negotiations. Safeguards have been included aimed at ensuring transparency and the fair, equal and equitable treatment of participants in procurement by means of this procurement method.

2. The article is relatively short in the light of the flexible nature of the method itself. However, it would be wrong to state that procedures of this procurement method remain largely unregulated in the Model Law. This procurement method, as any other, is subject to the general provisions and rules set out in chapters I and II of the Model Law, the procurement regulations and any other bodies of applicable law. For example, under the Model Law, the procuring entity will be required to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided for in article 25. This requirement is an essential measure for this procurement method to ensure effective oversight, and to permit challenges by aggrieved suppliers or contractors.

3. To the extent that the procuring entity complies with all the applicable rules, and that the negotiations are conducted on a concurrent basis so as to ensure fair, equal and equitable treatment of the suppliers or contractors, the procuring entity may organize and conduct the negotiations as it sees fit. The rules that are set out in article 51 are intended to confer this freedom upon the procuring entity, while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process. In particular, since the main use of competitive negotiations in practice will be in procurement in situations of urgency, the procedures should allow for negotiations of very short duration. As to the distinction between the type of bargaining that is envisaged in this procurement method, as compared with the discussions and dialogue that take place under other chapter V procurement methods, see the relevant commentary in the Introduction to this chapter.

4. Paragraph (1) cross-refers to the relevant provisions of article 34 on solicitation in competitive negotiations, one of which requires providing an advance notice of the procurement, except in cases of urgency. (For the guidance on advance notices, see the **commentary to section II of chapter II.**)

5. Paragraph (2), regulating communication of information during negotiations, is subject to the rules on confidentiality contained in article 24 of the

Model Law. The provisions are similar to the provisions addressing request for proposals with dialogue contained in article 49 (10). The **commentary to article 49** (10) is therefore relevant in the context of article 51 (2).

6. Paragraph (3) provides that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit BAFOs on the basis of which the successful offer is to be selected. BAFOs are defined as best and final with respect to all aspects of each supplier's or contractor's proposal. Thus, like in request for proposals with dialogue, no single set of terms and conditions of the procurement against which final submissions are evaluated is issued in this procurement method. BAFOs are to be presented by a date specified by the procuring entity in its request for BAFOs. The provisions are similar to those of article 49 (11). The **commentary to that latter provision** is therefore relevant in the context of this procurement method. To ensure that all participating suppliers or contractors are on an equal footing as regards receiving information about termination of negotiations and available time to prepare their BAFO, best practice involves issuing the request for BAFOs in writing and communicating it simultaneously to all participating suppliers or contractors.

7. UNCITRAL considers the BAFO stage essential since it provides for the fair, equal and equitable treatment of participating suppliers or contractors. It puts an end to the negotiations and terminates the ability of the procuring entity to modify its requirements or the terms and conditions of the procurement; the terms and conditions offered by suppliers and contractors are also then set. In addition, requiring requests for BAFOs to be issued to all suppliers or contractors remaining in the negotiations, leaves an audit trail as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (5) of article 51. Without that stage, excess discretion is given to the procuring entity to decide with which supplier or contractor to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

8. Paragraph (4) prohibits negotiations after BAFOs were submitted, so as to conform the competitive negotiations to equivalent stages in other procurement methods and to ensure the fair, equal and equitable treatment of suppliers or contractors. It draws on similar provisions in article 49 (12). The **commentary to article 49** (12) is therefore relevant in the context of article 51 (4). UNCITRAL considers it best practice to prevent the procuring entity from negotiating further after BAFOs have been presented, and to prevent multiple requests for BAFOs: this stance is taken consistently throughout the Model Law where the BAFOs stage is envisaged.

## 5. *Single-source procurement*

### *General description and main policy issues*

1. In view of the non-competitive character of single-source procurement and the requirement of article 28 (2) to seek to maximize competition to the extent practicable when the procuring entity selects a procurement method, single-source procurement is considered under the Model Law the method of last resort after all other alternatives have been exhausted. When an alternative to single-source procurement, such as restricted tendering, request for quotations or competitive negotiations, is appropriate, the procuring entity must select the procurement method that would ensure most competition in the circumstances of the given procurement. This is a particular concern in cases of urgency: the extent of urgency of the subject matter of the procurement will dictate whether competitive negotiations, which are preferable to single-source procurement as offering some competition, are feasible (see the **commentary to the conditions for use of competitive negotiations**).

2. It is recognized that, except where single-source procurement is used to promote a socio-economic policy (as to which, see article 30 (5) (e) and the **commentary thereto**), the procuring entity may avoid the use of single-source procurement by using alternative methods or tools or through proper procurement planning. For example, in situations of extreme urgency due to a catastrophic event (article 30 (5) (b)) where negotiations with more than one supplier or contractor would be impractical, the procuring entity may consider using procurement methods not involving negotiations, such as request for quotations for procurement of off-the-shelf items (see article 29 (2) and the **commentary thereto**). A closed framework agreement without second-stage competition may also effectively address situations of extreme urgency, where it has been concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time frame. With better procurement planning, framework agreements may also be a viable alternative to single-source procurement in situations referred to in article 30 (5) (c) (the need for additional supplies from the same source for reasons of standardization and compatibility). (See further the **commentary to chapter VII on framework agreements**).

### *Conditions for use of single-source procurement (article 30 (5))*

1. Article 30 (5) sets out the conditions for use of single-source procurement. The first, in subparagraph (a), refers to the existence of only one

supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other reasons that confirm the exclusivity. This can be considered an objectively justifiable reason for the use of single-source procurement provided that the rules of the Model Law on the description of the subject matter of the procurement are met. These rules contained in article 10 of the Model Law prohibit the procuring entity from formulating the description of the subject matter of the procurement in a way that artificially limits the market concerned to a single source. Where the risk or practices of formulating such narrow descriptions exist, the use of functional descriptions (performance/output specifications) should be encouraged. The enacting State should in addition ensure, through appropriate authorities, the regular monitoring of the practice of its procurement entities with the use of single-source procurement on this ground, since its improper use may encourage monopolies and corruption, whether inadvertently or intentionally. (See the **commentary to article 10**, in particular as regards the use of trademarks, trade names, patents and so forth.)

2. In these circumstances, enacting the requirement for an advance public notice of single-source procurement (contained in article 34 (5) of the Model Law) should be considered an essential safeguard: it tests the procuring entity's assumption that there is an exclusive supplier or contractor and so enhances transparency and accountability in this aspect of procurement practice. Where additional suppliers or contractors emerge, provided that they are qualified, the justification for single-source procurement falls away, and another procurement method will be required. Another aspect of best practice, which the rules or guidance from the public procurement agency or other body should emphasize, is to encourage procuring entities to plan for future procurements and to acquire appropriate licences, so as to allow for competition in those future procurements and avoid the unnecessary use of single-source procurement. This is particularly the case for the purchase of products protected by intellectual property rights, and spare parts, which have traditionally been procured using single-source procurement.

3. The second condition, set out in subparagraph (b), referring to extreme urgency owing to a catastrophic event, overlaps to some extent with the condition for use of the competitive negotiations in the case of urgency owing to a catastrophic event (paragraph (4) (b) of article 30). The difference is in the level of urgency: to justify the use of single-source procurement, the urgency must be so extreme that holding negotiations with more than one supplier or contractor would be impractical. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is perhaps not so urgent. As is the case in competitive

negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method: the amount procured using emergency procedures should be strictly limited to the needs arising from that emergency situation.

4. Subparagraph (c) refers to the need for standardization or compatibility with existing goods, equipment, technology or services as the justification for the use of single-source procurement. This use must be truly exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity. Procurement in such situations should therefore also be limited both in size and in time.

5. Subparagraph (d) justifies the use of single-source procurement for the protection of essential security interests of the State. This provision addresses, in particular, procurement involving classified information where the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used. (For guidance on the provisions of the Model Law on procurement involving classified information, see the discussion of classified information in part I of this *Guide*, in the Introduction to chapter I and in the commentary to articles 2 and 24).

6. Subparagraph (e) has been included in order to permit the use of single-source procurement to implement socio-economic policies of the enacting State. The term “socio-economic policies” is defined in article 2 (o), noting in particular that those are declared policy goals of that State as set out in the procurement regulations or other provisions of law of the State, rather than a policy that an individual procuring entity may wish to pursue. The **commentary to that definition** and articles 8-11 explain how such policies may be implemented in procurement.

7. Subparagraph (e) is drafted to provide safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement: it is allowed only where no other supplier or contractor is able to implement that policy. It should be interpreted in very restrictive terms, not to allow the use of single-source procurement for any other considerations. The requirement for an advance public notice of the procurement (as explained in the **commentary to solicitation in single-source procurement** below), and the additional requirement for an opportunity to comment, will allow the procuring entity’s assertion of the circumstances justifying this use of single-source procurement to be tested. Although the stage of seeking and receiving comments is not regulated in detail in the Model Law, to make the opportunity to comment meaningful, the procuring entity will need to allow sufficient time to elapse between the public notice of the procurement

and the start of the procurement proceedings. The procuring entity may receive comments from any member of the public and should be expected to provide explanations. The procurement regulations or other rules or guidance from the public procurement agency or other body should regulate further aspects of these provisions: in particular, whose comments should specifically be sought (e.g. of local communities) and the purpose or the effect of comments, especially negative, if received. The notice should encourage in particular comments on the question of whether there is only one available supplier or contractor, so as to avoid the abuse of this type of single-source procurement to favour a particular supplier or contractor.

8. As a general rule, the Model Law does not require approval by a designated organ for the use of single-source procurement. This approach is in conformity with the decision of UNCITRAL not to require, also as a general rule, the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (see the commentary on **“Institutional support”** in part I of this *Guide*). As an exceptional measure and to emphasize the highly exceptional use of single-source procurement under the conditions of subparagraph (e), however, enacting States may wish to provide for an ex ante approval mechanism. UNCITRAL acknowledges that this safeguard may be illusory: there can be elevated risks of corruption involving the approval chain where resort to single-source procurement is sought in improper cases. At the same time, there can be an unjustifiable waste of time and costs where permission for use of single-source procurement is sought for perfectly appropriate circumstances.

9. As in competitive negotiations, enacting States may consider that certain circumstances envisaged for the use of single-source procurement are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion in their domestic law. Similarly, enacting States may wish to impose additional requirements for the use of single-source procurement, such as those discussed in the **commentary to competitive negotiations**.

#### *Solicitation in single-source procurement (article 34 (4), (5) and (6))*

1. Article 34 (4) regulates solicitation in single-source procurement. Direct solicitation is an inherent feature of this procurement method. In this method, the procuring entity solicits a proposal or quotation from a single supplier or contractor identified by the procuring entity. (For general considerations relating to the exceptional nature of the use of direct solicitation under the Model Law (and for an explanation of the term “public and unrestricted solicitation”), see the **commentary to section II of chapter II**).

2. Article 34 (4) is coupled with the requirement in article 34 (5) for an advance notice of the procurement. The notice must specify in particular that single-source procurement will be used and must also provide a summary of the principal terms and conditions of the procurement contract. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of single-source procurement where a competitive method of procurement appropriate in the circumstances of the given procurement is available. This safeguard is particularly important in the context of this procurement method, which is considered exceptional and justified for use only in the very limited cases provided for in article 30 (5).

3. The procuring entity will not be required to publish the advance notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency owing to a catastrophic event (article 30 (5) (b)). This exemption is set out in paragraph (6) of article 34. In the other cases justifying resort to single-source procurement, providing an advance notice of the procurement is the default rule, subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of the essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. This situation may arise in particular when single-source procurement is used for the protection of essential security interests of the State under article 30 (5) (d). (For guidance on the provisions of the Model Law on confidentiality and procurement involving classified information, see the discussion of classified information in part I of this *Guide*, in the **Introduction to chapter I** and in the commentary to articles 2 and 24.)

4. Additional guidance on both the use of advance notices under article 34 (5) and (6) and on the objective identification of a supplier or contractor to participate in the process is found in the **Introduction to chapter IV**. Some issues raised there are also relevant in the context of single-source procurement.

### *Procedures for single-source procurement (article 52)*

1. Article 52 sets out relatively simple procedures for single-source procurement procedures. The simplicity reflects the highly flexible nature of single-source procurement, which involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation (and which therefore

falls outside the general scope of the Model Law). Issues of competition and fair, equal and equitable treatment of suppliers or contractors in the procurement proceedings, although important at the stage when the decision on the use of this procurement method is made, do not arise during the procurement proceedings.

2. The provisions cross-refer to the requirement of an advance notice of the procurement and an exemption thereto in article 34, as set out in the **commentary on solicitation in single-source procurement**. They also contain a requirement to engage in negotiations, unless to do so is not feasible in the light of the circumstances of the procurement concerned, for example in situations of extreme urgency. The requirement has been introduced so that the procuring entity can negotiate and request, when feasible and appropriate, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations.

3. The provisions of chapter I are generally applicable to single-source procurement, including the obligation under article 21 to exclude the sole supplier or contractor from further participation in the procurement proceedings on the ground of inducement, unfair competitive advantage or conflicts of interest. Such exclusion would lead to the cancellation of the procurement. The issues discussed in the **commentary to articles 19** and 21 are therefore also relevant in the context of single-source procurement. In addition to the requirement for an advance notice of the procurement discussed in the **commentary on solicitation in single-source procurement** above, a number of other provisions of the Model Law aimed at transparency in the procurement proceedings will be applicable, such as article 23 on publication of notices of procurement contract awards and article 25 on keeping the comprehensive record of the procurement proceedings, including justifications for the use of single-source procurement. The procedures of single-source procurement should not therefore be regarded as largely unregulated in the Model Law because of the brevity of article 52. They must be implemented and used taking into account all applicable provisions of the Model Law, as well as those of procurement regulations and other applicable provisions of law of the enacting State.

## CHAPTER VI. ELECTRONIC REVERSE AUCTIONS

### A. Introduction

#### 1. Summary

1. An electronic reverse auction (“ERA”), as defined in article 2 (*d*) of the Model Law, is an online, real-time purchasing technique utilized by a procuring entity to select the successful submission. It involves the presentation by suppliers or contractors (“bidders”) of successively lowered bids during a scheduled period of time and the automatic evaluation of those bids using IT systems, until a winning bidder is identified. The term “successively lowered bids” in the definition refers to successive reductions in the price or improvements in overall offers to the procuring entity. It thus provides an exception to the general rule under the Model Law that a supplier or contractor has one opportunity to present its price in response to an invitation to present a submission.

2. It has been observed that ERAs have many potential benefits. First, they can improve value for money through successive competition among bidders, using dynamic and real-time trading. The use of the Internet as the medium for holding the auction can also encourage wider participation and hence increased competition. Secondly, ERAs can reduce the time and administrative costs required to conduct the procurement of simple and off-the-shelf goods and standardized services. Thirdly, they can enhance internal traceability in the procurement process as information on the successive results of the evaluation of bids at every stage of the ERA and the final result of the ERA are recorded; all this information is made available to the procuring entity instantaneously. In addition, they can enhance transparency as each bidder’s relative position is made known to it instantaneously; the progress and outcome of the ERA are made known to all bidders instantaneously and simultaneously. Fourthly, the enhanced transparency and a fully automated evaluation process that limits human intervention may assist in the prevention of abuse and corruption.

3. Recognizing these potential benefits of ERAs, the Model Law enables such auctions on the conditions contained in article 31 so as to allow their

use in appropriate circumstances, and subject to the procedural requirements set out in articles 53-57. Consistent with its approach to all procurement methods under the Model Law, UNCITRAL provides for auctions in all procurement—whether of goods, construction or services. While ERAs are commonly used in the procurement of goods, such as office supplies, the use of ERAs in procurement of simple services—such as the purchase of hourly labour from technicians certified in a particular discipline—is found in practice.

4. ERAs have been increasing in use in recent years. Developments in communication technologies have facilitated the use of ERAs by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the ERAs take place virtually, rather than in person. For this reason, the Model Law allows only online reverse auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in ERAs especially when they are used as a phase in other procurement methods or preceded by off-line examination or evaluation of initial bids. The procedures are discussed in more detail in the commentary to the articles in chapter VI itself.

5. The introduction of an ERA system involves a significant investment, and is generally carried out as part of the introduction of an e-procurement system. The discussion in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide* should be considered in addition to the commentary to chapter VI.

## 2. *Enactment: policy considerations*

6. The UNCITRAL approach is to provide for ERAs used to select the winning bidder. Although there are other models in use, which involve a further examination and/or evaluation after the ERA, the Model Law requires that the ERA itself is to be the final stage in the procurement proceedings in which the winner is selected, and the winning terms and conditions are to figure in the contract. The UNCITRAL approach is considered the most transparent and at the lowest risk of abuse, and reflects the general prohibition throughout the Model Law of negotiations after the selection of the successful supplier or contractor.

7. ERAs under the Model Law may be conducted either as a procurement method (“stand-alone ERAs”) or as the final phase preceding the award of the procurement contract in other procurement methods (or under framework agreements with second-stage competition, “ERAs as a phase”), as and

where appropriate. The two types of ERAs require different provisions to some extent; enacting States may choose to provide for both these types of ERAs, or only one of them. The provisions in chapter VI are drafted to allow for either option to be exercised without significant drafting amendments to the Model Law's provisions.

8. By their very nature, ERAs encourage a focus on price, which means that for standardized and off-the-shelf goods or services, the procuring entity can reap the benefits of strong competition on price. Anecdotal evidence indicates that where quality considerations are important, or where the goods or services to be procured are not standardized, the risks to effective procurement are greater, because price reductions may be paid for by reducing variable quality elements (such as the materials used in manufacture). A noted concern in the use of ERAs is their relative ease of use from an administrative perspective, once systems are in place allowing for them, such that they may be overused and used in inappropriate situations. Overuse or inappropriate use may be based on an intention to reduce the numbers of competitors in the market, with risks of concentrating procurement markets and of collusion in repeated procurements, as discussed in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*. The conditions for use and procedures, as discussed in the **relevant commentary** below, have been designed to mitigate this risk, without unduly restricting the use of ERAs and their potential for development in the medium to longer term.

9. ERAs may also have an anti-competitive impact in the medium and longer term, as they may be more vulnerable than other procurement processes to collusive behaviour. The opportunity arises because there is a risk, where participating suppliers or contractors become aware of each others' identities, of price-signalling or other collusion, through the successive presentation of bids in an individual ERA, and also where there is regular or periodic procurement of the same subject matter using ERAs.

10. The maintenance of anonymity is therefore critical to mitigate the risks of collusion in ERAs, so that they are no higher than in other procurement methods. Generally speaking, ERAs are more vulnerable to price manipulation, price-signalling or other anti-competitive behaviour in markets with only a limited number of potentially qualified and independent suppliers or contractors known to each other, or in markets dominated by one or two major players, and in the repeated use of ERAs with the same participants, because anonymity is in practice more difficult to maintain. The Model Law's procedures have also been designed to mitigate this risk, for example by encouraging the combination of ERAs and open framework agreements under chapter VII for repeated purchases as further explained in the commentary to that chapter.

11. The provisions to mitigate the risks to competition in the conditions for use of and procedures for ERAs, described in the **relevant commentary** below, address the two types of ERAs provided for in the Model Law separately. In ERAs as a phase, considering the risk of collusion and other anti-competitive behaviour requires a more in-depth assessment of the market concerned, as the **commentary** explains. For this reason, the issues described regarding implementation and use in the following section may also inform policy decisions on enactment.

12. Enacting States will wish to consider whether or not tender securities should be required in ERAs: the **commentary to article 17** sets out the general considerations. The combination of participating bidders and the type of market in which ERAs are appropriate may themselves offer the required security to the procuring entity; the relative value of the procurement may also indicate that encouraging other measures to achieve the desired discipline in bidding may be the more appropriate course. For simple ERAs, which will include most stand-alone ERAs, tender securities are unlikely to be cost-effective as a general rule. As regards more complex stand-alone ERAs, and ERAs as a phase, tender securities might be appropriate. In such cases, the procurement regulations or rules or guidance from the public procurement agency or other body should address how the requirements will work in practice; including in which situations it would be justifiable for the procuring entity to request the tender security. For example, requesting tender securities may be considered at first sight useful in ensuring registration for an ERA, given that (under article 54), the procuring entity may be prevented from holding an ERA if an insufficient number of bidders has registered for the ERA to ensure effective competition. In practice, however, the fact of registration does not guarantee effective competition: bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding, so the tender security may in fact be worthless, or at best, not cost-effective. The same logic applies to tender securities, and so the implications of requesting them for participation in ERAs should be considered.

### ***3. Issues regarding implementation and use***

13. The following policy considerations are viewed as particularly important for the successful introduction and use of ERAs, which may inform the procurement regulations or rules or guidance from the public procurement agency or other body, to be issued to support the Model Law:

(a) *Appropriate use of ERAs:*

- (i) Stand-alone ERAs are most suitable for commonly used goods and services, which generally involve a highly competitive, wide market, where the procuring entity can issue a

detailed description or one referring to industry standards, and where the offers from bidders offer the same quality and technical characteristics. Those include office supplies, commodities, standard communication technology equipment, primary building products and simple services. A complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. In such procurement, the system is comparing like with like, and price can be the determining, or a significant determining, evaluation criterion. Where there is an Internet-based market, such as for office supplies, the results may be optimal;

- (ii) This type of procurement is likely to take place in a market with many participants, so that anonymity is assured, and competition should result. Where there are repeated ERAs, however, and whether or not they take place within framework agreements, rules or guidance from the public procurement agency or other body should address how to ensure that the same small group of participants does not always take part; procuring entities should monitor their procedures and take steps to modify them if there is any evidence of manipulation (see, further, the **guidance to article 56** below);
- (iii) The types of procurement where non-quantifiable factors prevail over price and quantity considerations including the procurement of construction or consulting services (e.g. advisory services) and other quality-based procurement are less suitable for ERAs. Rules or guidance from the public procurement agency or other body should therefore stress that it would be inappropriate to use ERAs in these circumstances;
- (iv) In order for an ERA to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures;
- (v) The greater the number of criteria to be evaluated in the ERA, the more difficult it is for both procuring entity and suppliers or contractors to understand how varying one element will impact on the overall ranking. Thus, where there are many variables, the ERA will be less appropriate. In addition, there will be no meaningful competition where the ERA effectively ceases to be based on a common description of the subject matter of the procurement. Such risk is higher where many variables related to technical, quality and performance characteristics of the subject matter are involved;

- (vi) In some ERAs as a phase, the conditions set out in subparagraphs (i) and (ii) above may apply: for example, where an ERA is held within an open framework agreement, within request-for-quotations procedures, and other methods with many participating suppliers or contractors. In other ERAs as a phase, with some or all of the features described in subparagraphs (iii)-(v) above, ERAs may strictly speaking be available under the conditions for use of article 31 (2), but will unlikely be appropriate, both because effective competition will be more difficult to achieve and because the risk of collusion will probably be higher than it would be without the ERA as a phase. However, where more detailed initial steps in the procedure are required (such as assessing qualifications and responsiveness, and perhaps ranking on the basis of quality considerations that are evaluated before the ERA), so that the ERA itself retains more of the features of the competitive market described above, an ERA may narrow down the number of outstanding evaluation items and then be appropriate. Nonetheless, it should be borne in mind that the result may be to add a layer of complexity to an already complex procurement procedure;
- (vii) The procurement regulations or rules or guidance from the public procurement agency or other body should therefore guide the procuring entity in considering the market concerned before a procurement procedure commences, to identify the relative risks and benefits of an ERA. In a similar vein to the **commentary to section I of chapter II**, an assessment should be made as to whether the risks of collusion rather than competition would be higher in an ERA than in any other procurement method, before a determination as to which method and technique to use. The competition authorities in the enacting State may be able to provide information on the relative risks, such as the risk of dumping in the market concerned;

(b) Phased introduction of ERAs: it is recommended that enacting States lacking experience with the use of ERAs should introduce them in a staged fashion as experience with the technique evolves; that is, to commence by allowing price-only ERAs, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex ERAs, where the award criteria include non-price criteria;

(c) Capacity-building: in order to derive maximum benefits from the use of ERAs and to encourage participation, both procuring entities and

suppliers and contractors must have confidence in the process and its results and must be able to operate ERAs effectively. To that end, States should be prepared to invest sufficient resources in awareness and training programmes at an early stage, for overhead costs in training and facilitating suppliers or contractors in participating in ERAs. For the procuring entity, the training should address both technical issues, such as how to quantify any non-price criteria objectively and to express them so that they can be factored in the automated mathematical formula or algorithm (see further subparagraph (e) below), and the provision of information to suppliers and contractors, especially SMEs. For suppliers and contractors, the training should address the system and how it functions, the changes involved in doing business with the Government through an ERA and what impact these changes will have on their business opportunities. Otherwise, the risk is that a marketplace in which procurement was previously handled successfully may be abandoned, prices will be higher than they would have been but for the introduction of ERAs, and the Government's investment in the ERA system may fail. This capacity-building also implies a higher overhead cost per procurement than traditional methods, at least in the early stages of the use of ERAs;

(d) Transparency in procedures and planning: a clear description of the subject matter and other terms and conditions of procurement must be established and made known to suppliers or contractors at the outset of procurement, together with the formula to select the winner and all information regarding how the ERA will be conducted, in particular the timing of the opening and criteria governing the closing of the ERA. This may require more detailed planning than in other procurement methods, and procuring entities should be made so aware;

(e) Drafting evaluation criteria: the provisions allow, in theory, any evaluation criterion to be part of the ERA, provided that it can be factored into a formula or algorithm that automatically evaluates and re-evaluates the bids during the auction itself, and which identifies the highest-ranking bid at each successive stage of the auction. During the auction, each revised bid results in a ranking or re-ranking of bids using these automated techniques. As the requirement for automatic evaluation requires the evaluation criteria to be capable of being expressed in monetary terms; the further those criteria stray from price and similar criteria (such as delivery times, and warranties or guarantees expressed as a percentage of prices), the less objective their expression in monetary terms will be. There may then be a disincentive for bidders to participate, and the outcome is less likely to be successful. Non-price criteria may vary from simple criteria such as delivery and guarantee terms to more complex criteria (such as the level of emissions in cars); further guidance on what constitutes price and other criteria, and their expression as a percentage of the total price, is to be found in the **commentary to article 11**.

14. Technical issues, such as ensuring adequate infrastructure, that the relevant Internet sites are available and supported by adequate bandwidth, and appropriate security to avoid the elevated risk of bidders' gaining unauthorized access to competitors' commercially sensitive information should be addressed in the procurement regulations or rules or guidance from the public procurement agency or other body. Issues of authenticity, integrity of data, security and related topics in the use of e-procurement generally are addressed in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide* and in the commentary to articles 7 and 40.

15. In the light of the above commentary on ensuring appropriate use and a phased introduction of ERAs, enacting States may wish to restrict—perhaps on a temporary basis—the use of ERAs to markets that are known to be competitive (e.g. where there is a sufficient number of bidders to ensure competition and to preserve the anonymity of bidders) or through qualitative restrictions such as limiting their use to the procurement of goods only, where costs structures may be easier to discern. Some jurisdictions have used lists identifying specific goods, construction or services that may suitably be procured through ERAs, or excluding items from procurement through ERAs. However, experience indicates that this approach is cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. Illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique, may therefore be a preferable tool.

16. Enacting States may also wish to provide, for example in the procurement regulations or rules or guidance from the public procurement agency or other body, additional conditions for the use of ERAs, such as consolidating purchases to amortize the costs of setting up the system for holding ERAs, including those of third-party IT and service providers, and guidance on the concept of “price” criteria drawing on the provisions of article 11 and the **commentary thereto**.

17. It is recommended that the public procurement agency or other body and the competition law authorities in an enacting State monitor competition in markets where techniques such as ERAs are used. The public procurement system should require the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure.

18. Finally, it is common for third-party agencies to set up and administer ERAs for procuring entities. The potential benefits indicating such an approach include administrative efficiency, costs savings and process efficiencies through centralized purchasing and particularly for repeat purchases,

the promotion of better quality tender and other documents, higher uniformity and standardization across government, and better understanding by suppliers or contractors of procuring entities' needs and consequently improved quality of submissions. However, the existence of such systems may raise the risks of overuse and misuse, because their ease of operation may lead procuring entities to use them whether or not they are really suitable or appropriate for the procurement at hand. Procuring entities should also be aware of other possible issues arising from outsourcing decision-making beyond government, such as to third-party IT and service providers; where they are remunerated on a fee-per-use basis, for example, the latter may have organizational conflicts of interest. They will wish to maximize their returns by promoting ERAs, without necessarily considering whether they are the appropriate procurement technique. To this extent, these third parties may influence procurement strategies. These issues arise also in other procurement techniques, such as framework agreements, and generally where outsourcing is concerned, and are discussed in the section on **“Institutional support”** in part I of this *Guide*, in the **commentary to article 7** and in the Introduction to chapter VII on framework agreements. The Model Law discourages charging fees for the use of procurement systems, including for ERAs, because they operate as a disincentive to participate, contrary to the principles and objectives of the Model Law; the manner of remunerating a third-party service provider should be considered in the light of these matters. Finally, even if the public procurement agency or other body or a procuring entity outsources the conduct of a single, some or all ERAs to third-party service providers, the relevant body or procuring entity must retain sufficient skills and expertise to supervise the activities of such third-party providers.

## **B. Article-by-article commentary**

### *Article 31. Conditions for use of an electronic reverse auction*

1. The purpose of article 31 is to set out conditions for the use of ERAs, either as stand-alone ERAs or ERAs as a phase (in which case they are cumulative with the other conditions for use of the procurement method concerned). These conditions are designed to mitigate the risks of improper use of or overuse of ERAs described in the Introduction to this chapter.
2. Paragraph (1) sets out the conditions for use of stand-alone ERAs. They are based on the notion that stand-alone ERAs are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally

available subject matter that it may need, as further described in the Introduction to this chapter.

3. The requirement for a precise description of the subject matter of the procurement found in paragraph (1) (a), coupled with the requirement for a detailed description in article 10, will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature and are in reality quantifiable (e.g. straightforward maintenance works).

4. In formulating that and other terms and conditions of the procurement, procuring entities will need to set out clearly the detailed technical and quality characteristics of the subject matter, as required in article 10 of the Model Law, so as to ensure that bidders will bid on a common basis. In this respect, the fact that bids will be automatically compared means that technical specifications, rather than functional ones, are generally more effective. The use of a common procurement vocabulary to identify the subject matter of the procurement by codes or by reference to general market-defined standards is therefore desirable.

5. Paragraph (1) (b) is aimed at mitigating the risks of collusion and ensuring rigorous competition in stand-alone ERAs (for a discussion of these matters, see the Introduction to this chapter). It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the ERA, but does not impose any minimum number. It is supplemented by article 55 (2) under which the procuring entity has the right to cancel the ERA if the number of suppliers or contractors registered to participate in the ERA is insufficient to ensure effective competition during the auction (see the **commentary to article 55 (2)** below).

6. The reference in paragraph (1) (b) to suppliers or contractors that are “anticipated to be qualified” to participate in the ERA should not be interpreted as implying that pre-qualification will always be involved in procurement through ERAs. It may be the case that, in order to expedite the process and save costs, the qualifications of the winning bidder only are assessed after the auction. See article 57 and the **commentary thereto** below.

7. The award of contracts under ERAs may be based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings. When non-price criteria are involved in the determination of the successful submission, paragraph (1) (c) requires that such criteria must be quantifiable and capable of expression in monetary terms (e.g. figures, percentages): this provision overrides the caveat in article 11 that the expression in monetary terms should be made “where practicable”. While all

criteria can in theory be expressed in such terms, as noted in the Introduction to this chapter, an optimal result will arise where the evaluation criteria are objectively and demonstrably capable of expression in such terms.

8. Paragraph (2) addresses the use of ERAs as a phase in procurement methods and in the second-stage competition in framework agreements. The paragraph provides for flexible conditions for use of ERAs in this manner. The only requirement imposed is that the conditions of paragraph (1) (c) of the article discussed above must be satisfied (i.e. the award criteria must be quantifiable and expressed in monetary terms). As discussed in the Introduction to this chapter, such ERAs may not always be appropriate, particularly where there is a focus on quality and a more complex evaluation of quality aspects than just pass/fail responsiveness criteria. In such cases, it may often be impossible or inappropriate to evaluate the quality aspects automatically through the auction. In addition, and as the Model Law requires the ERA to be the final stage before the award of a procurement contract, an ERA cannot be used where quality aspects are to be evaluated after the auction (as discussed in the Introduction to this chapter). Also in closed framework agreements, the use of ERAs as a phase will be appropriate only where there are limited numbers of variables (see the relevant **commentary to chapter VII** below).

9. Where ERAs are used as a phase there may be elevated risks of collusion as the bidders will most likely be known to each other from the preceding stages of the procurement proceedings. Such potential risks may also be present in some procurement methods and techniques regardless of whether an ERA is used as a phase in it, for example in closed framework agreements as discussed in the commentary to chapter VII. The determination as to whether or not ERAs as a phase are suitable under such circumstances of the procurement should therefore be made when the manner in which a procurement method or technique will operate is itself determined.

*Article 53. Electronic reverse auction as a stand-alone method of procurement*

*General description and policy consideration for stand-alone ERAs*

1. Article 53 sets out, first, the procedures for soliciting participation in procurement by means of a stand-alone ERA, and incorporates the provisions of article 33 (which also govern open tendering) by cross-reference. In subsequent paragraphs, the article sets out the rules applicable to pre-auction procedures in stand-alone ERAs. Although there are core procedures that will cover all stand-alone ERAs, the procedures for each procurement will

depend on the complexity of the ERA at hand. Some ERAs may be very simple, not even requiring the bidders' qualifications and the responsiveness of their bids to be assessed before the auction, while other may be more complex and involve the examination and evaluation of initial bids. Pre-qualification, although available under article 18, is unlikely to be appropriate for the type of procurement concerned. The subject matter of the procurement, the examination and evaluation criteria to be used, and whether qualifications are to be assessed before the auction or only those of the winner after the auction (as allowed under article 57 (2)) will determine the complexity of the procedures.

2. For example, for the procurement of off-the-shelf subject matter, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified. Hence the need for pre-auction checks is correspondingly low. In such cases, a simple declaration from suppliers or contractors before the auction may be sufficient (e.g. that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, assessing responsiveness before the auction may be necessary (e.g. when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids, as described in the following paragraph, will therefore be required. In some cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids. The article has been drafted to accommodate all these different options.

### *Solicitation in stand-alone ERAs*

3. Article 53 (1) regulates the solicitation of bids in stand-alone ERAs. By cross referring to the provisions of article 33, it mandates public and unrestricted international solicitation as the default rule (for a further explanation of that concept, see the [commentary to section II of chapter II](#)). There are no exceptions to the requirement for public and unrestricted solicitation. The pre-qualification procedures in article 18 ensure public and unrestricted solicitation when used in ERAs, as they require an invitation to participate in the pre-qualification proceedings to be published the same way as an invitation to ERAs would be published. Thus the principle of public and unrestricted solicitation is preserved even though the solicitation after the pre-qualification proceedings is addressed only to pre-qualified suppliers or contractors.

4. There are limited exceptions to the requirement for international solicitation under article 33 (4) for domestic and low-value procurement only, as explained in the **commentary to section II of chapter II**. In all other cases, therefore, the invitation to ERAs must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

5. The provisions on solicitation have been designed to fulfil one of the essential conditions for use of stand-alone ERAs—the existence of a competitive market (article 31 (1) (b)). Requiring international solicitation as an application of the default rule under the Model Law, the provisions aim at achieving as wide participation in an ERA as possible. The importance of fulfilling that condition is underlined in certain other provisions of this chapter aimed at ensuring effective competition during the auction: for example by the requirement in article 53 (1) (j) that the minimum number of suppliers or contractors required to register for the auction must be specified in the invitation to the auction and by requiring the cancellation of the auction if the specified minimum of registered suppliers or contractors is not reached. In addition, in accordance with article 55 (2), the procuring entity may cancel the auction even if the required minimum has been reached but the procuring entity still considers that the number of registered suppliers or contractors is not sufficient to ensure competition.

#### *Information required in an invitation to an ERA*

6. Paragraph (1) in addition lists all information that must be included in the invitation to the auction. Since, in these simple auctions, the invitation is followed by the auction itself and no further information may be provided, the list is intended to cover exhaustively all information that must be provided to suppliers or contractors before the auction. The aim is to enable them to determine whether they are interested and eligible to participate in the procurement proceedings, and if so, how they can participate. The information requirements are similar to those applicable to the contents of an invitation to tender (article 37) and the contents of solicitation documents in open tendering proceedings (article 39).

7. The list requires more information than the equivalent list in open tendering, reflecting the procedural particularities of this procurement method, in particular that it is held online and involves the automatic evaluation of bids during the auction. Subparagraph (g) specifically highlights the need to provide to potential suppliers or contractors, alongside the evaluation criteria and procedures, the mathematical formula that will be used in the evaluation procedure during the auction. The automatic evaluation of bids

using a mathematical formula, one of the distinct features of ERAs, is possible only where the evaluation criteria are quantifiable and expressed in monetary terms (as required by article 31 (1) (c)). Providing the mathematical formula from the outset of the procurement ensures that bids will be evaluated on a transparent and equal basis. This information, coupled with the requirement in paragraph (4) (c) to provide suppliers or contractors submitting initial bids with the result of any pre-auction evaluation, and the requirement in article 56 (2) to keep bidders informed of the progress of the auction, allows bidders to establish their status during the auction transparently and independently from the procuring entity and the system. They can thus verify the integrity of the evaluation process.

8. The information to be provided in subparagraphs (j)-(p) is also particular to ERAs. Subparagraph (j) requires a statement of the minimum number of suppliers or contractors required to register for the auction to be held. The importance of such information for ensuring effective competition during the auction is highlighted in the preceding section. No single minimum can be stated in the Model Law itself, because, in some ERAs, a minimum of three bidders may fulfil the requirement of ensuring effective competition and may ensure the anonymity of bidders and the avoidance of collusion, while in other cases it may not. The circumstances of each procurement will guide the procuring entity in specifying the appropriate minimum number. To avoid collusion, the minimum should be set as at a high a level as possible, taking into account however that the procuring entity will be obliged to cancel the auction if the minimum is not reached (see the commentary to article 55 (2) below on additional situations in which cancellation is permitted). Objectivity and ensuring fair, equal and equitable treatment of suppliers or contractors should not be overlooked in this context.

9. Subparagraph (k) is an optional provision (accordingly presented in square brackets) permitting a maximum number of bidders to be set, and setting out the procedure and criteria that are to be followed in selecting the maximum. The provision should not be enacted by States where local technical conditions do not so require, and in any event should be complemented with paragraph (2) of this article, so as to provide essential safeguards against abuse. UNCITRAL has permitted this measure in ERAs to allow for technical capacity limitations constraining access to the systems concerned (e.g. the technologies acquired for holding ERAs may accommodate only a certain maximum number of bidders). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision should become obsolete within a short period.

10. Establishing a maximum contradicts the Model Law's general principle of full and open competition; it is therefore permitted only in the exceptional

circumstances prescribed. The concept is to limit the number of participants for practical reasons but not the principle of competition, and the restriction is permissible only to the extent justified by the actual technical capacity constraints. Selection of the participants within this established minimum is to be carried out only in accordance with pre-disclosed criteria and procedures, which must be non-discriminatory. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the **Introduction to chapter IV**, such as “first-come, first-served,” the drawing of lots, rotation or other random choice in a commodity-type market. The goal should be to achieve maximum effective competition to the extent practicable. This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited. As explained in the Introduction to chapter IV, neither pre-qualification nor examination of any initial bids submitted, both of which involve pass/fail tests permits the selection of a predetermined number of best-qualified suppliers or contractors or best-ranked bids.

11. Subparagraphs (l)-(p) list the information about the technical aspects of the auction that must be provided to accommodate its online features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The Model Law lists only those minimum functional requirements crucial for the proper handling of ERAs, and they are expressed in technologically neutral terms. These requirements should be supplemented by the procurement regulations, and further rules or guidance from the public procurement agency or other body. For example, the procurement regulations must spell out the permissible criteria governing the closing of the auction referred to in subparagraph (o), such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no further new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The procurement regulations or other rules or guidance from the public procurement agency or other body should also make it clear that each of these criteria may entail the prior provision of additional specific information; guidance should expand on the types of information concerned. Examples include that item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged).

12. With reference to subparagraph (*p*), the procurement regulations should also require the disclosure of: (i) the procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information in the course of the auction will be made available to the bidders (at a minimum, and to ensure fair, equal and equitable treatment, the same information should be provided simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured). Suppliers or contractors may decide against participation in procurement involving ERAs, for example because of the lack of technical capacity, information technology literacy or confidence in the process, once all these matters are known.

13. This detailed information may be provided in the notice of the ERA itself or, by reference, in the rules for the conduct of the auction, provided that all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction, to allow them to properly prepare for participation in the auction. It should be acknowledged that it may not always be possible to provide all relevant information in the invitation. For example, the deadline for registration to the auction (subparagraph (*m*)) and the date and time of the opening of auction (subparagraph (*n*)) in complex auctions involving the examination or evaluation of initial bids may not be known with certainty before the examination or evaluation is completed. The criteria for closing the auction may need to be determined when the number of suppliers or contractors registered for the auction and other information that affects the structure of the auction (whether it would be held in one round or several subsequent rounds) are known. Where it is not possible to provide all relevant information in precise terms, the invitation must set out at a minimum the general criteria, leaving specific criteria to be defined later in the process but in no case later than the commencement of the auction.

14. Some information listed in paragraph (1) must be interpreted by reference to other provisions of this chapter. For example, subparagraph (*f*), referring to the criteria and procedure for the examination of bids against the description of the subject matter of the procurement, should be read together with the provisions of article 57 (2) that allow the examination of the winning bid after the auction in very simple ERAs. Subparagraph (*f*) also includes any criteria that cannot be varied during the auction (such as minimum technical requirements). Subparagraph (*s*), referring to the name, functional title and address of contact person(s) in the procuring entity for direct communication with suppliers or contractors “in connection with the

procurement proceedings before and after the auction”, has to be read together with the provisions of article 56 (2) (d) that prohibits any communication between the procuring entity and bidders during the auction.

15. Some information required to be provided for other procurement methods is not appropriate in the context of ERAs, and so does not appear in paragraph (1). For example, bids for a portion or portions of the subject matter of the procurement are not permitted (otherwise, separate auctions within the same procurement proceedings would be required). There is no provision permitting a meeting of suppliers or contractors, in order to preserve the anonymity of bidders. Subparagraph (u) on post-auction formalities does not include any reference to approval by another authority, both to reflect the conditions for the use of stand-alone ERAs and the type of the subject matter envisaged to be procured through such ERAs under article 31 (1) of the Model Law. The execution of a written procurement contract under article 22 of this Law is, however, not excluded, and specific formalities in the context of ERAs, such as the possibility of assessing qualifications or responsiveness after the auction, have been included.

16. As discussed in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*, the **commentary to article 7** and the relevant commentary in the Introduction to this chapter, the Model Law discourages charging entry fees for the use of procurement systems. Where such fees are levied, they must be transparent, justified, reasonable and proportionate and should not discriminate or restrict access to the procurement proceedings. Such fees would therefore need to be disclosed in the invitation to an ERA.

17. Paragraph (2) dealing with the imposition of a maximum number of suppliers or contractors that can be registered for the auction has been discussed above in connection with paragraph (1) (k) of the article. Notably, the procuring entity may impose such a maximum number only to the extent that technical capacity limitations in its communication system so require. As is also the case with open framework agreements (see the **commentary to article 60** on such agreements), enacting States should be aware that technical developments are likely to make this provision obsolete in the short to medium term.

#### *Additional requirements for ERAs involving initial bids*

18. Paragraphs (3) and (4) establish additional requirements for the contents of the invitation to the auction and other pre-auction stages in stand-alone ERAs involving initial bids. Although it would normally be the case that a

price-only ERA does not require initial bids and other pre-auction procedures, the provisions are flexible enough to allow for this eventuality (where, for example, the procuring entity considers that minimum technical requirements are critical). The enacting State may omit these two paragraphs if it decides to provide in its national public procurement law only for very simple ERAs, not involving any pre-auction stages beyond the invitation and registration for the auction.

19. In more complex ERAs, where the procuring entity wishes to examine qualifications and responsiveness prior to the auction and so calls for initial bids, it must include the information in the invitation to the ERA specified in paragraph (3), i.e. additional to that listed in paragraph (1). In such cases, the procuring entity must both request initial bids and provide sufficiently detailed instructions for preparing them, including the scope of the initial bids, the language in which they are to be prepared and the manner, place and deadline for presenting them. Paragraph (1) (f) and (g) as regards the criteria and procedures for examination and evaluation of bids will also be applicable to initial bids, and the information to be provided under that paragraphs will therefore need to cover those criteria and procedures before and during the auction. Since an overlap will exist between the information to be provided about the initial bids and bids during the auction, the procuring entity must correctly identify which information is relevant to which stage, to avoid confusion (in particular as regards the manner, place and deadline for presenting initial bids as opposed to the manner of accessing the auction and the manner and deadline for registering to the auction, different evaluation criteria and procedures and so forth). The information provided as regards preparation, examination or evaluation of initial bids must be carefully drafted to allow suppliers or contractors to prepare initial bids and assure them that their initial bids will be examined or evaluated on an equal basis.

20. Paragraph (4) regulates additional pre-auction steps that are required after the examination or evaluation of initial bids. To allow effective challenge by aggrieved suppliers or contractors, a notice of rejection of any initial bid together with the reasons for rejection must be promptly communicated to the supplier or contractor concerned. The provisions of paragraph (4) do not regulate the reasons for rejection but the provisions of chapter I of the Model Law will apply, such as article 9 setting reasons for disqualification, article 10 that sets out responsiveness criteria, article 20 on the rejection of abnormally low submissions, and article 21 on the exclusion of a supplier or contractor on the ground of inducements, an unfair competitive advantage or conflicts of interest. For ease of reference, the enacting State may wish to consider listing all grounds for the rejection of initial bids in the procurement regulations or rules or guidance from the public procurement agency or other body.

21. All suppliers or contractors submitting responsive initial bids must be invited to the auction unless the provisions of paragraphs (1) (k) and (2) have been enacted and the number of suppliers or contractors submitting responsive initial bids to be invited to the auction has been limited by the procuring entity in accordance with those provisions. If so, the procuring entity can reject bids in accordance with the criteria and procedure for the selection of the maximum number specified in the invitation to the auction. If the pool of suppliers or contractors submitting responsive initial bids will turn out to be below the minimum established in accordance with paragraph (1) (j), the procuring entity must cancel the ERA; if the pool turns out to be above the minimum but still insufficiently large to ensure effective competition during the auction, the procuring entity may decide to cancel the ERA, in accordance with article 55 (2) (see the **commentary to that article**).

22. As stated in paragraph (2) above, some complex ERAs may involve an examination: only those initial bids that meet the minimum threshold are admitted to the auction. In some other complex ERAs there is an additional evaluation of the initial bids and they may be ranked. In this case, the ranking of suppliers or contractors submitting responsive bids and other information about the outcome of the evaluation must be communicated to them, under paragraph (4) (c) of the article, before the auction can commence. In complex ERAs, the procuring entity may receive initial bids that significantly exceed the minimum requirements, particularly where suppliers or contractors would be permitted to offer items with different technical merits and correspondingly different price levels, and the ranking may have a significant impact on participation in the auction itself, requiring the procuring entity to consider whether there will be effective competition.

23. The information to be communicated to suppliers or contractors on the results of evaluation and any ranking may vary from auction to auction; in all cases, it should be sufficient to allow those suppliers or contractors to determine their status vis-à-vis their competitors before the auction in order to allow meaningful and responsive bidding during the auction. Together with the mathematical formula to be used during the auction, as disclosed in the invitation to the auction in accordance with paragraph (1) (g), this information should allow suppliers or contractors independently to assess their chances of success in the auction and identify which aspects of their bids they should and could vary and by how much, in order to improve their ranking. The **commentary to article 56** below discusses the possible conflict between full transparency and avoiding facilitating collusion in the transmittal of this information to bidders, and provides options on the question for consideration.

24. The provisions of paragraph (4) have been designed with a view to preserving the anonymity of bidders and the confidentiality of information

about their initial bids and the results of any examination or evaluation. Only information as relevant to each bidder is provided. To ensure fair, equal and equitable treatment of suppliers and contractors, the information must be dispatched promptly and concurrently to all of them.

*Article 54. Electronic reverse auction as a phase preceding the award of the procurement contract*

1. Article 54 regulates the procedures for soliciting participation in procurement proceedings involving an ERA as a phase. The conditions for use of such ERAs are discussed in the **guidance to article 31**.
2. Paragraph (1) refers to the minimum information that must be included when the procuring entity first solicits participation of suppliers or contractors in the procurement proceedings with ERAs as a phase. The provisions of paragraph (1) require that, in addition to all the other information required to be provided to suppliers or contractors, the procuring entity must specify that an ERA will be held, must provide the mathematical formula to be used during the auction and must disclose how the auction can be accessed. The disclosure of this minimum information at the outset of the procurement is essential in order to allow suppliers or contractors to determine not only their interest but also their ability to participate in the procurement. Suppliers or contractors may decide against participation in procurement involving ERA once the full picture is known, as explained in the Introduction to this chapter.
3. Once announced, the ERA will be the method of selecting the successful supplier or contractor, unless the number of suppliers or contractors participating is insufficient to ensure effective competition. In this case, and in accordance with article 55 (2), the procuring entity has the right (but not the obligation) to cancel the ERA. It also has a separate right under article 19 to cancel the procurement proceedings. Cancellation may be appropriate if it becomes known to the procuring entity that there is a risk of collusion, for example if the anonymity of bidders has been compromised at an earlier stage of the procurement proceedings.
4. Paragraph (2) refers to the stage immediately preceding the holding of the auction, after all other steps required to be taken in the procurement concerned have been completed (such as pre-qualification, examination or evaluation of initial bids) and the only remaining step is to determine the successful bid through the auction. The procuring entity must provide the suppliers or contractors remaining in the procurement proceedings with detailed information about the auction: the deadline by which they must

register for the auction, the date and time of the opening of the auction, identification requirements, criteria governing the closing of the auction and all other rules applicable to the conduct of the auction. The provisions of articles 53 and 54 have been drafted to ensure that equivalent information is provided to participants in stand-alone ERAs and ERAs as a phase. Discussion of the information required to be provided is found in the **commentary to article 53**.

*Article 55. Registration for the electronic reverse auction and the timing of the holding of the auction*

1. Article 55 regulates the essential aspects of registration for the auction and the timing of the auction, and is intended to ensure the fair, equal and equitable treatment of participating bidders, through the transparency requirements in paragraphs (1) and (2). These requirements are: communicating confirmation of registration and, where relevant, any decision to cancel the ERA promptly to each registered supplier or contractor.
2. Paragraph (3) requires that reasonable time be afforded to suppliers or contractors to prepare for the auction. This time should also allow for an effective challenge to the terms of solicitation under chapter VIII of the Model Law. Such a challenge can be made only up to the deadline for presentation of submissions, which in simple ERAs (with no pre-auction examination or evaluation of initial bids) means up to the opening of the auction; in other cases, it means up to the presentation of initial bids. The period of time between the issue of the invitation to the ERA and the auction itself should therefore be determined by reference to the circumstances (the simpler the ERA, the shorter the possible duration). The time requirement is qualified, as stipulated in paragraph (3), by the reasonable needs of the procuring entity, which may in limited circumstances (e.g. in cases of extreme urgency following catastrophic events) prevail over the other considerations.
3. Paragraph (2) allows the procuring entity to cancel the auction if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions are not prescriptive: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly exceptional cases where the procurement must continue despite the lack of effective competition. The enacting State is encouraged to provide in the procurement regulations or rules or guidance from the public procurement agency or other body an exhaustive list of circumstances that would justify the ERA to proceed in

such cases. There may be other reasons permitting cancellation (e.g. suspicion of collusion as explained in the Introduction to this chapter). This flexibility does not apply, however, in situations when the procuring entity must cancel the ERA, for example under article 53 (1) (j), when any required minimum number of registered suppliers or contractors has not been reached, or when the procuring entity must terminate the ERA for technical grounds under article 56 (5) (see the **commentary to those provisions**).

4. In stand-alone ERAs, the cancellation of the auction means the cancellation of the procurement. The procuring entity, upon analysing the reasons leading to the cancellation, may decide that another ERA would be appropriate, for example if mistakes in the description that caused a failure of sufficient number of suppliers or contractors to register for the auction can be rectified, or may choose another procurement method. Where ERAs as a phase are used, the procuring entity may either cancel the procurement or award the procurement contract on the basis of the initial bids, if that option is available under procurement regulations and the terms of solicitation.

5. Where ERAs as a phase are used, the procuring entity should also specify at the outset of the procurement any consequences if suppliers or contractors fail to register for the auction.

#### *Article 56. Requirements during the electronic reverse auction*

1. This article regulates the requirements during auctions, whether stand-alone ERAs or ERAs as a phase. Paragraph (1) specifies two types of auctions: the first type, simple ERAs, where the winning (lowest) price determines the successful bid; and a second type, where the winning bid is determined on the basis of price and additional non-price criteria. Regardless of the complexity of the criteria, all must be assigned a value, expressed in figures or percentages, as part of a pre-disclosed mathematical formula that makes their automatic evaluation possible. As required under articles 53 and 54, information about each criterion used in evaluation, the value assigned to it and the mathematical formula are to be disclosed at the outset of the procurement proceedings; they cannot be varied during the auction. What can be varied during the auction are prices and other modifiable elements as per the terms of solicitation.

2. Paragraph (2) lists the essential requirements for holding the auction: in this respect, they reflect the features of the ERA system under the Model Law and as defined in article 2 (d) (by contrast with some other types of ERA that are in use in practice), implement the conditions for use of ERAs as set out in article 31 and elaborate on the requirements contained in articles 53 and 54. Subparagraphs (a) and (c), for example, highlight the continuous

process of bidding. Subparagraph (a) in addition requires that the bidders are provided with an equal opportunity to bid. In practical terms, this means, for example, that the system must record bids immediately upon receipt, regardless of the originator, and must evaluate them and their effect on other bids. The system must promptly communicate the relevant information to all bidders. The latter requirement is elaborated in subparagraph (c), which refers to instantaneous communication to each bidder of sufficient information allowing it to determine the standing of its bid vis-à-vis other bids. The drafting of these provisions indicates that the same information is not necessarily communicated to all bidders, but the information communicated must be sufficient to allow this determination to be made, and it must ensure the fair, equal and equitable treatment of bidders.

3. The Model Law is intentionally silent on the nature of the information that must be disclosed to fulfil this requirement. In deciding on how to regulate this issue, enacting States will need to balance considerations of transparency and promoting rigorous bidding against avoiding collusion and preventing the disclosure of commercially sensitive information. Appropriate options, depending on the ERA and reflecting its complexity and other factors, include: (a) disclosing whether or not a bidder was leading the auction or had submitted the leading price; (b) disclosing the leading price; (c) disclosing to each bidder its standing compared with the leading bid (but no information on other bids); and (d) disclosing the spread of all bids. In any event, the procuring entity should be able to see the spread of all bids. Enacting States should be aware that, as experience in some jurisdictions indicates, the disclosure of the leading price could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. The greater the degree of information provided about other bids, the greater the possible risks of collusion; suppliers or contractors may also be able to reverse engineer others' bids in more complex ERAs using the mathematical formula provided. Whatever decision is taken by the procuring entity as regards the type of information that is to be disclosed during the auction, this decision must be reflected in the rules for the auction that are made available to potential bidders before the auction commences. In addition, all stages and bids should be recorded and included in the record of the procurement. These provisions supplement the requirement in articles 53 (1) (g) and 54 (1) (a) to disclose the criteria and procedure for evaluating bids that will be used during the auction and the requirement in articles 53 (4) (c) and 54 (3) to provide the results of any pre-auction evaluation.

4. Subparagraph (b) reiterates the principle of automatic evaluation of bids during the auction. Together with subparagraph (d), it highlights the importance of avoiding any human intervention during the running of the auction.

The auction device collects electronically the bids which are automatically evaluated according to the criteria and processes disclosed in the invitation to the auction. The collection device should ascribe identification tags to each bid that do not compromise anonymity. Online capacity should also exist to allow an immediate and automatic rejection of invalid bids, with immediate notification of the rejection and an explanation of the reasons for rejection. A contact point for urgent communications concerning possible technical problems should be offered to bidders. Such a contact point must be external to the auction device.

5. Paragraphs (3) and (5) of the article reiterate another important principle underlying auctions as provided for in the Model Law—the need to preserve the anonymity of bidders before, during and after the auction. Paragraph (3) reflects this principle by prohibiting the procuring entity from disclosing the identity of any bidder during the auction. Paragraph (5) extends this prohibition to the post-auction stage, including where the auction is suspended or terminated. The provisions should be construed broadly, prohibiting not only explicit disclosure but also indirect disclosure, for example, by allowing the identities of the bidders to be disclosed or identified by other bidders. Operators of the auction system on behalf of the procuring entity, including any persons involved, or others involved in the process in other capacities, for example, the contact point for urgent communications concerning possible technical problems, should be regarded as agents for the procuring entity in that regard, and so subject to the same prohibition. It is clear, however, that there may be practical difficulties in preserving the anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement for which a more or less stable pool of providers exists, and in repeated procurement of similar items through ERAs, whether or not framework agreements are used in conjunction with ERAs (see, further, the **Introduction to this chapter**).

6. Paragraph (4) supplements the requirements in articles 53 (1) (o) and 54 (2) (c) as regards the need to disclose the criteria governing the closing of the auction at the latest before the auction is held. These rules, which will have been previously disclosed, may not be changed during the auction. Further, under no circumstances may the auction be closed before the established deadline even if no bidding takes place. It is commonly observed in practice that active bidding starts towards the closure of the auction. Giving the discretion to the procuring entity to close the auction before the established deadline would open the door to abuse, for example by allowing pre-auction arrangements between a bidder and the procuring entity to influence the outcome of the auction in favour of that bidder. On the other hand, there is no prohibition against extending the deadline for submission of bids as long as it is done in a transparent manner. This facility may prove useful,

for example when the auction had to be suspended for technical reasons (as provided for in paragraph (5) of the article). It is good practice to require the rules for the conduct of the auction to address the criteria and procedures for any extension of the deadline for submission of bids.

7. Suppliers or contractors may withdraw from the ERA before its closure. This should not affect the auction unless the withdrawal occurs for reasons requiring suspension or termination of the auction under paragraph (5) of the article (e.g. failures in the procuring entity's communication system). In all other cases, the auction must proceed. Upon the closure of the auction, the procuring entity may need to analyse the reasons for withdrawal, especially if a substantial number of bidders have withdrawn, and any negative effect of such withdrawal on the outcome of the auction. The procuring entity's right to cancel the procurement at any stage of the procurement is reiterated in article 57, which in this respect supplements article 19 (1) (see the **commentary to article 19** on cancellation of the procurement).

8. Paragraph (5) requires suspending or terminating the auction in the circumstances it sets out. Apart from failures in the procuring entity's communication system that risk the proper conduct of the auction, there may be other reasons for suspension or termination of the auction. While it would not be possible to list all of them in the procurement law, the Model Law requires setting them all in the rules for the conduct of the auction that are to be made available under articles 53 and 54, as applicable. No further discretion should be given to the procuring entity in this respect since its exercise could lead to abuse through human intervention in the process. Although in some cases suspension or termination may be unavoidable, such cases must be minimized, and where they arise, should be reviewed as part of monitoring or oversight mechanisms.

9. The rules for the conduct of the auction must also include procedural safeguards to protect the interests of bidders in case of the suspension or termination of the auction, such as: immediate and simultaneous notification of all bidders about suspension or termination; and in the case of suspension, the time for the reopening of the auction and the new deadline for its closure. Where a stand-alone ERA is terminated, the rules should specify whether the termination necessarily cancels the ERA, or whether the contract can be awarded based on the results at the time of termination.

#### *Article 57. Requirements after the electronic reverse auction*

1. This article regulates steps to be taken after the auction, regardless of whether a stand-alone ERA or an ERA as a phase is involved. The applicable

rules are the same since in all cases the auction precedes the award of the procurement contract. No further evaluation or negotiation is allowed after the auction has been held to avoid impropriety, favouritism or corruption. The results of the auction are therefore intended to be the final results of the procurement proceedings. The practical implication is that, where the solicitation documents stipulate that the procurement contract is to be awarded to the lowest-priced bid, the bidder with that bid is to be awarded the procurement contract and the winning price is to figure in the procurement contract. Where the solicitation documents stipulate price and non-price criteria for the award of the procurement contract, the bidder submitting the most advantageous bid as determined through the application of the pre-disclosed mathematical formula is to be awarded the procurement contract and the terms and conditions of the winning bid are to figure in the procurement contract. The limited exceptions to these rules are spelled out in paragraphs (2) and (3).

2. Paragraph (2) is applicable to simple stand-alone ERAs (that is, those that are not preceded by initial bids). In such ERAs, assessments of qualifications and responsiveness are carried out after the auction, and only with respect to the winner and the winning bid. This approach saves time and cost. If the winner turns out to be unqualified or its bid unresponsive, the procuring entity has two options: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder, provided that the latter is qualified and its bid is responsive. This approach proceeds on the assumption that all bidders responding to the invitation can deliver the subject matter of the procurement at more or less the same level of quality; where the procurement involves simple, off-the-shelf subject matter, the risk to the procuring entity is low, because alternative sources of supply will be readily available. Guidance to suppliers or contractors that will participate in ERAs should underscore this possibility, so that they are not lured into presenting unsustainable bids at later stages of the auction.

3. Paragraph (3) is applicable to any type of ERA, and addresses the situation in which the winning bid appears to the procuring entity to be abnormally low (for an explanation of this term, see the **commentary to article 20**). It should be noted that in ERAs procuring simple, off-the-shelf subject matter, a performance risk may be unlikely for the reasons given in the preceding paragraph. The provisions of paragraph (3) are also subject to the general rules on the investigation of abnormally low submissions contained in article 20, including the safeguards to ensure an objective and transparent assessment (see the commentary to that article on the appropriate procedures). If all conditions of article 20 for rejecting the abnormally low bid have been fulfilled, the procuring entity may reject the bid and choose either to cancel the procurement proceedings or award the procurement

contract to the next winning bidder. This exception to the general rule requiring the award of the procurement contract to the winning bidder as determined at the end of the auction is included, in particular, to prevent dumping. The provisions of the Model Law have been drafted to allow greater flexibility to the procuring entity, but subject to the safeguards against abuse provided for in article 20.

4. In deciding which option to follow under paragraphs (2) or (3)—to cancel the procurement proceedings or award the procurement contract to the next winning bidder—the procuring entity should assess the consequences of cancelling the ERA, in particular whether holding a second auction in the same procurement proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid, in particular where collusion between the winning bidder and the next winning bidder is suspected. The provisions of paragraphs (2) and (3) are drafted with the intention of avoiding the imposition of any particular step on the procuring entity.

5. In either case under paragraphs (2) or (3), prompt action must be taken after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practicable. These steps should not be treated as an opportunity to undermine the automatic identification of the winning bid.

## CHAPTER VII. FRAMEWORK AGREEMENT PROCEDURES

### A. Introduction

#### 1. Summary

1. Framework agreement procedures can be described as a two-stage procurement technique, undertaken over a period of time, which involve:

(a) The solicitation of submissions against predetermined terms and conditions;

(b) The assessment of suppliers' or contractors' qualifications and the examination of their submissions against those terms and conditions, and, commonly, the evaluation of those submissions;

(c) Selected supplier(s) or contractor(s) and the procuring entity entering into a framework agreement on the basis of the submissions. The framework agreement sets out the terms and conditions of future purchases, and is concluded for a given duration (these steps (a)-(c) are the "first stage" of the procurement); and

(d) Subsequent and/or periodic awards of procurement contracts to the supplier(s) or contractor(s) parties to the framework agreement on the terms of the framework agreement, as particular requirements arise (which may involve the placement of purchase orders with a particular supplier or contractor party to the agreement or a further round of competition. This is the "second stage" of the procurement).

2. Framework agreement procedures are often used to procure the subject matter for which a procuring entity has a need over a period of time or at a time in the future, but does not know the exact quantities, nature or timing of its requirements. In essence, the framework agreement establishes the terms upon which purchases will be made (or establishes the main terms and a mechanism to be used to establish the remaining terms or refine the initially established terms: the latter may include the quantities to be delivered at any particular time, the time of deliveries, the overall quantity of the procurement and the price). Examples include commodity-type purchases, such as stationery, spare parts, information technology supplies and

maintenance, where the market may be highly competitive and where there will normally be regular or repeat purchases for which quantities may vary. They are also suitable for the purchase of items from more than one source, such as electricity, and for that of items for which the need is expected to arise in the future on an urgent or emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in urgent and emergency situations). These types of procurement may require security of supply, as may also be the case for specialized items requiring a dedicated production line, for which framework agreements are also suitable tools.

3. There is a variety of terminology in practical use for the type of procedures described above, including supply arrangements, indefinite-delivery/indefinite-quantity contracts or task-order contracts, catalogue contracts and umbrella contracts. Some such procedures are very close to the Model Law's framework agreement procedures; others have more significant differences. In particular, the extent to which the first stage of the procurement includes all the steps set out in paragraph 1 (a)-(c) above also varies; where there is no assessment of the qualifications and examination of responsiveness, then the arrangement is better classified as a suppliers' list. Suppliers' lists are not provided for in the Model Law because UNCITRAL considers that the very flexible provisions on framework agreements set out in chapter VII of the Model Law allow for the benefits of suppliers' lists to be achieved, without running the elevated risks to transparency and competition that suppliers' lists are considered to raise.

## **2. *Enactment: policy considerations***

4. The main potential benefits of framework agreement procedures in terms of procurement practice can be summarized as follows:

(a) *Administrative efficiency*: where the procedure is used for repeat procurements, it can be administratively efficient because of the effective aggregation of a series of procurement proceedings. Many steps that would otherwise be taken for each of a series of procurements are undertaken once: they include drafting terms and conditions, advertising, assessing suppliers' or contractors' qualifications, and examining, and in some forms of framework agreements evaluating submissions. As a result, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase procured separately;

(b) *Reducing the need for urgent procedures*: the shorter times for completing procurement procedures once the initial steps described in subparagraph (a) above have been undertaken can reduce the need for urgent

procedures, which are often conducted in non-transparent ways and without effective competition;

(c) Better outcomes for smaller procurements: these procurements are considered at risk of abuse or failure to achieve value for money because they are often conducted in procedures lacking transparency and competition;

(d) Better transparency in smaller procurements: the grouping of purchases achieved through the framework agreement procedure for the purpose of amortizing advertising and other costs enhances transparency since exceptions from some transparency requirements of the Model Law for procurement below a certain value threshold would no longer be applicable; the grouping can also facilitate oversight, either by oversight agencies or by suppliers or contractors themselves;

(e) Enhancing SME participation: placing smaller orders within the framework agreement may allow smaller suppliers or contractors to participate;

(f) Ensuring security of supply through binding a supplier or contractor to supply future purchases;

(g) Achieving further costs savings: centralized purchasing, which involves a central unit of one procuring entity or a specialized independent entity making purchases for a number of units, or one entity or consortium making purchases on behalf of several entities may reap economies of scale;

(h) Better supply chain management: the results can include reducing the costs of one-off bulk purchasing (which has been a characteristic of some central procurement) and consequential warehousing expenses; and

(i) Process efficiencies: centralized purchasing can also promote better quality tender and other documents, higher uniformity and standardization across government, and better supplier or contractor understanding of procuring entities' needs can improve the quality of submissions. Centralized purchasing agencies, as discussed in the section on **“Purchasing by groupings of procuring entities, including in the cross-border context, under the Model Law” in part I of this Guide**, can conduct the procurement on behalf of procuring entities, and their coordinating role can further enhance the benefits of centralized purchasing.

5. It will be clear from the above list that many benefits arise from the use of framework agreement procedures for repeated purchases. This is the most common use of the technique, for which they are particularly appropriate but, as is further explained below, not the only use. As with all procurement methods and techniques under the Model Law, the framework agreement procedure can be used in all procurement—whether of goods, construction, services or a combination thereof.

6. Enacting States should be aware of concerns about the use of framework agreement procedures and possible negative impacts on competition, some of which are inherent in the technique, and some that arise from its inappropriate use. Closed framework agreements (those with a limited number of participants; see the definition in article 2 (e) (ii) and explanations below) effectively close off full competition in the procurement market concerned for the period of their duration. In addition, the parties to closed framework agreements will be known to each other, raising the risk of collusion at the second stage. The risks concerned will vary from market to market—some markets are inherently more competitive than others.

7. The approach to the provisions enabling the use of framework agreement procedures under the Model Law has therefore been designed to facilitate the appropriate and beneficial use of the technique in repeat purchases and the other circumstances above (such as to provide in advance for urgent procurement and for security of supply), to discourage their inappropriate use, and to mitigate or minimize the risks that they may pose to competition. The provisions consequently contain both controls over the use of framework agreement procedures, in the form of conditions for their use in article 32, and mandatory procedures for conducting them in articles 58-63, in very broad terms, requiring the use of open tendering for the award of the framework agreement unless another procurement method is justified. As is the case for conditions for use of any procurement method, the provisions will delineate the situations in which framework agreement procedures are available, but cannot address whether the technique is appropriate. The procurement regulations and rules or guidance from the public procurement agency or other body to assist in the implementation and use of framework agreements will therefore be a key determinant of effective use. The commentary in the following section highlights the main issues that such supporting documents should address.

8. Under the Model Law (see article 2 (e)), the framework agreement procedures may result in any of three types of framework agreements:

(a) A “closed” framework agreement without second-stage competition, concluded with one or more suppliers or contractors, and in which all terms and conditions of the procurement are set out in the framework agreement. The submission at the first stage is final, and there is no further competition between the suppliers or contractors at the second stage of the procurement. The only difference of this type of framework agreement as compared with traditional procurement contracts is that the item(s) is or are purchased in the future, often in batches over a period of time. These framework agreements are “closed” in that no new suppliers or contractors can become parties to the agreement after it has been concluded;

(b) A “closed” framework agreement with second-stage competition, concluded with more than one supplier or contractor, and which sets out some of the main terms and conditions of the procurement. The submission at the first stage is “initial”, because although each such submission will be evaluated, a further round of competition among the suppliers or contractors that are parties to the framework agreement is required at the second stage. Those suppliers or contractors present a final submission at this second stage; the procuring entity selects the successful submission identified at that point through second-stage competition. These framework agreements are also “closed” in the sense described above; and

(c) An “open” framework agreement, concluded with more than one supplier or contractor, and which again sets out some of the main terms and conditions of the procurement. The submission at the first stage is “indicative”, because it will not be evaluated but will be assessed for responsiveness, and a further round of competition among the suppliers or contractors is required at the second stage. An “indicative” submission is, to that extent, not binding. Suppliers or contractors that are parties to the framework agreement present a final submission at this second stage; the procuring entity selects the successful submission identified at that point through second-stage competition, as in closed framework agreements with second-stage competition. These framework agreements remain “open” to new suppliers or contractors, meaning that any supplier or contractor may become a party at any time during the operation of the agreement if it is qualified and its indicative submission is responsive. These agreements are required to operate electronically, as is explained in the **commentary to article 60** below.

9. These different types of framework agreement cater to different circumstances, meaning that the decision to engage in procurement using a framework agreement can be a relatively complex one, requiring decisions on the appropriate procurement method for the award of the framework agreement and the appropriate type of framework agreement. For this reason, enacting States may wish to limit the use of framework agreement procedures while experience in the technique is gained. For example, they may wish to start with open framework agreements intended for procurement of commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. The commentary regarding implementation and use below explains the link between the procurement circumstances and the appropriate type of framework agreement, which may assist enacting States generally and in designing any phased introduction of the technique.

10. As the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement is not a procurement contract as defined in the Model Law, but it may be an enforceable contract in

enacting States. The law of the enacting State will therefore need to address such issues as the enforceability of the agreement in terms of contract law. Enacting States may also wish to issue guidance on whether the Government is to be bound to use the framework agreement, and the extent to which suppliers' or contractors' submissions at the first stage may be binding under the law of the enacting State. In the case of an open framework agreement, suppliers or contractors that join the agreement after its initial conclusion will need to be bound by its terms upon joining, and enacting States should ensure that the law makes appropriate provision in this regard.

11. Although the framework agreement may be a binding contract, the definition of the "procurement contract" under article 2 (*k*) of the Model Law does not include a framework agreement. The procurement contract for the purposes of article 2 (*k*) of the Model Law is concluded at the second stage of the procedure, when the procuring entity awards a procurement contract under the framework agreement. Technically, the award occurs when the procuring entity issues a notice accepting the supplier's or contractor's second-stage submission in accordance with article 22 of the Model Law. This means that the safeguards and procedures under the Model Law apply throughout the framework agreement procedure.

12. In this regard, it should also be noted that both stages of the framework agreement procedures are subject to the challenge under chapter VIII of the Model Law.

13. The Model Law does not provide for a further type of framework agreement that is sometimes encountered in practice, and under which suppliers or contractors (or a single supplier or contractor) can unilaterally improve their offers (or its offer). The reason for excluding this type of framework agreement is that there would be no mechanism for preventing the entity from passing information to favoured suppliers or contractors to assist them in improving their relative position, or for monitoring improved offers. Consequently, such framework agreements would be incompatible with the overall policy objectives of the Model Law.

### ***3. Issues regarding implementation and use***

14. The most significant issue of implementation and use is to promote the appropriate use of framework agreement procedures, which involves issues considerably more complex than an assessment of whether the conditions for their use as set out in article 32 of the Model Law are satisfied. Relevant issues for consideration include, first, that the administrative efficiency that may support the use of the technique may compromise other procurement

objectives, such as value for money, if procuring entities use framework agreements where they are not in fact the appropriate tool for the procurement concerned, simply to achieve those administrative efficiencies. The result may be that the procuring entity's real needs are simply not met, or are not met with the appropriate quality or at the appropriate price. Secondly, there is evidence in practice of framework agreements leading to reduced competition and transparency, collusion, and contract awards based on relationships between procuring entities and suppliers or contractors, rather than on the competitive procedures mandated under the Model Law, potentially compromising value for money. Thirdly, and particularly in the longer term, the scale of framework agreements can reduce overall participation and competition as suppliers or contractors that are not parties to the framework agreement leave the market. The suppliers or contractors that are parties to the framework agreement will be aware of each other's identities, and so ensuring competition once the framework agreement is in place can also be difficult in practice. As suppliers or contractors that are not parties to the framework agreement cannot participate in the award of procurement contracts, there is in fact restricted competition at the second stage of a framework agreement procedure. The negative consequences of restricted competition will be exacerbated where the effect of the framework agreement is to create a monopolistic or oligopolistic market. These matters require assessment before a decision is taken to use a framework agreement procedure, since addressing them once it is in operation is unlikely to be effective.

15. The circumstances of the given procurement will determine whether the use of a framework agreement procedure is appropriate and, if so, its structure, such as the type of framework agreement to be concluded, the scope of the framework agreement, the number of suppliers or contractors parties and the role of a centralized purchasing body, if any. The link between the circumstances of the procurement and various decisions on framework agreement procedures should be explained in rules or guidance from the public procurement agency or other body. The latter should also address such issues as monitoring the operation of framework agreements to assess their effectiveness in the context of each procurement as well as the procurement market as a whole and compliance with safeguards built in the Model Law to ensure transparency, competition and objectivity in their operation. These issues are discussed in more detail in the following subsections. In summary, the effective use of framework agreements procedures will require the procuring entity or other operator of the agreement to consider the type of framework agreement that is appropriate by reference to the complexity of the subject matter to be procured, its homogeneity or otherwise, and the manner in which competition is to be ensured. The enacting State will wish to ensure that appropriate capacity-building is in place in order to allow for optimal decision-making.

16. The technique is relatively new, and consequently the issues discussed may need to be updated as experience in their use is gained. Enacting States may also wish to monitor publications from the multilateral development banks and other organizations and bodies on the use of framework agreements procedures that are similar in type to those provided for in the Model Law.

*Circumstances of the procurement where framework agreements may be appropriate*

17. The conditions for use of framework agreements, as all conditions for use of procurement methods and techniques under the Model Law, describe where framework agreements may and may not be used. The conditions for use of framework agreement procedures in article 32 are considerably more flexible than other conditions for use, as the commentary below indicates. Elaboration in procurement regulations and rules or guidance from the public procurement agency or other body will be required in order to guide the procuring entity in deciding whether framework agreements are appropriate, recalling that the decision on the use of a framework agreement procedure must be included and justified in the record of the procurement concerned (see articles 25 (1) (g) and 32 (2)). The procurement regulations or rules or guidance from the public procurement agency or other body should explain the link between the main circumstances for which the Model Law encourages the use of framework agreement procedures, and the conditions for use themselves; in this regard, enacting States should be aware that the capacity required to operate framework agreements effectively can be higher than for some procurement methods and techniques envisaged in the Model Law, and training and other capacity-building measures will be key to ensuring successful and appropriate use.

18. The first circumstance arises where the procuring entity's need is "expected" to arise on an "indefinite or repeated basis" (article 32 (1) (a)). The procurement regulations and rules or guidance from the public procurement agency or other body should explain that these latter conditions need not be cumulative, though in practice they will commonly overlap. In this regard, the reference to an indefinite need, meaning that the time, quantity or even the need for the subject matter itself is or are not certain, can allow the framework agreement to be used to ensure security of supply, and in anticipation of repeat procurements. The rules or guidance from the public procurement agency or other body should also address the term "expectation", and how to assess in an objective manner the extent of likelihood of the anticipated need. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the

framework agreement is used in the case of repeat procedures. For indefinite purchases, those costs must be set against the likelihood of the need arising and the security that the framework agreement offers (e.g. setting prices and other conditions in advance).

19. The second circumstance arises where the need for the subject matter of the procurement “may arise on an urgent basis”. The same considerations apply as for indefinite purchases noted immediately above.

20. Consequently, complex procurement for which the terms and conditions (including specifications) vary for each purchase or may be expected to change before the procurement contract is awarded, such as procurement involving large investment or capital contracts, highly technical or specialized items, and more complex services, would not generally be appropriate for procurement through a framework agreement procedure.

#### *Selection of the appropriate type of framework agreement*

21. The circumstances of the given procurement will dictate the choice among available types of framework agreements. This link between the type of framework agreement that is available and the type of the framework agreement to be selected by the procuring entity should be explained in rules or guidance from the public procurement agency or other body. The first issue to be addressed there is how to choose among the three types of framework agreements identified above, given the different ways in which competition operates in each type. Closed framework agreements, which involve the evaluation of initial submissions, involve significant competition at the first stage (and may or may not involve competition at the second stage). Open framework agreements, on the other hand, do not involve the evaluation of indicative submissions at the first stage—only qualifications and responsiveness are checked—so all the competition in those framework agreements takes place at the second stage.

22. How narrowly the procurement need can and should be defined at the first stage will dictate the extent of competition that is possible and appropriate at that stage. If precise specification of the procurement needs is possible and if they will not vary during the life of the framework agreement, a framework agreement without second-stage competition, in which the winning supplier(s) or contractor(s) for all or some items is or are identified at the first stage, will maximize competition at the first stage and should produce the best offers. However, this approach is inflexible and requires precise planning: rigid standardization may be difficult or inappropriate, especially in the context of centralized purchasing where the needs of

individual purchasing entities may vary, where refinement of the requirements may be appropriate so needs are expressed with lesser precision at the first stage, and in uncertain markets (such as future emergency procurement). If the procuring entity's needs may not vary, but the market is dynamic or volatile, second-stage competition will be appropriate unless the volatility is addressed in the framework agreement (such as through a price adjustment mechanism). The greater the extent of second-stage competition, the more administratively complex and lengthy the second-stage competition will be, and the less predictable the first-stage offers will be of the final result; this can make effective budgeting more difficult. Where there will be extensive second-stage competition, there may also be little benefit of engaging in rigorous competition at the first stage; assessing qualifications and responsiveness may be sufficient. The public procurement agency or other body should therefore provide guidance on effective planning for both stages, and assessing the relative merits of standardization and accommodating different needs for individual procurements and across sectors of the overall government procurement market.

23. Where several requirements are bundled together under one framework agreement, the effect will be to provide flexibility for the procuring entity to finalize or refine its statement of needs when the needs themselves arise. The description of the procuring entity's or several procuring entities' needs in the initial solicitation will therefore be less precise or will be diverse as explained in the preceding paragraph. This would generally imply competition at the second stage (so that the relevant components from the bundle are identified for the procurement at issue). The approaches suggested in the preceding paragraph will therefore be relevant. There is the risk, however, that such bundling may restrict market access, particularly to SMEs, who may not be able to supply the full—and probably larger—scope of the framework agreement. In addition to the general concern that some suppliers or contractors may consequently leave or be driven out of the market concerned, a situation requiring monitoring as discussed elsewhere in the introduction to this chapter, the procurement regulations or rules or guidance from the public procurement agency or other body should encourage procuring entities to consider whether to allow in the solicitation documents for partial submissions, as discussed in the **commentary to article 39**, particularly where SME promotion is a socio-economic policy of the Government concerned. (For a discussion of socio-economic policies, see the relevant sections in part I of this *Guide*, the commentary on that topic in the Introduction to chapter I and the commentary to articles 2 and 8.)

24. A related issue is the selection between a single-supplier or multi-supplier framework agreement. A single-supplier closed framework agreement has the potential to maximize aggregated purchase discounts given

the likely extent of potential business for a supplier or contractor, particularly where the procuring entity's needs constitute a significant proportion of the entire market, and provided that there is sufficient certainty as to future purchase quantities (through binding commitments from the procuring entity, for example). This type of agreement can also enhance security of supply to the extent that the supplier or contractor concerned is likely to be able to fulfil the total need. Multi-supplier framework agreements, which are more common, are appropriate where it is not known at the outset who will be the best supplier or contractor at the second stage, especially where the needs are expected to vary or to be refined at the second stage during the life of the framework agreement, and for volatile and dynamic markets. They also allow for centralized purchasing, and can also enhance security of supply where there are doubts about the capacity of a single supplier to meet all needs.

#### *Compliance with transparency, competition and objectivity safeguards*

25. The procurement regulations or rules or guidance from the public procurement agency or other body should emphasize that good procurement planning is vital to set up an effective framework agreement: framework agreements are not alternatives to procurement planning. The Model Law requires the framework agreement itself to contain the terms and conditions of the envisaged procurement contracts (other than those to be established through the second-stage competition). The procurement regulations or rules or guidance from the public procurement agency or other body should emphasize that the agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and conditions during the operation of the framework agreement (see also the **commentary to articles 58-63** below).

26. A procuring entity that wishes to use a closed framework agreement is required to follow one of the procurement methods of the Model Law to select the suppliers or contractors to be parties to the closed framework agreement (i.e. at the first stage). Thus all the safeguards applicable to the selected procurement method, including conditions for its use and solicitation methods, will apply. The equivalent safeguard for an open framework agreement is that it must be established following specifically-designed open procedures, mirroring those of open tendering to a large extent. Rules and/or guidance from the public procurement agency or other body to procuring entities should stress these safeguards, and the matters discussed in the following paragraphs.

27. The provisions regulating the award of procurement contracts under framework agreements have been drafted to ensure sufficient transparency and competition where a second-stage competition is envisaged, based on the rules governing open tendering, as further explained in the **commentary to article 62** below. The provisions of article 22 governing the award of the procurement contract, including on the standstill period, which are applicable to framework agreement with second-stage competition, ensures transparency in decision-taking at the second stage. More generally, however, and given the risks to competition over the longer-term as discussed elsewhere in the Introduction to this chapter, the public procurement agency or other body should monitor the effect of the framework agreement on competition in the market concerned, particularly where there is a risk of a monopolistic or oligopolistic market. As noted in respect of other procurement methods and in the section on **“Institutional support”** in part I of this *Guide*, this monitoring can usefully be undertaken in conjunction with the competition authorities in the enacting State concerned.

28. The anti-competitive potential of framework agreements is mitigated through the provisions of the Model Law on their maximum duration. Setting a maximum duration for the operation of a framework agreement is also considered to assist in preventing attempted justifications of excessively long framework agreements. On the other hand, unnecessarily restricting the duration can compromise the administrative efficiencies of framework agreements. UNCITRAL considers that there is no one appropriate maximum duration because there are differing administrative and commercial circumstances.

29. For this reason, under article 59 (1) (a) of the Model Law, the procuring entity is to set out the maximum duration of a closed framework agreement within the maximum established by the enacting State in the procurement regulations (i.e. no stated limit is set out in the Model Law itself). The procurement regulations or rules or guidance from the public procurement agency or other body should state that the maximum includes all possible extensions to the initially established duration for the framework agreement concerned. Any suspension of the operation of a framework agreement resulting from challenge proceedings under chapter VIII of the Model Law extends the framework agreement for the period of suspension, but the overall duration of the framework agreement remains unchanged. This aspect is a key one in avoiding abuse in extensions and exceptions to that initially established duration.

30. Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a

series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions. As some procurement markets may change more rapidly, especially where technological developments are likely, for example in IT and telecommunications procurement, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum.

31. Enacting States may therefore consider that different periods of time might be appropriate for different types of procurement, and that for some highly changeable items the appropriate period may be measured in months. Shorter durations within the legal maximum contained in article 59 can be set out in the procurement regulations; if this step is taken, clear guidance must be provided to procuring entities to ensure that they consult the appropriate source. Such guidance should also address any external limitations on the duration of framework agreements (such as State budgeting requirements) and internal controls to address the award of procurement contracts at the end of a budget period or near the end of the duration of the framework agreement, to avoid observed abuse in such awards.

32. As regards open framework agreements, there is a lesser risk to competition because the framework agreement remains open to new joiners. The duration of the open framework agreement is therefore not subject to a statutory maximum to be set out in the procurement regulations; the duration is established at the discretion of the procuring entity (see article 61 (1) (a)). The safeguards applied are that the existence of the open framework agreement must be publicized and the provisions require the prompt assessment of applications to join it (see articles 60 (4) and (5) and 61 (2)).

33. Whereas an open framework agreement is required under the Model Law to be operated online (see article 60 (1)), the procuring entity has flexibility in this regard as regards closed framework agreements. Enacting States may wish to emphasize the advantages of an online procedure in terms of increased efficiency and transparency (e.g. the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly. See, further, the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*). Where the enacting State requires or encourages (or intends to encourage) that all framework agreements be operated electronically, the procurement regulations or other rules or guidance from the public procurement agency or other body may require that all of them be maintained in a central location, which further increases transparency and efficiency in their operation.

*Operation of and monitoring framework agreements at the individual procurement level and the system level*

34. Once the framework agreement is set up, its potential benefits will be maximized to the extent that it is in fact used to satisfy the procuring entity's needs for the subject matter of the procurement, rather than conducting new procurements for the subject matter concerned. The credibility of procuring entity in this regard will also be important for future procurements. The procuring entities should therefore be required to assess on a regular basis whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time. They should also consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. Where such optimal use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. Ways of assessing whether the technical solution or product proposed remains the best that the market offers may include market research, publicizing the scope of the framework agreement and so forth. Where the framework agreement no longer offers good commercial terms to the procuring entity, a new procurement procedure (classical or a new framework agreement procedure) will be required.

35. The terms of the framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, or if the framework agreement operates as an exclusive purchasing agreement, though this flexibility should be set against the better pricing from suppliers or contractors. Two ways of addressing this issue are: (a) to use estimated (non-binding) quantities in the solicitation documents so that the framework agreement can facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs, and so that the procuring entity will be able to purchase outside the framework agreement if market conditions change; and (b) using binding quantities, which could be expressed as minima or maxima. There may be markets in which one solution appears to be better than the other; the monitoring mechanism can inform appropriate guidance, or can use examples from practice where the choice needs to be made by the procuring entity.

36. More generally, guidance from the public procurement agency or other body, including monitoring agencies, should address how to derive the major benefit and avoid the pitfalls of framework agreements. For example, it should also encourage procuring entities themselves to assess on a periodic basis during the currency of a closed framework agreement whether its prices, and terms and conditions remain current and competitive, because

they tend to remain fixed rather than varying with the market. Procuring entities tend to procure through an existing framework agreement, even though its terms and conditions do not quite meet their needs or reflect the current market conditions, to avoid having to commence new procurement proceedings (and to draft new terms and conditions of the procurement, to issue a procurement notice, to ascertain the qualifications of suppliers or contractors, to conduct a full examination and evaluation of initial submissions and so forth). As a result, procuring entities may fail to assess price and quality sufficiently when placing a particular purchase order. They may overemphasize specifications over price. Guidance should therefore discuss the need to ensure an appropriate balance.

37. At the procurement market level, enacting States are encouraged to set up a monitoring mechanism to oversee the establishment and use of framework agreements, both to ensure that the relevant rules are followed, and to monitor whether the anticipated benefits in terms of administrative efficiency and value for money in fact materialize; this monitoring mechanism can also indicate where guidance and capacity-building are needed. The performance of individual procuring entities using the framework agreement and the performance of the framework agreement in terms of prices as compared with market prices for single procurements are also to be monitored. Increased prices or reductions in the quality of offers may arise from inappropriate or poor use of the framework agreement by one or two procuring entities.

38. Where enacting States consider that these issues may require capacity that needs to be developed, they may wish to introduce framework agreements in a phased manner, as discussed elsewhere in the Introduction to this chapter.

39. The enacting State should also be aware of the role of centralized purchasing entities in the use and operation of framework agreements. As discussed in the **Introduction to chapter VI on ERAs**, the outsourcing of any aspect of procurement can raise organizational conflicts of interest and related issues: such centralized purchasing entities may have an interest in increasing their fee earnings by keeping prices high and promoting purchases that go beyond the needs of the procuring entity. In addition, and in the context of framework agreements, the agency may undertake planning for future procurement, in which case the quality of information from procuring entities will be critical, not least covering the anticipated needs from the perspectives discussed above. The needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others if those needs are standardized without sufficient analysis. Interaction with the likely users of a framework agreement before the procedure commences can allow for a better decision on the appropriate extent of standardization and accommodating varying needs.

## B. Article-by-article commentary

### *Article 32. Conditions for use of a framework agreement procedure*

1. The purpose of article 32 is to set out the conditions for use of a framework agreement procedure (paragraph (1)) and provide for the record and justification requirements in resort to the procedure (paragraph (2)). While taking account of the need to ensure appropriate use of framework agreements, UNCITRAL has taken care to avoid limiting their usefulness through overly restrictive conditions.

2. Paragraph (1) lists conditions for use of framework agreement procedures, regardless of whether the procedure will result in a closed or open framework agreement. The conditions are based on the notion that framework agreement procedures can offer benefits for procurement, notably in terms of administrative efficiency where the procuring entity has needs that are expected to arise in the short to medium term but where not all terms and conditions of the procurement can be set at the outset of the procurement. Paragraph (1) permits the use of framework agreement procedures to reflect two situations where these circumstances may arise: first, where the need is expected to be “indefinite”, meaning its extent, timing and/or quantity are unknown, or it is expected to be repeated, and, secondly, where the need is expected to arise on an urgent basis. The first set of circumstances may arise for repeat purchases of relatively standard items or services (office supplies, simple services such as janitorial services, maintenance contracts and so forth). The second set of circumstances may arise where a government agency is required to respond to natural disasters, pandemics, and other known risks; this condition will normally, but need not, be cumulative with the first condition. Security of supply is usually a concern in this type of situation but also may become a concern in the first type of situation where indefinite need for repeat purchases will arise with respect to the items requiring specialist production. Where the procedure will result in a closed framework agreement, the conditions for use applicable to the procurement method intended to be used for the award of the agreement are also to be satisfied. This is because, in accordance with article 58 (1) of the Model Law, a closed framework agreement is to be awarded by means of open tendering proceedings unless the use of another procurement method is justified.

3. The conditions for the use of framework agreement procedures are considerably more flexible than the conditions for use of the procurement methods listed in article 27 (1): they do not require the procuring entity to state definitively that the needs will arise indefinitely or on an urgent basis, but merely that the need is expected to arise. The inherent subjectivity of the conditions

means that it is more difficult to enforce compliance with them than with the conditions for use of the procurement methods listed in article 27 (1). The Introduction to this chapter sets out measures that will enhance objectivity in taking such decisions, and so facilitate the monitoring of whether decisions are reasonable in the circumstances of a given framework agreement. In this manner, the conditions, when accompanied by appropriate procurement regulations and rules or guidance from the public procurement agency or other body, will facilitate accountability and promote best practice.

4. The costs of establishing and operating framework agreement procedures, which involve two stages, will normally be higher than those for one single-stage procurement, and so whether framework agreement procedures are appropriate will depend on whether the potential benefits will exceed these higher costs. Where the need is expected to be repeated, the administrative costs of setting up and operating the framework agreement can be amortized over a series of repeat procurements; where the need is expected to arise urgently or indefinitely, the administrative costs are to be considered against the value-for-money benefits that the earlier setting of the terms and conditions of the procurement may bring by comparison with the procedures otherwise available. The procuring entity, therefore, will need to conduct a cost-benefit analysis based on probabilities before engaging in a framework agreement procedure. The commentary in the Introduction to this chapter will assist enacting States in deciding on the appropriate guidance and training to ensure that the procuring entity has the necessary tools to do so. The above considerations are relevant particularly in the context of closed framework agreements.

5. In addition, the use of framework agreements should not be considered to be an alternative to effective procurement planning. In the context of a closed framework agreement in particular, unless realistic estimates for the ultimate procurement are determined and made known at the outset of a framework agreement procedure, potential suppliers or contractors will not be encouraged to submit their best prices at the first stage, meaning that a closed framework agreement may not yield the anticipated benefits, or that the administrative efficiency may be outweighed by price and/or quality concerns that compromise value for money.

6. A further reason for including conditions for use is to address the potential restriction on competition that the use of the technique, in particular a closed framework agreement, involves. The conditions are supported by the maximum duration to be provided in the procurement regulations for closed framework agreements under article 59 (1) (a), and the defined duration required by article 61 (1) (a), which require the needs concerned to be reopened to full competition after the duration of the agreement expires.

7. The conditions for use should be read together with the definition of the term “procuring entity”, which allows for more than one purchaser to use the framework agreement. If enacting States wish centralized purchasing agencies to be able to act as agents for one or more procuring entities, so as to allow for the economies of scale that centralized purchasing can offer, they may wish to promulgate procurement regulations or issue rules or guidance to ensure that such arrangements can operate in a transparent and an effective fashion.

8. Paragraph (2) requires the procuring entity to justify the use of the framework agreement procedure in the procurement record; the intention is that the cost-benefit analysis referred to in the preceding paragraphs be included. In the case of the award of a closed framework agreement, the paragraph will be supplemented by article 28 (3) that requires the procuring entity to put on the record a statement of the reasons and circumstances upon which it relied to justify the use of the procurement method other than open tendering in the award of the agreement. Given the observed risks of overuse of framework agreements because of their perceived administrative efficiency, and the broad conditions for use, timely and appropriate oversight of the justification in the record will be important (also to facilitate any challenge to the use of the framework agreement procedure by suppliers and contractors). Effective oversight will involve the scrutiny of the extent of purchases made under the framework agreement to identify over- or under-use. On these issues see further, the relevant commentary in the **Introduction to this chapter**.

#### *Article 58. Award of a closed framework agreement*

1. The purpose of article 58 is to set rules for the award of a closed framework agreement (the award of procurement contracts under it are regulated separately, in article 62). The provisions apply to both framework agreement procedures with second-stage competition and framework agreement procedures without second-stage competition, both of which, as explained in the Introduction to this chapter, may lead to the award of a closed framework agreement.

2. Paragraph (1), by referring in its subparagraph (b) to chapter II of the Model Law, requires the procuring entity to follow the provisions of chapter II in selecting the procurement method appropriate for the award of a closed framework agreement, and the procedures applicable to the procurement method selected. Neither the conditions for use nor this paragraph limit the procurement methods that can be used to award a closed framework agreement, on the condition, however, that the use of open tendering must be considered first and the use of any other method of procurement must

be justified. The choice takes account of both the circumstances of the procurement(s) concerned and the need to maximize competition as required by article 28. However, the importance of rigorous competition at the first stage of closed framework agreements means that the application of exceptions to open tendering should be carefully scrutinized, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate (as to which, see the **Introduction to this chapter**).

3. Examples of when procurement methods alternative to open tendering may be appropriate include the use of framework agreements for the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services (for which open tendering procurements may not be cost-effective), and specialized items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. There are examples in practice of effective procurement of complex subject matter using framework agreements combined with dialogue-based request-for-proposals methods, such as for the procurement of satellite equipment and specialized communications devices for law enforcement agencies. (See, also, the **commentary to section I of chapter II**. For a discussion of the decisions to use a framework agreement procedure and the choice of the procurement method and type of solicitation, see the Introduction to this chapter).

4. Paragraph (1) also envisages derogations from the procedures for the procurement method chosen as required to reflect a framework agreement procedure, such as that references to “tenders” or other submissions are to be construed as references to “initial” tenders or submissions where there will be second-stage competition involving second-stage tenders or submissions, and references to the selection of the successful supplier or contractor and to the conclusion of a procurement contract are to be construed as references to the admission of supplier(s) or contractors(s) to the framework agreement and the conclusion of that agreement. Enacting States may wish to provide guidance on the possible derogations, noting that the flexibility required to provide for closed framework agreements with and without second-stage competition and with one or more supplier or contractor parties means that the extent of the derogations will vary from case to case.

5. Paragraph (2) sets out the information that should be provided when soliciting participation in the framework agreement procedure. The solicitation documents must follow the normal rules for the procurement method selected: that is, they must set out the terms and conditions upon which

suppliers or contractors are to provide the subject matter of the procurement and the procedures for the award of procurement contracts (which will take place under the framework agreement). The two-stage nature of framework agreement procedures, which end with the award of procurement contract(s), means that the information provided to potential suppliers or contractors at the outset should cover both stages of the procurement. Hence the provisions regulate information pertaining to both stages, while making allowance for the fact that some terms and conditions of the procurement, disclosed in the solicitation documents in “traditional” procurement, will be refined or established at the second stage of the procedure.

6. The chapeau to paragraph (2) requires the normal solicitation information to be set out in full *mutatis mutandis*, meaning that information should be adapted to particularities of any given framework agreement procedure. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement. In other words, the solicitation documents must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the specifications and whether the selection of suppliers or contractors will be based on the lowest-priced or most advantageous submission) must be pre-disclosed also applies.

7. Deviations from the requirement to provide exhaustive information about the terms and conditions of the procurement at the time of solicitation of participation in the framework agreement procedure are permitted only so far as needed to accommodate the procurement concerned. For example, the procuring entity is unlikely to be able to fulfil the requirement of article 39 (d) for the solicitation documents to set out “the quantity of the goods; the services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided”. However, the extent of the necessary deviation will vary: the procuring entity may know the dates of each intended purchase, but not the quantities, or vice versa; alternatively, it may know the total quantity but not the purchase dates; or it may know none or all of these things.

8. The type of detailed information which is normally required to be provided when soliciting participation in a single-stage procedure, notably a “detailed description” and the requisite quantities under article 10 but which will necessarily be omitted in a framework agreement procedure will vary from case to case. The provisions are intended to ensure the maximum accuracy of the information provided to suppliers or contractors: greater accuracy should elicit better offers. Consequently, where the total quantity and delivery details regarding the purchases envisaged under the framework agreement are known at the first stage of the procurement, they must be disclosed. If the total quantity is not known at the first stage of the procurement, any minimum and maximum quantities that can be set for the purchases envisaged under the framework agreement should be included, failing which, wherever possible, estimates should be provided.

9. Paragraph (2) (b) requires disclosure of whether there will be one or more supplier or contractor parties to the agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (e.g. where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market).

10. There is no requirement for either a minimum or a maximum number of suppliers or contractors parties to a framework agreement; procuring entities should be encouraged to consider whether setting either or both would be appropriate. For example, a minimum number may be required to ensure security of supply; where second-stage competition is envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. Where the procuring entity envisages that the stated minimum may not be achieved, it should specify in the solicitation documents the steps that it will then take, which might involve the cancellation of the procurement or the conclusion of the framework agreement with a lower number of suppliers or contractors.

11. A maximum number may be appropriate, for example, where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly.

12. Where a minimum and/or a maximum of suppliers or contractors is or are to be imposed, the relevant number(s) must be notified in the solicitation documents. The record of procurement proceedings should, as a matter of best practice, include a justification of the procuring entity's decision(s)—and recording such information is an example of the additional information that the enacting State may wish to include in the list of information required to be included in the documentary record of the procurement proceedings under article 25 (1) (*w*). Where a maximum is stated, the criteria and procedures for selecting the participants should be to identify the relevant number of lowest-priced or most advantageous submissions. This approach involves ranking to select the suppliers or contractors to become parties to the framework agreement; although a defined maximum may be administratively simple, it has been observed, identifying a strictly defined number in advance could invite challenges from those whose submissions are ranked just below the winning suppliers' or contractors' (i.e. where there is very little to choose between successful and unsuccessful suppliers or contractors). A statement that a number within a defined range may be an appropriate alternative approach, provided that its intended use is clearly set out in the solicitation documents.

13. Paragraph (2) (*d*) requires that the form, terms and conditions of the framework agreement including, for example, whether there is to be second-stage competition, and evaluation criteria for the second stage, are to be provided in the solicitation documents. These transparency provisions are an application of the general principle of the Model Law that all terms and conditions of the procurement are to be determined in advance, as also reflected in the chapeau provisions of paragraph (2) (see above).

14. There is no exemption regarding the qualification and evaluation criteria and procedures for their application both for admission to the framework agreement and for any second-stage competition, save that the evaluation criteria to be applied at the second stage can vary within a pre-determined range, as explained in the **commentary to article 59** (1) (*d*). If this flexibility is to be used, the applicable range must be disclosed in the solicitation documents.

15. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (i.e. at the second stage of the procedure). On the other hand, transparency considerations,

objectivity in the process, and the need to prevent changes to selection criteria during procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers or contractors. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the framework agreement and thus also in the solicitation documents, and provided that the variation does not lead to a change in the description of the subject matter of the procurement (see article 63 and the **commentary thereto**).

16. Further guidance on the form, terms and conditions of the closed framework agreement is provided in the **commentary to article 59**.

17. Paragraph (3) provides that the provisions of article 22 on the acceptance of the successful submission and entry into force of the procurement contract apply to the award of a closed framework agreement, adapted as necessary to the framework agreement procedure (see the **commentary to article 22**). (Article 22 also applies in full to procurement contracts concluded under a framework agreement.) This provision is necessary because article 22 addresses the conclusion of a procurement contract and, as the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement itself is not a procurement contract.

18. The suppliers or contractors that will be parties to the framework agreement are selected on the basis set out in the solicitation documents, i.e. those submitting the lowest-price or most advantageous submission(s). The selection is made on the basis of a full examination of the initial submissions (where there is to be second-stage competition) or of the submissions (where there is no second-stage competition), and assessment of the suppliers' or contractors' qualifications. The responsive submissions are then evaluated, applying the evaluation criteria disclosed in the solicitation documents, and subject to any applicable maximum number of suppliers or contractors parties as set out in the solicitation documents.

19. Thereafter, the notification provisions and standstill period required by article 22 apply to the procedure through a cross reference in paragraph (3) (the exemptions envisaged to the standstill period under article 22 (3) either do not or are most unlikely to apply to the award of a closed framework agreement). The award of the closed framework agreement may also be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante approval

mechanisms of this type may be considered appropriate. If so, additional wording can be included in paragraph (3) or elsewhere in article 58 or in the procurement regulations, based on the optional wording found in article 30 (2). (On the discussion of ex ante approval mechanisms, see the section on “**Institutional support**” in part I of this *Guide*).

20. In order to forestall concerns that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold), article 23 of the Model Law requires the publication of a notice where a closed framework agreement is made in the same manner as the award of a procurement contract.

#### *Article 59. Requirements for closed framework agreements*

1. The purpose of article 59 is to set out the terms and conditions of the closed framework agreement and the award of contracts under that agreement. As some terms and conditions of the procurement are not set out at the outset of a framework agreement procedure (by contrast with “traditional” procurement), it is important for transparency reasons to require all those determined at the first stage, and the mechanism for determining the remainder, to be contained in the framework agreement itself. This safeguard will ensure that the terms and conditions of the procurement are known and consistent throughout the procedure. The framework agreement will therefore contain the terms and conditions that will apply to the second stage of the framework agreement procedure, including how the terms and conditions that were not established at the first stage will be settled: this information being important to encourage participation and transparency, it is also to be disclosed in the solicitation documents under article 58.

2. The chapeau provisions of paragraph (1) require the framework agreement to be in writing, in order to support the safeguards described in paragraph 1 above. They are supplemented by paragraph (2) of the article that allows under certain conditions to conclude individual agreements between the procuring entity and each supplier or contractor that is a party (see further below).

3. Paragraph (1) (a) refers to the limited duration of all closed framework agreements to the maximum set out in the procurement regulations, as discussed in the Introduction to this chapter. The main reason for imposing such a maximum is that the potentially anti-competitive effect of these agreements is considered to increase as their duration increases. It is important to note that the limit is the maximum duration, and not the average or

appropriate duration: the latter may vary as market conditions change, and in any event should reflect the nature of the procurement concerned, financial issues such as budgetary allocations, and regional or developmental differences within or among States.

4. The Model Law does not provide for extensions to concluded framework agreements or exemptions from the prescribed maximum duration: allowing such variations would defeat the purpose of the regime contemplated by the Model Law. If enacting States wish to provide for extensions in exceptional circumstances, a clear statement in the procurement regulations or rules or guidance from the public procurement agency or other body will be required to ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement. Rules or guidance from the public procurement agency or other body should also address the issue of a lengthy or sizeable purchase order or procurement contract towards the end of the validity of the framework agreement, not only to avoid abuse, but to ensure that procuring entities are not purchasing outdated or excessively priced items. If suppliers or contractors consider that procuring entities are using framework agreements beyond their intended scope, future participation may also be compromised: the efficacy of the technique in the longer term will depend, among other things, upon whether or not the terms are commercially viable for both parties.

5. Paragraph (1) (b) requires the terms and conditions of the procurement to be recorded in the framework agreement (and under article 58 will have been set out in the solicitation documents). These terms and conditions will include the description of the subject matter of the procurement, and the evaluation criteria in accordance with the requirements of article 11. (For guidance on the evaluation criteria in framework agreements procedures, see below.) These terms and conditions should also be set out in the light of the considerations that underpin the procuring entity's decision on the type of framework to be selected, as discussed in the Introduction to this chapter. Where the subject matter of the procurement is highly technical but may require customization, for example, an overly narrow approach to drafting the description and the use of detailed technical specifications may limit the usefulness of the framework agreement. The use of functional descriptions may enhance the efficacy of such a procedure, also by allowing for technological development and variations to suit the precise need at the time of the procurement contract. On the other hand, a precise technical description can enhance first-stage competition where no second-stage competition is to take place, should needs not be expected to vary. In addition, the procuring entity must ensure that the description is as accurate as possible both for

transparency reasons and to encourage participation in the procedure, and the guidance in the Introduction to this chapter may assist in this process.

6. Paragraph (1) (c) requires setting out in the framework agreement estimates of the terms and conditions that cannot be established with precision at the outset of the procedure. They are usually to be refined or established through second-stage competition, such as the timing, frequency and quantities of anticipated purchases, and the contract price. To the extent the estimates are known, they must be set out. Providing the best available estimates, where firm commitments are not possible, will also encourage participation. Naturally, the limitations on estimates should also be recorded, or a statement that accurate estimates are not possible (e.g. where emergency procurement is concerned).

7. Maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, guidance to these provisions should set out other sources of regulation in detail.

8. The contract price may or may not be established at the first stage. Where the subject matter is subject to price or currency fluctuations, or the combination of service providers may vary, it may be counterproductive to try to set a contract price at the outset. A common criticism of framework agreements of this type is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive, and task-based or project-based pricing should therefore be encouraged, where appropriate.

9. It will generally be the case that the agreement will provide that suppliers or contractors may not increase their prices or reduce the quality of their submissions at the second stage of the procedure, because of the obvious commercial disadvantages and resultant lack of security of supply that would ensue, but in certain markets, where price fluctuations are the norm, the framework agreement may appropriately provide a price adjustment mechanism to match the market.

10. Paragraph (1) (d) requires the framework agreement to identify whether or not second-stage competition will be used to award the procurement contracts under the framework agreement, and if it will be used, to define

terms and conditions of such second-stage competition. Paragraph (1) (d) (i) and (ii) require the substantive rules and procedures for any second-stage competition to be set out in the framework agreement. The rules and procedures are designed to ensure effective competition at the second stage: for example, all suppliers or contractors parties to the framework agreement are, in principle, entitled to participate at the second stage, as is explained further in the **commentary to article 62** below. The framework agreement must also set out the envisaged frequency of the competition, and anticipated time frame for presenting second-stage submissions—this information is not binding on the procuring entity, and is included both to enhance participation through providing to suppliers or contractors the best available information and to encourage effective procurement planning.

11. A key determinant of whether second-stage competition will be effective is the manner in which evaluation criteria will be designed and applied. A balance is needed between evaluation criteria that are so inflexible that there may be effectively only one supplier or contractor at the second stage, with consequential harm to value for money and administrative efficiency, and the use of such broad or vague criteria that their relative weights and the process can be manipulated to favour certain suppliers or contractors. The rules in paragraph (1) (d) (iii) therefore provide that the relative weight to be applied in the evaluation criteria during the second-stage competition should be disclosed at the first stage of the procedure. However, they also provide for limited flexibility to vary or give greater precision to the evaluation criteria at the second stage, reflecting the fact that multiple purchasers might use a framework agreement, with different relative weights to suit their individual evaluation criteria, and that some framework agreements may be of long duration. This flexibility will also be useful for centralized purchasing agencies, and to avoid the negative impact on value for money if one common standard must be applied to all users of the framework agreement.

12. The mechanism in paragraph (1) (d) (iii) therefore allows for relative weights of the evaluation criteria at the second stage to be varied within a pre-established range or matrix set out in the framework agreement and the solicitation documents.

13. Flexibility in applying evaluation criteria should be monitored to ensure that it does not become a substitute for adequate procurement planning, does not distort purchasing decisions in favour of administrative ease, does not encourage the use of broad terms of reference that are not based on a careful identification of needs, and does not encourage the abusive direction of procurement contracts to favoured suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to

a fee-earning centralized purchasing agency, which may use framework agreements to generate income (see, further, the discussion of outsourcing in the Introduction to this chapter). Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Ensuring that there is full transparency in the application of evaluation criteria, and the use of a predetermined and predisclosed range, will facilitate such oversight and assist in compliance with the requirement of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) that requires the evaluation criteria to be set and disclosed in advance (article 9 (1) (b) of the Convention). Enacting States will wish to provide that their oversight regimes examine the use of a range of evaluation criteria, in order to ensure that the range set out in the framework agreement is not so wide as to make the safeguards meaningless in practice.

14. Paragraph (1) (e) notes that the framework agreement must also set out whether the award of the procurement contract(s) under the framework agreement will be made to the lowest-priced or most advantageous submission. The basis of the award will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate. Where the enacting State has issued laws on competition policy, or there are provisions on that policy in the procurement regulations, such laws or regulations may provide for the evaluation criteria that aim at implementing socio-economic policies of the enacting State in accordance with article 11 (3). Such criteria may include, for example, the effect of a submission on the market for the subject matter of the procurement concerned. While such policies will not permit rotation among suppliers or contractors, they may allow the awards of procurement contracts to take account of competition policy. On the question of socio-economic policies generally, see the **section on that topic in part I of this Guide** and in the Introduction to chapter I and the **commentary to articles 2 and 8**.

15. Paragraph (2) provides limited flexibility to the procuring entity to enter into separate agreements with individual suppliers or contractors that are parties to the framework agreement. General principles of transparency and fair, equal and equitable treatment indicate that each supplier or contractor should be subject to the same terms and conditions; the provisions therefore limit exceptions to minor variations that concern only those provisions that

justify the conclusion of separate agreements; those justifications are to be put on the record. An example may be the need to execute separate agreements to protect intangible or intellectual property rights. In such cases, the result should not involve different performance obligations for different suppliers or contractors parties to the framework agreement. The need for separate agreements may arise also where different licensing terms need to be accommodated or where suppliers or contractors have presented submissions for only part of the procurement.

16. Paragraph (3) requires all information necessary to allow for the framework agreement to operate effectively, in addition to the above requirements, to be set out in the agreement itself. This approach is also intended to ensure transparency and predictability in the process. Such information may include technical issues, such as requirements for connection to a website if the framework agreement is to operate electronically, particular software, technical features and, if relevant, capacity. These requirements can be supplemented by detailed regulations to ensure that the technology used by the procuring entity does not operate as a barrier to access to the relevant part of the procurement market, applying the principles set out in article 7 (see the [commentary to that article](#)).

17. In multi-supplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). Enacting States may therefore wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments.

#### *Article 60. Establishment of an open framework agreement*

1. The purpose of article 60 is to set out the procedure for the first stage of an open framework agreement procedure. By comparison with the provisions for closed framework agreements, which are concluded through the use of a procurement method under chapters III, IV or V of the Model Law, an open framework agreement procedure is a self-contained one, and this article provides for the relevant procedures.

2. Paragraph (1) records the requirement that the agreement be established and maintained online. This provision is a rare exception to the approach of the Model Law in that its provisions are technologically neutral, and is included because seeking to operate an open framework agreement in traditional, paper-based format would defeat the administrative efficiency that lies at the heart of open framework agreement procedures, in that it relies

on the use of Internet-based, electronic means of communication. The procedure is designed to involve a permanently open web-based procurement opportunity, which suppliers or contractors can consult at any time to decide whether they wish to participate in the procurements concerned, without necessarily imposing the administrative burden of providing individual information to those suppliers or contractors, with consequent delays in response times. Requests to participate in the open framework agreement and responses to invitations to present second-stage submissions are intended to be submitted and considered in a time frame that only online procurement can accommodate.

3. Paragraph (2) provides the mechanism for solicitation of participation in the open framework agreement procedure. It applies the provisions of article 33 by reference; it is self-evident that solicitation to become a party to an open framework agreement must itself be open. The solicitation must also be international, unless the exceptions referred to in article 33 (4) and article 8 by cross reference apply (see the **commentary to articles 33** (4) and 8). It is recommended that the invitation also be made permanently available on the website at which the framework agreement will be maintained (see, also, the **guidance to article 61** (2) below, regarding ongoing publicity and transparency mechanisms, including periodic republication of the initial invitation).

4. Paragraph (3) sets out the requirements of the invitation that solicits participation in the procedure, and tracks the requirements for an invitation to tender and contents of solicitation documents in open tendering proceedings (articles 37 and 39), with certain deviations necessary to accommodate the conditions of an open framework agreement. In particular, the commentary to solicitation in open tendering proceedings should be consulted on the provisions equivalent to those in paragraphs (3) (d) (i), (3) (f) and (3) (g). The provisions are also consistent, so far as possible, with those applicable to closed framework agreements. In particular, the commentary to solicitation in closed framework agreements should be consulted on the provisions equivalent to those contained in paragraphs (3) (b) and (3) (e). Guidance on issues particular to open framework agreement procedures appears in the following paragraphs.

5. For reasons of transparency and predictability, paragraph (3) (a) requires the names and addresses of all procuring entities that can use the framework agreement to be included in the invitation to become a party to the open framework agreement. The provision is therefore flexible in terms of allowing procuring entities to group together to maximize their purchasing power, and in allowing the use of centralized purchasing agencies, but the framework agreement is not open to new purchasers. The reason for both the

flexibility and the limitation is to provide adequate transparency and to support value for money: suppliers or contractors need to know the details of the procuring entities that may issue procurement contracts if they are to be encouraged to participate and to present submissions that meet the needs of the procuring entity, and the efficacy of the procedure is to be ensured. In addition, the requirements of contract formation in individual States will vary; some may not permit procuring entities to join the framework agreement without significant administrative procedures. The provision should be read together with the definition of “procuring entity”, in article 2 (*n*), which allows more than one purchaser in a given procurement to be the “procuring entity” for that procurement. In the context of framework agreements, the entity that awards a procurement contract is by definition the procuring entity for that procurement; the framework agreement itself allows for several potential purchasers at the second stage. However, one agency will be responsible for establishing and maintaining the framework agreement, and it will be identified as the “procuring entity” for that purpose, as provided for in paragraph (3) (*a*). The transparency requirement can be implemented in the manner considered appropriate by the procuring entity by reference to the circumstances of the procurement concerned: for example, the information can be referenced via a website containing relevant names and addresses; where there is a centralized purchasing agency, that agency may be authorized to undertake the procurements concerned in its own name (as a principal), without therefore needing to publish details of its own client entities; if the agency operates as an agent, however, these details must then be published.

6. Paragraph (3) (*c*) requires the languages of the framework agreement to be set out in the invitation, and includes other measures to promote transparency and consequently to enhance access to the framework agreement once it has been concluded. The website at which the open framework agreement is located should be easy to locate, as an example of the general considerations regarding effective transparency in electronic procurement (see the commentary on e-procurement in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*). The invitation is also required to set out any specific requirements for access to the framework agreement; guidance on ensuring effective market access to procurement is provided in the **commentary to article 7**.

7. Paragraph (3) (*d*) contains a mixture of provisions of general applicability, and provisions specific to open framework agreement procedures, which together provide the terms and conditions under which suppliers or contractors can become parties to the open framework agreement. Paragraph (3) (*d*) (*i*) requires the standard declaration as to whether participation is to be restricted on the basis of nationality in the limited circumstances envisaged

by article 8 (see the **commentary to that article**). Paragraph (3) (d) (ii) is an optional provision (accordingly presented in brackets) permitting a maximum number of suppliers or contractors parties to the framework agreement to be set. The provision need not be enacted by States where local technical constraints do not so require, and in any event should be read in conjunction with the limited scope of this permission in paragraph (7) of this article (as explained in the commentary to that paragraph of the article below), so as to provide essential safeguards against abuse and undesirable consequences. The paragraph requires the non-discriminatory procedure and criteria that are to be followed in selecting any maximum to be disclosed. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the **Introduction to chapter IV**, such as “first-come, first-served,” the drawing of lots, rotation or other random choice in a commodity-type market. The goal should be to achieve maximum effective competition to the extent practicable. This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited.

8. Paragraph (3) (d) (iii) addresses the manner in which applications to become parties to the framework agreement are to be presented and assessed, and it tracks the information required for tendering proceedings under article 39. The provision refers to “indicative submissions”, a term used to reflect that there will always be second-stage competition under an open framework agreement. Moreover, while the qualifications of suppliers or contractors are assessed, and their submissions are examined against the relevant description to assess responsiveness (see paragraphs (5) and (6) of the article), by comparison with initial submissions in closed framework agreements, there is no requirement for an evaluation of indicative submissions. However, where the procuring entity considers that an evaluation—i.e. a competitive comparison of submissions, such as the one provided for in article 43 would be appropriate, it should set out in the solicitation documents that the evaluation will take place. Also by contrast with the position in closed framework agreements, and as is explained in the guidance to paragraph (6) of the article below, all suppliers or contractors presenting responsive submissions are eligible to join the framework agreement, provided that they are qualified.

9. Paragraph (3) (d) (iv) requires the invitation to include a statement that the framework agreement remains open to new suppliers or contractors to join it throughout its duration (see paragraph (4) of the article for the related substantive requirement), unless the stated maximum of suppliers or contractors parties to the agreement is exceeded and unless the potential suppliers or contractors are excluded under limitations to participation imposed in

accordance with article 8. The invitation should also set out any limitations to new joiners (which might arise out of capacity constraints, as described above, or as a result of imposition of limitations under article 8 of the Model Law), plus any further requirements, for example as regards qualifications of parties to the agreement and responsiveness of their indicative submissions.

10. Paragraph 3 (*e*) requires all the terms and conditions of the framework agreement (themselves governed by article 61) to be set out in the invitation, including, among other things, the description of the subject matter of the procurement and evaluation criteria. The requirements for those terms and conditions are discussed in the **commentary to article 61** below.

11. Paragraph (4) sets out the substantive requirement that the framework agreement be open to new suppliers or contractors throughout the period of its operation. As noted in the Introduction to this chapter, this provision is a key feature of open framework agreements.

12. Paragraph (5) requires indicative submissions received during the operation of the framework agreement to be assessed within a maximum period of time to be specified by an enacting State in the law. Such a period should be short in order that the framework agreement remains open to new joiners in reality; this is a critical feature in the context of an online open framework agreement, which may be designed for small-scale and regular purchases. All responsive submissions from qualified suppliers or contractors must be accepted and the suppliers or contractors concerned admitted to the framework agreement, as provided for in paragraph (6), subject to any capacity constraints justifying rejection imposed under paragraphs (3) (*d*) (ii) and (7) or other restrictions (where the procurement is domestic, for example; see the relevant discussion above), as set out in the invitation to become a party to the agreement.

13. Paragraph (7) is linked to paragraph (3) (*d*) (ii), both of which are put in brackets as an optional text to be considered for inclusion in the law by an enacting State. They concern imposition of the maximum number of suppliers or contractors parties to the agreement because of technical constraints. In addition to the considerations raised in connection with the similar provisions appearing in the context of ERAs (see the **commentary to article 53 (1) (k) and (2)**), there are additional considerations that an enacting State should keep in mind when considering enacting these provisions. Because the salient difference between closed and open framework agreements is that the latter remain open to new suppliers or contractors throughout their operation, any imposition of a maximum number of suppliers or contractors parties may effectively turn the open framework agreement into a closed framework agreement. This situation may be exacerbated in that

the benefits of a fluctuating pool of suppliers or contractors may be lost if suppliers or contractors that cease to participate in second-stage competition remain, from a technical point of view, parties to the framework agreement and block new joiners. Paragraph (7) therefore permits such a maximum number of supplier or contractors parties only where technical capacity constrains access to the systems concerned (e.g. the software for the framework agreement may accommodate only a certain maximum number). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision is likely to become obsolete within a short period.

14. Even though a maximum number, where needed, is likely to be of a reasonable size, the procuring entity is required to be objective in the manner of selecting the suppliers or contractors parties up to that maximum. See, further, the discussion of ensuring objectivity above, and the Introduction to chapter IV. The procurement regulations or rules or guidance from the public procurement agency or other body should provide guidance on these matters to procuring entities (noting, in particular, possibility of a challenge under chapter VIII).

15. Enacting States will observe that there is no evaluation of the indicative submissions provided for in this article. The nature of an open framework agreement is that, as is explained above, all responsive submissions from qualified suppliers or contractors are accepted. As is further explained in the **commentary to article 62** below, price competition is largely absent at the first stage, and so ensuring genuine competition at the second stage is critical.

16. The provisions of paragraph (8) are designed to provide transparency in decision-making and to allow a supplier or contractor to challenge the decision of the procuring entity not to accept the supplier or contractor in the framework agreement procedure if desired. The inclusion of such provision in the context of the open framework agreement is justified because safeguards of the standstill period notification would not be applicable to indicative submissions but only to submissions presented in response to the specific purchase orders placed under the agreement (the second-stage submissions). It is therefore essential for the supplier or contractor to know whether it is the party to the agreement without which it would not be able to learn about purchase orders placed under the agreement and present second-stage submissions. However, in the case of the challenge of the procuring entity's decision, the policy considerations regarding delaying the execution of a procurement contract to allow an effective challenge and allowing the procurement contract to proceed are different in the open

framework agreement context from the norm (the general policy considerations are set out in the **commentary to article 22**). In the case of open framework agreements, any aggrieved supplier or contractor whose submission was rejected as non-responsive or that was not admitted because of disqualification will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour. The harm occasioned by the delay in participation was considered as unlikely to override the interest in allowing an effectively limited portion of procurement contracts in open framework agreements to proceed.

### *Article 61. Requirements for open framework agreements*

1. Article 61 mirrors article 59 regarding closed framework agreements, and governs the terms and conditions of the open framework agreement and the award of contracts under it. As is also the case for closed framework agreements, the law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law. These issues are therefore not addressed in the Model Law.

2. Paragraph (1) records the requirement that the award of procurement contracts under the open framework agreement must be carried out through a competition at the second stage of the framework agreement procedure. Subparagraphs (c)-(f) set out the terms and procedures of the second-stage competition. They are similar to the provisions in paragraph (1) (d) of article 59, the **commentary to which** is therefore relevant in the context of article 61. The differences reflect the nature of the possible subject matter to be procured through open framework agreements (i.e. simple standardized items).

3. Paragraph (1) (a) requires the duration of the framework agreement to be recorded in that agreement. By comparison with closed framework agreements, there is no reference to any maximum duration imposed under the procurement regulations: the fact that the agreement is open to new suppliers or contractors throughout its period of operation lessens the risks of choking off competition as described in the **commentary to closed framework agreements**. However, in order to allow for new technologies and solutions, and to avoid obsolescence, the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject matter being procured. (See, also, the **Introduction to this chapter** on the importance of a periodic reassessment of whether the framework agreement continues to reflect what is currently available in the relevant market.) In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration.

4. Paragraph 1 (b) requires the terms and conditions of the procurement that are known at the stage when the open framework agreement is established to be recorded in the framework agreement (and under article 60 will have been provided in the invitation to become a party to the open framework agreement). This provision is similar to article 59 (1) (b) regarding closed framework agreements, but as noted above, some deviations are justified in the light of the nature of subject matter intended to be procured through the open framework agreements. Their nature would not require establishing any terms and conditions of the procurement at the second stage but only the refinement of the established ones, for example as regards the quantity, place and time frame of the delivery of the subject matter. Although the nature of an open framework agreement tends to indicate that the description of the procurement will be framed in functional and broad terms so as to allow refinement to the statement of the procuring entity's needs at the second stage, it is important that it is not so broad that the open framework agreement becomes little more than a suppliers' list (see the Introduction to this chapter). If that were the case, the procuring entity or entities using the framework agreement would be required to conduct or re-conduct stages of the procurement at the second stage (fuller reconsideration of qualifications and responsiveness as well as the evaluation of second-stage submissions), thus defeating the efficacy of the procedure. In addition, the extent of the change in the initial terms of solicitation at the second stage is subject to limitations of article 63. On the other hand, sufficient flexibility is required to allow for changes in the regulatory framework, such as regarding environmental requirements or those pertaining to sustainability.

5. Paragraph (2) requires the periodic re-advertising of the invitation to become a party to the open framework agreement. The invitation must be published, at a minimum, once a year, in the same place as the initial invitation. Nonetheless, enacting States may consider that more frequent publication will encourage greater participation and competition. The electronic operation of the open framework agreement implies purely online publication, including at the first stage under article 33, thus keeping the costs of publication to a reasonable level. The invitation must contain all information necessary for the operation of the framework agreement (including the relevant website, and supporting technical information).

6. Paragraph (2) also requires the procuring entity to ensure unrestricted, direct and full access to the terms and conditions of the framework agreement; the agreement operates online, which means that such information must be available at a website indicated in the invitation. It should also include the names of all procuring entities that may use the framework agreement: otherwise, they will not become parties to it (see the **commentary to article 60 (3) (a)** on the various ways in which this information can

be provided). Although there is no explicit requirement in the Model Law to make the list of suppliers or contractors parties to the framework agreement continuously available on the website, posting the list in such a way could be effective implementation of the requirement of article 23 (1) on the public notice of the award of the framework agreement. Such notice must include the names of suppliers or contractors to whom the framework agreement is awarded. Second-stage competitions should also be publicized on that website, as further explained in the commentary to article 62 immediately below.

### *Article 62. Second stage of a framework agreement procedure*

1. Article 62 governs second-stage competition under both closed and open framework agreements. Some of its provisions, such as in paragraph (3), are intended to accommodate differences in the award of procurement contracts under closed framework agreements without second-stage competition and closed framework agreements with second-stage competition.
2. As paragraph (1) notes, the framework agreement sets out the substantive criteria and certain procedures governing the award of procurement contracts under the framework agreement, and the provisions of this article record the other elements of the award procedures. Thus there is a requirement for full transparency as regards both the award criteria and the procedures themselves.
3. The procedures are aimed at allowing effective competition at this second stage of the procedure, while avoiding excessive and time-consuming requirements that would defeat the efficiency of the framework agreement procedures. These considerations are particularly important in open framework agreements, in which there have been indicative, rather than initial, submissions at the first stage and there has been no evaluation of those submissions. Where the framework agreement provides for second-stage competition, enacting States may wish to provide regulations or guidance to ensure that it is clear whether suppliers or contractors may vary their first-stage (initial) submissions at the second stage with a result less favourable to the procuring entity (e.g. by increasing prices if market conditions change).
4. Paragraph (2) records that a procurement contract can be awarded only to a supplier or contractor that is a party to the framework agreement. This may be self-evident as regards closed framework agreements, but in the context of open framework agreements the provision underscores the importance of swift examination of applications to join the framework agreement, and the utility of relatively frequent and reasonable-sized second-stage competitions

to take advantage of a competitive and dynamic market. In practice, a second-stage competition will be announced on the website of the open framework agreement, with a relatively short period for presenting final submissions in the second-stage competition. New joiners may wish to present their indicative submissions in time to be considered for the second-stage competition but may be able to participate only in subsequent competitions. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the open framework agreement.

5. Paragraph (3) records that article 22 applies to the acceptance of the successful submission under closed framework agreements without second-stage competition, except as regards the application of paragraph (2) of that article on a notice of a standstill period. This exemption reflects the provisions of article 22 (3) (a) that excludes the application of the requirement on a standstill period to awards of procurement contracts under a framework agreement procedure without second-stage competition (for the reason for such exclusion, see the **commentary to that article**).

6. Paragraph (4) sets out the procedures for the second-stage competition. Subparagraph (a) requires the issue of an invitation to the competition to all parties of the framework agreement or only those then capable of meeting the needs of the procuring entity in the subject matter of the procurement; in the latter case, the Model Law requires the procuring entity to give a notice of the second-stage competition to all parties to the framework agreement. The objectives of this provision are twofold: first, to avoid abuse or misuse in the award of contracts to favoured suppliers or contractors and, secondly, to limit submissions to those that are capable of fulfilling them to enhance efficiency.

7. The notice of the second-stage competition must be given at the same time when the invitation to the second-stage competition is issued. Giving such notice in this manner will allow any excluded supplier or contractor time to challenge the procuring entity's decision not to invite that supplier or contractor to the second-stage competition. This is an important safeguard: allowing much discretion on the procuring entity as regards the pool of suppliers or contractors to be invited to the second-stage competition may lead to abuse, such as favouritism. It is also critical in ensuring that second-stage competition is effective, recalling that experience in the use of framework agreements indicates that this stage of the process is a vulnerable one from the perspective of participation and competition. This vulnerability may increase even further since notification of the standstill period (article 22 (2)) will be provided only to suppliers or contractors that presented second-stage submissions (but not to all parties of the framework agreement).

8. To avoid being confronted by many aggrieved suppliers or contractors that challenge the procuring entity's assessment of their capability to meet the procuring entity's needs at a particular time, the procuring entity should interpret the term "then capable of meeting the needs" in a very narrow sense, in the light of the terms and conditions of the framework agreement and of the initial or indicative submissions. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally); initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements. The assessment of suppliers or contractors that are "capable" in this sense is therefore objective; all suppliers or contractors parties to the agreement must be presumed to be capable unless the framework agreement or their initial or indicative submissions provide to the contrary. The procuring entity should include an explanation in the record of the procurement as to why any suppliers or contractors parties to the agreement are not invited to participate in the second-stage competition.

9. The Model Law requires a written invitation to the second-stage competition to be issued simultaneously to each supplier or contractor being invited. The terms and conditions of the framework agreement may regulate the manner of issuing invitations, for example automated invitations for efficiency reasons. Although the Model Law does not regulate how the notice is to be provided, best practice is to issue the notice the same way as invitations, i.e. simultaneously to each supplier or contractor party to the framework agreement. The use of electronic notices keeps the costs of so doing to a minimum. A notice of the second-stage competition or a copy of the invitation could in addition be placed on the website at which the framework agreement itself is located; this may also encourage new suppliers or contractors to participate in the procedure where possible (i.e. in open framework agreements). There may be cost-efficient opportunities to publicize the second-stage competition further.

10. Enacting States will observe, however, that there is no requirement to issue a general notice of the second-stage competition, reflecting the presumption that the first stage of the framework agreement will have included an open invitation. This is because open tendering will be used by default for the award of a closed framework agreement under articles 28 and 58 (1) (see the **commentary to articles 28 and 58 (1)**) while open solicitation is required for the award of open framework agreements under article 60 (2) (see the **commentary thereto**). The Model Law seeks to avoid imposing too many procedural steps on the process that might compromise its efficiency.

11. Paragraph (4) (b) regulates the content of the invitation to the second-stage competition. Subparagraph (i) requires the information that sets out the scope of the second-stage competition to be included in the invitation, a vital transparency requirement. Where the invitation is issued electronically (which must be, for example, in open framework agreements), procuring entities may wish to incorporate the required restatement of the existing terms and conditions of the framework agreement by hyperlink (i.e. by cross-reference), provided that the link is adequately maintained. The invitation must also include both the terms and conditions of the procurement that are the subject of the competition and further details thereof where necessary. This provision should be read together with articles 59 (1) (d) (i) and 61 (1) (c), which require the framework agreement to set out the terms and conditions that may be established or refined through second-stage competition. The flexibility to engage in such refinement is limited by application of article 63 which provides that there may be no change to the description of the subject matter of the procurement, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10) to allow for such modifications. Other terms and conditions that may be refined include combinations of components (within the overall description), warranties, delivery times and so forth. The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in this aspect of the use of framework agreements.

12. Subparagraph (ii) requires a restatement of the procedures and criteria for evaluation of submissions, as originally set out in the framework agreement. Again, this provision is aimed at enhancing transparency, and should be read together with articles 59 (1) (d) (iii) and 61 (1) (f), which allow the relative weights of the evaluation criteria (including subcriteria) to be varied within a range set out in the framework agreement itself. Appropriate evaluation criteria and procedures at this second stage are critical if there is to be effective competition, objectivity and transparency, and their importance and application are explained in the [commentary to article 59](#).

13. Subparagraphs (iii)-(xi) repeat provisions from article 39 on the contents of solicitation documents (see the [commentary to that article](#)). With reference to subparagraph (iv), it is important to provide in the context of framework agreements a suitable deadline for presenting submissions: in the context of open framework agreements, for example, it may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the

procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14 (2) of the Model Law, which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events.

14. Paragraph (4) (c) is derived from the general requirements in article 11 (6), requiring objectivity and transparency in the evaluation of submissions by not permitting any previously undisclosed criteria or procedures to be applied during the evaluation (see the **commentary to that article**).

15. Paragraph (4) (d) applies the requirements of article 22, including on a standstill period, to the acceptance of the successful submission in the end of the second-stage competition (see the **commentary to that article**). Paragraph (10) of article 22 would require that the notice of the procurement contract specifying the name and address of the supplier or contractor that has entered into contract and the contract price be disclosed to the suppliers or contractors that presented second-stage submissions, so as to facilitate any challenge by unsuccessful suppliers or contractors. Paragraph (2) would require the procuring entity to provide explanations to unsuccessful parties of why their submissions were unsuccessful. This type of information and debriefing are particularly useful in the context of framework agreements where repeated procurements can benefit from improved submissions.

16. The provisions of article 23, requiring publication of the award, will apply to the award of procurement contracts under framework agreements (allowing smaller purchases to be grouped together for publicity purposes) (see the **commentary to that article**).

### *Article 63. Changes during the operation of a framework agreement*

1. Article 63 is intended to ensure objectivity and transparency in the operation of the framework agreement. It first provides that there can be no change in the description of the subject matter of the procurement, because allowing such a change would mean that the original call for participation would no longer be accurate, and a new procurement would therefore be required. The need for flexibility in the operation of framework agreements, such as

permitting refinements of certain terms and conditions of the procurement during second-stage competition, means that changes to those terms and conditions (including to the evaluation criteria) must be possible. The article therefore provides that such changes are permitted, but only to the extent that they do not change the description of the subject matter of the procurement, and with the transparency safeguard that changes are possible only to the extent permitted in the framework agreement. Thus even if within the permitted scope of variations under the framework agreement, a change would not be acceptable if it effectively led to a change in the description of the subject matter of the procurement (e.g. if the minimum quality requirements were waived or altered).

2. As a result, the description of the subject matter of the procurement may be framed in a functional or output-based way, with minimum technical requirements where appropriate, so as to allow for subject-matter modifications or technical substitutions as described in the commentary to the previous articles of chapter VII. Whether this approach is appropriate will depend on the nature of the procurement itself, as explained in the **Introduction to this chapter** and in the **commentary to article 59**. There is a risk of abuse in both allowing broad and generic specifications, and in permitting changes; the framework agreement may be used for administrative convenience beyond its intended scope, allowing non-transparent and non-competitive awards of procurement contracts. Furthermore, this lack of transparency and competition will also have the potential significantly to compromise value for money in those awards. The procurement regulations or rules or guidance from the public procurement agency or other body should therefore address these risks and appropriate measures to mitigate them in some detail.

## CHAPTER VIII. CHALLENGE PROCEEDINGS

### A. Introduction

#### 1. Summary

1. A key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include not only audits and investigations, and prosecutions for criminal offences, but also challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation. Challenge procedures are provided for in chapter VIII of the Model Law; the other mechanisms involve broader questions of oversight of administrative decision-making than arise in the procurement context alone, and consequently are not provided for in the Model Law.

2. An effective challenge mechanism helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for suppliers and contractors that have a natural interest in monitoring procuring entities' compliance with the provisions of the Model Law in each procurement procedure. It also helps foster public confidence in the procurement system as a whole. An additional function of a challenge mechanism is to act as a deterrent: its existence is designed to discourage actions or decisions knowingly in breach of the law. For these reasons, a challenge mechanism is an essential element of ensuring the proper functioning of the procurement system and can promote confidence in that system.

3. Furthermore, article 9 (1) (d) of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) requires procurement systems to include an effective challenge mechanism, termed a system of domestic review and including a system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures required by article 9 (1) of the Convention are not followed. UNCITRAL, in seeking to ensure that the Model Law addresses the Convention's requirements, requires in the Model Law that enacting States provide all rights and procedures

necessary (both at first instance and in appeals) for such an effective challenge mechanism. Similarly, and applying its general approach to the international context of the Model Law, the Model Law has been designed to be consistent, so far as practicable, with the approach to challenge procedures under the WTO GPA (see **paragraph 8 of part I** of this *Guide*).

4. Chapter VIII of the Model Law contains the provisions aimed at ensuring an effective challenge mechanism, and enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits. They comprise a general right to challenge (and to appeal a decision in a challenge proceeding), an optional request to the procuring entity to reconsider a decision taken in the procurement process; a review by an independent body; and/or an application to the court. However, the Model Law does not impose a specific structure on the system. In addition, there are various mechanisms to ensure the efficacy of the challenge mechanism. The Model Law seeks to decrease the need for challenges through its procedures for each procurement process. For example, article 15 provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents; the clarification mechanism in article 16 is designed to reduce the likelihood of challenges to decisions on qualifications, responsiveness and on the evaluation of submissions.

5. Other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under chapter VIII if for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, appropriate guidance should be provided to procuring entities and to suppliers or contractors, including requiring that the information about such allegations be made publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

## ***2. Enactment: policy considerations***

6. The requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) and the Model Law are founded on the recognition that legislation for challenge procedures needs to be drafted in a manner consistent with the legal tradition in the enacting State concerned. It is recognized that there exist in most States mechanisms and procedures for the challenge of acts of administrative organs and other public entities (often called a review function). In some States, such mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those

disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. States do, however, differ significantly in their approach to enforcement: in some countries, there is a long-standing system of review before specialist authorities and courts; in others there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some systems there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal, while in others there is a combination of administrative review, or independent review, and/or judicial review of procurement decisions through the ordinary courts (accompanied by special criminal proceedings for violations of procurement laws by procuring entities).

7. In view of the above, and in order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world, the provisions in chapter VIII set out the principles and main procedures to be followed in order to constitute an effective challenge mechanism. Continuing the general approach of the Model Law as a framework text (see the **section on “The Model Law as a ‘framework’ law: elements of a procurement system” in part I of this Guide**), they are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner.

8. In general terms, an effective mechanism involves the possibility of intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible (e.g. in some jurisdictions, after the contract is awarded); and the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course. The mechanism, in order to be effective, must include, at least one body to hear a challenge as a first step and a further body to hear an appeal as a second step.

9. The Model Law’s provisions require enacting States to provide for all the above elements of an effective mechanism, in a manner consistent with their legal tradition. They establish in the first place that suppliers and contractors have a right to challenge an act or decision of a procuring entity: there are no acts or decisions in a procurement procedure that are exempt from the mechanism. As to the body to hear the challenge (i.e. the first step), the Model Law provides for three alternatives.

10. As a first alternative, an application for reconsideration may be presented to the procuring entity itself under article 66, provided that the procurement contract is yet to be awarded. The purpose of providing for this procedure is to allow the procuring entity to correct defective acts, decisions or procedures.

11. Significantly, this system is an option for suppliers or contractors, and not a mandatory first step in the challenge process. The system has been included so as to facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs. Speedy remedies that can be granted without significant time and cost are features that are highly desirable in a procurement challenge mechanism. The fact that the procuring entity will be in possession of the facts relating to, and in control of, the procurement proceedings concerned, and may be willing and able to correct procedural errors of which it may perhaps not have been aware, contribute to achieving them. These features are important not only to the challenging supplier or contractor, but also in order to minimize disruption to the procurement process as a whole. Such a voluntary system may also lessen the perceived risk of jeopardizing future business through a legal procedure, which has been observed to operate as a disincentive to challenges. On the other hand, it is sometimes observed that procuring entities simply ignore the request, and submitting one operates in practice merely to delay a formal application in another forum. Enacting States are encouraged therefore to include the system, given its potential benefits, but to take steps to ensure that it functions in practice (matters of such implementation and use are considered in the following section).

12. The second alternative is for an independent, third-party review of the decision or action of the procuring entity that the supplier or contractor alleges is not in compliance with the law. This independent review may operate as an administrative procedure. It is broader in scope than the peer system outlined above, because challenges can be submitted after the entry into force of the procurement contract (or framework agreement). The independent body receiving the challenge may grant a wide range of remedies, and the **commentary to the provisions concerned** highlights those remedies that may not traditionally be available in certain legal systems. Those remedies are considered important features of the system envisaged under the Model Law, so enacting States are encouraged to enact them, subject to ensuring consistency between the independent review system and equivalent mechanisms before their courts. The length of time for disputes to be resolved in traditional court proceedings, and the potential benefits that can accrue with the acquisition of specialist expertise within the independent bodies, are also grounds for providing for the independent review system.

13. The third alternative is an application to a competent court. The Model Law does not provide procedures for such proceedings, which will be governed by applicable national law. Enacting States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system for first instance applications and appeals, to ensure adequate legal recourse and remedies in the event that the procurement rules and procedures of the procurement law are not followed, in order to be compliant with the requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*).

14. As to the body to hear the appeal, enacting States may limit such applications to the court, or may provide that they can be submitted to the independent body, or both, to reflect the legal system in the State concerned. Where the State wishes to provide for appeal before the independent review body under article 67, that article will need to be adapted to allow for the body to hear appeals: in the form it is provided in the Model Law, article 67 confers competence to hear challenges alone. See, also, the **commentary to that article** as regards the competence to hear challenges once a contract has entered into force.

15. Enacting States may also wish to use the provisions of the Model Law to assess the effectiveness of challenge mechanisms already in operation in their country. Where a system of effective and efficient court review is already present, there may be little benefit in introducing a new independent body. There may be equally little benefit in promoting procurement specialization in the courts if there is a well-functioning alternative forum. The importance of individuals with specialist expertise within any forum that will hear challenges should be emphasized, given the demanding decisions required and extensive procedures under the Model Law.

16. In this regard, enacting States are encouraged to review the scope of all forums available, to ensure that the system put in place indeed confers effective legal recourse and remedies (including appeals) as required by the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) and as is acknowledged to constitute best practice.

17. Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative forums, since the use of arbitration in the context of procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which generally involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting a dispute relating to the procedures in the Model

Law to arbitration, in appropriate circumstances, and notably as regards disputes during the contract management phase of the procurement cycle.

### *3. Issues regarding implementation and use*

18. A key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the interests of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process (particularly in the light of the general prohibition in article 65 on the procuring entity to take any step that would bring into force a procurement contract or framework agreement while a challenge or appeal remains unresolved (with limited exceptions)). The provisions limit the right to challenge to suppliers and contractors (including potential suppliers and contractors that have, for example, been disqualified); provide time limits for filing of applications and appeals, and for disposition of cases; and provide discretion in deciding in some circumstances whether a suspension of the procurement proceedings may apply. The procurement regulations and rules or guidance, such as those from the procurement agency or other body, should elaborate on these aspects of the provisions and achieving the appropriate balance between the interests of suppliers or contractors and the needs of the procuring entity. The discretion conferred regarding suspension of the procurement procedure (which is additional to the prohibition under article 65 referred to above) is critical in this regard; considerations relating to when suspension may or may not be appropriate are considered in the **commentary to articles 66 and 67** below.

19. A second factor contributing to the efficient resolution of disputes and limiting the disruption of the procurement process is encouraging early and timely resolution of issues and disputes, and enabling challenges to be addressed before stages of the procurement proceedings would need to be undone, of which the most significant is the entry into force of the procurement contract (or, where applicable, the conclusion of a framework agreement). There are several provisions in the Model Law to this end: first, the procedures for an application for reconsideration before the procuring entity; secondly, the imposition of time limits for filing applications for reconsideration to the procuring entity and application for review to an independent body; and, thirdly, the imposition of time limits for the issue of the decision. States will wish to ensure that all relevant time limits left to their determination are effectively aligned, both within chapter VIII and as regards the standstill period in article 22 (2).

20. A supporting element is the use of a standstill period (provided for in article 22 (2)). The aim of imposing a standstill period is to require a short

delay between the identification of the successful submission and the award of the procurement contract (or framework agreement), so that any challenges to the proposed award can be dealt with before the additional complications and costs of addressing an executed contract arise, as further explained in the **commentary to that article**.

21. The rules and procedures set out in chapter VIII are also intended to be sufficiently flexible so that they can be adapted to any legal and administrative system, without compromising the substance of the challenge mechanism itself or its efficacy. For example, certain important aspects of challenge proceedings, such as the forum where an application or appeal is to be filed and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country; the enacting State will need to adapt the provisions of chapter VIII in this regard.

22. Where States enact the optional system of requests for reconsideration to the procuring entity, they are encouraged to take steps to ensure that the benefits of this mechanism and its manner of operation (which includes formal procedures as the **commentary to article 66** explains) are widely disseminated and understood, so that effective use can be made of it. In this regard, there is often confusion between a request for reconsideration and a debriefing. The objective of debriefing is to explain a procuring entity's decision to the supplier or contractor affected, so that its rationale is clear, with the hope that its compliance with the provisions of the law becomes clear, or that a mistake can be corrected. It is thus an informal mechanism to support procurement procedures and, while encouraged by UNCITRAL in appropriate circumstances, is not expressly provided for in the Model Law. (See a further discussion of debriefing in the **commentary to article 22** above.) In order to avoid such confusion, the key differences in terms of the objectives, procedures and possible outcomes of both procedures should be highlighted. In addition, enacting States should monitor and oversee the response to applications submitted, so as to ensure that they are treated seriously and the potential benefits are obtained.

23. A further issue to be highlighted in the guidance to users is to emphasize that filing the application for reconsideration to the procuring entity is not available where the procurement contract has entered into force. The reason for this restriction is that, once the contract has come into force, there are limited corrective measures that the procuring entity could usefully require: its powers cease at that point. The restriction of the procuring entity's competence to pre-contract disputes is also intended to avoid granting excessive powers to the procuring entity, and is also consistent with the exclusion from the Model Law of the contract management stage. After the contract

formation period, the challenge will fall instead within the purview of independent or judicial review bodies—that is, the independent body or the court. Ensuring that the notice and standstill provisions under article 22 are respected should help limit the potential for disputes arising after the contract has entered into force.

24. As regards the system of review before an independent body under article 67, the system will need to reflect the legal tradition in the enacting State. Some legal systems provide for challenge or review of acts of administrative organs and other public entities before an administrative body, which exercises hierarchical authority or control over the organ or entity. In legal systems that provide for this type of review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. This type of body would not be independent in the sense required by the Model Law. The notion of “independence” in the context of chapter VIII means independence from the procuring entity rather than independence from the Government as a whole and protection from political pressure. For the same reasons as apply to hierarchical administrative review, an administrative body that under the Model Law as enacted in the State has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on procedures, will not fulfil the requirement for independence. States will wish therefore to consider in particular whether the independent body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

25. Enacting States are therefore encouraged, within the scope of their national systems, to provide the independent body with as much autonomy and independence of action from the executive and legislative branches as possible, in order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and effective.

26. An enacting State that wishes to set up a mechanism for independent review will need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g. the body that

exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

27. Guidance will also be required on the operating procedures of the independent body, as further discussed in the **commentary to article 67**. Particular importance should be given to the question of evidence, confidentiality and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard, to ensure that there is consistency in all proceedings, and to allow an effective and efficient appeal from a decision of an independent body. Finally, it may be desired to allow civil society representatives or others to observe challenge proceedings, and, if so and unless other laws already so permit, the procurement regulations or rules or guidance from the public procurement agency or other body will need to provide for the required facility, in accordance with the legal tradition in the enacting State concerned. As there is a risk of fragmented information, the role of the public procurement agency or other body discussed in the section on **“Institutional support”** in part I of this *Guide* will be vital in ensuring that the guidance directs the interested persons to all appropriate sources of information. These questions fall outside the scope of the Model Law and the *Guide*.

28. A substantive issue that arises in challenge proceedings generally is the question of whether the procurement proceedings should be suspended when a challenge application is filed. Although article 65 prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary where, without a suspension, a supplier or contractor submitting an application for reconsideration or review may not have sufficient time to seek and obtain interim relief. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings. The availability of suspension also enhances the possibility of settlement of applications at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. Both the procuring entity when considering an application for reconsideration of its own decision or action and the independent body when considering an application for review are therefore required to decide whether or not to suspend the procurement proceedings.

29. As regards the decision by a procuring entity in applications for a reconsideration, UNCITRAL was mindful that an automatic suspension would involve a cumbersome and rigid approach, and might allow suppliers

or contractors to submit vexatious requests that would needlessly delay the procurement proceedings, and might cause serious damage to the procurement proceedings. This possibility would allow suppliers or contractors to pressure the procuring entity to take action that might, albeit unwittingly, inappropriately favour the supplier or contractor concerned. Another possible disadvantage of an automatic suspension approach might be an increase in challenge mechanisms generally, resulting in disruption and delay in the procurement process.

30. Under article 66, the procuring entity is therefore given discretion to decide on whether or not to suspend the procurement proceedings. That decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. For example, a challenge to certain terms of the solicitation made early in the proceedings may not have the type of impact that requires suspension even if some minor corrective action is ultimately required. A challenge to some other terms might warrant a suspension, where there is a possibility that corrective action might avoid continuing down a non-compliant path, wasting time and probably costs; at the other extreme, a challenge to such terms a few days before the submission deadline would require quite different action and a suspension would be likely to be appropriate. The supplier or contractor concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier or contractor may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved.

31. This approach confers significant discretion on a procuring entity whose decision is being challenged. Enacting States may be concerned to minimize the risks of abuse of that discretion. An alternative approach would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. Such approach may be particularly appropriate where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance. If such an approach is preferred, more prescriptive regulation may be considered.

32. The suspension provisions in applications for review before an independent body are more directed in that there are two situations in which the procurement proceedings must be suspended (unless the independent body decides that urgent public interest considerations require the procurement contract or framework agreement to proceed, as the **guidance to**

**article 67** explains). The two situations concerned are considered to represent particularly serious risks to the integrity of the procurement process. First, where the application is received prior to the deadline for presenting submissions (in which case it is likely to refer to the terms and conditions of the procurement, or to the exclusion of a supplier or contractor in pre-qualification or pre-selection proceedings). The second is where no standstill was applied and a challenge is received after the submission deadline (where a suspension may allow a potentially abusive award to be prevented). The reason for requiring the suspension reflects the need to prevent other suppliers or contractors, or the procuring entity, from continuing down a non-compliant path, risking wasting time and probably costs. In other circumstances, the suspension is discretionary as in the case of applications for reconsiderations above.

33. Whatever solution is adopted, procurement regulations or rules or guidance from the public procurement agency or other body explaining the policy considerations will be key to ensuring good decision-taking in the question of suspensions.

34. As regards a system of applications to the court, many national legal systems provide for a judicial review of acts of administrative organs and public entities, either in addition to the independent body outlined above, or instead of its function. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted; in other systems the two means of challenge or review are available as options. Some States concerned may already provide rules that will guide those involved in challenge procedures on these matters. If not, the State may wish to establish them and to provide for the desired approach through law or procurement regulations, as supported by other rules or guidance from the public procurement agency or other body. The Model Law, which does not regulate court procedures, does not address this issue of sequencing. In addition, commencing parallel proceedings is not encouraged.

35. The Model Law does not address any issues of proceedings before a court, including available remedies, such as awarding compensation for anticipatory losses (such as lost profits) or granting interim measures, including under a contract that has been executed and where performance has commenced. Nonetheless, UNCITRAL encourages all remedies available in proceedings before the independent body to be available in proceedings before the court.

36. Challenges can address breaches of rules and procedures only at the instigation of suppliers or contractors, and so the other oversight mechanisms

outlined in the **Summary** above should be in place to deal with (a) non-compliance where a supplier or contractor chooses not to take action and (b) systemic issues. Suppliers or contractors may not wish to take action for many reasons: where the contract is of low value, larger suppliers or contractors may consider that losses may not justify the costs concerned; smaller suppliers or contractors may consider that the time and costs of any challenge are unaffordable; and all suppliers or contractors may be unwilling to challenge discretionary decisions because of the higher risk of failure, and may be concerned that a challenge will risk future relationships with the procuring entity.

## **B. Article-by-article commentary**

### *Article 64. Right to challenge and appeal*

1. The purpose of article 64 is to establish the basic right to challenge an act or a decision of the procuring entity in the procurement proceedings concerned, and the right to appeal a finding in a challenge procedure. These requirements are designed to satisfy the provisions of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*), which itself requires such a two-tier system.
2. Under paragraph (1), the right to challenge is based on a supplier's or contractor's claim that it has sustained loss or injury from non-compliance with the procurement law. The right is also given only to suppliers and contractors (the term includes potential suppliers or contractors as explained in the **commentary to article 2**, such as those excluded through pre-qualification or pre-selection), and not to members of the general public. Subcontractors are also omitted from the ambit of the right to challenge provided for in the Model Law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues, or based on nominal breaches, and also reflecting that the challenge mechanism is not the only oversight mechanism available.
3. In addition, the article does not address the ability of a supplier or contractor to present a challenge. Nor does it address the requirements under domestic law that a supplier or contractor must satisfy in order to be able to proceed with a challenge or obtain a remedy. Those and other issues, such as whether State bodies may have the right to pursue challenge

applications, are left to be resolved in accordance with the relevant legal rules in the enacting State.

4. Paragraph (2) enables challenges under articles 66 and 67 to the procuring entity and independent body respectively, and to the court. The enacting State is required to insert the name of the independent body and the name of the court when transposing this provision into domestic law. The nature of the independent body should be discussed in the procurement regulations or rules or guidance from the public procurement agency or other body, and may draw upon the issues discussed in the Introduction to this chapter. A challenge filed with the court—often termed a judicial review—will be made under the relevant authority and court procedures, reflecting the fact that those procedures are matters of general administrative law in the State concerned. Appropriate references to those procedures and the relevant sources of information should also be provided in rules or guidance from the public procurement agency or other body. As noted in the Introduction to this chapter, enacting States are encouraged to ensure that all the powers of the independent body set out in article 67 (and discussed in the **commentary to that article**) can be exercised by the courts with the competence to entertain procurement-related applications.

5. Paragraph (3) permits appeals from decisions made in challenge proceedings under articles 66 and 67, though only through court proceedings and following the court procedures concerned. This provision is in square brackets, because it may not be necessary where this authority already exists in other law. Enacting States may wish to make specific reference to the appropriate authority when transposing this provision into their domestic legislation, and to support it with guidance to ensure that all participants in procurement proceedings are fully acquainted with the appeal mechanism. If the authority exists elsewhere, the public procurement agency or other body should ensure that guidance about that authority is available to users of the procurement system.

6. The enacting State may add provisions in the law or procurement regulations addressing the sequence of applications, if desired. In this respect, they may wish to bear in mind their international obligations, including under the United Nations Convention against Corruption and the WTO GPA (see **paragraph 8 of part I** of this *Guide*), which may require them to ensure effective appeal to an independent body and that decisions of any review body that is not a court be open to judicial review.

7. Sequencing may be different depending on legal traditions of enacting States as noted in the Introduction to this chapter. Some States are more flexible by not requiring the supplier or contractor to exhaust the challenge

mechanism at the procuring entity before filing an application before the independent body or the court. Equally they may allow the aggrieved supplier or contractor not satisfied with the decision taken by the procuring entity in the challenge proceedings to appeal that decision in the independent body or the court. Where the application was filed directly to the independent body, the appeal of the decision of the independent body may be filed to any appeal authority within that body, if such an option exists, or to the court. Some States may however require exhausting some or all measures before filing an application to the court. The enacting State may require the aggrieved supplier or contractor to file an application for reconsideration first before the procuring entity and appeal any decision it wishes to appeal from that challenge proceedings within the independent body structure before applying to the court. Alternatively, the enacting State may allow aggrieved suppliers and contractors to bypass the procuring entity, and/or require them to exhaust all procedures available before the independent body structure, before applying to the court.

8. As noted in the Introduction to this chapter, enacting States should ensure that the provisions of article 64 are consistent with its legal and administrative structure, and to complement this framework with detailed guidance on its operation.

#### *Article 65. Effect of a challenge*

1. The purpose of article 65 is to prevent the entry into force of a procurement contract or framework agreement while a challenge or an appeal remains pending. This ensures that the challenge or appeal cannot be nullified by making an award a *fait accompli*. The reference to “take any step that would bring [the procurement contract or framework agreement] into force” is drafted broadly, so as to avoid any implication that only the signature of the contract or agreement or dispatch of the award notice under article 22 is covered.

2. The procuring entity is therefore prohibited from taking any step to bring a procurement contract (or framework agreement) into force where it receives an application for reconsideration or is notified of a challenge or an appeal by the independent body or courts. The prohibition provided for in this article, which arises where the notification is received within prescribed time limits, continues for a short period after a challenge or appeal has been decided and participants in the challenge proceedings have been notified, as provided for in paragraph (2), in order to allow any disaffected party to appeal to the next forum. Enacting States are to set the time in accordance with local circumstances—there is no minimum or maximum period

prescribed in the Model Law. In this regard, they will wish to ensure that this period is as short as their systems will permit, so as to avoid excessive disruption to the procurement process. The public procurement agency or other body should ensure that this and other relevant time limits, which are set by reference to submission deadlines and the standstill period referred to under article 22, are clearly known and understood.

3. The “participants in the challenge proceedings” referred to in paragraph (2) comprise only the procuring entity and the supplier(s) or contractor(s) presenting the challenge (and, where relevant, any governmental authority whose interests are or could be affected by the application, such as an approving authority), as further explained in the **commentary to article 68** below. They are generally a narrower group than the participants in the procurement proceedings, but under the right conferred by article 68 more suppliers or contractors may seek to join the challenge proceedings, or to launch their own challenge, where they assert loss or damage arising from the same circumstances.

4. The prohibition provided for is not absolute: there may be urgent public interest considerations that indicate that the better course of action would be to allow the procurement proceedings to continue and the procurement contract or framework agreement to enter into force, even while the challenge is still outstanding. An independent body may therefore order that the procuring entity may proceed with steps that would bring the contract or framework agreement into force. An option is provided in paragraph (3) (b) for enacting States to specify that an independent body may take a decision on this question without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial, rather than an adversarial, basis, but in other States, it may be less so. When drafting rules of procedure and guidance for the operations of the independent body, States will also wish to ensure that there are clear rules and procedures as regards the elements and supporting evidence that a procuring entity would need to adduce as regards urgent public interest considerations where it makes such an application, and how applications to permit the procurement to continue should be filed (including whether the application is to be made by the procuring entity *ex parte*, or *inter parts*).

5. The need for timely resolution of procurement disputes and an effective challenge mechanism should be balanced with the protection of urgent public interest considerations. This is particularly important in jurisdictions where court systems in the enacting State do not allow for injunctive and interim relief and summary proceedings. Paragraph (3) (b) is drafted to ensure that any decision to permit the procurement contract or framework agreement to proceed in such circumstances can itself be challenged (by application of

the general rights conferred under article 64). The procuring entity, on the other hand, should also be given the opportunity to request the competent court to allow it to proceed with the procurement contract or framework agreement on the grounds of urgent public interest considerations where the independent body has ruled against allowing the procurement contract or framework agreement to enter into force.

6. An important requirement in this regard contained in paragraph (3) (b) is to ensure that prompt notice of the decision taken by the independent body is provided to all participants concerned, including the procuring entity. The provisions in this context refer not only to the participants in the challenge proceedings as in paragraph (2) (see paragraph 3 above) but also to all participants in the procurement proceedings since interests of the latter will be affected by the decision. The provisions require disclosure of the decision and its reasons, which is essential to allow any further action (such as an appeal from the decision concerned). By the nature of an application under paragraph (3), there may be need for the protection of confidential information, the public disclosure of which will be restricted under article 69. This however does not exempt the independent body from the obligation to notify all concerned (as listed in the provisions) of its decision and provide reasons therefor; any confidential information will have to be excluded to the extent and in the manner required by law.

*Article 66. Application for reconsideration before the procuring entity*

1. Article 66 provides that a supplier or contractor that wishes to challenge a decision or action of the procuring entity may, in the first instance, request the procuring entity to reconsider the decision or action concerned. This application is optional, because its effectiveness will vary both according to the nature of the challenge at issue and the willingness of the procuring entity to revisit its steps in the procurement process. Enacting States may consider that it is desirable to promote the early resolution of disputes by encouraging the use of the optional challenge mechanism envisaged by this article; so doing might also enhance efficiency and the long-term relationship between the procuring entity and suppliers and contractors.

2. The procedure under this article is to be contrasted with a debriefing procedure as described in the **commentary to article 22** and as noted in the Introduction to this chapter. The application for reconsideration is a formal procedure, and in this regard it is important for the scope of the application and the issues it raises to be clearly delineated at the outset (both to ensure their effective consideration and to avoid other issues being raised during the proceedings). The application must therefore be in writing. There

are no rules presented in the Model Law as regards supporting evidence: the applicant will wish to present its best case to demonstrate why a reconsideration or corrective action is the appropriate course, but how that may be done will vary from case to case. Regulations and procedural rules, as noted above, should address evidentiary gathering where it is necessary. A general approach that permits the submission of a statement of application with any supporting evidence being filed later may defeat the aim of requiring prompt action on the application by the procuring entity (provided for under paragraph (3)), and accordingly these regulations and rules should encourage the early submission of all available evidence.

3. The purpose of the two time limits in paragraph (2) is, in general terms, to ensure that grievances are promptly filed so as to avoid unnecessary delay and disruption in the procurement proceedings, and to avoid actions or decisions being unwound at a later stage. There are, broadly speaking, two types of challenges contemplated by the article: first, challenges to the terms of solicitation, pre-qualification or pre-selection and to the decisions or actions taken by the procuring entity in the pre-qualification or pre-selection proceedings, which must be filed prior to the deadline for submissions. In this context, the “terms of solicitation, pre-qualification or pre-selection” encompass all issues arising from the procurement proceedings before the deadline for presenting submissions, such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from examination and evaluation of submissions. The terms of the solicitation, pre-qualification or pre-selection include the contents of any addendum issued pursuant to article 15. The use of the term “prior to” the submission deadline is crafted in broad terms, so as to allow enacting States to provide in applicable regulations for a filing deadline that is a defined, short, period before the submission deadline (and there may be the need for different periods for different procurement methods: the appropriate period for ERAs would normally be shorter than for procurement methods with dialogue or negotiations). The reason for this approach is that there may be a need to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline. Enacting States may also set deadlines based on knowledge for very lengthy procurement proceedings (i.e. within the overall requirement to file a challenge before the submission deadline), to ensure that challenges to the terms of solicitation, pre-qualification or pre-selection and to the decisions taken by the procuring entity in the pre-qualification or pre-selection proceedings are filed as early as is practicable.

4. The second type of challenge is likely to relate in some manner to the award, or proposed award, of the procurement contract (or framework

agreement) and here the main aim is to ensure that the challenge is addressed before the additional complications of an executed contract (or an operating framework agreement) arise. The issues will commonly arise from the examination and evaluation of submissions, a step in the procurement process that may also include the assessment of qualifications of suppliers or contractors (but not pre-qualification). The deadline for submission of these challenges is the expiry of the standstill period where one applies, or the entry into force of the procurement contract (or framework agreement) as applicable. Reference in the text is made to the entry into force of the procurement contract (or framework agreement), rather than to the dispatch of the notice of acceptance, in order to allow for situations in which signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract (or framework agreement) is required (which are possibilities envisaged under article 22 and the articles of the Model Law describing the contents of the solicitation documents).

5. The provisions do not refer to the procuring entity's competence to consider challenges to decisions to cancel the procurement. Although a decision to cancel the procurement is, in principle, no different from any other decision in the procurement process, the Model Law is drafted on the basis that the issues involved are such that they should more appropriately be considered either by the independent body, where an enacting State has conferred the authority on this body to review any challenges related to procurement that had been cancelled, or otherwise only by the courts. See, further, the **commentary to article 67** on the considerations that will assist the enacting State in deciding whether to confer such authority on the independent body.

6. Should an application be filed out of time, the procuring entity has no competence and should dismiss the application under paragraph (3) (a) of the article. Where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract (or framework agreement), the provisions mean that a challenge initiated after the expiry of the standstill period but before approval is granted is out of time.

7. The interaction of articles 66 and 65 means that upon the filing of an application for reconsideration, no procurement contract may be awarded (or framework agreement concluded) unless a request by the procuring entity for an exemption from the prohibition of article 65 on the grounds of urgent public interest is granted by the independent body under article 65 (3) or by the court.

8. Paragraph (3) requires the procuring entity to take several steps. First, promptly after receipt of the application, it must publish a notice of the

application. There is no fixed time limit given for this step; the appropriate time will depend on the manner of publication. In the electronic environment, for example, the most effective place for publication to take place is the website where the initial notice of the procurement was published. The aim is to ensure that all interested persons, including participants in the procurement proceedings (whose contact details may or may not be known to the procuring entity), are informed that the application has been filed.

9. In addition to this publication requirement, within three working days of receipt of the application, the procuring entity must notify all participants in the procurement proceedings known to it (i.e. whose contact details are made known to the procuring entity) about the submission of the application and its substance. Providing notice of the substance of the application permits the procuring entity to avoid the disclosure of potentially confidential information without the need to redact confidential information from the application.

10. The purpose of the publication and notification provisions is to make the suppliers or contractors aware that an application has been submitted concerning procurement proceedings in which they have participated or are participating or have interest in participating and to enable them to take steps to protect their interests. Those steps may include intervention in the challenge proceedings under article 68, as discussed in the **commentary to that article**.

11. Within the same period (three working days of receipt of the application), the procuring entity must take further steps, which amount to an initial review of the application for reconsideration. It must first decide whether it will entertain the application. Paragraph (3) (a) identifies the types of situation in which the procuring entity may decide not to entertain the application. The procuring entity will consider such issues as whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application (as noted in the **commentary to article 64**, subcontractors and members of the general public, as opposed to potential suppliers or contractors, do not have standing); whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious. These issues may be particularly pertinent in those systems in which challenge mechanisms are in their infancy and where suppliers or contractors may be unsure about the extent of their rights to file a challenge. Permitting early dismissal is important to minimize disruption to the procurement process and to minimize the costs of all concerned.

12. A decision on dismissal can be challenged under the competence granted by article 64, because, as paragraph (3) (a) of the article notes, the dismissal

constitutes a decision on the application. This provision also allows the prohibition against entry into force of the procurement contract or framework agreement to lapse after the time period specified in article 65, unless a further challenge or an appeal against the dismissal is made. To allow further challenge or appeal in a timely fashion, the provisions require the procuring entity to notify the applicant about its decision on dismissal and reasons therefor not later than three days upon receipt of the application (see paragraph (3) (c) of the article).

13. If the procuring entity decides to entertain the application, it must consider whether to suspend the procurement proceedings and, if so, the duration of the suspension. Although article 65 prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings. The purpose of suspension is to enable the interests of the applicant to be preserved pending the disposition of the proceedings. The approach taken with regard to suspension—that is, to allow the procuring entity to decide on the matter—is designed to strike a balance between the right of the supplier or contractor to have a challenge reviewed and the need of the procuring entity to conclude a procurement contract (or a framework agreement) in an economic and efficient way, without undue disruption and delay of the procurement process. The procuring entity's decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. The supplier or contractor concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier or contractor may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved. For the general policy issues relating to decisions on suspension, examples that may assist in assessing whether a suspension is appropriate and the guidance that the public procurement agency or other body should issue to assist procuring entities in this regard, see the Introduction to this chapter.

14. The period of three working days given to decide on suspension, and on the length of any suspension applied, and to notify the applicant and all participants in the procurement process of its decision, is designed to ensure swift decisions on whether or not to apply a suspension. Where the procuring entity decides to suspend the proceedings, it need not give reasons for that decision, because it is not one that the applicant will wish to challenge. Under paragraph (3) (c) (ii), the procuring entity must advise the applicant of the reasons for any decision not to suspend the procurement. Under paragraph (8) of the article it must in addition put on the record all

decisions in relation to suspension and the reasons for them. These transparency measures provide safeguards against abusive failures to suspend and ensure that the procuring entity's decision can itself be challenged and scrutinized (e.g. by the courts).

15. Where a procuring entity decides not to grant a suspension, the applicant may consider that this decision is a likely predictor of the eventual decision on the application, and accordingly that its best course would be to terminate its application before the procuring entity and commence proceedings before an independent body or court (rather than appealing the decision not to suspend). Paragraph (4) confers this right. While a procuring entity may consider that this option operates as a disincentive to treat applications with the seriousness the system is intended to confer, a subsequent challenge before another forum or action by another oversight body, which should be considered a probable consequence, should demonstrate that any such approach is unwise. Paragraph (4) also provides that a failure to abide by the three-day notification requirement permits the applicant to commence proceedings with an independent body or court, a measure also intended to discourage dilatory conduct on the part of the procuring entity. Where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain the application ceases. The procuring entity may nevertheless be able to continue with corrective action in the procurement proceedings concerned, provided that such action does not contravene any order of the independent body or court or other provisions of domestic law. Where such an application to an independent body or court is limited in scope, the precise implications of that application for the pre-existing application before the procuring entity will be a matter of domestic law.

16. Paragraphs (5)-(7) regulate the procuring entity's steps as regards the application that it entertains. Paragraph (5) confers a wide discretion on the procuring entity when deciding on the application. Possible corrective measures might include the following: rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

17. The decision of the procuring entity on an application that it entertains is to be issued and communicated to the applicant, and to all participants in the challenge and procurement proceedings, as required by paragraph (6). The enacting State is invited to specify the appropriate number of working

days within which the decision must be issued. The period of time so specified should balance the need for a thorough review of the issues concerned and the need for an expeditious resolution of the application for reconsideration, in order to allow the procurement proceedings to continue.

18. If the application cannot be disposed of expeditiously, independent review or judicial review may be the more appropriate course. To that end, in the absence of a timely decision, or if the decision is unsatisfactory to the applicant, paragraph (7) entitles the supplier or contractor that submitted the application to commence review proceedings under article 67 or proceedings before the court, as appropriate.

19. Paragraph (8) provides additional transparency mechanisms. All decisions of the procuring entity must be recorded in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of further disputes, and to facilitate any further challenge or appeal. Although in some systems silence by the procuring entity to an application can be deemed to be a rejection of such an application, the provisions require a written decision as an example of good practice. The application and all decisions must also be included in the record. The implication of this provision is that these documents (subject to confidentiality restrictions of article 25), will be made available to the public in accordance with the requirements of article 25.

20. Where the enacting State provides that certain actions of the procuring entity are to be subject to the decision of an approving authority, as discussed in the section on “Institutional support” in part I of this *Guide*, and in the commentary to articles 22 (7) and 30 (2) and (5) (e), the enacting State will need to ensure that appropriate provision is included in this article to allow that authority to receive an application for reconsideration and all information pertinent to the relevant challenge proceedings.

#### *Article 67. Application for review before an independent body*

1. Article 67 regulates review proceedings before an independent body. The system envisaged by the Model Law is based on the premise that the independent body should be granted all the powers set out in this article, subject to the ability to take action once the procurement contract has entered into force, as further discussed below. These powers are required as a package in order to ensure the effectiveness of the system.

2. States may choose to omit this article and provide only for judicial review in addition to the request for reconsideration under article 66. This

flexibility is granted on the condition that the enacting State provides an effective system of judicial review, including an effective system of appeal, to ensure that a challenge can be made in compliance with the requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*). In those States in which effective independent review is already achieved through the court system, there may also be little advantage in introducing another layer of review; the application to the procuring entity may, nonetheless, provide a useful mechanism to assist in the early resolution of disputes.

3. Paragraph (1) is drafted to ensure broad competence on the part of the independent body. As noted in the **commentary to article 64** above, the aggrieved supplier or contractor can apply directly to the independent body for a review of decisions and actions taken by the procuring entity in the procurement proceedings (i.e. bypassing the application for reconsideration proceedings before the procuring entity under article 66). In addition, a supplier or contractor that is dissatisfied with a decision of the procuring entity under article 66, or if no decision is issued as prescribed in that article, can commence new proceedings before the independent body. The paragraph is therefore one of the key provisions intended to give effect to the requirements of the United Nations Convention against Corruption (see paragraph 8 of part I of this *Guide*) for an effective system of review.

4. Paragraph (2) establishes time limits for the commencement of review applications. Paragraph (2) (a) addresses challenges to the terms of solicitation, pre-qualification or pre-selection and to the decisions or actions taken by the procuring entity in the pre-qualification or pre-selection proceedings. It provides the same time limits as apply in application for reconsideration proceedings before the procuring entity in the same context. See, further the **commentary to article 66** above.

5. Under paragraph (2) (b) (i), applications regarding other decisions or actions taken by the procuring entity in the procurement proceedings should be submitted within the standstill period prescribed in article 22 (2), where a standstill period has been applied. Under paragraph (2) (b) (ii), where a standstill period was not applied (either because the procuring entity was permitted not to apply a standstill period under the provisions of article 22 (3), or failed to respect the requirements of a standstill period), a challenge must be filed within a specified number of working days from the point of time when the supplier or contractor became aware or should have become aware of the circumstances giving rise to the application. To avoid an indefinite period during which applications for review can be filed under such circumstances, the provisions also refer to the absolute maximum—the application cannot be filed upon expiry of a certain number of days after the

entry into force of the procurement contract (or the framework agreement). Such a final deadline is required in order to provide a balance between the rights of suppliers or contractors to enforce the integrity of the process and the need for the procurement contract to continue undisrupted. The absolute maximum period may be expressed in weeks or months rather than working days, where it would be more appropriate to do so. Enacting States are invited to specify these two time limits in the light of their local needs.

6. As regards the first time limit in paragraph (2) (b) (ii), the WTO GPA (see **paragraph 8 of part I** of this *Guide*) specifies a minimum 10-day period; and enacting States may wish to be guided by that provision in considering the appropriate time period for their domestic legislation. As regards the second time limit in paragraph (2) (b) (ii), although in many cases the public notice of the award of the procurement contract or framework agreement to be published under article 23 will probably alert the supplier or contractor submitting the application to the circumstances concerned, it will not necessarily be always the case. For example, the reasons for not applying a standstill period may also justify an exemption from the obligation to publish a notice of the award—such as where confidentiality is invoked for the protection of essential national interests of the State. Accordingly, it was decided not to refer to the publication of the notice of the award as the starting point for calculating the absolute maximum, since the publication will not take place in all cases, but to refer instead to the entry into force of the procurement contract.

7. Paragraph (2) (b) (ii) does not expressly confer competence on the independent body to consider challenges arising out of the procurement that had been cancelled. This is presented as an option for enacting States to consider (the alternative being to confer exclusive competence to the court). The paragraph, as paragraph 2 (c) of article 67, provides an option to an enacting State to allow the independent body to consider challenges arising out of the cancelled procurement. In some jurisdictions, this type of challenges is to be brought only before a court because they most likely raise issues of the public interest. Where the enacting State confers the authority on the independent body to consider challenges arising out of the cancelled procurement, the text in square brackets referring to a decision to cancel the procurement in paragraphs 2 (b) (ii) and 2 (c) of the article should be retained.

8. Paragraph (2) (c) envisages that a supplier or contractor may request the independent body to entertain an application after the expiry of the standstill period applied pursuant to article 22 (2), on the grounds that the application raises significant public interest considerations. The absolute deadline for submission of such late applications is to be established by enacting States, which should be aligned with the final deadline to be established in

paragraph (2) (b) (ii). It is up to the independent body to decide whether significant public interest considerations are indeed present and justify entertaining such late applications. As regards the type of issues that should permit entertaining applications after the standstill period, enacting States may consider that the most common will be the discovery of fraudulent irregularities or instances of corruption. The enacting State will wish to provide rules or guidance on these matters. The discretionary element of this provision allows the independent body to dismiss the application even where it was established that the application involves significant public interest considerations; it also does not bar the independent body from considering late applications where no significant public interest considerations are involved. Within the normal limitation period in the jurisdiction concerned, such applications can also be submitted directly to the courts. This provision is in particular important in situations in which the normal transparency safeguards of the Model Law do not apply.

9. Paragraph (2) (d) provides the time limit for the submission of applications for review of the failure of the procuring entity to issue a decision under article 66. When setting this time limit, enacting States are, again, left to determine the relevant number of working days from the point of time when the decision should have been communicated to the applicant as required under article 66.

10. Paragraphs (3) and (4) address issues of suspension. In summary, the suspension provisions complement the prohibition against the entry into force of the procurement contract or framework agreement while a challenge remains unresolved (see the [commentary to article 65](#)). Recognizing that in some jurisdictions, the independent body may have limited powers as regards the procurement contracts or framework agreements that have entered into force, both paragraphs (and subsequent paragraphs of this article) contain text referring to procurement contracts or framework agreements that entered into force in square brackets for the enacting State to incorporate in its domestic law, or not, as it chooses. The text in square brackets will be necessary where the independent body has competence to consider challenges after the entry into force of the procurement contract or framework agreement. For a discussion of issues that arise in deciding whether or not to grant such competence, see the commentary to paragraph (9) of this article.

11. Paragraph (3) delineates the general discretion to be granted to the independent body to order the suspension of the procurement proceedings. This discretion is subject to the requirement to suspend the procurement proceedings under certain circumstances referred to in paragraph (4). In all other cases not covered by paragraph (4) where suspension is mandatory, the independent body may order a suspension for so long as it considers it

necessary to protect the interests of the applicant; it may also lift or extend any suspension so granted, and these powers may be exercised at any time during the challenge proceedings before the independent body.

12. Paragraph (4) sets out two situations in which the procurement proceedings must be, as a general rule, suspended. Those are the situations considered to pose particularly serious risks to the integrity of the procurement process.

13. Under paragraph (4) (a), the suspension for a period of 10 working days must be applied where the application is received prior to the deadline for presenting submissions. The reason for this approach is to ensure to a large extent that such challenges are addressed before all submissions are received, when corrective action is easier to achieve. In such circumstances, the independent body may wish to take such steps as to extend the deadline for submission of tenders, and correct other actions as regards the terms of solicitation, pre-qualification or pre-selection.

14. Paragraph (4) (b) covers situations where no standstill was applied and a challenge is received after the submission deadline. No fixed period is provided for in the text, because circumstances may indicate different periods are appropriate. As the challenge may be received after the entry into force of the procurement contract, the optional power is given to suspend performance of a procurement contract or operation of a framework agreement, as the case may be.

15. In each case covered by paragraphs (3) and (4), the suspension is presumptive and not automatic, in that the independent body may decide that urgent public interest considerations may justify that the procurement proceedings should proceed. This is the same test as applies in article 65 (3) (under which a procuring entity may seek to lift the prohibition to enter into the procurement contract or framework agreement), and enacting States should ensure that appropriate guidance is given on the public interest considerations that may justify a decision not to suspend. Examples when this might be the case include natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. The rules of procedure for the independent body may provide permission for the body to make enquiry of the procuring entity if its decision on suspension must be taken before it has a chance to review documents relating to the procurement proceedings, such as the full record of the procurement proceedings, effective access to which is to be provided by the procuring entity to the independent body in accordance with paragraph (8) of this article (see, further, below).

16. In any event, the independent body should bear in mind that a suspension might ultimately prove less disruptive of the procurement process because it may avoid the need to undo steps taken in the procurement process if a decision is taken to overturn or to correct a decision of the procuring entity. In addition, the appropriate degree of incentive for suppliers or contractors to submit challenges should be ensured, in which the availability of suspension is an important consideration.

17. In order to mitigate the potentially disruptive effect of an application for review, paragraphs (5) and (6) together operate to require the independent body to undertake an initial consideration of the application filed, akin to that set out in paragraph (3) of article 66 (see the **commentary to that article**). This initial review of the application is intended to permit the independent body to assess the application swiftly and on a prima facie basis, so as to determine whether it should be entertained.

18. Paragraph (5) requires the independent body promptly to notify the procuring entity and all participants in the procurement proceedings whose identities are known to the independent body of the application for review, and of its substance. It is not required to notify other entities whose interests might be affected by the application (such as other government entities), but is required to publish a notice of the application so that such entities can take steps to protect their interests, as appropriate. Such steps may include intervention in the challenge proceedings under article 68, a request to lift a suspension that has been applied, and such other steps that may be provided for under applicable regulations or procedural rules.

19. It must also take a decision on suspension, and notify all concerned about its decision (including, where relevant, the period of suspension). The independent body must also provide reasons for a decision not to suspend the procurement proceedings to the applicant (so as to facilitate any appeal against that decision) and to the procuring entity.

20. The powers to dismiss the application for review under paragraph (6) track those given to the procuring entity under article 66, again as discussed in the commentary to that article. The same transparency safeguards as regards the notification of the decision and reasons therefor as in article 66 are also applicable.

21. Under paragraph (7), notices of the actions taken under paragraphs (5) and (6) must be given within three working days after the application was received, as is the case with applications for reconsideration to the procuring entity. The effect of the notices will vary with the decisions they notify, but notably the independent body may require the procuring entity to suspend the procurement proceedings.

22. Paragraph (8) requires the procuring entity to provide effective access to all documents relating to the procurement proceedings in its possession to the independent body promptly upon receipt of a notice of the application; this obligation is subject to the confidentiality provisions in articles 24 and 25, in particular restrictions on disclosure of certain information, which however may be lifted by competent authorities identified by enacting States in those provisions. Enacting States may wish to provide rules or guidance to avoid excessive disruption of both procurement and review proceedings by providing secure and efficient means of transfer of such documents, noting that the use of IT tools (discussed in the section on **“Specific issues arising in the implementation and use of e-procurement”** in part I of this *Guide*) may facilitate this task. Such guidance should discuss the manner of access to documents in practice (e.g. physical or virtual), and that the relevant documents could be provided in steps (e.g. a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it).

23. Paragraph (9) lists the remedies that the independent body can grant with respect to the application for review. Paragraph (9) acknowledges that differences exist among national legal systems with respect to the nature of the remedies that bodies exercising quasi-judicial review are competent to grant. In enacting the Model Law, States are encouraged to enact all remedies that, under its legal system, an independent body undertaking such a review can be authorized to grant, so as to ensure an effective system of review as required by the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*). The thrust of the provisions is to ensure that an appropriate decision on the application is taken (including, where circumstances so dictate, that the application is dismissed or rejected); as part of that exercise, any suspension existing when the application is disposed of must also be lifted or extended where the independent body considers it necessary.

24. Some provisions in this paragraph appear in square brackets, indicating their optional nature and possibility of their variation in accordance with the local circumstances of the enacting State. The first set of square brackets opens in the beginning of subparagraph (c) and ends at the end of subparagraph (f). These subparagraphs confer the authority on the independent body to overturn, confirm or revise all or some acts or decisions of the procuring entity and to overturn the award of a procurement contractor or a framework agreement that has entered into force.

25. Not all jurisdictions however allow their administrative bodies to decide on acts or decisions taken by another administrative body, such as the procuring entity; in those jurisdictions, such authority may be limited to the

court. Those jurisdictions will therefore opt not to enact subparagraphs (c)-(f). Some other jurisdictions may permit the independent body to take actions as regards acts or decisions of the procuring entity other than acts or decisions bringing the procurement contract or framework agreement into force. Finally, other jurisdictions may permit the independent body to take actions as regards all acts or decisions of the procuring entity, including acts or decisions bringing the procurement contract or framework agreement into force. The additional sets of square brackets found in subparagraphs (c) and (d) accommodate these two latter different situations by giving an option to jurisdictions to enact those subparagraphs with or without the text referring to acts or decisions bringing the procurement contract or framework agreement into force. Those jurisdictions that permit the independent body to take actions as regards all acts or decisions of the procuring entity, including those bringing the procurement contract or framework agreement into force, will enact the provisions without the text appearing in square brackets in subparagraphs (c) and (d). Those States that exclude from the competence of the independent body acts or decisions of the procuring entity bringing the procurement contract or the framework agreement into force will need to enact the provisions with the text appearing in square brackets in subparagraphs (c) and (d). This latter group of States would also probably decide to omit subparagraph (f) that confers the authority on the independent body to overturn the award of a procurement contract or a framework agreement that has entered into force.

26. The term “overturn” in those provisions has been chosen as a neutral one, as the Model Law is not designed to imply any particular legal consequences, so that the enacting State may provide for the consequences appropriate in the light of the legal tradition in the jurisdiction concerned. Where an independent body cannot be granted the power to overturn a procurement contract or framework agreement or to substitute its own decision for that of a procuring entity, an alternative formulation would be to permit the independent body to annul the decision of the procuring entity, so that the procuring entity is then required to take another decision in the light of the decision of the independent body.

27. Corrective action should be regarded as the primary and most desirable remedy. This approach is reflected in the WTO GPA (see **paragraph 8 of part I** of this *Guide*). The early resolution of disputes through corrective action will reduce the need for financial compensation. Financial compensation may, however, be part of the appropriate remedy in a given case, for example where a contract has entered into force but it is not considered appropriate to interfere in the contract. A system without provision for any financial compensation (beyond the costs of filing an application) may therefore fail to provide adequate remedies in all situations, and the question of

financial compensation should therefore be a part of the broader perspective of putting in place a system of remedies that is effective.

28. Paragraph (9) (i) therefore makes provision for financial compensation, and sets out two alternatives for the consideration of the enacting State. Where the text in square brackets is retained, compensation is limited to any reasonable costs incurred by the supplier or contractor submitting an application as a result of the unlawful act, decision or procedure in the procurement proceedings; those costs do not include profit lost because of non-acceptance of a submission of the applicant. The types of losses compensable under the second alternative (i.e. where provisions are enacted without the text in square brackets) are broader, and might include lost profit, in appropriate cases. Enacting States will wish to consider how purely economic loss is addressed in their domestic legal systems, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (including the extent to which financial compensation is contingent on the applicant proving that it would have won the procurement contract concerned but for the non-compliance of the procuring entity with the provisions of this Law). Issues of quantification are matters of applicable domestic law, but the procurement regulations may need to address aspects that are specific to the procurement context. The possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process. It may also increase the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals. The enacting State may therefore wish to carefully monitor the operation of the mechanism of financial compensation in challenge proceedings, especially where a quasi-judicial system is in its infancy. This should be coupled with a regular review of the entire challenge mechanism to ensure that it is operating effectively in allowing, and encouraging where appropriate, suppliers or contractors to bring applications.

29. Paragraph (10) provides for a maximum period within which the decision on the application that the independent body decided to entertain must be taken. It also provides for the requirement of prompt notification of that decision to all concerned. Together with paragraph (11) that requires all decisions taken by the independent body during the review proceedings to be in writing, complete, reasoned and put on the record, paragraph (10) sets out important transparency safeguards that also aim at ensuring efficient and effective review proceedings and possible further action by aggrieved suppliers or contractors in courts if need be. Paragraphs (10) and (11) are similar to paragraphs (6) and (8) of article 66; the matters discussed in the **commentary to that article** are therefore relevant here.

30. The examination of evidence, and the manner in which it is conducted (such as whether hearings are to take place), will be a significant determining

factor as regards the necessary length of administrative or quasi-judicial proceedings, and will reflect the legal tradition in the enacting State concerned. If detailed rules governing procedures in administrative or quasi-judicial review do not already exist in the enacting State, the State may provide such rules by law or in regulations, to cover such matters as the conduct of review proceedings, the manner in which applications are to be filed, and questions of evidence.

*Article 68. Rights of participants in challenge proceedings*

1. Article 68 is designed to ensure that due process operates during the challenge proceedings. The references in paragraph (1) to any supplier or contractor participating in the procurement proceedings and to any governmental authority whose interests are or could be affected by challenge proceedings establish a broad right of participation in challenge proceedings beyond the applicant. These rights of participation are intended to provide an appropriate balance between effective challenge proceedings and avoiding excessive disruption, as noted in the **commentary to article 64** regarding general rights to commence challenge proceedings, and are predicated on the notion that participation is granted to the extent that the supplier or contractor, or other potential participant, can demonstrate that its interests may be affected by the challenge proceedings.

2. In this context, the “participants in challenge proceedings” can include a varying pool of participants, depending on the timing of the challenge proceedings and subject of the challenge. Any supplier or contractor participating in the procurement proceedings to which the application relates can join the challenge proceedings. The reference to suppliers or contractors “participating in the procurement proceedings” is intended to permit all those that remain in the proceedings concerned, but to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge relates. The possibility of broader participation in the challenge proceedings is provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible. Participation of other suppliers or contractors participating in the procurement proceedings might include a request to lift a suspension that has been applied, and other steps that may be provided for under the applicable regulations or procedural rules. The enacting State should provide rules and procedures to support this approach, to ensure that the proceedings can continue with appropriate dispatch and that suppliers or contractors can participate effectively; it may also wish to provide suitable nomenclature to identify the various participants more accurately.

3. The “participants in challenge proceedings” can include other governmental authorities. In this regard, the term “governmental authority” means any entity that may fall within the definition of the procuring entity under article 2, including entities that are entitled to operate and/or use a framework agreement, subject to the requirement in article 68 (1) for those entities to have an interest in the challenge proceedings at the relevant time. See, further, the discussion of the permitted users of framework agreements in the **commentary to article 60** above. In this regard, it should be noted that a party to a framework agreement whose interests would or could be affected by the challenge proceedings is most probably the lead purchasing entity rather than other entities that became parties to the framework agreement at the outset of the procurement proceedings. The term would also include any approving authority in the context of the procurement concerned (see for example articles 22 (7) and 30 (2) and (5) (*e*) where the role of the approving authority is envisaged).

4. Paragraph (2) enshrines the right of the procuring entity to participate in challenge proceedings before an independent body.

5. Paragraph (3) sets out the fundamental rights of participants in the challenge proceedings, of which the most significant are the right to be heard, to have access to all the proceedings and to present evidence. These rights accrue to those described in paragraphs (1) and (2) of the article, and not to anyone that may be present during hearings that take place in public (such as members of the press). The independent body may grant access to the record of the challenge proceedings (which will, under the provisions of article 67 (8), include the record of the procurement proceedings). Participants in the challenge proceedings will need to demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid suppliers or contractors conducting exhaustive searches of the documents in case they may discover issues of relevance. Access to records is also subject to the provisions on confidentiality in article 69. There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion.

#### *Article 69. Confidentiality in challenge proceedings*

Article 69 has been included in chapter VIII to apply the principles of confidentiality found in articles 24 (1) and 25 (4) to challenge proceedings, in particular those taking place in the independent body (to which articles 24 and 25 (4) do not apply). The **commentary to articles 24 and 25 (4)** is therefore relevant in the context of article 69.

*Part three*

**CHANGES MADE TO THE  
1994 UNCITRAL MODEL LAW ON  
PROCUREMENT OF GOODS,  
CONSTRUCTION AND SERVICES**



**CHANGES MADE TO THE  
1994 UNCITRAL MODEL LAW ON  
PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES**

**A. Summary**

1. This part of the *Guide* provides a commentary on the revisions made to the 1994 Model Law when compiling the 2011 Model Law. The aim is to enable users of the 1994 text to assess their domestic laws to see how best to update them, where it is not intended to implement the 2011 Model Law in its entirety. Accordingly, editorial changes (stylistic, consequential, structural and other minor changes not affecting the substance of the provisions) are not addressed; nor, therefore, are all provisions of either Model Law discussed in this part.

2. With the same aim in mind, this part of the *Guide* links the 1994 and 2011 provisions to the extent possible. A table of concordance between the 2011 Model Law and the 1994 Model Law and a table of concordance between the 1994 Model Law and the 2011 Model Law (excluding new provisions) are reproduced in annexes to the *Guide*. References to the paragraphs and articles in this part of the *Guide* are to the articles of the 1994 Model Law, or where they have not been changed, to both texts, unless otherwise noted.

3. The commentary in this part of the *Guide* is intended to supplement, and not replace, the commentary in parts I (General remarks) and II (Commentary on the text of the UNCITRAL Model Law on Public Procurement). The policy issues set out in those earlier parts of the *Guide* are therefore not repeated here; cross references are, however, included where the policy discussion further explains the revisions concerned.

**B. Commentary on the changes made**

**1994 PREAMBLE**

4. Deletion throughout the Model Law, including in the preamble (see *chapeau* and paragraph (c)), of references to “goods, construction and services”, reflects the approach taken in the 2011 Model Law as regards the basis for

the selection of procurement methods—the level of complexity of the subject matter of the procurement, as opposed to whether it is goods, construction or services that are to be procured (further explained in paragraph 57 below).

5. Paragraph (*b*) has been amended to indicate that the Model Law promotes the objectives of fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality as a general rule. The relevant qualifier in the 1994 text (“especially where appropriate”) has therefore been deleted.

6. Finally, paragraph (*d*) has been amended to refer to the “equal”, in addition to the “fair and equitable”, treatment of suppliers and contractors, which harmonizes the Model Law in this respect with other international and regional instruments regulating public procurement, where all these three concepts in different combinations may be found.

## **1994 CHAPTER I. GENERAL PROVISIONS**

### **A. Summary of changes made in this chapter**

7. Chapter I sets out the principles that govern all procurement under the Model Law, and is considerably expanded as compared with its 1994 counterpart (the 1994 chapter I contains 17 articles, the 2011 chapter I contains 26 articles). Many of the principles that were previously found in the 1994 text either in the rules on tendering or elsewhere in procedural articles have been collated in the expanded 2011 chapter I. Examples include clarifications and modifications of solicitation documents, language of tenders, tender securities and acceptance of the successful submission and entry into force of the procurement contract. The 2011 articles are not so much new as made broader and of general application.

8. The consolidation of some provisions found in various articles of the 1994 Model Law resulted in the addition of the following new articles: article 11 (Rules concerning evaluation criteria and procedures), article 14 (Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions), article 16 (Clarification of qualification information and of submissions) and article 24 (Confidentiality). Some provisions are completely new, not found in the 1994 text: article 6 (Information on possible forthcoming procurement), article 12 (Rules concerning estimation of the value of procurement), article 20 (Rejection of abnormally low submissions) and article 26 (Code of conduct).

9. The chapter has been reordered to present, so far as possible, the provisions in chronological order of steps usually taken in most procurement proceedings.

### **B. Article-by-article commentary**

#### *Scope of application (article 1)*

10. Paragraphs (2) and (3) have been deleted, with consequential changes in paragraph (1), to reflect that the Model Law applies to all public

procurement, including in the defence and national security sectors. In 1994, defence procurement was excluded (though article 1 of that text allowed the procuring entity to choose to apply the Model Law to a given procurement). UNCITRAL considered that the broad variety of procedures available under the 2011 Model Law made it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the 2011 Model Law contain provisions that are intended to accommodate procurement involving essential national security or defence issues (termed in this *Guide* “security-related procurement” for ease of reference), such as provisions applicable to the procurement involving classified information in which transparency mechanisms may need to be relaxed, and provisions regulating certain “alternative” procurement methods. Any decision not to apply the full ambit of the 2011 Model Law to any procurement has to be justified in the record of the procurement under article 25: there is no blanket exemption from the 2011 Model Law’s procedures. On this point, see the sections on **“Protecting classified information”** and **“Inclusion of defence and security-related procurement”** in part I of this *Guide*.

### *Definitions (article 2)*

11. This article has been substantially redrafted. A number of new definitions have been added and some definitions found in the 1994 text have been deleted or amended, as a consequence of the introduction of new procurement techniques, concepts and other changes throughout the Model Law. The definitions now also appear in alphabetical order.

12. New definitions are: “direct solicitation”, “domestic procurement”, “electronic reverse auction”, “framework agreement procedure”, “pre-qualification”, “pre-qualification documents”, “pre-selection”, “pre-selection documents”, “procurement involving classified information”, “procurement regulations”, “socioeconomic policies”, “solicitation”, “solicitation document”, “standstill period” and “a submission (or submissions)”.

13. Amended definitions are: “procurement”, “procurement contract”, “procuring entity”, “supplier or contractor” and “tender security”:

(a) In the definition of “procurement” (or “public procurement”), the words “by a procuring entity” have been added at the end, to highlight that the Model Law does not deal with procurement by parties not covered by the definition of the “procuring entity”;

(b) In the definition of “procurement contract”, changes have been made to reflect in particular the introduction of framework agreement

procedures and to encompass procurement contracts concluded under such procedures. As a result, references to “supplier or contractor” have been put in the plural and the words “resulting from procurement proceedings” have been replaced with “at the end of the procurement proceedings”;

(c) In the definition of “procuring entity”, changes have been made to reflect the fact that procurement may be conducted by multiplicity of public entities, not only by a single public entity, and that such public entities may be from different States (i.e. joint purchases by public entities of two or more countries);

(d) In the definition of “supplier or contractor”, changes have been made, as in the definition of “procurement contract”, to reflect primarily the introduction in the 2011 Model Law of framework agreement procedures. The reference to “the party to a procurement contract with the procuring entity” has therefore been replaced with a reference to “any party to the procurement proceedings with the procuring entity”;

(e) The definition of “tender security” now reflects the fact that a tender security is provided to the procuring entity upon the requirement of the procuring entity. The definition therefore opens with the statement “a security required from suppliers or contractors by the procuring entity”. At the end of the definition, a sentence has been added to make it clear that the definition does not refer to a security guaranteeing contract performance.

14. For the reasons set out in paragraph 4 above, the definitions of “goods”, “construction” and “services” have been deleted. These terms have been substituted in the 2011 Model Law by the term “subject matter of the procurement”, a self-explanatory concept.

*International obligations of this State relating to procurement [and intergovernmental agreements within (this State)] (article 3)*

15. The article remains substantively unchanged, except for inclusion of additional pairs of square brackets in the title and in the text of the article and an accompanying footnote that explains that the text in brackets is relevant to, and intended for consideration by, federal States.

*Procurement regulations (article 4).* Remains substantively unchanged.

*Public accessibility of legal texts (1994 article 5) (Publication of legal texts (2011 article 5))*

16. The title of the article has been broadened to reflect the substantive changes made in the article, which is now split into two paragraphs: the

first dealing with legal texts of general application that must be promptly made accessible to the public and systematically maintained, and the second dealing with judicial decisions and administrative rulings with precedent value that must be made available to the public. See the **commentary to article 5** in part II of this *Guide* for explanation of different legal regimes applicable to the publicity of these two types of legal texts.

*Qualifications of suppliers and contractors (1994 article 6; 2011 article 9)*

17. The phrase “in order to participate in procurement proceedings” in paragraph (1) (b) has been deleted, since it could have been understood to require pre-qualification proceedings in all cases. Since the general rule is that qualifications of suppliers or contractors may be ascertained by the procuring entity at any stage of the procurement proceedings, article 9 (1) of the 2011 Model Law avoids linking assessment of qualifications to any particular stage of the proceedings.

18. The list of criteria in paragraph (1) (b) has also been expanded to refer to environmental qualifications and requirement that suppliers and contractors meet ethical and other standards applicable in the State. The 1994 reference to “reputation”, on the other hand, has been deleted to eliminate subjectivity in the process when the procuring entity assesses whether suppliers or contractors are qualified.

19. Paragraph (2) of the 2011 Model Law refers not only to “appropriate” qualification criteria, as the 1994 provisions did, but also to qualification criteria “relevant” in the circumstances of the particular procurement, to restrict the discretion of the procuring entity in the selection of qualification criteria.

20. New provisions have been included in the article as paragraph (7) of the 2011 text: they reflect in substance the provisions of 1994 article 10, which has been deleted, with one substantive modification. The modification restricts any requirement for legalization of documentary evidence to the supplier or contractor presenting the successful submission (the 1994 text allowed the procuring entity to require the legalization of documentary evidence from any supplier or contractor).

21. 1994 paragraph (6) (a) (which has become 2011 paragraph 8 (a)) has been amended, and now requires the procuring entity to disqualify a supplier or contractor for “misrepresentation” as well as for submitting false information (for a discussion of “misrepresentation”, see the **commentary to article 8** in part II of this *Guide*). A new subparagraph 8 (d) has been added

in the 2011 text, reproducing the provisions of article 7 (8) of the 1994 Model Law that permit a further assessment of qualifications in the procurement proceedings that involved pre-qualification.

*Pre-qualification proceedings (1994 article 7; 2011 article 18)*

22. In paragraph (1), the phrase “prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V” has been replaced with the phrase “prior to solicitation”. The 2011 provisions better reflect the point at which the qualifications of suppliers and contractors are ascertained and qualified suppliers and contractors are identified, in pre-qualification proceedings.

23. The reference to “printing” in paragraph (2) has been deleted, to reflect the technology-neutral nature of the 2011 Model Law. On that point, see the section on “**Specific issues arising in the implementation and use of e-procurement**” in part I of this *Guide*. The substantive provision found in 1994 paragraph (3) (a) (iv) (requiring the procuring entity to express the deadline for submission of applications to pre-qualify “as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity”) has become the basis for drafting equivalent requirements in a new article in chapter I of the 2011 Model Law on rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions (article 14). As a result, these requirements have become applicable under the 2011 text not only to the deadlines for submitting applications to pre-qualify but also to those for presenting applications for pre-selection and for presenting submissions.

24. Two new paragraphs have been introduced in the article, as paragraphs (3) and (4) of 2011 article 18, addressing the publication and content of the invitation to pre-qualify. In the 1994 Model Law, these provisions appeared in chapter III on open tendering (articles 24 and 25). The goal of the amendments is to make the article self-contained and applicable to all procurement methods, and thus the article consolidates all provisions on pre-qualification. The lists of information to be included in the invitation to pre-qualify and in the pre-qualification documents have been amended: everything that would be of immediate interest and relevance to potential suppliers or contractors in order to decide whether to participate in the procurement proceedings is to be disclosed at the outset of the procurement proceedings (i.e. in the invitation to pre-qualify), while details of the pre-qualification proceedings are to be included in the pre-qualification documents.

25. Paragraph (5) (which has become 2011 paragraph (7)) has been amended to make it clear that the procuring entity, in reaching a decision with respect to the qualifications of each supplier or contractor, can apply only those criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents. A new paragraph (8) has been included in the 2011 provisions reproducing the last sentence of 1994 paragraph (6) (the rule that only pre-qualified suppliers or contractors may participate in further stages of the procurement proceedings has therefore been made more visible).

26. Paragraph (7) (which has become 2011 paragraph (10)) has been considerably strengthened: the phrase “upon request” and the last part of the paragraph has been deleted with the result that the procuring entity is obliged under the 2011 Model Law, without any qualifier, to promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

27. As noted in paragraph 21 above, 1994 paragraph (8) has been relocated to the article on qualifications.

#### *Participation by suppliers or contractors (article 8)*

28. The article has been significantly amended. Two new paragraphs have been introduced, as paragraphs (2) and (5) of 2011 article 8. First, 2011 paragraph (2) prohibits the procuring entity from establishing any requirement aimed at limiting the participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof, except when the procuring entity is authorized or required to do so by the procurement regulations or other provisions of law of the enacting State. This provision should be understood in conjunction with paragraph (1) of the article, which refers to a possible limitation of participation on the basis of nationality: the newly introduced paragraph refers to possible limitation on other grounds permitted by law, to comply for example with sanctions imposed by the United Nations Security Council. The second new paragraph, 2011 paragraph (5), requires the procuring entity to make available to any person, upon request, its reasons for limiting the participation of suppliers or contractors in the procurement proceedings. This provision is in line with one of the general goals that guided UNCITRAL in amending the 1994 Model Law—to strengthen its transparency provisions to allow, inter alia, public oversight of the decisions of the procuring entity where and as appropriate.

29. The other substantive change in this article relates to provisions of paragraph (3). The 2011 text has eliminated the requirement for a specific

declaration by the procuring entity, required in the 1994 text, that suppliers and contractors may participate in the procurement proceedings regardless of nationality. The 1994 text left unregulated the consequences of the failure by the procuring entity to make such a declaration, and article 52 (2) explicitly excluded any decision on limitation of participation from review. The default rule in the 2011 Model Law as reflected in the amendments made in the Preamble (see paragraph 5 above) is that all suppliers or contractors are permitted to participate in any procurement proceedings regardless of nationality or other criteria. No specific declaration by the procuring entity of unlimited participation is therefore needed. The 2011 article makes it clear, as explained in the preceding paragraph, that reasons for exclusion must exist in the procurement regulations or other provisions of law of the enacting State, and are not a matter of discretion by the procuring entity. When such reasons exist, 2011 provisions require the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, to declare that participation is limited and provide a statement of the reasons and circumstances on which it relied to reach the decision to limit the participation (see 2011 paragraphs (3) and (4)). To ensure fair, equal and equitable treatment of suppliers and contractors, 2011 paragraph (3) continues that any such declaration may not later be altered.

*Form of communications (1994 article 9) (Communications in procurement (2011 article 7))*

30. The change in the title of the article reflects its expanded scope: it deals now not only with the form but also with means of communication.

31. The substance of provisions of paragraphs (1) and (2), which in essence provide for functional equivalence between paper and non-paper form and means of communication, is retained in the 2011 text with a few exceptions. First of all, the principle of functional equivalence is now unconditional (i.e. the caveats introducing 1994 paragraph (1) have been deleted). Second, 2011 paragraph (1) includes an additional requirement as regards the form of communication, not found in the 1994 text: it must be accessible so as to be usable for subsequent reference. This additional requirement aligns the provisions with the corresponding provisions of the UNCITRAL instruments on e-commerce (see paragraph 97 of part I of this *Guide*). Lastly, the flexibility envisaged in paragraph (2) as regards the form and means of communication is no longer applicable to (a) notices of cancellation of the procurement (in the 1994 text, these were notices of the rejection of all tenders, proposals, offers or quotations (see article 12 (3))); and (b) the notices of acceptance of the successful submission (in the 1994 text, this was a notice of the acceptance of the successful tender (see article 36 (1))). This is because under

the 2011 Model Law completely new regimes have been established with respect to these types of notices: a requirement for publication of a notice of cancellation has been introduced (see article 19 (2) of the 2011 Model Law) and a robust procedure for acceptance of the successful submission, including notice of a standstill period as a general rule, must be followed (see 2011 article 22). On these issues, see further paragraphs 38-42 and 98 and 99 below and the **commentary to article 22** in part II of this *Guide*.

32. Paragraph (3) of the 1994 text, which provides for non-discrimination against or among suppliers or contractors on the basis of the form in which they transmit or receive information, has been replaced with provisions that reflect the new approach to the selection of form and means of communication under the 2011 Model Law. Unlike the 1994 text that provides for the unconditional right of a supplier or contractor to submit a tender in a particular form and by particular means (see article 30 (5) of the 1994 text), the 2011 Model Law gives the right to the procuring entity to select the form and means of communication without the need to justify that choice, subject to some safeguards. On this subject, see further the **commentary to article 7** in part II of this *Guide*.

*Rules concerning documentary evidence provided by suppliers or contractors (article 10)*

33. The article has been deleted and its provisions, including one substantive modification, have been incorporated in the article on qualifications of suppliers or contractors (see paragraph 20 above).

*Record of procurement proceedings (1994 article 11)  
(Documentary record of procurement proceedings (2011 article 25))*

34. The article has been substantially revised; the change to the title has been made to emphasize that all steps in the procurement proceedings must be documented. The list of information to be included in the record of procurement proceedings has been expanded and made illustrative, rather than exhaustive. Some additional information has been included in the list as a result of introduction of new procurement techniques and regulatory regimes (e.g. electronic reverse auctions, framework agreements, selection of means of communication, standstill period, classified information, socio-economic policies, and abnormally low submissions). Other additional information has been listed to strengthen transparency and to allow for effective oversight, be it by the public, or interested suppliers or contractors or competent authorities.

35. 2011 paragraph (2) expands the scope of information to be made available for inspection by the public. 2011 paragraph (3) does the same with respect to suppliers or contractors that presented submissions. Unlike the 1994 Model Law, the 2011 text limits the group of suppliers or contractors that may have access to information listed in paragraph (3) to those that presented submissions and excludes those that applied for pre-qualification but were disqualified (since the information in question is of no relevance to them). Those suppliers or contractors that presented submissions may request access to the procurement records at any time after the decision of acceptance of the successful submission has become known to them. The 2011 text, unlike its 1994 counterpart, does not cover situations when the procurement is cancelled. This is on the understanding that in such cases, access to the records may be restricted for public interest and interested suppliers or contractors would need to obtain the order of competent authorities to get access to them.

36. The exceptions to disclosure found in paragraph (3) of the 1994 text has been made of general application, i.e. without reference to any particular portion of the record or to any particular group of interested persons seeking access to the record. The 1994 public interest exception has been replaced with an exception to protect the essential security interests of the State. The latter was considered to be more precise and more likely to be regulated by law. The 1994 exception referring to legitimate commercial interests of the parties has been replaced with a reference to legitimate commercial interests of the suppliers or contractors.

37. 1994 paragraph (4), which excluded any liability of the procuring entity for damages to suppliers or contractors owing solely to a failure to maintain a record of the procurement proceedings, has been deleted. The 2011 text now includes an obligation of the procuring entity to record, file and preserve all documents relating to the procurement proceedings in accordance with applicable law (see 2011 article 25 (5) and the **commentary thereto** in part II of this *Guide*).

*Rejection of all tenders, proposals, offers or quotations (1994 article 12)  
(Cancellation of the procurement (2011 article 19))*

38. This article has been substantially revised. The change in title (reflected throughout the 2011 Model Law) refers to the cancellation of the procurement rather than to the rejection of all tenders, proposals, offers or quotations, to accurately reflect that cancellation of the procurement can take place at any time, not only after all submissions have been received.

39. Paragraph (1) of the 2011 text confers an unconditional right on the procuring entity to cancel the procurement at any time prior to the acceptance of the successful submission. It is more flexible than the 1994 equivalent provision, which allowed for the prior approval of such a decision by a designated authority of the State. The removal of this condition was part of the wholesale removal of ex ante control mechanisms throughout the 2011 Model Law (with two exceptions, which are addressed in paragraph 59 below; for general guidance on the approach of the 2011 Model Law to control mechanisms, see the section on “**Institutional support**” in part I of this *Guide*). A second condition in the 1994 text, requiring the possibility of rejection of all submissions to be reserved in the solicitation documents, has been removed, reflecting that this requirement had proved of little practical benefit.

40. Paragraph (1) of the 2011 text also envisages the possibility of cancelling the procurement after the successful submission is accepted, but where the successful supplier or contractor fails to sign a written procurement contract or provide a mandatory contract performance guarantee (see 2011 article 22 (8) and the **commentary thereto** in part II of this *Guide*). It also imposes an explicit requirement on the procuring entity not to open any tenders or proposals after taking a decision to cancel the procurement and to return them unopened to the suppliers or contractors that presented them.

41. The notification requirements in case of cancellation of the procurement have been considerably strengthened. The procuring entity is required under 2011 paragraph (2) not only promptly to notify suppliers or contractors that presented submissions about the cancellation, but also to communicate to them the reasons for the decision to cancel the procurement. There is also now an explicit requirement to include the decision and reasons for it in the record of the procurement proceedings and to publish a notice of cancellation in the same manner and place where the original notice of the procurement was published.

42. Finally, 2011 paragraph (3) restricts the no-liability clause in paragraph (2) of the 1994 Model Law to situations other than arising as a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

#### *Entry into force of the procurement contract (article 13)*

43. The article has been deleted. The dual regime for entry into force of the procurement contract under the 1994 Model Law—the one applicable to tendering proceedings and the other applicable to all other proceedings—has been replaced with a single regime, set out in 2011 article 22. On this subject, see the further discussion of changes made to article 36 of the 1994

Model Law in paragraphs 98-99 below and the **commentary to article 22** in part II of this *Guide*.

*Public notice of procurement contract awards (1994 article 14)  
(Public notice of the award of the procurement contract or framework agreement (2011 article 23))*

44. The article has been revised by the addition of requirements that aim at enhancing transparency. 2011 paragraph (1) now provides for the minimum content of the notice to be published: the name of the supplier (or suppliers) or contractor (or contractors) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price. It also makes it clear that the provisions apply to publication of notices upon the entry into force of the procurement contract or conclusion of a framework agreement. Such clarification was necessary to avoid possible confusion with other types of notices, such as the standstill notice under 2011 article 22 (2).

45. 1994 paragraph (2) has been strengthened and becomes paragraph (3) of the 2011 text; it requires the procurement regulations to prescribe the manner of publication of all contract award notices under the article, so that there will be no uncertainty on this matter. Paragraph (2) of the 2011 text exempts low-value contract awards from the publication requirement contained in paragraph (1) of the article. However, it requires the procuring entity to publish a cumulative notice of such low-value awards from time to time but at least once a year; in this regard it retains the exemption in paragraph (3) of the 1994 text, but with an added transparency safeguard.

46. Under the 1994 provisions, the low-value threshold amount for the purpose of invoking an exemption from the publication requirement contained in paragraph (1) is to be specified in the law. In the 2011 text, this amount is to be specified in the procurement regulations, to provide greater flexibility, as further explained in the **commentary to article 23** in part II of this *Guide*.

*Inducements from suppliers or contractors (1994 article 15) (Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor; an unfair competitive advantage or conflicts of interest (2011 article 21))*

47. The scope of the article has been expanded, as reflected in the 2011 title, in order to implement the requirements of the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*). 2011

paragraph (1) now also states expressly that exclusion may result where a gratuity, an offer of employment or any other thing of service or value is offered, given or agreed to be given so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

48. The title of the article and the provisions have also been amended to convey more clearly the possibility of such exclusion, which may occur at any time in the procurement proceedings. The 1994 wording (with its references to rejection of a tender, proposal, offer or quotation) implied that this may happen only after a tender, proposal, offer or quotation was submitted.

49. Finally, the requirement of approval by a designated organ of the enacting State of the decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings, found in parenthesis in the 1994 text, has been deleted.

*Rules concerning description of goods, construction or services (1994 article 16) (Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement (2011 article 10))*

50. The change to the title of the article has been made to convey clearly the scope of the article, which addresses both descriptions and terms and conditions of the procurement.

51. The article has also been substantially revised. 2011 paragraph (1) is a new provision, and requires a description of the subject matter of the procurement in the solicitation and, where and as applicable, pre-qualification or pre-selection documents. An important safeguard against abuse in the assessment of responsiveness of submissions is the requirement in 2011 paragraph (1) (b), not found in the 1994 text, to set out clearly in the solicitation documents the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.

52. Paragraph (1) of the 1994 text, which prohibited obstacles to participation and which has become paragraph (2) of the 2011 text, has been considerably strengthened. The 2011 text prohibits any description of the subject matter of the procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality. The provisions now also cross-refer to

article 8 of the 2011 Model Law, which sets out a general rule for unrestricted participation of suppliers or contractors in the procurement proceedings (with limited exceptions as described in that article).

53. Paragraph (2) of the 1994 text, which has become paragraph (3) of the 2011 text, has also been strengthened. The first sentence of paragraph (2) of the 1994 text has been streamlined in the 2011 Model Law. The relevant provisions in the 2011 text set out two separate rules: first, that, to the extent practicable, the description of the subject matter of the procurement must be objective, functional and generic; and second that it must set out the relevant technical, quality and performance characteristics of that subject matter. Unlike its 1994 counterpart, the 2011 text encourages functional specifications.

54. The provisions of 1994 paragraph (3) (b) have been expanded in paragraph 5 (b) of the 2011 text, with references to “standardized trade conditions” and “the terms and conditions of the procurement”. The 1994 corresponding provisions referred in this context only to “standardized trade terms” and “the terms and conditions of the procurement contract”.

*Language (1994 article 17) (Rules concerning the language of documents (2011 article 13))*

55. The title of the 2011 article reflects its expanded scope: it has been consolidated with the provisions of 1994 article 29 that set out rules for the language of tenders. The resulting consolidated article of the 2011 Model Law does not limit its application to tenders but covers all submissions as well as applications to pre-qualify and for pre-selection.

**1994 CHAPTER II. METHODS OF PROCUREMENT AND  
THEIR CONDITIONS FOR USE (2011 CHAPTER II. METHODS  
OF PROCUREMENT AND THEIR CONDITIONS FOR USE;  
SOLICITATION AND NOTICES OF THE PROCUREMENT)**

**A. Summary of changes made in this chapter**

56. The title of the chapter has been changed to reflect the introduction of a new section on solicitation and notices of the procurement. The 2011 title of the chapter is: “Methods of procurement and their conditions for use; solicitation and notices of the procurement”. The chapter in the 2011 Model Law thus contains two sections: the first with provisions on methods of procurement and their conditions for use and the second with provisions on solicitation and notices of the procurement.

*1. Methods of procurement and their conditions for use*

57. The provisions on methods of procurement and their conditions for use have been substantially revised as a result of introduction of new procurement methods and techniques and reflecting a new approach to drafting the revised Model Law: the appropriate procurement method is to be selected by the procuring entity not on the basis of whether it is goods, construction or services that are to be procured but in order to accommodate the circumstances of the given procurement (in particular, the complexity of the subject matter) and to seek to maximize competition to the extent practicable (article 28 of the 2011 Model Law). This decision was based on several grounds. First, services and other procurement methods are procedurally similar, if not identical: the main difference is the extent to which the skills and experience of individuals providing the subject matter of the procurement can be taken into account. UNCITRAL considered that these issues are important not just in services procurement, but also in mixed contracts and goods and construction (accordingly, under 2011 article 11, they can be included in the evaluation criteria in any procurement). Secondly, many traditional goods contracts now take the form of services—such as IT contracts in which the hardware is leased, rather than purchased, and it would make little sense to allow procurement decisions to be potentially distorted by considerations of which method might offer the most flexibility. In addition, UNCITRAL expressly stated that the Model Law should reflect the fact that policies and

practices evolve over time, and has therefore crafted its provisions in a flexible manner, balancing the needs of borrowers, ongoing developments in procurement methods and capacity development. As a result, subject to their conditions for use, all procurement methods are available for all procurement. Since there is no longer any dedicated procurement method for the procurement of services as opposed to goods or construction, there is no chapter in the 2011 Model Law with the name “Principal method for procurement of services” as in the 1994 Model Law (its chapter IV, see paragraphs 100-123 below). For a fuller discussion of these issues, see the **commentary to article 28** in part II of this *Guide*.

58. The section on methods of procurement and their conditions for use is opened by a new article 27 that lists all procurement methods and techniques available under the 2011 Model Law. Some listed procurement methods have names identical to their 1994 counterparts (restricted tendering, request for quotations, two-stage tendering, competitive negotiations and single-source procurement). Some listed procurement methods have names not found in the 1994 Model Law although they drew their features from the procurement methods or selection procedures of the 1994 Model Law: open tendering is equivalent to tendering proceedings in chapter III of the 1994 Model Law; request for proposals without negotiation draws its features on the selection procedure described in article 42 of the 1994 text; request for proposals with dialogue combines the features of articles 43 (selection procedures with simultaneous negotiations for procurement of services) and 48 (request for proposals) of the 1994 Model Law. These latter two procurement methods in the 1994 text (selection procedures with simultaneous negotiations for procurement of services and request-for-proposals) had many similarities and could be used for procurement of services. Request for proposals with dialogue in the 2011 Model Law retains the main feature of those 1994 procurement methods—the use of interaction with suppliers or contractors, held concurrently with a group of suppliers or contractors (as opposed to consecutive negotiations, which is a distinct feature of another request-for-proposals type of proceedings). In order to avoid confusion over terminology and the selection of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the 2011 Model Law uses a distinct term to identify this new procurement method. Request for proposals with consecutive negotiations draws its features from the selection procedure described in article 44 of the 1994 Model Law. 2011 article 27 refers to newly introduced procurement techniques—electronic reverse auctions and framework agreements—and the chapter includes conditions for use of these techniques (articles 31 and 32 of the 2011 text):

(a) Electronic reverse auctions have been increasing in use since the adoption by UNCITRAL of the 1994 Model Law. The 1994 text did not

provide for traditional in-person auctions, in large part because of observed collusion. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the 2011 Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in electronic reverse auctions, especially when they are used as a phase in other procurement methods or preceded by offline examination or evaluation of initial bids (for the relevant discussion, see the **Introduction to chapter VI** in part II of this *Guide*);

(b) The 1994 Model Law did not make provision for the use of framework agreements. Their use has increased significantly since the date of the adoption of the 1994 Model Law, and in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement can arguably be operated without specific provision in the Model Law. UNCITRAL considers that the use of framework agreements could enhance efficiency in procurement and in addition enhance transparency and competition in procurements of subject matters of small value that in many jurisdictions fall outside many of the controls of a procurement system. Indeed, the grouping of a series of smaller procurements can facilitate oversight. UNCITRAL therefore has made specific provision for them, to ensure their appropriate use and to ensure that the particular issues that framework agreements raise are adequately addressed. For the relevant discussion, see the **Introduction to chapter VII** in part II of this *Guide*.

59. 2011 article 27 is accompanied by a footnote, the first part of which repeats a footnote to article 18 of the 1994 Model Law. The footnote has been expanded by the requirement to provide in the national enactment of the Model Law for an appropriate range of options, including open tendering. In addition, it now states that “States may consider whether, for certain methods of procurement, to include a requirement for external approval by a designated organ.” This addition replaces the ex ante approval mechanisms, which are presented as options in the context of the selection of an alternative procurement method in the 1994 Model Law. Ex ante approval mechanisms for the use of alternative procurement methods have been removed from the Model Law with two exceptions: an approval mechanism is envisaged as an option for the use of request for proposals with dialogue (a footnote to article 30 (2) suggests that States may wish to consider a measure of ex ante control for the use of request for proposals with dialogue) and for single-source procurement to promote socioeconomic policies under article 30 of the 2011 text. For general guidance on the approach of the 2011

Model Law to control mechanisms, see the discussion in the section on “**Institutional support**” in part I of this *Guide*.

## 2. *Provisions on solicitation and notices of the procurement*

60. The newly introduced section of this chapter consolidates the provisions on solicitation and notices of procurement for various procurement methods found throughout the 1994 Model Law, such as articles 24, 37, 47 (1) and (2), 48 (1) and (2), 49 (1), 50 (1) and 51. The changes made to those articles of the 1994 Model Law are analysed below in the context of each specific article.

61. New provisions have been introduced in the section, in particular including a requirement on the procuring entity to publish an ex ante notice of the procurement in case of direct solicitation, other than in request for quotations and where direct solicitation is used in cases of urgent procurement. The 2011 Model Law also specifies the minimum information to be included in such ex ante notices of the procurement.

### **B. Article-by-article commentary**

*Methods of procurement (1994 article 18) (General rules applicable to the selection of a procurement method (2011 article 28))*

62. The rules applicable to the selection of procurement methods contained in the 1994 text have been substantially revised. The default procurement method remains open tendering (the change in terminology from tendering to open tendering has been made to harmonize the Model Law with other international instruments regulating public procurement). The use of any other procurement method still requires justification through a consideration of whether the conditions for use under articles 29 to 31 of the 2011 text are satisfied; a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other methods is still to be included in the record of the procurement proceedings. The optional language for an ex ante approval mechanism has been removed.

63. The rules on methods of procurement available for procurement of services contained in paragraph (3) of the 1994 text have been removed. This change reflects the new approach to drafting the 2011 Model Law as explained in paragraphs (4) and (57) above.

64. A significant change from the 1994 Model Law is an approach to the selection of a method from among the alternative procurement methods. As

the 1994 Guide acknowledges, there was an overlap in the 1994 Model Law in the conditions for use of two-stage tendering, request for proposals and competitive negotiations and no rules that would establish a hierarchy among them. The 1994 Guide invited enacting States to consider the desirability of including all these three methods in their procurement laws. The 2011 Model Law takes a different approach: in addition to setting out the largely distinct conditions for use of each procurement method, it introduces two requirements that are supposed to guide the procuring entity in determining the most appropriate method among those available in some situations. Those requirements are “to accommodate the circumstances of the procurement concerned” and to “seek to maximize competition to the extent practicable”. (For explanation of these requirements, see the **commentary to article 28** in part II of this *Guide*).

65. These requirements are particularly useful where conditions for use of some procurement methods may overlap, for example request for proposals with dialogue and competitive negotiations are both considered appropriate for protection of essential security interests of the State. The requirements “to accommodate the circumstances of the procurement concerned” and to “seek to maximize competition to the extent practicable” will determine the procuring entity’s choice between these two procurement methods.

*Conditions for use of two-stage tendering, request for proposals or competitive negotiation (1994 article 19) (Conditions for the use of two-stage tendering, request for proposals with dialogue and competitive negotiations are found in 2011 article 30, paragraphs (1), (2) and (4))*

66. The provisions of 1994 article 19 have become the basis for formulating the conditions for use of three procurement methods in the 2011 Model Law: two-stage tendering, request for proposals with dialogue and competitive negotiations. Two-stage tendering and competitive negotiations draw their main features from the methods of the same names in the 1994 Model Law. Request for proposals with dialogue is in many respects a new procurement method, and is one of the three requests-for-proposals types of proceedings of the 2011 Model Law.

67. As noted in paragraph 64 above, the 2011 text largely eliminated the overlap in the 1994 conditions for use of two-stage tendering, request for proposals and competitive negotiations. In the 2011 Model Law, there are only two conditions for the use of two-stage tendering (they drew on 1994 paragraph (1) (a) and (d)), there are only three conditions for the use of competitive negotiations (they drew on 1994 paragraph (1) (c) and paragraph (2)) and each request-for-proposals type of proceedings can be used

under a distinct set of conditions, as explained further below. The optional language for an ex ante approval mechanism has been removed.

68. 1994 article 19 (1) (a) has been amended in 2011 article 30 (1) (a) to make the primary condition for use of two-stage tendering more specific and distinct from the conditions for use of other procurement methods. For example, the 1994 reference to “negotiations” has been replaced with a reference to “discussions” with suppliers or contractors, to convey more accurately the notion that no bargaining type of negotiations is held in this procurement method; rather, discussions are solely for the purpose of refining some aspects of the description of the subject matter of the procurement to formulate them with the necessary level of detail (see the **Introduction to chapter V**, and the **commentary to article 30 (1)**, in part II of this *Guide*).

69. The second condition for use of two-stage tendering, where previous open tendering failed (1994 article 19 (1) (d)), has been amended in 2011 article 30 (1) (b) by including an additional requirement on the procuring entity to consider that not only new open tendering proceedings but also any procurement method under chapter IV of the 2011 Model Law (i.e. restricted tendering, request for quotations and request for proposals without negotiation) would be unlikely to result in a procurement contract. This requirement has been added to reflect one of the general premises on which revisions to the 1994 text have been made—to limit unnecessary human interaction of the procuring entity with suppliers or contractors as much as possible, which is considered to be an important anti-corruption measure.

70. The conditions for use of request for proposals in 1994 article 19 (1) apply largely unchanged as the conditions for use of request for proposals with dialogue under article 30 (2) of the 2011 Model Law, except that 2011 subparagraph (c) refers to the protection of “essential security interests of the State” (this change has been made to ensure consistency in this respect with other international instruments), and 2011 subparagraph (d) includes the additional requirements described in the preceding paragraph.

71. The 2011 Model Law has also introduced conditions for use of two other request-for-proposals types of proceedings (not found in the 1994 Model Law): request for proposals without negotiation, and request for proposals with consecutive negotiations (see articles 29 (3) and 30 (3) of the 2011 Model Law). Both are available under the 1994 Model Law in the context of procurement of services only. Under the 2011 Model Law, they are not treated as a procurement method appropriate only for procurement of services, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, construction or services that are procured (see paragraph 57 above). (For a discussion of

the conditions for use of these methods, see the **commentary to articles 29 (3) and 30 (3)** in part II of this *Guide*.)

72. The conditions for use of competitive negotiations under the 2011 Model Law have been made limited to the situations set out in 1994 articles 19 (1) (c) (which has also been reworded to refer to the protection of essential security interests of the enacting State, see paragraph 70 above) and 19 (2) (urgency and catastrophic events). The latter has been amended. 1994 article 19 (2) (b) required the procuring entity, in the context of urgency owing to a catastrophic event, to establish before the use of competitive negotiations that it would be impractical to use any other procurement method. In the case of simple urgency, it had to establish before the use of competitive negotiations that it would be impractical to use tendering proceedings (1994 article 19 (2) (a)). The 2011 Model Law applies the same requirement to both cases—simple urgency and urgency owing to a catastrophic event: in both cases the procuring entity must establish before the use of competitive negotiations that it would be impractical to use any other competitive procurement method. The provisions by referring to “competitive methods of procurement” make it clear that they do not intend to encompass single-source procurement (the 1994 reference to “other methods of procurement” was ambiguous in this respect).

*Conditions for use of restricted tendering (1994 article 20; 2011 article 29 (1))*

73. The 1994 reference to “reasons of economy and efficiency” has been deleted from the revised text. This deletion reflects the UNCITRAL decision not to refer to any objective of the Model Law listed in its Preamble in the articles of the text itself. The procuring entity should, in any event, consider the objective of “maximizing economy and efficiency in procurement” and all other objectives of the Model Law when selecting any procurement method—a consideration that should also be applied at all other stages of the procurement proceedings, as appropriate. In addition, it was also considered that the reference to “economy and efficiency” was relevant in the context of the second condition for use of this procurement method (to avoid disproportionate costs and time), not to its use where there was a limited supply base. The optional language for an ex ante approval mechanism has been removed.

*Conditions for use of request for quotations (1994 article 21; 2011 article 29 (2))*

74. The wording of the article has been amended so as to allow the use of request for quotations for all types of standardized or common procurement

that is not tailored by means of specifications or technical requirements. Paragraph (2) of the 1994 text has been deleted from 2011 article 29 (2) in the light of 2011 article 12 setting rules concerning estimation of the value of procurement applicable to all procurement methods, not only requests for quotations. The optional language for an ex ante approval mechanism has been removed.

*Conditions for use of single-source procurement (1994 article 22; 2011 article 30 (5))*

75. The condition for use in 1994 article 22 (c) has been restricted in the 2011 text to cases of extreme urgency; the justification for the use of single-source procurement found in 1994 article 22 (e) has been eliminated, and the condition for use in 1994 article 22 (f) has been rephrased, for reasons explained in paragraph 70 above, to refer to the protection of essential security interests of the State.

76. The optional language for an ex ante approval mechanism has been removed, except where the use of single-source procurement is for the promotion of socio-economic policies under article 30 of the 2011 Model Law (in the 1994 Model Law, an ex ante approval mechanism in such circumstances is not presented as an option but rather as a default statement).

**1994 CHAPTER III. TENDERING PROCEEDINGS  
(2011 CHAPTER III. OPEN TENDERING)**

**1994 SECTION I. SOLICITATION OF TENDERS AND  
OF APPLICATIONS TO PRE-QUALIFY  
(2011 SECTION I. SOLICITATION OF TENDERS)**

**A. Summary of changes made in this chapter**

77. The changes in the title of the chapter reflect the change in the name of this procurement method: in the 2011 Model Law it is referred to as open tendering. The change in the title of the chapter's first section reflects the consolidation of all provisions related to pre-qualification in a single article in chapter I of the 2011 Model Law (see article 18). The title of the 2011 chapter therefore reads "Open tendering" and the title of the section reads "Solicitation of tenders".

78. The main changes in the chapter itself are the removal of a number of provisions to chapter I, so as to make them applicable to all procurement methods, not only to tendering proceedings.

**B. Article-by-article commentary**

*Domestic tendering (article 23)*

79. The article has been deleted. Its provisions became the basis for exemptions to the rules of the Model Law on the issuer of tender securities (article 17 (1) (b)), the international publication of an invitation to pre-qualify (article 18 (2)) and the international publication of the solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction (article 33 (4)).

*Procedures for soliciting tenders or applications to pre-qualify (1994 article 24) (Procedures for soliciting tenders (2011 article 36))*

80. The procedures for soliciting tenders have been moved from this chapter to 2011 chapter II (article 33) and made applicable to open tendering,

two-stage tendering and electronic reverse auctions (see the **commentary to article 33** in part II of this *Guide*). The procedures for soliciting applications to pre-qualify have been moved to the article that regulates pre-qualification proceedings as a whole (see article 18 of the 2011 Model Law and the **commentary to it** in part II of this *Guide*).

81. The main substantive changes are: under the 2011 Model Law, it is for the procurement regulations to identify the publication where this type of information is to be published (the 1994 Model Law required the enacting State to specify the official publication in the Law); and the provision of greater flexibility as regards the manner of international publication. As regards the latter, the 2011 text sets out that international publication involves ensuring that the publication will be widely accessible to international suppliers or contractors. It replaces the 1994 requirement for publication “in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation”, which had been considered in practice to require the use of an English-language publication, and was therefore unnecessarily restrictive.

*Contents of invitation to tender and invitation to pre-qualify (1994 article 25) (Contents of invitation to tender (2011 article 37))*

82. The change in the title of this article reflects the removal of the provisions related to the invitation to pre-qualify to 2011 article 18, which regulates all aspects of pre-qualification proceedings (see the commentary to article 18 in part II of this *Guide*).

83. The list of information to be included in the invitation now includes an additional requirement to set out all relevant information as regards any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, and the manner of presenting tenders.

*Provision of solicitation documents (1994 article 26; 2011 article 38)*

84. The reference to the cost of printing has been deleted to reflect the technology-neutral nature of the 2011 text. The 2011 provisions refer to the costs of providing solicitation documents to suppliers or contractors.

*Contents of solicitation documents (1994 article 27; 2011 article 39)*

85. The following amendments have been made to the required contents of the solicitation documents:

(a) The information listed in subparagraphs (v) and (x) of the 1994 Model Law has been deleted;

(b) Subparagraph (d) now refers to the “detailed description” of the subject matter of the procurement required by article 10 of the 2011 Model Law;

(c) The information related to examination and evaluation of tenders (listed in subparagraphs (e) and (r) of the 1994 Model Law) has been amended. Under those provisions in the 2011 Model Law, the procuring entity is required to disclose in the solicitation documents both the procedures and criteria that will be applied for examining and evaluating tenders;

(d) Subparagraph (p) of the 2011 Model Law adds a reference to the manner of opening tenders, in addition to the place, date and time of the opening (as in subparagraph (q) of the 1994 Model Law), reflecting the technology-neutral nature of the 2011 Model Law, which enables both manual and automatic opening of tenders;

(e) The final proviso in subparagraph (t) of the 1994 Model Law that the omission of any reference to applicable laws or regulations will not constitute grounds for review or give rise to liability on the part of the procuring entity has also been deleted; the 2011 Model Law includes additional references to the laws or regulations applicable to procurement involving classified information and to the place where all laws and regulations directly pertinent to the procurement in question may be found;

(f) Finally, the information listed in subparagraph (w) of the 1994 Model Law, which has become subparagraph (v) of the 2011 Model Law, has been supplemented by a requirement to include the duration of the applicable standstill period or, if none will apply, a statement to that effect and the reasons therefor.

*Clarifications and modifications of solicitation documents*  
(1994 article 28; 2011 article 15)

86. This is a further set of provisions that has been moved to chapter I of the 2011 Model Law and thus made applicable to all procurement proceedings, not only to tendering.

87. The provisions as they appear in 2011 article 15 remain substantially the same, except:

(a) The requirement for the procuring entity to respond to the request for clarification “within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender” has been replaced with

a requirement to respond “within a time period that will enable the supplier or contractor to present its submission in a timely fashion”; and

(b) A new paragraph (3) has been added obliging the procuring entity (i) to publish the amended information in the same manner and place in which the original information was published; and (ii) to extend the deadline for presentation of submissions if, as a result of a clarification or modification, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate.

**1994 Section II. Submission of tenders**  
**(2011 Section II. Presentation of tenders)**

*Language of tenders (1994 article 29) (Rules concerning the language of documents (2011 article 13))*

88. This is yet another set of provisions that has been moved to chapter I of the 2011 Model Law and thus made applicable to all submissions, not only to tenders. As explained in paragraph 55 above, the provisions have been consolidated with article 17 of the 1994 Model Law that deals with the language of the pre-qualification and solicitation documents. As a result, article 13 of the 2011 Model Law regulates the language(s) of all documents in the procurement proceedings, regardless of whether the documents are prepared by the procuring entity or by suppliers or contractors.

*Submission of tenders (1994 article 30) (Presentation of tenders (2011 article 40))*

89. The provisions have been substantially revised. Paragraphs (1)-(4) have been removed to 2011 article 14 (addressing the rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions). Apart from making the provisions applicable not only to tenders but also to applications to pre-qualify, applications for pre-selection and to all submissions, the following substantive amendments have been made:

(a) Paragraph (1) in 2011 article 14 refers not only to the place and deadline but also to the manner for presenting the relevant documents, for the reasons provided in paragraph 85 (d) above;

(b) A new requirement has been included in paragraph (2) of 2011 article 14 that the deadlines fixed by the procuring entity must allow sufficient time for suppliers or contractors to prepare and present their

applications or submissions, taking into account the reasonable needs of the procuring entity (in the 1994 Model Law, such a requirement was found only in the context of applications to pre-qualify (see 1994 article 7 (3) (a) (iv) and paragraph 23 above));

(c) Finally, paragraph (3) of 2011 article 14 requires the procuring entity to extend the deadline if, as a result of a clarification or modification, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate (reflecting corresponding changes made in provisions on clarifications and modifications of solicitation documents, see paragraph 87 (b) above).

90. The remaining provisions of article 30 of the 1994 Model Law have been reflected in 2011 article 40 and amended as follows:

(a) Paragraph (1) in 2011 article 40 opens with a new express requirement that tenders must be presented in the manner, at the place and by the deadline specified in the solicitation documents;

(b) Reflecting the new legal framework for the use of various means of communication, in particular that the procuring entity has the right to require the use of a particular means of communication or combination thereof (see article 7 of the 2011 Model Law and the **commentary thereto** in part II of this *Guide*), the right of the supplier or contractor to submit a tender in a paper form in a sealed envelope has been removed;

(c) The requirement on the procuring entity to ensure at least a similar degree of integrity if it requires an alternative to paper form of communication has been added to paragraph (2) (a) (ii) of 2011 article 40 (the 1994 Model Law referred only to authenticity, security and confidentiality);

(d) Under paragraph (2) (b) of 2011 article 40, the procuring entity must provide to the supplier or contractor a receipt showing the date and time when its tender was received (the 1994 Model Law required such a receipt only upon request);

(e) Under paragraph (2) (c) of 2011 article 40, the procuring entity is required to preserve the security, integrity and confidentiality of a tender and to ensure that the content of the tender is examined only after it is opened (there was no such requirement in the 1994 Model Law);

(f) Paragraph (3) of 2011 article 40 emphasizes that a tender received by the procuring entity after the deadline for presenting tenders must be returned unopened to the supplier or contractor that presented it.

*Period of effectiveness of tenders; modification and withdrawal of tenders (1994 article 31; 2011 article 41).* Remains substantively unchanged.

*Tender securities (1994 article 32; 2011 article 17)*

91. This is another set of provisions that has been moved to chapter I of the 2011 Model Law (article 17) and thus made applicable to all procurement methods, not only to tendering. The term “tender securities” has nevertheless been retained in the 2011 Model Law to reflect that it is widely used and consistently understood. The guidance to article 17 (see the **commentary to article 17** in part II of this *Guide*) emphasizes that a tender security may nonetheless be requested in any other procurement method, if appropriate.

92. The amendments to the provisions as they are set out in 2011 article 17 are as follows: (i) paragraph (1) (b) includes the exception for domestic procurement found in article 23 of the 1994 Model Law (see paragraph 79 above); and (ii) in paragraph (1) (f) (ii) reference is made to a failure to sign a procurement contract if so required by the solicitation documents (not by the procuring entity as in the 1994 text), in line with the provisions of the Model Law obliging the procuring entity to include this type of requirement, when applicable, in the solicitation documents (see, for example, article 27 (y) of the 1994 Model Law and article 39 (w) of the 2011 Model Law).

**1994 Section III. Evaluation and comparison of tenders**  
**(2011 Section III. Evaluation of tenders)**

93. The change in the title of the section reflects the deletion throughout the 2011 Model Law of references to “comparison” of tenders and other submissions. This change has been introduced to reflect that “evaluation” necessarily encompasses a comparison between submissions, unlike examination (which involves checking submissions against a single set of responsiveness criteria set out in the solicitation documents), and therefore the term “comparison” is superfluous.

*Opening of tenders (1994 article 33; 2011 article 42)*

94. The following amendments have been made to the provisions:

(a) In paragraph (1), the reference to the deadline specified in any extension of the deadline has been deleted; it was considered superfluous (the deadline is required to be specified in the solicitation documents, the 2011 definition of which includes any amendments thereto. The reference to the “deadline” in the 2011 text therefore encompasses any extension of the originally stipulated deadline (see the **commentary to article 15** (3) of

the 2011 Model Law in part II of this *Guide* as regards the consequences of extending the deadline));

(b) In paragraph (1), a reference has been added to the manner of opening of tenders, reflecting the technology-neutral nature of the 2011 text that enables manual and automatic opening of submissions;

(c) In paragraph (2), the words “to be present at the opening of tenders” have been replaced with the words “to participate in the opening of tenders”, to reflect that the role of suppliers or contractors or their representatives at the opening of tenders is not limited to those of passive observers: they may interact with the procuring entity, for example by pointing out any inconsistencies or improprieties that may be observed during the opening of tenders. This is true in physical as well as virtual meetings.

*Examination, evaluation and comparison of tenders (1994 article 34)*  
*(Examination and evaluation of tenders (2011 article 43))*

95. The change in the title of the article reflects the deletion throughout the Model Law of references to “comparisons” of submissions, for the reasons provided in paragraph 93 above.

96. The article has been substantially revised. Some of its provisions have been removed and reflected in articles of chapter I of the 2011 Model Law, as follows:

(a) The provisions of paragraph (1) are reflected in the new 2011 article 16 on clarification of qualification information and of submissions. They have been strengthened by an explicit prohibition of negotiations or making any change in price pursuant to a clarification sought, except in clearly listed cases (see article 16 (3) and (4)) and by the requirement to include in the record of the procurement proceedings all communications generated in the context of clarifying qualification information or submissions (see article 16 (6));

(b) Some provisions of paragraph (4) (b) (ii) and provisions of paragraphs (4) (c) and (4) (d) are reflected in the new 2011 article 11 on rules concerning evaluation criteria and procedures. 2011 article 11 has introduced many new elements to the rules concerning evaluation criteria and procedures, in particular:

- (i) Unlike paragraph (4) (c) of 1994 article 34, which set out an exhaustive list of evaluation criteria for determining the lowest evaluated tender, paragraph (2) of 2011 article 11 provides

for an illustrative list of evaluation criteria; paragraph (1) of that article establishes the general rule that all evaluation criteria must relate to the subject matter of the procurement;

- (ii) A reference to environmental characteristics of the subject matter of the procurement has been added in the illustrative list in paragraph (2) of 2011 article 11, to reflect the observed increase of such criteria in practice;
- (iii) Paragraph (3) of 2011 article 11 establishes a further general rule that for the procuring entity to be able to apply any evaluation criteria not relating to the subject matter of the procurement (such as criteria to promote socio-economic policies, as discussed in the **section on “Socio-economic policies” in part I of this Guide**), including a margin of preference, the procurement regulations or other provisions of law must require or authorize the procuring entity to do so;
- (iv) The optional language for an ex ante approval of applying a margin of preference has been deleted; and paragraph (3) (b) of 2011 article 11 does not limit preferences to domestic suppliers or contractors or for domestically produced goods, but also allows any other preference (so that criteria to promote socio-economic policies can also be provided for as preferences, as discussed in the section on “Socio-economic policies” in part I of this Guide);
- (v) The list of considerations found in paragraphs (4) (c) (iii) and (4) (c) (iv) of the 1994 Model Law has been deleted. It was considered that the rules on the evaluation criteria that do not relate to the subject matter of the procurement are drafted in sufficiently broad terms to accommodate the considerations of the enacting State referred to in the deleted paragraphs, and that some of the considerations set out in those paragraphs were no longer relevant or to be encouraged;
- (vi) Paragraph (5) of 2011 article 11 sets out clear rules as regards the information about the evaluation criteria and procedures that must be included in the solicitation documents;
- (vii) In addition to prohibiting the use of any criterion or procedure not set out in the solicitation documents, paragraph (6) of 2011 article 11 explicitly requires the procuring entity in

evaluating submissions and determining the successful submission to use only those criteria and procedures that have been set out in the solicitation documents and to apply them only in the manner that has been disclosed in those solicitation documents.

(c) The provisions of 1994 paragraph (8) have been reflected in the new 2011 article 24 on confidentiality and in 2011 article 25 on the documentary record of procurement proceedings.

97. The remaining provisions of 1994 article 34 have been reflected in 2011 article 43 and amended as follows:

(a) Paragraph (1) (a) requires the procuring entity to regard the tender as responsive if it conforms to all responsiveness requirements set out in the solicitation documents in accordance with article 10 of the Model Law (amending in this respect 1994 paragraph (2) (a));

(b) To avoid confusion with the acceptance of the successful tender in accordance with article 22 of the 2011 Model Law after the evaluation of tenders, references to (non-)acceptance of tenders in paragraphs (3) and (4) of the 1994 text have been replaced with references to (non-)rejection of tenders in paragraphs (2) and (3) of the 2011 text;

(c) Paragraph (3) (a) prohibits the procuring entity from applying any procedure not set out in the solicitation documents (expanding the reference to criteria that was found in 1994 article 34 (4) (a); this approach is in conformity with the corresponding provisions of article 11 of the 2011 Model Law (see paragraph 96 (b) (vii) above));

(d) Amending the provisions of 1994 article 34 (4) (b), 2011 paragraph (3) (b) expressly notes that, where price is the only award criterion, the lowest priced tender is the successful one, and where there are award criteria in addition to the price, the successful tender is the most advantageous tender ascertained not only on the basis of the criteria (as in the 1994 text) but also applying the procedures for evaluating tenders specified in the solicitation documents. The term “the most advantageous tender” has replaced the term “the lowest evaluated tender” that was used in this context in the 1994 Model Law, to reflect (i) the evolution of procurement practices and terminology since that date, notably that providing for quality criteria has become increasingly common and more broadly accepted; and (ii) to align in this respect the Model Law with other international texts on public procurement;

(e) Paragraph (4) requires the procuring entity to convert the tender prices of all tenders to the currency specified in the solicitation documents, according to the rate set out in those documents (thus amending 1994 article 34 (5)).

*Prohibition of negotiations with suppliers or contractors (1994 article 35; 2011 article 44).* Remains substantively unchanged.

*Acceptance of tender and entry into force of procurement contract (article 36) (Acceptance of the successful submission and entry into force of the procurement contract (2011 article 22))*

98. This is a further set of provisions that have been moved to chapter I of the 2011 Model Law and thus made applicable to all procurement methods, not only to tendering; the expanded scope is reflected in the title change.

99. The article has been substantially revised as a result of the introduction of provisions regulating a standstill period. In addition, it has been restructured to ensure a more logical flow in the provisions. Paragraph (1) of 2011 article 22 expressly requires the procuring entity to accept the successful submission (a provision designed to avoid abuse), unless one of the listed circumstances justifying non-acceptance of the successful submission is satisfied. Paragraph (2) then sets out the general rule on the application of a standstill period; paragraph (3) addresses the exceptions to that rule; and paragraph (4) contains the rules on the dispatch of the notice of acceptance of the successful submission. Paragraphs (5)-(10) establish the general rule on the entry into force of the procurement contract (upon dispatch of the notice of acceptance), special rules on the entry into force of the procurement contract (a written procurement contract, its signature and/or approval by another authority), rules on exceptional circumstances justifying selection of the next successful submission (failure to sign a procurement contract or to provide a contract performance security), the general rule about the time point when notices under the article are considered to be dispatched, and finally rules on notifying other suppliers or contractors about the procurement contract that entered into force.

## **1994 CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES**

### **A. Summary of changes made in this chapter**

100. There is no chapter with the above name in the 2011 Model Law since, as explained in paragraph 57 above, there is no longer any dedicated procurement method for the procurement of services as opposed to goods or construction. The appropriate procurement method is to be selected by the procuring entity not on the basis of whether it is goods, construction or services that are to be procured but in order to accommodate the circumstances of the given procurement (in particular, the complexity of the subject matter) and to seek to maximize competition to the extent practicable (article 28 of the 2011 Model Law; for a fuller discussion of these issues, see the **commentary to article 28** in part II of this *Guide*).

101. Most provisions in 1994 chapter IV have been at least partially reflected in the 2011 Model Law in the provisions governing request-for-proposals proceedings (as explained in paragraph 58 above, the 2011 Model Law regulates three types of request-for-proposals proceedings: request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations), and some have been included and made of general application in chapter I; details of this restructuring are provided below.

### **B. Article-by-article commentary**

*Notice of solicitation of proposals (1994 article 37; subsumed in 2011 articles 18, 35, 47 and 49)*

102. The provisions of paragraphs (1) and (2) of 1994 article 37 are now reflected in article 35 (1) and paragraph (2) of articles 47 and 49 of the 2011 Model Law, except for the provisions governing pre-qualification, which in the 2011 Model Law are all found in article 18, as noted in paragraph 24 above.

103. Unlike 1994 article 37, the 2011 request-for-proposals provisions do not use the term “a notice seeking expression of interest”; rather, the term

“invitation to participate” is used in 2011 articles 35 (1), 47 (1) and 49 (1). See further on this point paragraphs 132 and 133 below.

104. Amending paragraphs (1) and (2) of 1994 article 37, article 35 (1) of the 2011 Model Law on solicitation in request-for-proposals proceedings establishes the place where the invitation is to be published—this general rule is the same as that applicable to tendering and similar methods (see paragraph 81 above). The paragraph then lists exceptions to the general rule drawing on provisions of 2011 article 33, paragraphs (3) and (4), and provisions of 1994 article 37 (3).

105. The information that must be included in the invitation, set out in articles 47 (2) and 49 (2) of the 2011 Model Law, is considerably broader than that contained in article 37 (1) of the 1994 Model Law.

106. 1994 article 37 (3) is reflected in article 35 (2) of the 2011 Model Law. The optional language for an ex ante approval of direct solicitation in request-for-proposals proceedings has been deleted. For the reasons explained in paragraph 73 above, the reference to “reasons of economy and efficiency” to justify direct solicitation have been deleted from the chapeau provisions. 1994 article 37 (3) (b) has been subsumed into 2011 article 35 (2) (b) that requires the procuring to select the suppliers or contractors from which to solicit proposals in a non-discriminatory manner (on the practical implications of this provision see, further, the **Introduction to chapter IV** and the **commentary to articles 34** and **35** in part II of this *Guide*). 1994 article 37 (3) (c) has been subsumed into the broader reference to procurement involving classified information in 2011 article 35 (2) (c).

107. As regards the general strengthening of the provisions on direct solicitation in request for proposals proceedings in the 2011 Model Law (such as record requirements, ex ante notices of the procurement and their contents), see the Introduction to chapter IV and the commentary to articles 34 and 35 in part II of this *Guide*.

108. 1994 article 37 (4) has been reflected in article 47 (3) and 49 (4) of the 2011 Model Law. As in the case of the corresponding provisions applicable to tendering, the reference to costs of printing has been deleted in the 2011 Model Law (see paragraph 84 above).

*Contents of requests for proposals for services (1994 article 38; subsumed in 2011 articles 47 (4) and 49 (5))*

109. The provisions of 1994 article 38 have been reflected in articles 47 (4) and 49 (5) of the 2011 Model Law. The list of information to be included

in the request for proposals has been amended: (a) the information listed in subparagraphs (d), (h), (l) and (o) has been deleted, as it was not relevant; (b) the remaining provisions have been amended to reflect the changes to the equivalent provisions regulating the contents of the solicitation documents in open tendering (see paragraph 85 above), and some related information has been grouped together for ease of reference; and (c) additional information has been included (in particular, regarding minimum responsiveness criteria, details of procedures, and (in request for proposals with dialogue) any elements that will not be the subject of dialogue and the minimum and maximum number of, and how to select, the suppliers or contractors to be invited to the dialogue).

*Criteria for the evaluation of proposals (1994 article 39; subsumed in 2011 article 11)*

110. The provisions of the article have been reflected in article 11 of the 2011 Model Law (on the rules concerning evaluation criteria and procedures). 2011 article 11 (2) (c) lists certain evaluation criteria that may be particularly relevant in request-for-proposals proceedings, such as the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

111. Article 11 of the 2011 text does not refer to qualifications and reputation (which were included in subparagraph (a) of the 1994 text), nor to the criteria listed in subparagraph (1) (b) of the 1994 text. Both these types of criteria have been deleted, as they were considered to be excessively subjective. For the reasons explained in paragraph 96 (b) (v) above, the criteria listed in subparagraphs (d) and (e) have also been deleted. Finally, the provisions of paragraph (2) on margins of preference have been amended, for the reasons explained in paragraph 96 (b) (iii) and (iv) above.

*Clarification and modification of requests for proposals (1994 article 40; subsumed in 2011 article 15)*

112. The provisions of the article have been reflected in article 15 of the 2011 Model Law (on clarification and modification of solicitation documents). For the changes made to the 1994 provisions, see paragraphs 86 and 87 above.

*Choice of selection procedure (article 41)*

113. There are no equivalent provisions in the 2011 Model Law.

*Selection procedure without negotiation (1994 article 42; subsumed in 2011 article 47)*

114. The provisions of the article have been reflected in article 47 of the 2011 Model Law (on request for proposals without negotiation). Substantial changes have been made to those procedures, each stage of which is now regulated in the 2011 Model Law in some detail.

115. Unlike the 1994 Model Law, the 2011 Model Law explicitly regulates the submission of proposals in two envelopes: one containing the financial aspects of the proposals and the other containing the technical, quality and performance characteristics of the proposals. The latter envelopes are opened first. The procuring entity is allowed to open envelopes containing the financial aspects of the proposals of only those suppliers or contractors whose proposals' technical, quality and performance characteristics proved to be responsive. It thus evaluates the financial aspects of the proposals after the completion of the evaluation of technical, quality and performance characteristics of the proposals. The method in the 2011 text always presupposes that the successful proposal will be the proposal with the best combined evaluation in terms of: (a) the criteria other than price specified in the request for proposals; and (b) the price.

116. The 2011 Model Law provides for essential safeguards against abuse, not expressly set out in the 1994 Model Law. For example, there are explicit requirements: to notify each supplier or contractor of the results of examination of technical, quality and performance characteristics of their proposals; to include the results of examination and evaluation immediately in the record of the procurement proceedings; to return unopened the envelopes containing the financial aspects of the non-responsive proposals to the suppliers or contractors concerned; to notify each supplier or contractor with a responsive proposal the score assigned to them; to invite each such supplier or contractor to the opening of the envelopes containing the financial aspects of their proposals; and to read out, at the opening of those envelopes, the score assigned to each such supplier or contractor together with the respective financial aspects of their proposals.

*Selection procedure with simultaneous negotiations (1994 article 43; subsumed in 2011 article 49)*

117. The provisions of the article and those of article 48 of the 1994 Model Law have both been reflected in article 49 of the 2011 Model Law (on request for proposals with dialogue). There is no longer any requirement in the evaluation of proposals to consider the price of a proposal separately,

after completion of the technical evaluation (such a requirement was found in paragraph (3) of the 1994 text).

118. The 2011 text introduced the possibility of (a) holding a pre-selection procedure for the purpose of limiting the number of suppliers or contractors from which to request proposals and; (b) establishing a maximum number of suppliers or contractors that can be invited to participate in the dialogue. The 2011 Model Law regulates each stage of the procedure in detail, to avoid abuse and to ensure transparency in the use of the method.

119. To ensure transparency, the 2011 text requires a notice of the results of any pre-selection and of the examination of proposals against minimum responsiveness criteria to be provided to each supplier or contractor (the 1994 text was silent on these points). To ensure the fair, equal and equitable treatment of suppliers or contractors during the procedures, the 2011 text requires that the dialogue must be conducted by the same representatives of the procuring entity on a concurrent basis, and that the relevant information must be distributed among participating suppliers or contractors on an equal basis (the 1994 text was silent on the former point while on the latter it contained a similar requirement in the context of competitive negotiations in article 49 (2) but not in article 43 or 48).

120. Additional safeguards, not found in the 1994 text, include: a requirement on the procuring entity to ensure that the number of suppliers or contractors invited to participate in the dialogue (at least three, if possible) is sufficient to ensure effective competition; and prohibition of negotiations on BAFOs and of modification of the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements, any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue. (See further paragraphs 129-141 below and the **commentary to article 49** in part II of this *Guide*).

*Selection procedure with consecutive negotiations (1994 article 44; subsumed in 2011 article 50)*

121. The provisions of the article have been reflected in 2011 article 50 (on request for proposals with consecutive negotiations). In the 2011 text, all stages preceding the negotiations on the financial aspects of the proposals are the same as in request for proposals without negotiation (2011 article 50 cross-refers therefore to the relevant provisions of 2011 article 47). The provisions regulating the stage of negotiations reflect the main elements of 1994 article 44, with the following modifications:

(a) There is an explicit requirement on the procuring entity to rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals and to promptly communicate to each supplier or contractor presenting a responsive proposal the score of the technical, quality and performance characteristics of its respective proposal and its ranking;

(b) There is an explicit prohibition of modification of the subject matter of the procurement, any qualification, examination or evaluation criterion, including any established minimum requirements, any element of the description of the subject matter of the procurement, or term or condition of the procurement contract, other than the financial aspects of proposals that are the subject of the negotiations;

(c) There is also an explicit prohibition of reopening negotiations with any supplier or contractor with which the procuring entity has terminated negotiations.

*Confidentiality (1994 article 45; subsumed in 2011 article 24)*

122. The provisions of the article have been reflected in article 24 (2) and (3) of the 2011 Model Law, with the following modifications:

(a) The 1994 requirement to treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors has been expanded to prohibit such disclosure also to any other person not authorized to have access to this type of information;

(b) This general prohibition applies not only to the content of proposals but also to the content of applications to pre-qualify, of applications for pre-selection and of any submissions;

(c) This general prohibition does not apply to information required to be provided or published in accordance with the provisions of the Model Law;

(d) The 1994 prohibition on a party to the negotiations of disclosure to any other person of any technical, price or other information relating to the negotiations without the consent of that other party has been expanded to encompass not only parties to negotiations but also parties to any discussions, communications or dialogue between the procuring entity and a supplier or contractor in two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement proceedings;

(e) The latter prohibition may be waved only by the requirement of law or order of the court or other competent organ designated by the enacting State.

123. 2011 article 24 (on confidentiality) in addition contains a general prohibition on the procuring entity, in its communications with suppliers or contractors or with any person, of disclosure of any information if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition. This prohibition may be waived only upon an order of the court or other competent organ, and subject to the conditions of that order. In the 1994 Model Law, similar provisions were found only in the context of disclosure of information from the record of procurement proceedings and in the context of review proceedings (see 1994 articles 11 (3) and 55 (3), respectively). 2011 article 24 also envisages the possibility that the procuring entity may take additional measures to protect classified information. On the issue of preserving confidentiality in the procurement proceedings, see further the **commentary to article 24** in part II of this *Guide*).

## 1994 CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT (2011 CHAPTERS IV-VII)

### A. Summary of changes made in this chapter

124. The procedures for “alternative” methods of procurement (i.e. alternative to open tendering) and other procurement techniques (electronic reverse auctions and framework agreements) are found in the 2011 Model Law in several chapters: chapter IV (which groups procedures for restricted tendering, request for quotations and request for proposals without negotiation); chapter V (which groups procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement); chapter VI (which addresses electronic reverse auctions); and chapter VII (which addresses framework agreements procedures).

125. The procurement methods in chapters IV and V have been grouped together on the basis of whether a procurement method envisages some type of discussion, dialogue or negotiation between the procuring entity and supplier(s) or contractor(s): chapter IV methods do not allow any such interaction while chapter V methods do. The **Introduction to chapter IV and V**, and the commentary to the articles settings out the conditions for use of these methods of procurement explain the main features of each method and their typical uses.

### B. Article-by-article commentary

#### *Two-stage tendering (1994 article 46; 2011 article 48)*

126. Paragraph (2) has been amended in the 2011 text to refer to “performance characteristics” instead of “other characteristics”, to reflect changes made in the article on description of the subject matter of the procurement (2011 article 10). Substantive revisions, aimed at enhancing precision and strengthening safeguards against abuse in this procurement method, have been made in paragraphs (3) and (4) of the article:

(a) The 2011 text refers to “discussions” instead of “negotiations” in paragraph (3), for the purpose of stressing that no bargaining type of

negotiations (unlike in competitive negotiations or single-source procurement) takes place in the context of this procurement method;

(b) For the purpose of precision, the 2011 text refers in the same paragraph to “initial tenders” instead of “tenders”;

(c) Paragraph (3) also imposes a new requirement on the procuring entity, when it engages in discussions with any supplier or contractor, to extend an equal opportunity to participate in discussions to all suppliers or contractors;

(d) Paragraph (4) has been substantially revised. In the 2011 Model Law, it is split into five subparagraphs:

- (i) The first subparagraph, drawing on the first sentence of paragraph (4) of the 1994 text, requires the procuring entity to invite all suppliers or contractors whose initial tenders were not rejected at the first stage to present final tenders with prices in response to a revised set of terms and conditions of the procurement. Thus, unlike the 1994 text that refers in this context to a single set of specifications, the 2011 text refers to “a revised set of terms and conditions of the procurement” throughout paragraph (4);
- (ii) The second subparagraph replaces the second sentence of paragraph (4) of the 1994 text. First, it expressly prohibits the procuring entity from modifying the subject matter of the procurement. The procuring entity may only refine aspects of the description of the subject matter by deleting or modifying any aspect of the technical, quality or performance characteristics of the subject matter of the procurement initially provided and adding any new characteristics that conform to the requirements of the Model Law. The procuring entity is also authorized to delete or modify any criterion for examining or evaluating tenders initially provided and add any new criterion that conforms to the requirements of the Model Law, but only to the extent that such deletion, modification or addition is required as a result of changes made in the technical, quality or performance characteristics of the subject matter of the procurement;
- (iii) The third, fourth and fifth subparagraphs reproduce the provisions of the third, fourth and fifth sentences of paragraph (4) of the 1994 text, respectively.

*Restricted tendering (1994 article 47; 2011 articles 34 and 45)*

127. The provisions of paragraphs (1) and (2) of the article have been reflected in article 34 (1) and (5) of the 2011 Model Law, respectively, on

solicitation in restricted tendering. Substantive modifications made in those provisions relate to the minimum content of the notice of restricted tendering and the place of publication of such notice (thus amending paragraph (2) of the 1994 text). Article 34 (5) of the 2011 Model Law expressly requires that an advance notice is to be published before direct solicitation is made, and lists the minimum information to be included in such notice (for the implications of such a notice, and any responses thereto, see the **commentary to article 34** in part II of this *Guide*). Unlike the 1994 Model Law that required an enacting State to specify in the procurement law itself the official publication where the notice was to be published, the 2011 Model Law defers the specification of the place of publication to the procurement regulations.

128. The provisions of 1994 paragraph (3) have been reflected in 2011 article 45 and modified by stating expressly that the provisions of chapter III of this Law apply to restricted tendering except for those that regulate the procedures for soliciting tenders, the contents of the invitation to tender and the provision of the solicitation documents in open tendering (the excluded provisions are either irrelevant or cumbersome in the context of direct solicitation, which is an inherent feature of this procurement method).

*Request for proposals (1994 article 48; subsumed in 2011 articles 11, 15, 24, 35 and 49)*

129. As noted in paragraph 58 above, the 2011 Model Law provides for three types of request-for-proposals proceedings (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations). Article 48 and article 43 of the 1994 Model Law (on the latter, see paragraphs 117-120 above) have together been reflected in article 49 of the 2011 Model Law (on request for proposals with dialogue).

130. The requirement in paragraph (1) of the 1994 text that the request for proposals must be addressed to as many suppliers or contractors as practicable, but at least to three, if possible, has been replaced with provisions requiring the request for proposals to be issued: to each supplier or contractor responding to the open invitation; following pre-qualification, to each pre-qualified supplier or contractor; following pre-selection proceedings, to each pre-selected supplier or contractor; and in the case of direct solicitation, to each supplier or contractor selected by the procuring entity. For the avoidance of doubt, this stage of the procurement proceedings can be the first stage only in cases of direct solicitation; in all other cases, the request for proposals is issued after another process (e.g. open solicitation under article 35 (1) of the 2011 Model Law, pre-qualification or pre-selection).

131. The requirement for at least three suppliers or contractors if possible has been retained in the 2011 Model Law in the context of the possible minimum and maximum number of suppliers or contractors to be invited to the dialogue phase (see paragraphs (5) (g) and (7) of article 49 of the 2011 Model Law).

132. The provisions of paragraph (2) regulating the publication of a notice seeking expressions of interest are not found in the 2011 Model Law in the context of any request-for-proposals proceedings. They are reflected in 2011 article 6 (on the publication of information on possible forthcoming procurement) that encourages appropriate information to be published for proper planning by both the procuring entity and suppliers and contractors, without imposing legal consequences for the issue of the information concerned (see the **commentary to 2011 article 6** in part II of this *Guide*).

133. The first stage in the request-for-proposals proceedings in the 2011 Model Law is regulated in article 35 (on solicitation in request-for-proposals proceedings) where several options for solicitation are provided. The default method—the publication of an invitation to participate—constitutes the solicitation, and it thus obliges the procuring entity to take appropriate steps with respect to all suppliers or contractors that responded to such an invitation. (This is to be contrasted with a notice seeking expressions of interest in 1994 article 48 (2).)

134. Reasons justifying exceptions to the default method are also spelled out in article 35 of the 2011 Model Law. The reasons found in the 1994 text—economy or efficiency—have been replaced with three specific reasons, the drafting of which draws on provisions of article 37 (3) (a) to (c) of the 1994 Model Law, for the reasons explained in paragraph 73 above.

135. The provisions of the 2011 Model Law regulating request-for-proposals proceedings do not include any specific provisions on evaluation criteria (unlike paragraph (3) of the 1994 text). 2011 article 11 regulates this matter for all procurement methods, including request for proposals, as explained in the **commentary to that article** in part II of this *Guide*. Thus the aspects covered in the chapeau and subparagraphs (a) and (c) of paragraph (3) of the 1994 text were no longer necessary; in addition, the highly subjective criteria listed in 1994 subparagraph (b) do not appear in the 2011 text. As noted in paragraph 110 above, certain provisions of article 11 of the 2011 text have been drafted to accommodate the special features of request-for-proposals proceedings, such as the need to take into account the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

136. The minimum information to be included in the request for proposals found in paragraph (4) of the 1994 list has been considerably expanded in its

2011 counterpart (see article 49 (5) and the **commentary thereto** in part II of this *Guide*).

137. The provisions of paragraph (5) have been reflected in the new 2011 article 15 (on clarifications and modifications of solicitation documents), discussed in paragraphs 86 and 87 above.

138. The provisions of paragraphs (6) and (7) (a) and (b) have been reflected in the new 2011 article 24 (2) and (3) (on confidentiality), discussed in paragraphs 122 and 123 above.

139. The provisions of paragraph (7) (c), which provided for an equal opportunity to all participating suppliers or contractors to participate in negotiations, should be read in the context of the relevant modifications made in the 2011 Model Law (article 49 (6)) as regards the reasons for rejection of submitted proposals. While the 1994 Model Law was silent on this point, the 2011 Model Law in article 49 (5) (g), (6) (b) and (7) have introduced an explicit provision allowing the procuring entity to limit the number of suppliers or contractors that it will invite to participate in the dialogue (see the **commentary** to the relevant provisions of article 49 in part II of this *Guide*).

140. The provisions of paragraphs (8) and (10) have been reflected in article 49 (11) and (13) of the 2011 Model Law, respectively. The principle contained in paragraph (9) (a) of 1994 article 48 that only the criteria set out in the request for proposals could be considered in the evaluation of proposals is reflected in 2011 article 11 (6) as applicable *mutatis mutandis* to all procurement methods.

141. Procedures envisaging evaluation of the price separately from the evaluation of the effectiveness of a proposal, and only after completion of the technical evaluation (see subparagraphs (b) and (c) of paragraph (9) of the 1994 text) do not appear in the 2011 Model Law. UNCITRAL considered that it would be unreasonable to impose these types of restrictions on the procuring entity that may find itself in various circumstances when using the request-for-proposals-with-dialogue procurement method. Simultaneous evaluation of all relevant considerations may be required in order to be able to select the offer that best meets the needs of the procuring entity.

*Competitive negotiation (1994 article 49) (Competitive negotiations (2011 article 51); see also 2011 articles 24 and 34)*

142. The provisions of paragraph (1) of the article have been reflected in article 34 (3) of the 2011 Model Law (on solicitation in competitive negotia-

tions), to which 2011 article 51 (1) cross-refers. A new requirement for an advance notice (as described in paragraph 127 above) has been added to the 2011 text, except where the use of competitive negotiations is justified by urgent needs (see 2011 article 34 (5) and (6)).

143. Paragraph (2) has been expanded in time, through making reference to communications generated before and during the negotiations. It has also been amended to require that the relevant information is sent at the same time to all participants, except as regards information that is specific or exclusive to any supplier or contractor or where its communication would be in breach of the confidentiality provisions of article 24 of the 2011 Model Law.

144. The provisions of paragraph (3) have been reflected in 2011 article 24 (3) (on confidentiality).

145. The provisions on competitive negotiations in 2011 article 51 also introduce an express prohibition of negotiations between the procuring entity and suppliers or contractors with respect to their BAFOs. They also introduce a definition of the successful offer (defined as the offer that best meets the needs of the procuring entity).

#### *Request for quotations (1994 article 50; 2011 articles 34 and 46)*

146. The first sentence of article 50 of the 1994 Model Law has been reflected in article 34 (2) of the 2011 Model Law (on solicitation in request-for-quotations proceedings), to which 2011 article 46 (1) cross-refers. The 1994 requirement to solicit quotations from a minimum of three suppliers or contractors “if possible” has been replaced with an absolute requirement to solicit from at least three suppliers or contractors in 2011 article 34 (2); the 1994 provisions were considered to raise an excessive risk of abuse and subjectivity in selecting suppliers from which to solicit quotations. In the light of the type of the subject matter for which the method has been designed—off-the-shelf items—at least three suppliers or contractors should always be capable of providing the subject matter of the procurement.

147. The remaining provisions of article 50 of the 1994 Model Law have been reflected in article 46 of the 2011 Model Law, largely unchanged except for the addition of the phrase “as set out in the request for quotations” at the end of 2011 paragraph (3). The phrase has been added to ensure fair, equal and equitable treatment of suppliers or contractors by requiring that information about the needs of the procuring entity that has been provided to participating suppliers or contractors at the outset of the procurement remains valid throughout the procurement proceedings and is the basis for the selection of the successful quotation.

*Single-source procurement (1994 article 51; 2011 articles 34 and 52)*

148. The provisions of article 51 of the 1994 Model Law have been reflected in article 34 (4) of the 2011 Model Law (on solicitation in single-source procurement), to which 2011 article 52 cross-refers. A new requirement for an advance notice (as described in paragraph 127 above) has also been added to the 2011 text, except where the use of single-source procurement is justified by urgent needs (see 2011 article 34 (5) and (6)).

149. 2011 article 52 includes procedures for single-source procurement (there were no equivalent provisions in the 1994 text). They require the procuring entity to engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited, unless to do so is not feasible (see, further, the **commentary to article 52** of the 2011 Model Law in part II of this *Guide*).

**1994 CHAPTER VI. REVIEW**  
**(2011 CHAPTER VIII. CHALLENGE PROCEEDINGS)**

**A. Summary of changes made in this chapter**

150. A frequent criticism of the 1994 Model Law was that its review provisions were weak and ineffective: they were stated in a footnote to the Model Law to be optional and limited; there were many decisions exempt from review; the system was largely administrative and hierarchical rather than judicial; and there was no requirement for an independent review. In addition, the supporting guidance gave considerable discretion to the enacting State in implementing the provisions themselves. After the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) entered into force in 2005, UNCITRAL noted that the Model Law would also need to be amended to implement article 9 of the Convention, which requires (among other things) procurement systems to address “[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established ... are not followed.” The title of the chapter has therefore been amended to reflect this international requirement.

151. Chapter VIII of the 2011 Model Law strengthens the 1994 review provisions, notably by removing their optional nature. Unlike a footnote to the title of the chapter in the 1994 text that highlights the optional nature of the chapter, the equivalent footnote in the 2011 text does not diminish the status of the chapter as compared to other chapters of the Model Law. It alerts enacting States to options in the text of the chapter (found in square brackets) that are intended to accommodate States with different traditions. Reflecting the more robust stance than the 1994 provisions, enacting States are encouraged in this *Guide* to incorporate all the provisions of the chapter to the extent that their legal system so permits (in this respect, the guidance replaces the suggestion in the footnote to the 1994 inviting States to use the articles on review to measure the adequacy of existing review procedures).

152. The 2011 provisions provide for an optional request to the procuring entity to reconsider a decision taken in the procurement process, unlike the 1994 Model Law that requires aggrieved suppliers or contractors to apply to the procuring entity first when the contract has not yet entered into force. The

2011 text gives an option to the aggrieved supplier or contractor in such a case to apply either to the procuring entity, to an independent body or to the court; however the 2011 text (through the use of square brackets in article 64) and this *Guide* acknowledge that the sequence of application to review bodies will very much depend on legal traditions of enacting States (on this point see further paragraph 162 below). Given the requirements in the Convention against Corruption, States must have both a review and an appeal mechanism, but the Model Law is flexible so that enacting States can implement its provisions in accordance with their legal traditions.

153. The 2011 chapter also considerably strengthens the review provisions by deleting a lengthy list of decisions that were exempted from any review process as explained in paragraph 159 below. Under the 2011 regime, any decision or action by the procuring entity allegedly not in compliance with the provisions of the procurement law may be challenged by suppliers or contractors that claim to have suffered or claim that they may suffer loss or injury because of such alleged non-compliance.

154. The significantly enhanced scope of the challenge mechanism has necessitated the introduction of various mechanisms to ensure the efficacy of the procedure, and to appropriately balance the need to preserve the rights of suppliers and contractors and the integrity of the procurement process on the one hand and, on the other, the need to limit disruption of the procurement process. A new article 65 has therefore been introduced to provide for a general prohibition against taking any step to bring the procurement contract into force while a challenge remains pending. Urgent public interest considerations may be invoked by the procuring entity as a ground for lifting this prohibition. The 2011 text also contains a completely new regime for suspension of procurement proceedings providing for optional and mandatory suspension. These matters are discussed in detail in the **Introduction to chapter VIII** in part II of this *Guide*.

155. There are also supporting measures to encourage early and timely resolution of issues and disputes, enabling challenges to be addressed before stages of the procurement proceedings would need to be undone, including notice provisions throughout the Model Law, provisions on the standstill period discussed in the **commentary to article 22** in part II of this *Guide*, and new deadlines for submission of applications for reconsideration or review.

156. The chapter in the 2011 text, which like in the 1994 text is final in the Model Law, is preceded by two additional chapters not found in the 1994 Model Law: on electronic reverse auctions and framework agreements. They regulate procedures of these procurement techniques. The provisions of these chapters of the 2011 Model Law are not discussed in this part of the *Guide*

since no provisions on these subjects are found in the 1994 Model Law. (For the commentary on those chapters, see part II of this *Guide*.)

## B. Article-by-article commentary

*Right to review (article 52) (Right to challenge and appeal (2011 article 64))*

157. For the reasons set out in paragraph 150 above, the title of the article has been changed to the “Right to challenge and appeal”.

158. The reference to “a breach of a duty imposed on the procuring entity by this Law” found in paragraph (1) of the 1994 text has been replaced by a reference to “the alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law”, to reflect the deletion of exceptions from review found in paragraph (2) of 1994 article 52 (see the immediately following paragraph) and thus the considerably expanded scope of decisions and actions that can be the subject of challenge and appeal proceedings.

159. The exceptions from review found in paragraph (2) of the 1994 Model Law were deleted, the most notable of which were the selection of a procurement method or a selection procedure and the limitation of participation in procurement proceedings on the basis of nationality. This list of exceptions had raised criticism from practitioners and the donor community alike, in that it invited abusive practices and did not promote accountability in the procurement process. UNCITRAL considers it particularly important, as part of effective oversight of the use of the toolbox approach to the selection of the appropriate procurement method (discussed in the **Introduction to section I of chapter II** in part II of this *Guide*), that this decision, as all others, should be subject to challenge. The deletion of the exceptions was also considered necessary in order to align the Model Law with the United Nations Convention against Corruption (see **paragraph 8 of part I** of this *Guide*) and other international and regional instruments regulating public procurement.

160. The first article in chapter VIII in the 2011 Model Law invites an enacting State in paragraphs (2) and (3) to specify the bodies before which challenge proceedings can be brought, and any sequence of such proceedings (e.g. whether the supplier or contractor must apply first to the procuring entity before approaching another administrative body or the court; and whether it must exhaust one forum before applying to another to prevent forum-shopping).

*Review by procuring entity (or by approving authority) (1994 article 53)  
(Application for reconsideration before the procuring entity (2011  
article 66))*

161. The change in the title of the article reflects the deletion of the reference to the approving authority throughout the 1994 text, together with the provisions that provided for review by the head of the approving authority. This was in compliance with UNCITRAL's decision to remove, with a few exceptions, provisions from the Model Law requiring approval by another authority of the steps taken by the procuring entity in the procurement process (see paragraph (39) above).

162. UNCITRAL heard experience from some jurisdictions that the 1994 provisions requiring aggrieved suppliers or contractors to apply always first to the procuring entity when the contract has not yet entered into force had proved ineffective—merely delaying a further application. Consequently, the use of this mechanism in 2011 article 66 has been made optional (a supplier or contractor can choose whether to apply directly to a procuring entity, an independent body or a court). However, filing applications in several bodies simultaneously is discouraged. It is for an enacting State to build in appropriate mechanisms according to their legal traditions and taken into account circumstances on the ground that would prevent unjustified disruptions of the procurement process while at the same time protect the rights of aggrieved suppliers or contractors.

163. The article has been revised to provide for a swift, simple and relatively low-cost procedure, which can allow applications to be resolved by the parties at an early, less disruptive stage, and with relatively low costs. The 20-day period for submission of complaints established in paragraph (2) of the 1994 text has been replaced with the following deadlines in paragraph (2) of the 2011 text: (a) prior to the deadline for presenting submissions (if applications for reconsideration concern the terms of solicitation, pre-qualification or pre-selection or decisions or actions taken by the procuring entity in pre-qualification or pre-selection proceedings); and (b) within the standstill period or, if none was applied, prior to the entry into force of the procurement contract or the framework agreement (if applications for reconsideration concern other decisions or actions taken by the procuring entity in the procurement proceedings).

164. These new deadlines have been introduced to encourage early submission of challenges and to prevent disruption of the procurement process by late-stage challenges, for example, by suppliers or contractors that had been excluded from participation at an early stage (e.g. because of nationality or where disqualified). For further discussion of this point, see the **commentary to article 66** in part II of this *Guide*). No such safeguard was built in the 1994

text. The 1994 text dealt only with disruptions of the implementation of the procurement contract by allowing the procuring entity not to entertain a complaint or continue to entertain a complaint after the procurement contract entered into force (paragraph (3) of 1994 article 53).

165. The regime established in the 2011 Model Law also provides for appropriate safeguards to prevent the procuring entity from rushing, when an application for reconsideration or review is filed, towards taking steps to bring the procurement contract into force. This safeguard is found in the new 2011 article 65, as noted in paragraph 154 above, which prohibits the procuring entity from taking any step that would bring a procurement contract into force where there is a timely filing of an application or appeal, or notification thereof. This prohibition remains in effect for the entire duration of the consideration of the challenge and for an additional period to be established by the enacting State to allow an appeal against the decision taken on the challenge. The prohibition may be lifted on the ground of urgent public interest considerations, but such a decision is to be taken either by an independent body or the court, and may itself be challenged (see article 65 of the 2011 Model Law and the **commentary to that article** in part II of this *Guide*).

166. Paragraphs (4)-(6) of article 53 of the 1994 Model Law have been replaced with detailed regulation of challenges before the procuring entity, including notification requirements, time periods for taking decisions and actions by the procuring entity, consequences of the failure of timely notification, grounds for dismissal of the application, and requirements as regards the form, content and recording of the decision taken by the procuring entity (see the **commentary to 2011 article 66** (3)-(8) in part II of this *Guide*).

*Administrative review (1994 article 54) (Application for review before an independent body (2011 article 67))*

167. The change in the title of the article reflects a significant strengthening of the provisions for this type of challenge, namely a requirement that it be heard by an independent third party. For a discussion of the meaning of independence in this context, see the **commentary to article 67** in part II of this *Guide*. The footnote that accompanies the 1994 article, suggesting that States without such a legal tradition might not enact the provisions, has been deleted for reasons akin to those explained in paragraph 151 above: enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits.

168. The deadlines established in paragraph (1) of the 1994 text have been replaced with another set of deadlines (see 2011 paragraph (2)) which mirror

where relevant the deadlines for submission of applications for reconsideration to the procuring entity (see paragraph 163 above). Unlike the 1994 Model Law, the 2011 text does not specify any time periods but invites enacting States to do so in the light of the circumstances on the ground (e.g. references to 20 days found in the 1994 text may be considered excessive in jurisdictions where electronic filing of applications is possible).

169. Paragraphs (2), (4) and (5) of the 1994 text have been replaced with detailed regulation of procedures, including mandatory and optional suspension of the procurement proceedings or the procurement contract or operation of the framework agreement, notification requirements, grounds for dismissal of applications, time periods for taking decisions or actions by the independent body, access by the independent body to all documents relating to the procurement proceedings and the form, content and recording of the decision taken by the independent body (see the **commentary to article 67** (3)-(8), (10) and (11) in part II of this *Guide*).

170. The list of actions that may be taken by the administrative body as regards the application, found in paragraph (3) of the 1994 text, has been significantly amended. The resulting 2011 article 67 (9) is not exhaustive, in that after the prescribed actions, it includes a reference to such alternative action as may be appropriate in the circumstances. The provisions of subparagraph (a) of the 1994 list, regarding the applicable legal rules or principles, have been reflected in the chapeau provisions rather than in the list of available actions to reflect the reality that any declaration of such rules or principles would be a precursor to the action to be taken by the independent body.

171. Some items have been added to the list of available actions, such as confirmation of a decision of the procuring entity and overturning the award of a procurement contract or a framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, ordering the publication of a notice of the overturning of the award (2011 article 67 (9) (c)-(f)). These items are presented in square brackets (for the policy considerations that may guide enacting States in deciding whether or not to include them in their legislation, see the **commentary to the relevant provisions of article 67** in part II of this *Guide*).

172. The options regarding the extent of financial compensation in 1994 subparagraph (f) have been merged, and are now in 2011 article 67 (9) (i). Enacting States have the option of limiting any financial compensation to “the costs of the preparation of the submission or the costs relating to the application, or both”. (The policy considerations that may guide enacting States in deciding whether or not to include this option in their legislation are set out in

the **commentary to the relevant provisions of article 67** in part II of this *Guide*). The 1994 reference to “injury” suffered has been replaced with a reference to “damages” suffered, the latter more commonly used and consistently understood in various legal systems. These amendments have been made to ensure the harmonization of the Model Law generally with other international instruments regulating public procurement.

*Certain rules applicable to review proceedings under article 53 [and article 54] (article 55)*

173. The provisions of paragraphs (1) and (3) of the 1994 article, except for the last part of paragraph (3), have been reflected in the notifications and record requirements found in 2011 articles 66 and 67 that address applications for reconsideration before the procuring entity and applications for review before an independent body, respectively.

174. The provisions of paragraph (2) have been reflected in 2011 article 68 (on the rights of participants in challenge proceedings).

175. The provisions on confidentiality found in paragraph (3) of the article have been reflected in the new 2011 article 69 (on confidentiality in challenge proceedings).

*Suspension of procurement proceedings (article 56)*

176. There is no separate article in the 2011 Model Law addressing issues of suspension. The provisions on suspension are found in 2011 articles 66 and 67 that address applications for reconsideration before the procuring entity and applications for review before an independent body, respectively.

177. The 1994 suspension regime has been completely revised in the 2011 Model Law. The provisions on seven-day automatic suspension found in paragraphs (1) and (2) and on a declaration of the type referred to in paragraph (1) of the 1994 Model Law have been deleted, as has the limit of maximum 30 days of suspension found in paragraph (3) of the article. The provisions on the certification by the procuring entity as regards urgent public interest considerations have been reflected in 2011 article 65 (3) (a) in the form of a request by the procuring entity to the independent body to lift the article 65 prohibition to enter into contract; under the new 2011 regime, such a request is to be considered by the independent body and the decision of the independent body can be challenged by aggrieved suppliers or contractors. This approach provides a fundamental shift away from the position of the 1994 Model Law, which stated

in paragraph (4) of the article that such certification is conclusive with respect to all levels of review except judicial review. See further the commentary to articles 65, 66 and 67 in part II of this *Guide* on the suspension regime under the 2011 Model Law.

*Judicial review (article 57)*

178. The article has been deleted. The provisions on judicial review are found in 2011 article 64 (2) and (3). They are put in square brackets for consideration by enacting States, as explained in the **commentary to that article** in part II of this *Guide*.



## ANNEX I. TABLE OF CONCORDANCE BETWEEN THE 2011 MODEL LAW AND THE 1994 MODEL LAW

<i>Article of the 2011 Model Law</i>	<i>Relevant provisions of the 1994 Model Law</i>
<i>Preamble</i>	<i>Preamble</i>
<b>Chapter I.</b>	<b>CHAPTER I.</b>
<b>General provisions</b>	<b>GENERAL PROVISIONS</b>
<b>Articles 1-26</b>	
Article 1. Scope of application	Article 1. Scope of application
Article 2. Definitions	Article 2. Definitions
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within [this State]]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]
Article 4. Procurement regulations	Article 4. Procurement regulations
Article 5. Publication of legal texts	Article 5. Public accessibility of legal texts
Article 6. Information on possible forthcoming procurement	<b>New provisions</b>
Article 7. Communications in procurement	Article 9. Form of communications
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors
Article 9. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors Article 7. Prequalification proceedings (para. (8)) Article 10. Rules concerning documentary evidence provided by suppliers or contractors
Article 10. Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement	Article 16. Rules concerning description of goods, construction or services
Article 11. Rules concerning evaluation criteria and procedures	<b>New provisions based on the 1994 text</b> (1994 articles 27 ( <i>e</i> ), 34 (4), 38 ( <i>m</i> ), 39 and 48 (3))
Article 12. Rules concerning estimation of the value of procurement	<b>New provisions</b>
Article 13. Rules concerning the language of documents	Article 17. Language Article 29. Language of tenders

<i>Article of the 2011 Model Law</i>	<i>Relevant provisions of the 1994 Model Law</i>
Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions	<b>New provisions based on the 1994 text</b> (1994 articles 7 (3) (a) (iv) and 30 (1) to (4))
Article 15. Clarifications and modifications of solicitation documents	Article 28. Clarifications and modifications of solicitation documents, and article 48 (5)
Article 16. Clarification of qualification information and of submissions	<b>New provisions, based in part on paragraph (1) of 1994 article 34</b>
Article 17. Tender securities	Article 32. Tender securities
Article 18. Pre-qualification proceedings	Article 7. Pre-qualification proceedings Also provisions related to pre-qualification of articles 23, 24 and 25
Article 19. Cancellation of the procurement	Article 12. Rejection of all tenders, proposals, offers or quotations
Article 20. Rejection of abnormally low submissions	<b>New provisions</b>
Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest	Article 15. Inducements from suppliers or contractors
Article 22. Acceptance of the successful submission and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract Article 36. Acceptance of tender and entry into force of procurement contract
Article 23. Public notice of the award of a procurement contract or framework agreement	Article 14. Public notice of procurement contract awards
Article 24. Confidentiality	Articles 34 (8), 45, 48 (7) and 49 (3)
Article 25. Documentary record of procurement proceedings	Article 11. Record of procurement proceedings, and article 34 (8)
Article 26. Code of conduct	<b>New provisions</b>
<b>Chapter II. Methods of procurement and their conditions for use; solicitation and notices of the procurement Articles 27-35</b>	<b>CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>
<b>Section I. Methods of procurement and their conditions for use Articles 27-32</b>	
Article 27. Methods of procurement	<b>New provisions</b>
Article 28. General rules applicable to the selection of a procurement method	Article 18. Methods of procurement

<i>Article of the 2011 Model Law</i>	<i>Relevant provisions of the 1994 Model Law</i>
Article 29. Conditions for the use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)	Articles 20 and 21
Article 30. Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)	Articles 19 and 22
Article 31. Conditions for use of an electronic reverse auction	<b>New provisions</b>
Article 32. Conditions for use of a framework agreement procedure	<b>New provisions</b>
<b>Section II. Solicitation and notices of the procurement Articles 33-35</b>	<b>New provisions based on various provisions of the 1994 Model Law</b>
Article 33. Solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction	Article 24. Procedures for soliciting tenders or applications to pre-qualify
Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement	Articles 47 (1) and (2), 49 (1), 50 (1) and 51
Article 35. Solicitation in request-for-proposals proceedings	Articles 37 and 48 (1) and (2)
<b>Chapter III. Open tendering Articles 36-44</b>	<b>CHAPTER III. TENDERING PROCEEDINGS</b>
<b>Section I. Solicitation of tenders Articles 36-39</b>	
Article 36. Procedures for soliciting tenders	Article 24. Procedures for soliciting tenders or applications to pre-qualify
Article 37. Contents of invitation to tender	Article 25. Contents of invitation to tender and invitation to pre-qualify (para. (1))
Article 38. Provision of solicitation documents	Article 26. Provision of solicitation documents
Article 39. Contents of solicitation documents	Article 27. Contents of solicitation documents

*Article of the 2011 Model Law**Relevant provisions of the 1994 Model Law***Section II.****Presentation of tenders****Articles 40-41**

Article 40. Presentation of tenders	Article 30. Submission of tenders (paras. (5) and (6))
Article 41. Period of effectiveness of tenders; modification and withdrawal of tenders	Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

**Section III.****Evaluation of tenders****Articles 42-44**

Article 42. Opening of tenders	Article 33. Opening of tenders
Article 43. Examination and evaluation of tenders	Article 34. Examination, evaluation and comparison of tenders (paras. (2)-(7))
Article 44. Prohibition of negotiations with suppliers or contractors	Article 35. Prohibition of negotiations with suppliers or contractors

**Chapter IV.****Procedures for restricted tendering, request for quotations and request for proposals without negotiation****Articles 45-47**

Article 45. Restricted tendering	Article 47. Restricted tendering
Article 46. Request for quotations	Article 50. Request for quotations
Article 47. Request for proposals without negotiation	Article 42. Selection procedure without negotiation, and other relevant provisions of chapter IV. Principal method for procurement of services

**Chapter V.****Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement****Articles 48-52**

Article 48. Two-stage tendering	Article 46. Two-stage tendering
Article 49. Request for proposals with dialogue	Article 43. Selection procedure with simultaneous negotiations Article 48. Request for proposals
Article 50. Request for proposals with consecutive negotiations	Article 44. Selection procedure with consecutive negotiations
Article 51. Competitive negotiations	Article 49. Competitive negotiation

<i>Article of the 2011 Model Law</i>	<i>Relevant provisions of the 1994 Model Law</i>
Article 52. Single-source procurement	Article 51. Single-source procurement
<b>Chapter VI.</b>	<b>New provisions</b>
<b>Electronic reverse auctions</b>	
<b>Articles 53-57</b>	
Article 53. Electronic reverse auction as a stand-alone method of procurement	
Article 54. Electronic reverse auction as a phase preceding the award of the procurement contract	
Article 55. Registration for the electronic reverse auction and the timing of the holding of the auction	
Article 56. Requirements during the electronic reverse auction	
Article 57. Requirements after the electronic reverse auction	
<b>Chapter VII.</b>	<b>New provisions</b>
<b>Framework agreement procedures</b>	
<b>Articles 58-63</b>	
Article 58. Award of a closed framework agreement	
Article 59. Requirements for closed framework agreements	
Article 60. Establishment of an open framework agreement	
Article 61. Requirements for open framework agreements	
Article 62. Second stage of a framework agreement procedure	
Article 63. Change during the operation of a framework agreement	
<b>Chapter VIII.</b>	<b>CHAPTER VI. REVIEW</b>
<b>Challenge proceedings</b>	
<b>Articles 64-69</b>	
Article 64. Right to challenge and appeal	Article 52. Right to review
Article 65. Effect of a challenge	<b>New provisions</b>
Article 66. Application for reconsideration before the procuring entity	Article 53. Review by procuring entity (or by approving authority); Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], paras. (1) and (3); and Article 56. Suspension of procurement proceedings

<i>Article of the 2011 Model Law</i>	<i>Relevant provisions of the 1994 Model Law</i>
Article 67. Application for review before an independent body	Article 54. Administrative review; Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], paras. (1) and (3); and Article 56. Suspension of procurement proceedings
Article 68. Rights of participants in challenge proceedings	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54], para. (2)
Article 69. Confidentiality in challenge proceedings	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54] (para. (3), last sentence)

## ANNEX II. TABLE OF CONCORDANCE BETWEEN THE 1994 MODEL LAW AND THE 2011 MODEL LAW (EXCLUDING NEW PROVISIONS)

<i>Article of the 1994 Model Law</i>	<i>Relevant provisions of the 2011 Model Law</i>
<b>CHAPTER I. GENERAL PROVISIONS</b>	<b>Chapter I. General provisions</b>
Article 1. Scope of application	Article 1. Scope of application
Article 2. Definitions	Article 2. Definitions
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within [this State]]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within [this State]]
Article 4. Procurement regulations	Article 4. Procurement regulations
Article 5. Public accessibility of legal texts	Article 5. Publication of legal texts
Article 6. Qualifications of suppliers and contractors	Article 9. Qualifications of suppliers and contractors
Article 7. Prequalification proceedings Paragraph (3) (a) (iv) Paragraph (8)	Article 18. Pre-qualification proceedings Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions Article 9. Qualifications of suppliers and contractors (para. (8) (d))
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors
Article 9. Form of communications	Article 7. Communications in procurement
Article 10. Rules concerning documentary evidence provided by suppliers or contractors	Article 9. Qualifications of suppliers and contractors (para. (7))
Article 11. Record of procurement proceedings	Article 25. Documentary record of procurement proceedings
Article 12. Rejection of all tenders, proposals, offers or quotations	Article 19. Cancellation of the procurement
Article 13. Entry into force of the procurement contract	Article 22. Acceptance of the successful submission and entry into force of the procurement contract
Article 14. Public notice of procurement contract awards	Article 23. Public notice of the award of a procurement contract or framework agreement

<i>Article of the 1994 Model Law</i>	<i>Relevant provisions of the 2011 Model Law</i>
Article 15. Inducements from suppliers or contractors	Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest
Article 16. Rules concerning description of goods, construction or services	Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement
Article 17. Language	Article 13. Rules concerning the language of documents
<b>CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE</b>	<b>Chapter II. Methods of procurement and their conditions for use; solicitation and notices of the procurement</b>
Article 18. Methods of procurement	Article 28. General rules applicable to the selection of a procurement method
Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation	Article 30. Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)
Article 20. Conditions for use of restricted tendering	Article 29. Conditions for the use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)
Article 21. Conditions for use of request for quotations	Article 29. Conditions for the use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)
Article 22. Conditions for use of single-source procurement	Article 30. Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)
<b>CHAPTER III. TENDERING PROCEEDINGS</b>	<b>Chapter III. Open tendering</b>
<b>SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PRE-QUALIFY</b>	<b>Section I. Solicitation of tenders</b>
Article 23. Domestic tendering	Article 33. Solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction (para. (4))

<i>Article of the 1994 Model Law</i>	<i>Relevant provisions of the 2011 Model Law</i>
Provisions related to pre-qualification in: Article 24. Procedures for soliciting tenders or applications to pre-qualify Article 25. Contents of invitation to tender and invitation to pre-qualify Other provisions from these articles	Article 18. Pre-qualification proceedings Article 36. Procedures for soliciting tenders Article 37. Contents of invitation to tender
Article 26. Provision of solicitation documents Article 27. Contents of solicitation documents	Article 38. Provisions of solicitation documents Article 39. Contents of solicitation documents
Articles 28. Clarifications and modifications of solicitation documents	Article 15. Clarifications and modifications of solicitation documents
<b>SECTION II. SUBMISSION OF TENDERS</b>	<b>Section II. Presentation of tenders</b>
Article 29. Language of tenders	Article 13. Rules concerning the language of documents
Article 30. Submission of tenders Paragraphs (1)-(4) Paragraphs (5) and (6)	Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions Article 40. Presentation of tenders
Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders	Article 41. Period of effectiveness of tenders; modification and withdrawal of tenders
Article 32. Tender securities	Article 17. Tender securities
<b>SECTION III. EVALUATION AND COMPARISON OF TENDERS</b>	<b>Section III. Evaluation of tenders</b>
Article 33. Opening of tenders	Article 42. Opening of tenders
Article 34. Examination, evaluation and comparison of tenders Paragraph (1) Paragraphs (2) to (7) Paragraph (8)	Article 16. Clarification of qualification information and of submissions Article 43. Examination and evaluation of tenders Article 24. Confidentiality Article 25. Documentary record of procurement proceedings (confidentiality-related provisions)
Article 35. Prohibition of negotiations with suppliers or contractors	Article 44. Prohibition of negotiations with suppliers or contractors
Article 36. Acceptance of tender and entry into force of procurement contract	Article 22. Acceptance of the successful submission and entry into force of the procurement contract
<b>CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES</b>	<b>Chapter IV, article 47, and chapter V, articles 49 and 50</b>
Article 37. Notice of solicitation of proposals	Article 35. Solicitation in request-for-proposals proceedings

<i>Article of the 1994 Model Law</i>	<i>Relevant provisions of the 2011 Model Law</i>
Article 38. Contents of requests for proposals for services	Article 47. Request for proposals without negotiation Article 49. Request for proposals with dialogue
Article 39. Criteria for the evaluation of proposals	Article 11. Rules concerning evaluation criteria and procedures
Article 40. Clarification and modification of requests for proposals	Article 15. Clarifications and modifications of solicitation documents
Article 41. Choice of selection procedure	Article 28. General rules applicable to the selection of a procurement method
Article 42. Selection procedure without negotiation	Article 47. Request for proposals without negotiation
Article 43. Selection procedure with simultaneous negotiations	Article 49. Request for proposals with dialogue
Article 44. Selection procedure with consecutive negotiations	Article 50. Request for proposals with consecutive negotiations
Article 45. Confidentiality	Article 24. Confidentiality
<b>CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT</b>	<b>Chapter IV, articles 45 and 46, and Chapter V, articles 48, 49, 51 and 52</b>
Article 46. Two-stage tendering	Article 48. Two-stage tendering
Article 47. Restricted tendering	Article 45. Restricted tendering Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement
Article 48. Request for proposals	Article 49. Request for proposals with dialogue Article 35. Solicitation in request-for-proposals proceedings Article 11. Rules concerning evaluation criteria and procedures Article 15. Clarifications and modifications of solicitation documents Article 24. Confidentiality
Article 49. Competitive negotiation	Article 51. Competitive negotiations Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement
Articles 48 (7) and 49 (3)	Article 24. Confidentiality

<i>Article of the 1994 Model Law</i>	<i>Relevant provisions of the 2011 Model Law</i>
Article 50. Request for quotations	Article 46. Request for quotations Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement
Article 51. Single-source procurement	Article 52. Single-source procurement Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement
<b>CHAPTER VI. REVIEW</b>	<b>Chapter VIII. Challenge proceedings</b>
Article 52. Right to review	Article 64. Right to challenge and appeal
Article 53. Review by procuring entity (or by approving authority)	Article 66. Application for reconsideration before the procuring entity
Article 54. Administrative review	Article 67. Application for review before an independent body
Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]	Article 66. Application for reconsideration before the procuring entity Article 67. Application for review before an independent body Article 68. Rights of participants in challenge proceedings Article 69. Confidentiality in challenge proceedings
Article 56. Suspension of procurement proceedings	Article 65. Effect of a challenge Article 66. Application for reconsideration before the procuring entity Article 67. Application for review before an independent body
Article 57. Judic	Article 64. Right to challenge and appeal



