

# WORLD TRADE ORGANIZATION

RESTRICTED

WT/WGTGP/W/1

10 July 1997

(97-2887)

**Working Group on Transparency  
in Government Procurement**

Original: English

## THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

Statement by the Representative of the UNCITRAL at  
the Working Group's Meeting of 23 May 1997

### Introduction

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services is currently being utilized by States on an increasingly wider scale. Among the various policy objectives of the Model Law is that of transparency in the public procurement process. After introducing the process of formulation of the Model Law, the present paper outlines the manner in which the Model Law promotes transparency. Because of the summary nature of the presentation, the paper does not attempt exhaustively to list and describe all of the provisions contained in the Model Law that facilitate greater transparency. It is intended rather to highlight the principal ways in which national legislation based on the Model Law would promote transparency in public procurement.

### I. LEGISLATIVE NATURE AND HISTORY OF MODEL LAW

#### A. Purpose of Model Law

2. The United Nations Commission on International Trade Law (UNCITRAL) concluded the preparation of the UNCITRAL Model Law on Procurement of Goods, Construction and Services in 1994. The purpose of the Model Law is to provide a model for States modernizing their national procurement legislation or establishing such legislation for the first time. Its scope is limited to the procedures utilized in selecting suppliers and contractors with whom public purchasers conclude procurement contracts.

#### B. The UNCITRAL Process

3. UNCITRAL is an intergovernmental technical organ of the United Nations General Assembly. Its primary function is to act as a sort of global "commercial law legislature" for international commerce. The international conventions or treaties, model laws and other legal instruments formulated by UNCITRAL assist States in modernizing the legal regime for international commerce. This enables commercial parties from different countries, regions, and legal and economic systems to successfully implement various types of commercial transactions and to overcome differences among legal systems that might otherwise hinder international commerce.

4. The UNCITRAL process takes place at the intergovernmental level. The rotating membership of UNCITRAL is made up of 36 States, elected by the General Assembly on the basis of a regional representation formula. In addition, all other States are invited to participate in the work of UNCITRAL as observers. Both member and non-member States thus participate actively in the development of legal instruments formulated by UNCITRAL. In addition to the input of the delegates, who represent

their governments, the work of UNCITRAL benefits from the input of interested international organizations both of intergovernmental and non-governmental character (e.g., World Bank, International Chamber of Commerce, Asian-African Legal Consultative Committee, International Bar Association) as well as the input of experts. It may also be noted by way of introduction that UNCITRAL deals primarily with matters of contractual relations between trading parties, rather than focusing on intergovernmental trade regulation and tariff arrangements.

5. It is also noteworthy that the legal texts of UNCITRAL are developed on the basis of a consensus. This is a fitting approach in view of the objective of spanning various types of legal and economic systems, and meeting the needs of international commerce, which involves the interaction of parties from States at various levels of economic development. That approach has successfully led to formulation of instruments widely adopted by and utilized in States at all levels of economic development, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration, and the UNCITRAL Arbitration Rules.

#### C. Juridical Nature of an UNCITRAL Model Law

6. The UNCITRAL Model Law on procurement is exactly what its title indicates - a model for emulation by national legislatures. It is not a treaty or convention like the WTO Agreement on Government Procurement although there is harmony in the substantive content of the two instruments. Adoption of legislation based on the Model Law does not depend on reciprocal action by any other State. Apart from that aspect, the Model Law may be viewed as the consensus statement of governments from around the world on the minimum elements of a sound national legislative framework for public procurement. As such it is intended to be used by States from all regions and at all levels of economic development.

#### D. Guide to Enactment

7. Together with the Model Law, UNCITRAL has issued a *Guide to Enactment of the Model Law*. The *Guide* is intended to assist legislatures and executive branches of government utilizing the Model Law to modernize or establish procurement legislation.

### II. TRANSPARENCY: THE FOUNDATION OF THE UNCITRAL MODEL LAW

8. The preamble to the Model Law lists its main policy objectives. Those include the overarching objective of economy and efficiency in procurement, maximizing participation of bidders and competition among them, fairness in treatment of bidders, objectivity in decision-making, and transparency.

9. Those objectives are closely intertwined, in that it would hardly be possible to achieve economy and efficiency in procurement without maximizing participation and competition, objectives which depend in turn on objectivity and procedural fairness in the selection process. At the foundation of that pyramid of objectives is transparency, on the basis of which procedural fairness is achieved, and thus the confidence of the bidding community in the integrity of the procurement process.

10. Aside from promoting participation in procurement proceedings by assuring bidders of fair treatment, mechanisms that achieve transparency foster the accountability of procuring entities to governmental and legislative oversight bodies, and help to build the confidence of the public, at large in the management and expenditure of public funds.

11. The Model Law reflects the various aspects of transparency that a sound national legislative framework for procurement would establish. Firstly, there is the question of making readily available to as wide an audience as possible information about procurement opportunities. Secondly, there is

the body of provisions in a procurement statute designed to ensure disclosure to bidders, and implementation, of the "rules of the game" of the selection of the successful bidder. Lastly, there is the desirability of having what one might term transparency as to the results of a procurement action.

A. Information about Procurement Opportunities

12. This aspect is implemented in the Model Law by procurement methods involving wide participation, and solicitation requirements designed to facilitate such participation. Thus, as the default rule for the procurement of goods or construction, the open tendering method is prescribed (Article 18). Similarly, for procurement of consultancy and other types of intellectual services, a principal method is included. It may be implemented so as to strike an appropriate balance between publicizing services procurement opportunities and achieving economy and efficiency, from the standpoint both of procuring entities and bidders, in the preparation and consideration of proposals (Chapter IV). A related aspect is the limitation of the use of the less competitive methods of procurement (e.g., restricted tendering, request for quotations, and single-source procurement) to those tightly defined cases in which they are truly appropriate (Articles 19-22).

13. The solicitation requirements related to announcement of procurement opportunities in the Model Law may be supplemented by an enacting State by including in the legal regime requirements also of publication of indicative notices of procurement planned for a given year or other budgetary period.

B. Disclosure of Procedural Rules Governing Procurement

14. The next dimension of transparency has to do with disclosing to interested parties the procedural rules, or "rules of the game", of the procurement process. This in turn has several aspects, including, as outlined below, accessibility of the relevant legislative and other normative instruments, clarity as to the scope of applicability of procurement rules, and predisclosure and transparency in the rules governing the selection of the successful bidder.

Accessibility of legal texts

15. While most States have among their basic constitutional and legislative principles the requirement that laws have to be published and otherwise made accessible to the general public, the accessibility of normative texts is closely linked to the achievement of the fundamental goals of procurement policy, in particular the objective of transparency. Thus, the Model Law includes an Article requiring accessibility to the general public of legal texts governing procurement (Article 5).

16. A way of facilitating accessibility of normative texts, and clarity in the understanding of applicable rules, is the consolidation to the extent feasible of legislative rules governing the selection procedure. To the extent that those rules may be scattered about the statutes of a given State, accessibility is made more complicated, and transparency may be diminished. Consolidation will assist not only bidders in understanding the procurement process, but also will have the benefit for procuring entities of defining more clearly their obligations.

Clarity in scope of application of procurement rules

17. Another fundamental way of injecting greater transparency into public procurement is to maximize clarity as to the scope of application of the legal regime governing such procurement. This translates into defining clearly: (a) the types of state agencies and other entities covered (Article 2(b)); (b) the types of procurement covered (Article 1); (c) defining any exceptions to the coverage in the procurement law or its implementing regulations and making any such exceptions as surgical and limited as possible (Article 1(2) and (3)).

18. The recommendation embodied in the Model Law is to extend the coverage of the procurement law to as much as possible of public procurement. Thus, procurement of goods, construction and services is covered. While a slot is included in the Model Law for the enacting State to list the types of procurement that may be excluded from coverage, it is not intended to encourage or recommend extensive exclusions.

19. Procuring entities may be uncertain as to which rules to apply if a procurement action is subject to treaty obligations of the State in question. An example is procurement using funds disbursed under a loan agreement between the State and an international financial institution such as the World Bank or with funds provided under a bilateral aid agreement which is tied to the application of specific procurement rules. The Model Law relieves the procuring entity of that uncertainty by deferring to conflicting international treaty obligations of the enacting State (Article 3).

20. The extent of possible conflict between legislation based on the Model Law and the procurement rules of international financial institutions such as the World Bank is rather limited, since the Model Law is in basic harmony with the procedures and principles of such rules.

### III. TRANSPARENCY IN CONDUCT OF PROCUREMENT PROCEEDINGS

21. The Model Law includes a comprehensive set of procedures designed to ensure that procurement proceedings - in the variety of circumstances encountered in everyday practice - are conducted in a transparent manner. Those provisions may be categorized in the manner set forth below.

#### A. Use of Most Competitive and Transparent Procurement Method

22. A basic way in which a procurement law can foster transparency is by guiding procuring entities to use the most competitive and open procurement methods feasible in any given case. This in turn helps to foster transparency, as it may generally be assumed that the more open and competitive the procurement proceedings are, the more transparency there is. As has already been noted, the Model Law follows such an approach, by requiring open tendering for the procurement of goods and construction, except when the circumstances fit the grounds specified for use of less open and competitive methods. A similar approach is followed with respect to the main method for the procurement of consultancy and other intellectual services.

#### B. Adequate Range of Alternative Methods

23. A shortcoming in some procurement laws is that they lack an adequate range of alternative procurement methods to deal with situations in which open tendering may not be the most appropriate method. Such laws may drop down from the most open and transparent method to a method that is essentially without competition, such as single-source procurement - or to a method with very limited transparency such as unstructured, simultaneous negotiations with several bidders.

24. Legislation based on the Model Law may avoid such a pitfall. For example, an enacting State may elect to include in the range of procurement methods available to procuring entities methods such as two-stage tendering and request for quotations ("shopping"). From a transparency point of view, as well as from the standpoint of ease of application of the law by procuring entities, the law should be as clear as possible as to the circumstances in which the alternatives may be used. Additional transparency may be achieved by defining procedures for the alternative methods (Chapter V) and requiring entry into the record of the procurement proceedings - when an alternative method is used - of a statement of the grounds justifying the use of the alternative method (Article 11(1)(g)).

C. Negotiation in the Award Process

25. The degree to which a procurement law achieves transparency is related also to the manner in which negotiated procurement is handled. Among the methods offered by the Model Law for consideration by legislators, the two-stage tendering is a method that permits negotiations and technical discussions to be conducted with bidders when a procuring entity wishes to discuss with bidders various technical or contractual possibilities to solve its procurement need, while applying the transparent selection procedures of tendering in the second stage (Article 46).

D. Predisclosure of Information for Effective Participation in Procurement Proceedings

26. At the heart of the provisions of the Model Law aimed at achieving transparency, and its other objectives, are rules requiring predisclosure to participating bidders of various types of information essential for effective participation of bidders in procurement proceedings.

27. One essential type of information concerns the qualification criteria and procedures to be applied to bidders seeking to participate in the procurement proceedings. The Model Law identifies an exhaustive list of the general types of qualification criteria that may legitimately be applied (Article 6(1)(b)). Their legitimacy stems from the fact that they are objectively linked to the capacity of a bidder to perform the procurement contract.

28. The exhaustive listing of permissible qualification criteria is part of a package of qualification provisions in the Model Law crucial to transparency (Articles 6 and 7). Other provisions include, for example, the requirement that in prequalification proceedings an up or down decision be made on every application (Article 7(5)), that qualification assessments may be made only on the basis of predisclosed criteria (Article 6(3) and (4)), and that applicants for prequalification determined to be unqualified be informed of the grounds for their disqualification (Article 7(7)).

29. The next aspect of essential predisclosure concerns the technical specifications for the procurement in question. The Model Law requires use of objective, functionally defined technical specifications, detailed to the fullest extent possible and referring to relevant national and international standards (Article 16). This contributes not only to transparency, but also to more effective competition and ultimately to better value for the public purchaser.

30. A concomitant, essential requirement, in particular in tendering proceedings, as well as in the principal method for procurement of services, is the predisclosure of the technical evaluation criteria by which bids are to be evaluated, and the relative weight of the criteria (Article 27(e); Article 38(m)). The cardinal rule here is that only those evaluation criteria that have been predisclosed may be used (Article 34(4)(a)).

31. Another area of importance from the standpoint of transparency and predisclosure to bidders has to do with the terms of the procurement contract and the manner in which they describe the rights and obligations of the parties. It may be noted in this connection that in tendering proceedings the Model Law requires the predisclosure to bidders of the terms of the eventual contract, as well as the manner of its entry into force (Article 27(f); Article 27(y); Article 13).

32. Another important way of injecting greater transparency into the legal rules applicable to contractual and other aspects of the procurement process is to utilize harmonized legal instruments. This is particularly relevant in international procurement. To this end a State may wish to consider becoming party to the United Nations Convention on Contracts for the International Sale of Goods, to ensure that internationally harmonized and widely understood and available rules may be readily applicable to the procurement contract.

33. Furthermore, use may be made of instruments such as the INCOTERMS of the International Chamber of Commerce (ICC) to define specific aspects of the delivery and insurance terms of the procurement contract, the ICC Uniform Customs and Practice for Documentary Credits (UCP) to define rights and obligations of the issuer and the beneficiary under letters of credit, and the ICC Uniform Rules for Demand Guarantees (URDG) and the ICC Uniform Rules on Contract Bonds (URCB) for defining rights and obligations with respect to bids and performance guarantees. Mention should also be made of the role of standard forms of contract and bidding documents in promoting transparency in the procurement process. For the purposes of dispute settlement under the procurement contract, the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules are widely known and acceptable both to public purchasers and suppliers and contractors.

E. Clarity of Bid Solicitation Documents

34. The discussion in the preceding paragraphs underscores the importance from the viewpoint of transparency of comprehensive and clearly drawn bid solicitation documents. For this reason, the Model Law presents detailed provisions, in this regard for tendering proceedings (Article 27), as well as for procurement of consultancy and other intellectual services (Article 38). Also indispensable is an effective mechanism for responding to requests for clarification of the solicitation documents (Article 28; Article 40). This involves responding to requests for clarification in time for the responses to be taken into account in timely bid preparation and submission, and circulation of the clarification to all participating bidders. Related mechanisms include meetings of bidders and site visits, after which the procuring entity prepares minutes that are then provided to the bidders.

F. Bid Submission and Opening

35. Several Model Law provisions promote transparency at this crucial stage of procurement proceedings when the method used is tendering. Noteworthy are the requirements that the tender validity period be deemed to be only as predisclosed in the solicitation documents (Article 31(1)), that bid opening should coincide with the deadline for submission of bids (Article 33(1)), and that bidders or their representatives should be allowed to attend bid opening (Article 33(2)), at which certain basic information about each bid is read out, including the bid price (Article 33(3)).

G. Bid Evaluation

36. The Model Law sets forth a number of procedures for tendering proceedings that guard transparency at the climactic bid evaluation stage. Those include, for example, the following: (a) only predisclosed technical and qualification criteria may be applied; (b) no changes are to be solicited or offered with a view to making unresponsive bids responsive (Article 34(1)(a)); (c) prohibition of negotiation (Article 35); (d) preservation of confidentiality as to the contents of bids (Article 34(8)); and (e) correction of arithmetical errors appearing on face of tender, with disclosure of the correction to the bidder (Article 34(1)(b)).

IV. TRANSPARENCY IN RESULTS OF PROCUREMENT PROCEEDINGS

A. Notifications to Bidders and General Public

37. Mechanisms for recording and disclosing the conduct of procurement proceedings, and the results of such proceedings, constitute another essential step towards transparency in public procurement. They include, in particular: (a) notification to bidders of the results of applications for prequalification, including disclosure of grounds for rejection; (b) notification to participating bidders of the winner of the selection of the successful bidder (Article 36(6)); (c) publication of notice of contract award competition (Article 14).

B. Record of Procurement Proceedings

38. An important tool for establishing transparency in public procurement is the maintenance of a record of the procurement proceeding. In addition to laying down the requirement, the Model Law details the required contents of the record and the extent and recipients of disclosure of the record (Article 11). Adequate record procedures, in addition to safeguarding transparency, help to make a procurement law self-policing to the extent that interested parties and the general public can monitor the performance of procuring entities.

V. REVIEW PROCEDURES

39. Effective complaint and review procedures are essential for transparency in the public procurement process generally, and the accountability of procuring entities to bidders, oversight and supervisory bodies and the general tax-paying public. The Model Law sets a standard for such a mechanism that has the following key features: (a) affirmation of the right of aggrieved bidders to obtain review of alleged violations by procuring entities of required procedures (Article 52(1)); (b) exemption of certain discretionary matters not involving the rights of individual bidders from the review process so as to prevent excessive disruption of the procurement process (Article 52(2)); (c) several stages of review, commencing with initial petition to the procuring entity (if the procurement contract has not yet entered into force), followed by administrative review, and culminating with judicial review (Articles 53-55 and 57); (d) the possibility of a limited period of suspension of procurement proceedings, except in the presence of strong countervailing public interest (Article 56),

VI. TECHNICAL ASSISTANCE FOR PREPARATION OF PROCUREMENT LEGISLATION  
BASED ON MODEL LAW

40. The text of the UNCITRAL Model Law and of the accompanying Guide to Enactment are available from the UNCITRAL secretariat (Vienna International Centre, A-1400 Vienna, Austria, P.O. Box 500, tel: 43 1 21345 4060, fax: 43 1 21345 5813). In addition, the UNCITRAL secretariat can assist States in obtaining legal technical consultancy services to assist in the preparation of legislation based on the Model Law.